SUPREME COURT OF VICTORIA

NEWNHAM v VICTORIA POLICE FORCE
(No. 4285 of 1996)

D cid d: 16 October 1997 by McDonald J.

Section 25A(1) (voluminous requests) — Section 30 (internal working documents) — Section 31(1) (law enforcement documents) — Section 50(4) (public interest override).

Factual background

Newnham worked for the respondent Victoria Police in its Communication and Information Technology Department until he was suspended as a result of allegedly making unauthorised use of, and having unauthorised access to, police computers in May and September 1992. Newnham was subsequently charged with four counts of making and creating false documents, and of one count of criminal damage.

Procedural history

On 3 June 1994, Newnham requested access to 12 categories of documents. Victoria Police granted access to a number of documents but refused access to the remainder. Newnham sought internal review of that decision and subsequently applied to the Tribunal for review.

On 19 December 1995, the Tribunal ordered that Newnham be granted access to a number of the documents in dispute but that Victoria Police was not required to provide access to the remainder ((1995) 9 VAR 260). Newnham appealed to the Supreme Court in relation to the Tribunal's decision that Victoria Police was not required to provide access to two of the categories of documents, and Victoria Police appealed in relation to the Tribunal's decision that it was required to provide access to one of the categories of documents.

Th decision

The Court dismissed the appeal and the cross-appeal.

The reasons for the decision

The appeal: the first category of documents

The first category of documents consisted of all files and reports pertaining to the investigation that led to Newnham being charged. The Tribunal found that the documents in this category were exempt under s.31(1)(d) and concluded that it could not be in the public interest to grant access to those documents. Newnham appealed from this decision on two grounds. The first ground was that the Tribunal erred, as a matter of law, in failing to have regard to whether the public interest required the release of the documents (i.e. it failed to exercise its public interest override power found in s.50(4)). The second ground was that, in the alternative, if the Tribunal exercised its public interest override power, it committed an error of law in the exercise of that power.

Sections 31(1) and 31(2)

The Court made some important comments about the relationship between ss.31(1) and 31(2) in the course of considering the first ground of appeal. These comments are set out at length below:

> Where any agency resists providing to a person access to a document under the Act on the ground that the document is an exempt document and the agency relies on one or other of the provisions of sub-ss(a) to (e) of s.31(1) of the Act the first task for the Tribunal to undertake, when reviewing that decision of the agency, is to determine the issue whether disclosure of the document under the Act would or would be reasonably likely to do one or other of the things or matters identified in those subsections. Whether or not such disclosure would or would be reasonably likely to do such thing or matter is an issue of fact to be addressed and determined on the evidence before the Tribunal. Although it may be said that each of the matters, the subject of subss(a) to (e) of s.31(1) of the Act, address public interest considerations as to why an agency ought not to be required to provide access to a particular document under the Act, when determining the issue whether or not it has been established that disclosure of the document under the Act would or would not be reasonably likely to do one or other of the things or matters referred to in sub-ss(a) to (e) of s.31(1) of the Act, the public interest issues are not matters relevant to that question and are not matters which should be addressed...
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> However, s.31(2) of the Act provides that the section, that is s.31 of the Act, does not apply to any document such as described in sub-ss(a) to (f) of s.31(2), 'if it is in the public interest that access to the document should be granted under this Act'. If the document is of a nature or kind as described in one or other of sub-ss(a) to (f) of s.31(2) of the Act, it is [at] that point that the issue of whether it is in the public interest that access to the document should be granted must be addressed. If it is contended that the relevant document is of a nature or kind as identified in such sub-sections, it is necessary for that factual matter to be determined and on it being determined that it is of such nature or kind the question of whether it is in the public interest that access to the document should be granted must be addressed. If it is determined on the issue of public interest that it is in the public interest that access to the document should be granted under the Act, then the result is that s.31 does not apply to the document and the document, notwithstanding that its disclosure under the Act would or would be reasonably likely to do one or other of the matters identified in s.31(1)(a) to (d), it is not an 'exempt document' under the Act.
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> However, where in circumstances a person seeks access to a document under the Act and its disclosure would or would reasonably likely to do one or other of the matters or things identified in sub-s(a)-(e) of s.31(1), but it is not contended that it is a document of a type or nature as identified in s.31(2)(a)-(f), or if it is determined as a fact that it is not a document of such type or nature, then the matter under s.31(2), whether it is in the public interest that access to the document should be granted does not arise. In such latter circumstances the document would be an 'exempt' document under s.31(1).

In the present case, it was accepted by both parties that Newnham did not rely on the provisions of s.31(2) as a basis for contending that the documents in this category were not exempt. It followed that the Tribunal's consideration of whether the public interest required access to be granted to the otherwise exempt documents could only have arisen in the exercise of its power under s.50(4) of the Act.

Accordingly, Newnham's first ground of appeal (that the Tribunal failed to exercise its public interest override power) was dismissed. The Court noted in passing that the Tribunal's failure to state expressly that it was exercising its power under s.50(4) did not constitute an error of law.

Section 50(4)

In the course of considering the second ground of appeal, the Court observed that the Tribunal's exercise of

power under s.50(4) is a balancing exercise:

> The exercise to be undertaken is to decide whether in the circumstances [the] public interest weighs in favour of an applicant being granted access to a document of the agency which is otherwise an exempt document under the Act or in favour of such access not being granted.

The Court concluded that it had not been demonstrated that there existed an error of law in the Tribunal's exercise of the power. The Court added that the Tribunal's conclusion that the public interest did not require the release of the documents did not, of itself, demonstrate that an error of law had been committed. Accordingly, the second ground of appeal was also dismissed.

The appeal: the second category of documents

The second category of documents consisted of written reports relating to allegations against Newnham in respect of unauthorised access and/or modification of the computer system at the Crime Department. Victoria Police had found that there were no documents relating to allegations against Newnham concerning the Crime Department's computer system, but that there was one report relating to allegations against Newnham concerning another Department's computer system.

The Tribunal allowed Newnham to amend his request to refer to the correct computer system (this course of action was not objected to by Victoria Police — see Comment 1 below), and then went on to consider whether the Report was exempt under ss.30(1) and 31(1)(d).

When considering whether the disclosure of the Report would be contrary to the public interest, the Tribunal had regard to the evidence of the author of the Report that if he knew that the Report would be released he would not have given such frank opinions, and that if the Report were released he would be loathe to give such frank opinions in the future. Without specifically referring to this evidence, the Tribunal concluded that it would be contrary to the public interest to release the Report, observing:

> In this particular situation, the advantage of allowing an agency to express views in relation to investigations and possible charges far outweighs the applicant knowing what charges may have been brought against him, and attempting to use the fact that no charges were brought against him for one particular offence as analogous to helping the defence of another matter.

Accordingly, the Tribunal found that the Report was exempt under s.30(1). [The Tribunal noted in passing that the Report was also exempt under s.31(1)(d)]. Newnham appealed from this decision on a number of grounds. The Court's consideration of those grounds is set out below.

Section 30(1)

The Court confirmed that a document will not be exempt under s.30(1) unless two elements are satisfied: first, that the document is an 'internal working document'; and second, that the disclosure of that document would be contrary to the public interest.

Newnham did not challenge the Tribunal's conclusion that the Report was an internal working document and, in relation to the question of public interest, the Court noted that the Tribunal was required to carry out a 'balancing exercise'. The Court found that the Tribunal did not commit an error of law when it carried out this balancing exercise. More specifically, the Court held that the Tribunal had not taken an irrelevant consideration into account when it considered the evidence that the author of the Report would not have expressed his thoughts in such a 'frank manner' had he known that the Report would be released. Moreover, the fact that this evidence was not referred to in the Tribunal's conclusion on the issue did not mean that the Tribunal's consideration of the evidence constituted an error of law.

Finally, the Court observed that there was no need for the Tribunal to exercise its power under s.50(4) after it had decided that the Report was exempt under s.30(1). This is because the Tribunal, having concluded that it would be contrary to the public interest to disclose the Report (and, hence, the Report was exempt under s.30(1)), did not need to consider whether the public interest required the release of the Report under s.50(4).

Accordingly, the Court dismissed the various grounds of appeal.

The cross-appeal: the third category of documents

The third category of documents consisted of a hard copy and disc copy of a 'binary audit trail file' for the relevant computer system between 20 August 1992 and 14 September 1992. In essence, the file contained a record or 'audit' of the use of the computer system in question.

The Tribunal found that the file was not exempt under ss.31(1) and 33. This finding was not challenged by Victoria Police. However, the Tribunal also found that Victoria Police could not claim under s.25A(1) that to process this part of the request would substantially and unreasonably divert its resources from its other operations. This is because Victoria Police had not complied with the notification and consultation provisions found in sub-section (6) of s.25A. Victoria Police's cross-appeal concerned that part of the Tribunal's decision. Its first ground of appeal was, in effect, that the Tribunal erred in law by finding that the notification and consultation requirements of s.25A apply where an agency seeks to refuse access to a document on the basis that it is an exempt document and, in addition, seeks to refuse access on the basis that the request is voluminous.

Victoria Police's second ground of appeal was, in effect, that even if there was a requirement to comply with the notification and consultation provisions in s.25A(6), the Tribunal erred in failing to find that that requirement was postponed until it was decided that the document was not exempt.

Section 25A

The Court observed that to allow Victoria Police's grounds of appeal would require 'considerable qualification' to be given to s.25A(6). The Court continued:

> It may be thought that if it was the intention of Parliament that the operation of s.25A should be so qualified in such circumstances where an agency claims to be entitled to refuse access to a document otherwise than by reason of the provisions of s.25A the Parliament would have provided that by the legislation itself.

Having regard to the words of s.25A and the objects of the Act, the Court concluded that the notification and consultation provisions in s.25A(6) were mandatory at all times. Moreover, the provisions of that sub-section should not be read

or construed 'so as to provide that the operation of the provisions of sub-section 6 are to be postponed until there is a final determination of the issue whether a particular document is an exempt document under the Act'.

Accordingly, Victoria Police's cross-appeal was dismissed.

Comments

1. There must be some doubt as to whether the Tribunal had the jurisdiction to allow Newnham to amend his request so that the second category of documents referred to the correct computer system. It is arguable that Victoria Police did not interpret that part of the request as referring to the correct system; rather, it found that there were no documents concerning the computer system referred to in the request (and then noted that there was one report concerning the correct system). Having made a decision that there were no documents falling within that part of the request, it does not appear that the Tribunal had jurisdiction to entertain an application concerning a decision that might have been made by Victoria Police had the request referred to the correct system. At best, Victoria Police's comments in that regard might be characterised as 'being helpful' in indicating how it might have proceeded if the request had been differently worded: see *Re Thwaites and Metropolitan Ambulance Service* (unreported, AAT of Vic, Coghlan PM, 19 June 1996).

2. The Court implicitly accepted that an agency may refuse to process *part* of a request under s.25A(1). The language of s.25A, however, makes it clear that the agency must consider whether the request *as a whole* is voluminous. It does not contemplate that part of a request may be voluminous and other parts of that same request are not. Put simply, a request is either voluminous or it is not. That said, it is arguable that an agency is entitled to waive its right to claim s.25A(1) in respect of part of a request (and may process that part), just as an agency is entitled to waive its right to claim that a document is exempt in respect of part of that document (and may release that part).

3. The powers of an agency set out in s.25A(1) and s.25A(5) are threshold powers that allow an agency to refuse to process a request (either on the ground that the request is voluminous or on the ground that it is clear from the face of the request that all of the documents are exempt). In my view, once an agency has processed the request (i.e., it has identified, located and collated all the relevant documents, and has made a decision to grant, refuse or defer access to those documents) it cannot turn around and refuse to process the request under s.25A. This is what appears to have happened in the present case because, after processing the relevant part of the request and determining that the file was exempt under ss.31(1) and 33, Victoria Police sought to refuse to process that part of the request under s.25A(1).

[J.D.P.]