system of this State is designed to assist.

Second, the Tribunal emphasised that it is important when dealing with matters concerning the education and discipline of children, and in dealing with the discipline of those who educate them, that there be full and frank disclosure made to decision makers of all those involved. According to the Tribunal, it would be contrary to the public interest to disclose the material in question because there could not be such full and frank disclosure in the absence of confidentiality. The Tribunal accepted that both Ms Hopcroft and Ms Barry would not have made the comments on the Boletti and Splatt letters if they did not believe that those comments would not be kept confidential. This was primarily because they were not persons who were the subject of an investigation. The Tribunal noted in passing, however, that if they were persons who were the subject of an investigation, they would have been likely to have given such information in any event.

And third, the Tribunal noted that the Department had already released an enormous amount of information about Anthony's behaviour at the School. Since matters dealing with Anthony's conduct at the School or with the reason for his suspension from the School in November 1995 were completely and adequately set out in those documents, the Tribunal concluded that there would be nothing further to be gained by releasing the documents in question.

Section 35(1)(b)

The Tribunal concluded, without discussion, that the documents were exempt under s.35(1)(b).

Section 50(4)

The Tribunal concluded, without discussion, that the documents were not required to be released pursuant to the public interest override in s.50(4). The Tribunal considered that its consideration of the public interest grounds under s.30(1) was sufficient to enable it to conclude that s.50(4) was inapplicable in the present case.

[J.D.P.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

Adapted with permission from Decision Summaries prepared by the Information Access Unit of the Family and Administrative Law Branch of the Commonwealth Attorney-General's Department.

EASTERDAY and AUSTRALIAN SECURITIES COMMISSION (ASC) (RESPONDENT) and AUSTRALIAN STOCK EXCHANGE LIMITED (ASX) (JOINED PARTY) (No. W95/232)

D cid d: 9 February 1996 by Deputy President T.E. Barnett.

Abstract

Section 37(1)(b) — identity, or existence or non-existence, of a confidential source of information — whether confidentiality waived.

- *Section 37(2)(b) — disclosure of lawful methods or procedures relating to law enforcement so as to prejudice the effectiveness of those methods or procedures — impeding flow of information.*

Issues

Whether a disclosure of information in a document supplied under a statutory duty would enable a person to ascertain the identity or existence or non-existence of a confidential source of information, and whether confidentiality had been 'waived' (s.37(1)(b)). Whether disclosure of that information would disclose lawful methods or procedures relating to law enforcement in such a way that it could reasonably be expected to prejudice their effectiveness (s.37(2)(b)). Whether there was a public interest in rectifying an alleged procedural injustice which would override the exemptions in s.37.

Facts

Mr Easterday was one of three prospectors who had sold their share in a partnership after an assay had shown a high gold content. The price of shares began to rise but a number of persons bought shares heavily while the price was still low. A confirmation drilling conducted by the purchasers indicated that the announcement of the high gold content had been incorrect and that there was no gold. The share price dropped immediately when this was announced but, just before the second announcement, a significant group of the recent share purchasers sold their shares at the top price making a significant profit. Mr Easterday and two others were eventually convicted of conspiracy and false pretences arising from these events. Mr Easterday sought access under the *FoI Act* to a Surveillance Report which the ASX had given the ASC pursuant to the Corporations Law (s.776).

Decision

The Tribunal held that the document was exempt under s.37(1)(b) and s.37(2)(b) and, therefore, did not find it necessary to consider whether other exemptions claimed were applicable.

Section 37(2)(b) — disclose lawful methods or procedures

The Tribunal found that disclosure of the document would disclose lawful methods or procedures relating to law enforcement and could reasonably be expected to prejudice their effectiveness. It rejected the argument that publication of the document would not impede the flow of information because the ASX is obliged to provide this assistance to the ASC pursuant to s.776 of the Corporations Law. It was not merely the attitude of the ASX towards providing information that was important, but also the attitude of the ASX's informants. The Tribunal accepted that the reports are provided by the ASX on the basis that they are to be treated with strict confidentiality as the ASX fears that if its informants believed such reports would be published they would cease to provide the information willingly. (See Comment below in para. 2.)

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

The Tribunal found that disclosure under the *FoI Act* could reasonably be expected to disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law as set out in s.37(1)(b). Mr Easterday had argued that there had been a waiver of confidentiality because, after the ASC had passed the document to the police, the police had passed it to the Director of Public Prosecutions (DPP) who had an obligation to disclose any exculpatory information to the defence at the criminal trial. The Tribunal did not consider the document to be exculpatory. Despite the fact that the existence of the document was disclosed at the criminal trial and it had been the subject of cross-examination at the trial, the Tribunal did not accept that there had been a waiver of confidentiality. (See Comment below in para. 1.)

The Tribunal rejected the applicant's argument that there was a public interest in rectifying procedural injustice, which he alleged had occurred at his criminal trial, and that the public interest should override any exemption in the *FoI Act*. Section 37 does not provide for an exception on the basis of public interest (see *Department of Health and Jephcott* (1985) 9 ALD 35), and in any case, on the Tribunal's view of the document not being exculpatory, it was not convinced that there had been any procedural unfairness.

Comments

1. The Tribunal, in finding that the exemption in s.37(1)(b) was applicable, did not distinguish between the confidentiality of the information in the requested document and information as to the identity or existence or non-existence of a confidential source of information. It may be that the information in the document would have revealed the identity or existence or non-existence of a confidential source of information (other than the ASX), but if so the Tribunal did not refer to that fact. The onus is on an agency to establish the confidentiality under s.37(1)(b). Evidence was also given that the ASX provided information of the kind involved on the basis that it is treated with strict confidentiality. To the extent that confidentiality of the information was the issue, and not the identity or existence or non-existence of a confidential source of information, the Tribunal should have considered the applicability of s.45. On the question of 'waiver', the Tribunal gave no details of the circumstances in which 'waiver' was alleged to have occurred. Under s.37(1)(b) the question is not strictly one of 'waiver' but rather of whether FoI disclosure would reveal, or confirm, the existence or identity of a confidential source of information. This requirement would not be satisfied if the identity of the source was already unarguably public knowledge (see discussion in *Re Gold and Department of the Prime Minister and Cabinet* (1994) 37 ALD 168; (1994) 52 *FoI Review* 55).

2. The Tribunal, in finding that the exemption in s.37(2)(b) was applicable, did not specify how the disclosure of the document would disclose lawful methods or procedures and thereby prejudice, or be likely to prejudice, the effectiveness of those methods or procedures. The requirement that the ASX pass information to the ASC is a statutory obligation and, therefore, a public one and the fact that the ASX obtains information for this purpose from informants is freely referred to. There is no indication that there is anything about the methods or procedures of the ASC, at least those employed in this case, which would be prejudiced by the disclosure of the document requested by the applicant (see *Re John Russo and Australian Securities Commission* (1992) 28 ALD 354). The Tribunal did not explain how impeding the flow of information from informants to the ASX, if this in fact occurred, would disclose such methods.

LUTON and COMMISSIONER OF TAXATION (No. A95/238)

Decided: 19 February 1996 by Senior Member P. Bayne.

Abstract

- *Section 24A — refusal on basis that document does not exist.*
- *Section 26(1)(a) — meaning of 'findings on any material questions of fact' — includes all ultimate facts required by statute to be found — does not necessarily include all primary facts relevant to decision — only need to state findings on primary facts that are of some importance in the process of reasoning to conclusion that ultimate facts exist — reference to 'material on which findings were based' — should be sufficient to identify what is referred to and its source or nature — 'reasons for decision' — should show a rational connection between findings of fact and decision — no particular form for a reasons statement — length depends on time available.*
- *Section 55(5) and (5A) — Tribunal's power to order further searches.*
- *Section 62(2) — declaration that s.26(1) notice does not contain adequate particulars — Tribunal has discretion not to exercise power to make declaration — discretion exercised in relation to statement concerning documents since released in full — Tribunal's jurisdiction where claim that documents do not exist — whether Tribunal should take account of substituted statement of reasons — Tribunal's power to review adequacy of reasons statement — may only examine whether an adequate explanation of reasons, not whether decision is correct.*

Issues

The central issue in the case was the meaning of the requirements in s.26(1)(a) (reasons statements) and s.62(2) (declaration that particulars in statements are inadequate), especially the requirement to state 'findings on material questions of fact'; the Tribunal gave guidance on how much this obligation required a decision maker to include in a statement of reasons. The other elements of s.26(1)(a) were briefly discussed. Subsidiary questions arose as to the Tribunal's powers under s.62(2), including whether it had any discretion as to the making of a declaration, its jurisdiction where there was a claim that documents did not exist (see s.24A), and what orders it could make under s.62(2).

Facts

Mr Luton applied to the Tribunal for a declaration under s.62(2) that the Australian Taxation Office's (ATO's) statement of reasons for refusing access to certain documents did not contain adequate particulars. He had sought access to (i) an evaluation report on the Child Support Review Office and supporting papers, and (ii) documents and information in re-

lation to the implications of a High Court decision (*Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1) for the administration of the Child Support Legislation. The ATO provided a reasons statement under s.26(1) which identified a number of documents under (i) for which exemption was claimed, and stated in respect of (ii) that 'no such document exists as the case has not been considered by the office from the perspective of the Child Support Legislation'. On the day of a Directions Hearing in this matter the ATO provided Mr Luton with all the documents which in its view fell within (i), but Mr Luton maintained that the ATO must have other relevant documents in its possession. The ATO continued to deny at the hearing that it had any documents under (ii). Just prior to the hearing, and in an earlier letter, the ATO filed a document purporting to replace the original reasons statement.

Decision

The Tribunal granted a declaration that the ATO's statement of reasons did not (in relation to the request in (ii)) contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence on which the findings were based, or adequate particulars of the reasons for the decision in question. The further s.26(1) notice was required to deal also with the applicant's concern that there may be further documents under category (i) (see above).

Tribunal's discretion under s.62(2) — subsequent release and 'substitute' statement

Where a statement dealt with subsequently disclosed documents, the Tribunal found that it had a discretion whether or not to make a declaration: in such a case no purpose would be served by the Tribunal making a declaration in respect of an inadequate statement. That consideration outweighed other considerations suggesting that 'may' in s.62(2) should be read in context as meaning 'shall'. The public interest in the Tribunal not diverting its time and resources also outweighed the interests of public administration in sending a message to agencies to remind them of their obligations to provide adequate statements of reasons. (See Comment in para. 2 below.)

The Tribunal also held that, in carrying out its function under s.62(2), it could not have regard to the ATO's later 'substitute' statement of reasons. In view of the extent of the inadequacy of the original statement and the variations between the two further statements, the Tribunal did not exercise its discretion to decline to make a declaration. It was in the interests of public administration and the applicant that the ATO provide a further s.26 notice.

Tribunal's jurisdiction where claim that documents do not exist — ss.26(1), 62(2), 24A and 55(5) and (5A)

The Tribunal found that the prerequisite for the operation of s.62(2), that there be a s.26(1) notice, had been satisfied. Where an agency responds that it has no documents in its possession that satisfy the request, it has, in terms of s.26(1), made a decision refusing to grant access to a document in accordance with the request. The Tribunal had jurisdiction under s.62(2) as it did in reviewing the substance of such a decision (see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at 28 ff; *Re Kalman and Department of Veterans' Affairs*, unreported, 23 October 1992, was inconsistent with other decisions and overlooked the 1991 amendments inserting s.24A (agency may refuse request where satisfied that document does not exist) and s.55(5) and (5A) (Tribunal's power to order further searches). (See also 1994 amendments inserting paras (aa) and (ab) in s.55(1) to overcome the *Kalman* decision.)

Section 62(2) — whether statement of reasons contained adequate particulars

The power in s.62(2) to consider the adequacy of the particulars in a statement of reasons does not authorise the Tribunal to undertake an examination of the correctness of the decision, which would be in the nature of a review of the decision. Rather, s.62(2) means that the Tribunal may examine whether the reasons statement is an adequate explanation of the reasons of the decision maker that will enable an applicant to decide whether to seek review of a decision. The remedial power of the Tribunal is confined to making a declaration in the terms permitted by s.62(2).

The Tribunal found that the original s.26 statement of reasons did not state adequate particulars as required by s.26(1). To say that 'no such documents exist' was a bare statement of ultimate fact (see below). The Tribunal commented that the guidelines on the requirements for statements of reasons in the Attorney-General's Department's *New FoI Memo 26* are a valuable guide to agencies on the elements of s.26, although in one respect (see below) it overstated the obligation to provide reasons.

Findings on material questions of fact

In determining what was required by the obligation to state 'findings on material questions of fact', a distinction has to be made between ultimate facts, primary facts, and material questions of fact. An ultimate fact is the principal fact in issue which must be shown to exist if the decision is challenged, and is determined in the end by the words of the statute (e.g. under s.41(1), that a document contains personal information it would be unreasonable to disclose). A s.26(1) statement of reasons must state any findings of ultimate fact, as part of the obligation to state findings on material questions of fact, but such a statement will not ordinarily, by itself, 'amount to a sufficient statement of the decision-maker's finding on a material question of fact' (*Re Proudfoot and Human Rights and Equal Opportunity Commission* (1992) 16 AAR 411 at 416; (1994) 51 *FoI Review* 37). (See also *New FoI Memo 26*, paras 50 and 34 on not merely restating the words of an exemption.)

The requirement concerning material facts did not make it necessary to state *every* finding of *primary* fact made by a decision maker on the way to making a decision (see e.g. *McAuliffe v Secretary, Department of Social Security* (1991) 13 AAR 462 at 473). That would impose too high a duty on a decision maker. To the extent that *New FoI Memo 26* appeared to require that findings on every primary fact needed to be stated (paras 29 and 27), the requirement was overstated. 'Primary facts are those facts which render probable the existence or non-existence of an ultimate fact in issue, or of some higher level primary fact . . .' A *material* primary fact refers only to 'those *findings of primary facts which are of some importance in the proc-*

ess of reasoning to the conclusion that an ultimate fact exists' (emphasis in the original): it was not possible to be more precise than that. The Tribunal considered that the importance of a primary fact should be considered from the point of view of the applicant's (and any relevant third party's) desire to know that a certain finding of fact had been made in order to understand the basis of the decision and to decide whether to seek review of it. The Tribunal gave examples of the kinds of findings of material fact appropriate to a claim that no document existed. (See also Example 1, Attachment A in *New FoI Memo 26.*)

Reference to material on which material findings of fact were based

The Tribunal stated the requirements in referring to the material on which findings of material questions of fact were based in terms similar to those in para. 48 of *New FoI Memo 26*, and gave examples in the context of a claim that documents do not exist.

Reasons for decision

The reasons element of a s.26 notice 'should show a rational connection — i.e. a connection supported by a chain of reasoning — between the findings of fact and the decision' (*New FoI Memo 26*, para. 49). The decision maker 'links up the findings on material facts to (her or his) understanding of the law relevant to the decision, and then provides reasoning which demonstrates why it is that the law justifies the decision made'. This may be very complex in matters under the *FoI Act* where there may be many documents, and parts of documents needing separate treatment, and many different kinds of reasons for a decision to deny access to a document or part of a document. The length of a statement will depend on the time available to formulate the statement (*Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507 per Woodward J), noting that in FoI matters decisions are required to be made within prescribed time limits. A reasons statement need not follow any particular form and need not set out separately the various elements in s.26(1)(a), and in s.26(1)((b) and (c), so long as those elements are reflected in the statement.

Comments

1. This decision contains the most thorough and careful examination made by the Tribunal of the requirements of a s.26(1) notice and statement of reasons. Because of its technical nature it may be difficult to read and follow in places, but is a welcome statement of the relevant principles. The Tribunal is clearly correct that the requirement to state 'the findings on any material question of fact' does not involve having to state a finding on every primary fact relating to the making of the decision. Note that the decision acknowledges the complexity in many cases of preparing reasons statements in FoI matters.

2. The Tribunal's discretion as to whether or not to make a declaration when a statement of reasons is found to be inadequate will need to be exercised sparingly, given the trouble and expense to which an applicant will have been put in making a s.62(2) application (subject to any payment of costs which the Tribunal may recommend under s.66). In the present case, while a declaration on the reasons for initially refusing the documents later released would not have assisted Mr Luton in any practical way, it might have been useful to agencies to have the Tribunal's summary views, whether adverse or otherwise, on the statement. Very few applications under s.62(2) have been heard by the Tribunal (see *Re Gregory and Department of Social Security*, unreported, 12 December 1986, and *Re Warren and Department of Defence* (above)), and comment on reasons statements in the rare s.62(2) cases could be of benefit in improving agency decisions.

[R.F./G.H.]

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