that general standards of annual reporting have improved. The 1995 report of the Department of Treasury and Finance was released internally to staff with a note explaining that the format and content had changed dramatically from previous editions in order to compete for the IPPA prize for best annual report. However, such factors lend little understanding to why agencies still fail to perceive the reporting requirements of FoI information and statistics as either important or essential. Maybe the view of one Tasmanian bureaucrat is far more widespread than previously suspected. When asked about FoI the response was: *'If you ask GBEs they would say that FoI is the work of the devil'.*[20]

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**Referenc s**

1. ALRC/ARC, 'Open Government: a Review of the Federal Freedom of Information Act 1982, Report No. 77, 1995, p. 64.
2. ALRC/ARC, 'Open Government, above, p.65.
3. See Smith, Bruce, 'FoI in New South Wales: The Continuing Saga', (1995) 58 *FoI Review* 62; Smith, 'Bruce, Parliament and FoI in NSW', (1994) 54 *FoI Review* 79; Smith, Bruce, 'The Demise of FoI in NSW', (1994) 49 *FoI Review* 2; Smith, Bruce, 'The Further Demise of FoI in NSW', (1994) 52 *FoI Review* 45; Smith, Bruce, 'How to Write an Annual Report Without Even Trying', (1993) 45 *FoI Review* 30; Smith, Bruce, 'The Quest for the Holy Report' (1992) 39 *FoI Review* 28.
4. NSW Ombudsman, 'Implementing the FoI Act: A Snap-Shot', A Special Report to Parliament under s.31 of the *Ombudsman Act*, July 1997.
5. NSW Ombudsman, 'Implementing the FoI Act,' p.ii.
6. NSW Ombudsman, 'Implementing the FoI Act,' p.ii.
7. It appears that several inconsistencies are evident at times between the figures that are quoted. For example the total number of requests for information received differs according to whether you are on page 1 (2709) or page 4 (2612).
8. The top 11 include, in descending order: Department of Community and Health Services, Department of Environment and Land Management, Tasmania Development and Resources, Department of Transport, Workplace Standards Authority, Department of Justice, Department of Education, Community and Cultural Development, Department of Primary Industries and Fisheries, Department of Vocational Education and Training, Department of Premier and Cabinet and Department of Treasury and Finance.
9. See Castellino, Deanne and Murdoch, Rachel, 'Using Freedom of Information to Avoid Trial by Ambush in Criminal Matters: FoI and Discovery in Tasmania Since Sobh,' (1994) 53 *FoI Review* 60-62.
10. Department of Justice, Freedom of Information Annual Report 1995–1996, p.8.
11. Section 33AB of the *Tasmanian State Service Act 1984* and s.27 of the *Financial Management and Audit Act 1990.*
12. These agencies include: Department of Treasury and Finance, Department of Community and Health Services, Department of Premier and Cabinet, Department of Justice, Department of Primary Industries and Fisheries, Department of Transport and the Department of Police and Public Safety.
13. Department of Justice, Department of Treasury and Finance.
14. Department of Premier and Cabinet, Department of Treasury and Finance, Department of Transport
15. Department of Justice.
16. Department of Police and Public Safety, Department of Primary Industry and Fisheries.
17. Financial Management and Audit Act 1990, Treasurers Instructions, *Tasmanian State Service Act 1984* including Regulation No. 123 of 1990.
18. The Auditor General (Tasmania), Special Report No 4: 'Standard of Annual Reporting by Government Departments', May 1993, p.21.
19. See for example IPAA, 'Communiqué: the newsletter of the IPAA', 67, August 1996, pp.9, 11.
20. Reported in Harris, Mel and Grey, Fleur, 'GBE Accountability: Lost in the Twilight Zone?, Advanced Administrative Law Research Project held at the Law School, University of Tasmania, 1996.

# VICTORIAN FoI DECISIONS

## Administrative Appeals Tribunal

**OWEN and DEPARTMENT OF HEALTH AND COMMUNITY SERVICES (DHCS) (No. 95/028580)**

**D cid d:** 16 May 1996 by Presiding Member Coghlan.

*Sections 30 (internal working documents) — s.33 (personal affairs) — s.35 (material obtained in confidence) — s.38 (secrecy provisions) — s.50(4) (public interest override).*

### Factual background

Mr Owen had a relationship with Ms Nikolovska. Their child, Antoinette, was born in 1989. Their relationship ended in 1991 and since then they have been involved in a vigorous custody dispute. Since 1992 the respondent department (DHCS) had received certain information amounting to notifications under the *Children and Young Persons Act 1989* (the CYP Act) from a number of sources. The DHCS made a number of investigations as a result of these notifications but, according to a departmental officer, the investigations did not lead anywhere.

### Procedural history

On 10 May 1995, Owen applied under the *FoI Act* for access to all documents relating to the investigations conducted by the DHCS involving his daughter, Ms Nikolovska and himself. On 25 July, Owen was advised that there were a total of 570 documents on file. Access was provided to 350 documents in full, and to 14 documents in part. Owen requested internal review, and the decision was affirmed on 17 August, except for the release of one further page. The documents were variously claimed to be exempt from release under ss.29, 30, 31, 32, 33, 35 and 38.

On 5 September, Owen applied to the Tribunal for a review of the internal review decision, on the basis that he had a right to know how the social workers had (allegedly) abused his daughter and attempted to destroy his relationship with her, and he wanted to expose the (alleged) conspiracy which took place. Mr Owen had made an application for custody of Antoinette and stated that the material sought was vital for his application.

## The d cision

The Tribunal ordered the release of an old address, and of two dates that had already been revealed in the schedule of documents claimed to be exempt. The Tribunal affirmed the decision of the DHCS in all other respects.

## The reasons for the decision

### *Section 38*

Many of the documents had been released but with sentences deleted. The deleted information related to the notification and the identity of the notifier. It also included matters that could tend to identify the notifier. The DHCS argued that the information was exempt from release under ss.31, 35 and 38 of the Act.

In relation to s.38, the DHCS argued that s.67(2) of the the CYP Act was an enactment to which s.38 applies. Section 67(2) of the CYP Act prohibits the disclosure of the identity, or information which is likely to lead to identification, of a person who gave information during the course of an investigation, without the written consent of the person or authorisation by the Secretary.

The Tribunal, relying on *Harrigan v Department of Health* (1986) 72 ALR 293, stated that it is well accepted that to attract the exemption under s.38, the particular enactment must be expressed so as to relate specifically to the relevant information. The Tribunal decided that s.67(2) was sufficiently specific to satisfy the requirements of s.38 of the Act, as it detailed the information which was not to be released. The Tribunal found that s.64(4) of the CYP Act also satisfied the requirements of s.38.

The Tribunal found that s.67(2) clearly prohibited disclosure of the deleted information and for those reasons the information was exempt from release under s.38. The exempted information included dates and times as it was accepted by the Tribunal that divulging this information might lead to the identification of a person who gave a notification or information during the course of an investigation.

### *Section 33*

One document contained the child's address and incomplete telephone number. The DHCS claimed exemption under s.33(1) of the Act. The Tribunal adopted the definition of 'Personal Affairs' set out in *Re F and Health Department* (1988) 2 VAR 458: as 'any matters of private concern to an individual'. The Tribunal found that the child's address was of a personal nature. The Tribunal then went on to consider whether its disclosure would be unreasonable. It referred to the case of *Page v The Metropolitan Transport Authority* (1988) 2 VAR 243 which held that the question was one which required a balancing of interests. There was no evidence led on this question, and the exemption was claimed by assertion. It was not known whether the applicant knew the details anyway. It was uncontentious that it was an old address. In those circumstances, the Tribunal was not satisfied that the exemption had been made out and ordered that the address be released.

Transcripts of interviews with the child about the abuse were held by the Tribunal to be information of a sensitive and extremely personal nature relating to the personal affairs of the child. The Tribunal balanced the competing interests of Mr Owen who wanted access to information for his Family Court case on the one hand, and, on the other, the fact that the information about his young daughter was of a very sensitive kind which, if released, would be available to the public at large. The Tribunal held that disclosure was clearly unreasonable in all the circumstances.

A telephone message left at the DHCS by Ms Nikolovska, was also held to be exempt under s.33.

### *Section 35*

Numerous documents were claimed to be exempt by the DHCS on the grounds that they contained material obtained in confidence. The Tribunal in discussing s.35 stated that it is well established that the nature of the information can be determined both by evidence as to the circumstances in which the material came into the possession of the agency, and also by the nature of the documents (*Thwaites and Department of Health and Community Services* (1995) 59 *FoI Review* 80). The information contained in the documents related to the suspected abuse of Antoinette by her father. The author wished it to remain confidential. The DHCS gave evidence that this information was of the type the Department receives on a confidential basis and about which there is a public expectation that it will be so treated. It was vital that such documents remain confidential if reporting was to continue. After examining the material, the Tribunal concluded that it was the sort of information that one would expect to be given and received in confidence. The Tribunal was satisfied that it was information received in confidence.

It also had to be shown that disclosure was contrary to the public interest by reason that disclosure would be reasonably likely to impair the ability of an agency to obtain similar information in the future. The Tribunal followed *Ryder v Booth* [1985] VR 869 and stated that it was not enough that the persons giving information would be resentful about its release. The degree of impairment has to go 'beyond a trifling or minimum impairment'.

The Tribunal accepted the uncontested evidence of a Senior Program Adviser of the DHCS that there was a public perception that notifications would be treated confidentially, and the number of notifications would decrease if such information was not treated confidentially. The Tribunal was satisfied that there was a well-founded basis that the ability of the DHCS to obtain information would be impaired to more than a trifling degree.

A conversation between departmental officers and a clinical psychologist was also held to be exempt under s.35 as there was a clear understanding between the professions that it would remain confidential. The Tribunal held that it could be implied that the information was given in confidence, and release could lead to the undesirable situation of the psychologist being cross-examined in the Family Court on what the DHCS thinks she said.

### *Section 30*

The DHCS relied on s.30 to exempt departmental discussions about the case and the procedures used. The Tribunal stated that the first limb of s.30(1) was made out as the material records opinion and advice and reflects the deliberative processes of the DHCS. It was satisfied that s.30(3) did not apply as the factual material was intertwined with recommendations and advice, and ceased to be purely factual. It was not properly severable (*Re Evans v Ministry for the Arts* (1986) 1 VAR 315; *Re Brog v Department of Premier & Cabinet* (1989) 3 VAR 201).

The second limb of the test under s.30(1) is whether disclosure is contrary to the public interest. The Tribunal stated that in each case it is appropriate to look at the whole cir-

cumstances and balance the competing interests. The balance is between the interest in the public having access to documents, against the public interest in protecting the deliberative processes of agencies which s.30(1) seeks to protect (*Pescott and Auditor-General of Victoria* (1987) 2 VAR 93; (1987) 11 *FoI Review* 56; *Re Easdown and Director of Public Prosecutions (No. 1)* (1987) 2 VAR 102; *Re Lapidos and Auditor-General of Victoria* (1989) 3 VAR 343; (1989) 23 *FoI Review* 53).

The Tribunal found that the balance falls in favour of non-disclosure. The reasons given were that Owen's arguments related to his own personal interest. The Tribunal concluded that the information related to the proper consideration and deliberation in the DHCS and disclosed nothing improper.

***Section 50(4)***

Finally, the Tribunal considered whether exempt documents (other than documents found to be exempt under s.33) should be released pursuant to s.50(4). Owen provided a long list of reasons why it was in the public interest that the documents be released. Most of the reasons related to wide and various allegations against the DHCS staff (including sex discrimination, malicious intent, contempt of court and gross incompetence). Owen also argued that it was against the public interest to limit his capacity to fight the Family Court case. The DHCS argued that the public interest required the documents to be withheld in order to ensure the constant flow of information about child abuse, the protection of informants, and the protection and the welfare of the child.

The Tribunal found no evidence in the material that would substantiate allegations of maladministration. If these matters were relevant to his Family Law case, there were other forums to try to obtain the relevant material. It would be inappropriate for FoI to circumvent these procedures (applying *Deltaline Nominees v The Roads Corporation* (1995) 8 VAR 472). The Tribunal accepted the respondent's arguments and held that no public interest was demonstrated that would override the exemptions.

**[C.M.]**

**THWAITES and METROPOLITAN AMBULANCE SERVICE (No. 95/030671)**

**D cided:** 19 June 1996 by Presiding Member Coghlan.

*Amendment of an application for review*

## Factual background

On 17 March 1994, the MAS entered into a contract with Intergraph Corporation Pty Ltd (Intergraph) for the provision of computer-aided despatch (CAD), mobile data terminal (MDT) and automatic vehicle location (AVL) systems and related support services (the 1994 contract).

Intergraph was subsequently chosen to provide a single CAD system, and support services, to cater for all of the State's emergency services organisations (the Project). A separate agreement was also made between the MAS and Intergraph for the supply of AVL and MDT systems and associated services (the MAS-Intergraph contract). The 1994 contract was terminated when Intergraph began providing services under the Project and under the MAS-Intergraph contract.

## Procedural history

On 28 March 1995, Mr Thwaites, MP, requested access to:

> All documents relating to the contract for the AVL/CAD computer system including tender documents, assessment of bidders, the contract with the successful company Intergraph, and any schedule of installation or completion.

On 17 May 1995, the MAS notified Thwaites under s.25A(6)(a) of its intention to refuse access under s.25A(1) (on the basis that the request was voluminous). Having received no response from Thwaites, the MAS decided, on 28 June 1995, to refuse access under s.25A(1).

On 25 July 1995, Thwaites wrote to the MAS requesting internal review, adding:

> In order to simplify the matter pursuant to Section 25A of the *Freedom of Information Act,* I seek initially the contract with the successful company Intergraph and any amendments to the contract, any schedule of installation, and documents showing monies paid to Intergraph ['the reframed request'].
>
> I reserve my right to seek other documents encompassed in my initial request after further consultations with you with a view to ensuring that the request is not voluminous.

On 7 August 1995, the MAS affirmed the original decision to refuse access under s.25A(1). The MAS also purported to refuse access to the documents described in the reframed request under s.25A(5) (on the basis that it was clear from the face of the reframed request that all of the documents sought were exempt in their entirety). On 21 September 1995, Thwaites applied to the Tribunal for a review of 'the decision made on 7 August 1995', which was described as:

> The refusal of the Chief Executive Officer of the Metropolitan Ambulance Service to provide access to all documents sought in the Applicant's letter of 28 March 1995 ...relating to the contract for the AVL/CAD computer system installed by the Metropolitan Ambulance Service.

At a Preliminary Conference held on 3 May 1996, Thwaites indicated that he sought access to the contract with Intergraph, to schedules of installation and to documents showing moneys paid to Intergraph. In other words, Thwaites sought review of the MAS's purported decision to refuse access to the documents described in the reframed request under s.25A(5). The issue before the Tribunal was whether the application for review could be amended to refer to those documents on the basis that access had been denied to them under s.25A(5).

## The decision

The Tribunal held that the application for review was concerned with the MAS's decision to refuse access under s.25A(1), and that the application could not be amended to deal with a review of the MAS's purported decision to refuse access under s.25A(5).

## The reasons for th decision

The Tribunal considered two main issues. First, which decision properly formed the subject of the application for review. And second, whether the application for review could be modified in the manner requested by Thwaites.

***The first issue — the subj ct of the application for review***

The Tribunal examined the relevant correspondence and found that the application for review was concerned with the MAS's decision to refuse access under s.25A(1). (The Tribunal noted in passing that six weeks was a 'reasonable' time for the MAS to wait for a response from Thwaites in relation to the offer to consult made under s.25A(6).)

The Tribunal rejected the argument that it had jurisdiction because Thwaites had reframed his request on 25 July 1995 and a decision had been made on that reframed request. According to the Tribunal, the MAS internal review officer had no jurisdiction to make a decision in relation to the reframed request because there had been no initial decision on the reframed request. As such, the officer could at best be described as 'being helpful in giving an indication of how he might proceed were he actually reviewing a primary decision'.

***The s cond issue — amending the application for review***

The Tribunal confirmed that there are two situations in which it can alter the decision that is the subject of an application for review. The first situation is where the respondent agrees to grant access to some documents during the hearing (and therefore the hearing will proceed on the basis of the remaining documents in dispute). The second situation is where the applicant lodges an application for review in respect of a deemed refusal and the respondent subsequently makes an actual decision. In that situation, s.53(5) provides that the Tribunal may, at the request of the applicant, treat the application as extending to the actual decision.

The Tribunal found that neither of the above two situations had occurred in the present case, and accepted that the existence of a narrow express power to amend an application for review under s.53(5) meant that there was no room for a wider implied power to amend.

The Tribunal also concluded that s.35 of the *AAT Act* did not empower it to amend the application for review in the manner sought. There were two reasons for this conclusion. First, the Tribunal does not have the power to amend the application under the *Fol Act,* and the provisions of that Act prevail over the provisions of the AAT Act (cf s.61A of the *Fol Act).* And second, s.35(1)(b) of the *AAT Act,* which requires the Tribunal to conduct its proceedings with 'little formality and technicality', relates to matters of procedure and cannot be relied upon to confer jurisdiction upon the Tribunal that it would not otherwise have had.

For the above reasons, the Tribunal concluded that it did not have the jurisdiction or the (implied) power to amend the application so that it applied to a decision that had not in fact been made by the MAS. In other words, the Tribunal found that it did not have the jurisdiction or the power to amend the application so that it applied to the MAS's purported decision to refuse access pursuant to s.25A(5).

**[J.D.P.]**

**O'SULLIVAN and DEPARTMENT OF HEALTH & COMMUNITY SERVICES (DHCS) (No. 95/022225)**

**Decided:** 17 July 1996 by Deputy President Galvin.

*Section 31(1)(c) (law enforcement documents)— s.33(1) (personal affairs) — s.35(1)(b) (confidential information) — s.38 (secrecy provisions).*

## Factual background

The DHCS is the body primarily responsible for enforcing and administering the law relating to the protection and wellbeing of children in Victoria. The Department received a notification that O' Sullivan's children had allegedly been abused and were in need of protection. As a result, the DHCS conducted an investigation into the matter.

## Procedural history

On 23 November 1994, O'Sullivan requested access to documents relating to the investigation. The DHCS released some documents either as a whole or in part, but decided that the remainder of the documents were exempt under ss.31(1)(c), 33(1), 35(1)(b) and 38. The Department affirmed this decision on internal review, and O'Sullivan applied to the Tribunal for review.

At the hearing, 19 documents remained in dispute. These documents were case notes that were created by, or that had come into the possession of, the Department pursuant to its obligations under the *Children and Young Persons Act 1989* (the CYP Act). The case notes included information that had been provided by 'informers'.

## The decision

The Tribunal varied the decision of the Department by ordering the release of two documents in part. The Tribunal affirmed the decision of the Department in all other respects.

## The reasons for the decision

***Section 33(1)***

The Tribunal found that most of the case notes contained information that related to the personal affairs of informers. With the exception of two case notes, it found that it would be unreasonable to disclose such information, primarily because to do so would unreasonably infringe the informers' right to privacy.

The Tribunal ordered the release of part of one case note on the basis that the information in question was 'so innocuous'. The Tribunal ordered the release of part of another case note on the basis that the information in question did little more than to 'stipulate a temporal aspect' of what was already in the public domain.

***Section 35(1)(b)***

The Tribunal found that most of the case notes were exempt under s.35(1)(b) because the information within them would 'more probably than not' have been communicated in confidence, and because their disclosure would 'more probably than not' be contrary to the public interest in that such disclosure would be reasonably likely to impair the Department's ability to obtain similar information in the future.

By contrast, the Tribunal held that part of one case note was not exempt under s.35(1)(b) because it was 'difficult to accept' that the information 'was necessarily or more probably than not' communicated in confidence.

***Section 31(1)(c)***

The Tribunal confirmed that the DHCS's performance of its duties and functions under the CYP Act constitutes part of the administration of the law. The Tribunal accepted in most cases that the information provided by the informers was 'more probably than not' communicated and received in confidence. Accordingly, the Tribunal held that most documents that referred to the name of an informer were exempt under s.31(1)(c).

One document was held not to be exempt under s.31(1)(c) because the Tribunal was not satisfied that the information within it was communicated in confidence. The Tribunal held that another document was not exempt under the section because it was not clear from the document itself (or from the other documents in dispute) that the name in question referred to a confidential informer.

***Section 38***

Section 67(2) of the CYP Act prohibits the DHCS from disclosing the names of informers or any information that is likely to lead to the identification of an informer. The Tribunal found that documents that referred to the name of an informer were exempt under s.38 by virtue of s.67(2) of the CYP Act.

**[C.M.]**

**ALAN BRYGEL and THE DEPARTMENT OF JUSTICE (No. 95/27739)**

**D cided:** 17 July 1996 by Deputy President Macnamara.

*Section 30(1) (internal working documents) — s.31(1)(a),(e) (law enforcement documents) — s.33(1) (personal affairs) — s.35(1)(b) (confidential information) — Section 38 (secrecy provisions) — s.50(4) (public interest override).*

## Factual background

In late 1991, Brygel was on remand awaiting trial on a number of charges. He had allegedly threatened the lives of three Ministers in the then Labor Government, namely Mr Sandon, Mr Roper and Mr Spyker. He had also allegedly threatened the life of Detective Chief Constable Cullen. Brygel was eventually acquitted of the charges pertaining to the Ministers but, in a separate trial, was convicted of threatening to kill Mr Cullen. In 1995, the Court of Appeal quashed that conviction and did not order a retrial.

Brygel believes that he was the victim of a vendetta. He believes that his imprisonment was the result of a political conspiracy and that a bashing he received while in prison was organised by Mr Sandon.

## Procedural history

On 13 April 1995, Brygel sought access from the Office of Corrections to all his prison records. Some records were released to him, but he was denied access to 20 documents that were claimed to be exempt under various sections of the Act. Brygel applied to the Tribunal for access to those documents yet disclaimed any interest in six of them at the outset of the hearing.

## The d cision

The decision to refuse access to the documents was affirmed.

## Th reasons for the d cision

***Section 31(1)(a)***

After noting that the expression 'administration of the law' embraces the administration or management of prisons and prisoners (following *Mallinder v Office of Corrections* (1988) 2 VAR 566), the Tribunal held that s.31(1)(a) can only be attracted 'where there is some identified or identifiable specific investigation or legal action by way of regulation or enforcement either in existence or contemplated'. This is because s.31(1)(a) requires prejudice to the enforcement or proper administration of the law in a particular instance and, according to the Tribunal, there can be no 'particular instance' in the absence of such an investigation or action.

In the present case, the Tribunal noted that there was no current investigation by the Office of Corrections into Brygel. Accordingly, the Tribunal concluded that the section had no application because there was no relevant 'particular instance' in this case.

***Section 31(1)(e)***

The Tribunal noted that the expression 'reasonably likely' spoke of a chance of an event occurring or not occurring that is real rather than fanciful or remote, and that the expression is not limited to a chance that is more likely than not to occur (see *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836; *Pinder v Medical Practitioners Board* (1996) 10 VAR 75).

The Tribunal went on to find that certain information deriving from files of the Prison Investigation Unit was exempt under s.31(1)(e) on the basis that its disclosure would (or would be reasonably likely to) endanger the lives or physical safety of prisoners who had provided confidential information to the Unit.

***Section 33***

According to the Tribunal the expression 'personal affairs' encompassed any matters of private concern to an individual. The Tribunal noted that in *Stewart v Victorian Police* (1988) 2 VAR 192 it was held that the co-operation in recorded interviews carried out by the Internal Investigations branch of the Police is a personal matter and will normally remain private. Following *Stewart,* the Tribunal held that the fact that an individual had been in communication with the Prisons Investigation Unit would relate to his personal affairs. The Tribunal went on to conclude that the disclosure of such information would be unreasonable given the atmosphere of violence and intimidation in the prison system. Accordingly, the documents containing such information were held to be exempt under s.33.

***Section 38***

The 'enactment' relied on to enliven s.38 was s.30 of the *Corrections Act 1986.* This section was considered by the Tribunal in the earlier case of *Mallinder v Office of Corrections* (1988) 2 VAR 566; (1989) 20 *FoI Review* 16. *Mallinder* held that s.38 directs attention to the nature of the information contained in the document rather than the capacity of the person who receives that information. Documents are exempt under s.38 because they contain information and because there is in force an enactment relating to that information which prohibits its disclosure. To have relevance an enactment must apply 'specifically' to the particular information. The enactment must be formulated with precision. Section 38 has no application if the enactment identifies the information merely by reference to the capacity of the person who has received or is in possession of the information. The Tribunal in *Mallinder* concluded that s.30 of the *Corrections Act* was not a sufficiently specific provision to attract the s.38 exemption.

The Tribunal noted that s.30 of the *Corrections Act* had been totally recast since *Mallinder.* It now has a very detailed and specific definition of what is to be considered confidential information. Section 31(1)(d), for example, states that information relating to the personal affairs of a prisoner is confidential information. The Tribunal, following *Knight v Department of Justice* (1994) 8 VAR 52, found that this revised s.30 is 'specific' enough to attract the s.38 exemption. The Tribunal went on to find that documents containing the names and personal details of prisoners were exempt under s.38.

***Section 30(1)***

The Tribunal observed that s.30 requires the establishment of two things: first, that disclosure of the document would disclose opinion, advice or recommendation in the course of deliberative processes; and second, that such disclosure would be contrary to the public interest.

The Tribunal noted that, in the mainstream of public administration, claims that disclosure would inhibit frankness and candour in the deliberative process (and hence be contrary to the public interest) have been

met with scepticism. The Tribunal did accept, however, that in the context of the prison system there may be less ground for such scepticism. Two prison officers gave evidence that an atmosphere of violence and intimidation was endemic in the prison system. The Tribunal held that, in such an environment, much can be said to the effect that releasing information may curb frankness and candour.

The Tribunal went on to uphold the exemption under s.30(1) for documents containing the advice and opinion of officers. The Tribunal stated that the environment of the prison system meant that there would be a genuine cause for apprehension that frankness and candour would be affected if it were known that such material would be released.

***Section 35(1)(b)***

Two documents containing information provided to the Prisons Investigation Unit were held to be exempt under s.35(1)(b). The first document named the informant and might have led to the informant's identity being revealed even if that name were deleted. The bulk of the second document contained pages that entailed no particular confidentiality (and may have been generally available to the public) but the presence of those pages 'would have a tendency to disclose the identity of the informant' who provided the information in confidence.

The Tribunal found that the particular atmosphere and environment that obtained in the prison system meant that if the two documents were disclosed then the actual informants and other potential informants would be extremely reluctant or perhaps wholly unwilling to furnish information to the Prisons Investigation Unit in the future.

***Section 50(4)***

The Tribunal considered whether any of the exemptions (apart from s.33: see s.50(4)) should be overridden on public interest grounds. The Tribunal stated that if any of the matters raised by Brygel were proven by the documents in dispute or if any of them lent support to Brygel's claims, it would be manifestly in the public interest that the documents be released to enable detection and punishment of such serious wrongdoing. The Tribunal found, however, that the documents did not lend any support whatsoever to Brygel's contentions. Accordingly the Tribunal concluded that there was nothing in the public interest which required the release of the documents.

**[C.M.]**

# 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.

**WATERMARK AND AUSTRALIAN INDUSTRIAL PROPERTY ORGANISATION (AIPO)**
**(No. V94/547)**

**D cided:** 21 December 1995 by Deputy President P. Gerber, B.H. Pascoe (Senior Member), C.G. Woodard (Member).

### Abstract

*Section 3 — application of exemptions — no leaning in favour of disclosure.*

*Section 4(1) — AIPO not a 'prescribed authority'.*

*Section 11 — right of 'every person' to make request — firm of patent attorneys not a 'person'.*

*Section 40(1)(a) — prejudice effectiveness of procedures or methods for the conduct of examinations — effect of release of examination papers.*

*Section 40(1)(b) — prejudice attainment of objects of particular tests, examinations or audits — effect of release of examination papers.*

- *Section 40(1)(d) — effect of release of papers on examination system — adverse effect on the proper and efficient conduct of operations not substantial — meaning of 'substantial'.*
- *Section 40(2) — disclosure not on balance in the public interest.*
- *Section 43(1)(c)(i) — whether disclosure of examination papers could adversely affect a person's business or professional affairs — possible criticism of examiners and examination candidates — claim rejected.*
- *Section 45(1) — examination answers confidential in character — material not explicitly received in confidence — whether obligation of confidence imported — other elements of breach of confidence absent.*

### Issues

Whether a firm of patent attorneys was a 'person' and could make an FoI request (s.11(1)). Whether the Tribunal should 'lean' in favour of disclosure of documents (s.3). Whether disclosure of examination papers written by successful candidates would prejudice examination procedures (s.40(1(a)) or prejudice particular examinations (s.40(1)(b)). Whether their disclosure would substantially adversely affect operations of the Patent Attorneys Professional Standards Board (the Board) (s.40(1)(d)), and whether the balance of public interest favoured disclosure (s.40(2)). Whether disclosure of the papers would have an unreasonable adverse effect on any person's business or professional affairs (s.43(1)(c)(i)) or would involve a breach of confidence (s.45); whether obligation of confidence when nothing said as to confidentiality.

### Facts

Watermark, a firm of patent attorneys, applied for copies of 1993 examination papers of successful candidates [which contained candidates' numbers but not their names] in the examination in one of the eight subjects which must be passed to secure registration as a patent attorney. In view of s.11(1) of the *FoI Act*, which confers a right of access on 'every person', AIPO and the Tribunal treated the application as a personal one from the principal partner of the firm, Mr Mischlewski. The Tribunal