VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

FOGARTY and OFFICE OF CORRECTIONS AND HEALTH DEPARTMENT
Nos 980628 and 871082
Decided: 4 July 1989 by Judge Jones (President).
Request by applicant for documents relating to his detention in prisons and youth training centres — claims for exemption under ss.30 and 31 — operation of s.31(2).

The applicant sought access to a number of documents relating to his detention in prison and youth training centres. The documents broadly came within two categories: documents relating to the security rating and placement of the applicant in prison (which was the responsibility of the Classification Committee) and documents relating to proceedings before the Adult Parole Board. After reviewing the functions of both bodies the Tribunal concluded that the provision of full and frank information was vital to their effective operation. Disclosure would affect the extent and quality of information received and would also lead to prison staff and others being reluctant to provide information in the future. The Tribunal noted that this could only have a prejudicial effect on the operation of the classification system and the proper management of prisons and prisoners.

A number of the documents in dispute were psychiatrists' reports. In preparing these reports the psychiatrists were in the difficult position of being responsible not only to the Classification Committee or the Adult Parole Board but also to the prisoner himself. The Tribunal pointed out that this situation did not sit comfortably with the doctor-patient relationship. It also created a difficult environment to work in, and would be made even more difficult, if the reports were routinely disclosed.

Section 31(1)(a) was the main exemption provision in dispute. This section provides:

> (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would reasonably be likely to —
>
> (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance . . .

The Tribunal was satisfied that the phrase 'administration of the law' embraced the administration or management of prisons and prisoners and the classification and parole of prisoners. It ruled that a number of the disputed documents, including reports prepared by psychologists and psychiatrists on the applicant and parole officers' reports were exempt under s.31(1)(a).

The applicant had contended that s.31(2) applied to negate the operation of s.31(1). Section 31(1) does not apply to a report on the degree of success achieved in any program adopted by an agency for investigating breaches of, or enforcing or administering, the law (s.31(2)(d)). The Tribunal was not aware of any authority on the interpretation of this provision. The documents in question were created in the course of the process of classifying the applicant in prison. They reviewed the applicant's condition and provided advice and opinions on his management and placement. The Tribunal ruled that these reports did not concern the degree of success achieved in the program of classification. Moreover, s.31(2) only applied 'if it is in the public interest that access to the document should be granted under this Act'. The public interest in ensuring the safety and good order of prisons and prisoners and maintaining the effectiveness of the Parole Board and the Classification Committee outweighed, in the Tribunal's opinion, any public interest in favour of disclosure. Similar reasoning was applied by the Tribunal in refusing to exercise its discretion under s.50(4) — to release the documents in the public interest. The formal decision of the Tribunal was to set aside the respondents' decision on four documents and order their release to the applicant, and that the respondents' decisions otherwise be affirmed.

[K.R.]

REES and LEGAL AID COMMISSION
No. 890471
Decided: 5 July 1989 by R. Howie (Member).
Documents relating to custody proceedings between applicant and his wife — claim for exemption under s.33 — whether disclosure unreasonable.

The applicant had been involved in acrimonious custody proceedings with his wife and subsequently sought access to information relating to her legal representation. The applicant gave evidence that he wanted the information to know 'how much taxpayers' money has been wasted' in providing legal assistance to his former wife.

The Tribunal ruled that the documents in dispute — dates of attendances upon legal advisers, duration of attendances, matters discussed at these attendances and associated costs — related to the personal affairs of the applicant's former wife. In order to satisfy the exemption the respondent also needed to prove that disclosure of the documents to the applicant would be unreasonable. The Tribunal concluded that 'a high value should be placed on the right of any person to attend upon his or her legal advisers and for the fact of such attendances, their frequency, duration, and purpose to be treated as confidential'. Disclosure would therefore be unreasonable in the circumstances, and the decision of the respondent was accordingly affirmed.

[P.V.]

BARNETT and HEALTH DEPARTMENT
No. 880419
Decided: 13 July 1989 by Deputy President J. Galvin.
Psychiatrists' reports concerning applicant prepared for Parole Board and Classification Committee — exemption claimed under ss.30, 31 and 35 — whether Tribunal should exercise its discretion to release the documents in the public interest.

Barnett had spent much of his life in psychiatric and penal institutions. While serving a prison sentence, he was certified and in April 1971

transferred to J Ward of Aradale Mental Hospital, Victoria from where he was not released as an outpatient until October 1981. In November 1987 he sought access to his mental health records held by the Health Department. A number of documents were released to him but the Department refused to grant him access to five psychiatrists' reports which had been prepared either for the Parole Board or the Prisoners' Classification Committee. Barnett required the reports to prepare his defence to certain criminal charges and in relation to his concern that he may have been 'lost in the prison system of Ararat Mental Hospital for at least ten years'. The Department claimed that the reports were exempt under ss.30(1), 31(1)(a), 31(1)(e) and 35(1)(b).

The Tribunal first directed its attention to the s.31 claim. This section provides:

> (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —
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> (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.
>
> . . .
>
> (e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.

There was no evidence before the Tribunal to suggest that there was any likelihood of prejudice to the investigation of a breach or a possible breach of the law. The only issue was whether release of the information would or would be reasonably likely to prejudice the proper administration of the law. The phrase 'administration of the law' has been interpreted to embrace the management of prisons and prisoners and the classifications of prisoners: *Haigh and Health Commission of Victoria* (County Court, 19 June 1984, unreported) and *Mallinder and Office of Corrections* (1989) 20 *FoI Review* 16). Following the *Mallinder* decision, the Tribunal held that disclosure of the reports would be reasonably likely to prejudice the proper administration of prisoners and the prison classification system and upheld the exemption claim. However, it rejected the s.31(1)(e) claim, ruling that the weight of evidence was insufficient to conclude that disclosure of the reports would result in danger or even a real chance of danger to anyone.

Turning to ss.30 and 35(1)(b), the Tribunal focused on whether disclosure would be contrary to the public interest. It took the view that there was an important public interest in the protection of psychiatrists who work in the prison system. The competing public interest was knowing whether a person had been wrongly detained in a State institution for a substantial period of their life. In this case, after reviewing the applicant's history of detention, the Tribunal ruled that the public interest in knowing why Barnett was held in custody for so long outweighed any competing public interest. Accordingly, both exemption claims failed.

The same public interest considerations prompted the Tribunal to exercise its discretion under s.50(4) to release most of the information in the reports, despite upholding the s.31(1)(a) exemption. It ordered that apart from the names, qualifications, descriptions and titles of the authors, the reports in dispute be released to Barnett.

[K.R.]

PROSPECTORS' AND MINERS' ASSOCIATION OF VICTORIA and DEPARTMENT OF INDUSTRY, TECHNOLOGY AND RESOURCES
No. 880578
Decided: 8 August 1989 by E.L. Cooney (Member).
Orders made by Governor in Council under Mines Act 1958 exempting land from miners rights claims — access sought to documents leading up to decision being made — claims for exemption under ss.28, 30 and 34.

The applicant, an association of miners involved in small scale prospecting and mining was aggrieved by Orders made by the Governor in Council in February 1986 exempting 20,000 hectares of land from miners rights claims. The effect of the Orders was to facilitate the preliminary exploration of land in Horsham, Victoria by a multinational mining company, CRA Ltd.

The first group of documents in dispute included a submission by the Minister for Industry, Technology and Resources to Cabinet, a draft of the submission and file notes detailing Cabinet's decision on the Horsham development, all of which were claimed to be exempt under s.28.

Section 28 provides:

> (1) A document is an exempt document if it is —
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> (a) the official record of any deliberation or decision of the Cabinet;
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> (b) a document that has been prepared by a Minister for the purpose of submission for consideration by the Cabinet;
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> (c) a document that is a copy of, or contains an extract from, a document referred to in paragraph (a) or (b); or
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> (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

At the commencement of proceedings, the Secretary to The Department of the Premier and Cabinet tendered a certificate under s.28(4) certifying that the documents in dispute were of a kind referred to in s.28. However, the failure of the Secretary to specify the heads of exemption under s.28 which were relied upon led to the Tribunal rejecting the certificate. Its rejection of the certificate was based upon a comment made by the Full Court of the Supreme Court in *R v Kelly: Ex parte Victorian Public Service Board* [1985] VR 825 that the certificate must assign the documents specified to one of the categories mentioned in s.28(1). A second certificate satisfying this requirement was tendered by the Secretary and admitted into evidence by the Tribunal over the objection of the applicant.

Turning to the substantive arguments, the Tribunal had little difficulty in upholding the s.28 claim. Evidence led by the Department proved to the Tribunal's satisfaction that the Cabinet submission had been presented to the Minister, read and approved by him, and then prepared in a special format for Cabinet's consideration. This was sufficient for the Tribunal to find that the submission had been 'prepared by a Minister' as required by s.28(1)(b) for consideration by the Cabinet. It also ruled that file notes written by an officer of the respondent which detailed the decision of Cabinet fell within the terms of s.28(1)(d).

The second group of documents comprised an options paper prepared by a departmental officer for his Minister, correspondence between CRA and the Department and a briefing note prepared for the

Minister. Exemption claims were raised under ss.30 and 34.

The options paper contained information provided by CRA to the Department and possible strategies that the Minister might follow in light of the information. The information in question was of a technical and financial nature concerning CRA's application for mining exploration. Having found that this information was acquired from a business undertaking and related to matters of a business, commercial or financial nature, the Tribunal upheld the s.34 claim. So far as the balance of the document was concerned, the Tribunal accepted the s.30 claim made by the respondent. The function of administering the *Mines Act* and assessing courses of action available under the legislation was considered to be part of the deliberative processes of the respondent. On the public interest issue, the applicant relied upon claims that the exemption order was *ultra vires* and that CRA was a foreign company acting to the detriment of local miners. These and other public interest factors relied upon by the applicant were rejected by the Tribunal which instead accepted the respondent's evidence that the information in question was still commercially sensitive and related to matters of ongoing concern between the Department and CRA, disclosure of which could adversely affect the State economy.

The remaining documents in dispute, namely correspondence between CRA and the Minister for Industry, Technology and Resources and a briefing note were also the subject of successful claims for exemption under s.34.

Finally, the Tribunal was left to decide whether it should exercise its discretion under s.50(4). For the same reasons advanced in deciding the public interest criterion in s.30(1)(b), the Tribunal ruled that disclosure was not required in the public interest and accordingly affirmed the decision under review.

[P.V.]

LEE and MINISTRY OF EDUCATION
Nos 860499, 870742-6, 880362, 880882-3
Decided: 16 August 1989 by Deputy President J. Galvin.
Amendment of records under s.39 — whether correction or amendment extended to destruction — whether information in applicant's files inaccurate, incomplete, out of date or misleading.

The applicant, pursuant to s.39 of the *Freedom of Information Act* requested that her records be destroyed, claiming they were misleading and discriminatory. Section 39 enables a person to request the 'correction or amendment of any part of that information where it is inaccurate, incomplete, out of date, or where it would give a misleading impression'.

The Tribunal held that there was nothing in the *FoI Act* to warrant the conclusion that destruction ceases to be an acceptable form of correction or amendment merely because it involves all and not only part of the information. Whilst it accepted that in their ordinary usage the terms 'correction' and 'amendment' would appear to contemplate something less than entire destruction, in view of the provisions of s.49 of the Act (which permits the destruction of documents with the consent of the Keeper of Public Records), destruction is a form of correction or amendment, albeit an extreme form.

The question also arose of when the failure to make a decision is deemed to be a refusal. Section 43 of the *FoI Act* provides that where a request is made pursuant to s.39, reasonable steps must be taken to enable the applicant to be notified of the decision 'as soon as practicable but in any case not later than 30 days after the day on which the request is received'. Section 53 of the Act refers to the time period provided in s.43 and says that when that time has elapsed, the principal officer of the agency or the Minister shall, for the purpose of enabling an application to be made to the Tribunal under s.50, be deemed to have made, on the last day of the relevant time period, a decision refusing to grant access to the document. Whilst it refers to s.43 and would thereby appear to intend the measure to have application to requests for correction and amendment, the last words of the sub-section confine its operation to access. The Tribunal, faced with the confusion presented by the provisions, turned to s.3(4) of the *AAT Act* which is as follows:

> For the purposes of an enactment that makes provision in accordance with this section for the making of applications to the Tribunal for review of decisions, a failure by a person to do an act or thing within the period prescribed by that enactment, or by another enactment having effect under that enactment, as the period within which that person is required or permitted to do that act or thing shall be deemed to constitute the making of a decision by that person at the expiration of that period not to do that act or thing.

The Tribunal stated that it may be the case that s.53 does not have application to requests for correction and amendment. However, s.3(4) of the *AAT Act* did apply and upon the expiration of 30 days from the applicant's request (made on 28 June 1986) a decision refusing it was deemed to have been made. The deemed refusal therefore predated the applicant's application.

Turning to the amendment application, the Tribunal stated that it is not the purpose of s.39 to rewrite a document in words other than those of its author so as effectively to substitute an applicant's opinion for the author's opinion. Such a course goes beyond the correction of inaccuracy or inadequacy to the extent contemplated by the section (*Traynor and Melbourne and Metropolitan Board of Works* 2 VAR 168, 190). In the present case the Tribunal was not persuaded that any of the information contained in the applicant's files was inaccurate, incomplete, out of date or misleading.

[K.R.]

MARKULIS and VICTORIA POLICE
No. 689/1353
Decided: 22 September 1989 by Deputy President J. Galvin.
Crime Stoppers initiative — information provided to police under initiative leading to investigation of applicants — access sought to details of information — claim for exemption under ss.31 and 35.

This case involved the initiative known as Crime Stoppers. As a result of information received by Crime Stoppers from an unidentified informant, a search warrant was issued and a search conducted at the Markulis' home early in the morning on 22 December 1988. The search did not reveal any cause for further police action to be taken. The applicants were, however, greatly aggrieved at the invasion of their privacy and the resulting embarrassment.

In an endeavour to discover the identity of the informant, Mrs Markulis wrote to the Freedom of

Information Officer at Victoria Police requesting a copy of the relevant Crime Stoppers' file. The FoI Officer denied access to the file under ss.31 and 35 because of the undertaking given by the police that the information received would be kept in confidence and anonymity. Upon internal review the decision of the FoI Officer was upheld.

Victoria Police relied upon ss.31(1)(c) and 35(a)(a) and (b) of the *FoI Act*. It told the Tribunal that since the Crime Stoppers program commenced, anonymity and confidentiality had been constantly stressed. Whilst sensitive to the serious concerns of the applicants, the Tribunal was conscious that there were potentially grave consequences to an important criminal investigatory aid should the file be disclosed. Having regard to the nature of the Crime Stoppers' program and the assurances which attended its promotion, and to the fact the report in the case was anonymous, the Tribunal held that the document in dispute was within s.35(1).

It remained to be considered whether the disclosure of the information would be contrary to the public interest, in that it would be reasonably likely to impair the ability of the Victoria Police to obtain similar information in the future. Acknowledging that the Markulis' experience had been a serious and regrettable matter, the Tribunal nevertheless ruled that the possible injustice to the Markulis family was outweighed by the magnitude of undermining an initiative which had proven to significantly contribute to the detection of criminals in Victoria, should the documents be released in this instance.

[K.R.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

BURCHILL and DEPARTMENT OF INDUSTRIAL RELATIONS
No. V88/584
Decided: 15 March 1989 by Deputy President B.M. Forrest.
Commonwealth submission to Remuneration Tribunal — claim for exemption under ss.34(1)(d) — conclusive certificate issued under s.34(2) — application made to exclude applicant's legal representatives — nature of Tribunal's power under s.58C.

The applicant had sought access to the Commonwealth Government submission to the Remuneration Tribunal on the subject of parliamentary salaries.

Access to the document was refused, with the respondent relying on a number of exemption provisions including s.34, the cabinet documents exemption. Further, the Secretary to the Department of Prime Minister and Cabinet had issued a conclusive certificate under s.34(2) certifying that the submission was a document of a kind specified in ss.34(1)(c) and (d). During the course of proceedings, counsel for the respondent indicated that he proposed to lead evidence from the Director of the Cabinet Office relating to the decision-making process of Cabinet which led to the submission being prepared. An order was sought from the Tribunal excluding the applicant and his legal advisers while this evidence was being given.

Section 58C provides:

> (2) At the hearing of a proce ding referred to in sub-section 58B(1), the Tribunal —
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> (a) shall hold in private the hearing of any part of the proceeding during which evidence or information is given, or a document is produced, to the Tribunal by —
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> (i) an agency or an officer of an agency
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> . . .
>
> or during which a submission is made to the Tribunal by or on behalf of an agency or Minister, being a submission in relation to the claim
>
> (iv) in the case of a document in respect of which there is in force a certificate under sub-section 33(2) or 33A(2) or section 34 or 35 — that the document is an exempt document;
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> (3) Where the hearing of any part of a proceeding is held in private in accordance with sub-section (2), the Tribunal —
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> (a) may, by order, give directions as to the persons who may be present at that hearing; and
>
> (b) shall give directions prohibiting the publication of —
>
> (i) any evidence or information given to the Tribunal;
>
> (ii) the contents of any documents lodged with, or received in evidence by, the Tribunal; and
>
> (iii) any submission made to the Tribunal,
>
> at that hearing.

In support of its application the respondent relied on a number of authorities, including *News Corporation Ltd and others v National Companies and Securities Commission* 57 ALR 560 and *Hazan and Australian Federal Police* (1987) *FoI Review* 8. After examining these decisions the Tribunal concluded that they were not authority for the view that the Tribunal was compelled to conduct the hearing in private. It observed:

> To decide th question whether reasonabl grounds exist for the respondent's claim requires the matter be fully argued. . . . Counsel and solicitor for the applicant can only be of real assistance if aware of the evidence and any submissions on behalf of the respondent to be critically reviewed. That to my mind is a powerful consideration to be considered by the Tribunal in the exercise of its discretion in giving effect to the procedural requirement of s.58C(3) of the *FoI Act* and outweighs the argument based on the content of the evidence the respondent proposed to lead.

The Tribunal considered that the exclusion of the applicant was sufficient to safeguard the confidentiality of the documents and the evidence to be lead. It declined to accept undertakings of non disclosure offered by the applicant's legal representatives in view of the observations of Woodward J in *News Corp.* that such undertakings would be contrary to public policy.

Comment

The reluctance of the Tribunal to accept undertakings from the applicant's legal representatives stands in contrast to the regular acceptance of such undertakings by the Victorian AAT, albeit pursuant to a specific power (s.56(3)).

Following the handing down of this decision, the respondent appealed to the Federal Court. The court reversed the Tribunal's decision and ordered that the applicant's legal representatives be excluded from the hearing of evidence by the Director of the Cabinet Office. This decision will be reported in the next issue of *FoI Review*.

[P.V.]