NSW FoI DECISION

DISTRICT COURT

HAMILTON v ENVIRONMENT PROTECTION AUTHORITY (No. 367/1997)

Decid d: 5 August 1998 and 18 September 1998, Ainslie-Wallace J, District Court of NSW.

Abstract

interpretation of Act — section 5 — consideration of objects — construction to advance objects — objects cannot prevail over other sections — Act to be considered in conjunction with environmental legislation

- *Section 59A — what is irrelevant to determination of public interest*
- *Clause 9, Schedule 1 — internal working documents — deliberative processes — public interest — tests to be used for deciding*
- *Clause 7, Schedule 1 — business affairs — no public interest test — read in light of Act's objects*
- *Clause 10, Schedule 1 — legal professional privilege — s.122 Evidence Act 1995 — waiver*

Clause 4, Schedule 1 — law enforcement — reasonable expectation of prejudice

Introduction

This case involved two decisions by the District Court: one on 5 August 1998 dealing with an issue of principle about the tests to be applied under the Act concerning the public interest, and the second on 18 September 1998 dealing with the application of those principles to specific documents sought under the Act.

Background to the request

The application on the Environment Protection Authority (EPA) related to documents concerning a smelter in the Port Kembla area of NSW which had operated from 1908 until it closed in 1995.

It was described in the decision as involving the 'largest environmental concern of the Illawarra area' (Decision, 5 Aug., p.2).

The smelter had a history of emitting 'unacceptable amounts of pollutants' (5 Aug., p.2) and the company conducting the smelter had ongoing dealings with first the State Pollution Control Commission and subsequently the EPA in relation to its licence and the attainment of pollution reduction levels.

Other matters associated with the smelter's history included a Commission of Inquiry ordered by the NSW Minister for Urban Development and Planning regarding a Development Application to upgrade the smelter, litigation by the appellant in the Land and Environment Court about the development consent, special legislation validating the consent and thereby defeating the litigation and dealings between the EPA and a new owner of the smelter who wanted to reopen it (5 Aug., pp.3–5).

As things stand, the current owner is undertaking work on the smelter with the intention it will start operations in July 1999 (Decision, 18 Sept., p.8).

While some of the facts about the smelter's history were said to be in dispute, Her Honour relied on the material put to her by the EPA in giving a brief history of the matter.

Interpretation of the *FoI Act*

The appellant argued the *FoI Act* should be considered in conjunction with the EPA's responsibilities under environmental legislation.

The Court was taken to national and State policy documents dealing with sustainable development and NSW coastal policy, which made numerous references to community involvement in environmental issues, including access to data. The policies had been reflected in legislation (5 Aug., pp.9 & 10).

The EPA's argument was that this involvement was limited and the terms of the specific legislation need to be examined and not the broader policy. The judgment continues:

> It was further argued that in construing the legislation one had to keep in mind that our system of government provides for representation of the public by those elected to Parliament and that it is the elected members of Parliament who determine the legislation and that it is incompatible with this system of government to have the public participating in every decision which is taken.
>
> Of course, in construing any legislation one must keep in mind the matters to which counsel for the respondent referred, and I do not propose to enumerate here the degree to which the various pieces of legislation permit public participation. I am mindful that it was those very representatives who enacted the legislation which permits and, indeed, compels in some instances public consultation, however, I am satisfied that the legislation to a degree enacts the recognition by the government of the need for consultation of and communication with the public on matters of the environment which affect them. Having so found does not mean that I take the view that the public have a right to participate in every decision, they do, however, have an interest in and a right to participate which ought to be borne in mind when considering the FoI legislation. [5 Aug., pp.10 & 11]

In her approach to the Act Her Honour cited s.33 of the *Interpretation Act 1987* (NSW) as authorising an approach to construction that promoted the purpose or object of the Act.

As for the objects of the *FoI Act* these are set out in s.5 and Her Honour was urged by the appellant to consider these on the basis that:

> ... the policy behind the environmental legislation together with the objects of the FoI Act create an overwhelming case for disclosure of documents which concern the environmental matters and which affect the public. [5 Aug., p.11]

Her Honour considered the authority of *Victorian Public Service Board v Wright* (1985–1986) 160 CLR 145 and *Searle Australia Pty Ltd v PIAC* (1992) 36 FCR 111 entitled her in the event of an ambiguity in any exemption clause in the legislation to adopt a construction that advanced rather than impeded access to information (5 Aug., p.11). Consistent with *Searle* though, the objects of the Act could not prevail over its other sections but the court was not limited to its use of the Acts's objects merely in relation to an ambiguity but in considering the Act as a whole (5 Aug., p.12).

As to her approach Her Honour said:

> I propose therefore to have regard to the objects of the FoI Act as set out in section 5 and bearing in mind in particular section 5(2)(b)
>
> ... by conferring on each member of the public a legally enforceable right to be given access to documents held by the Government, subject only to such restrictions as are reasonably necessary for the proper administration of the Government ...
>
> and the degree to which environmental legislation recognises the need for public participation when considering the matter before me. [5 Aug., p.12]

The EPA's FoI record

This decision has an importance for citizens who want to obtain information from the EPA about systemic environmental issues.

Before looking at the decision it is useful to consider the EPA's experience of FoI. In the 5 August decision it was noted that in making the decisions about the Hamiliton application the decision makers within the EPA formulated their views on the basis of tests put together from the Premier's Department FoI Procedure Manual, a paper prepared for an FoI Act training session and from decided cases. Apparently no reference was made in the case to the FoI Guidelines issue by the Office of the Ombudsman.

In the five years 1992/93 to 1996/97 the EPA has doubled the number of FoI requests received but the number of requests granted in full has declined from 76% to 59%. Apparently all of the requests received in these five years were non-personal ones.

From an examination of EPA Annual Reports from 1992/93 to 1996/97 (the 1997/98 figures were not available) the following picture emerges:

Y ar	92/93	93/94	94/95	95/96	96/97
No. of requests dealt with	21	40	38	46	58
Grant in full	16	30	27	32	34
Grant in part	4	4	7	12	17
Refused	1	6	4	2	7

In addition to the decline in requests granted in full and the increase in refusals, from 5% in 1992/93 to 12% in 1996/97, requests granted in part increased from 19% in 1992/93 to 29% in 1996/97.

The EPA noted these changes in its 1996/97 annual report and observed how in most of the cases of part access a substantial number of documents were still released, albeit with exempt material deleted.

On the positive side the EPA might be getting better at its Internal Reviews. Between 1992/93 and 1994/95, eight internal reviews were carried out and the original decision was upheld in all of them. In 1995/96 and 1996/97, ten internal reviews were carried out and six resulted in variations of the original decision.

The Office of the Ombudsman appears irrelevant to the scrutiny of the EPA as the latter's reports show only two matters went to the Ombudsman over the five years examined.

In the *Hamilton* case the original FoI application was made on 3 June 1997 and while some documents were released others were withheld. An internal review was sought which resulted in further documents being released in whole or in part. An appeal was then made to the District Court.

In *Hamilton* the applicants sought access to about 250 documents and ended up with 219 of them.

In looking at the EPA's record as a whole it may be the narrow tests applied in *Hamilton* were applied in other cases but given the decision both the Premier's Department and the EPA will have to revise the guidelines they employ. Again according to the EPA's 1996/97 annual report many of the complex applications were dealt with by a small number of officers: six officers processed 39 applications. Perhaps they should all be given copies of the *Hamilton* decision.

The decision of principle: 5 August 1998

The essence of the first decision was a challenge to the tests used by the EPA in determining the public interest aspect of claimed exemptions. The appellant argued those used were not legally available and the respondent formulated a number of new tests to be considered by the Court. The tests are set out below and then discussed individually.

Tests for the public interest

Test 1: Disclosure would impair the integrity of the decision-making process within the agency by inhibiting the frank and open exchange of views prior to final decision making.

Test 2: Disclosure could affect the candour with which the advice is given.

Test 3: Disclosure of documents developed in the formulation of policy is against the public interest.

Test 4: Disclosure would encourage ill-informed or captious public or political criticism.

Test 5: Premature release of tentative or partially considered policy matter which may mislead and encourage ill-informed speculation.

Test 6: Disclosure could prejudice the integrity of the decision making process by not fairly disclosing the reasons for the decision made especially in the case of high level officers involved and the sensitivity of the matter.

Additional Tests: confidentiality and e-mail communications.

Section 59A

This section played a large part in the Court's determination of the scope of the claimed tests and provides:

> For the purposes of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:
>
> (a) cause embarrassment to the government or a loss of confidence in the Government; or
>
> (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

Section 6(2) of the Act deems 'Government' to include a public authority, a local authority and a public office.

Test 1: Frank and open views

The EPA claimed its officers needed to feel free to have 'unstructured debates' about issues (quaintly referred to as 'brainstorming' in the evidence) and while many opinions were canvassed not all of these were accepted. It might be a source of professional embarrassment to officers to find their opinions were made public in circumstances where their opinions had not been accepted and

debate would therefore be smothered (5 Aug., p.13).

In addition it was claimed junior officers might feel inhibited in expressing views within an agency where those views were contrary to agency policy if it were known these views would become public. (The EPA's view seems to overlook the constant pressures for conformity within organisations as part and parcel of institutional dynamics.)

Her Honour considered the House of Lords decision in *Conway v Rimmer* (1968) AC901 and the High Court decision in *Sankey v Whitlam* (1978) 142 CLR 1 on the basis the appellant's argument that the 'candour and frankness' test should not be regarded as a legitimate test of the public interest as it had been rejected by these authorities (5 Aug., p.14).

Based on the cases cited in argument Her Honour said:

> Nonetheless the argument continues to be raised and the courts have entertained it as a matter to be taken into account in assessing the public interest but only to the extent that the agency resisting disclosure had produced evidence to the effect that past experience has shown such a want of candour as to predict it happening in the future. [5 Aug., p.14]

The issue really became how much of the 'test' still existed and in what circumstances would it apply. It was clear particular evidence had to be produced to show a loss of candour in the future so to that extent the High Court has not disposed of the test completely. Her Honour observed:

> There is much force in the argument that there is no place for such a test when considering the public interest that is said to work against disclosure under the FoI Act. It seems to me, with respect, to be an untenable proposition to say that the quality of the advice given by public servants and indeed the quality of their suggestions on particular issues be impaired if those advices and suggestions could become public. Indeed Mason J in *Sankey v Whitlam* (supra) page 97 wondered whether the possibility of future publicity would act as a deterrent against specious or expedient advice and so be in the public interest. I am mindful too that a diminution in frankness and candour simpliciter is not the end of the matter. There must, in my view, be a corresponding and directly related detriment to the public interest. [5 Aug., pp.15-16]

Her Honour was satisfied:

> ... the test, in its application, must be limited to instances in which there is particular evidence which supports the contention that there will be a loss of candour in similar future deliberative processes.' [5 Aug., p.16]

Test 2: Candour of advice

This claimed separate test was treated by Her Honour as 'squarely' within the 'frankness and candour' considerations for Test 1.

The test as such was allowed as part of Test 1.

Test 3: Policy formulation

To claim the exemption under cl.9 of Schedule 1 requires the document to be part of the decision-making function of the agency and disclosure would be contrary to the public interest.

The Court had to decide if documents were 'truly "deliberative" in the formation of a decision' (5 Aug., p.17).

In reviewing other decisions under Federal and Queensland FoI law Her Honour seemed to settle with approval on an approach that said 'deliberative processes' extended beyond policy formation and included documents that were part of the 'thinking' processes of an agency and it appears a document containing factual or statistical material might still be exempt in the case of say an expert report, where the information 'is inextricably linked with material in which an opinion is expressed' (5 Aug., p.18).

In dealing with the public interest second limb of cl 9 Her Honour noted the EPA seemed to take the view it was against the public interest to disclose a document if it was a deliberative document, in other words there is a 'class' test for documents that will be protected as such.

Again Her Honour considered other decisions and noted that if a document is a deliberative document that 'may assist' in making a determination but:

> That is of course a far cry from testing whether to disclose a deliberative document is contrary to the public interest by the application of a test which merely restates the definition of a deliberative document. [5 Aug., p.19]

And as to the underlying approach:

> In my view the FoI Act is underscored by the notion that the Government as an agent of the citizens ought to provide to them all documents other than those necessary to perform its functions as an agent. It is the balance of the public interest which determines disclosure and so far as New South Wales is concerned section 59A further expands the public interest in disclosure by not exempting those documents which, by their release, might embarrass the government or be misunderstood by those who might have access to them (a point to which I shall later return in more detail). An examination of the competing public interests for and against the disclosure of documents ought not be prescribed and indeed is not in the legislation to enable any number of matters to be considered in determining the relevant balance. [5 Aug., p.20]

As the EPA's 'test' did not advance the identification of the public interest it was not considered a proper test.

Test 4: Ill-informed criticism

The appellant claimed this test was not available as a matter of law on two grounds: s.59A of the Act as the first ground, and the High Court's decision about freedom of political discussion in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, as the second. Her Honour said of *Conway* and *Sankey*:

> Any support for the protection of ministers and public servants gleaned from that judgement and from *Sankey v Whitlam* (supra) has to be confined to the context in which they were made and in my view that protection does not extend for it to become a matter of public interest to be weighed in determining disclosure. In any event if I am in error as to the proper interpretation of the views of the High Court in this regard, section 59A is, in my opinion, conclusive of the question.
>
> That disclosure of documents may cause embarrassment to a minister or public servant can only be occasioned by their opinions or views being made public through the documents and coming into the wider public eye and this may result in that person or persons being subject to public criticism. However, it is both contrary to the provisions of section 59A and to the policy underlying the FoI Act to use this as a test of what would be contrary to the public interest and I find that it is not legally available. [5 Aug., p.23]

Given her conclusions on s.59A Her Honour thought consideration of the second ground was not strictly necessary. Her Honour noted the various High Court decisions about freedom of political discussion, including its extension in the *Lange* case to the affairs of statutory authorities and public utilities. Her Honour noted the freedom was not absolute and the High Court had proposed two tests for legislation thought to infringe this freedom: the object of the law must be compatible with the maintenance of

representative government and it must achieve that object.

Her Honour said the EPA's proposed test infringed the second limb of the High Court's test because it placed 'a restriction on political discussion if it be carping and which is not reasonable to obtain the legitimate object of the FoI Act and would, but for my earlier ruling, be invalid for determining the public interest' (5 Aug., p.25).

Test 5: Premature speculation

This was another claimed test that seems to be expressly defeated by virtue of section 59A. In essence, the EPA's view was that the test applied to a decision that had not been made. Even where a decision had been made the EPA claimed the test could still apply 'to protect a matter of wider policy which might apply to future decisions' (5 Aug., p.26).

In addition:

> Counsel for the respondent also argued the test applied was not caught by section 59A(b) because it applied to documents which were on their face complete but which nevertheless could, if released, create confusion and may mislead. She argued that the type of documents to which section 59A(b) applied were those which were not complete or appeared to be only part of a series of documents and which would thereby mislead if they were released. For my part the fineness of this distinction was not immediately apparent from a reading of the section.' [5 Aug., p.27]

The EPA's argument was apparently based on federal cases where no equivalent of s.59A exists and courts had entertained the argument that ministerial certificates claiming exemption were reasonably granted on the basis that to release documents would create a misleading impression and erode confidence in the administration of legislation.

As for the public interest Her Honour noted, in relation to one of the federal cases quoted:

> The Court in considering the argument on the matter of the public interest was not balancing competing public interests but merely considering whether the ground claimed was reasonable. The Court in that instance was considering the public interest in a much narrower context than I am required to do under the New South Wales FoI Act. [5 Aug., p.28]

In addition her Honour considered a decision (*Re Fallon Group Pty Ltd and the FCT* (1995) 31 ATR 1164) where a document was withheld as it did not represent the final policy on the taxation matter in issue and it was undesirable for members of the public to possibly alter their affairs to their detriment in reliance on such a document. In the *Fallon* case the court did not consider the 'confusion' view, which Her Honour would have agreed with but she said such a position was clearly distinguishable from a case where, to quote a Queensland court, documents are withheld on the basis of 'rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it ...' (5 Aug., p.29).

Her Honour also noted a Senate Standing Committee's concerns about this test in that: 'FoI decision makers may take it upon themselves to decide what will and will not confuse the public and what is an 'unnecessary debate' in a democratic society' (5 Aug., p.29).

In NSW, s.59A simply makes the test unavailable.

Test 6: Integrity of process

Based on the federal and Queensland authorities considered by Her Honour this test is available in particular cases and is to be determined on a document by document basis.

The test does not depend on the level within an organisation where communication takes place but it was recognised documents created at a high level will concern matters that have 'an inherent delicacy' and:

> The essence of the test seems to me to be the element of prejudice to the integrity of the decision making process by not fairly disclosing the reasons for the decision made. [5 Aug., p.30]

Again the EPA raised arguments in favour of the test which were defeated by s.59A, such as to avoid embarrassment to the decision makers in an agency or the possible confusion to be caused by partial release of documents.

The EPA's additional tests

The EPA claimed that where documents were created in confidential circumstances then they ought not be disclosed and this represented a separate test of exclusion to be incorporated as part of the public interest test.

Her Honour noted the existing provisions in the Act, such as clauses 12 and 13, already allowed for exemption to be claimed in cases where a document contains or was created from confidential information but the element of confidentiality could not be used to further confine the operation of the Act by making it part of the public interest test (5 Aug., pp.32-33).

The EPA also sought exemption of e-mail records on the basis their disclosure would 'operate as a constraint on the officers and will adversely affect the decision making process' (5 Aug., p.33). The argument was that e-mails had replaced telephone and face to face to face conversations (which are not disclosed unless a written record is made of them — as one would expect to occur) and would operate as a constraint if released.

Her Honour emphasised the FoI Act focused on providing information and was not concerned with the form so the claimed test really amounted to a claim that their release would 'inhibit frankness and candour' (5 Aug., p.33).

Both tests were rejected.

The decision on the documents and costs: 18 September 1998

Subsequent to the decision of 5 August 1998 the EPA having found some of its tests were not lawfully available decided only to dispute the disclosure of a small number of documents.

The public interest issue was the central aspect of both decisions in this case. In terms of the history of the dealings between the EPA and the operators of the smelter over regulation of polluting emissions even the witness for the EPA '... gave evidence in which he candidly gave much of this history and in which he agreed that the failure of the EPA to control the emissions caused a loss of public confidence in the agency' (18 Sept., p.4). A number of other concessions about EPA ineffectiveness were also made and it was noted that at the same time local residents were complaining about the smelter's emissions.

Her Honour did not in her second judgment try to summarise all of the public interest argument but noted:

> In essence the public interest advanced by the appellant is that there has been a history of admitted failure on the part of the respondent to control the emission of pollutants from the smelter. There was a change in the EPA's approach to those emissions between the issue of

the Pollution Reduction Programmes in 1993 to SCL and the proposed licence conditions made after the Commission of Inquiry in 1995. It was submitted that the operations of the smelter had a profound impact on the local residents. There was an immediate impact of emissions on breathing and stains on houses from iron particulate fallout from the smelter. It was further submitted that there was a concern that there may be more long term health consequences for the residents of the community. It was also said that there is a wider community concern in maintaining confidence in regulatory agencies. [18 Sept., pp.5-6]

One would have thought access to EPA's documents would be an essential precondition for the residents to have any meaningful involvement in and impact on the development of environment policies and practices.

Turning to the documents, the EPA had released a parcel of documents from which it had deleted personal details of people and the appellant did not press for complete release.

The remaining documents were those which the EPA claimed were wholly exempt, on four grounds.

Clause 7 — business affairs

Documents sought related to three companies and their dealings with the EPA. While the companies concerned knew about the application and the appeal none of them were represented at the hearing nor did they make any submissions. Correspondence to the EPA and its solicitors did contain reasons by the companies against disclosure and the Court took note of these.

To satisfy cl.7 Her Honour noted:

> ... it is not sufficient that the information in issue is *derived from* a business but *must itself* be information about business, professional, commercial or financial affairs ... [18 Sept., p.10]

While there was no public interest component of the exemption it was to be read in the light of the Act's objects. Therefore in relation to the possible future detriment to the supply of business and other information to an agency, such detriment as might reasonably flow from the disclosure must outweigh the public interest in access to information. There must be an 'unreasonable adverse effect' in order for the exemption to apply (18 Sept., pp.11-12).

When all of the documents had been considered the claimed exemption was upheld in 11 cases and dismissed in 21 cases.

Clause 9 — internal working documents

A number of documents were considered in terms of their impact on 'frankness and candour' within the EPA. One involved comments about internal conflicts within the EPA and expressed opinions about a particular council and an MP. The EPA's witness claimed such information should be exempt because it acted to

> ... allow internal conflict to be identified and dealt with before it could impinge on decision making ... and it allows the decision maker to be aware of local considerations or attitudes and personalities which could have an impact on the decision ultimately made. [18 Sept., p.18]

The claim was upheld, although the appellant did not press the point.

A second document consisted of a briefing note for the Minister with some handwritten comments by the Director General of the EPA on the bottom. The exemption was claimed for these handwritten notes. It was argued a Minister who receives many such briefing notes is assisted by comments given in a 'pithy and direct way' so as to enable the Minister to get the gist of the document without going in to its contents (18 Sept., p.19). I suppose the Minister still reads the full briefing notes?

The evidence was that the Director General would be reluctant to continue this practice if the document was released — he would apparently still make the comments but not in writing.

In considering this exemption, which was sought in relation to a number of other documents on the same basis, Her Honour had regard to the document itself and the other documents which had been released or were to be released pursuant to her orders.

The claim was upheld on the basis the deision-making process would be impeded or impaired if such comments were inhibited (18 Sept., p.20).

Clause 4 — prejudice to law enforcement

Two documents were considered here on the basis that it was necessary to show a 'reasonable expectation' of prejudice. The Court was satisfied prejudice was made out.

Clause 10 — legal professional privilege

There was no doubt the documents sought attracted the privilege but it was claimed it had been waived on an earlier occasion.

The waiver claim arose out of the earlier litigation by the appellant in this case against the Minister in the Land and Environment Court, when the documents sought were produced for inspection under subpoena.

The appellant claimed the *Evidence Act 1995* (NSW) acted as a code (it doesn't according to federal and State authorities) and that s.122 provided the means of determining if waiver had occurred.

On the facts surrounding the subpoena of the documents for the earlier case the court was satisfied there was no voluntary and knowing disclosure so as to amount to a waiver (18 Sept., p.28).

Costs

The appellant claimed costs should follow the event. The EPA argued the *FoI Act* made no provision for costs orders and as Her Honour had ruled that the matter was to proceed without a strict application of the rules of evidence the Court was excluded from considering a costs order.

It was held the Court had a general power to award costs in civil proceedings but the appellant argued such an order was not consistent with the spirit of the *FoI Act,* which involves making information available at the lowest reasonable cost. In addition to make costs orders might discourage people from pursuing matters in the Court (18 Sept., p.24).

In the event, Her Honour decided that as neither part was 'clearly "successful"', as claimed exemptions were not subsequently pressed following her first decision, and as the lawfulness of the tests used by the EPA had not previously been tested and her decision may be appealed it was considered not appropriate to make an order for costs.

Conclusions

This will probably be one of the last District Court decisions dealing with FoI matters as the new Administrative Decisions Tribunal commenced operations in NSW on 6 October 1998. The ADT will take over the review function.

Judge Ainslie-Wallace has given an important decision which has the potential to narrow the claims for exemption made by public agencies and advance the interests of the citizens seeking information from those who govern them.

It is hoped the ADT will be as committed to advancing the cause of access to information as Her Honour was in this case.

[P.W.]

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

MANN and THE MEDICAL PRACTITIONERS BOARD OF VICTORIA
(1997) 12 VAR 142

Decided: 20 August 1997 by Presiding Member Coghlan.

Part 5 — amendment of personal records.

Factual background

The *Medical Practice Act 1994* establishes a complaints procedure under which a person may lodge a complaint with the Medical Practitioners Board of Victoria (the Board) regarding the professional conduct of a medical practitioner.

On 5 June 1996, a complaint was lodged with the Board regarding Mann's professional conduct. The complaint related to, amongst other matters, the language used by Mann in correspondence with the complainant.

On 3 October 1996, the Board considered the complaint. The Board found that the matters raised by the complaint did not constitute unprofessional conduct, but that the language used by Mann in the correspondence was 'intemperate'. The Board's findings were recorded in the Minutes of the Board's meeting.

On 8 October 1996, the Board sent letters to both Mann and the complainant to inform them of the Board's findings. These letters stated that the Board had found that the matters raised by the complaint did not constitute unprofessional conduct, but that:

- the Board had found the language used by Mann was intemperate; and
- accordingly, the Board advised Mann to desist from using such language in the future.

Procedural history

On 30 December 1996, Mann requested that the Board amend the Minutes and delete the matters contained in the dot points in the previous paragraph pursuant to s.39 of the Act. On 24 January 1997, the Board informed Mann it had decided not to accede to Mann's request. Mann sought review of this decision by the Tribunal under s.50(2)(e) of the Act.

The decision

The Tribunal affirmed the decision of the Board.

Reasons for the decision

Part 5 of the Act provides for the amendment of personal records. Section 39 of the Act provides that an individual may request the correction of information relating to his or her personal affairs where that information is 'inaccurate, out of date, or where it would give a misleading impression'. The rationale of s.39 is to prevent third parties who are reading the information from getting the wrong impression.

The Tribunal considered the principles that apply to the operation of s.39 of the Act. Section 39 allows individuals to seek correction of documents that contain personal information that is factually incorrect. Section 39 can also be used to correct documents that contain personal information of an opinion kind (see *Re Stephens and Victorian Police* (1988) 2 VAR 236; (1988) 15 *FoI Review* 28 and *Re Buhagiar and Victorian Police* (1989) 2 VAR 530; (1989) 21 *FoI Review* 32). In *Re Stephens* and *Re Buhagiar*, the Tribunal held that information of an opinion kind ought to be amended under s.39 where:

> the facts underlying such opinions have been thoroughly discredited or have been demonstrated to have been totally inadequate;
> - the person forming such opinion was tainted by bias or ill-will, incompetence or lack of balance or necessary experience;
> - the factual substratum underlying the opinion is so trivial as to render the opinion formed dangerous to rely upon and likely to result in error; or
> - the facts upon which the opinion was based were misapprehended.

However, the Tribunal also considered the limits of the application of s.39 in respect of information of an opinion kind. In particular, s.39 cannot be used to challenge or review an opinion with which an applicant is dissatisfied. Similarly, s.39 cannot be used to make amendments so as to simply substitute the applicant's opinion for the opinion of the author of the document. Section 39 also cannot be used to deal with matters of jurisdiction, such as whether or not the author of an opinion actually had the power to express such an opinion (*Re Setterfield*).

In applying these principles to the present circumstances, the Tribunal held that the information expressed in the Minutes and in the letters was not incomplete, incorrect or misleading such as to justify deletion or annotation under s.39 of the Act.

In coming to that conclusion, the Tribunal found that the Minutes and the letters accurately expressed the Board's opinion and findings at the time. The Tribunal also stated that a 'a fair reading of the material makes it clear that the Board did not find any unprofessional conduct' and that 'even if one regarded [the Board's comments] as a reprimand in the form of a rebuke, it is hard to see that the material gives a misleading impression that there has been a hearing and a finding of professional misconduct'. The Tribunal also