Administrative Appeals Tribunal of Australia

Fernandes and National Archives of Australia [2014] AATA 180 (2 April 2014)

Last Updated: 3 April 2014

[2014] AATA 180

Division	**GENERAL ADMINISTRATIVE DIVISION**
File Number(s)	**2013/0407, 0408, 0082**
Re	**Clinton Fernandes**
	APPLICANT
And	**National Archives of Australia**
	RESPONDENT

DECISION

Tribunal	**President D Kerr**
Date	**30 January, 3 February 2014**
Date of written reasons	**2 April 2014**
Place	**Canberra**

1. The decision of the respondent is varied.
2. The Tribunal decides that the first line of the handwritten text at Part 21 Folio 130 and the first paragraph of Part 21 Folio 133 are not exempt from release under the Archives Act 1983, but otherwise affirms the decisions under review.

3. The operation of the Tribunal's decision is to come into effect 7 days from the date of these reasons.

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President D Kerr

Catchwords

Archives – Exempt records – Information or matter communicated in confidence – Information or matter the disclosure of which could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth – Degree of satisfaction required to conclude records "could reasonably be expected" to cause damage – Construction of word "security" in Archives Act – Role of Inspector-General of Intelligence and Security in review

Legislation

Archives Act 1983 ss 3(7), 33(1), 33(1A)(c), 50A, 51, 52

Administrative Appeals Tribunal Act 1975 s 36

Australian Security Intelligence Organisation Act 1979

Office of National Assessments Act 1977

Cases

Aldred and Department of Foreign Affairs and Trade [1990] AATA 833

Attorney-General v Cockcroft (1986) 10 FCR 180

Commonwealth v John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39

Drake v Minister for Immigration (1979) 46 FLR 409

Fernandes and National Archives of Australia [2011] AATA 202

Re Maher and Attorney-General's Department (1985) 3 AAR 396

Re Slater and Director-General, Australian Archives [1988] AATA 110; (1988) 8 AAR 403

Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286

Staats and National Archives of Australia [2010] AATA 531

REASONS FOR DECISION

President D Kerr

Oral reasons given on 30 January 2014

1. It is a matter of common agreement between the parties that Indonesian-Australian relations are of fundamental importance to our nation. It is not surprising that there is considerable public interest in events that occurred in the aftermath of the Indonesian incorporation of East Timor in the late 1970s. That was of some domestic controversy and the effective de facto recognition by the Australian Government generated a degree of domestic debate and also some international attention.
2. Dr Fernandes has made a significant contribution to intellectual debate and research on this subject and has, understandably, sought to inform himself as best available by seeking from the National Archives of Australia ('Archives') documents that relate to the events that have been the subject of his research.
3. The present matters relate to documents that cover a period some years after the original Indonesian incorporation of East Timor when Indonesia sought to secure victory over remnant Fretilin resistance.
4. Dr Fernandes has a prima facie entitlement to access those documents after the expiry of the release date rules that govern them. In the present instance, there is no dispute that the period is 30 years, but the release date periods are now being sequentially reduced: see *Archives Act 1983* s 3(7).
5. There is no dispute that Archives has a substantial collection of documents relevant to Indonesia–East Timor political events in general and it is from that collection of documents that these applications arise.
6. The prima facie entitlement that Dr Fernandes has to access to those documents is subject to the documents not being within a relevant exemption. The ultimate issue that is before this Tribunal is whether certain records that Archives has determined are subject to a relevant exemption are in fact exempt and whether that decision should be confirmed by this Tribunal or set aside.
7. These are not the first proceedings that Dr Fernandes has brought in relation to the events that occurred more than 30 years ago following the Indonesian incorporation of East Timor. The previous matter was before this

Tribunal in *Fernandes and National Archives of Australia* [2011] AATA 202, which I will refer to as Fernandes No 1.

8. In Fernandes No 1 the then President of the Tribunal, Downes J, indicated at [9] that:

Unlike some cases involving questions of national security the present review is conventional merits review. I am to make the "correct or preferable decision" as to whether any, and if so which, of the redacted material is exempt: Drake v Minister for Immigration *(1979) 46 FLR 409 at 419; see also* Shi v Migration Agents Registration Authority *[2008] HCA 31; (2008) 235 CLR 286 at 309.*

9. Counsel are agreed as to the correctness of that proposition. This Tribunal is to exercise an independent judgment of its own and is not bound by any view that has been expressed by way of affidavit evidence or oral evidence by any witness. Of course it is natural that the Tribunal will treat with respect any evidence that is being given but it must form its own independent judgment. That goes to the logic as well as to conclusions as to the existence of a proper claim for exemption.

10. Nor is the Tribunal bound by any view of the Inspector-General of Intelligence and Security whose evidence must be sought if a document is ultimately to be released.

11. However, unlike ordinary merits review proceedings before this Tribunal, the proceedings are subject to two particular elements that have to inform the manner in which it is conducted.

12. The first is the existence of an Attorney-General's certificate that was issued in these proceedings. On 23 January 2014, the Attorney-General issued a certificate under s 36 of the *Administrative Appeals Tribunal Act 1975* which is exhibit 1. In that certificate the Attorney-General certified

pursuant to subsection 36(1) of the Administrative Appeals Tribunal Act 1975 that disclosure of:

1. *the contents of the confidential affidavit affirmed by Jim Hagan, Deputy Director-General of the Office of National Assessments, on 23 October 2013*
2. *the contents of the confidential affidavit described in the schedule of this certificate, together with the schedule itself*
3. *any evidence adduced or submissions made by or on behalf of the respondent concerning the matters contained in those confidential affidavits and parts thereof,*

would be contrary to the public interest because the disclosure would prejudice the security, defence or international relations of Australia.

13. Section 36 of the AAT Act relevantly reads as follows:

- *(1) If the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter, or*

the disclosure of any matter contained in a document, would be contrary to the public interest:

a. *by reason that it would prejudice the security, defence or international relations of Australia;*

b. *by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or*

c. *for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed;*

the following provisions of this section have effect.

(2) A person who is required by or under this Act to disclose the information or to produce to, or lodge with, the Tribunal the document in which the matter is contained for the purposes of a proceeding is not excused from the requirement but the Tribunal shall, subject to subsection (3) and to section 46, do all things necessary to ensure that the information or the matter contained in the document is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the proceeding, and, in the case of a document produced to or lodged with the Tribunal, to ensure the return of the document to the person by whom it was produced or lodged.

14. The proceedings therefore present some challenges to counsel representing the applicant. The applicant knows of only some of the evidence that is before the Tribunal and is unable to cross-examine on much of that which has been put to the Tribunal by way of evidence to support the conclusions reached by Archives which are now pressed upon the Tribunal.

15. Those circumstances require this Tribunal to take a more active part in the examination of witnesses who appear before it in the closed part of the proceeding and to do what it can, without taking the role of advocate for the applicant, to test robustly any evidence that is given by a witness whose evidence is the subject of such a certificate.

16. In the matter of Fernandes No 1, Downes J indicated to counsel that he would put to those witnesses any questions that counsel for the applicant thought should be asked. I followed a similar course. Whilst my questions were not always put in the form that they were tendered, the substance of the issues that were canvassed was drawn to the attention of witnesses so that the Tribunal could be informed as to the response of those witnesses in relation to the issues that were raised.

17. The second area in which these proceedings are made more complex arises out of the terms of s 50A of the Archives Act:

Inspector-General of Intelligence and Security must be requested to give evidence in certain proceedings

(1) This section applies in any proceedings before the Tribunal under this Act in relation to a record that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b).
(2) Before determining that the record is not an exempt record, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:
(a) the damage that could reasonably be expected to be caused to the security, defence or international relations of the Commonwealth if the record were made available for public access; or
(b) whether it would be reasonable to maintain the confidentiality of information or matter to which both of the following apply by not making the record available for public access:
(i) the information or matter was communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth, to an authority of the Commonwealth or to a person who received the communication on behalf of the Commonwealth or an authority of the Commonwealth (the Commonwealth entity);
(ii) the foreign entity advises the Commonwealth entity that the information or matter is still confidential.
(3) Before determining that part of, or a copy of part of, the record is to be made available for public access under section 38, the Tribunal must request the Inspector-General to appear personally and give evidence on:
(a) whether making that part, or a copy of that part, of the record available for public access could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth; or
(b) whether it would be reasonable to maintain the confidentiality of information or matter to which both of the following apply by not making that part, or a copy of that part, of the record available for public access:
(i) the information or matter was communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth, to an authority of the Commonwealth or to a person who received the communication on behalf of the Commonwealth or an authority of the Commonwealth (the Commonwealth entity);
(ii) the foreign entity advises the Commonwealth entity that the information or matter is still confidential.
(4) Before hearing the evidence of the Inspector-General, the Tribunal must hear any evidence to be given or submissions to be made by or on behalf of:
(a) the Archives; or
(b) the Commonwealth institution of which the record is property.

(5) The Inspector-General must comply with a request under subsection (2) or (3) unless, in the opinion of the Inspector-General, the Inspector-General is not appropriately qualified to give evidence on the matters in relation to which the Inspector-General has been requested to give evidence.
(6) For the purposes of enabling the Inspector-General to comply with a request under subsection (2) or (3):
(a) the Tribunal must allow the Inspector-General to take possession of, and make copies of or take extracts from, any record given to the Tribunal for the purposes of the proceeding; and
(b) the Inspector-General may require the production of the record that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b); and
(c) the Inspector-General may require the production of any Commonwealth record that relates to the record mentioned in paragraph (b); and
(d) the Inspector-General may make copies of, or take extracts, from the records mentioned in paragraphs (b) and (c); and
(e) after such period as is reasonably necessary for the purposes of giving evidence to the Tribunal, the Inspector-General must:
(i) return the original of any record to the Tribunal or to the entity that produced the record; and
(ii) destroy any copies of or extracts taken from any record.
(7) The Inspector-General must permit a person who would be entitled to inspect a record mentioned in paragraphs (6)(a) to (d) if it were not in the possession of the Inspector-General to inspect the record at all reasonable times as the person would be so entitled.
(8) The Tribunal is not bound by any opinion of the Inspector-General expressed while giving evidence under this section.
(9) The Tribunal must allow the Inspector-General a period within which to consider the records mentioned in paragraphs (6)(a) to (d) that is reasonable having regard to:
(a) the nature of the evidence that the Inspector-General has been requested to give; and
(b) the time required by the Inspector-General to perform the Inspector-General's other functions.
(10) The fact that a person is obliged to produce a document under subsection (6) does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that document.

18. Claims are made under s 33(1)(a) in respect of all the records that are the subject of this review and claims are made under s 33(1)(b) in respect of a number of such documents and records.

19. Given that the scheme of the Archives Act is that the Inspector-General of Intelligence and Security is not to give her evidence until after the Tribunal

has heard evidence on behalf of Archives, and need be heard only if the Tribunal is still contemplating the possibility that a record is not exempt, it appears to the Tribunal that if it is entirely satisfied from the evidence before it and the submissions it has heard that a record is an exempt record, the Inspector-General of Intelligence and Security need not be requested to give evidence.

20. I have considered the application of the provisions of the Archives Act which make reference to the giving of evidence by the Inspector-General of Intelligence and Security. I do not take it that those provisions require that the Tribunal make provisional findings that a record is not an exempt record before requesting the Inspector-General of Intelligence and Security to give evidence.

21. An indication that the Inspector-General of Intelligence and Security will be requested to give evidence is not an indication that ultimately the Tribunal will make a finding the document is not an exempt document. It is simply an indication that the Tribunal has reached no final conclusion and will be assisted by hearing from the Inspector-General of Intelligence and Security before reaching its decision.

22. However, an indication that the Inspector-General of Intelligence and Security will not be requested to give evidence in respect of a particular record necessarily implies that the Tribunal has been satisfied on the evidence and submissions it has received that the document is an exempt document.

23. As indicated previously there have been earlier proceedings in relation to requests by Dr Fernandes which were heard and determined by Downes J in Fernandes No 1. Those proceedings related to a request for documents relating to a period in late 1975 involving Indonesian military action in East Timor.

24. These requests relate to a slightly later period. Originally there were three requests. Dr Fernandes originally sought access to several parts of a record: part 10, part 20 and part 21. In this context a "record" means a large number of documents which are held by Archives under a single heading. The terms of those requests can be found in T3 to T5 of the Tribunal's documents.

25. Ultimately, Dr Fernandes has been satisfied with, or certainly has not pressed for review of, Archives' decision in relation to access to documents or records in part 10. What remains are some matters that relate to his requests for documents/records in parts 20 and 21. Part 20 covers the period from 4 August 1981 to 30 October 1981. Part 21 covers the period from 13 October to 11 January. (That is what the files say, but it may be that is a transposition error, because otherwise it would appear that there could be an overlap in the dates which is difficult to understand. I think 13 October should be 31 October. It would flow on naturally from 30. But I refer to it simply that way because that is how it appears in the T documents that I have seen. However, nothing turns on this.)

26. The respondent tendered as Exhibit 4 a considerable body of material that was made available by Archives to Dr Fernandes in relation to his requests for the records covered in parts 20 and 21. However, I accept the submission counsel for the applicant made that it would be an error of law to balance the release of those materials against the smaller number of documents that have been the subject of a claim for exemption. Each claimed exemption should be treated as an individual matter and no consequence flows from the fact that some documents were previously released.

27. Section 51 of the Archives Act provides the onus of establishing the reason why a document should not be released is on Archives. However, as has been correctly submitted by counsel for Archives, if a document falls properly within an exemption, it is not a document that can be released, nor is it a document that falls within the terms of the provisions which entitle access to it.

28. The relevant provisions of Archives Act s 33 are the following:

Exempt records

(1) For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:

(a) information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth;

(b) information or matter:

(i) that was communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth, to an authority of the Commonwealth or to a person who received the communication on behalf of the Commonwealth or an authority of the Commonwealth (the Commonwealth entity); and

(ii) which the foreign entity advises the Commonwealth entity is still confidential; and

(iii) the confidentiality of which it would be reasonable to maintain;

29. Section 31(1A)(c) then makes plain that a document that is an exempt record is not to be made publicly available.

30. There was little disagreement between counsel who have been extremely helpful to the Tribunal in their submissions as to how this Tribunal should approach the determination that it is charged to make.

31. Both parties agreed that the understanding of what is intended to be meant by the word "security" in section 33(1)(a) cannot be confined as Deputy President Forgie held in *Staats and National Archives of Australia* [2010] AATA 531 at [90]–[99].

32. In that case Deputy President Forgie took the view that the construction to be given to the word "security" should mirror that of the definition of the term "security" in the *Australian Security Intelligence Organisation Act 1979*. However, both counsel agreed that this gave instances akin to those under

consideration too narrow a construction of the term "security". As an example, it would not apply to a reduction in the flow of information to the Commonwealth from overseas intelligence agencies, a matter, for example, that was considered to come within the language of "security" by Spender J in *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833 at 14, referring to *Re Slater and Director-General, Australian Archives* [1988] AATA 110; (1988) 8 AAR 403 at 414.

33. I accept counsel for the applicant's proposition that the correct approach to the text of s 33(1)(a) is to read it as expressing the intention of the Parliament using words of ordinary English understood in their unique statutory context.

34. I also accept Mr Latham's submission that the Archives Act's references to security, defence or international relations are references to distinctly unique concepts, albeit that inevitably in some instances there may be some overlap as to whether or not a matter that affects the international relations of Australia might also be a matter that affects the security of the country, and that significant damage that is occasioned to international relations may have consequential and predictable effects that flow on to damage security interests.

35. Counsel were agreed that neither mere embarrassment nor the risk of exposure, or to use the words of Mason J in *Commonwealth v John Fairfax & Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39 at 52 that it "will merely expose... to public discussion and criticism" the actions of either Australia or Indonesia or any of Australia's agencies would be sufficient of themselves to justify a conclusion that a document is an exempt document. I propose to act on that basis.

36. There was also a large measure of agreement as to how the Tribunal should approach the degree of satisfaction it must have if it is to conclude that the release of a document "could reasonably be expected" to cause damage to one of the relevant interests. That expression, albeit in a slightly different context, was considered by Spender J in *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

37. His Honour indicated that in his view it was not sufficient that there be merely the allegation or mere possibility of damage as a consequence of disclosure, and went on to say:

In Re Maher and Attorney-General's Department *(1985) 3 AAR 396 Davies J at 409 accepted as correct a submission that what is necessary is disclosure "would or could reasonably be expected to cause actual and significant damage".*

38. For my part I do not accept such a high threshold has been established by the authorities. Where both counsel were in agreement and the Tribunal is happy to indicate it finds useful guidance is in the language of Sheppard J in *Attorney-General v Cockcroft* (1986) 10 FCR 180.

39. In *Cockcroft* his Honour said at 196:

In my opinion he [the decision-maker] will not be justified in claiming exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could prejudice that supply [the future supply of information] But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.

40. As was indicated by Mr Latham, the Tribunal can be guided by Sheppard J's indication that the proper point of the spectrum is somewhere between risk and balance of probabilities. But in the end, as Mr Latham correctly indicates, the real test is not to be found in any gloss of judicial language, but rather in the language of the Archives Act itself understood in the context of the interests it is protecting. I intend to proceed on that basis, bearing in mind that both counsel are agreed as to the relevance and appropriateness of Sheppard J's views in that regard.

41. The applicant made a number of submissions which the Tribunal properly has taken into account. It submitted that East Timor is now an independent state. Timor Leste has reasonable relationships with Indonesia. The applicant submitted that these events occurred a very significant time in the past and many of the people who had had lead roles in the military intervention would now be dead.

42. The applicant submitted that the passing of time reduces sensitivity, a point that is self-evident in most instances. The Tribunal accepts that proposition, albeit it notes that the Archives Act assumes that certain documents will retain security sensitivity even after 30 years and provides explicitly for their exemption. Whether or not they do so with respect to the records Dr Fernandes has sought is the matter that is currently under consideration.

43. The applicant stresses the responsibility of the Tribunal not to defer to the views of any agency or witness. The Tribunal assured the applicant and his counsel that the Tribunal accepted that proposition.

44. Turning to more particular matters, the applicant accepted that information provided in confidence by other governments or agencies of other governments should remain confidential under s 33(1)(b) unless it had been released by the other government.

45. The applicant accepted that it was proper that any document or record that disclosed the identity of any informant who had provided information to an Australian intelligence service who did not want their identity to be revealed should be accepted by this Tribunal to be an exempt document.

46. The applicant also accepted that any record that reveals the surveillance techniques of the Australian intelligence services should remain exempt if the release of the document would increase the capacity of any other state to take countermeasures.

47. That was qualified by the applicant's submission that any record that disclosed a technique that had already been disclosed, was redundant, was not classified or could be redacted to conceal the surveillance method used, would not be an exempt document.
48. The applicant accepted that if a record is an exempt document, there is no balancing interest in academic research or any other broader considerations that would enable the Tribunal to override the exemption. The respondent expressed no disagreement with those submissions and the Tribunal regards each of the propositions set out at [43]-[47] to be sound.
49. I thank counsel for their cooperation and willingness to make reasonable concessions. They have assisted the Tribunal greatly in thinking through the way in which it is duty-bound to deal with these matters.
50. The difficulty, of course, is the application of those principles and I now turn to the evidence. There is only relatively limited material that I can refer to in these open reasons. There was an open affidavit that was affirmed by Amanda Louise Gorely; it was received without objection. Her affidavit refers to a number of matters, including the fact that Australia has entered into a security of information agreement with the government of the United States.
51. The critical terms of Ms Gorely's affidavit are to the effect that there are four documents, the subject of these proceedings that contain information falling within the scope of that security agreement. She deposes the information in those documents was provided by the US Government to the Australian Government and each of the documents are classified Secret. She deposes to her view that the documents and all of the information in the documents fall within the scope of the security agreement.
52. At [12] she deposes to the fact that the Australian Government has written to the United States Government to ask whether the US Government had communicated the information in the documents in-confidence, whether the US Government would like the Australian Government to continue to restrict access to the documents, and whether there are any ongoing sensitivities. Ms Gorely then deposes to the fact that on 6 May 2013 the US Government responded by informing the Australian Government that it wanted the Australian Government to continue to restrict access to the four documents.
53. The other open affidavit that was filed in this matter was that of Mr Jim Hagan, Deputy Director-General of the Office of National Assessments ("ONA"). In that affidavit Mr Hagan deposes to the role of the ONA as an independent statutory body established by the *Office of National Assessments Act 1977*; describes the functions of the ONA; deposes that liaison with international counterparts is an important source of information for ONA and deposes that ONA has responsibility to coordinate and maintain these

international relationships on behalf of all agencies within the Australian intelligence community.

54. He deposes that, in accordance with the arrangements between ONA and Archives, ONA was asked to review the documents and that he has examined the documents personally and has identified a small amount of text in two folios that, in his view, ought not be disclosed because, in his judgment, it could reasonably cause or expected to cause damage to the defence, security and international relations of the Commonwealth, and that those parts are parts of paragraphs 1 and 2, folio 8, part 20 of series A1838 item 3038\2\1 and part of the main subject line in folio 129 of part 21 of series A1838 item 3038\2\1.

55. He indicates that for reasons he will outline in a classified affidavit, the public disclosure of this information will damage ONA's relationship with international partner agencies. He deposes that if ONA's relations with its international partners are damaged, this could in turn damage relations between international partners and the Australian intelligence community and between the foreign and Australian governments more generally. He then states that, for reasons he intends to outline in his classified affidavit, he considers the disclosure of that information will also damage the security and defence of the Commonwealth.

56. Mr Hagan gave evidence and was cross-examined in relation to it. He explained that the release of the document in his view would have two effects: direct impairment of the interests of Australia and an indirect effect in relation to other parties who are observers who might draw their own conclusions.

57. He also stressed the particular sensitivity about the relationship currently between Australia and Indonesia and pointed out, and it is a matter of no particular surprise, as it is a matter in public record, that there are presently some significant tensions between the governments of Australia and Indonesia and that was part of his evidence that present circumstances have to be taken into account in relation to potential damage to Australia's international relations and security interests.

58. In relation to third party effects, that is, indirect effects, he gave evidence that turned on the consequence of the Snowden releases:

"there's also other parties that we deal with who are also observers of what happens in Australia who might also take their own – draw their own conclusions if confidentiality was breached in another relationship... It's the third party effects that are released by it that it can have.

59. Before I turn to conclusions that I have reached I should briefly mention the submission put forward by the applicant that the responsibility of the Tribunal is to go through each proposed redaction line by line and word by word. In broad principle, the Tribunal accepts that proposition but it also accepts the qualification urged upon the Tribunal by Mr Hyland that there will

be some instances where it is plain that the whole of the document falls within one of the exempted classifications, such that the intent of the Act makes plain that the whole of the document would be an exempt record.

60. Nonetheless, this Tribunal will do all it can; the Archives Act favours openness and it is only material that is exempt that is excluded from release.

61. Regrettably, I have reached the position where I now have to express conclusions which I am unable to explain in these open reasons. Following that I will adjourn these proceedings and give reasons in a closed session (a) explaining how the Tribunal has disposed of the matter for such appeal rights that Archives may have, or indeed that the applicant may have, albeit in the latter instance the difficulty in pursuing those appeal rights is self-evident.

62. As I have indicated, if a record is not referred to in these parts of the Tribunal's reasons the Tribunal is to be assumed to have found that the claim for exemption is made out and the decision of Archives is to be affirmed.

63. The documents that I now refer to are documents upon which no concluded view has been reached by the Tribunal and on which it will be assisted by reaching a final view by the evidence of the Inspector-General of Intelligence and Security.

64. Those records are part 20 folio 140 in part, that is, the first redaction, part 20 folio 125, folio 13 and part 20 folio 8 in part, that is, the first paragraph. Part 21, folio 130 to 133, part 21 folio 129 and part 21folio 29 but only as to the first three letters of the redaction. Can I thank counsel for the way in which they have approached this matter. I appreciate the difficulty for counsel for the applicant in appearing for an applicant in proceedings where the bulk of materials cannot be made known to him. But I have been greatly assisted by both counsel. The professionalism of each has been exemplary and in the best traditions of the Bar. I thank them for it.

Communication received following delivery of oral reasons

65. After delivery of the above reasons on 30 January 2014, counsel for the respondent on 31 January 2014 wrote to the Tribunal in the following terms: *we have identified two errors in the marked up documents which we provided to the Tribunal which relate to the documents the Tribunal yesterday indicated it wished the IGIS to give evidence about. The errors involved indicating that the Archives maintained an exemption claim over the entirety of paragraph 1 in folio 8 (of part 20) and the 3 letter acronym on folio 29 (of part 21). In fact, the first line of paragraph 1 in folio 8 (i.e. before the word 'and') has in fact already been released, as has the three letter acronym on folio 29.*

66. Following delivery of the Tribunal's reasons on 30 January 2014, and receipt of the email referred to in [65] above, the Tribunal on 3 February 2014 took further evidence in the absence of the applicant including from the

Inspector-General of Intelligence and Security. It was of course unnecessary for the Tribunal to hear evidence from the Inspector-General of Intelligence and Security in relation to those parts of the documents that had already been disclosed to the applicant.

Oral reasons given on 3 February 2014

67. The Tribunal's open reasons delivered on 3 February were the following: *The Tribunal has given attention to the relevant considerations in s 52 regarding the non-disclosure of certain matters. Having regard to these considerations, particularly the necessity of avoiding the disclosure to the applicant of a matter contained in a record to which the proceedings relate, being matter by reason of which the record is an exempt record, and my obligation to take into account the submissions of the agency, the Tribunal, being satisfied by reason of the confidential nature of the evidence, orders pursuant to s 35(2) that publication of the evidence given by the Inspector-General of Intelligence and Security in the closed session and the terms of Exhibit 9 be prohibited except to the respondent and its legal representatives, the Inspector-General of Intelligence and Security and the other witnesses who gave evidence in the absence of the applicant in these proceedings.*

Final disposition of this matter

68. The Tribunal on 3 February 2014 delivered closed reasons to the Director-General and the National Archives. These reasons cannot be published. The Tribunal reserved its decision in relation to Part 21 Folios 130-133.

69. The Tribunal has delivered closed written reasons dealing with Part 21 Folios 130-133. The Tribunal decides that the first line of the handwritten text at Part 21 Folio 130 and the first paragraph of Part 21 Folio 133 are not exempt from release under the Archives Act 1983, but otherwise affirms the decisions made by Archives under review. To accommodate the intent of s 55A of the Archives Act, the Tribunal will order that the operation of its decision come into effect 7 days after the date of publication of these reasons.

I certify that the preceding 69 (sixty-nine) paragraphs are a true copy of the reasons for the decision herein of President D Kerr

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Associate

Dated 2 April 2014

Dates of hearing	**28-30 January, 3 February 2014**
Date final submissions received	**3 February 2014**
Counsel for the Applicant	**Mr I Latham**
Counsel for the Respondent	**Mr J Hyland**
Solicitors for the Respondent	**Australian Government Solicitor**
