FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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WALLACE and MERIT PROTECTION AND REVIEW AGENCY (MPRA) (No. A94/147)

D cided: 13 July 1995 Deputy President G.L. McDonald.

Abstract

Section 36 — wide ambit of 'deliberative process' documents — investigator's notes and draft report — public interest in accountability and the rights of applicants contrasted with public interest in avoiding prejudice to investigation process — candour argument — avoiding confusion — compromise to integrity of system — 'confusion and unnecessary debate' — claims not upheld for notes — claim of 'unnecessary confusion' upheld for draft report.

Section 40(1)(c) and (d) — meaning of 'substantial adverse effect' — claims not upheld.

Section 45(1) — breach of confidence — necessary elements of action — claim upheld — s.45(2) not considered.

Section 66 — recommendation that costs be paid — 'substantial success' of applicant — payment of 50% recommended.

Issues

Whether informal working notes and a draft report were deliberative process documents (s.36(1)(a)); whether disclosure of notes would be contrary to the public interest on grounds of 'candour'; 'confusion of the public', or compromising the integrity of the system; whether disclosure of draft report would lead to 'unnecessary debate' (s.36(1)(b)). Whether there would be a 'substantial adverse effect' on the management or assessment of personnel or on operations of the agency (s.40(1)(c) and (d)) — meaning of 'substantial adverse effect'. Whether disclosure would found an action for breach of confidence (s.45(1)) and whether s.45(2) prevented operation of s.45(1). Whether to recommend to the Attorney-General that the costs of the applicant be paid on the basis of 'substantial success' (s.66(1) and (2)).

Facts

Mr Wallace had applied to the MPRA for review of a promotion for which he was an unsuccessful applicant: the successful applicant was affirmed in the position. Mr Wallace requested access under FoI to all working papers held by the MPRA relating to its investigation of the matter. The documents still in issue at the time of the hearing consisted of handwritten notes made by the MPRA's investigator recording his deliberations and interviews conducted in the course of the inquiry, and a draft report prepared by the investigator.

Decision

The Tribunal ordered the release of most of the notes of the investigator's deliberations, but held that the notes of interviews and the draft report were exempt. It also recommended the payment of 50% of the applicant's costs.

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

Given the wide ambit of the term 'deliberative processes' in s.36(1) (see *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588 at 605-6 and *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112 at 118-9), notes made in the course of the inquiry, and the draft report, were part of the deliberative processes of the MPRA (see para. 1 below).

Under s.36(1)(b) there was clearly a public interest in ensuring that the MPRA fulfilled its statutory role and in the right of the applicant whose interests were affected by the operations of the Agency to obtain the documents. A claim for exemption of the notes of the investigator's deliberations, based on the effect of disclosure on the candour of officers of the MPRA, was rejected: the trend of the cases gave weight to the objects of the *FoI Act* over submissions that a lack of candour would result from disclosure. This was so even in cases where confidentiality was traditionally assumed (e.g. *Re Kamminga and Australian National University* (1992) 26 ALD 585 at 589-90; (1992) 40 *FoI Review* 48)). It was difficult to see how the candour argument could be sustained in relation to the relevant notes. The Tribunal also rejected the argument that disclosure of the notes would lead to confusion: the applicant had seen the final report, and the notes, and the context in which they were generated, were clearly different from the material contained in the final report. Disclosure would not compromise the integrity of the system even if the notes revealed a different path from that contained in the final report, a matter on which the Tribunal made no finding. The notes of interviews were also not exempt under s.36(1).

However, the Tribunal held that the confidential draft report, submitted by the investigator to his supervisor for review and approval at a more senior level, was exempt. Its disclosure would, as far as the applicant was concerned, be likely to lead to 'unnecessary debate resulting from disclosure of the possibilities considered' (Davies J in *Re Howard and Treasurer* (1985) 7 ALD 626 at 634-5), and debate should rather be about the final report. On balance the public interest in preserving confidentiality outweighed the applicant's right to know the contents of the draft report. (See Comments in para. 2 below.)

Section 40(1)(c) and (d) — substantial adverse effect on the management or assessment of personnel or on the operations of an agency

The Tribunal rejected claims under s.40(1). The words 'substantial adverse effect' in s.40(1) should be given their ordinary meaning of '... will probably have an important unfavourable or injurious effect ...' (see *Re Vulcan Australia and the Comptroller-General of Customs* (1994) 34 ALD 773 at 781, a *Customs Act* decision on the words 'likely to have a significant adverse effect'; see Comment in para. 3 below). The argu-

ments as to the application of s.40(1) were similar to those raised in relation to s.36(1)(b) (i.e. 'candour', 'confusion' and 'threat to the integrity of the system'). The Tribunal found it difficult to see how disclosure could have any adverse effect, let alone a 'substantial' one, and it was unnecessary to consider s.40(2). Claims for exemption under s.40(1) of notes of interviews were also rejected. However, notes of discussions with two persons were held exempt under s.45 (see below).

Section 45 — breach of confidence

The Tribunal upheld a claim that disclosure of notes of interviews would found an action for breach of confidence (s.45(1)). As in *Re Kamminga* (above) there was no contractual or proprietary basis for a claim of confidentiality. The Tribunal applied the generally accepted tests for determining whether breach of confidence would be established in equity (see Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443; (1987) 7 *Fol Review* 10, adopted by the Tribunal in *Re Kamminga*). The information in the interview reports was identifiable and had the necessary quality of confidentiality as it was not common knowledge and its contents were known only to its author. In view of assurances given to interviewees, and the provisions of the *Merit Protection (Australian Government Employees) Act 1984* concerning the conduct of investigations in private and the non-disclosure of information obtained by reason of being an MPRA officer, an obligation of confidence had arisen. Disclosure itself could be described as a misuse of information, and, if detriment was a necessary element of an action for breach of confidence (doubted in *Re Kamminga*, above) it would be present in the effect on the interviewees' relationships in the ATO. (See Comments in para. 4 below.)

Section 66 — payment of costs

The Tribunal found that the applicant had been 'substantially successful'. That finding was not dependent on the proportion of all documents claimed to be exempt which the Tribunal had determined should be released, but rather on whether, having regard to the nature of the documents concerned, the applicant had, in a qualitative sense, been 'substantially successful' (*Re Lianos and Secretary, Department of Social Security (No.2)* (1985) 9 ALD 43). The Tribunal recommended that 50% of the applicant's costs be paid. (But see Comment in para. 5 below.)

Comments

1. While the concept of 'deliberative process' documents in s.36(1) may have a 'wide ambit' as the Tribunal commented, there are clear limits to the concept: not every document on an agency file comes within the term and purely procedural or administrative documents are not covered by it (*Re Waterford and the Treasury (No. 2)*, above, at 602, and *Re VXF and HREOC* (1989) 17 ALD 491; (1989) 24 *Fol Review* 67). Some information may be generated or received prior to the commencement of the deliberative process, and in one case concerning notes of interviews in relation to a sexual harassment complaint, they were held to have predated commencement of consideration of the issues (*Re Booker and Department of Social Security*, unreported, 13 September 1990; (1991) 31 *Fol Review* 11).

2. There is an apparent tension between the Tribunal's rejection of the s.36 claim in relation to the notes of the investigator's deliberations and its acceptance of a similar argument in relation to the draft report. The Tribunal did not explain why 'debate' about any differences between the draft report and the final report was 'unnecessary'. Compare the view of the Tribunal in *Re Walker and Commissioner of Taxation*, unreported, 14 December 1994; (1996) 62 *Fol Review* 18, that the 'unnecessary debate' referred to in *Re Howard* (above) must have reference to matters of public interest in the context of the facts of each case, and that in *Howard* the facts related to circumstances of national political and economic significance which would certainly have given rise to public debate. The Tribunal in *Re Walker* rejected a claim in relation to taxation matters between the applicant and the ATO, which is not dissimilar to the present case. The potential actions of an applicant in seeking redress for a perceived defect in promotional procedures do not seem to fall within the rationale for this ground of public interest in non-disclosure. The decisions concerning 'candour' are consistent with a long line of Tribunal cases (see e.g. *Re Walker*, above). However, the Tribunal seems to have been in error in referring to the specific knowledge of the applicant, rather than referring to public disclosure, which is the standard for establishing an exemption. However, this seems unlikely to have made a difference to the decision on the question of 'confusion'.

3. In almost identical circumstances a decision of the Tribunal in *Re Scrivanich and Public Service Board* (1984) 6 ALD 98 held that, in considering the exemptions under ss.36(1) and 40, the public interest in ensuring that promotions in the Public Service are made in accordance with generally accepted principles of natural justice outweighed any public interest in a procedure whereby comments were made by officers to their subordinates or supervisors. The Tribunal there held that the applicant should be given access to the reports of interviews with witnesses prepared by an officer of the then Grievance Appeals Bureau (GAB), the predecessor of the MPRA. The Federal Court dismissed an appeal by the Public Service Board against that decision (*Public Service Board v Scrivanich* (1985) 8 ALD 44). The Tribunal in *Wallace* made no reference to the *Scrivanich* decisions. Had the Tribunal in the *Wallace* matter considered the question of the interview reports under s.36(1), as it should have (see para. 6 below), the decision in *Scrivanich*, on virtually identical facts, would have been very relevant.

4. In *Scrivanich* the Federal Court held that the report by the GAB officer was not in the nature of advice for the agency's deliberative processes and therefore did not constitute a deliberative process document as defined in s.36(1)(a). In *Wallace* the Tribunal was of the opinion that the draft report by the MPRA officer to his supervisor constituted 'consultation' for the purposes of the agency's deliberative processes. As the officer concerned in *Wallace* was part of the agency, it would appear preferable to characterise such a report either as 'recommendation' or 'deliberation' in the course of, or for the purposes of, the agency's deliberative processes.

5. The Tribunal's reading of 'substantial adverse effect' as equivalent to 'significant adverse effect', i.e. as meaning 'an important unfavourable or injurious effect' is helpful and supports the approach taken in a number of Tribunal decisions, but not all, that the word 'substantial' means 'serious' or 'significant' (the most recent example of this is *Re Saxon and*

Australian Maritime Safety Authority, unreported, 19 and 26 June 1995; (1996) 65 *FoI Review* 68; and compare the decision in *Re Morris and the Australian Federal Police*, unreported, 7 April 1995; (1996) 63 *FoI Review* 35, especially the Comment in para. 3)). However, s.40(1) does not include the word 'likely' so that the reference in *Re Vulcan* (above) to what will 'probably' occur is not applicable to the concept in s.40(1) of what 'could reasonably be expected' (see for example *Searle Australia Pty Ltd v PIAC and DCSH* (1992) 108 ALR 163). The decision not to accept s.40(1) in this case may be compared with its acceptance in *Re Sherrington and the MPRA*, unreported, 8 March 1995; (1996) 62 *FoI Review* 23, where the relevant information had been obtained from outside the agency. A somewhat different argument in relation to the notes of interviews might have had some chance of success (see *Re Barkhordar and ACT Schools Authority* (1987) 12 ALD 332).

6. On the question of detriment in an action for breach of confidence, see *Re Raisanen and SBS*, unreported, 2 December 1994; (1996) 61 *FoI Review* 11. In upholding the s.45(1) claim, the Tribunal did not refer to s.45(2) of the *FoI Act* which limits the application of s.45(1) where s.36(1)(a) would be applicable or would be applicable except for some limitations in s.36. Both the persons who refused to consent to release of notes of interviews with them were officers of a Commonwealth agency and their interviews were presumably in their capacity as officers of an agency. The notes of their conversations with the MPRA's investigator were 'consultations or deliberations ... for the purposes of an agency' prepared in the course of the investigator's duties. In that case the result should have been that s.45(1) did not apply, as disclosure would not have been a breach of confidence owed to a person other than a person in the capacity of an officer of an agency.

7. The Tribunal overlooked entirely the need, once an applicant's 'substantial success' is established under s.66(1), to examine the specific factors referred to in s.66(2) and to exercise the general discretion in that provision.

REDFERN and UNIVERSITY OF CANBERRA (THE UNIVERSITY) (Nos A94/191 and A95/67)

Decided: 25 July 1995 by Deputy President B.J. McMahon.

Abstract

- *Section 11 — right to obtain access to documents not information — no requirement to create new document.*
- *Section 15 — requirement to provide information to enable document to be identified — request for 'random sample' not a valid request.*
- *Section 24A — document that does not exist — destruction of examination responses.*
- *Section 40(1)(a) and (2) — prejudice effectiveness of procedures or methods for conduct of examinations (1)(a) — lack of countervailing public interest (2).*
- *Section 41(1) — identification of students from examination answers — disclosure of personal opinions unreasonable — no public interest in disclosure.*
- *Section 45(1) — examination answers confidential in character — obligation of confidentiality imported.*

Issues

Whether a request for a random sample of examination responses provided sufficient information to permit a document to be identified (s.15). Whether an agency is obliged to generate a document in response to a request (s.11). Whether s.9 required an agency to publish guidelines on marking specific examination papers when no such guidelines existed. Application of s.24A to destroyed documents. Whether responses of students to questions in examinations were personal information which it would be unreasonable to disclose (s.41(1)) and whether disclosure of those responses would found an action for breach of confidence (s.45(1)). Whether disclosure of those responses would or could reasonably be expected to prejudice the effectiveness of procedures or methods for the conduct of examinations (s.40(1)(a)).

Facts

Mr Redfern sought access to a copy of his response to an examination, which he had failed, and to a copy of the 'exam stencil' (i.e. marking criteria for a particular examination) used in the marking of that response. He was initially refused access to the 'exam stencil' under s.36 (deliberative process documents), although the University later contended that no such document existed. Mr Redfern made a second series of requests for examination papers, a random sample of other student responses to that examination, the exam stencil and any other documentation used in the assessment of that unit. He was supplied with his own script books and a copy of the examination question paper. Access to the remainder of the documents, including the exam stencil, was denied under s.40(1)(a) and (b). At the hearing there were differences of opinion on the meaning of 'random sample' in this context.

Decision

The Tribunal affirmed the University's decision on the grounds that the request for a random sample of other students' responses did not satisfy s.15, that some of the relevant documents had been destroyed and that no marking stencils were used in the examinations in question. However, although it was unnecessary to the decision, the Tribunal also expressed its opinion on the exemptions which the agency had claimed.

Section 24A — non-existent documents

Section 24A provides for refusal of access to a document which after reasonable steps have been taken cannot be found or which does not exist. Evidence was given that examination answers that might have satisfied the first request had been destroyed after one semester in accordance with normal procedure. There was no evidence that the answers sought in the second request had been destroyed. The Tribunal was also satisfied on the evidence that no marking stencils relating to any of the examinations covered by Mr Redfern's requests had been created.

Section 11— right of access — section 9 — availability of guidelines

Mr Redfern had argued that the University was obliged to cause a marking model to be created. The Tribunal held that an agency is not obliged to generate a document, for example by collecting information, which falls within the description in a request for access: the right of access conferred by s.11 is a right to obtain access to documents not information. Section

20 (relating to forms of access) reinforced the conclusion that an agency was not obliged to create a new document. Section 9 provides for making documents publicly available which contain such matters as guidelines on rights or obligations under legislation or schemes administered by an agency. However, the Tribunal found that s.9 did not import any obligation on an agency to bring appropriate documents into existence. In any case, in the Tribunal's view, s.9 could not refer to a particular guideline for a particular unit examination.

Section 15— identification of document

The AAT held that a request for a random sample of examination papers did not satisfy the requirement of s.15(2)(b) to provide such information concerning a document as is reasonably necessary to identify it. The evidence revealed differing views as to the nature of a random sample of examination papers, and the University should not have had to guess at the meaning of the terms of the request. Section 24(6) required consultation with an applicant before refusing a request on the ground that it does not satisfy s.15(2)(b). Despite the claim by the University in its statement made under s.37 of the *AAT Act* that the request was for an unidentifiable document, nothing had happened by the time of the hearing to clarify the terms of the request. (See Comment in para. 1 below.)

Section 40(1)(a)— prejudice to examination procedures — section 40(2) — balancing public interest test

The Tribunal held that disclosure of other students' examination responses could reasonably be expected to prejudice the effectiveness of procedures for the conduct of examinations (s.40(1)(a)). There was a reasonable expectation of prejudice where it was reasonable to expect that result as against something that was 'irrational, absurd or ridiculous' (*Attorney- General's Department v Cockcroft* (1986) 64 ALR 97; (1986) 3 *FoI Review* 35). The Tribunal noted also that paras (a) and (b) of s.40(1) did not contain the word 'substantially' employed in paras (c), (d) and (e). In the Tribunal's view there were two ways in which disclosure of candidates' responses could prejudice the effectiveness of examination procedures. First, it would be inimical to the necessity that examiners' views, if properly arrived at, should have finality and not be subject to informal collateral disagreement; the University administration adopted a principle of respect for academic judgment in conjunction with a system of consultation with a moderator in relation to potential failures, and an appeal system relating to observance of the procedures. Secondly, there was a possibility that making examination answers publicly available would increase the danger of plagiarism and breach the security of the examination system. (However, see Comment in para. 2 below.)

The Tribunal found no countervailing public interest in disclosure of other students' responses which would on balance outweigh the prejudice disclosure would cause (s.40(2)). It rejected Mr Redfern's submission that there was a public interest in ensuring that all testing be governed by objective observable procedure and that marks be capable of verification. The Tribunal noted the evidence of the University's Vice-Chancellor that it was not possible to set examination responses against objective observable standards of achievement, and referred to the detailed evidence that there were other avenues open to a student to have a failed examination re-examined. (See Comment in para. 2 below.)

Section 41— unreasonable disclosure of personal information

The Tribunal found that the identity of students could be ascertained from the examination papers by means of their student number on the front page of the examination response and by means of their handwriting. While it would be possible to delete the numbers under s.22, it was not possible to disguise handwriting. Answers to questions requiring personal opinions about courses of action available and attitudes to law reform and policy issues constituted personal information when linked to the other identifying information. It would be unreasonable to disclose such information which had been obtained under strict examination conditions aimed at ensuring anonymity and privacy. There was evidence of an expectation, based on longstanding practice and published procedures, that answers were to be kept confidential to University officials. Disclosure would also be unreasonable because of the other appeal provisions available to dissatisfied candidates. (See Comment in para. 3 below.)

Section 45 — breach of confidence

The Tribunal held that disclosure of the examination responses would found an action for breach of confidence under s.45(1), the necessary elements of which were discussed by Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* 7 AAR 187 at 203-4; (1987) 7 *FoI Review* 10 and adopted by the Tribunal in *Re Kamminga and Australian National University* (1992) 15 AAR 297 at 304; (1992) 40 *FoI Review* 48. The Tribunal rejected Mr Redfern's argument that the responses could not be confidential in character because the candidates were simply stating the law which was not confidential: the responses included views on law reform and social issues. There was evidence from a previous student of an implied arrangement of confidentiality in examination responses, made clear by the use of numbers rather than names on the cover sheets. Moreover, it was clear from handbooks and examination policies that the University received the responses in circumstances that imported an obligation of confidence. (However, see Comment in para. 4 below.)

Comments

1. The Tribunal's principal finding was that the request for a random sample of examination responses remained vague and insufficient to identify particular documents as required by s.15. The University had not based its refusal of the request on that ground and had not consulted with Mr Redfern under s.24(6) to assist him to make the request in a form that would have satisfied s.15. However, it did take that view in the s.37 *(AAT Act)* statement. Had consultation taken place, this preliminary objection to the request could perhaps have been overcome. In practice, the applicant might have recast the request to seek *all* examination responses, and then negotiated in principle with the University concerning a formula for identification of a sample of the documents. This would have enabled the matter to be decided on the claims for exemption. If the University had refused to negotiate, Mr Redfern's request would nonetheless have been valid under s.15.

2. The decision not to disclose responses to examination papers is

consistent with the decision in *Re Raisanen and SBS*, unreported, 2 December 1994; (1996) 61 *FoI Review* 11. However, while the result may have been correct, there are some problems with the reasoning in the decision. In relation to the s.40(1)(a) claim, the Tribunal was persuaded that there was a danger of plagiarism and sale of papers if examination answers were released. However, the University did not object to releasing to a candidate the candidate's own examination answers, and the answers of a successful candidate could readily be used in the way feared. While the Tribunal's stress on the desirability of the finality of examiners' decisions, and its rejection of the applicant's public interest arguments, were based on evidence before it, the Tribunal seems not to have given any weight to the public interest in accountability of the University for the standards of its examinations, which could have been weighed against the evidence as to the fairness of the procedures relating to students who failed.

3. The Tribunal decided in effect that the identity of students could 'reasonably be ascertained', as required by the definition of 'personal information' in s.4(1), from student numbers and the handwriting of students. The question of reasonable ascertainment of identity is a difficult area on which there is as yet little authority: for some recent decisions see *Re Morris and AFP*, unreported, 7 April 1995; (1996) 63 *FoI Review* 35, *Re Sime and DIEA*, unreported, 3 May 1995; (1996) 64 *FoI Review* 54, and, though it related to 'personal affairs information', *Re Fallon Group and Commissioner of Taxation*, unreported, 8 August 1995; p.?? this issue of *FoI Review*. The Tribunal in *Re Hittich and Department of Health, Housing and Community Services*, reported under the name *Re Pfizer and DHHandCS* (1993) 30 ALD 647 (1996) 61 *FoI Review* 10, took a similar view of identification from handwriting. The Tribunal was certainly correct in saying that, if it was possible to identify the examinee, then the information in the examination responses, including as they apparently did value judgments about public issues, was personal information. However, on the question whether disclosure of that material was unreasonable under s.41(1), the Tribunal's reasons made no reference to the specific contents of the examination responses, treating the issue as one relating to a class of documents containing certain broad kinds of information. Moreover, the Tribunal gave no real consideration under this exemption to any pro-disclosure public interest factors.

4. There was evidence that supported the claim under s.45(1) that responses to examinations conducted by the University were provided on a mutual basis of confidentiality, but there is more doubt about the issue of the confidential character of the information in the responses. While some of it may certainly have been confidential in that it revealed personal views which were not in the public arena, the applicant argued that there was nothing confidential about the actual views expressed in the responses on what the law was. On the other hand, the views of examinees on questions they have been asked are not common or public knowledge, and a claim for their confidentiality could perhaps be upheld. As the Tribunal did not in its reasons examine the documents on a line by line basis, it did not come to a conclusion on this question.

FEDERAL COURT

DAY v COLLECTOR OF CUSTOMS
(No. G290 of 1994)

D cid d: 17 May 1995 by Einfeld J.

Abstract

Sections 43 and 45 — confidential documents affecting commercial interests — need for detailed examination of documents — 'global process' of considering documents.

Section 64 — required production of documents to Tribunal to determine whether exempt — relationship to ss.35, 37 and 39 of AAT Act — s.39 discretion not excluded where no s.64 order made — Tribunal retains s.39 discretion to allow access to exempt documents upon undertakings by applicant's counsel.

Issues

Whether Tribunal considered content of documents in sufficient detail. Whether Tribunal, in absence of s.64 order, has discretion to allow access to exempt documents by applicant's counsel subject to undertakings.

Facts

This is an appeal to the Federal Court of a Full Tribunal's decision in *Re Day and Collector of Customs* (1994) 33 ALD 777. The Tribunal there affirmed use of ss.43 and 45 to exempt certain material relating to an anti-dumping investigation. Mr Day appealed the decision on the grounds that the Tribunal:

1&2) had failed to properly consider each document at issue and did not apply s.22;

3) had improperly denied access to certain names; and

4) had erred by refusing to permit Mr Day's counsel, upon undertakings, to have access to the documents claimed as exempt.

Decision

Einfeld J of the Federal Court allowed the appeal, accepting grounds 1 & 2 and 4. His Honour considered himself not able to rule on ground 3 because of the Tribunal's related 'failure . . . to disclose its reasoning process', but also found such a ruling unnecessary. Einfeld J remitted the matter to the Tribunal for rehearing in accordance with his judgment.

Grounds 1&2: Failure to properly consider each document

The Federal Court found that the Tribunal had not referred to specific documents, nor to evidence about them, and had not considered release with deletions under s.22. Further, the Tribunal, by not categorising the documents and not explaining the reasons for a general consideration of them, had failed to meet the requirements for global treatment of documents as discussed in *News Corporation Ltd v National Companies and Securities Commission*