FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

KILPRIN and DEPARTMENT OF TREASURY
No. S87/123
D cided: 28 October 1987 by Deputy President R.A. Layton
Jurisdiction — whether any request made under ss.48 and 49 — purpose of s.48.
The applicant had written two letters to the Federal Treasurer, concerning an alleged misinterpretation of legislation relating to reciprocal agreements with regard to invalidity pensions. One of the letters mentioned s.48 but it was unclear as to which record he sought to have amended or how this was to be done. As he had not received any response within the 30 day period which is required for response to requests under s.48, the applicant had applied for review by the Tribunal. The question which arose at the hearing was whether the Tribunal had jurisdiction to consider the application.

The Tribunal held that the key issue was whether or not a request had been made pursuant to ss.48 and 49. In its view, the applicant's letters failed to specify in accordance with s.49(2) 'particulars of the matters in respect of which the claimant believes the record of information kept the agency or Minister is incomplete, incorrect, out of date or misleading' and also failed to specify 'the amendments that the claimant wishes to make'. In view of this, it concluded that the applicant had made no 'request' pursuant to s.48 and that it therefore had no jurisdiction to consider his application for review of a deemed refusal of request pursuant to s.56(1) and (3).

However, as it was conscious of the fact that the applicant had paid a lodgment fee of $200, the Tribunal went on to offer some comments concerning the nature of the applicant's application. In its view, s.48 was specifically concerned with personal information and was not concerned with information in relation to the public at large. Furthermore, it pointed out the right of amendment was confined to information in 'a document . . . to which access has been provided to a claimant'. In view of this, it was, in its view, difficult to conceive of any manner in which Acts of public knowledge and matters of legal interpretation of those Acts could come within the ambit of s.48; whilst interpretation of legislation might well affect the applicant personally, it could not be regarded as referring to his personal affairs.

PARISI and AUSTRALIAN FEDERAL POLICE AND ANOR
No. N86/804
Decided: 5 November 1987 by B.J. McMahon (Senior Member), C.J. Stevens and G.R. Taylor (Members)
Application for access to files relating to applicant's internment during WWII — claims for exemption under ss.33A(1)(a) and (b), 37(2), 41 and 45.
The applicant, a naturalised Australian of Italian origin, had been interned in Queensland during World War II. He had been denied access to a number of documents relating to his internment, most of which consisted of reports from local officers at the Queensland Police to their superiors 'for information'. These included reports on events prior to the applicant's internment and his conduct after his release and correspondence concerning the applicant and a number of other people who were, or could have been, interned. At the hearing the first respondent sought to rely on claims for exemption under ss.37(2) and 45. The second respondent, the State of Queensland, also argued for exemption under s.33A.

A preliminary threshold question which was considered by the Tribunal was the question of its jurisdiction under s.12, given the age of the documents in question. It concluded that, looked at as a whole in the light of its observations in *Re Peters* 5 ALD 187, all except one of the documents were properly classified as documents relating to the personal affairs of the applicant and therefore within s.12(2)(a).

A second threshold question was whether the second respondent was entitled to avail itself of an argument under s.33A if that argument was abandoned by the primary decision-maker. The Tribunal answered this in the affirmative. It pointed out that the second respondent did not have to rely on the mechanism of s.26A as it had become a party in its own right by order of the Tribunal pursuant to s.30(1A) of the *Administrative Appeals Tribunal Act* 1975. It also stressed that it was required by the legislation to conduct a full enquiry into the validity of any claim for exemption, no matter what sections were called in aid to support such claim, and that it therefore followed that no party should be precluded unilaterally by the action of another party from taking advantage of rights to which it was properly entitled.

The Tribunal also rejected an argument to the effect that, as the primary decision-maker and reviewing officer had relied only on ss.33A and 41, the first respondent was somehow estopped from relying on claims under ss.37 and 45. In its view, that argument was based on a misconception of the functions of the Tribunal (see *Re Waterford (No. 2)* 5 ALD 588, 598).

With regard to the claim for exemption under s.33A, the Tribunal referred to the judgment of the Full Court of the Federal Court in *Arnold on behalf of Australians for Animals v State of Queensland and Anor* 12 *FoI Review* and to its earlier decisions in *Re Mickelberg* 11 ALN N21 and *Re Reithmuller* 8 ALN N92. In its view, the information in question was supplied by the Queensland Police Force in confidence and the fact that it was regarded as confidential at the time it was furnished was sufficient compliance with the test of confidentiality in s.33A. Furthermore, it took the view that the material had not lost is confidential nature by virtue of the passage of time (see *Attorney-General v Jonathan Cape Ltd* [1976] QB 752, 771) as there was a continuing relationship of confidence. It also concluded that it had not been established by the evidence before it that disclosure would, on balance, be in the public interest. The Tribunal also upheld the claim for exemption under s.45 on the same basis and made reference to the decision of the Federal Court in *Corrs, Pavey, Whiting and Byrne v Collector of Customs* (reported in this issue).

The Tribunal then considered a claim for exemption under s.37(2)(c). It took the view that the words 'public safety' were not confined to situations of civil emergency and that, in times of war, considerations of public safety and lawful methods for their protection were much wider than in times of peace. It did not, however, find it necessary to consider to the extent to which disclosure of the documents in question would prejudice the maintenance of such methods as any documents which might have come into this category were, in its view, exempt on other grounds.

The Tribunal finally considered a claim for exemption under s.41 in

respect of a number of documents which referred to other persons, mostly members of the contemporary Italian community in Queensland. It rejected an argument to the effect that their disclosure would not be unreasonable as these persons could now be dead. In its view, even if it was prepared to assume that all these persons were dead, such an argument was contrary to the express terms of the opening subsection which referred to the personal affairs of a deceased person. It also stressed that the fact that the applicant would have known all these people did not make it any less unreasonable to make public details of their affairs. It concluded that all of the documents in question were exempt and that it was not possible to grant access to them with deletions pursuant to s.22 as any resulting documents would have been misleading.

In the light of these findings the Tribunal affirmed the decision under review.

ORGANON (AUSTRALIA) PTY LTD and DEPARTMENT OF COMMUNITY SERVICES AND HEALTH and ANOR
No. N87/324
D cid d: 5 November 1987 by B.J. McMahon (Senior Member), C.J. Stevens and G.R. Taylor (Members)
Documents relating to marketing application of IUD — reverse-FoI application under s.27 — discussion of nature of 'trade secret' in s.43.

The second respondent (PIAC) had made a request for access to documents relating to an IUD, including documentary evidence supplied by the applicant manufacturer in support of its application for import approval and any reports of adverse reactions resulting from the use of IUD. Notice of the request had been given to the applicant which opposed access to four documents comprising part of its marketing application. These consisted of:

- two documents containing details of the composition and physical properties of the plastic used in the manufacture of the IUD;
- a document containing information of a statistical nature;
- a computer printout; and
- a document relating to products other than the IUD and to individual patients.

The Tribunal examined the claim that the documents were exempt under s.43 by examining separately each of the branches of s.43(1). After reviewing a number of United States and Australian decisions which had discussed the concept of a trade secret, it concluded that, for the purposes of s.43(1)(a), it was necessary to have regard to the following matters:

(a) whether the information was of a technical character;
(b) the extent which the information was known outside the business of the owner of that information;
(c) the extent to which the information was known by persons engaged in the owner's business;
(d) measures taken by the owner to guard the secrecy of the information;
(e) the value of the information to the owner and to his competitors;
(f) the effort and money spent by the owner in developing the information; and
(g) the ease or difficulty with which others might have acquired or duplicate the secret.

In the case of the first two documents, there was, in its view, evidence which established that they contained valuable information which had not been published, could not be duplicated without considerable money and effort and which would, if duplicated or revealed, have provided a substantial commercial benefit to another party. It therefore concluded that, although there was no evidence of any contract between the owner of the secret and the applicant, the information nevertheless should be characterised as containing trade secrets.

With regard to the second branch of s.43, the Tribunal referred to the interpretation of the expression 'could reasonably be expected' in *Attorney-General's Department v Cockcroft* 64 ALR 197 and *Arnold v State of Queensland* 10 *FoI Review* 45. Applying this test, it concluded that the first four documents came within the exemption in s.43(1)(b).

The Tribunal then considered the third branch of s.43(1) and concluded that the fifth document fell within this category. In its view, while the notes were statistically of little value, their disclosure could have produced a feeling among medical practitioners that the applicant was not to be trusted with confidential information. This could have affected its reputation as a marketer and also the reputation for suitability of its product.

Finally, in the case of the fourth branch of s.43, the Tribunal considered the likely effect of disclosure on the supply of information to the first respondent pursuant to the requirements of the *Therapeutic Goods Act* 1966. It referred to authorities on the equivalent American exemption provision and to its decision in *Re Cockcroft and Attorney-General's Department* (reported in this issue) and concluded that, although the evidence did not support a case for exemption of the fifth document under this paragraph, the third and fourth documents fell squarely within its purview. A factor which influenced it in its conclusion was evidence that the statistical material in the third document went further than that required under the legislation. It commented in this regard that, if such information were to be made available to the world at large against the applicant's wishes, it was reasonable to expect that it would be disinclined to be so generous in the future in the quantity and quality of the information it supplied.

COCKCROFT and ATTORNEY-GENERAL'S DEPARTMENT AND ANOR
Nos N84/331 and N84/77
Decided: 13 November 1987 by Deputy President C.J. Bannon QC, R.A. Hayes and P.M. Roach (Senior Members)
Request for access to documents relating to employment application — claims for exemption under ss.43(1)(c)(ii) and 45.

Two applications for review of decisions refusing the applicant access to documents had been referred back to the Tribunal following a successful appeal by the respondents on a number of questions of law. The documents in issue contained information which was supplied by the second respondent to the NSW Employment Discrimination Committee. The Tribunal upheld the respondent's claims for exemption under ss.43 and 45 by a majority of two to one.

Deputy President (J. Bannon)
The Deputy President upheld the claim for exemption under s.43(1)(c)(ii) on the basis that disclosure of the information in question could reasonably be expected to prejudice the future supply of information to the Commonwealth and to an agency for the purpose of the administration of matters administered by an agency. He commented that, although he had been somewhat exercised as to whether or not some attachments which were extracts from documents already in the public domain should be treated as exempt, he had concluded that they were in fact exempt as their disclosure would have led to an inference concerning matters, properly protected from disclosure, contained in the body of one of the documents.

Deputy President Bannon also upheld a claim for exemption under s.45 on the basis that the information contained in the documents in question had been given upon an assurance of confidentiality and had the necessary quality of confidence.

It took the view that the repetition of some of the contents of the confidential information in the committee's documents did not destroy its confidentiality (see *Wheatley v Bell* [1982] 2 NSWLR 544, 548).

The Deputy President rejected an argument that, because second respondent had entered upon a process of conciliation before the committee, the committee was obliged in law as a matter of procedural fairness to disclose the substance of the second respondent's reasons to the applicant so that he could reply to them. In his view, it was not open to a party on the same evidence to raise a new legal ground for the first time of a rehearing. In addition, he pointed out that the circumstances were not such as to give rise to a duty to accord natural justice and that the concept of procedural fairness discussed by Mason CJ in *Kioa v West* (1985) 159 CLR 550, 587 did not have any application within the statutory framework of the *Fol Act* as there was no room for the justice of the common law to supply the omission of the legislature.

P.M. Roach

Mr Roach in a separate Statement of Reasons also upheld the claims for exemption under ss.43 and 45. In the case of the s.43 claim, he expressed the view that, if communications made 'in confidence' to the government on matters such as these were to be disclosed to persons against the wishes to the communicator, there would be an erosion of confidence on the part of the public who might make such communications.

With regard to the s.45 claim, he was satisfied that the purpose of the communication by the second respondent was to satisfy the committee that its decision not to employ the applicant was not because of his political convictions. It was not, in his view, made for the purpose of enabling the committee to communicate to the applicant the reasoning which had influenced it and the fact that the committee ever had information about the reasoning of the second respondent was due to the willingness of the second respondent to entrust it with information which it was not willing to disclose to the applicant.

Dr R.A. Hayes (dissenting)

Dr Hayes rejected the claims for exemption under ss.43 and 45. In his view, all the evidence established that the information in question was to be used for the purposes of conciliating, in relation to the matter of the applicant's complaint. Furthermore, he rejected an argument to the effect that the issue of an implied consent to the employer's reasons to the applicant raised new legal grounds not advanced before the Federal Court on appeal which could not be raised before the Tribunal on a rehearing (see *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 and *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. In his view, the authorities were not relevant here as this was a matter of administrative review. He did not regard the general principle that in matters of administrative review, neither the applicant nor the decision-maker was bound by reasons advanced at preliminary stages of the matter, as being in any way limited in the case of rehearing.

In the case of the s.43 claim, Dr Hayes referred to the comments of Sheppard J *Attorney-General v Cockcroft* 64 ALR 97, 112. He pointed out that the only evidence before the Tribunal was the evidence of an officer of the second respondent giving his opinion as to how it would react to disclosure; there was no information as to how employers generally might react. In his view this was not a sufficient evidentiary basis for denying access under s.43(1)(c)(ii).

CORRS PAVEY WHITING & BYRNE and DEPARTMENT OF HEALTH
No. V87/18

Decided: 20 November 1987 by R.A. Balmford (Senior Member), H.C. Trinick and J.H. Wilson (Members)

Applicant seeking information provided to respondent by third party — initial decision succeeded by another prior to hearing — whether deemed or subsequent decision should be subject of review — claims for exemption under ss.43 and 45.

The background to this matter was briefly as follows. Corrs Pavey Whiting & Byrne (CPWB) had requested access to documents relating to an application by Drug Houses of Australia Ltd (DHA) for marketing approval of a drug, Cimitedine. The respondent had consulted the applicant which had objected to the release of the documents on the basis that they were exempt under s.43. In the meantime, CPWB, which had not received any reply by the due date applied for review of the decision which was deemed to have been made by virtue of ss.56(1) and 19(3)(b). Subsequently the respondent wrote to the applicant refusing access to the documents in reliance on claims for exemption under ss.43(1)(a) and (b) and 45. This decision was subsequently varied so as to give access to all of the documents other than certain parts which were in issue in this case.

The Tribunal first considered the question as to whether it was empowered to review the subsequent decision as well as the deemed one which was the subject of the application for review. It concluded that s.56(5) was intended to empower it, if it was so requested by an applicant, to consider, so far as appropriate, at one and the same hearing, both the deemed decision and the subsequent one.

The Tribunal then proceeded to examine the claims for exemption in respect of the documents in issue which were sought by CPWB in order to discover:

- whether DHA had either imported Cimitedine or manufactured it in Australia;
- whether there had been tests conducted upon Cimitedine in Australia or elsewhere;
- the dates on which Cimitedine was imported or manufactured (if applicable) and any submissions made to the respondent in respect of Cimitedine; and
- whether any samples had been submitted to the respondent.

It was argued on behalf of the respondent that the information in question was supplied and received in confidence on the basis of a longstanding implicit understanding between itself and applicant drug companies. It was also stated that disclosure of the various dates in question would give information to rivals of DHA as to the likely timing of its marketing and that disclosure of the name of the product against which the drug was tested could also give rise to a marketing disadvantage to DHA by leading to claims being made in the market place as to whether or not the drug was a true copy of some other drug. Finally, the respondent argued that drug companies would only feel free to provide the full and frank information which was necessary for its effective functioning if they could be assured of confidentiality.

The Tribunal first discussed the authorities relating to the exemption provisions which were relied upon by the respondent. It referred to its discussion of s.43(1)(c)(i) in *Re Actors Equity (No. 2)* 7 ALD 584, 590 and endorsed the view that there was a public interest component implied by the wording of that paragraph. It also referred to the discussion of s.43(1)(c)(ii) in *Re Angel* 9 ALD 113, 126-7 and *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97, 100 and to the discussion of *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC

133 in *Re Corrs Pavey Whiting and Byrne and Alphapharm and Collector of Customs* 11 ALD 312. With regard to s.45, the Tribunal referred at length to its discussion of the relevant cases in *Re Brennan (No. 2)* (1985) 8 ALD 10, 20 and to the conflicting views on the meaning of 'breach of confidence' expressed by the Full Court of the Federal Court in *Corrs Pavey Whiting & Byrne v Collector of Customs and Alphapharm Pty Ltd* 12 *FoI Review*.

The Tribunal concluded that the respondent had discharged the onus of proof imposed on it under s.61 in respect of two sets of material:

- those dates appearing in material received by the respondent from DHA; and
- a document containing marketing information supplied by DHA.

These materials were in its view exempt under s.45.

The remaining material, which comprised the dates appearing in material which originated from the respondent and the name of the product against which DHA's drug was tested, was not, in its view, exempt under s.45 as it could not be said to have been 'received under circumstances imparting an obligation of confidence'. The Tribunal, was, however, satisfied that the disclosure of this latter information 'would disclose . . . information . . . concerning a person [DHA] in respect of his business . . . affairs . . . being information the disclosure of which would, or could reasonably be expected to unreasonably affect that person adversely in respect of his lawful business affairs' in terms of s.43(1)(c)(i).

WISEMAN and DEFENCE SERVICE HOMES
No. N87/517
Decided: 23 December 1987 by B.J. McMahon (Senior Member), C.J. Stevens and G.R. Taylor (Members)

Request for access to documents relating to transfer of applicant's interest in Defence Service Home — claims for exemption under ss.41 and 45 — documents relating to personal affairs of wife.

The applicant and his former wife had obtained a loan from the respondent which was secured by a mortgage over their matrimonial home. On their divorce the applicant had been ordered to transfer title to his wife and she, in order to obtain the respondent's consent to the transfer, had furnished it with a number of documents relating to her affairs. The applicant had been denied access to these documents on the basis that they were exempt under ss.41 and 45.

Three of the documents in question related to the payment of rates on the matrimonial property. The Tribunal found in relation to these that there was no indication that they were supplied in confidence and that their disclosure would not constitute an unreasonable disclosure of the personal affairs of the wife. It commented that, even if the documents could be categorised as dealing with the financial or other personal affairs of the wife, they related the affairs of both the husband and wife and so came within the proviso in s.41(2).

The remaining documents contained information about the wife's financial circumstances, the use to which she intended to put the matrimonial home and her intentions with regard to remarriage. These clearly related in the wife's personal affairs so that the only question to be determined was whether their disclosure would be unreasonable.

The Tribunal referred to its earlier decision in *Re Chandra* 6 ALN 257 in which it had discussed two types of matters to be taken into account in determining whether such disclosure would be unreasonable. It commented that the nature of the information here was of a highly personal kind. Furthermore, the circumstances under which it was obtained were similar to those in *Re Corkin* 2 AAR 515 in that the information was supplied to the respondent in the belief that this was necessary to enable her to obtain title to the matrimonial home; it was not willingly published to the world. In addition, there was a clear and explicit wish on the part of the wife that the information should not be disclosed to the applicant and the information, being mainly more than six years old, could not, in the Tribunal's view, have been of any present relevance notwithstanding that there was litigation still pending between the husband and wife. The Tribunal therefore concluded that disclosure of the documents in question would be unreasonable, despite the applicant's legitimate interest in wanting to know what preceded the registration of the transfer of his interest.

The Tribunal also upheld an additional claim for exemption under s.45 on the basis that the documents contained confidential information which was provided and received in circumstances of confidentiality. (See *Re Maher* 7 ALD 731 and *Corrs Pavey Whiting and Byrne v Collector of Customs* 12 *Fol Review* 72.) It commented that the wife was under the impression that it was necessary to furnish these documents in order to secure title to her home; whether or not, she was in error, as a matter of law, was beside the point.

IN BRIEF

The Minister for Property and Services has recently released the final report on public records policy in Victoria titled 'Future Directions for Management of Public Records'. As readers will recall, a consultant's report examining public records policy recommended as a policy objective the immediate introduction of a 30-year rule for records which were at least 30 years old.

It is disappointing to report that the Minister recommended the implementation of the 30-year principle should be phased in to reflect resource implications. Some of the options canvassed include a phased introduction via stepwise reduction of the 85-year rule, a year by year introduction of 30-year access, 31-year access, etc. Further information concerning the report can be obtained from Ms Carol Neumann, Manager, Planning and Review, Department of Property and Services, 35 Spring Street, Melbourne (ph. 651 3100).

- The Victorian Premier's persistent battle to extend protection of Cabinet documents continues unabated. On 20 January 1988 the Legal and Constitutional Committee recommended that the Freedom of Information (Exempt Offices) Regulations 1987 and the Public Service (Unauthorised Disclosure) Regulations 1987 should be suspended until Parliament could consider their validity in the autumn session. Two labour MPs, Mr Gordon Hockley and Ms Joan Coxsedge voted with the conservative parties to suspend the regulations. Undeterred, the Cain Government on 28 January via the Governor-in-Council gazetted its rejection of the Committee's recommendations. Mr Cain also directed an all party committee to look at the operation of the *FoI Act* and the *Public Records Act*.

This action has been criticised by the FoI Access Network which has pointed out that the *FoI Act* and the *Public Records Act* have been reviewed by the Attorney-General's Department and the Department for Property and Services, respectively.