–personal information in the 'public domain'	Schedule 1, Clause 3(3) & 3(4)	16/94
–prescribed details	Section 21	24/94; 4/95
–factor in favour of disclosure		21/94
practic of providing copies of submissions	Section 69	16/94
prejudice		
–meaning	Schedule 1, Clause 8(2)(b)	9/94; 10/94; 19/94 21/94
'prev nt th objects'	Schedule 1, Clause 11(1)(b)	10/94
public inter st test		
–meaning		1/94; 4/94; 18/94; 6/95
–scope		1/94;
–public interest and litigation		4/94
–public interest factors	Section 30	9/94
–public interest factors –s.30 notice		9/94
–public interest factors –weight accorded		9/94
–burden of proof		17/94
–public interest & private concern		26/94
r ason for seeking access		
–applicant's reasons for seeking access		4/94
r veal		
–meaning	Schedule 1, Clause 5(l)(b)	6/95
sch dul s		
–requirement for the preparation of	Section 30	10/94
separating 'political' issues from		
'gov rnment issues'		16/94
sol purpose test		
–application of 'sole purpose test'		2/94; 5/95; 8/95
substantial adverse effect		
–meaning	Schedule 1, Clause 10(l)	6/94; 25/94
Supr m Court		4/94
transf r of applications		
–procedures		5/94

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

LANCASTER and DEPARTMENT OF LABOUR (No. 92/20833)

Decid d: 3 February 1994 by Deputy President J.M. Galvin.

Access to documents relating to an investigation by the Deputy Director General of the Department of Labour into the applicant's conduct as an employee — ss.30(1), 33(1) and 35(1)(b).

The applicant was subject to an investigation by the Deputy Director General of the Department of Labour. This took the form of interviews with the applicant's work colleagues, in which assurances of confidentiality were given. Some of the allegations arising from these interviews were discussed with the applicant; others, relating to such matters as his frequent absence from work in the afternoon, were corroborated from file records.

As a result of the investigation, the privilege of flexible hours was withdrawn from the applicant. On the basis of his poor performance and on medical advice, his position in the public service was reduced one level, without loss of salary. The Department therefore maintained that its actions were not disciplinary but 'matters of "closer management" adopted in the public interest'. The Department also asserted that to release the names associated with the allegations and to disclose the withheld reports would prejudice its future ability to give assurances of confidentiality and impair the proper conduct of later, similar investigations.

Although the applicant acknowledged that he was in ill-health and not fit for work, he saw the investigation as part of a conspiracy to 'destroy his health and career'. He complained of a denial of natural justice in relation to the allegations. Some of the documents related to alleged misuse of government motor

vehicles on which the applicant had 'blown the whistle'. He sought the documents to assist his pursuit of legal proceedings against the Department and individual officers of it. He also submitted that release of the documents was in the public interest.

One of the 11 documents involved, four had been released save for the names of individuals attached to the allegations. In respect of these, the Tribunal held that the names were part of the information covered by the assurance of confidentiality and that, on the evidence, disclosure would be likely to impair the department's ability to obtain similar information in the future. Accordingly, the names were exempt from disclosure pursuant to s.35(1)(b).

In the case of the respondent's refusal to disclose documents in their entirety, the refusal was upheld in respect of three documents. These were said to fall within either or both the s.35(1)(b) exemption based on confidentiality and the public interest and the s.30(1) exemption protecting the deliberative processes of agencies and the public interest. The four documents which the Tribunal ordered released were edited to exclude names and titles (as protected by s.35(1)(b) and briefing notes and other reports preliminary to, or forming part of, the investigation, which were held to fall within s.30(1). The Tribunal commented on the importance of the opportunity for 'fullness and frankness' in documents integral to investigative processes.

Finally, the Tribunal considered whether there was a 'public interest' in accordance with s.50(4) which would over-ride the exemption conferred by the other sections. Again, on the basis of the need for fullness and frankness in investigative processes, it held that the public interest supported non-disclosure.

Comment

One of the supposed achievements of the *freedom of information* legislation was to enable an individual to know and answer the case against him/her — as a cornerstone of natural justice and defence against secretive, collusive or simply mistaken bureaucracy.

These cases exemplify the recent trend towards identifying 'the public interest' with the needs of bureaucracy rather than the rights of the citizenry, including individual citizens. They also look to an extrinsic 'public interest' rather than the public interest *in disclosure* which underpinned the 1984 Act.

[B.K.]

GIBBS and BAIRNSDALE REGIONAL HEALTH SERVICE (No. 93/32673)

Decided: 7 February 1994 by President Fagan J.

Access to document assessing the applicant's professional performance as a nursing supervisor — s.35(1)(b).

The applicant applied to the Bairnsdale Regional Health Service for access to a letter assessing her professional performance. The letter was written by two intern doctors and forwarded to the Chief Executive Officer of the hospital. On the basis of the criticisms it contained, the applicant was offered a voluntary departure package, which she took as an alternative to resignation.

The applicant submitted that she was entitled to a copy of the letter, having regard to its contents and the depth of her professional experience in comparison with that of the interns. The respondent based its refusal on s.35(b) of the *Fol Act 1984* exempting an agency from disclosure where such disclosure was likely to impair the ability of an agency or Minister to obtain similar information in the future and was contrary to the public interest.

In dismissing the application, the Tribunal held that to deter the staff of a small hospital, dependent on peer assessment, from putting their complaints in writing would be contrary to the public interest — especially when what was at stake was the quality of patient care. It also took account of evidence that the assessment was given and received in confidence. Other ingredients in the Tribunal's decision were:

- its implied acceptance of the hospital's position that the process was not disciplinary but managerial (despite its effect in terminating the applicant's employment); and
- the fact that no immediate practical disadvantage would flow from the decision to refuse access to the documents, given that the applicant had left the hospital service.

[B.K.]

AMR and VICTORIA POLICE FORCE (No. 93/074881)

D cid d: 17 August 1994 by M. Levine (Member).

Application for access to information and documentation on police file relevant to proceedings for rape in the Crimes Compensation Tribunal — s.33(1).

The applicant was a claimant in proceedings in the Crimes Compensation Tribunal (CCT) alleging rape by her brother and other unknown offenders. A confidentiality arrangement between the Victoria Police and the CCT prior to September 1993, under which police files were available to the Tribunal but not to applicants, had been superseded by a new protocol permitting access by applicants, subject to certain exceptions. One of these exceptions was for 'briefs not authorised for prosecution'.

As a result of statements by the applicant's brother (PR), recorded on the police files, the police decided not to prosecute. The magistrate constituting the CCT suggested to the applicant that she obtain the material on file so as to take account of it in presenting her case. Her request for access was made before the new protocol came into affect.

Having regard to the fact that a renewed request would activate the new protocol, the Tribunal resolved to determine the case in accordance with it.

The respondent submitted that the documents were exempt from disclosure on the s.33(1) ground that to release them would involve unreasonable disclosure of information relating to a person's personal affairs. The Tribunal inferred that 'the principle of unreasonableness may well be applied by the respondent in all cases where an interviewed person discloses personal affairs in an interview but is not subsequently charged with any offence'. It commented that 'such a broad brush approach to exempting documents cannot be accepted and each case will depend on its facts'. It also noted that PR's own views on disclosure of the file had not been sought, although such views would only have been one factor in the overall balance.

On the facts, the Tribunal held that, having regard to the information being sought; the purpose for which it was sought; the nature of the infor-

mation being disclosed; the circumstances in which it was obtained; the fact that the information had no current relevance to any investigations or matters which might be prejudiced (given the police decision not to prosecute); and the fact that the incidents referred to concerned the applicant and PR, the elements favouring release outweighed protection of PR's right to privacy. (Note, however, that such balancing of interests is not technically called for by s.33(1), except insofar as it may be relevant to the issue of 'reasonableness').

On the issue of confidentiality, the Tribunal suggested that no reasonable person in the position of PR could expect his statements to the police to remain confidential. The Tribunal also gave a narrow construction to the exception in the protocol for 'briefs not subject to prosecution', limiting these to completed investigations where there was a decision not to prosecute, not to investigations not proceeded with (as in the present instance).

Subject to the removal of names of third parties, the Tribunal ordered the release of the documents, which it held to be a necessary tool in the applicant's presentation of her case before the CCT. In this respect, and in contrast to cases involving agency internal reports into applicants' own conduct, the Tribunal gave considerable emphasis to the natural justice underpinnings of the FoI legislation.

[B.K.]

BILLINGHURST and OFFICE OF FAIR TRADING AND BUSINESS AFFAIRS
(No. 94/002599)

Decid d: 10 January 1995 by Deputy President J.M. Galvin.

Section 30(1) internal documents — s.31(1)(c) confidential information in relation to the enforcement or administration of the law — s.35(1) disclosure likely to impair the ability of the agency to obtain similar information in the future.

The applicant had a dispute with the Prospectors' and Miners' Association which had led to him being expelled from membership of the Association. Documents in relation to the dispute had been lodged with the Registrar of Incorporated Associations. The documents he was seeking were to assist him in challenging the validity of the expulsion.

The respondents alleged that all the information they possessed had been provided in confidence and no evidence was provided to contradict that. The Tribunal stated that the administration of the *Associations Incorporation Act 1981* could be characterised as an aspect of the administration of the law, and that documents that were provided that disclosed the identity of a confidential source fell within s.31(1)(c). In addition the Tribunal held that s.35(1) would have also covered some of the documents.

Some hand written notes of an investigator of the Office of Fair Trading were denied access on the ground of s.30(1). They were held to be internal documents, and the public interest being protected was the same interest as that protected by s.31(1)(c) and s.35(1).

The Tribunal held that there was no evidence to support a public interest overriding the exemptions under s.50(4), and affirmed the respondent's decision, save for the first line of a footnote to a document partly released to the applicant.

[K.R.]

DRANE and VICTORIA POLICE
(No. 94/023015)

Decided: 17 January 1995 by Deputy President Ball.

Section 30(1)(a) and (b) — internal working documents, s.33(1) — personal privacy.

The applicant, President of the Sporting Shooters' Association of Victoria (Inc) made two requests for access to police documents. The first request involved one document for review before the AAT, concerning the functioning of the administration of the Firearms Registry, an arm of Victoria Police Force. The second request involved 26 documents for review by the AAT and was directed to all reports and documents submitted by members of the Police Force concerning the *Firearms Act* review which had been conducted, at the request of the Victorian Government, in 1993.

The respondents relied on s.30(1)(a) to deny access to all the documents sought, and s.33(1) for one of the documents. The one document under the first request was a report prepared in 1991 which was held by the Tribunal to be an internal working document within the meaning of the Act, and it was not in the public interest to allow its release as it was 'out of date'. Similarly, all the documents in the second request, which included reports, submissions and briefing notes, were held to fall under s.30(1)(a) and (b), with the exception of one document. In addition one document, a report, also fell under s.33(1).

The Tribunal referred to a decision of Deputy President Galvin in *Pescott and Auditor-General of Victoria* (1987) 2 VAR 93 in which the Tribunal had stated that it did not appear 'to be the objective of the Act to provide a means of access to the preliminary exchanges of views and criticisms sought and calculated to assist in the evolution of a final report' (at 98). The Tribunal held in this case that the District Firearms Officers would in all likelihood respond differently in the future to a request for submissions if it was known that the submission would be available to the public, and that there would be less candour and a reticence in expressing personal opinions by members of the police if the information were not supplied to their superiors in confidence.

As one of the documents identified the names and addresses of two people, the Tribunal held that the document was of a personal nature and was exempt under s.33(1).

The one document that the Tribunal released, overturning the respondent's claim to the exemption under s.30(1)(a), was the final submission made by the Police Force to the Firearms Consultative Committee. The report had been made in response to public advertisements place in the *Age* and the *Sun*. The Tribunal followed the comment of Rowlands J in *Coleman and Director-General, Local Government Department, Pentland* [1985] 1 VAR 9 where he said that it was 'part of the public interest that those with an obligation to make a professional assessment record their final opinion in a considered form such as they are content to stand by if public scrutiny eventuates'.

[K.R.]

TILLEY and VICTORIA POLICE (Nos 93/46910 & 49603)

D cid d: 31 January 1995 by J. Pr uss (M mb r).

Section 30 — internal working documents; s.33 — personal privacy; s.32 — legal professional privilege; s.35 — communicated in confidence.

The applicant sought documents relating to his Petition for Mercy to the Governor. The respondent released a number of documents to the applicant but denied access to four documents, which were the subject of the review.

The context for the application was detailed in the decision of the Tribunal, which set out the circumstances under which the applicant was seeking the Petition for Mercy.

The first document was called the 'Dosser Report'; a report from Detective Inspector Dosser to another detective. The document had been released to the applicant save for specified paragraphs on the grounds of ss.30, 33 and 35(1)(b). The applicant stated that he wanted access to those paragraphs so that he could initiate a private prosecution, to prepare another Petition for Mercy and to Petition the Human Rights Commission in Switzerland. The Tribunal held that the release of the material in one of the paragraphs in the first document would not assist in those matters and that accordingly it was exempt under s.33. Another of the paragraphs was held by the Tribunal not to fall within the s.33 exemption, nor the s.35 exemption, nor the public interest part of s.30(1)(b), and other paragraphs and sentences were individually scrutinised, so that some of the paragraphs were released from the first document.

The second document was a formal record of interview between the police and a person involved in the original proceedings against the applicant. It was held to fall within s.33 and the Tribunal was not satisfied that the release of the material would assist the applicant in his objectives.

The final two documents were memoranda from the Victorian government solicitor to the Attorney-General in relation to the applicant's application for Mercy. Exemption was based on s.32. The Tribunal was satisfied that the material had been brought into existence for the *sole purpose* of providing legal advice, and was so exempt.

Finally, the Tribunal examined s.50(4) to see whether the public interest required the release of the documents , already found to be exempt, and did not find so.

[K.R.]

DAVID SYME & CO LTD and VICTORIA CASINO GAMING AUTHORITY (No. 94/038436)

Decided: 24 February 1995 by Deputy President Ball and A. Coghlan (Member).

- *Section 38 — secrecy provisions and s 50(4) — public interest override.*

The *Sunday Age* sought access to all documents relating to the assessments of bids and awarding of contracts for the temporary and permanent Melbourne Casino that the Victorian Casino Gaming Authority had created after 31 May 1993. This request was then narrowed to five specific areas:

1. the interim, June 1993 reports of the financial and planning sub-committees;
2. the final documents and reports of those sub-committees;
3. accompanying documentation to those reports or material responding to those reports and any other exchanges of material between the committees and the Authority;
4. material provided to the Government on assessment of the bids, including finance and planning assessment; and
5. any other reports or documents that assessed the financial or planning states of the bids of bidders since June 1993.

The Authority denied access and the applicant applied to the Tribunal for review of the decision.

Every document sought, had been claimed exempt under s.38 of the *Fol Act*. The secrecy provision that the respondent was relying on was section 151 of the *Casino Control Act 1991*. The Tribunal held that it was now well accepted, that to attract the exemption, the particular enactment must be expressed so as to relate specifically to the relevant information (*Federal Commissioner of Taxation v Swiss Aluminium Australia Ltd v Others* 66 ALR 159). The Tribunal was satisfied that the words in s.151 'with respect to the establishment or development of a casino' were sufficiently specific to attract the operation of s.38 of the *Fol Act*. One document had also been prepared for consideration by cabinet and was held to be exempt under s.28.

The Tribunal then looked as s.50(4) to determine whether there was a public interest requiring that access be given to those documents that had fallen under s.38. The emphasis was on the word 'requiring'. In the Tribunal's view, if it could have been established that there had been a breakdown in the licensing process, or if some illegality, impropriety or potential wrongdoing could be demonstrated, and the documents would reveal that, then it would be in the public interest to release the documents. However, on perusing the documents, the Tribunal was satisfied that they did not disclose anything about the licensing process, nor throw any light on the allegations referred to by the applicant.

Moreover, the Tribunal held that the nature of the activity itself, the size and scope of the casino licence and the use of a large and significant tract of public land could make the licensing process a matter of public interest; however, they weighed that against the fact that Parliament had given clear indications of its intentions about the release of secret information, through ss.151, 13 and s.142 of the *Casino Licence Act 1991*. As such, the possible public interest was outweighed by the stringent secrecy provisions and sensitive nature of the documents. The Tribunal was not satisfied that the public interest *required* access to be granted to the documents.

[K.R.]