Katrina - please PA (C54)

Issued
21/2/97
KM.

cc Departmental Board
Members
Mr Briant
Mr Gamble
Mr Haire
Mr Smith(IDB)

21 February 1997

TO: Secretary

FROM: Ashley Ray (CMB)

DISCLOSURE OF ADVICE TO MINISTERS

Purpose

1. The purpose of this note is to provide advice, and draft reply on Mr Carvill's note (and attachments) of 27 January 1997 to Mr Semple.

Issue

2. The issue raised by Mr Carvill concerns the disclosure stance taken in the Code of Practice on Access to Government Information on the "confidentiality" of officials' advice to Ministers and the discovery of such written advice in legal proceedings.

3. Mr Carvill's note explains his understanding, based on certain sections of the above Code and on custom and practice, namely that disclosure of civil servants' advice to Ministers was "confidential" and that its disclosure could be detrimental to open and frank discussions between Ministers and their officials. The line which Mr Carvill had followed, and which I suspect other Departments would have followed, is that officials' advice to Ministers is not volunteered.

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4. The judicial review case which involved DENI resulted in provision of such information to the court. This was done on the advice of DENI's Counsel.

Interpretation

5. In my view, the Code of Practice establishes a procedure which should be followed in deciding which information should be **volunteered** to meet Open Government principles. The Code does not provide a legal protection to non-disclosure if a court decides to seek specific documents which would not normally be released under the Code. The disclosure of such information is a matter for decision by the relevant Department on a case-by-case basis and in the light of legal advice.

DED Experience

6. I have canvassed colleagues within the DED Group and have been advised that information on "confidential" advice to Ministers was provided on a number of occasions where the Department was involved in legal proceedings. These are detailed in Annex I attached below.

Judicial Review

7. I have attached, at Annex II, Mr Gamble's response to my request for advice on Mr Carvill's note. In addition to providing a detailed explanation of a particular case, Mr Gamble makes important points about judicial reviews. I have incorporated his views in the draft response at Annex III below.

Response

8. Attached, at Annex III, is a draft response for consideration.

Ashley Ray

ASHLEY RAY

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Annex I

DED INSTANCES WHERE "CONFIDENTIAL" ADVICE WAS REQUIRED BY, AND DISCLOSED TO, COURTS

I **1989 JUDICIAL REVIEW OF A CERTIFICATE ISSUED BY THE SECRETARY OF STATE UNDER SECTION 42 OF THE FAIR EMPLOYMENT ACT 1976**

1. The certificate had been applied for by NIE (then in the public sector) in order to prevent investigation by the Fair Employment Agency of a complaint by John Tinnelly and Sons of Newry that NIE had discriminated against it in the award of a contract.

2. Discovery of documents was granted for the purposes of the review. This meant that the Department had to release to the other side all papers bearing on the matter. These included everything from exchanges of minutes between officials in DED and inter-departmental exchanges to minutes of meetings and submissions to the Secretary of State. In the particular circumstances of the Tinnelly case, part of the contents of the papers was able to be withheld on public interest immunity (PII) grounds: a PII certificate had to be issued to achieve that. (Even then officials recall that the judge insisted on seeing some (or maybe all) of the edited papers in their undoctored form.) There was no question that a general argument based on preserving the confidentiality of advice given to Ministers provided any protection against disclosure.

II **THE [redacted] CASE**

3. [redacted] had her employment terminated on 26 June 1987 when she reached 60 years. She claimed that in failing to implement the Equal Treatment Directive, the UK, on the basis of the Francovich case, became liable in damages to her for the losses she sustained.

4. The UK considered it had implemented the Directive by the 1975 Sex Discrimination Act and the corresponding 1976 Northern Ireland Order. However, subsequent decisions by the European Court of Justice, in particular Marshall No 2 of August 1993, resulted in the UK having to amend its legislation to remove the provisions allowing different retirement ages for men and women. The Northern Ireland amendment came into operation on 26 January 1989 after Mrs Porter's employment had been terminated. After due consideration and advice from senior Counsel, Ministers, including the Secretary of State and the Attorney General, agreed that the case "be settled" before it came to hearing. The Department obtained DFP approval on 22 June 1995 to make an ex-gratia payment, including legal costs, of not exceeding £100K.

5. Whilst the case was "settled" before it came to a hearing, the court had requested discovery of documents. The documents required by, and submitted to, the court included exchanges between officials and Ministers.

III DELOREAN: DED V ARTHUR ANDERSEN

6. In the DED v Arthur Andersen case which has been ongoing in the US Courts since 1985, a substantial number of confidential submissions providing advice to Ministers and copies of Cabinet papers were obtained by the defendants during the discovery process.

(These cases were, of course, well before the Scott report and the requirement for this degree of disclosure in court cases therefore owes nothing to Scott. The requirement for disclosure owes nothing to the Open Government guidelines either, since the above cases preceded them too.)

Annex 4

cc Mr Gibson
Mr Templeton

19 February 1997 APU 20.2.97

To: Ashley Ray

From: R Gamble

DISCLOSURE OF ADVICE TO MINISTERS

1. Thank you for copying me these papers originating from Pat Carvill about the disclosure of advice to Ministers during a judicial review (the Oakwood case).

2. I have some personal experience of this area, from a 1989 judicial review of a certificate issued by the Secretary of State under Section 42 of the Fair Employment Act 1976. The certificate had been applied for by NIE (then in the public sector) in order to prevent investigation by the Fair Employment Agency of a complaint by John Tinnelly and Sons of Newry that NIE had discriminated against it in the award of a contract.

3. Discovery of documents was granted for the purposes of the review. This meant that the Department had to release to the other side all papers bearing on the matter. These included everything from exchanges of minutes between officials in DED and inter-departmental exchanges to minutes of meetings and submissions to the Secretary of State. In the particular circumstances of the Tinnelly case, part of the contents of the papers was able to be withheld on public interest immunity (PII) grounds: a PII certificate had to be issued to achieve that. (Even then the judge insisted on seeing some (or maybe all, I don't recollect precisely) of the edited papers in their undoctored form.) There was no question that a general argument based on preserving the confidentiality of advice given to

Ministers provided any protection against disclosure. The Tinnelly case was, of course, well before the Scott report and the requirement for this degree of disclosure in court cases therefore owes nothing to Scott. It owes nothing to the Open Government guidelines either, since it preceded them too.

4. I therefore agree with the line you are taking in your note to the Secretary. What has to be disclosed in the context of court proceedings and what should be offered to enquirers under Open Government guidelines seem to me to be two entirely different things, and should not be considered in the same breath, as Pat Carvill is doing. I do not think that DENI's experience in the Oakwood case was anything new, as indicated above. Where I do think that Pat Carvill may have a point is when he talks about the apparent ease with which judicial reviews are obtained. The more frequent these become the more the internal decision-making processes of Government will become effectively open and the more the candour of written advice to Ministers may be compromised. But if that was thought to be a real problem, Government would probably need to do something to limit the frequency of judicial review (the judiciary seems unlikely to do so itself) rather than to seek to restrict disclosure. Once court proceedings of any kind are launched, it is hard to see how any material evidence could be justifiably withheld except through devices such as IIP certificates, which are themselves very controversial.

R Gamble

R GAMBLE

·DEPARTMENT·OF·ECONOMIC·DEVELOPMENT·
An Equal Opportunities Organisation

Annex III

DRAFT RESPONSE TO MR CARVILL

TO: Pat Carvill (DENI)

FROM: G Loughran (DED)

cc PS/Sir David Fell
NI Perm Secretaries
Departmental Board Members
Mr Briant
Mr Gamble
Mr Haire
Mr Smith(IDB)

DISCLOSURE OF ADVICE TO MINISTERS

1. Thank you for sight of your note to John Semple on this topic.

2. Attached, at Annex I, three instances are described in which, because of legal proceedings, we were required to disclose documents containing "confidential advice" to Ministers.

3. Like you, my initial reaction, for the reasons you have highlighted, is not to volunteer "confidential advice". Also, like you, I am not aware of any post-Scott guidance, or precedent, which would suggest alternative action.

4. I believe that we should continue to be cautious about volunteering documents which deal with "confidential advice" to Ministers. Indeed, I would read the Code of Practice as signalling such caution. However, when it comes to court action I believe that your experience, and ours, clearly points to the need for a case-by-case decision. Legal advice is needed in the first instance on what should be released to the court. If the court is dissatisfied with the response to its discovery request, legal advice should again be sought as to whether further documents should be released and, of course, on the attendant risks of whatever action is proposed.

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5. If there is to be a change to the approach outlined above and, if requested by a court in relation to discovery of documents, the system at large should automatically volunteer the "confidential advice" officials provide to Ministers, then I would hope that John Semple and his people would provide views (including Whitehall views) which we could then debate collectively before departing from present practice.

6. Your note raises the issue of the ease with which judicial reviews can be obtained. The more frequent these become the more the internal decision-making processes of Government will become effectively open and the more the candour of written advice to Ministers may be compromised. But if that was thought to be a real problem, Government would probably need to do something to limit the frequency of judicial review (the judiciary seems unlikely to do so itself) rather than to seek to restrict disclosure. Once court proceedings of any kind are launched, it is hard to see how any material evidence could be justifiably withheld except through devices such as Public Interest Immunity (PII) certificates, which are themselves very controversial. I have commented on this issue as it may be appropriate to cover it in any collective debate.

G LOUGHRAN