VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

BROG AND DEPARTMENT OF THE PREMIER AND CABINET (No. 870660)

Decided: 3 July 1989 by Deputy President J. Galvin.

Review of market research studies conducted by the applicant — access to draft report refused under s.30 — whether author of report 'an officer'

Between 1984 and 1986 Mr Brog carried out major studies for the Victorian Government at considerable cost to the taxpayer. The Government's Effectiveness Review Committee as part of a standard verification process appointed an evaluation group to review his work. A final report was submitted to the respondent in September 1987 following which solicitors acting for the applicant sought access to a copy of the first draft report. Access was denied on the grounds that the report was exempt under s.30. A second draft report had been made available to the applicant because the respondent regarded it as substantially similar to the final report, which had been made public.

The Tribunal began by looking at the term 'officer' which is defined in s.5 to mean 'a member of the agency, a member of the staff of the agency, and any person employed by or for the agency . . .'. The evaluation group comprised the University of Melbourne through its Centre for Applied Research on the Future and a Ministerial adviser. The Tribunal found that the University was an 'officer' as it considered that a corporate entity could be a 'person' for the purposes of s.30. It was further satisfied that the report contained information in the nature of opinion and advice which represented the deliberations of the evaluation group, therefore satisfying the requirements of s.30(1)(a). In establishing the public interest requirement, s.30(1)(b), the respondent relied on the following grounds:

- the draft report had an inherent character that brought it within the ambit of s.30;
- the release of the draft report, where a final report had been published, had the potential for mischief or would undermine confidence in the final report;
- release of the draft report would have the consequence of disclosure of information which was either considered to be inaccurate or which lacked adequate verification or relevance.

Referring to the previous cases of *Birrell and Department of the Premier and Cabinet* (1986) 1 VAR 230 and *Re Borthwick and Health Commission of Victoria* (1985) 1 VAR 25 which held that it would be contrary to the public interest to release the preliminary thoughts of the advisers, the Tribunal stated:

> I do not take the cases cited to be authoritative for the proposition that a draft is necessarily exempt because all drafts of their nature are exempt. The Tribunal must look at every document individually in order to assess its exempt status. It is reasonable to conclude no more from the authority than that there is a likelihood of exemption in such cases.

Looking at the report, the Tribunal held that in the present case, it would be contrary to the public interest to release those parts which were not already in the public domain. In the absence of accompanying material, they would have the potential for misconstruction, confusion and undermining confidence in the final report.

The Tribunal then considered the application of s.30(3) and noted that material was not purely factual 'if its release would have the consequence of disclosing what is not factual and what the legislation aims to exempt'. Accordingly, the Tribunal only ordered the release of those parts of the first draft that were repeated in the second or final drafts or were purely factual material that could be severed from the documents.

[K.R.]

E.L. YENCKEN AND CO. PTY LTD and MINISTRY FOR PLANNING AND ENVIRONMENT (No. 2)
No. 880799

Decided: 5 July 1989 by R. Howie (Member).

Applicant successful in AAT proceedings — application for costs under s.58(2) — relevant considerations in the exercise of the Tribunal's discretion.

In earlier proceedings before the AAT the applicant was successful in obtaining an order which overturned a decision of the Ministry not to grant it access to documents. Having obtained a favourable order, an order for costs was sought under s.58 which provides:

> (1) Subject to subsection (2), in any proceedings before the Tribunal arising under this Act the costs incurred by a party shall be borne by that party.
>
> (2) The Tribunal may order that the costs incurred by an applicant in the proceedings shall be borne by the person who made the decision under review.

The Tribunal had the benefit of a number of authorities which had considered the circumstances in which it should exercise its discretion to award costs against a respondent. After reviewing these authorities, the Tribunal concluded that costs would usually be awarded against a respondent where it had unreasonably withheld material, had acted in bad faith or in a way that warranted censure or where the issues before the Tribunal were of such a novel, complex or important nature that there was a public benefit extending beyond the immediate parties in having them properly argued by legal advisers.

On behalf of the applicant it was contended that the delay by the Ministry in answering the request and complying with AAT procedural requirements was the kind of conduct that merited a costs order against the Ministry. While the Tribunal conceded that the Ministry had been guilty of some delay, it ruled that the Ministry's conduct was not of a magnitude that justified an adverse costs order, particularly in light of the large number of documents that were processed in answering the request. Further, the release of documents to the applicant shortly before and during the hearing did not, in the Tribunal's opinion, deserve censure as the practice appeared to be common in litigation. As the applicant also failed to persuade the Tribunal that there were any novel or complex issues raised during the hearing, it was in the end unsuccessful in obtaining an order of costs against the Ministry.

[P.V.]