FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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WARREN and DEPARTMENT OF DEFENCE (DEFENCE)

(No. N92/621)

Decided: 22 December 1993 by M.D. Allen (Senior Member), J.D. Campbell and L.R. Way (Members).

Abstract

Section 4(1) — definition of 'personal information' — extends to work performance information.

Section 48 and 50(1) and (2)(b) — whether Army records concerning the applicant were incomplete, incorrect, out of date or misleading — amendment by addition of notes to records.

Section 55(6)(c) — amendment of records of opinion — whether based on mistake of fact, or author biased, unqualified to form opinion, or conducted factual inquiries improperly.

Issues

Whether Army records concerning the applicant's work performance were 'personal information' (s.4(1)), and whether they contained information which was incomplete, incorrect, out of date or misleading (ss.48 and 50(1) and (2)(b). Limitations on amendment of records of opinion in s.55(6)(c).

Facts

The applicant, Warren, was a former serving officer in the Australian Army. He had resigned from the Army in 1981 after rejection of his response to a requirement to show cause why his appointment should not be terminated. He requested amendment of documents held by Defence Army Office relating to his military service, including his annual Officer Reports and letters and minutes relating to his work performance and Defence's investigation of his grievances. Warren sought annotations stating that documents were invalid, did not reflect the facts, were inaccurate and/or were written with an improper motive. Warren had many disagreements with superior officers concerning his attitude and performance, one report describing him as having 'the outlook of a hippie'. His difficulties continued from the time of his posting to an Army Transport and Movement Group in Sydney in 1977, and later posting to a similar group in Melbourne, until his resignation. The Tribunal described Warren's experience as a 'tragic . . . destruction of a career'. In earlier proceedings, Warren obtained a declaration by the Tribunal under s.62(2) of the *FoI Act* that Defence's statement of reasons refusing his request for amendment of documents was inadequate.

Decision

The Tribunal directed that several documents be amended by means of annotations (the correct term is 'notes', which is used hereafter: s.50(2)(b)) setting out the respects in which the Tribunal found the documents to be incomplete, incorrect or misleading. Other amendments requested by Warren were refused on the evidence before the Tribunal. The Tribunal rejected allegations that there was a conspiracy against Warren on the part of his superior officers. In relation to one document, the Tribunal held that it was not used or available for an administrative purpose, as the information in it was not intended to be acted upon but was merely a covering minute indicating a disagreement between Army Headquarters as to responsibility. For the purposes of regulation 19 (in fact, regulation 20) of the Administrative Appeals Tribunal Regulations, the Tribunal certified that the proceedings had terminated favourably to the applicant, as a result of which the filing fee of $300 was refundable.

Notes made

In particular the Tribunal made the following findings that records of information were in some way wrong as provided in s.48:

A confidential report on Warren contained comments that were unsupported by evidence at the time or before the Tribunal. They were incomplete and misleading and did not constitute an objective report on Warren.

- Two letters from Warren's commanding officer were found to be misleading in that Warren had not been given an opportunity, as was required under Army regulations, to see the letters or make representations on their contents. One paragraph of one letter was in error and misleading in implying that an interview between Warren and a senior officer had been called by the senior officer concerning Warren's future career, whereas the interview had been sought by Warren.
- A minute was found to be misleading in overstating Warren's alleged poor performance and failed to take into account improvement by him attested to in the documents.
- Another minute was found to be incomplete and misleading in not adequately dealing with all the facts and circumstances surrounding the member's redress of wrongs, while another was incorrect in referring to the Defence Force Ombudsman when it should have referred to the Office of the Defence Force Ombudsman within Defence. The Tribunal was also not prepared to find on the evidence before it that Warren's case had been exhaustively reviewed several times.

The Tribunal directed that notes setting out these matters be made to the relevant documents. In the case of other passages there was insufficient evidence to persuade the Tribunal that the opinions they contained should be altered or it should direct that notes should be added.

In making its decisions, the Tribunal adopted the approach in *Re Cox and Department of Defence* (1990) 20 ALD 499, where the Tribunal found that the applicant had referred to cogent evidence requiring a finding that the documents were either incomplete, incorrect, out of date or misleading, or a combination of those criteria, unless the additional

evidence was placed on the record and cautionary notations made.

Section 4(1) — 'personal information' and work-related information

The Tribunal stated that the definition of 'personal information', included in the *FoI Act* in October 1991, expanded the definition of what was 'personal affairs information', and that there could not now be any question that an assessment of capacity or previous work performance is information relating to a person's personal affairs (but see Comment 5 below).

Amendment of opinions and s.55(6)(c)

The Tribunal noted that a number of passages in the documents containing opinions of Warren's superior officers were 'complete and accurate records of the opinion of the persons who made them' *(Re Cox* (above)), and that individuals were not entitled under the legislation to 'shape or colour such information according to [their] own whims or preferences' *(RR v Department of the Army* 482 F.Supp 770 (1980)). It noted that s.55(6)(c) (introduced in October 1991) now provided the bases on which the Tribunal may decide that an amendment of an opinion is appropriate (but see Comment 2 below), namely where the opinion was based on a mistake of fact, or the author was biased, unqualified to form the opinion or acted improperly in conducting the factual inquiries that led to the formation of the opinion.

In relation to one document the factual basis of which Warren had challenged, the Tribunal commented that it had neither the time nor the resources to undertake a task that would require a lengthy hearing with witnesses attempting to recollect events of some 13 years ago. It did not think that a respondent should have to be put to the expense of producing witnesses and seeking to rebut the minutiae of events which were peripheral and long past. In its view the Tribunal's powers were no greater than those of the makers of the decisions being reviewed. (However, see the Comment 4 below.) The Tribunal therefore took a broad brush approach, and rectified wrong information where that had been demonstrated on the existing evidence.

Comments

(1) Warren was technically successful in obtaining recognition via the Tribunal that the opinions in a number of documents required qualification. On the other hand, in most cases Warren did not obtain the kind of wide ranging amendments he sought. The notes directed by the Tribunal to be made did, however, call in question statements of fact or opinion that had been arrived at without proper attention to the available facts or without giving Warren an opportunity to make representations. For further comments on this case, see Peter Bayne, 'The privacy dimension of Freedom of Information laws', (1994) 1(3) *Australian Journal of Administrative Law* 162-166.

(2) The Tribunal's approach in this case to the amendment of opinion information differed from that of the Tribunal in *Re Close and ANU* (1993) 48 *FoI Review* 78. In the latter, the Tribunal held that an accurate record of the subjective opinion of a committee could not be shown to be 'incorrect'. It also considered that for an expert opinion to be 'misleading' it was not enough that the author of an opinion did not have regard to all the relevant information, although where the author did not take account of significant material placed before it, it might be appropriate to describe the author's opinion as 'misleading'. In the present case, the Tribunal was prepared to find information 'misleading' or 'incomplete' or both where it was at variance with other documentary material before the Tribunal and where there were defects in the reporting and decision making process. However, like the Tribunal in *Close*, in most cases it did not go on to make findings of fact which would have corrected the records.

(3) The Tribunal's approach to s.55(6)(c) in the two cases was different. There was no suggestion in *Warren* that s.55(6)(c) shifted an evidentiary burden onto the applicant. In *Warren* the Tribunal's reasons may give the impression that the considerations in s.55(6)(c) contain all the criteria for amendment of *opinions*. Rather, they constitute limitations on the power of the Tribunal in considering whether opinion information is incomplete, incorrect, out of date or misleading (s.50(2)(b)). In *Close*, even though the Tribunal conceded that the committee in question had failed to take into account all the relevant facts, it felt unable to say that the committee's opinion was incorrect and that it had based its statement on a mistake of fact. In *Warren*, the Tribunal appeared readier to determine that information was incomplete or misleading where there was conflicting evidence or where not all the relevant facts had been taken into account. This was presumably on the basis that the opinion was based on a mistake of fact (s.55(6)(c)), although it did not spell out its reasoning. Further, while the Tribunal in *Close* concluded that the committee was not required to give Dr Close an opportunity to be heard as a matter of procedural fairness, in *Warren* the Tribunal found that under Army Regulations Warren should have been given an opportunity to see and comment on reports on his performance, and that the reports were therefore misleading. It did so without explicit reference to the criteria in s.55(6)(c). The Tribunal may have considered that the author of the opinion had not acted properly in conducting the factual inquiries leading to the formation of the opinion.

(4) The approach in *Warren*, both to the application of the criteria in s.48 and to the grounds in s.55(6)(c) on which a record of an opinion can be challenged, appears less narrow than that in *Close*. However, the actual findings and notes themselves were extremely limited and it is often difficult to understand the legal basis for them. For example, the Tribunal held that material was incomplete because there was a lack of evidence for it. A finding that the material was incorrect might have been more appropriate. This may be connected with the Tribunal's approach which was broadly to point out, in the notes added to the records, deficiencies in the reporting and decision making process without making substantive findings on the disputed questions of fact. Unlike the Tribunal's directions in *Cox* (above), the notes added by the Tribunal therefore did not correct the records said to be incomplete, incorrect or misleading. All of this may follow from the Tribunal's limited conception of its fact finding role discussed in the next paragraph.

(5) In *Warren* the Tribunal rejected any obligation for it to enter upon an examination of the facts by means of a hearing with witnesses. It confined itself to examining the documents in issue for evidence of error and to the evidence of the applicant. Defence does not appear to have led evi-

dence on the factual correctness of the opinions in issue. However, the Tribunal's function is to make a decision on the merits as to whether a record of information is wrong under s.48. This requires it where appropriate to exercise its own powers of fact finding through the examination of witnesses, even though the decision maker whose decision is being reviewed does not have such powers. The Tribunal did undertake such a procedure in *Re Toomer and Department of Primary Industries and Energy* (1990) 12 AAR 51. In *Warren* the Tribunal may have been conscious that the hearing in *Toomer* took 40 days, and may have wished to avoid such a resource intensive exercise. See also *Re Mann and Department of Health (ACT)* (ACT AAT, unreported, 12 August 1994) on when an extensive inquiry is required.

(6) The decision reaffirms that purely work performance information is within the definition of 'personal information' in s.4(1), as against the situation under the previous phrase 'information relating to the personal affairs of a person' as interpreted by the courts and the Tribunal (see, for example, *Department of Social Security v Dyrenfurth* (1989) 80 ALR 533, where the authorities are discussed). However, the Tribunal confuses the two concepts in its expression of this principle.

[R.F./R.A.]

RUSSELL ISLAND DEVELOPMENT ASSOCIATION (RIDA) and DEPARTMENT OF PRIMARY INDUSTRIES AND ENERGY (DPIE)
(No. Q93/270)

D cid d: 13 and 19 January 1994 by Deputy President S.A. Forgie.

Abstract

- *Sections 22(1)(a)(ii) and 15 — information 'reasonably . . . regarded as irrelevant to [a] request' — reasonably, as opposed to irrationally or absurdly, considered or looked on as irrelevant to a request — requests to be interpreted broadly — some material irrelevant to request.*

  Section 40(1)(d) — meaning of 'substantial adverse effect' — disclosure of MP's correspondence with agency on performance of government programs — would not inhibit comments to extent that adverse effect was real or significant.

  Section 41(1) — MP's comments on government program may be 'personal information' about MP — not unreasonable to disclose personal information about a person or persons — unreasonable to disclose — unlikely person or persons would agree to disclosure.

- *Section 42 — legal professional privilege — documents created for sole purpose of giving and receiving legal advice — relationship of Attorney-General's Department officer and client — sufficient degree of independence.*

- *Section 58(2) — Tribunal has no discretion to grant access on public interest grounds if document exempt.*

Issues

Whether information irrelevant to request (s.22(a)(ii)), and factors to be taken into account in deciding relevance. Breadth of interpretation of requests. Whether letter from MP constituted 'personal information' about the MP (s.4(1)), and whether its disclosure would be unreasonable (s.41(1)). Unreasonableness of disclosing comments about a person or persons where unlikely they would consent (s.41(1)). Whether disclosure of MP's letter would have a substantial adverse effect on operations of agency; meaning of 'substantial' (s.40(1)(d)). Application of legal professional privilege to correspondence between client and Attorney-General's Department (s.42). Lack of power for Tribunal to grant access to exempt document on public interest grounds (s.58(2)).

Facts

RIDA sought access to documents relating to its selection for a grant under the Local Energy Efficiency Projects Scheme (the LEEP Scheme), and the cancellation of that grant. The LEEP scheme provided grants to community organisations to support the implementation of projects promoting energy efficiency and conservation. RIDA's grant was cancelled following representations from other community organisations on Russell Island and the local Shire Council, as well as correspondence between the local Federal MP, Mr Con Sciacca, and the Minister. DPIE granted access to the majority of documents but denied access to nine documents in full or in part.

Decision

The Tribunal varied the decision under review granting RIDA partial access to a ministerial briefing (the exemption claim for which had already been withdrawn by DPIE and which the Tribunal did not consider exempt) and to Mr Sciacca's letter to the Minister. Otherwise the decision under review was affirmed.

'Public interest' argument and section 58(2)

The Tribunal rejected RIDA's submission that the Tribunal should grant access simply because access was in the public interest. In the absence of a public interest element in an exemption, it can only grant access in accordance with the terms of the Act which prescribe in effect what is in the public interest (but see Comment 1 below). In particular, s.58(2) does not give the Tribunal any discretion to grant access to an exempt document.

Sections 22(a)(ii) and 15 — whether information relevant to request

The Tribunal was guided, in its interpretation of the words in s.22(a)(ii) 'could reasonably be regarded as irrelevant to (the) request', by Federal Court decisions on the interpretation of the similar expression 'could reasonably be expected to' in ss.37 and 43 *(Attorney-General's Department v Cockroft* (1986) 64 ALR 97 at 111-12). The question under s.22(1)(a)(ii) is whether the information might 'reasonably' as opposed to 'irrationally or absurdly' be considered or looked on as irrelevant to the request.

A request under s.15 does not require precise descriptions of documents, which may be described in broad terms. The section recognises the difficulties which often face a person, who may know very little about the administration of government, in describing documents with great exactitude. Requests cannot be interpreted with the degree of precision that applies to legislation or a set of pleadings, but should be interpreted broadly. In determining what is relevant to a request, regard must first be had to the words of the request and then to the context in which it is made.

RIDA's request related to its selection for a grant and the termination

of that grant. The Tribunal held that, given that the applications were not ranked by DPIE in order to assess whether they were to get a grant, information in documents attached to a departmental brief relating to the selection and rejection of other applicants could reasonably be regarded as irrelevant to RIDA's request. Comments on future consultations for LEEP grants in the correspondence between Mr Sciacca and the Minister were also irrelevant to the request. (See Comment 3 below.)

Section 41(1) — unreasonable disclosure of personal information

Mr Sciacca's comments on processes involved in the administration of the LEEP Scheme related to the affairs of Government and were not about individuals. They were therefore not within the term 'personal information' as defined in s.4(1), unless they were personal information in disclosing Mr Sciacca's views at that time (see Comment 4 below). On the other hand, Mr Sciacca's views about a person or persons did constitute 'personal information'.

There was no change to the meaning of the word 'unreasonable' in s.41(1) as a result of the amendments made in October 1991 (*Re Zalcberg and Australian and Overseas Telecommunications Corporation* (1992) 40 *FoI Review* 50. Whether or not disclosure would be unreasonable is a question of fact and degree calling for a balance of all the legitimate interests involved (*Wiseman v Commonwealth*, (1989) 25 *FoI Review* 9; *Re Chandra and Department of Immigration and Ethnic Affairs* (1984) 6 ALN N257). What is 'unreasonable' has as its core public interest considerations (*Colakovski v Australian Telecommunications Corporation* (1991) 13 AAR 261 per Lockhart J at 270), and reference should not be made to a person's interest in obtaining access under the Act (s.11(2) and Jenkinson J in *Colakovski* at 272).

Disclosure of Mr Sciacca's opinions about certain processes involved in the administration of the LEEP scheme, if it amounted to personal information about Mr Sciacca, would not be unreasonable (and see below on s.40(1)(d)). His views played no part in the final decision to cancel the grant. However, it would be an unreasonable disclosure of a person's personal affairs (see Comment 4 below) to disclose Mr Sciacca's views in the letter about a person or persons. It was unlikely that the person or persons concerned would want these views expressed to the world at large without the chance to balance them with their own views (and see *Chandra*, above). There is no provision for such a balance to be struck when considering the release of information under s.41 of the Act.

Section 40(1)(d) — substantial adverse effect on operations of agency

The phrase 'substantial adverse effect' has the same meaning in both s.40(1)(d) and s.40(1)(c). In some cases the Tribunal had held that it indicated the degree of gravity that must exist before the exemption must be made out (e.g. *Harris v ABC* (1983) 50 ALR 551 at 564), while in one it had preferred the view that 'substantial' meant that the adverse effect need only be 'real or of substance and not insubstantial or nominal' (*Ascic v Australian Federal Police* (1986) 11 ALN N184) (see discussion of authorities in *Re Booker and the Department of Social Security*, (1991) 31 *FoI Review* 11). The Tribunal adopted the latter view (but see Comment 5 below).

The Tribunal rejected DPIE's claim that disclosure of Mr Sciacca's correspondence with the Minister and DPIE's briefing note on it would in future inhibit or obstruct the free flow of information from Members of Parliament as to the performance of government programs (see Comment 5 below). There was no evidence to show that members of the public or Members of Parliament or Senators would be more reticent in commenting on the performance of government programs. Even if they did, Parliamentarians might well use more indirect, even if less efficient, means to convey the same information. However, it was not established that those means would lead to an effect that was adverse in any real or significant way.

Section 42(1) — legal professional privilege

DPIE's request for legal advice as to its right to terminate the LEEP Scheme grant agreement with RIDA, and the resulting advice from a legal officer of the Attorney-General's Department, were held exempt under s.42 of the Act. The documents were brought into existence for the sole purpose of the obtaining and provision of legal advice, and the legal adviser, who was at arm's length from DPIE, was sufficiently independent of the Department to found a claim for legal professional privilege (*Waterford v Commonwealth* (1987) 71 ALR 673).

Comments

(1) The Tribunal's comment that the terms of the Act in effect prescribe what is in the public interest must be read in the light of the facts that the *FoI Act* is not itself a code of access and the Act encourages the disclosure of information, even exempt information, outside the terms of the Act where that can properly be done (s.14; and see New FoI Memo No. 19, paras 2.1-2.6). As pointed out in this decision, the Tribunal does not have such a discretion (s.58(2)).

(2) The Tribunal's reassertion of the proposition that requests are to be interpreted broadly, and not with the precision applying to legislation or a set of pleadings, is helpful (see also *Re Timmins and National Media Liaison Service* (1986) 4 AAR 311, *Re Anderson and AFP* (1986) 4 AAR 414, and *Re Gould and Department of Health* (Federal AAT, unreported, 19 March 1985); see also New FoI Memo 19, paras 5.7-5.10). However, the Tribunal's own reading of the request seems extremely technical. Given that the applicant is always entitled to put in a further request, there seems little point in highly technical approaches to the wording of a request if consultation with an applicant reveals that the applicant does want access to a document.

(3) Both DPIE and the Tribunal appear to have been in error in claiming that s.22(a)(ii), relating to deletion of irrelevant material from a requested document, was applicable to the attachments to the ministerial submission. DPIE rightly treated each of the attachments as separate documents. Section 22(a)(ii) applies only to information *within a document, not to separate documents*, with the intention that information reasonably regarded as irrelevant may be deleted without the need to claim an exemption. The error in this respect may not have made much difference in practice to the outcome. It is not the case, as suggested by DPIE, that information satisfying the test of irrelevancy in s.22(a)(ii) is exempt, although the effect is similar. See New

FoI Memo No. 19, paras 7.17-7.19 on deletion of irrelevant material.

(4) The Tribunal did not find it necessary to decide whether information that revealed that an MP had made a representation to a Minister on a particular matter at a particular time was 'personal information', since it held that it would not in any case be unreasonable under s.41(1) to disclose it. The better view would appear to be that information that discloses that a person held a particular view, or made representations about an issue, at a particular time, is personal information (see *Re Timmins and NMLS*, above, although this dealt with the previous concept of 'personal affairs information'). The Tribunal's reference to an 'unreasonable disclosure of a person's *personal affairs*' (our emphasis) should have been to an 'unreasonable disclosure of personal information'.

(5) The Tribunal appears to have endorsed the interpretation of the word 'substantial' in s.40(1)(d) that was favoured in *Ascic v AFP* (above) ('not insubstantial or nominal'), rather than that favoured in *Harris v ABC* (above) and in *Re Dyrenfurth and Department of Social Security* (1987) 12 ALD 577 and other cases (indicating 'gravity' or 'seriousness' of effect). However, the actual decision, that the effects of disclosure of MP's representations would not be 'adverse in any real or *significant* way' (our emphasis), may have gone further than the formula in *Ascic*. Interestingly, Professor L.J. Curtis, President of the ACT Tribunal, concluded in *Re 'B' and ACT Medical Board of Health* (ACT AAT, unreported, 11 April 1994) that the better interpretation was that stated in *Harris*. DPIE's claim that MPs would not make forthright representations was a form of the frankness and candour argument which has frequently been rejected by the Commonwealth and ACT Tribunals (see *Re Weetangera Action Group and (ACT) Department of Education and the Arts*, ACT AAT, unreported, 31 January 1992).

[R.F./R.A.]

SRB AND SRC and THE DEPARTMENT OF HEALTH, HOUSING, LOCAL GOVERNMENT AND COMMUNITY SERVICES (HEALTH)
(Nos N93/43 and N93/432)

Decided: 28 March 1994 by Deputy President B.J. McMahon, Professor G.A.R. Johnston and G.D. Stanford (Members).

Abstract

- *Section 24 (1) — 'substantial and unreasonable diversion of resources' — resources available at time of request or hearing — resources reasonably required to deal with FoI application consistent with attendance to other priorities — estimates of numbers of documents and time and re*sources involved — factors relevant to whether diversion 'unreasonable' — public interest factors — relevance of other disclosures of documents.
- *Sections 27 and 27A — consultation with third parties — whether can be omitted in any circumstances — 'reasonably practicable' to consult.*
- *Section 38 — secrecy provisions — section 135A National Health Act — exercise by Minister of discretion to release not reviewable in FoI proceedings.*

Issues

Whether processing of a number of requests would substantially and unreasonably divert Health's resources (s.24(1)). Relevance of resources at time of request or hearing and nature of resources and diversion. Factors relevant to determination of 'unreasonableness' of diversion of resources. Whether consultation process could be omitted (ss.27 and 27A). Whether exercise of discretion by Minister to release documents under a secrecy provision reviewable in FoI proceedings.

Facts

The applicants were members of a group of approximately 2100 people who received pituitary hormone products under the National Pituitary Hormone Program which was administered by Health. The products were produced by the Commonwealth Serum Laboratories and were used as treatments for short stature in children and infertility in adults. People who received these substances were at risk of developing Creutzfeldt-Jakob Disease, a rare and fatal brain and nervous system disease. The present request was made by the Public Interest Advocacy Centre (PIAC) on behalf of six applicants, but similar requests were made on behalf of 51 other applicants. PIAC's request was comprehensive and sought highly specific information as to both individual treatments and broad policies of the program, and included minutes and other documents of the Hormone Program Advisory Committee (HPAC).

Health agreed to the release of patients' files to the individuals concerned, and the release of minutes of the meetings of the HPAC and its sub-committees, subject to consultation with third parties under ss.27 and 27A. However, Health claimed that compliance with the balance of the request constituted an unreasonable diversion of its resources (s.24(1)). It was expected that exemptions would be claimed in respect of each document under various sections of the Act and that the hearing of those claims for exemption would take a considerable time. PIAC sought review of a deemed refusal of the request (a deemed refusal occurs when an application is not dealt with in the time limit provided in the Act). To expedite the review, the parties agreed to have the overall claims under ss.24 and 38 of the Act determined on a preliminary basis, as a decision in favour of Health would conclude the matter.

Decision

The Tribunal held that processing the request would substantially and unreasonably divert the resources of Health from its other operations (s.24(1)). It also rejected PIAC's arguments concerning s.38.

Sections 27 and 27A — consultation with third parties

The Tribunal upheld Health's view that it was required under ss.27 and 27A to consult with the patients' doctors, hospitals, and possibly nursing staff concerning information relating to them, before it could be released to the applicants. It rejected PIAC's contention that this was an unduly restrictive view and that simply deleting the identifying personal information was sufficient. Some of those consulted requested the removal not only of their names but also of some

other information. Consultation was necessary with those whose 'personal information' (s.41) or 'professional affairs' (s.43) were referred to in the documents. 'Affairs' is a word with wide ranging meaning (*Johns v Connor* (1992) 107 ALR 465). A 'reasonable opportunity' to make submissions as to the application of the exemptions in ss.41 or 43 must at least involve sending a third party a copy of the document. It is not possible to short cut this process having regard to the statutory rights of third parties. There was no evidence that the 'rational integrity' of the documents could be retained if references to the third parties were deleted. (On the preceding two points see Comments 2 and 3 below.)

Section 24(1) — substantial and unreasonable diversion of resources of agency

In making its decision on s.24, the Tribunal took account of the fact that there were other similar or identical requests and that the documents were subject to the consultative process (see Comment 1 below). The Tribunal said that the resources of the agency (s.24(1)(a)) means the resources reasonably required to deal with the FoI application consistent with attendance to other priorities; the resources are those the agency has either at the time the request was lodged or at the date of the hearing, not the resources which the agency might be able to obtain, or the whole of the resources of a large Department of State, as this would make the section meaningless. (But see Comment 1 below.) No account can be taken of any reasons of the applicant for requesting documents (s.24(4)), but the agency may have regard to the four factors set out in s.24(2) (i.e. the various tasks involved in processing a request). In the negotiations between the parties pursuant to s.24(6), PIAC had not reduced the scope of request. The Tribunal commented that the provisions of the *FoI Act* concentrate upon individual documents and individual rights and are clearly not intended to deal with such far-ranging inquiries as are required by this application. The existence of s.24 placed limitations on the objects in s.3 and the general right of access in s.11. (See Comments below.)

The officers of Health who were processing the requests gave evidence as to the work involved in identifying and copying documents, consultation and decision making. There were 600 files: some 300 were less likely to contain relevant papers although they needed to be examined. The time involved in scheduling documents and consultation was estimated to take approximately two person years. Health estimated its costs to the date of the hearing at $90,000 and that completion of the processing of the requests would cost between two and four times this amount. Most of this cost related to consultation. The Tribunal was satisfied from this evidence that processing the requests under the *FoI Act* would substantially divert the resources of Health.

In determining whether the diversion of resources would be unreasonable, the Tribunal saw its task as to weigh up the considerations and form a balanced judgment of reasonableness based on objective evidence (*Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) (108 ALR 163 at 187) and *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496 at 501). The extent of the unreasonableness need not be overwhelming (*Prasad v Minister for Immigration and Ethnic Affairs* (1985) ALR 549). Release of the policy files would be consistent with the public interest and the objectives of the *FoI Act*, including informing people of government functions and decisions which affect them, and facilitating scrutiny of government decision making. There was a limited public interest in making the policy files available to the patients who had been placed at risk.

On the other hand, the Tribunal took into account the following factors: the helpfulness of Health in responding to the request; the existence of an independent inquiry (the 'Allars Inquiry') appointed by the Minister, to which many of the requested documents had been made available; the fact that Health had made available a large number of the documents through the discovery process in legal proceedings by the participants; and that each FoI applicant had received his or her personal file. In view of these matters the Tribunal held that the diversion of resources would be unreasonable. (See Comment 4 below.)

Section 38 — secrecy provisions — s.135A of the National Health Act

The Tribunal noted that all releases of documents to that point had been accompanied by a certificate under s.135A(3)(c) that the information was disclosed to a person, who, in the opinion of the Minister, was expressly or impliedly authorised by the person to whom the information relates, to obtain it. The Tribunal rejected PIAC's submission that the Minister should have considered the release of these documents under s.135A(3)(a) (divulging information in the public interest). The exercise of the Minister's discretion under s.135A was not reviewable by the Tribunal in FoI proceedings. PIAC's submission that s.135A did not apply to information received after 1985, when the program ceased, was also rejected. The information had still been acquired in the performance of the officers' duties.

Comments

(1) Comments to the effect that s.24(1) is an exemption are incorrect, although it is similar in effect. The Tribunal's decision to aggregate this application with other similar applications is consistent with the views expressed in *Re Shewcroft* (above). The 1987 Report on FoI Legislation of the Senate Standing Committee on Legal and Constitutional Affairs recommended that s.24 be amended to prevent the aggregation of requests for the purposes of that section (see paras 7.49-7.56), but the recommendation was not implemented. However, as a matter of statutory interpretation there is doubt about the right of agencies to aggregate requests for FoI purposes. One danger is that agencies may seek to aggregate unrelated requests to an applicant's detriment. In any case, in the present matter the number of requests would only have affected the number of copies it was necessary to make, and not such matters as search and retrieval or decision-making time, as the requests were either identical or very similar.

(2) The estimated number of files and folios and the time and resources necessary to process the request were identified sufficiently to enable determination of the substantial character or otherwise of the diversions of resources (see *Re Swiss Aluminium Ltd and Department of Trade* (1986) 10 ALD 96). However,

the Tribunal does not seem to have given careful consideration to the possibility of making resources available from other resources of Health without causing a substantial diversion of resources from other priorities. Without doubt the requests were extremely large, and the success of the s.24(1) claim may not appear surprising. However, the Tribunal's reasoning is open to a number of criticisms. (See New FoI Memo 19, paras 8.1-8.13 on s.24 and related provisions.)

(3) Much of the Tribunal's reasoning on substantial diversion of resources rested on projected resources spent on consultation. However, it was open to Health, or the Tribunal on review, to determine under ss.27 and 27A that consultation with those affected would not be 'reasonably practicable' having regard to the scale of the consultations that would be required. The Tribunal appeared unaware that the question of what is' reasonably practicable' includes the question of workload, as well as extending more widely to questions such as the location of third parties concerned. A reduced consultation process may have prevented the diversion of resources being found to be substantial. There is certainly no requirement, as the Tribunal thought, that there be 'evidence that the rational integrity of the documents could be retained if references to the third parties were deleted'; s.22 on deletion no longer requires that documents from which deletions have been made not be misleading, and the onus is on the respondent to support the refusal of access (s.61). Again, it may be noted that neither Health nor the Tribunal gave consideration to the possibility of staged release outside the time limits imposed by the Act (see, for example, *Re Geary and Australian Wool Board (1987)* 12 *FoI Review* 71, and para. 8.9, last dot point of New FoI Memo No. 19).

(4) Many of the considerations taken into account by the Tribunal in determining the question whether the substantial diversion of resources would also be 'unreasonable' appear to be irrelevant. The disclosure of documents to a government appointed inquiry and the availability of documents in the discovery process have no bearing on the FoI rights of the applicants (see, for example, *Re Green and AOTC* (1992) 28 ALD 655). Nor does the fact that an agency has released to the applicants files containing personal information about them. The question whether the documents would be exempt or not is also not relevant to a determination under s.24(1). There is no justification for the Tribunal's comment that the Act was not intended to deal with such far-ranging inquiries and was intended to focus on individual documents. While s.24(1) may impose limits on what may be obtained as a result of a particular request, there is no underlying assumption that the Act is not intended to apply to numbers of documents. The existence of s.24 itself is enough to indicate this, together with an absence of any other express limitation on the number of documents which may be the subject of an FoI request.

[R.F./R.A.]

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LETTER

Dear Editor

If it is axiomatic that oppositions are in favour of strengthened FoI legislation and governments would rather see it weakened, then one solution would be to place FoI legislation into a future Bill of Rights.

As the Bill of Rights would be a part of our Federal Constitution, FoI legislation could only be amended by a referendum. This would place FoI at arms length from the government of the day ensuring its ongoing capacity for the scrutiny of both government and bureaucracy.

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