Questions along the lines of how a convicted murderer could have access to FoI seemed to suggest that the use of FoI should be restricted, reminiscent of the encryption debate. The fact that Coulston remains in jail and is trying to overturn his conviction was too readily overlooked. The Act creates a right of access to government documents and does not distinguish between worthy and unworthy applicants or requests. To attempt to restrict access to FoI to certain persons or certain purposes would be a disastrous development that would create a further means of stymying legitimate requests.

None of this is to say that FoI as we know it is beyond reproach. By all means let there be debate about FoI, for without questioning and re-evaluation, we risk being left with an atrophied system. The debate should be about how to improve access and develop a pro-disclosure culture, both in government and among the public. FoI is not some relic of the 1960s and 1970s that has outlived its use. If this were so, why has the idea been embraced by Ireland, which has recently introduced FoI, and by the Blair government, which has made it a key element of its program?

FoI is just one of the tools that underpins the community's right to know, and, were the culture of government more pro-disclosure, formal applications and appeals would be measures of last resort. But we should be particularly wary of claims that the information abundance made possible by technological change does away with the need for FoI. In many cases, FoI will still be necessary to get access to the kinds of documents that will not find their way onto web sites or into glossy brochures. The aims of accountability and participation remain as relevant and necessary as ever, as does, unfortunately, the need for vigilance against erosion of FoI.

JENNY MULLALY

Jenny Mullaly is a researcher at the Communications Law Centre, which, together with the Australian section of the International Commission of Jurists, is holding a conference on freedom of information in Melbourne on 19–20 August. For further information, call (03) 9248 1278 or send email to comslaw@dingo.vut.edu.au.

VICTORIAN FoI DECISIONS

AAT / VCAT

STEVENS and MELBOURNE MAGISTRATES' COURT (No. 1995/022882)

Decided: 24 March 1998 by Deputy President Dimtscheff.

Section 33(6) (personal affairs).

Factual background

Stevens was convicted of certain offences. In an attempt to exonerate himself, Stevens sought access to certain documents that he believed were in the possession of the Crimes Compensation Tribunal (the CCT).

Procedural history

Stevens requested access to files and documents in the possession of the CCT. The CCT apparently refused to confirm or deny the existence of the documents pursuant to s.33(6). This decision was affirmed on internal review on 24 March 1995 and, on 30 June 1995, Stevens applied to the Tribunal for review.

Th decision

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

The reasons for the decision

Section 33(6) states that an agency is not required to give information about the existence or non-existence of a document where such information, if included in a document of the agency, would, if the latter document were released, involve the unreasonable disclosure of information relating to the personal affairs of any person.

The Tribunal noted that, in practical terms, reliance on s.33(6) will necessarily require a respondent to present their case in general terms. According to the Tribunal, a respondent may rely on s.33(6) if it establishes that 'should a document exist [that document] would hypothetically be exempt pursuant to the provisions of s.33(1)'.

The Tribunal further noted that the invocation of s.33(6) prevented the Tribunal from perusing any disputed documents as was normally its discretion pursuant to s.33(1), on the basis that to do so would indicate to the applicant that the documents sought were, in fact, in existence (*Re O'Sullivan and Department of Health and Community Services (No.2)* (1995) 9 VAR 1).

The Tribunal found on the balance of probabilities that the respondent had 'fulfilled [the] necessary criteria' in this matter and accordingly, affirmed the respondent's decision.

Comments

In my view, the Tribunal misunderstood the approach to be adopted when determining whether a document is exempt under s.33(6). The Tribunal approached s.33(6) on the basis that it required a respondent to show that, should the actual documents exist, those documents would hypothetically be exempt under s.33(1).

In fact, s.33(6) is not concerned with the hypothetical scenario described. Rather, s.33(6) requires the Tribunal to assess whether a hypothetical document containing a reference *as to the existence or non-existence of the actual documents* would be exempt under s.33(1).

Furthermore, it appears that the Tribunal did not actually have jurisdiction to hear Stevens' application. Section 52 of the Act requires that an application for review be lodged with the Tribunal within 60 days of notification of the relevant decision. (The AAT has no power to grant an extension of time within which the application may be lodged; the position is different under the VCAT regime because s.52 has been amended.) Accordingly, it would appear that Stevens' application was not made within time — Stevens was notified of the decision on or about 24 March

1995 but filed his application for review on 30 June 1995 (more than 90 days later).

[C.P.R.]

RINTOUL and SWINBURNE UNIVERSITY OF TECHNOLOGY (No. 1997/29623)

D cid d: 17 April 1998 by Deputy President Galvin.

Section 33(1) (personal affairs).

Factual background

Rintoul, a solicitor, acted as an agent for a group of clients in seeking information from the Swinburne University of Technology (Swinburne). The information sought related to the bonuses paid, or the calculation of bonuses which may or had become payable, to six members of the staff of the TAFE Division of Swinburne.

Procedural history

Rintoul sought access to documents recording the information about the bonuses. Swinburne identified a number of documents answering the request and refused access on the basis that they were exempt under s.33(1). Rintoul sought internal review of the decision and confined his request to bonuses paid or the calculation of bonuses which may have become payable since July 1994. On review, Swinburne's refusal by reference to s.33(1) was affirmed. At the hearing, 22 documents remained in dispute. The documents consisted of extracts from four contracts of employment, three letters of appointment, three print-outs of entries on Swinburne's Human Resource database, two salary cards and various memoranda relating to outcomes of performance appraisals and bonus reviews and assessments.

The decision

The Tribunal granted access to the documents with all personal information deleted.

The reasons for the decision

Section 33(1)

The first matter requiring determination was whether all or any of the information in dispute related to the personal affairs of a person. Rintoul conceded that all of the documents in dispute contained information which related to the personal affairs of various employees and confined his submission to documents in edited form with that personal information deleted. The Tribunal did not accept the argument that the release of the information in an edited form would answer an entirely different request, and was prepared to interpret the request broadly enough so as to embrace the edited pages.

The Tribunal then considered whether disclosure of all or any of the information would be unreasonable. Following *Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243 ((1988) 15 *FoI Review* 28) the Tribunal acknowledged that a balancing of interests was required. Rintoul's interest, which was clarified during the course of the hearing, was to discover whether there had been proper compliance with appropriate procedures. The Tribunal observed that there did not appear to be anything in the information in dispute that was 'likely to throw significant light' on that matter. The Tribunal also noted that there was arguably no interest in knowing details of bonuses in relation to a small number of executives whose job descriptions may fairly be said to position them below the level of 'high fliers'.

On the other hand, the Tribunal placed particular weight on the evidence on behalf of the employees that should the information in dispute be released (or such part of it as would identify the particular executive officers or their bonus entitlements) significant disadvantage would arise for both the executive officers and Swinburne. In additional, the Tribunal observed that the release of the documents with personal information deleted would serve the public interest in awareness of proper procedures.

Accordingly, the Tribunal concluded that the release of information relating to the executive officers' personal affairs was unreasonable. It went on to find that Rintoul was entitled to the remainder of the information for which no exemption had been made out.

[M.R.F.]

WESTERN SUBURBS LEGAL SERVICE and VICTORIA POLICE (No. 1997/03976)

Decid d: 3 June 1998 by Presiding Member Davis.

Section 29(b) (confidential information from the government of another country or State) — Section 30 (internal working document) — Section 31(1)(d) and (e) (law enforcement documents) — Section 35 (confidential information) — Section 50(4) (public interest override).

Factual background

Oleoresin Capsicum Spray (OC Spray) is a naturally occurring biodegradable product. When used as a spray, it has a number of effects including causing blood vessels to dilate rapidly and eyes to burn and close tightly. Victoria Police made the decision to use OC Spray after conducting a number of reviews and trials. Victoria Police's investigations into OC Spray began in 1992 and involved gathering information from both interstate and overseas sources.

Procedural history

Western Suburbs Legal Service (WSLS) sought access to documents relating to Victoria Police's introduction and use of OC Spray. Victoria Police granted access to a number of documents but also wrote to WSLS stating that the request was non-specific and requesting more specific details. The Tribunal considered this to be a decision to refuse to release the documents. The documents in dispute comprised: documents containing matters communicated by another country in confidence to Victoria Police; internal working documents; documents relating to operational methods of law enforcement; law enforcement safety documents and documents obtained in confidence.

The decision

The Tribunal affirmed the decision of Victoria Police in all respects.

The reasons for the decision

Section 29(b)

The Tribunal held that the documents in this category came from overseas enforcement agencies and were given to Victoria Police in confidence. The Tribunal noted that

the fact that some of the documents were stamped or stated that the document was not to be disclosed supported Victoria Police's other evidence as to the confidentiality of the material.

The Tribunal then considered whether disclosure of these documents would be contrary to the public interest. It found that there was a public interest in releasing the documents, that is, a free flow of information from Victoria's law enforcement agency to the public generally and the encouragement of public debate and transparency. However, this interest was not sufficient to outweigh the detrimental effects of releasing the documents. These detrimental effects included the 'drying up' of the flow of information from law enforcement agencies in different countries and also the risk that the material could be used in a mischievous and misleading manner because it was not always accurate. This could cause the public to obtain a wrong impression of OC Spray and of the activities of the police force.

Accordingly, the Tribunal held that the documents in this category were exempt under s.29(b).

Section 30

The Tribunal found that the documents in this category were prepared by various officers of Victoria Police for consideration by other members of Victoria Police and that they contained matters in the nature of opinion, advice or recommendation for the purpose of deliberation between such officers. The Tribunal rejected WSLS's submission that, as the documents were produced after relevant legislation had been passed, they could not have formed part of Victoria Police's deliberative processes. Rather, it noted that '[i]t is incumbent upon Victoria Police to continually update its information on safety and desirability of using what methods of law enforcement are available, whether legislation has passed or not'.

The Tribunal then considered whether it would be contrary to the public interest to disclose the documents. It noted that it is very important that officers of a department are able to freely put their views in writing so they can be considered by other members of a department without being subject to scrutiny by outsiders. This consideration was not outweighed by the public interest of encouraging debate and transparency and therefore the documents in this category were held to be exempt under s.30.

Section 31(1)(d)

The documents in this category comprised a Training Manual and Standard Operating Procedures for OC Spray, a document from the National Police Research Unit in relation to OC spray and an overseas document concerning OC Spray. The Tribunal accepted Victoria Police's evidence that disclosure of these documents could adversely affect Victoria Police in successfully resolving situations and that it would create risks to the lives or safety of members of Victoria Police. The Tribunal distinguished *Re Western Suburbs Legal Services v Victorian Police* (unreported 18 August 1995, Galvin DP) on the basis that the methods described in the documents were not widespread as there was no evidence to suggest that the documents had been spread outside the police force itself or disseminated to any members of the public. Accordingly, the Tribunal found that the documents were not sufficiently widespread so as to fall outside the exemption in s.31(1)(d).

Section 35

The Tribunal accepted Victoria Police's evidence that the documents in this category were given in confidence. The Tribunal noted that this was supported by the terms of the documents, the information contained in them, the purpose for which the information was provided and the circumstances for which it was provided.

The Tribunal also accepted that disclosure would inhibit the passing of further confidential information between Victoria Police and the agencies which provided the documents.

Accordingly, the Tribunal found that the documents in this category were exempt under s.35(1)(b).

Section 50(4)

The Tribunal held that there was no legitimate public interest that required the release of the documents in dispute and that any 'small' public interest resulting from complete transparency of police procedures, work investigation and inquiry, was far outweighed by the detriment that would occur if those documents were released. This detriment included the stifling of Victoria Police's free line of communication with other agencies in Australia and around the world, the possibility of placing its methods of policing at a disadvantage and the risking of the lives of its members.

Comment

This decision raises the issue of whether the act of an agency writing to an applicant seeking clarification of the request should be characterised as a decision to refuse access. In this instance, the Tribunal found that Victoria Police's act of writing to WSLS stating that the request was non-specific and requesting more specific details *was* a decision to refuse to release the documents. However, s.17(4) of the Act provides Victoria Police has a duty to consult with WSLS if the request does not provide specific enough information before refusing to process a request on the grounds that it is not sufficiently specific. This provision suggests that a more appropriate reading of the invitation to consult would be that it is an indication that the agency *intends* to refuse to process the request, rather than the decision to refuse itself.

The decision also seems to limit the ambit of *Re Western Suburbs Legal Services v Victoria Police* where Galvin DP held that s.31(1)(d) does not apply where the methods or procedures in question are widespread and evidence of them is given daily in the courts. In the present decision, the Tribunal seemed to consider that the methods or procedures in question could only be widespread if the documents themselves had been spread outside the police force. It did not consider whether knowledge of the methods or procedures could be widespread from sources *other* than the documents in dispute.

[M.R.F.]

ROBERTSON and DEPARTMENT OF HUMAN SERVICES (DHS) (No. 1998/018088)

Decided: 12 August 1998 by Presiding Member Mattei.

Section 33(1) (personal affairs) — Section 35(1)(b) (confidential information).

Factual background

Robertson was alleged to have abused his son. The DHS investigated the matter. During the course of this investigation, the DHS interviewed Robertson's son on two occasions.

Procedural history

Robertson sought access to the DHS's Protective Services file regarding his son. The DHS granted partial access to the file and, after internal review, further documents were released. Robertson appealed to the Tribunal and, at the hearing, confined his application to the documents recording the DHS's interviews with his son.

The Tribunal's decision

The Tribunal affirmed the DHS's decision.

The reasons for the decision.

Section 33(1)

The Tribunal found that the documents in dispute were documents the disclosure of which would involve the unreasonable disclosure of information relating to the personal affairs of Robertson's son. The Tribunal noted that the applicant sought access to the documents in order to help him demonstrate that his son had been manipulated. The Tribunal observed that whilst it could appreciate the frustration felt by Robertson and noted his suspicion that his son had been manipulated, it held that it was not for the Tribunal to adjudicate on whether such suspicion was well-founded.

Section 35(1)(b)

The Tribunal also found that disclosure of the documents recording the interviews would divulge information or matter communicated in confidence by Robertson's son to the DHS and that such disclosure would be contrary to the public interest by reason that it would be likely to impair the DHS's ability to obtain similar information in the future.

[J.D.P.]

BRACKS and MELBOURNE PORT CORPORATION (MPC) VELLA and MELBOURNE PORT CORPORATION

Decided: 8 September 1998 by Presiding Member Davis.
Section 5 (definition of 'prescribed authority').

Procedural history

Bracks and Vella requested the MPC to provide them with a number of documents pursuant to the Act. The MPC claimed that it was not a 'prescribed authority' for the purposes of the Act and was therefore not obliged to provide the documents sought.

Bracks and Vella argued that the MPC was a prescribed authority because it was a 'body corporate established for public purpose by, or in accordance with, an Act'.

Since the MPC was a body corporate established in accordance with the *Port Services Act 1995* (the PSA), the issue for the Tribunal to determine was whether the MPC was established for a 'public purpose'.

The decision

The Tribunal held that the MPC was established for a public purpose and was therefore a prescribed authority for the purposes of the Act.

The reasons for the decision

The Tribunal observed that the purpose for which a body corporate is established should only be characterised as 'public' if a *dominant* purpose of the establishment is 'public or government [sic]' in nature.

The Tribunal noted that in determining whether a body was established for a public purpose it is necessary to look at the particular body in question and consider matters such as why it was established, its structure, how it operates and its relationship to the public. The Tribunal also noted that, in the present case, this issue should be resolved by reference to the PSA 'and, if need be, the Parliamentary Debates at the time [the PSA] was being debated in Parliament'.

The Tribunal carried out this exercise and concluded that the dominant purpose of the MPC was a 'public purpose'. It reached this conclusion for the following reasons:

- the objectives of the MPC had a 'real element of public purpose about them';
- the government exercises a strong supervisory role over the MPC, which indicated that the MPC was formed so that it would exercise its objectives 'for the benefit of the State of Victoria';
- the MPC was in the same position as most other government bodies and agencies in relation to the borrowing of money; and
- the *Financial Management Act 1994* applied to the MPC as a 'public body'.

Accordingly, the Tribunal found that the MPC was a prescribed authority for the purposes of the Act.

[J.D.P.]

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