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 —
>
> (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 —
>
> (i) an agency or an officer of an agency
>
> . . .
>
> 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;
>
> (3) Where the hearing of any part of a proceeding is held in private in accordance with sub-section (2), the Tribunal —
>
> (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.]

Federal Court

WISEMAN v COMMONWEALTH OF AUSTRALIA
No. G 167 of 1989, Full Court
Decided: 24 October 1989 by Sheppard, Beaumont and Pincus JJ.
Document provided by the wife of the applicant to the Defence Service Homes Corporation — claims for exemption under ss.41 and 45 — ascertaining whether an obligation of confidence existed.

In 1976 the appellant and his then wife mortgaged their jointly owned home to the Defence Service Homes Corporation (henceforth the Corporation). In 1981, following the dissolution of the marriage, the Family Court ordered the appellant to transfer his interest in the home to the former wife. She then asked the Corporation to consent to the transfer (pursuant to s.35 of the *Defence Service Homes Act* 1935). The Corporation required her to provide certain information to it, which she did in the form of certain documents. The information concerned her financial circumstances, the use to which she intended to put the home, and her intention of remarrying. In 1987, the appellant made application for these documents under the *Freedom of Information Act* 1982. The AAT found that they were exempt under ss.41 and 45 of the Act.

Section 41(1) provides:

> A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

The AAT found that the documents related to the former wife's personal affairs, taking as the test whether they contained information as to 'matters of private concern to an individual' (apparently applying *Re Williams and Registrar of the Federal Court of Australia* (1985) 3 AAR 529 and *Department of Social Security v Dyrenfurth* (1987) 80 ALR 533 at 535-539 (also at 8 AAR 544; 15 ALD 232). The Full Court held that there was no error of law in this approach.

The AAT then held that to disclose the documents would be unreasonable, applying *Re Chandra and Department of Immigration and Ethnic Affairs* (1984) 6 ALN 257 at 259 (also at [1984] ADMN 92-027. Again, the Full Court held that there was no error of law in this approach.

Section 45(1) provides: 'A document is an exempt document if its disclosure under this Act would constitute a breach of confidence'. The appellant argued that there was no evidence to support the AAT's finding that the former wife had provided the documents in circumstances of confidentiality. The Full Court rejected this argument saying:

> It is true that there was no express contact made, or explicit stipulation imposed, at the time the information was imparted, that it be kept confidential. But it is trite law that confidentiality can also be established by inference drawn from the whole of the circumstances. Information provided with respect to his or her private affairs, including financial information is, prima facie, inherently confidential (see *Baueris v Commonwealth of Australia* (1987) 75 ALR 327 at pp. 329-330). In our opinion, it was at least open to imply a pledge of confidentiality in this case.

Again, no error of law was demonstrated.

Comment
This decision illustrates the application of well-established principles. One point to note is that the test in *Re Chandra* to determine whether disclosure is unreasonable within s.41(1) is again quoted without adverse comment. This test incorporates 'public interest' considerations.

[P.B.]

JOINT COAL BOARD v CAMERON
No. G 1424 of 1988, Full Court
Decided: 26 October 1989 by Davies, Beaumont and Pincus JJ.
Document written by the applicant and provided to his employer — employer provided document to Joint Coal Board — whether Board a prescribed authority — whether document exempt under s.45 — scope of the obligation of confidence to be considered.

The Respondent, Robert Cameron, was employed between 1981 and 1987 at North Nattai Colliery by Clutha Development Pty Ltd. In this period, he claimed to have suffered injuries in the course of his employment which entitled him to compensation under the Workers' Compensation Act 1926 (NSW). In accordance with that Act, he gave notice of a particular injury to his employer, 'effectively at the pit-head' (see Reasons of Beaumont and Pincus JJ, p.13). The employer then handed the claim to the Insurance Division of the Joint Coal Board. (The Board performs the function of workers' compensation insurer in this industry.)

In 1988, the solicitors for Cameron made a request under the *Freedom of Information Act* 1982 for access to 'all accident report forms completed or signed by' Cameron. The Joint Coal Board refused access, claiming that it was not subject to the *Freedom of Information Act* 1982, and, at later stages, that the documents were exempt under s.45 of the Act.

The Joint Coal Board's argument that it was not subject to the Act turned on whether it was a 'prescribed authority' and thus an 'agency'. The definitions of these terms are in s.4 of the Act, which provides that, ('unless the contrary intention appears'):

> 'agency' means a Department or a prescribed authority;
> 'prescribed authority' means —
> (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment, other than . . .

As it operates in New South Wales, the Joint Coal Board is established under a Commonwealth Act — the *Coal Industry Act* 1946 (Cth) — and a NSW Act — the *Coal Industry Act* 1946 (NSW). The legislation has been considered in two High Court decisions: *The Queen v Duncan: Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, and *Re Cram: Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117. Considering what the High Court had to say about the bodies established under those Acts, the Federal Court had no difficulty in holding that the Joint Coal Board was at least a body 'established by the Commonwealth Act' (and also was a body established in accordance with the provisions of that Act) (Reasons of Beaumont and Pincus JJ, p.10; Reasons of Davies J, p. 5). It was noted that in *Re Cram* the court said that 'the authorities derive their existence from the Commonwealth Act, although not exclusively so . . . (op. cit., p.128). In relation to the qualification, Beaumont and Pincus J said:

> There is not express statement in the *FoI Act* to the effect that, in order to qualify as a 'prescribed authority', the body concerned must be *exclusively* established by, or in accordance with the provisions of, the federal statute. [Reasons of

Beaumont and Pincus JJ, p.10. See too Reasons of Davies J, p.7.]

Their Honours then turned to 'the real question', which was 'whether there is anything in the statutory context to justify an implication that the Commonwealth legislative source must be the exclusive source and the *FoI Act* read down accordingly' (op. cit., and see pp. 8-9 for the full argument). They said simply that there was no basis in the context of the *Freedom of Information Act* 1982, or otherwise, for making such an implication, and that indeed, having regard to the fact that the creation of the single body (the Joint Coal Board) 'was a matter of legitimate concern to the Commonwealth and fell within federal legislative power', it would be wrong to read down the definition of 'prescribed authority; in the way contended (op. cit.).

An argument made before (and rejected by) the Administrative Appeals Tribunal, to the effect that the Insurance Division was not an agency was noted by but not discussed by the Federal Court (op. cit., p. 8).

Of more general interest is the rejection of the argument by the Joint Coal Board that the AAT had erred in law in rejecting the application of the exemption in s.45 of the Act. Section 45(1) provides: 'A document is an exempt document if its disclosure under this Act would constitute a breach of confidence'. (Section 45(2) was not relevant in this case.)

The documents in issue had been created by the person (Cameron) on whose behalf the application for access was made. In these circumstances, the AAT said that although as against outsiders the documents were impressed with the character of confidentiality, 'there are no grounds for suggesting that the grant of access to the document to the person who created it, in his own interest, is in any way a breach of confidence' (quoted Reasons of Beaumont and Pincus JJ, p. 13-14). One ground of alleged error was that 'nothing here turns on the fact that the respondent is requesting his own claim form: access pursuant to the Act is to *anyone* who so requests . . . (op. cit., p. 14).

Beaumont and Pincus JJ dealt with the matter by postulating (as appropriate to the case) a two-fold test:

(1) Did the information in the claim forms have the required quality of confidentiality at the time the material was communicated? (See *Corrs Pavey Whiting & Bryne v Collector of Customs* (1987) 14 FCR 434 per Jenkinson J, at p. 438.)

(2) If so, was the confidentiality intended to be absolute or limited only? That is to say, would there be a breach of the confidentiality if the information were now to be disclosed by the Board to the respondent, being the person who supplied the very information in question? [op. cit., p. 15].

Thus, the majority thought that the AAT had not made any error in taking into account that the respondent was the person who created the documents in issue. It is apparent that they thought this inquiry material to the second question, which was also described as one concerning 'the scope or extent of [the] confidentiality'. How it was answered depended on the factual question of 'the intention of the parties at the time of the communication of the information that the recipient should be at liberty, consistently with the confidence reposed, to divulge the information to a limited class of persons (see *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at pp. 191-1)' (op. cit., p. 15). Their Honours said that the AAT was clearly correct to hold that 'from all the circumstances of the case that there would be no breach of confidentiality if the information were later [than the time the claim form was made] to be disclosed *to the respondent*' (op. cit., p. 16). It appears that this was so even if the employer, Clutha, were regarded as the provider of the document (Reasons of Beaumont and Pincus JJ, p.15, and compare to the argument at p.14).

It appears that Davies J held that having regard to the statutory context, and, in particular, the functions of the Board, that an employer who provided a document of this kind to it 'should have understood that the Board might use any information communicated to it as it saw fit', and that the disclosure to the respondent Cameron of his claim form 'would be within those functions' (Reasons of Davies J, p. 9).

Comment

1. The approach to the question whether the Joint Coal Board was a prescribed authority might be seen to reflect a 'liberal' attitude to the scope of the *Freedom of Information Act* 1982, so that it will apply to joint Commonwealth-State authorities. But the Federal Court does not spell out any such approach.

2. The approach to s.45 is another contribution to resolution of the relevance of the interest of the applicant in the application of the exemptions (see 'The interest of the applicant and the exemptions', in (1989) *FoI Review* 62-64). In relation to s.45, the majority have found a way to take an applicant's interest into account. In essence their approach is that taken by Mr Todd in *Re Lander and Australian Tax Office* (1985) 9 ALN N25 at 26, which is to ask whether the applicant is a person within the scope of the confidence reposed by the confider (here, Clutha, the employer) in the confidant (here, the Joint Coal Board).

This approach is no doubt very sensible, and because it turns on the words 'breach of confidence' in s.45, it does not necessarily have any bearing on how other exemptions might be applied. It does however seem to be in tension with the analysis of s.45 taken by Jenkinson J (with whom Sweeney J agreed) in *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434; see (1989) *FoI Review* 63-64.

[P.B.]