VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

KNIGHT and DEPARTMENT OF JUSTICE (No. 2)
(1995) 8 VAR 460

D cid d: 19 May 1995 by Presiding Member Coghlan.
Section 31(1)(a) (enforcement or proper administration of the law) — Section 31(1)(d) (methods or procedures for preventing etc breaches of the law) — Section 50(4) (public interest override).

Factual background

Julian Knight is a prisoner held at Coburg Prison.

Procedural history

Julian Knight requested access to four manuals held by the Office of Corrections. The first manual, the 'Standard Operating Procedures Manual', set out the matters of daily routine within what was the High Security Unit of Pentridge Prison. This manual contained 16 memoranda: 12 were directed to governors, staff and/or watch officers, the remaining four were directed to visitors and/or prisoners (the four memoranda).

The second manual, the 'Governor's Local Instructions', set out the daily operational procedures at Pentridge Prison. The third manual, the 'Emergency Procedures Manual', set out the procedures to be followed when a particular emergency arose in a Victorian prison. And the fourth manual, the 'Operational Orders', covered practical location operating procedures and provided a set format for relevant security procedures for all Victorian prisons.

The Department of Justice (the Department) refused access to the manuals and, on 11 October 1994, this decision was affirmed on internal review. The Department claimed that the manuals were exempt under s.31(1)(a) and (d). The Department also claimed that the manuals were exempt under s.38 by virtue of s.30(1)(c), (f) and (g) of the *Corrections Act 1986* (Vic.).

Th decision

The Tribunal ordered the Department to release the four memoranda and affirmed the decision of the Department in all other respects.

The reasons for the decision

Sections 31(1)(a) and 31(1)(d)

After noting that the 'administration of the law' embraces the administration and management of prisons and prisoners, the Tribunal considered whether the four manuals were exempt documents under s.31(1)(a) and (d).

The Tribunal found that the four memoranda were uncontroversial and were already in the public domain. As such, their disclosure could not prejudice the enforcement or proper administration of the law in this instance (cf s.31(1)(a)) nor would their disclosure prejudice the effectiveness of methods or procedures used to prevent breaches or evasions of the law (cf s.31(1)(d)).

The Tribunal concluded that to disclose the rest of the manuals (the Documents) would reveal practices and procedures that, if known to prisoners, could 'disrupt and negate' the management of prisons and the security of the system. Accordingly, the Tribunal held that the Documents were exempt under s.31(1)(a) and (d). The Tribunal reached this conclusion even though the High Security Unit at Pentridge Prison had been closed, noting that the security procedures used at Pentridge were also used at other prisons.

Section 50(4)

The Tribunal concluded that the public interest did not require the release of the Documents pursuant to s.50(4). It did so for two reasons. First, there was nothing in the Documents that was inappropriate or that revealed mismanagement or malpractice. And second, disclosing the Documents could in fact be contrary to the public interest, primarily because the information obtained within the Documents could assist an 'inventive' prisoner. This led the Tribunal to observe that the public interest lies in the public being confident that 'every precaution to maintain security is taken' and that release of the Documents could 'prejudice such maintenance'.

[J.D.P.]

MILDENHALL and DEPARTMENT OF PREMIER AND CABINET (No. 2)
(1995) 8 VAR 478

Decided: 16 June 1995 by Deputy President Macnamara.

Section 5(1) ('document of an agency') — Section 28 (cabinet documents).

Factual background

In March 1993, the Secretary to the Department of Premier and Cabinet entered into an agreement with AMR: Quantum Harris Pty Ltd (AMR). Under this agreement, AMR agreed to carry out the Victorian Attitudes Monitoring Study (the Study) in a series of stages or 'waves' over a three-year period. The Study required AMR to conduct a survey of attitudes held by Victorians.

The answers to the questions asked in each 'wave' of the Study were fed into AMR's computer system and collated by a special software program. The data was recorded on a hard disc (the disc). The Department did not have the computer technology to enable it to read the data on the disc. Nevertheless, clause 6.7 of the agreement required AMR to provide the Department with copies of the data in a 'machine readable form'.

In November 1993, Mr Camakaris, the joint Managing Director of AMR, made a presentation of the results of the first 'wave' of the Study to the Victorian Cabinet. He told the Ministers that he had a print-out of the statistical material on which the report was based and that they could examine that material if they wished. The Ministers told Mr Camakaris that the report was sufficient, that they did not require the print-out and that he need not bring similar 'raw material' to further Cabinet meetings. As a result, Mr Camakaris did not take a print-out of the statistical information on which the second report was based when he gave his next presentation to Cabinet in or about January 1994.

AMR destroyed the print-out that was taken to the first Cabinet meeting but retained the disc containing

the statistical data on which the first and second reports were based.

Procedural history

On 8 June 1994, Mildenhall sought access to 'all documents relating to the Victorian Attitudes Monitor Survey (VAMS) including any preliminary and/or progressive reports'. The Department interpreted this request as being an application for documents relating to the Study and released certain documents but claimed exemptions for others.

In earlier proceedings, the Tribunal affirmed the Department's decision to refuse access to documents (*Mildenhall and Department of Premier and Cabinet (No. 1)* (1995) 8 VAR 294. For a discussion of this case, see Rubinstein, K, 'The Extended Reach of Cabinet Documents: Lessons from Victoria and Queensland' (1996) 3 *Australian Journal of Administrative Law* 134). It became clear during the course of that hearing that the disc existed. This led the Tribunal to order that a second hearing be held to determine whether the applicant was entitled to access to the disc.

The Department claimed that the disc was not a document in its possession for the purposes of the Act and that, if it was, it was exempt as a Cabinet document under s.28(1)(b), s.28(1)(ba), and s.28(1)(c).

The decision

The Tribunal held that the disc was not a document of the Department at the date of the request. Accordingly, the Tribunal decided that the disc was not subject to the Act.

The Tribunal went on to note that, if the disc were a document of the Department, the disc was exempt under s.28(1)(c).

The reasons for the decision

Section 5(1) — possession

Section 5(1) of the Act defines a 'document of an agency' to mean a document 'in the possession of' the agency, whether created in the agency or received in the agency.

The Tribunal analysed the relevant authorities and, with some hesitation, decided that the phrase 'in the possession of' was not confined to actual or physical possession. Following *Re Guide Dog Owners and Friends Association and Commissioner for Corporate Affairs* (1988) 2 VAR 405, the Tribunal found that a document will be 'in the possession of' an agency if that agency has a right to immediate possession of that document.

In the present case, the Tribunal examined the agreement between AMR and the Department and noted that clause 6.7 required AMR to provide the Department with six copies of each report 'as well as copies of the data collected in statistical form which shall be in machine readable form'. Without expressing a view on the meaning of 'machine readable form', the Tribunal concluded that clause 6.7 gave the Department a right to immediate possession of the disc.

Section 5(1) — waiver

The Tribunal accepted Mr Camakaris' evidence that, in late 1993, the Cabinet Ministers had told him that AMR need not provide the statistical data in machine readable form. Thus, the Tribunal concluded that the Department had waived its right to immediate possession of the disc before Mildenhall requested access to it.

Accordingly, the Tribunal found that the disc was not a document of the Department at the date of the request. Although not strictly required to do so, the Tribunal went on to consider whether the disc was exempt under s.28.

Section 28(1)(b)

The Tribunal held that the disc was not exempt under either limb of 28(1)(b). The Tribunal found that the disc was not exempt under the first limb because, whilst the disc was prepared on behalf of the Premier, it was not intended to be submitted for consideration by the Cabinet. This was because the Cabinet did not have the necessary software to read the data on the disc. Moreover, the Cabinet Ministers expressly said at the first meeting that they did not wish to examine the raw data in future. Thus, there was clearly no intention that the disc was to be submitted for consideration by the Cabinet insofar as it contained the raw material upon which the second report was based.

The Tribunal found that the disc was not exempt under the second limb of s.28(1)(b) because it could not be said that the Cabinet had considered the disc in any fashion.

Section 28(1)(ba)

The Tribunal concluded that the disc was not exempt under s.28(1)(ba) because it was not prepared for the purpose of briefing the Premier in relation to issues to be considered by the Cabinet. The fact that the disc was used in the preparation of material that was used to brief the Premier did not mean that it was prepared for the purpose of briefing the Premier.

Section 28(1)(c)

The Tribunal held that the disc was exempt under s.28(1)(c) as a copy of, or draft of, or containing extracts from, documents entitled to the exemptions in s.28(1)(b) or s.28(1)(ba). This was because the disc contained data constituting questions and answers that formed the basis of the reports on the first two waves of the Study, which the Tribunal had previously found to be exempt under s.28(1)(b) and s.28(1)(ba) *(Mildenhall and Department of Cabinet (No. 1)* (1995) 8 VAR 294).

Section 28(3)

Section 28(3) provides that a Cabinet document is not exempt to the extent that it discloses purely statistical, technical or scientific material unless disclosing the document would disclose a Cabinet deliberation or decision.

The Tribunal held that the s.28(3) had no application in the present case. It did so for two reasons. First, the information was not of a purely statistical nature because the questions on the disc were selected after lengthy consultations with the Ministers. And second, disclosing these questions would tend to disclose the deliberations of Cabinet by showing what the Ministers had 'on their minds'.

[J.D.P.]

DELTALINE NOMINEES PTY LTD and THE ROADS CORPORATION (1995) 8 VAR 472

Decided: 16 June 1995 by Deputy President MacNamara.

Section 32 (legal professional privilege) — Section 50(4) (public interest override).

Factual background

The Roads Corporation (the Corporation) proposed to acquire the land on which Deltaline Nominees Ltd (Deltaline) conducted business.

If the proposed acquisition went ahead, the Corporation would have become liable to pay compensation to the Deltaline under the *Land Acquisition and Compensation Act 1986* (Vic.). Accordingly, the Corpo-

ration sought legal advice about a number of issues relevant to the acquisition.

The Corporation's solicitors suggested that the Corporation obtain a report from a Consultant Town Planner. The Corporation accepted this suggestion and authorised its solicitors to commission such a report. Perrott Lyon Mathieson prepared a report as required (the Report) and sent a copy to the Corporation's solicitors and two copies to the Corporation.

Procedural history

Deltaline requested access to the Report. The Corporation claimed that the Report was an exempt document under s.32.

The decision

The Tribunal affirmed the decision of the Corporation, and, accordingly, dismissed the application.

The reasons for the decision

Section 32

The Tribunal found that the Report was brought into existence for the sole purpose of providing legal advice to the Corporation. It also found that the Report would not have existed in its particular form if the Corporation had not sought legal advice. Accordingly, the Tribunal concluded that the Report was privileged.

The Tribunal reached this conclusion after making a number of observations about legal professional privilege.

First, the Tribunal confirmed that legal professional privilege attaches to communications made for the sole purpose of giving or receiving legal advice or for use in existing or anticipated litigation (*Baker v Campbell* (1983) 153 CLR 52).

Second, the Tribunal confirmed that the communication need not be between the solicitor and client directly. Privilege also attaches to a communication between a solicitor and a third party (here, the Consultant Town Planner) where the sole purpose of the communication is to furnish legal advice to the client (*Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63).

Third, the Tribunal made the obvious point that a document may be created for the sole purpose of legal advice where the advice relates to the performance of a statutory obligation. Thus, the fact that the advice related to the Corporation's duties under the *Land Acquisition and Compensation Act* did not mean that the Report was not privileged.

And fourth, the Tribunal confirmed that a document is not privileged if it would have come into existence quite apart from the process of either legal advice or actual or contemplated litigation.

Section 50(4)

After noting that a privileged document will be released under the public interest override in s.50(4) if public interest factors 'of a high order' are present *(Chadwick and Department of Property and Services* (1987) 1 VAR 444 at 455-56), the Tribunal concluded that no such factors were present in this case. It reached this conclusion for two reasons.

First, the Tribunal rejected the argument that there was a public interest in the early and satisfactory resolution of land acquisition disputes and, to achieve this aim, the *FoI Act* should be used as an alternative to the discovery procedures in the Tribunal or in the Supreme Court. The Tribunal observed that the degree of disclosure that may be thought appropriate in the particular adjudicative process is properly dealt with by the governing rules of procedure, and it would be 'wrong and disruptive' to intrude on those rules by manipulating the public interest override in s.50(4).

And second, the Tribunal noted that this case involved a dispute between an acquiring authority and an individual land owner; it did not have any wider societal significance.

[J.D.P.]

HALLIDAY and THE OFFICE OF FAIR TRADING
(No. 93/52789)

Decided: 20 July 1995 by Presiding Member Coghlan.

Section 25A(1) (voluminous request) — Section 30(1) (internal working documents) — Section 32(1) (legal professional privilege) — Section 50(4) (public interest override).

Factual background

Halliday, a director of Spectra Systems Pty Ltd (Spectra), was prosecuted in relation to offences allegedly committed under the *Fair Trading Act 1985* (Vic.). In September 1993, both Halliday and Spectra were found guilty and convicted of two offences under that Act.

Procedural history

In May 1993, Halliday wrote a 19-page letter to the Office of Fair Trading (the OFT) requesting access to certain documents. On 28 June 1993, the OFT notified Halliday of its intention to refuse access to the documents pursuant to s.25A(1) (i.e. to process the request would substantially and unreasonably divert the resources of the OFT from its other operations). The OFT subsequently decided to refuse access on that basis and, on 2 August 1993, that decision was affirmed on internal review.

On 29 September 1993, Halliday applied to the Tribunal for a review of the internal review decision. Halliday did not complain to the Ombudsman about the OFT's refusal to grant access under s.25A(1).

At the preliminary conference held on 21 January 1994, the parties informed the Tribunal that they 'were meeting to finalise the documents in dispute'. The OFT wrote to Halliday on 4 July 1996, referred to Halliday's 'amended request', and released certain documents yet refused access to 36 others. The OFT claimed that the 36 documents were exempt under s.30(1) and/or s.32(1).

The jurisdictional question

The first question was whether the Tribunal had the jurisdiction to review the OFT's decision to refuse access under s.25A(1). This question was answered by reference to sub-sections (8) and (9) of s.25A. According to the Tribunal, those sub-sections require an applicant to complain to the Ombudsman about the Minister's or Agency's decision to refuse access under s.25A(1) before applying to the Tribunal for review. Since Halliday had not complained to the Ombudsman, the Tribunal concluded that it had no jurisdiction to review the OFT's decision under s.25A(1).

The Tribunal went on to conclude that the decision under review was the decision of the OFT dated 4 July 1994.

The decision

The Tribunal's decision was in three parts.

First, it affirmed the decision of the OFT in relation to 20 documents. Second, it ordered that two documents be released in full and that two documents be released in part. And third, in relation to 12 documents, it set aside the OFT's decision, remitted the matter back to the OFT for

reconsideration, and ordered that the non-exempt parts of the documents be released and the exempt parts be identified and resubmitted to the Tribunal for further determination.

The reasons for the decision

Part 1 — Section 30(1)

The Tribunal confirmed that a document will be exempt under s.30(1) if two requirements are satisfied. First, that disclosure of the document would disclose matters in the nature of opinion, advice or recommendation prepared by an officer in the course of, or for the purposes of, the deliberative processes involved in the functions of the agency. And second, that disclosure of the document would be contrary to the public interest.

The Tribunal noted that the words 'opinion, advice or recommendation' mean matters in the nature of 'a personal view', 'an opinion recommended or offered' or 'a presentation worthy of acceptance', and held that the following documents satisfied the first requirement:

> a file note of a discussion of legal issues between a legal officer of the OFT and the Manager of the OFT's legal branch;
>
> a file note from one legal officer to another containing opinions, advice and recommendations; and
>
> three pages of handwritten notes containing advice made by a legal officer in preparation for a court hearing.

The Tribunal noted that s.30(3) did not apply to any of the above documents because any facts contained within them were 'so intertwined with the advice or recommendations forming the deliberative material' that they ceased to be 'factual material' for the purposes of the sub-section. In other words, the Tribunal found that the factual material in the documents was not properly severable.

The Tribunal went on to hold that to disclose the above documents would be contrary to the public interest. The Tribunal reached this conclusion after balancing the public interest in disclosure against the public interest in protecting the deliberative processes of the agency, and finding that the information in the documents related to the 'proper consideration and deliberation within the OFT' and disclosed 'nothing improper'.

Part 1 — Section 32(1)

The Tribunal defined legal professional privilege in the following way:

> It is a principle of common law that in civil and criminal proceedings a person is entitled to preserve the confidentiality of statements and other materials which have been made or brought into existence for the sole purpose of seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings.

The Tribunal went on to make eight observations about the nature and scope of the privilege.

First, the rationale for the privilege is that it promotes the public interest. The privilege assists and enhances the administration of justice by facilitating the representation of clients by legal advisers.

Second, the principle underpinning the privilege is confidentiality.

Third, the question of whether a document attracts the privilege must be answered by reference to the reason why the document was brought into existence. This question is a question of fact.

Fourth, a document will attract the privilege if it was brought into existence either for the sole purpose of seeking or giving professional legal advice, or for the sole purpose of use in anticipated or existing legal proceedings.

Fifth, the privilege normally applies to communications between a client and a lawyer. However, it extends to a communication between the lawyer and a third party if the communication was made for the purpose of actual or contemplated litigation. (In *Deltaline Nominees Pty Ltd and The Roads Corporation* (1995) 8 VAR 472; reported in this issue of FoI Review, the Tribunal held that the privilege also attaches to a confidential communication between a lawyer and a third party where the sole purpose of the communication was to furnish legal advice to the clients.)

Sixth, a document may be privileged if part of it does not contain legal advice. In such circumstances, the reason why the document was brought into existence must be examined carefully.

Seventh, legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies (see *Waterford v Commonwealth of Australia* (1987) 163 CLR 54). Privilege attaches in this situation because it is in the public interest for government agencies to have 'free and ready confidential access to their legal advisers'.

And eighth, someone other than the owner of the privilege may give evidence that the document in question is privileged. It is not necessary for the owner of the privilege to come forward and claim the privilege.

Applying these principles, the Tribunal concluded that the following documents were exempt under s.32(1):

- file notes made by a legal officer recording the substance of telephone conversations with witnesses in Magistrates' Court proceedings;
- a memorandum from counsel to a legal officer relating to legal proceedings; and
- correspondence between a legal officer and costs consultants (including the request and receipt of advice on costs issues);
- a file note made by a legal officer recording the substance of a telephone conversation with a client who had requested legal advice;
- notes made by a barrister in preparation for a court appearance;
- notes made by a legal officer prepared for the purpose of instructing a barrister;
- briefs to counsel;
- a file note made by a legal officer in relation to various related legal proceedings;
- a note made by a legal officer recording the discussion between various officers of the OFT and counsel.

Part 2 — Documents ordered to be released

The Tribunal held that two documents were not exempt as a whole and that two documents were not exempt in part because those documents contained non-confidential information that was not in the nature of opinion, advice or recommendation.

Part 3 — The OFT's decision set aside in part

Twelve of the documents in dispute consisted of handwritten notes made by a lawyer when attending a public hearing. The notes made did not record what was said verbatim and were taken as an aide memoir. The Tribunal observed that parts of the documents may have been in the

nature of comment or observation, but that such parts had not been specifically identified.

The Tribunal set aside the OFT's decision in relation to the 12 documents and held that those parts of the documents that were not in the nature of comment or observation were not exempt under either s.30(1) or s.32(1). Accordingly, the Tribunal ordered that those parts be released to Halliday. The Tribunal also ordered that those parts of the documents that were in the nature of comment or observation be identified and resubmitted to the Tribunal for further determination.

Section 50(4)

After noting that a privileged document will not be released under the public interest override in s.50(4) unless public interest factors 'of a high order' are present (Chadwick and Department of Property and Services (1987) 1 VAR 444 at 455-56), the Tribunal concluded that no such factors were present in this case. It reached this conclusion for three reasons. First, the documents did not disclose any evidence of impropriety or excessive expenditure by the OFT; nor did they reveal why Halliday and not others was prosecuted. Second, there was no evidence that releasing the documents would assist Halliday in establishing his innocence. And third, it would be inappropriate to use s.50(4) to circumvent the Supreme Court Rules relating to the discovery of documents.

Comments

It is incorrect to state that an applicant may not apply to the Tribunal for review of a decision made under s.25A(1) unless he or she has made a complaint to the Ombudsman (see Kyrou, Victorian Administrative Law at para. [2263/10]). The Act does not prevent an applicant from seeking internal review of a decision to refuse access under s.25A(1) and then applying to the Tribunal for a review of that decision under s.50(2)(a).

For an examination of the question of whether the Tribunal has the jurisdiction to amend an application for review of a decision made under s.25A(1), see *Thwaites and Metropolitan Ambulance Service* (unreported, 19 June 1996, Coghlan PM).

[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.

NIR HAIM TOREN and DEPARTMENT OF IMMIGRATION AND ETHNIC AFFAIRS (DIEA) (No. Q93/578)

Decided: 8 March 1995 by Deputy President S.A. Forgie.

Abstract

Section 37(1)(c) — disclosure endangering life or physical safety — meaning of 'would or could reasonably be expected' — past vendettas and bad blood but no physical harm or threats — no evidence to support expectation of danger to life or physical safety.

Section 45(1) — elements of breach of confidence — whether information confidential in character or given and received in confidence — information known or ascertainable in a particular industry is in public domain — information provided for particular purpose assumed to be received on confidential basis — detriment to confider required for breach of confidence (and see para. 1 in Comments below).

Issues

The principal issues were whether there was evidence which would support a reasonable expectation of disclosure endangering the life or physical safety of any person (s.37(1)(c)), and whether it would be a breach of confidence to disclose information obtained from a person (s.45), some of it in relation to processing the FoI request. The Tribunal expressed views on whether 'detriment' was necessary to a breach of confidence action and what it entailed.

Facts

The applicant, Mr Toren, sought access to all documents written to DIEA's Queensland office opposing his coming to Australia, especially a letter from a Mr D. Wachtel. DIEA refused access to all relevant documents. Mr Toren's brother, Mr Dan Toren, had arrived in Australia in 1985 and had participated in Mr Wachtel's diamond importing businesses, subsequently ending his relationship with Mr Wachtel on less than amicable terms. Dispute between them continued for some time. Both brothers were directors of a diamond trading firm. Mr Toren visited Australia from time to time in connection with the business and in 1992 he applied for a return travel visa to Australia. The position for which Mr Toren applied was required to be advertised, and in the course of consultations by the Department of Employment, Education and Training (DEET) the views of Mr Wachtel were obtained. A temporary work visa was ultimately issued to Mr Toren to enable him to work in the family business. When consulted under s.27A, Mr Wachtel objected to disclosure of his letters.

Decision

The Tribunal set aside the decision and decided that six documents were not exempt, one was wholly exempt, and two dealing with the FoI request were exempt in part (s.22).

Scope of request

Four documents on which DIEA had made decisions had come into existence after the date of the request; they were created in the course of deciding that five other documents should not be released. The Tribunal has power to deal with relevant documents which come into existence after a request is made (*Re Murtagh and Federal Commissioner of Taxation* (1984) 54 ALR 313 and *Re Edelsten and Australian Federal Police* (1985) 9 ALN N65; (1986) 2 *FoI Review* 24). While the Tribunal doubted that the four documents came within