FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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HARM and DEPARTMENT OF SOCIAL SECURITY
(No. Q91/53)

Decided: 23 October 1992 by Deputy President S.A. Forgie.

Abstract

Section 38 — before amendment in October 1991 — application to secrecy provision in s.19(2) of Social Security Act 1947 — prohibition of communication to any person of any information concerning another person obtained by an officer in the performance of duties — information concerning other residents at applicant's address — covered by s.19(2) — exempt under s.38.

Section 45 — before amendment in October 1991 — did not involve reference to considerations of public policy relevant to remedies for breach of confidence in its technical sense — elements necessary for breach of confidence under unamended s.45 — information received in confidence.

Issues

Whether ss.38 (secrecy provisions) and 45 (breach of confidence), as they were before the amendments to the *Fol Act* in October 1991, operated to exempt certain material in CES documents. Whether information received in confidence. The applicable date of the exemptions — whether date of request or date of internal review decision (or date of Tribunal's decision).

Facts

On 16 October 1990 Ms Harm requested access to information concerning the payment to her of special benefit. In addition to documents released in their entirety, two documents were released with deletions made under ss.38 and 45. The deletions from the first document concerned the details of other clients residing at the same address as Ms Harm; deleted from the second document was a note of a telephone conversation between an unidentified employer and a CES officer. Ms Harm had been interviewed by the supervisor of the Guide Dogs for the Blind in Toowoomba. The supervisor then telephoned the CES office. The CES officer who spoke to the supervisor could not recall whether she had asked for any part of the conversation to be treated as confidential, but considered it should be so treated and only made available to CES and DSS officers to assist Ms Harm.

The Tribunal received evidence about the operations of the CES concerning work activity testing. CES is required to collect information from employers on job seekers referred to them. The information is used to review the requirements of the job and in making future referrals. Employers sometimes make adverse comments concerning those sent to them by CES, and CES treats these comments as confidential. The Tribunal took note of the respondent's (DSS) manual concerning disclosure of client records, which in broad terms provided for disclosure of records to the person concerned except in the case of material given in confidence. The manual provided that such confidential material should be deleted before documents were released to the person about whom they contained information. Provision was also made for consultation with third parties who had provided information.

Decision

The Tribunal affirmed the decision of DSS that the deletions constituted exempt material under ss.38 and 45.

Section 38 — secrecy provision in s.19(2) of the Social Security Act 1947

Because they were in force at the time of the decision under review, the Tribunal applied the provisions of s.38 of the *Fol Act* as they were before the amendments made on 25 October 1991 (see Comments below). The Tribunal held that s.19(2) of the *Social Security Act 1947*, which prohibited the communication to any person of any information concerning another person obtained by an officer in the performance of his or her duties, was a secrecy provision to which the provisions of the unamended s.38 applied (*Re Lianos and Department of Social Security* (1985) 7 ALD 475, and *News Corporation v National Companies and Securities Commission* (1984) 6 ALD 83). The information in question was information concerning another person obtained by an officer in the course of duties and was accordingly information to which s.19(2) specifically referred. It was therefore exempt under the unamended s.38.

Section 45 — breach of confidence

The Tribunal again applied the provisions of s.45 as they were at the time of the decision under review and before the amendments of October 1991. As a result, it was the view of the majority in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428 that were relevant in this case to the scope of s.45. That view was that s.45 did not involve reference to considerations of public policy relevant to remedies for breach of confidence in its technical sense. That was no longer the case after the 1991 amendment to s.45. Despite his dissent on the issue whether s.45 referred to an actionable breach of confidence, the views of Gummow J in *Corrs Pavey* on the elements of breach of confidence were relevant to the unamended form of s.45. In brief those elements were:

- the information must be identified with specificity, not merely in global terms;
- the information must have the necessary quality of confidentiality, and not be, for example, common or public knowledge;
- the information must be received in such circumstances as to import an obligation of confidence; and

there must be actual or threatened misuse of that information (or, put another way, disclosure must be unauthorised: *Baueris v*

Commonwealth (1987) 75 ALR 327; (1987) 10 *FoI Review* 47)).

Consideration centred on the question whether the information had been received in circumstances importing an obligation of confidence. There was no evidence from the person who provided the information as to whether she regarded it as provided in confidence, and the CES officer could not recall if the provider had asked that her comments be kept confidential. However, the Tribunal was satisfied that the general procedures followed by CES were sufficient to establish that the information was received on a confidential basis. The manual contemplated the receipt of information on a confidential basis, and it was the practice of CES to treat as confidential adverse comments made by employers about job seekers. There was nothing in the evidence to show that the information in question should have been received on any other than a confidential basis. Section 45 applied to render the information exempt.

Comments

The Tribunal's view that the applicable law was that applying at the date of DSS's final decision made no difference in practice to the outcome. However, it was assumed in the Comments in para.11of the Decision Summary of *Re Green and AOTC* ((1994) 50 *FoI Review* 23) that the Tribunal, Deputy President Forgie presiding, had decided that the applicable date for exemption provisions which had changed after receipt of a request was the date of the Tribunal's decision. It appears from the decision in the present case that Deputy President Forgie is of the view that the relevant date is the date of the final effective decision of the agency concerned, in this case the date of the internal review decision. However, it is not clear that the Tribunal's approach is consistent with s.58(2) of the *FoI Act* which provides that in proceedings under that Act, where it is established that a document *is* an exempt document, the Tribunal does not have power to decide that access be granted to exempt material in the document. See also *Re Motor Traders Association of Australia and Trade Practices Commission* (reported in this issue), where the Tribunal held that, as it was making a fresh decision, it was bound to apply the *FoI Act* as it was at the time of the Tribunal's decision.

It may be questioned whether the Tribunal too readily assumed, without requiring the agency to consult with the person concerned, that information had been given by the employer in confidence and that its disclosure would be unauthorised. The CES manual itself specified that where information had been obtained from outside sources, consultation should occur with the authors of the information before a decision on disclosure was made. If the provider had no objection to its disclosure, it could not be said that disclosure of the information would be unauthorised. For another relatively recent case on s.45 see *Re Kamminga and the Australian National University* (1992) 15 AAR 297; (1992) *FoI Review* 48. For a case in which the Tribunal rejected a s.37(1)(b) claim as to confidentiality as not supported by sufficient evidence, see *Re Liddell and Department of Social Security* (1989) 20 ALD 259; (1990) *FoI Review* 18.

[R.F./R.A.]

MOTOR TRADES ASSOCIATION OF AUSTRALIA and TRADE PRACTICES COMMISSION (No. A91/209)

Decided: 30 October 1992 by Deputy President B.J. McMahon.

Abstract

Section 22 — not 'reasonably practicable' to make edited copies of exempt documents with deletions.

Section 36(1) — disclosure not contrary to the public interest.

Section 37(1)(b) — disclosure of confidential source of information.

Section 40(1)(d) — substantial adverse effect on conduct of operations of agency — meaning of 'substantial'.

Section 42 — documents subject to legal professional privilege.

Sections 27 and 43(1)(c)(i) & (ii) — unreasonable adverse effect on business affairs — not necessary for agency to consult under s.27 when intending to claim exemption.

Section 45 — elements of actionable breach of confidence — documents exempt.

Section 61 — onus on respondent to establish decision was justified.

Issues

Whether it was necessary in the proceedings to identify specifically those documents which remained in issue. Application of exemptions in ss.36(1), 37(1)(b), 40, 42, 43(1)(c)(i) and (ii) and 45. Meaning of the word 'substantial'. Whether 'reasonably practicable' to provide edited copies of exempt documents under s.22(1).

Facts

The applicant (MTAA) applied to the respondent (the TPC) for access to documents relating broadly to the pricing of petrol. A large number of relevant documents were identified, many of which were wholly or partially released to MTAA. Claims were no longer pressed for the exemption of numerous documents tendered in open court in collateral legal proceedings. While unable to identify those documents common to both proceedings, counsel for the TPC undertook to do so in the future. TPC tendered a long affidavit from one of its senior officers who also gave oral evidence in chief but was not cross-examined in any detail by MTAA's solicitor. The senior officer stated that he relied on his own knowledge of the industry and on information provided by officers of the TPC. MTAA's solicitor took the view that s.61 of the *FoI Act* required the respondent to discharge the onus of proving that the documents were entitled to exemption under the Act, and that his client's cause was better served by analysing the affidavit itself than by introducing new or contradictory material through cross-examination. The Tribunal considered this was a flawed approach to an administrative hearing which had had adverse effects on MTAA's case.

Although the parties were unable at the hearing to identify with precision the documents remaining in issue, both parties agreed that the present proceedings should continue and that the matters raised in issue should be dealt with in general terms. The Tribunal considered general reasons for the exemption claims as summarised at the end of the lengthy affidavit. In the Tribunal's view this was a legitimate way to approach the question of entitlement to exemption (*News Corporation Limited v National Companies and Securities Commission* (1984) 5 FCR 88 at 102 per Woodward J). The approach was not opposed by counsel for MTAA who confined himself to

analysing the summarising paragraphs, and submitting that the evidence advanced did not support the claims made.

Decision

The Tribunal affirmed the decision under review to refuse access except in relation to a claim for exemption under s.41(1). It reserved liberty to both parties to apply in respect of the application to specific documents of the principles enunciated in general terms in the decision. This did not extend to adducing further evidence.

Applicable date of exemption provisions — 1991 amendments

After the date of the TPC's internal review decision, significant amendments were made in October 1991 to some of the exemptions claimed (ss.41 and 45). The Tribunal held that it was conducting a fresh exercise of administrative power and was bound to apply the exemptions in the *FoI Act* as they stood at the date of its decision (see also summaries of *Re Green and AOTC* (1994) 50 *FoI Review* 21 and *Re Harm and Department of Social Security* (reported in this issue)).

Section 36(1) — deliberative process documents and the public interest

There was no discussion as to whether particular documents constituted deliberative process documents as defined in s.36(1)(a). The Tribunal held, on the basis only of the summarising paragraph of TPC's affidavit, that disclosure of the documents for which the s.36 exemption was claimed would be contrary to the public interest. The TPC's general claim was that 'the public interest requires that staff be able to synthesise and analyse information without opinions expressed being the subject of public scrutiny' and that it would be assisted by information from a wide range of sources (but see Comment below).

Section 37(1)(b) — confidential source of information

On the basis of general assertions in the affidavit, the Tribunal accepted s.37(1)(b) claims in relation to documents the TPC claimed had been expressly or impliedly provided in confidence. No specific evidence was given concerning alleged confidential sources (see Comment below).

Section 40(1)(d) — substantial adverse effect on conduct of operations of agency

The TPC claimed that its many functions required it to be able to provide a clear understanding that information was being provided on a confidential basis and that release of the particular information and of documents generally would have a substantial adverse effect on the TPC's ability to obtain the information on which it relies to perform its functions. Neither the TPC nor the Tribunal gave any consideration to possible public interest factors favouring disclosure under s.40(2). While the word 'substantial' had been defined in *Re Healy and Australian National University* to mean 'serious' or 'significant' (see also Beaumont J in *Re Williams and Registrar, Federal Court of Australia* (1985) 8 ALD 219), the Tribunal thought that test may have been displaced by the judgment of Muirhead J (in *Ascic v Australian Federal Police* (1986) 11 ALN 184; (1986) 6 *FoI Review* 8), doubting that in s.40 'substantial' imported a concept of gravity and suggesting it more properly meant 'real or of substance and not insubstantial or nominal' (see also the examination of authorities in *Re Booker and Department of Social Security* and Comments below). On either interpretation the Tribunal accepted that the exemption had been made out. The TPC had provided probative evidence and it was unnecessary for a respondent to tender evidence from third parties.

Section 41(1) — unreasonable disclosure of personal information

The Tribunal rejected the claim under s.41(1) as not being supported by sufficient particulars of the facts on which the claim was said to be based.

Section 42 — legal professional privilege

At the time of the hearing it was not possible to identify with precision which of the documents, for which s.42 was claimed, coincided with documents subject to legal professional privilege in the Federal Court litigation. The Tribunal rejected MTAA's submission that the TPC had not made out its exemption claim, accepting that there was evidence for the exemption in respect of some of the documents. The Tribunal expected the parties to confer as to the documents in question, and gave them liberty to apply if need be as to the application of the appropriate principles to specific documents.

Section 43(1)(c)(i) & (ii) — business affairs documents

Where an agency has decided not to release documents it is not obliged by s.27 to confer with an affected party, nor need it produce evidence from relevant third parties that their interests would be adversely affected by disclosure. The Tribunal accepted that consultation with the large number of sources involved would have been onerous. The TPC gave general evidence that substantial adverse effects (s.43(1)(c)(i)) would follow for a large number of businesses through the release of information indicating the way in which they conducted business, including pricing policies, marketing strategies, competitive position, margins and relationships to others in the industry. The Tribunal also accepted as 'inherently credible' the TPC's evidence that industry participants would not continue to co-operate in providing information if they could not be assured that its confidentiality would be maintained (s.43(1)(c)(ii)). (See Comments below).

Section 45(1) — breach of confidence

The Tribunal was satisfied as to the presence of the four elements of an actionable breach of confidence (leaving aside the question of public policy defences) as stated by Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic.)* (1987) 7 AAR 187 and adopted by the Tribunal in *Re Kamminga and Australian National University* (1992) 15 AAR 297. Although it had not inspected the documents, the Tribunal was satisfied that the information claimed to be confidential had been identified with sufficient specificity: the documents were in existence and were readily identifiable (but see Comments below). The documents had the necessary quality of confidentiality, there being no evidence of the contents being common or public knowledge. The Tribunal was also satisfied from the TPC's evidence and description of relevant documents that they had been provided on a basis of explicit or implicit mu-

tual understanding that they would be treated as confidential.

Section 22 — obligation to provide edited copies of documents containing exempt material

The Tribunal rejected the submission by MTAA that the TPC had made no attempt to make documents available under s.22 with deletion of exempt material. The Tribunal accepted that, because of the numerous documents which would need to be meticulously examined by officers with detailed knowledge of their contents, it was not 'reasonably practicable' for the TPC to make edited copies and therefore s.22 had no application (citing *Re Carver and Department of the Prime Minister and Cabinet* (1987) 6 AAR 317 — but see Comments below).

Comments

The decision has no precedent value in view of the fact that the parties *and the Tribunal* agreed to run the case in general terms without identification of the specific documents still in issue or reference to their actual contents. The Tribunal's approach was unsatisfactory in not relating exemption claims to specific documents and in accepting bald and unsubstantiated claims where not tested or contradicted by the applicant. It failed to determine for itself whether the onus on the respondent to establish the correctness of a decision (s.61) had been discharged in relation to specific exemption claims, relying instead on the 'inherent credibility' etc. of the claims. This reliance on the reasonableness of the *claims for exemption*, rather than on the expectations of the consequences of disclosure, would appear contrary to the approach of the Full Federal Court in *Searle* (below). In effect the Tribunal failed to exercise its full merits review powers. Moreover, there is no evidence in the Tribunal's reasons that the TPC or the Tribunal had made any attempt to consider the application of the deletion provisions of s.22 and the Tribunal made no reference to detailed evidence in support of the claimed workload exception to s.22 (compare the approach of the Tribunal in *Re Carver* (above) and, in relation to the workload provision in s.24, in e.g. *Re Swiss Aluminium Australia Ltd and Department of Trade* (1986) 10 ALD 96).

The public interest ground accepted by the Tribunal in relation to s.36 is in essence nothing but a restatement of the 'frankness and candour' approach largely rejected by the Tribunal and the courts (see e.g. the examination of authorities in *Re Weetangera Action Group and (ACT) Department of Education and the Arts*; (1994) 51 *FoI Review* 32, Mr Todd sitting as President in the ACT AAT, and *Re Kamminga* (above)). Once again, the Tribunal adopted a default approach to the question where the public interest lay, and made no reference at all to the need to balance other public interest considerations in favour of disclosure in relation to ss.36, 40(2) and 43(1)(c)(i). Again, while the matter remains to be definitively decided, the better line of authority on the meaning of 'substantial' in s.40(1) is that it requires that the expected effects of disclosure be of a serious character.

The Tribunal made no attempt to assess whether disclosure of individual documents could in fact reasonably be expected to disclose confidential sources of information (s.37(1)(b)) (compare the approaches in *Re Gold and Department of the Prime Minister and Cabinet* (reported in this issue) and *Re Liddell and Department of Social Security* (1989) 20 ALD 259; (1990) 26 *FoI Review* 18). Similarly, the evidence concerning the supposed effects under s.43 of disclosure was lacking in substantiating detail and was not related to specific information. The Full Federal Court has made it clear that what the phrase 'could reasonably be expected' requires is not the reasonableness of a *claim* for exemption but the reasonableness of *expecting* certain consequences (*Searle Australia Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163)). The present decision totally disregarded that distinction. *Searle* also emphasised that since the introduction of the *FoI Act* agencies could not give absolute assurances of confidentiality: there is an enforceable right of access subject to the exceptions and exemptions in the Act. Again, by not inspecting the specific documents or parts of documents which it was claimed were confidential in character (i.e. not public or common knowledge) the Tribunal did not itself test the claims in relation to specific information (s.45) (compare the approach of the Tribunal in *Re Drabsch and Collector of Customs*).

[R.F./R.A.]

SAID and JOHN DAWKINS (No. W92/203)

Decid d: 14 January 1993 by Deputy President P.W. Johnston.

Abstract

Section 4(1) — definitions of 'prescribed authority' and 'official document of a Minister' — no FoI access to constituency documents held by a Member of the House of Representatives (MP) who is also a Minister — documents relating to another portfolio.

Issues

Whether constituency documents held by an MP who is also a Minister, and relating to another portfolio, are subject to FoI access. Meaning of 'prescribed authority' and 'official document of a Minister'.

Facts

Said made a request under FoI to Mr Dawkins, his local MP, for copies of all files in Mr Dawkins' possession having anything to do with him or his son since 1977. Mr Dawkins, the Commonwealth Treasurer, declined to respond to Said's request on the basis that the documents requested were not subject to the *FoI Act*.

Decision

The Tribunal held that it had no jurisdiction to hear the matter as the documents were not either 'documents of an agency' or 'official documents of a Minister' as defined in s.4(1).

Scope of the request — section 15(3) and (4)

The Tribunal accepted that the natural and reasonable reading of the terms of the request was that Said was seeking access to documents held by Mr Dawkins at his electorate office relating to various enquiries made by Said as a constituent over a number of years. While the Act should not be approached pedantically or its provisions applied too stringently, this was the natural reading of the request. There was nothing substantial to indicate that Said was seeking official documents held by Mr Dawkins as a Minister, even though the letter had been addressed to Mr Dawkins both as 'Member for Fremantle' and 'Treasurer of Australia'. If Mr Dawkins had assisted Said to make a valid request, as contemplated by s.15(3) and (4), Said might have been able

to reformulate his request in terms that were more explicitly directed to documents within the scope of the Act. However, s.15(3) and (4) apply only to agencies and not to other persons not caught by the Act (or to Ministers).

Access provisions — section 11 — 'prescribed authority' — section 4(1) and (3)

Section 11 limits access under the *FoI Act* to documents of an agency (which is defined as a Department or a prescribed authority) or official documents of a Minister. The scope of access is not enlarged by the expression of general intent in s.3. The Tribunal rejected the argument that Mr Dawkins as an MP was a 'prescribed authority' under sub-paragraph (b)(ii) of the definition of that term. It was illogical to contend that the omission of Commonwealth Parliamentarians from s.4(3) (excluding Territory legislators and administrators from the *FoI Act*) carried the implication that they were intended to be within the definition of 'prescribed authority'. Moreover, the House of Representatives was not 'established by, or in accordance with the provisions of, an enactment [of the Commonwealth]': it is established by s.24 of the *Commonwealth Constitution* which in its original form was an enactment not of the Commonwealth Parliament but of the United Kingdom Parliament (*Sankey v Whitlam* (1978) 142 CLR 1 at 31 per Gibbs ACJ). Nor could the House of Representatives or the Commonwealth Parliament be described as a 'company' or an 'association'. Finally, those bodies could not come within paragraph (d) of the definition of a 'prescribed authority': other matters aside, there had been no declaration of it as a prescribed authority under the *FOI (Miscellaneous Provisions) Regulations*. Mr Dawkins was an individual unconnected with a prescribed authority.

'Official document of a Minister' — definition in s.4(1)

The Tribunal rejected Said's argument that a distinction should not be drawn between Mr Dawkins as an MP and as a Minister. The definition of 'an official document of a Minister' in s.4(1) refers to a document in the possession of a Minister 'in his capacity as a Minister, being a document that relates to the affairs of an agency or a Department of State'. The definition clearly delineates documents held *in the capacity of a Minister* (by virtue of office) from other kinds of documents, and requires them to relate to the affairs of an agency or Department. A document which is held by an MP in his or her representative capacity cannot be transformed magically into an official document of a Minister merely because the MP is, incidentally, a Minister. This was consistent with the purport of the Explanatory Memoranda of 1981 and 1983 and with FoI Memorandum No.19 (definition excludes 'representations which a Minister receives from one of his constituents concerning the affairs of another portfolio'). The previous understanding of the provision was reinforced, not changed, by the 1983 amendment to the definition, so the argument that access should be given to documents coming into Mr Dawkins possession between 1977 and 1983 could not succeed. There was no entitlement to access prior to the amendment.

Comments

This is the first specific case on the question of access to documents of an MP who is also a Minister, although there was no real doubt about the matter. The Tribunal's remarks on the establishment of the houses of the Commonwealth Parliament by the Constitution may be relevant to some other bodies referred to in the Constitution (for example, the Inter-State Commission, revived in practice between 1975 and 1991).

[R.F./R.A.]

SUSIC and THE AUSTRALIAN INSTITUTE OF MARINE SCIENCE (AIMS) (No. Q91/580)

Decided: 24 March 1993 by Deputy President S.A. Forgie.

Abstract

Section 36(1)(a) and (b) — deliberative process documents — report of independent expert acting as final arbitrator not a deliberative process document — recommendations for future consideration were part of deliberative processes of agency — disclosure of recommendations not in public interest.

Section 56(1) — no longer relevant after an actual decision made (but see comment below).

Issues

Whether part of a report was in the nature of opinion, advice or recommendation in the course of an agency's deliberative processes (s.36(1)(a)) and, if so, whether its disclosure was in the public interest (s.36(1)(b)). Effect on deemed refusal provision (s.56(1)) of making of an actual decision.

Facts

The applicant (Susic) sought access to one paragraph of a report written by Associate Professor I. Jenkins, an external academic, who was nominated by the Queensland Branch of the Royal Australian Chemical Institute to arbitrate in a long-running dispute between Susic and other academics employed by the Australian Institute of Marine Science (AIMS). The dispute related to the use of some of Susic's research material in AIMS' 1985-86 annual report. Susic had been provided with a copy of the report from which the paragraph had been deleted.

Decision

The Tribunal affirmed the actual decision to refuse access to the paragraph.

Which decision under review where deemed refusal under s.56(1) is followed by actual decision

In the context of a request for an extension of time to make an application to it, the Tribunal observed that where a person receives notice of an actual decision, even after a deemed refusal has arisen under s.56(1), that section no longer applies (but see comment below). The decision under review was thus the actual decision made by the agency.

Section 36(1)(a) — deliberative process documents

The Tribunal held that the report, other than the deleted paragraph, did not fall within the provisions of s.36(1)(a). The report was itself a final determination of the issues referred to the professor. It was therefore not part of the 'thinking processes' of AIMS, not being in the nature of an opinion, advice or recommendation in the course of AIMS' deliberative processes (s.36(1)(a)) (*Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112, and *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588). The report differed from that in *Harris v*

ABC (1983) 50 ALR 551 , where the ABC sought a report to assist it in making management decisions.

On the other hand, the deleted paragraph had been written in response to a request for appropriate recommendations on the basis of professional ethics and scientific practices. As AIMS intended to deliberate on those issues, the Tribunal held that the views in that paragraph had been expressed in the course of the deliberative processes involved in AIMS' functions, if not specifically for the purposes of those deliberative processes. Accordingly, the paragraph came within s.36(1)(a) (*Kavvadias v Commonwealth Ombudsman* (1984) 54 ALR 245).

Section 36(1)(b) — whether disclosure contrary to the public interest

The Tribunal referred to the instances of the public interest given by Davies J in *Re Howard and the Treasurer* (1985) 7 ALN 626 at pp.634-35. The public interest is not to be limited by the prescription of categories of classes of documents the disclosure of which would be contrary to the public interest; the public interest is not to be circumscribed, and all documents must be examined to ascertain the public interest for or against disclosure (Davies J in *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112).

The Tribunal held that disclosure of the matter in the deleted paragraph would be contrary to the public interest (s.36(1)(b)). This was not a case in which the applicant had been given access to other documents relating to the same matters or where there had been public statements about the issues (compare *Re Downie and Department of Territories* (1985) 8 ALD 496; (1986) 1 *Fol Review* 11). Nor was it a case where to release additional information would add to public knowledge. Access to the paragraph might or might not deal with all aspects relevant to a consideration of the matters dealt with in it and would not necessarily fairly represent all sides considered in a decision on those matters. Disclosure could create misleading impressions which might impede AIMS' decision-making processes.

Comm nts

The case is a good illustration of the careful discriminations needed to identify what is genuine deliberative process material under s.36(1)(a) and what is not within that provision. The Tribunal's comments on s.56(1) seem incorrect in principle, but there is probably little practical difference since s.56(5) provides that where, after an application is made to the Tribunal, an actual refusal decision is given, the Tribunal may treat the proceedings as extending to a review of the actual decision. The Tribunal's view would only have a serious effect if it was taken to require an internal review where an actual decision is given after a deemed refusal but before an appeal to the Tribunal has been lodged.

[R.F./R.A.]

GOLD and THE DEPARTMENT OF THE PRIME MINISTER AND CABINET (No. V92/632)

Decided: 26 and 27 April 1993 by Deputy President I.R. Thompson, R.C. Gillham and G.C. Woodard (Members).

Abstract

Section 22 — whether deleted material was in fact irrelevant.

Section 37(1)(b) — information given by police to a Royal Commission — not established that it would reveal, or enable ascertainment, of identity of a confidential source of information — witnesses not involved in obtaining information — some information second hand — account taken of information already disclosed.

Section 41(1) — disclosure of certain names in context of alleged criminal activities held unreasonable — consent to disclosure by other people precluded exemption under s.41(1).

Section 45 — circumstances in which disclosure would found an action for breach of confidence — information provided in confidence long before — no longer had quality of confidentiality.

Issues

Whether disclosure of material in the report of a Royal Commission a considerable time ago would enable identification of a confidential police informant (s.37(1)(b)), or would involve a breach of confidence (s.45(1)) or an unreasonable disclosure of personal information (s.41(1)). Whether deleted material was in fact irrelevant (s.22).

Facts

Mr Gold sought access to information concerning himself, his family, his business and his business associates contained in one chapter of the final report of the Royal Commission on the Ships' Painters and Dockers Union (the Costigan Royal Commission). The Department of the Prime Minister and Cabinet (PM&C) released some of the information but claimed exemption for the remainder under ss.37(1)(b), 41 and 45.

Due to an error by someone acting on behalf of PM&C, Gold was supplied with a full copy of the document, without deletions, in conjunction with an amended statement under s.37 of the *AAT Act*. Gold returned that copy and a photocopy he had made to PM&C and gave an undertaking in writing not to disclose the contents to anyone unless authorised to do so as a result of the decision. Although he stressed that nothing could erase from his mind what was written in the paragraphs relating to him, he continued with the appeal because he wished to be able to use the information 'to clear his name'. The Tribunal expressed its concern at the cost of the lengthy proceedings, which it doubted could assist Mr Gold to vindicate his reputation.

Decision

The Tribunal varied the decision under review by granting the applicant access to additional information. Access was granted to some information deleted by PM&C under s.22 as irrelevant.

Section 37(1)(b) — disclosure of confidential source of information

Witnesses for the Australian Federal Police (AFP) and the National Crime Authority did not know the identity of the source or the specific circumstances of the provision of certain information, but believed it would have been obtained on the understanding that the identity of the source would be kept confidential. The information had been made available to the Costigan Commission by the AFP on the basis that the confidentiality of its source would be respected and maintained, and it formed the basis for certain statements in that Commission's report. The AFP claimed that disclosure of those statements would enable a person having relevant background

knowledge to identify the source ('mosaic' effect). It did not explain this in detail, perhaps because the applicant was conducting his own case.

In the Tribunal's view, the evidence was often of a broad sweeping character. As some of the information had been supplied second-hand by an informant, its character would not disclose the informant's identity or enable it to be ascertained, although it might disclose the identity of the person from whom the informant obtained the information. The fact that parts of the report were based on information provided to the Costigan Commission by the AFP had already been revealed in the evidence of the AFP and disclosure of that fact would not in any case disclose the identity of the informant. If none of the information had been disclosed, the exemption could possibly have been upheld in relation to all of it, but in the light of what had already been disclosed, further disclosure would not increase the risk of identifying the applicant. None of the information was held exempt under s.37(1)(b). (See Comments below)

Section 45 — breach of confidence

The Tribunal adopted the formulation of Gummow J of the circumstances which would found an action for breach of confidence (in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic.)* (1987) 74 ALR 428 at 437; (1987) 12 *Fol Review* 72; adopted by a Tribunal including the President, Justice D.F. O'Connor, in *Re Kamminga and the Australian National University* (1992) 15 AAR 297; (1992) 40 *Fol Review* 48). The Tribunal concluded that the information had been provided in confidence but no longer had the necessary quality of confidentiality: it related to matters long past, did not concern trade secrets, did not disclose the informant's identity and would not cause any detriment to the informant (see Comments below).

Section 41 — unreasonable disclosure of personal information

The Tribunal held that the disclosure of certain names in the context of a report concerning alleged criminal activities would be unreasonable. However, it permitted the disclosure of other names where the persons concerned had indicated in statutory declarations that they had no objection to this course. (See Comments below)

Comments

The accidental disclosure of the relevant document resulted from failure to follow the Tribunal's Practice Direction of 12 April 1985 on 'Freedom of Information Act 1982 (Cth) — Filing of Affidavits and Supporting Documentation'. The Practice Direction clearly states that the respondent should not include the documents claimed to be exempt with the documents lodged under s.37 of the *AAT Act*. The Tribunal deals at the hearing with questions as to the production of the documents in question.

For other cases on access to material of the Costigan Commission, see *Re Carver and Department of the Prime Minister and Cabinet* (1987) 12 ALD 447; (1987) 8 *Fol Review* 19 and *Re Clarkson and Department of Premier and Cabinet and Department of Prime Minister and Cabinet* (Victorian AAT, unreported, 29 March 1990).

In requiring that for s.37(1)(b) to be established, the evidence for the respondent must show some logical link between disclosure of the information and the alleged disclosure of an informant's identity, rather than relying on an unexplained 'mosaic effect', the Tribunal was more rigorous than in some other decisions involving an alleged 'mosaic' effect (see, e.g., the *Archives Act* decision in *Re McKnight and the Australian Archives*, unreported, 28 July 1992). It is only the confidentiality of a source's *identity or existence* which is protected by s.37(1)(b), not the information actually provided by the confidential source (unless, as was unsuccessfully argued here, it would enable the informant's identity to be ascertained) (*Re Anderson and Australian Federal Police* (1986) 4 AAR 414).

This is an important example of information which was once confidential in character, and therefore protected under s.45, losing that character and no longer being protected under s.45. However, the Tribunal does not say precisely why the information did not have 'the necessary quality of confidentiality'. Confidential information can lose that character by becoming public or because the original understanding as to confidentiality was limited in its intended duration. In saying that the information 'related to matters long past', the Tribunal does not say which of those situations was the case here. The better opinion now seems to be that detriment to the confider is not necessary to found an action for breach of confidence (see e.g. Gummow J in *Smith Kline & French Laboratories (Australia) Limited v Secretary, DCSH* (1990) 22 FCR 73 at 112, citing R. Dean, *The Law of Trade Secrets*, 1990, pp.177-8). The situation is different where a government is bringing an action for breach of a duty of confidence owed to it: in addition to the other elements, the government must show that disclosure would be contrary to the public interest (see e.g. Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39).

This is the only Tribunal decision in which an applicant has obtained the consent of those concerned to the release of personal information about them, thereby ensuring that release of that information would not be 'unreasonable' under s.41. The case is also interesting for the Tribunal's rejection of the claim that some of the material deleted under s.22 was irrelevant to the request.

[R.F./R.A.]

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that currently stigmatise whistleblowers. The Report noted how whistleblowers were victimised and harassed following their disclosures with substantial impacts on their public and private lives.

The Federal minister for Justice was reported to be looking at legislation while the *Sydney Morning Herald* in its editorial noted protection for whistleblowers '. . . is a critical part of any regime that aims to make the public service open and accountable' (2 September 1994). The Review hopes to make more detailed comments about the report in the next issue.