FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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THOMAS LINCOLN CHAPMAN AND WENDY CHAPMAN and MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

Decided: 26 June 1996 by Deputy President G.L. McDonald.

Abstract

Section 3(1) — object and purpose of FoI Act — designed to make government more open and accountable.

Section 36(1) and (5) — deliberative process documents (1)(a) — meaning of 'consultation' and 'deliberate processes' — 'purely factual material' (5) — distinction between factual statements which can stand alone and those which form part of the deliberative process — public interest — certain factors not relevant — public interest in confidential consultation of Minister with Prime Minister — status of 'Howard' factors.

Section 42(1) — legal advice exempt — summaries of that advice also exempt.

Section 64(1) — Tribunal's discretion to require production of documents — rare for Tribunal not to require production of documents in determining exemption claims — non-production should be the exception rather than the rule.

Issues

The decision was concerned principally with public interest factors in relation to deliberative process documents (s.36(1)(a) and (b)), and with what constituted 'purely factual material' (as against material that forms part of the deliberative process (s.36(5)). The Tribunal also had to determine whether to exercise its power under s.64(1) to require production of the documents in dispute, and commented on the relevant factors.

Facts

The applicants (the Chapmans) made a request to the Aboriginal and Torres Strait Islander Commission (ATSIC) seeking a copy of a letter to the Prime Minister from the Minister for Aboriginal Affairs and Torres Strait Islander Affairs (the Minister). Under s.16(1), ATSIC transferred the request to the Minister as the appropriate agency to determine the request. The copy of the letter in the Minister's possession included an annotation concerning a conversation with a member of the Prime Minister's staff. The Minister released two small parts of the letter, including part of the annotation, but refused access to the remainder.

The request arose out of the disputes surrounding the proposal to construct a bridge to Hindmarsh Island. When an application was made under the *Aboriginal and Torres Strait Islander Heritage Protection Act* for protection of the area from injury or desecration, the Minister made an emergency declaration protecting the area and directed that a report be prepared on the proposal. The Minister received the report two days before the extended emergency declaration was due to expire. On the same day the Minister 'wrote to the Prime Minister informing him that [the Minister] would be required to make a decision whether to make a declaration before Cabinet next met, consulting him about a proposed course of action and seeking an opportunity to speak to him' (para. 8 of the Minister's s.37 statement). The Minister made a declaration the following day. The Chapmans' request was made in the context of proceedings in the Federal Court and the Full Court of the Federal Court in both of which the Chapmans were successful in their challenge to the Minister's declaration (see *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74 and *Tickner v Chapman* (1995) 133 ALR 226).

Decision

The Tribunal varied the decision by releasing eight paragraphs which it held contained purely factual material (s.36(5)), but otherwise affirmed the Minister's decision.

Section 64(1) — production of document to the Tribunal

The Tribunal rejected a submission by counsel for the Minister that the Tribunal should not exercise its discretion under s.64(1) to require the production of the letter for inspection by the Tribunal. It was argued on behalf of the Minister that the Tribunal should not require the document for inspection unless satisfied that it contained material that would give substantial support to the contentions of the party seeking access to it (*Air Canada v Secretary of State for Trade* [1993] 2 AC 394, *Somerville v Australian Securities Commission* (1995) 131 ALR 517 at 552) (see also para. 2 in Comments for a fuller account). The Tribunal placed reliance on the fact that the 'object and purpose of the FoI Act [were] clearly designed to make government more open and accountable ...' (referring to s.3(1)). Exemption of documents 'should be the exception rather than the rule', and 'determining which documents are exempt is an issue of critical importance'. In the Tribunal's view, apart from cases where a large number of documents share the same characteristics and a generalised approach is appropriate (see *News Corporation Ltd v NCSC* (1984) 5 FCR 88 at 102, and *Day v Collector of Customs* (1995) 38 ALD 264 at 268; (1998) 66 *FoI Review* 83), it was 'difficult to see how the Tribunal could carry out its function without inspecting the documents'. It would be a rare case where the Tribunal would not require the production of the documents as part of determining whether or not to uphold exemption claims. The Tribunal distinguished FoI proceedings from those involving public interest immunity claims, where the degree to which the information in documents would support the case of the party seeking production was relevant to whether a court would inspect them before deciding whether or not to order their production. In such cases the Tribunal considered the distinction between a 'class' claim and a 'contents' claim to be relevant, the latter lending itself more readily to inspection and production. (See Comments in para. 2.)

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

The Tribunal found that the letter was consultative in nature for the purposes of the Minister's deliberative processes. The word 'consultation' was used in s.36(1)(a) 'to mean the seeking of advice or counsel from a person, not extending to the seeking of a direction as to how to proceed'. There was nothing to suggest that a direction was being sought or given or that the Minister was implementing a predetermined government policy. It was also clear that the Minister was proposing to take some prospective action. The Minister's intentions were properly construed as being proposals rather than conclusions. The Minister was obliged to consider all material he considered relevant, and consultation with the Prime Minister, who was also the senior portfolio Minister, was relevant and appropriate. Deliberative processes are an agency's or Minister's 'thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action ...' (*Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588 at 606). In determining whether a document was part of a deliberative process, the Tribunal should be guided by the wording of the whole document and by reference to the surrounding circumstances and matters revealed in the evidence. It was relevant to characterisation of the letter that the Government had stated its policy in the Parliament that Cabinet would be consulted where practicable before any declaration was made under the relevant section of the *Aboriginal Heritage Act,* and that there was no opportunity for such consultation.

Section 36(5) — purely factual material

The Tribunal found that all of the unreleased paragraphs of the letter contained factual statements. The effect of s.36(5) was the same as that of the equivalent Queensland provision: it was 'not intended to protect the "raw data" or evidentiary material upon which decisions are made', but the provision allowed the exemption to be maintained 'where the factual material was inextricably intertwined with the deliberative process' (*Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1QAR 60; see also *Harris v ABC* (1984) 51 ALR 581 at 587 and US cases there referred to). The Tribunal drew a distinction between statements of facts which can stand alone and are subject to disclosure under s.36(5), and those 'which are so close to the deliberative process that they form part of it' (referring to para. 11 of FoI Memorandum No. 27). Drawing the line between the two will often be difficult for a decision maker, and it is necessary to have regard both to the content of the document and the context forming part of the deliberative process. The Tribunal found that those paragraphs containing only background information against which the process was carried out were not exempt (s.36(5)). On the other hand, paragraphs containing statements of fact which also contained 'material about the Minister's considered opinion and/or proposed course of action' were not excluded by s.36(5) from exemption and had to be considered under the public interest provisions of s.36(1)(b). Had the Minister already made up his mind on the course of action to be taken, rather than merely referring to proposals, those parts of the letter dealing with that course of action would also have been subject to the exception in s.36(5). (See Comments in para. 4.)

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

The Tribunal found that it would be contrary to the public interest to disclose the remaining paragraphs of the letter. However, it rejected the claim of the Minister that the letter was a communication between Ministers as part of the policy formulation and consultation process prior to the making of the decision: the process involved a 'one-off decision on an individual case', and no question of development of government policy was involved. The Tribunal also rejected the following public interest considerations, advanced by the Minister, as not relevant to non-disclosure of the letter:

- that the letter involved consultation at the highest level of government;
- that the issues remained highly controversial;
- that the consultation with the Prime Minister was in lieu of Cabinet; and

  the need for consultation with the Prime Minister to be 'with complete frankness'.

However, the Tribunal accepted that the following public interest considerations were relevant to non-disclosure of the letter:

  The Minister's decision had been set aside by the Federal Court, and scrutinised by both Houses of Parliament, and a new decision was pending. The fact that there was a continuing controversy over the issues involved in the Minister reaching his decision did not of itself, however, lead to the conclusion that disclosure would be contrary to the public interest.

- The decision was important both to the Aboriginal people and in its effect on property and other interests and in its potentially adverse effect on Commonwealth/State relations. In the Tribunal's view, since the decision would be subject to Parliamentary and court scrutiny, for which the Minister must take responsibility, there was 'a clear public interest in [the Minister] being able to consult prior to making an ultimate decision ... on a confidential basis'.

(See Comments in para. 3 below.)

So far as the annotation by the Minister recording the views of the Prime Minister's adviser were concerned, the Tribunal held it could be misleading to release the sentence without further explanation. There seemed little point in releasing the advice concerning the Minister's proposal as contained in the letter if the latter was exempted.

In reaching its decision, the Tribunal referred to the views of Mason J (as he was then) in *Commonwealth v Fairfax* (1980) 32 ALR 485 at 492-3, to the effect that '(i)t is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action'. The well-known public interest considerations, summarised by Davies J in *Re Howard and the Treasurer* (1985) 3 AAR 169 at 178, had been criticised in some later decisions (e.g. *Eccleston*, above, and *Veale and Town of Bassendean*, unreported, Western Australian Information Commissioner, 25 March 1994; see also *Re Weetangera Action Group and ACT Department of Education and the Arts*, unreported, ACT Administrative Appeals Tribunal, 31 January

1992: (1994) 51 *FoI Review* 32 and the cases there referred to). In the present Tribunal's view, it was evident from the text of the *Howard* decision, and from the discussion of public interest in the recent report on FoI of the Australian Law Reform Commission and the Administrative Review Council (*Open government: a review of the federal Freedom of Information Act 1982*, at 96), that the approach to the public interest test in *Howard* was subject to change with the passage of time and experience in the administration of the *FoI Act*. (See Comments in para. 3 below.)

Section 42(1) — legal professional privilege

Two paragraphs of the letter summarised legal advice obtained by the Minister. The Tribunal held that summaries of advice that would itself be exempt under s.42 were also exempt.

Comments

1. The case before the Tribunal was conducted entirely on the basis of legal argument without the need to adduce formal evidence in the form of affidavits or otherwise. The facts as set out in the Minister's statement under s.37 of the *Administrative Appeals Tribunal Act* were agreed between the parties. This may have been the first s.36 case to have been so conducted. It would also seem to have been the first time a communication at such a high level has been required by the Tribunal to be released, even if only in part.

2. The case for the Minister contended (i) that the Tribunal should follow judicial presidential members in FoI cases such as *Howard* (above) and court decisions on public interest immunity in not releasing, or requiring the production of, a communication at this high level relating to a matter of continuing political controversy, and (ii) that where the nature of the document made it clear that public disclosure should not occur, the Tribunal should not require inspection of the document. The Tribunal's reasoning proceeded from its interpretation of the purposes of the *FoI Act* and of the Tribunal's role in reviewing exemption claims where the contents were determinative. There is only one direct judicial authority on the matter in which the WA Information Commissioner was prevented from obtaining access to documents for which public interest immunity could be claimed (*WA Museum v Information Commissioner*, Supreme Court, White J, unreported, 13 July 1994; the reasoning was not persuasive and differed from the Minister's submissions in the present case). Exercise of the Tribunal's discretion under s.64(1) to require production of the documents in issue must depend on the contribution inspection of the documents will make to determining exemption claims in the particular case, which is consistent in theory with the submissions made on behalf of the Minister on the parallels in this respect between FoI and public interest immunity. Where a question of whether a document includes 'purely factual material' arises, it would be difficult for the Tribunal to determine that issue without sighting the documents. In general terms the Tribunal's endorsement of requiring production of the documents in issue in all but exceptional (and conclusive certificate) cases is a reflection of the practice of the Tribunal in recent years following the 1991 amendment to s.64(1).

3. The Tribunal's rejection of the application in the present case of several of the most criticised of the '*Howard* factors' is consistent with the comments in *Re Saxon and AMSA*, unreported, 26 June 1995, where, after referring to *Eccleston* (above), it was said by the Tribunal that the '*Howard* factors' 'had not aged as gracefully as they might'. The Tribunal gave considerable weight to the current factors contributing to the document's continuing sensitivity, such as the continuing inquiry, and the impact on Aboriginal people and the potential for adversely affecting Commonwealth–State relations. There is an oversight in the Tribunal's reasoning in that the Tribunal does not at any stage seek to identify and balance the public interest considerations favouring non-disclosure against the public interest considerations favouring disclosure.

4. As the Tribunal pointed out, there are difficulties in drawing the line between *purely* factual material and factual material that is 'inextricably intertwined with the deliberative process'. Use of s.36(5) will always involve difficult questions in determining whether it is possible to release 'purely factual material' without revealing deliberate process material. The reference in *Eccleston* to not protecting the raw data or evidentiary material on which decisions are based is a useful one. It will always be difficult in a particular case to decide how to use ss.22(1) and 36(5) in determining whether it is possible to release factual material without revealing deliberate process material. See also *Re Aldred and Department of Treasury* (1994) 35 ALD 685; (1995) 59 *FoI Review* 84 and *Re Swiss Aluminium and Department of Trade* (1985) 9 ALD 243. The Tribunal commented that a document which merely notified a decision already taken would be a purely factual matter which would not be exempt. Likewise a whole communication to that effect would seemingly not come within the meaning of s.36(1)(a).

[R.F./G.H.]

Comment continued from p.49

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Other recent developments

A note from Israel: '*After six years of hard work our proposed law (the Freedom of Information Coalition Law) passed the entire legislative process. Now the Government has a year to implement the law. We are translating the law and we will put it on the net next month*' From Ishai Menuchin, FoI Coalition Co-ordinator.

Recently released: the UK Select Committee on Public Administration *Third Report: Freedom of Information* available at http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmpubadm/398-iv/ 398iv10.htm

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Editorial Co-ordinator: Elizabeth Boulton **Typesetting and Layout:** Last Word
Printing: Thajo Printing, 4 Yeovil Court, Mulgrave
Subscriptions: $40 a year or $30 to *Alt. LJ* subscribers (6 issues)
Correspondence to Legal Service Bulletin Co-op., C/- Faculty of Law, Monash University, Clayton 3168 Tel. (03) 9544 0974
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