the Unit's training courses on the Commonwealth *FoI Act* prior to the conference. The training modules emphasised the similarities and differences between the Commonwealth and the Hong Kong approaches to information access, resulting in some enthusiastic discussion about the advantages and disadvantages of each system. The Hong Kong visitors were particularly intrigued by the requirement to give detailed reasons for decisions under the *FoI Act*. The corresponding requirement in the Hong Kong Code merely requires reference to the relevant section of the Code under which exemption is claimed, with no requirement to explain why the information falls within that section. They considered the Commonwealth requirements extremely onerous, although appreciating the benefit to the applicant, and potential for preventing appeals where a decision is clearly explained. The Hong Kong visitors were generally optimistic about the Code's survival of Hong Kong's return to China in 1997.

Conclusion

International visits to the Unit have encouraged us to strive for further improvements in FoI at the Commonwealth level. The fact that so many FoI delegations have returned to Australia suggests that they have found their experiences here helpful and worthwhile. The interest shown by international visitors in the *FoI Act* has also assisted us in assessing our own performance and practices.

Generally the overseas visits augur well for the development of FoI internationally. However, some of questions asked by the more apprehensive overseas visitors were reminiscent of attitudes displayed by some participants at the FoI Review Agency Forum, held in June 1995 to allow representatives of all government departments and agencies to discuss the matters raised in the Review's Issues Paper. At times it seemed that FoI had totally failed to influence some agencies' cultures of secrecy, raising questions about just how much our Act has achieved. Hopefully the outcome of the Review of the Commonwealth Act will deliver solutions to the continuing problem of agency culture in the Commonwealth, as well as providing assistance by example to our colleagues overseas.

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The author thanks Madeline Campbell for her assistance. The views expressed in this article are those of the author and should not be taken to represent those of the Department.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

BINSE and DEPARTMENT OF JUSTICE
(No. 94/034347)

D cided: 5 May 1995 by Presiding Member Coghlan.

Section 31(1)(a) (enforcement or proper administration of the law) — Section 33(1) (personal affairs) — Section 50(4) (public interest override).

Background

In late 1993, Binse was allegedly involved in the planning and execution of an attempted escape from Pentridge Prison.

Procedural history

In December 1993, Binse applied to the Department of Justice requesting access to documents contained in his classification file and management file, and to documents in any investigation file compiled in relation to him between 1 October 1993 and 21 December 1993.

On 11 March 1994, an authorised officer of the Department informed Binse that a classification file and three investigation files fell within the terms of his request. The classification file, which was not the subject of appeal, was partially released to Binse. The first investigation file, which contained documents concerning the detection and investigation of the attempted escape, and the second investigation file, which contained documents concerning the detection of a hole between certain prison cells, were also released in part. The third investigation file, which contained documents concerning items of contraband found at the prison soon after the attempted escape, was not released at all.

The Department claimed that 36 of the 42 documents that had not been released or had not been released in full were exempt under s.31(1)(a), and that the remaining six documents were exempt under s.33(1). The applicant applied to have this decision reviewed internally. This application for review was unsuccessful and Binse applied to the AAT for review.

Th decision

The Tribunal affirmed the decision of the Department and, accordingly, dismissed the application.

Reasons for the decision

Section 31(1)(a)

The Tribunal found that the 36 documents, to the extent that they had not been released, related to an incident or incidents involving breaches of security by prisoners. The Tribunal held that these documents were exempt under s.31(1)(a) for two reasons.

First, the Tribunal concluded that disclosing the documents could prejudice the enforcement or proper administration of the law in a particular instance. This was because such disclosure would reveal the type of information of interest to and gathered by Correctional Services, and the manner in which Correctional Services gathered and considered such information for the purposes of maintaining prison security.

Second, the Tribunal concluded, without discussion, that disclosing the 36 documents would be reasonably likely to prejudice the investigation of a breach or possible breach of the law.

Section 33(1)

The Tribunal found that the remaining six documents contained the names

of other prisoners. The Tribunal held that releasing this personal information would be 'unreasonable' for the purposes of s.33(1). This was because such release could cause considerable disquiet among all the prisoners, and could even lead to the particular prisoners in question being harmed. Accordingly, the Tribunal held that the documents were exempt under s.33(1).

Section 50(4)

The Tribunal held that the public interest in maintaining the good order and management of high security prisons far outweighed any public interest in favour of disclosure. Accordingly, the Tribunal did not release the 36 documents pursuant to the public interest override in s.50(4).

Comment

The exemption in s.31(1)(a) has two separate limbs: the 'breach or possible breach of the law' limb, and the 'enforcement or proper administration of the law' limb.

In *Shulver and Victoria Police Force* (1995) 9 VAR 71 at 76 the Tribunal decided that a document will be exempt under the 'breach or possible breach of the law' limb if the document was prepared in the course of or for the purposes of a specific investigation of a breach or possible breach of the law, and if releasing the document would or would be reasonably likely to prejudice that investigation.

In this case, whilst the 36 documents were clearly prepared in the course of or for the purposes of at least one of the three investigations, the Tribunal simply assumed that releasing the documents would prejudice those investigations. It is difficult to see how such prejudice could be established. There was no indication that the investigations remained on foot. And, if the investigations had been completed and were unlikely to be revived, it is not easy to see how they could be prejudiced by the release of the documents.

In relation to the 'enforcement or proper administration of the law' limb of the exemption, there is little doubt that 'the administration of the law' embraces the administration or management of prisons and prisoners and the classification of prisoners (see, for example, *Mallinder and Officer of Corrections* (1988) 2 VAR 566 at 580). Unfortunately, however, the precise meaning of the phrase 'in a particular instance' is not free from doubt. It is unclear whether the phrase should be interpreted as requiring the identification of a particular *area, facet* or *aspect* of the administration of the law, or whether it should be interpreted as requiring the identification of a single specific *case* or *instance* of such administration.

If the former interpretation were adopted, the administration or management of prisoners is, by itself, a particular area, facet or aspect of the administration of the law and is thus a 'particular instance' for the purposes of the exemption (cf *Re Clarkson and Department of Premier and Cabinet*, unreported, AAT of Vic., Judge Duggan P, 29 March 1990). Nothing more need be established.

If the latter interpretation were adopted, however, the specific circumstances of the case must be examined. Importantly, there is some room for differences of opinion under this approach. Some decisions of the Tribunal indicate that the proper administration of the law would not be prejudiced in a 'particular instance' if Binse in the particular case sought access to a report of an investigation that had been completed and would not be revived (*Re Coleman and Director-General, Local Government Department, Pentland* (1985) 1 VAR 9 at 12). But other decisions, which effectively merge the two interpretations, indicate that prejudice 'in a particular instance' would be established if releasing the document in the particular *case* would have a negative impact on a particular *area* of the administration of the law. For example, such prejudice may exist where releasing a document would affect the quality or quantity of similar documents in the future (cf *Haigh and Health Commission of Victoria*, unreported, County Court, Rendit J, 19 June 1984).

It is regrettable that the Tribunal did not refer to the different interpretations of 'a particular instance' outlined above before concluding that the 36 documents were exempt under the 'enforcement or proper administration of the law' limb of s.31(1)(a).

[J.D.P.]

KNIGHT and DEPARTMENT OF JUSTICE (NO. 1)
(No. 94/030792)

D cided: 19 May 1995 by Presiding Member Coghlan.

Section 31(1)(a) (enforcement or proper administration of the law) — Section 33(1) (personal affairs) — Section 50(4) (public interest override).

Background

In late 1993, several prisoners attempted to escape from Pentridge Prison. The Prison's Investigation Unit investigated the attempted escape and produced two investigation files. The first investigation file contained documents concerning the detection and investigation of the attempted escape, and the second investigation file contained documents concerning items of contraband found at the prison soon after the plot to escape was detected.

Knight claimed that some of the information in the files was provided by a 'prison informer'. He also claimed that he had been falsely accused as the informer and that he wanted the actual informer to be publicly identified.

Procedural history

Knight requested access to the documents in the two investigation files. On 8 July 1994, the Justice Department's Internal Review Officer affirmed the original decision to refuse access to the 42 documents in those files.

The Department claimed that 38 out of the 42 documents were exempt under s.31(1)(a), and that the remaining four documents were exempt under s.33(1). Knight applied to the AAT for review.

The decision

The Tribunal affirmed the decision of the Department and, accordingly, dismissed the application.

Reasons for the decision

Section 31(1)(a)

The Tribunal found that the 38 documents related to an incident or incidents involving breaches of security by prisoners. The Tribunal held that these documents were exempt under s.31(1)(a) for two reasons.

First, after noting that the phrase 'the administration of the law' embraces the administration of management of prisons and prisoners, the Tribunal concluded that disclosing the documents could prejudice the enforcement or administration of the law in a particular instance. This was because such disclosure would reveal the type of information of inter-

est to and gathered by Correctional Services, and the manner in which Correctional Services gathered and considered such information for the purposes of maintaining prison security.

Second, the Tribunal concluded, without discussion, that disclosing the 38 documents would be reasonably likely to prejudice the investigation of a breach or possible breach of the law.

Section 33(1)

The Tribunal found that the remaining four documents were exempt under s.33(1). According to the Tribunal, the disclosure of one of the documents — the diary of another prisoner — would 'by its very nature' involve the unreasonable disclosure of personal information. The Tribunal also held that disclosure of the other three documents — which contained the names of certain prisoners — would also involve the unreasonable disclosure of personal information. This was because such disclosure could cause considerable disquiet amongst the prisoners and could even lead to the particular prisoners in question being harmed.

Section 50(4)

Knight made two arguments in support of his claim that the public interest required that he be given access to the 38 documents. First, releasing the documents would reveal the 'informer' and hence clear him of that label. Second, since the substance of the documents had already been released to the media, the Department could not deny access.

The Tribunal dismissed the first argument as 'mere speculation' and, in relation to the second, observed that 'there was no evidence' that the substance of the documents had been released to the media. Moreover, the Tribunal noted that the fact that information has somehow found its way into the public arena does not, by itself, establish a public interest ground for release.

The Tribunal concluded that the public interest in maintaining the good order and management of high security prisons far outweighed any public interest in favour of disclosure. Accordingly, the Tribunal did not release the 38 documents pursuant to the public interest override in s.50(4).

Comment

See the Comment in the summary of *Binse and Department of Justice* (p.32 this issue).

[J.D.P.]

MANSFIELD and CIC WORKERS COMPENSATION (CIC) (No. 94/037134)

Decided: 25 May 1995 by Deputy President Dimtscheff.

Section 32 (legal professional privilege)

Facts

Mansfield brought a negligence action against his employer, the Herald and Weekly Times, in November 1992. The writ was also served on the Accident Compensation Commission, which referred the matter to its Claims Agent, CIC's predecessor. On 1 December 1992, CIC's predecessor wrote to Ron Camp & Associates Pty Ltd, requesting an investigation of the circumstances surrounding the allegations of negligence contained in the writ. Ron Camp & Associates Pty Ltd investigated the matter and prepared a report (the report).

Procedural history

On 28 July 1993, Mansfield applied for access to the report. CIC claimed that the report was an exempt document under s.32 and Mansfield applied to the Tribunal for review.

The decision

The Tribunal allowed the application, set aside CIC's decision, and ordered CIC to release the report to Mansfield.

The reasons for the decision

Citing *Re Atkinson and Public Transport* Corporation [1992] 5 VAR 255 at 274, the Tribunal observed that s.55(2) casts the onus on the respondent agency in question to prove that the decision was justified. Accordingly, the Tribunal held that CIC bore the onus of proving that the report was brought into existence for the sole purpose of submission to legal advisers for advice, or for use in legal proceedings. The Tribunal held that this onus had not been discharged. This was because CIC had not satisfied the Tribunal, on the balance of probabilities, that the report had not been brought into existence for some other purpose.

[J.D.P.]

WRIGHT and ENVIRONMENT PROTECTION AUTHORITY (EPA) (No. 93/33369)

Decided: 25 May 1995 by Deputy President Dimtscheff.

Section 30 (internal working documents) — Section 33 (personal affairs).

Facts

In October 1980, the EPA became aware that a former quarry in Yarraville was riddled with arsenic contamination. This led the EPA to carry out limited testing of the site in the 1980s. Then, in the early 1990s, it carried out further soil testing on the former quarry site. It also began testing the soil taken from nearby residential properties. These tests were carried out with the consent of the property owners in question, who were advised that the results would not be released to the public.

Procedural history

On 30 March 1993, Wright made a request seeking access to documents relating to test results taken from fruit and vegetables, creek water and soil on and near the former quarry site. On 21 May 1993, the EPA released a number of documents to Wright. But the EPA also refused access, either in full or in part, to several documents. Apart from an internal office memorandum of the EPA these documents fell into two categories:

- documents that disclosed the location of sampling sites on private property; and
- documents that contained the results of sampling from residential areas.

The EPA claimed that these documents were exempt, either in full or in part, under ss.30, 33 and/or 35. Wright applied to have this decision reviewed internally. This application for review was unsuccessful and he applied to the AAT for review.

The decision

The Tribunal affirmed the EPA's decision and, accordingly, dismissed the application.

The reasons for the decision

Section 30(1)

The Tribunal confirmed that the purpose of s.30(1) is to allow the frank exchange of views and ideas between officers within an agency, and that a document will be exempt under

this section if the following three requirements are satisfied:

(i) the document contains either matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or matter in the nature of a consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister of an agency;

(ii) the 'matter' concerned was given, made or carried out in the course of, or for the purposes of, the deliberative processes involved in the function of an agency or Minister or of the Government; and

(iii) disclosing the document is contrary to the public interest.

Applying these principles, the Tribunal found, without considerable discussion, that several of the documents in question were in fact exempt under s.30(1). The Tribunal also found that these documents did not contain 'purely factual material' (cf s.30(3)). According to the Tribunal, the factual material could not be severed because it was 'inextricably intertwined with the policy-making process', so that disclosing it would disclose what the Act aims to exempt.

Nevertheless, the Tribunal held that the remainder of the documents in question were not exempt under s.30(1). This was because the documents were not generated within the EPA. Rather, they either were provided to the EPA from a non-agency organisation, or were of uncertain origin. Since the remainder were not exempt under s.30(1), the Tribunal considered whether they were exempt under s.33(1).

Section 33(1)

The Tribunal confirmed that a document will be exempt under s.33(1) if the following two requirements are satisfied:

(i) the document contains information relating to the personal affairs of a person; and

(ii) disclosing the information is seen to be 'unreasonable'.

Applying these principles, the Tribunal found that the remainder of the documents were exempt under s.33(1). The first element was satisfied because each document contained the location of a residential property test site and the name and address of the owner of that site. This was clearly information relating to the personal affairs of the property owners.

The Tribunal confirmed that the second element, which involves the balancing of the individual's right to privacy against the public interest in disclosure, requires the consideration of a number of factors, including:

- the identity of the parties;
- the nature of the information and the circumstances in which it was obtained;
- the currency and relevancy of the information;
- the damage likely to be suffered by the third party, were the information disclosed;
- the nature of the public interest in disclosure; and
- the purpose for which the information is sought.

After carrying out this balancing exercise in the present case, the Tribunal concluded that disclosing the personal information, along with the degree of contamination involved, would unreasonably expose the private affairs of the property owners to 'what would be no less than a real threat of destructive public scrutiny'. Put another way, dislosing the information would expose the property owners to 'odium, or significant fear of financial loss or worse'.

[J.D.P.]

THE AERO CLUB INCORPORATED and VICTORIA POLICE (No. 1994/44852)

Decided: 30 May 1995 by Presiding Member Davis.

Section 35 (material obtained in confidence) — Section 50(4) (public interest override).

Facts

The Aero Club had links with the respondent police force. A disagreement about the way in which the Club had been managed led to a police investigation. This investigation was completed and no charges were laid.

The Club then requested access to documents relating to the investigation. The Victoria Police released a number of documents to the Club but denied access to two documents. The first document was a letter dated 10 March 1993 from Mr Peatling to Mr Comrie, the Chief Commissioner of Police. This letter contained a number of allegations about the Club's activities. The letter did not state that it was confidential and, according to Mr Peatling, the letter would not have been written or sent had the Chief Commissioner not been a patron of the Club. The second document was a statement taken by Superintendent Walshe from Mr Peatling on 26 May 1993. The allegations in the first document were expanded in this statement. It was clear on the face of the document that both its author and Mr Peatling intended it to be confidential.

The Victoria Police claimed that these two documents were exempt under s.35(1)(b). The Club applied to have this decision reviewed internally. This application for review was unsuccessful and the Club applied to the AAT for review.

The first document: confidentiality

The Tribunal noted that the fact the first document did not state that it was 'confidential' did not preclude a finding of confidentiality. Nevertheless, the Tribunal held that the first document was not confidential on the basis that Mr Peatling wrote the letter to Mr Comrie because Mr Comrie was a patron of the Club, not because he was the Chief Commissioner of Police. Accordingly, the Tribunal held that the document was not exempt and the Club was granted access to it.

Thus, it would appear that a document will not be a confidential document for the purposes of s.35(1) unless:

- the parties intended that the contents of the document be kept confidential; and
- the document was given to and received by the Minister or agency in a *professional,* rather than a *personal,* capacity.

The second document: public interest

Since the second document was regarded by all the relevant parties as confidential, (and presumably since the information was received by Superintendent Walshe in his professional capacity) the question was whether disclosing the document would be contrary to the public interest.

The Tribunal answered this question in the affirmative on the bases that:

disclosing the document would be reasonably likely to impair the ability of the Victoria Police to ob-

tain similar statements in the future; and

such an impairment would be 'so damaging to the public as to warrant non-disclosure of the document' (see *Ryder v Booth* [1985] VR 869 at 885 per King J).

The second document: public interest override

The Tribunal held that the second document should not be released pursuant to the public interest override in s.50(4) of the Act. It did so for two reasons.

First, the Tribunal distinguished *Re Beck and State Electricity Commission* (1985) 1 VAR 91, where it was held that, in appropriate cases, the public interest in protecting employment or property rights may outweigh the public interest in non-disclosure. In this case, the application did not concern the protection of such rights.

And second, the Tribunal distinguished *Re Richardson and Commissioner of Corporate Affairs* (1987) 2 VAR 51, where it was held that, if the agency intended to keep acting on the mistaken belief that information in a document was true, the public interest in clubs knowing that information may outweigh the public interest in non-disclosure. In this case, the Victoria Police did not intend taking any further action in relation to the second document. Moreover, there was nothing to suggest that the information in the statement was in fact false.

[J.D.P.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

Adapted with permission from Decision Summaries prepared by the Information Access Unit of the Family and Administrative Law Branch of the Commonwealth Attorney-General's Department.

MORRIS AND OTHERS and AUSTRALIAN FEDERAL POLICE (AFP)
(No. Q94/131)

Decided: 7 April 1995 by Deputy President S.A. Forgie.

Abstract

Section 4(1) — definition of 'personal information' — information 'about' a person — when identity can 'reasonably be ascertained from' information — use in conjunction with information available in public arena.

Section 11(1) and (2) — meaning of 'person' (1) — whether applicable to business names — reasons for making request not relevant to right of access (2) — may sometimes be relevant to application of exemptions.

- *Section 22(1) — edited copies of documents — deletion of exempt material — whether 'reasonably practicable' to make copy.*

  Sections 26A and 27A— adjournment for consultation with States where s.33A may apply and with relevant persons concerning personal information — interim deletion of information under Tribunal's general powers.
- *Section 33(1)(a)(iii) and (b) — damage to international relations (1)(a)(iii) — no evidence of damage — information communicated in confidence by foreign government or agency (1)(b) — information need not be confidential in character nor disclosure a breach of confidence — general understanding of confidentiality.*
- *Section 33A(b) and (5) — material communicated in confidence by State government or agency (1)(b) — evidence must be directed to specific information — public interest in ensuring that AFP continued to receive information — outweighed public interest in access (5).*
- *Section 37(1)(b) — no evidence person a confidential source of information.*
- *Section 40(1)(d) and (2) — meaning of 'substantial adverse effect' (1) — 'adverse effect of sufficient gravity, seriousness or significance to cause concern to a properly informed reasonable person' — law enforcement agency's need for confidential system of communications — disclosure would reveal sources of and responses to complaints — balancing public interest test (2).*
- *Section 41(1) — criteria for determining unreasonable disclosure of personal information — public interest considerations — unreasonable to disclose names and information appearing in context of police documents — whether can refer to person's interest in obtaining access.*

  Section 45(1) — elements of breach of confidence — information not having confidential quality and no evidence of being communicated or received in confidence.

Issues

Whether business names were entitled to seek access to information under the *FoI Act* (s.11(1)) or to obtain review under the *AAT Act* (s.27). Whether disclosure of Interpol and other police information exempt under s.33(1)(a)(iii), s.33(1)(b) or s.33A(1)(b)); scope of 'communicated in confidence'. Need for consultations under ss.26A and 27A. Meaning of 'substantial adverse effect' in s.40(1), and whether disclosure of information about police communications and sources exempt under s.40(1)(d). Whether identity could be 'reasonably ascertained from' information (s.4(1)) and whether personal information exempt under s.41(1). Whether information exempt under s.37(1)(b) or 45(1). Relevance of applicant's reasons for making a request (s.11(2)). Deletion of exempt or irrelevant information under s.22. Inadvertent disclosure under the Act of information later claimed to be exempt, and changes in grounds for decision.

Facts

Mr Morris, his wife and a number of corporations and business names sought access to documents which referred or related to their business practices and other matters. They were engaged in activities which included an internationally operating 'Mail Order Fulfilment House' which for a fee fulfilled subscriptions from