

FEDERAL FOI DECISIONS

Administrative Appeals Tribunal

BROWN and MINISTER FOR ADMINISTRATIVE SERVICES No. AV90/58

Decided: 27 July 1990 by I.R. Thompson (Deputy President).

Request for documents — minutes addressed to a Minister — pecuniary interest declaration of Ministerial adviser — application of s.40(1)(d) — meaning of 'substantial' — not applicable here — application of s.41 — information related to personal affairs but lacked precision — application of s.45 — no obligation of confidence arose — factual matter in the minutes not exempt under ss.34, 36 and 40 — non-factual matter not exempt under ss.36 and 40 — disclosure of documents to be subject to compliance by agency with s.27.

The applicant, a Shadow Minister of the current Opposition in the Commonwealth Parliament, requested certain documents from the respondent, the then Minister for Administrative Services. As material to this decision they were —

- (1) a pecuniary interest declaration completed by an M. Ross, a former member of the respondent's Ministerial staff;
- (2) a minute (henceforth 'the first Minute') to the respondent from a senior public servant to which certain documents were attached; and
- (3) another minute (henceforth 'the second Minute') of a similar character to document (2) to which certain documents were attached.

[It is of interest that the respondent conceded access to question-time briefs; these kinds of documents have been held exempt in other decisions (see *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at p.610.)

Concerning document (1), the respondent claimed exemption under ss.40(1)(d), 41 and 45 of the Act. In ordinary practice, this document should have been submitted by Ross through his Minister to the Department of Administrative Services for safekeeping by them. The relevant guidelines stated that it was provided on a confidential basis and that only the Minister and the Prime

Minister would have had access to it. But in this instance the respondent said that he had never seen the document. It had been located in a safe in the office of the respondent to which Ross and two others had access. The Tribunal found that Ross had placed his pecuniary interest declaration (document (1)) in this safe and had not submitted it to the Minister.

The matter in the document which gave difficulty in terms of the exemptions was information concerning Ross' interests in real estate, personal property, family income, liabilities, gifts, sponsored travel and hospitality, and any further interests which could give rise to a conflict of interest.

The first question was whether this matter was exempt under s.40(1)(d), which provides that

- (1) Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to . . . (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency . . .

Sub-section (2) provides that this section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

The Tribunal held that applying *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 the question was whether the effect described in s.40(1)(d) was something to be expected as a reasonable — as distinct from an irrational, absurd or ridiculous — result of disclosure of document (1). It found that a person required to submit a pecuniary interest declaration might be deterred from completing the form if he or she knew that it might be disclosed to other persons, and that that could have an adverse effect on the effect of the system for making declarations to maintain probity among Ministerial staff (para. 13). That adverse effect could be described as substantial

in the sense that it would be sufficiently serious or significant to cause concern to a properly informed reasonable person (*Re Theiss and Department of Aviation* (1986) 9 ALD 454), or be of a sufficient degree of gravity (*Harris v Australian*

Broadcasting Corporation (1983) 50 ALR 551 at 564).

But the Tribunal held that this expectation could not be found to exist in this case because Ross did not submit his pecuniary interest declaration to the respondent, and in those circumstances its disclosure could not deter others from submitting a pecuniary interest declaration to the relevant Minister.

The next question was whether s.41(1) rendered document (1) exempt. This provides that

A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

It was held that the matter did relate to the personal affairs of Ross, but that its lack of precision was such that its disclosure would not be unreasonable (para. 14).

The Tribunal next considered s.45(1), which provides that

A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.

It was held that this exemption was also not applicable, in as much as Ross had not at any time drawn it to the attention of the respondent 'so as to impose any obligation of confidence on the respondent' (para. 15). The lack of any detail in the statement was also noted.

The background to documents (2) and (3) was the possible purchase by the government of land on which to erect a Family Court building. Generally speaking, they were 'minutes, with other documents annexed to them, addressed to the respondent by officers of his Department relating to a Cabinet decision and subsequent negotiations in respect of a site for a Family Court in Sydney' (para. 2). Again, speaking generally, they comprised, in the one part, factual material (such as the history of negotiations) and, in the other, recommendations or options for action. Apart from one of the annexures, the Tribunal took the same view of all these documents.

The factual matter was held to be not exempt, either as an application of the specific exceptions to govern such matter in s.34(1A) or s.36(5) or in relation to s.40(1)(d) simply on the

basis that the exemption did not apply to such matter.

The non-factual matter in document (1) was described as

[containing] an assessment of the situation by the writer, information relating to an alternative offer by another company and a statement of the options for future action which the writer regarded as available to the government (para. 21).

This matter fell within s.36(1), but it was held that its disclosure would not be contrary to the public interest.

It reveals only that the Minister and his departmental officers were concerned to protect the public interest and to ensure that appropriate accommodation for the Family Court was provided without unnecessary commitment of public funds (para. 21).

This matter had, however, the further characteristic that it related to 'negotiations between the government and landowners conducted in confidence', and it was argued that the manner in which the Minister and his Department carried out their functions would be adversely affected if this kind of matter were disclosed. To this the Tribunal — in rejecting the exemption claim — said that

the only way in which that would occur would be if it caused landowners to be reluctant to deal with [the government]. In view of the protection given by section 43 of the Act (read together with section 27) to persons whose commercial affairs might be adversely affected by disclosure of information about negotiations between them and the government, I am not satisfied that persons wishing to sell or lease land would, or could reasonably be expected to, be deterred from negotiating with the government by disclosure [of this kind of information] (para. 22).

Thus the information was not exempt under s.40(1)(d). [It might also be presumed that s.36 was similarly not applicable. *Eds*]

It was added that it was also not exempt under s.43(1)(c)(ii). This provides that 'information . . . concerning the business, commercial or financial affairs of an organisation' is exempt if its disclosure 'could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory, or the administration of matters administered by an agency'.

But it was held that before access was given to the applicant, the provisions of s.27 must be complied with, so that the commercial interests concerned could, if they so wished, make submissions that the relevant information in the document was exempt under s.43.

Finally, it was held that insofar as the information has any commercial value to the Government, the provisions of s.43 could not be invoked by the respondent (applying *Harris*, supra).

One aspect of the other matter in the documents might be noted. One part of document (2) contained 'a statement of the strategy adopted up to the date of the minute and a suggestion, expressed in terms of three choices, for a future strategy' (para. 27). The Tribunal noted that two of the *Howard* factors ((1985) 3 AAR 169 at 178) indicated that matter dealing with the development of policy, or the disclosure of which will lead to confusion and unnecessary debate, was of a kind which it might be contrary to the public interest to disclose under s.36(1)(b). The Tribunal found, however, that

[i]n the present case the advice was given in relation to the course of action to be followed on one occasion; it did not relate to any general policy in respect of the purchase of land. Disclosure of it would reveal the three possibilities canvassed by the writer of the minute. But none of them was such that the respondent's decision to accept one rather than either of the others — if, indeed, he did that — is likely to give rise now to any controversy. On the other hand, the public interest may well be served by the disclosure of what appears to have been a thoroughly competent handling of the situation (para. 27).

Some other information in the documents had the character of a 'note on possible strategy written by the Department's New South Wales Regional Office', and it was held that 'disclosure . . . at this time nearly three years later would not be contrary to the public interest' (para. 33).

[P.B.]

BOOKER and DEPARTMENT OF SOCIAL SECURITY No. Q89/193

Decided: 13 September 1990 by S.A. Forgie (Deputy President).

Access to notes and records of interview connected to sexual harassment complaint — application of s.36 — whether the documents were a consultation — whether they related to the deliberative processes — application of s.40 — meaning of 'substantial' — s.40(1)(d) — whether they concerned the operations of the agency — s.40(1)(c) — effect on the management of personnel.

The documents in issue were described by the AAT as being 'in the nature of interview reports or state-

ments taken from witnesses and relate to the investigation of the allegations of sexual harassment made against Mr Booker' (para. 27). They stemmed from a 1988 investigation conducted within the respondent Department of a complaint of sexual harassment, and of complaints made by Booker. These investigations had been conducted in the light of the guidelines set out in the Department's Personnel Management Guidelines relating to Sexual Harassment. These provided a mechanism for the resolution of complaints of sexual harassment, and they contemplated, although in a guarded way, the disclosure of documents under the *Freedom of Information Act*.

The first exemption considered was s.36. The respondent had not relied on this claim when it made its decision [although it is not clear whether the claim was made in the s.37 statement]. The applicant objected to the claim being raised at the hearing, but the AAT dismissed the objection:

as the tribunal is not limited to the reasons given by the decision-maker by [sic] the facts before him, Mr Booker's objection . . . could not be allowed (para. 17).

Section 36, as material, provides that

(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act —

(a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and

(b) would be contrary to the public interest.

The AAT held, however, that the document in issue did not come within the terms of s.36(1)(a). They were clearly not within the description of 'opinion, advice or recommendation' and nor were they a 'deliberation'. Each contained 'only what amounts to notes of interview or statements from witnesses' (para. 22).

More difficult was the question whether they could be described as 'consultation[s]'. Citing authority on the nature of the obligation to consult, the AAT held that 'in order for there to be a consultation, there must be something in the way of a two-way exchange between at least two

parties', a condition not satisfied here (para. 25).

This holding meant that the AAT did not need to resolve the question of the scope of the 'deliberative processes' of an agency. The AAT noted the different approaches taken in the authorities; in particular, the contrast between the approach of Beaumont J in *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 (and see *Public Service Board v Scrivanich* (1985) 8 ALD 44 at pp.47-48) and that of Sheppard J in *Kavvadias v Commonwealth Ombudsman* (No. 1) (1984) 54 ALR 285 (and see *Re Waterford and Department of the Treasury* (No. 2) (1984) 5 ALD 588); [see further comment, below].

Thus, the AAT turned to consider the exemptions in s.40. So far as is material, they provide:

(1) Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to —

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency . . .

(2) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

It was first held that the disclosure of the documents could not have any effect on operations of the respondent, and that therefore s.40(1)(d) was not applicable (para. 30). The AAT did note that according to the description of the Department's functions in the Administrative Arrangements Order, 'it is difficult on its face to conclude that the Department's investigation of sexual harassment relate in any way to its "operations"'. But it also said that 'operations are necessarily conducted by staff' and that 'at one level' the Department would presumably 'be able to carry its operations more effectively if the attention of some of its staff were not diverted by the investigation or by any of the events which preceded it'

(para. 30). But in the end, the paucity of the evidence and argument on this matter led the AAT to find that s.40(1)(d) did not apply.

But the AAT did find that the exemption in s.40(1)(c) applied, and indeed saw in that provision an indication that s.40(1)(d) was limited in its scope. It was said that

[s.40(1)(c)] relates in part to the management of personnel and it seems to me that an inference may be drawn that paragraph 40(1)(d) is to be confined strictly to matters relating directly to operating and that matters relating to staff which have only a more individual effect should be considered under paragraph 40(1)(c). I do not intend to express any concluded view, though, as the matter has not been fully argued (para. 31).

Section 40(1)(c) was considered and applied even though the respondent had not specifically relied upon it as a basis for non-disclosure of the documents. The AAT cited *Re Witheford and Department of Foreign Affairs* (1983) 5 ALD 534 and *Minister for Health v Sharvid Pty Ltd* (1986) 10 ALD 124 as authority for this course of action.

The various authorities on the meaning of the word 'substantial' in this context were outlined, although no summation was attempted. The nub of the argument of the respondent (albeit put in relation to s.40(1)(d)) was that 'if confidentiality were not able to be assured, management would not be able adequately to deal with problems of sexual harassment and general staff grievances', which would have 'a consequent effect on morale and productivity' (para. 36). The AAT held that the evidence justified this claim (para. 39). The existence of mechanisms for resolving allegations of sexual harassment was said to be a material consideration.

So far as s.40(2) was concerned, the AAT adopted passages from *Arnold v Queensland* (1987) 6 AAR 463, 'and particularly the comments made in that case regarding the weight to be given to sub-section 3(2) in considering whether to disclose documents' (para. 41, and see 6 AAR 463 at pp.472-473 per Wilcox J, and 483 per Burchett J). But the application of s.40(2) was rejected

out of hand on the basis that 'there is no evidence that disclosure would be to the public interest' (para. 31).

Comment

1. On the question of the scope of deliberative processes, see Aronson and Franklin, *Review of Administrative Action* (1987) at pp.294ff
2. The AAT makes an interesting analysis of the scope of s.40(1)(d), a troublesome provision often resorted to by agencies to overcome any problem in relying on s.36. Compare to the failed argument in *Re James and Australian National University* (1984) 2 AAR 327; 6 ALD 687, noted in Aronson and Franklin, *Review of Administrative Action* (1987) p.317.
3. The applicant argued that he needed access to the documents to mount legal proceedings. But at that point where this interest might have been recognised, that is, in relation to s.40(2), the AAT did not consider the interest of the applicant in the disclosure of the documents to him (compare *Re James* above). Perhaps it was assumed that this interest was not relevant. This latter position is certainly defensible (see articles in *FoI Review* Nos. 24 (at p.62) and 27 (at p.27). but even on the basis that the effects of disclosure must be assessed on the basis that it is 'to the world', is there not a public interest in seeing that a person such as the appellant is fairly treated?
4. The decision repeats and acts on the view that the AAT may consider the application of an exemption which is not claimed by the agency. There is now Federal Court authority for this view; see *Austin v Attorney-General's Department* (1986) 12 FCR 22. The unfairness to the applicant should be apparent, and a legislative change is necessary.

[P.B.]