VICTORIAN FoI DECISIONS

Supreme Court

SOBH v POLICE FORCE OF VICTORIA
(No. 11325 of 1992)

Decid d: 25 March 1993 by Brooking, Nathan and Ashley, JJ.

Appeal against decision of the Supreme Court denying access to documents on the applicant's police file including a summary of offences, brief head and statements of witnesses — claims for exemption under s.31(1)(a) — interpretation of s.31(1)(a) — whether disclosure of the police brief or entire file under the FoI Act would inevitably prejudice the proper administration of the law.

The applicant appealed against a decision of the Supreme Court upholding an exemption for documents on his police file under s.31(1)(a). The Appeal Court held that disclosure of a police brief, or entire file, did not inevitably prejudice the proper administration of the law, although the individual circumstances of the case must be considered. The decision in effect means that discovery is now available to an accused appearing in a Magistrate's Court.

Ashley J

Ashley J noted that the appellant in effect sought pre-trial discovery. He emphasised that if the police argument was accepted, it would apply not only to the few documents disputed in the present case but to all cases where an accused sought access to Police documents where he/she had '. . . no *right* of access to such documents prior to the hearing under existing practices and procedures . . .' The effect of the judgment, at first instance, was that where a defendant to pending criminal proceedings sought access to the police brief prior to the summary hearing, committal or trial, all such documents were exempt regardless of content.

His Honour examined the reasons given at first instance. He considered that the phrase 'the . . . administration of the law' includes relevant matters of practice and procedure and extends to the conduct of litigation generally, the object of which is to achieve justice within the framework of the law. The question was whether disclosure of a document would prejudice the proper administration of the law, giving that phrase its full meaning, or (contrary to his interpretation of the phrase) whether it would prejudice the existing rules of practice and procedure.

His Honour acknowledged that consideration would need to be given to the impact of disclosure on the rules of practice and procedure, but stated that the mere fact that disclosure affected these rules was not decisive of prejudice. If this was the case, the status quo would be rendered 'sacrosanct', and very clear words would be required to achieve this effect. He emphasised the need to consider the individual documents in question. He noted that it is beyond argument that in Australia there is no right of pre-trial discovery in respect of documents in the possession or control of the prosecution, but that documents might be volunteered by the prosecution or ordered by the Court to be provided to an accused. His Honour decided that the denial of a right of discovery has to an extent been mitigated by the existence of a hand-up brief procedure. For these reasons, he was not prepared to say that accelerated access to such information would prejudice the proper administration of the law.

Nathan J

Nathan J found that the Victorian *FoI Act* '. . . abrogates, albeit in restricted circumstances, the existing immunity of the police from making pre-trial discovery to an accused or other person' (p.11), and that 'the proper administration of the law' is a narrower concept than administering justice. The law includes the pre-existing criminal law, which does not permit pre-trial discovery, and the *FoI Act* which confers a broad right of access to information, subject only to necessary exemptions (pp.9-11). He commented that proper administration of the *FoI Act* requires reference to the particular circumstances of the case, and '. . . a predisposition in favour of access tempered with the obligation to exempt any document which might either incipiently or actually impede or derogate from the administration of all the law' (p.11). His Honour found no infringement of these principles in allowing access to the information sought. He acknowledged that the decision would add to the burden the police must bear in dealing with FoI requests, and that this was probably an unintended consequence of the Act, but decided that there was no inevitability of prejudice attaching to disclosure.

Brooking J

Brooking J discounted the three bases for the lack of right to discovery[1] in an accused suggested by Murphy J in *Clarkson v Director of Public Prosecutions* [1990] VR 745 at 759. He found that there is no right in an accused person to obtain discovery of all documents relevant to the charge, but that the court in its criminal jurisdiction has an inherent power to order production of documents to the defence where the interests of justice require it. He noted that the law's attitude had altered in the direction of disclosure to the accused.

Disclosure under the *FoI Act* was something that would not have arisen under previous practice and procedure. This could mean that in some sense there has been a departure from what the proper administration of the law would have been independent of FoI. However, a departure from existing practice and procedure does not necessarily prejudice the proper administration of the law.

He acknowledged that it may be possible to argue that '. . . the court's discretion to order production of documents is more satisfactory than a right to discovery, since the discretion can be exercised with a proper regard for the dangers of misuse of information disclosed to the accused' (pp.20-21). However, such a rationale does not lead to the conclusion that disclosure to an accused person under FoI would necessarily, and in all circumstances, prejudice the proper administration of the law. His Honour found that the question at issue could not be answered in a

general way, as had been the approach at first instance,[2] but considered that the Act required a determination on a case-by-case basis, whether disclosure of the document would have this effect. He did not accept that it is necessarily prejudicial to the proper administration of the law to allow a party to legal proceedings to obtain an advantage not otherwise available according to the existing practice and procedure.

[H.T.]

REFERENCES

1. '. . . first, the public interest immunity which excuses the Crown from naming sources, secondly, the existence of the committal procedure, during which witnesses may be called upon to produce documents, thirdly, the absence of mutuality, in consequence of the privilege against self-incrimination' (p.8).
2. At first instance the court decided that disclosure would give the accused access to documents to which he would otherwise have no right, and that this advantage meant that the proper administration of the law would be prejudiced.

UPDATE

1. The High Court has refused leave to appeal the decision on the basis that there was no error in law.
2. The Tasmanian Ombudsman has applied the *Sobh case* to a Tasmanian review decision.

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

S and COMMISSIONER OF TAXATION

(No. W91/63)

D cided: 12 February 1993 by Deputy President P.W. Johnston.

Request for access to documents previously the subject of Tribunal review — whether Tribunal competent to reassess claims for exemption — request for documents comprising 'Audit File' — whether applicant's knowledge of process relevant to ambit of review — application defined in terms of request for access — whether documents exempt under s.38 as subject to secrecy provisions of tax legislation — whether documents exempt under s.41(1) as relating to personal affairs of tax payers — whether documents exempt under s.37(1)(b) as revealing identity of confidants — whether documents exempt under s.45 as revealing information in breach of confidence — whether document exempt under s.37(2)(b) as disclosing methods of detection — whether documents exempt under s.12(1)(b) as being documents publicly accessible subject to a fee or charge.

The applicant had previously made a request in May 1988 for disclosure of materials comprising his 'Audit File'. Following the denial of this request by the respondent, the applicant sought review before the Tribunal which, in June 1989, affirmed the respondent's objections ((1989) 24 *FoI Review* 69). The documents the subject of the June 1989 review dealt with two categories of documents: the first comprising working papers generated by departmental officers in the course of the audit, the second being documents in which various departmental officers had been named.

As regards the first category, the Tribunal upheld the respondent's claim for exemption under s.37(1)(a) and 37(2)(b), on the basis that their disclosure at that time could reasonably be expected to prejudice the investigations currently on foot. Exemption under the provisions of s.40(1)(c), (d) and (e) was upheld in respect of the second category.

Following the completion of the audit of the applicant's tax affairs, the basis for exemption in respect of the first category of documents was no longer applicable and the respondent accordingly released a large number of these documents to the applicant. In November 1990, the applicant made a further request for access to the residue of the documents, a request denied by the respondent. Prior to seeking review of this decision by the Tribunal, the applicant sought to enlarge the ambit of his request in two respects. First the applicant asserted that the audit commenced before the date nominated by the respondent (6 August 1986) and, accordingly, he sought to have encompassed within his claim for access, documents in the respondent's possession prior to that date. Second, the applicant now sought access to documents which had come into existence as part of the audit, but created subsequent to November 1990, the date of his current request.

The respondent objected to the competence of the Tribunal to review its refusal to disclose those documents previously considered by the Tribunal in its June 1989 proceedings, on the basis that the issue of exemption had already been determined. In order to clarify ambit of the present review, the Tribunal held two Directions Hearings in May and June 1992, making the following ruling in July 1992:

1. All documents sought by the applicant as part of his 'Audit File', (being documents generated in relation to or as a result of the decision to conduct an audit into the applicant's tax affairs) that have come into existence up to the date of the hearing of this matter, shall be included in this application.
2. To the extent that any of those documents were determined by Deputy President McDonald in application W88/120 to be exempt from disclosure by reason of s.40(1)(c) . . . they shall be excluded from further consideration by the Tribunal.

The Tribunal stated that the reasons supporting the ruling (refer Decision No. 8092) were to be rad as incorporated into the present decision. It briefly explained the second limb of the ruling to be based on the view that the Tribunal ought not review an earlier decision dealing with an identical issue on an identical set of facts, either because of the