COMMERCIAL CONFIDENTIALITY, FREEDOM OF INFORMATION AND THE PUBLIC INTEREST#

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Introduction

The purpose of this paper is to evaluate the exercise of the discretion[1] by the Administrative Appeals Tribunal (AAT) on review to order the release, in the public interest, of documents otherwise exempt under section 34 of the *Freedom of Information Act 1982* (Vic) (FOI Act).

The issues raised for consideration are how the AAT has struck a balance between the competing interests in favour of and against disclosure. In favour of disclosure are the democratic accountability values reflected in the "creation of a general right of access"[2] in the objects clause of the Act. Against disclosure are the "exemptions necessary for the protection of essential public interests and the ..... business affairs in respect of persons of whom information is collected..."[3] External review of agency decisions by the AAT has allowed it to recognise and articulate how these conflicting interests have been balanced. This paper considers a number of recent cases where the AAT has had the opportunity to achieve the balance. It will be argued that the AAT has, in general, properly balanced the competing interests.

Because the "strength"[4] of the section 34 exemption has been early recognised by the AAT the paper will seek to consider the exemption and the content of the "public interest" within the context of the Act as a whole and the recent recognition by the High Court of a constitutional implication of freedom of communication. Before turning to the cases the paper will thus briefly consider the background rationale to Freedom of Information (FOI), the proper approach to disclosure, and the development of the concept of the public interest.

The democratic rationale of FOI - the "political speech" cases

It is important to remember that freedom of information in Australia had its genesis in a dissatisfaction with existing accountability mechanisms under the Westminster system of government.[5] The proponents of FOI saw that the accountability of government could be improved by providing access to information held by government:

> Open Government in the true sense is a central need in a democracy. People must have information to enable them to make choices about who will govern them and what policies the individuals or political parties that they choose to govern, shall implement.

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> Freedom of information is very closely connected with the fundamental principles of a democratic society and is based on three major premises:
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> 1 The individual has a right to know what information is contained in Government records about him or herself.
>
> 2 A Government that is open to public scrutiny is more accountable to the people who elect it.
>
> 3 Where people are informed about Government policies, they are more likely to become involved in policy making and in government itself.6

The accountability and participatory rationale behind FOI has now been given important recognition by the High Court in the *"political speech"* cases.[7] This is because of the recognition by the High Court in those cases of an implication in the Constitution of an implied *"freedom of communication"*. In the cases are a number of references to democratic and accountability principles, and of the need for information which it can be argued are part of the public interest.

In the *Australian Capital Television* case[8] Mason CJ based his support for an implied guarantee of freedom of communication on the basis of the Constitution providing for a representative government where politicians are accountable:

> The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.
>
> .....
>
> Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may be called for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and response to the will of the people. Communication and the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.[9]

The Chief Justice went on to hold that the freedom of communication did not cease with communication between representatives and the electorate. It also applied to "all persons, groups and other bodies in the community.[10] It was seen as "a central element of the political process". Deane and Toohey JJ adopted a similar position to Mason CJ in relation to the implication of freedom of communication within the Constitution and relied on their reasoning in *Nationwide News*[11] Importantly they also found that the implication extends to all political matters including the matters relating to other levels of government.[12]

Gaudron J based her decision on the representative nature of our parliamentary democracy and held that "freedom of discussion of matters of public importance is essential to the maintenance of a free and democratic society."[13] She also held that free elections entail at the very least "freedom of political discourse. And that discourse is not limited to communications between candidates and electors, but

extends to communication between the members of society generally."[14]

McHugh J found that the Constitution created institutions of representative and responsible government that:

> must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities of policies of all candidates for election. Before they can cast an effective vote at election time they must have access to the information, ideas, and arguments which are necessary to make informed judgment as to how they had been governed and as to what policies are in the interests of themselves, their communities and the nation.[15]

This need for information to participate and to bring accountability was also accepted in *Theophanous*[16] where Deane J noted that modern developments "have greatly enhanced the need to ensure that there be unrestricted public access to political information and to all points of view." He confirmed the "freedom of the citizen to examine, discuss and criticise the suitability for office of the elected members of Parliament."[17]

In *Stephens*[18] McHugh J provides another argument in favour of access. In the course of his judgment he found that the law of qualified privilege gives protection in the law of defamation to the communication of information about government. He recognised important participatory and accountability values when he said:

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials.[19]

By analogy his comments illustrate the important interest of the public in receiving information about the functioning, powers or performance of representatives and officials. These are democratic accountability and participatory values which he is articulating. They are the values which inform "the public interest" in the FOI Act.[20]

Applying the public interest over rider

The Victorian FOI Act is unique in that it is the only one in Australia that has an "over-riding" public interest test allowing the AAT to override, in the public interest, exemptions made out by agencies.[21] As the 1979 Senate Report indicated, a "properly framed public interest test, provides a balancing test by which any number of relevant interests may be weighed one against another."[22] The report endorsed the principle of external review in the Act on the basis that it would "allow for a natural growth in the ideas about the way in which government should relate to the community."[23] It is submitted that the comments in the political speech cases now narrow the "essential public interests" against disclosure in section 3 of the Act. In any balancing process they tip the scales in favour of disclosure because disclosure of information is so important to the representative democracy in which we live. They give added weight to and complement the "right" conferred in section 3 of the Act.

This is important because the public interest is a key concept in its general application, and the approach to its interpretation has a major impact on the utility of the Act as an accountability

mechanism. Further, in contrast to the position at the federal level,[24] there is consistent authority that a "leaning approach" to disclosure should be adopted.

In *Victorian Public Service Board v Wright*[25] the Court said "(I)t is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information". In the recent case of *Sobh v Police Force of Victoria*[26] the Court said that "while the issue is ultimately one of statutory construction, the court should lean in favour of disclosure".[27] Nathan J, after reviewing with approval the US authorities which have held that "exemptions are to be narrowly construed",[28] said that the interpretation of the FOI Act in the particular cases should be approached "with a predisposition in favour of access..."[29] This analysis is supported by a comment in *Arnold v Queensland*[30] where the structure of the Commonwealth FOI Act was considered. Wilcox J noted that the policy of extending information in the objects clause (s 3(1)) was taken further by "requiring the implementation of that policy in the exercise of the discretions conferred by the Act."[31] He then went on to note that while the exemption under consideration did not confer a discretion "the command of s 3(2) is an indication that Parliament regarded the principle of facilitating and promoting the disclosure of that information as itself constituting a weighty factor to be taken into account in making a judgment as to the public interest in any decision whether to disclose particular documents."[32]

When these comments are combined with earlier comments that the Act is remedial[33] they amply support the conclusion of the Australian Law Reform Commission and the Administrative Review Council that "agencies should, therefore, approach a request with a presumption that documents should be disclosed."[34] Further the exemption provisions should be interpreted against a "presumption that disclosure of government information is in the public interest".[35]

These comments are particularly important in relation to the power in subsection 50(4) to override certain exemptions when the public interest "requires" it. In a number of cases the Tribunal has suggested that this imparts "an imperative" tone.[36] The legislative history of this provision is not clear but it is suggested that there is no warrant for any gloss on the word "requires" in subsection 50(4) and that it bears its ordinary meaning in this context. Consistent with section 3 the discretion in subsection 50(4) should not be fettered by any requirement other than the public interest considerations in favour of disclosure outweigh those against disclosure. Such an interpretation is consistent with the object of the Act.

Evolution of the content of the public interest

Before turning to recent decisions involving the public interest and commercial confidentiality it should be noted that in the leading early cases on confidential documents and public interest there has been a theme of participation and accountability. In *Re Binnie and DIETR*,[37] the public interest in having an informed debate on the "humanitarian issue" of animal testing was enough to prompt release of documents otherwise exempt under section 34. The respondent submitted that the public interest included "the achievement of the benefit to Victoria of the project, the undesirability of impeding that development and the undesirability of the revelation by Government of material gained by it in confidence from commercial sources." These considerations were held to be insufficient to override, in the circumstances, the public's "right to know".[38] The Tribunal said :

> The ground of public interest requiring that access be granted is the desirability that the public have sufficient knowledge to properly consider and debate the issue

> surrounding the chemical testing upon animals at the proposed centre.[39]

While *Re Binnie* recognised the importance of public debate and participation the earlier case of *Re Gill*[40] had identified an aspect of the public interest that has been a recurring feature of subsection 50(4) cases, namely the revelation of iniquity.

> Clearly the revelation in the documents of iniquities such as illegal or sharp practices detrimental to the welfare of the State and its citizens would be amongst the factors which would prompt release.[41]

When the concept of the public interest was considered by the Supreme Court of Victoria in *DPP v Smith*[42] the Court recognised the centrality of standards administration when it said:

> The public interest is a term embracing matters among others, of standards of human conduct and of the functioning of government and government instrumentalities, tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.[43]

The comments in *DPP v Smith* were applied in *Re State Bank of NSW and Department of Treasury*[44] where the AAT gave weight to the need for "an informed public debate" on a matter that had been "of great public interest" when ordering the partial release of documents exempt under section 34. The sensitivities of the commercial organisation and the public interest in giving "appropriate protection to sensitive information" were overridden in the interest of the community being provided with information to assist it in public debate.

This theme of the right of the public to information to assist debate and to decide for itself about the proprieties of action by agencies and public figures was recognised as an aspect of the public interest in *Re Robinson and the University of Melbourne.*[45] The public interest in scrutinising the indirect financial sources of support provided to a Member of Parliament outweighed the interest of the respondent in maintaining financial support. On appeal Brooking J said that "(O)ne of the strongest public interests is in the purity of public administration".[46]

Recent decisions on business and commercial information and the public interest

Politicians and journalists have been repeat players in FOI applications. With the change of government in Victoria in October 1992 the Opposition has attempted to utilise FOI to expose a number of matters relating to commercial interests of organisations dealing with government. A number of cases will be considered in two categories. The first is where the information sought was asserted to be commercially sensitive by the agency. The second category is where the information was covered by an express or implied undertaking of confidentiality. These FOI applications have generally been well reported and have allowed the AAT to explore a number of heads of public interest relating to government administration. This use is not new but the fact that so many cases have been brought to judgment since the change of government does allow a good focus on the public interest considerations recognised since *Smith's* case[47]

It is now proposed to consider a number of recent cases, most involving Opposition politicians, which deal with documents which relate to the business and financial affairs of government and the private sector. The cases have a number of common features in that they were all the subject of political controversy, they involved the expenditure or potential expenditure of government monies, they all relate to commercial or quasi commercial activities of government and in all of them there were existing forms of accountability mechanisms available. Speaking generally

the applicants were substantially unsuccessful in the applications. Even so it can be argued that the appeal hearing itself allowed a number of public interest issues to be agitated as well as the elucidation of evidence relating to the government decision-making process which justified the exercise, at least from the applicant's point of view.

Contracts for government services

In three of the cases the applicants were seeking details of contractual arrangements between government agencies and the private sector in relation to matters the subject of political controversy and media interest. The first of the cases was *Re Thwaites and Department of Premier and Cabinet*[48] *(DDB Needham case)*. This request related to advertising arrangements undertaken by the incoming government and sought details of documents relating to an advertising agency appointed in the first two months of the new government. The actual appeal was reduced to two documents which related to details of an arrangement between the respondent and the agency DDB Needham, and an invoice which detailed the actual rate at which advertising was procured. The political controversy associated with the issue was the fact that the person involved in the advertising contract for the respondent was a member of the Liberal Party, had worked on the Liberal Party campaign for government and had formerly worked for DDB Needham. Further the new contract substituted for an existing arrangement for government advertising. The issue of the contract between the Department of Premier and Cabinet and DDB Needham had been the subject of extensive press coverage as well as a parliamentary debate. The exemptions sought by the respondent were paragraph 34(1)(a) and this exemption was ultimately held to be made out. A claim for exemption under subsection 34(4) failed.

The public interest grounds upon which the applicant relied were directed to the issue of accountability of government administration. They included:

(i) government accountability for the proper administration of public monies;

(ii) that consultants and contractors are engaged under a fair and proper tendering system and without apparent or real favouritism;

(iii) that regulations were complied with;

(iv) the evaluation of claims of commercial efficiency made by Ministers;

(v) participation and informed debate about contracting out of services;

(vi) assessing whether there was value for money and clearing the air.[49]

All these heads were in a sense subsets of the "purity of the public administration"[50] public interest and the respondent asserted against that interest the fact that the documents contained "rather sensitive information reflective of an important element of the conduct of business of DDB".[51] The document contained details of commission, rebate and fee structures and there was evidence that it would impinge adversely on the DDB business. Thus the exemptions under paragraphs 34(1)(a) and (b) were made out. The Tribunal ultimately rejected release of the documents on public interest grounds but expanded on the meaning of public interest as discussed in *Smith's* case.[52] It was said that there is involved in the public interest "an element of what is for the good or benefit of the community."[53]

The Tribunal did concede that "the quality of professional assistance engaged by government... and in a broad sense the terms and conditions upon which such assistance is obtained are matters of public interest".[54] Release however would only be ordered if the public interest demanded it.

The Tribunal held that there was no suggestion that Mr Bennett, despite having worked for the Liberal Party election campaign was "in any respect unsuitable for the task or undeserving of the appointment or that his engagement was motivated by bias or favouritism".[55] In relation to the argument that the new agreement overtook an existing agreement the Tribunal rejected this and noted that the new arrangement did not show anything "apparently sinister, untoward or inconsistent."[56] The fact that it had not been submitted to the Tender Board as it should have been was not a factor because there was no evidence of anything which would cause public concern. It further noted that the whole arrangement had now expired and had been replaced by a more permanent arrangement.[57]

The overall decision is cautious and reflected the Tribunal's assessment of the commercial interests claim made by the private sector organisation. This is consistent with the comments in *Gill's* case[58]where the Tribunal spoke of the "strength of the business affairs" exemption. Further there was nothing apparent in the documents which would have focused on the public interest arguments of the applicant. It can however be argued that the appeal was a vindication for the applicant in that at least an independent Tribunal in public assessed the fact there was nothing untoward or irregular associated with the transaction or reflected in the documents. This applied particularly where there were such close connections between the incoming government, DDB Needham and Mr Bennett.

The public interest considerations which were rejected or not made out on the evidence in the *DDB Needham* case were however made out in another case involving some of the same issues and personnel, the *Leeds Media* case.[59] That case arose out of the granting of a tender to Leeds Media Pty Ltd by the respondent agency for master media agency services. The tender process was managed by Mr Bennett who was referred to in the earlier case. The issue here was whether there had been proper compliance with the government processes and in particular whether the successful applicant was giving the government value for money. The particular public interest heads argued included:

(i) engagement of consultants and contractors under a fair system;

(ii) scrutinising contracts involving the media because of potential of government to pressure the media;

(iii) evaluation of claims of commercial efficiency to participate in the public debate;

(iv) to clear the air after a major public controversy over advertising contracts and the role of Mr Bennett in recommending the contracts.[60]

The documents in dispute essentially included a number of documents containing commercial information from potential tenderers for the master media contracts. They also consisted of correspondence between Mr Bennett of the respondent and the tenderers, and the unsuccessful tenderers, as well as correspondence by Bennett to the Tender Board. Exemptions sought to be made out included subsection 30(1) and paragraphs 34(1)(a) and (b) and subparagraph 34(4)(a)(ii). Despite the respondent making out exemptions on a number of documents, the Tribunal ordered release of three documents in the public interest.

The Tribunal first referred to the dicta of Mason CJ in the *Television* case.[61] The Tribunal proposed to release material which "will assist in informing the public as to the basis on which the... contract was awarded". The Tribunal accepted that there was high level of public debate and interest, and further the debate did not reflect a mere "political controversy". The debate involves speculation concerning matters relating to the contract and the

credentials of the winning bidders. The Tribunal said:

> Public debate is not surprising given the fact that the contract is a substantial and lucrative one and it was keenly sought by advertising agencies. The contract has an added significance in that it would appear that contracts led by Leeds will not be subject to scrutiny by the State Tender Board.[62]

It was held that release would assist in establishing the criteria on which the contract was awarded "rather than allowing the matter to remain one of conjecture, speculation and rumour".[63]

The Tribunal considered the matters that had been raised by the respondent and noted that release would not cause detriment to any of the companies involved. Further, some of the material had been released in general terms in Parliament and one particular item of information was not a closely guarded secret within the industry. The Tribunal accepted that the partial release of information given in confidence was presumably in recognition "of the need to better inform Parliament concerning the matter".[64] The Tribunal then noted that commercial entities must expect that in some circumstances material provided to government will be released. A "frankness and candour" argument as well as an argument that release would mislead the public were summarily dismissed.

It can be seen that the depth of the public controversy here as well as the fact that an existing accountability mechanism, the Tender Board, appeared to have been bypassed were factors. Perhaps the most significant aspect of the case however is the acceptance of the need for governments to be accountable as reflected in the *Television* case.[65] As will be seen below however, the sentiments in this decision have not at this stage commanded universal respect.

The third case involving government contracts was the *Office Renovations* case.[66] This case involved the various documents relating to the renovations of the Minister of Health's office. The only exemption claimed was paragraph 34(1)(a). Significantly the respondent chose to call no evidence but sought to rely on the documents as, on their face, containing information which came within the description "business, commercial or financial nature".

The decision is of interest as an indication of at least one division of the AAT being prepared to give weight to the accountability rationale of the Act. The applicant argued the following grounds of public interest:

(i) accountability of government;

(ii) informed public participation in government decisions;

(iii) knowing the cost of upgrading or refurbishing a Minister's office at a time of major budget cuts;

(iv) ensuring that proper processes were followed, including tendering and Treasury approval;

(v) ensuring that government money was not wasted;

(vi) informing the public about matters which are the subject of political debate and media attention.[67]

The AAT followed *Smith's* case[68] and accepted that the public interest "is a fluid concept which evolves and changes with the passage of time".[69] Each of the heads argued by the applicant was accepted, although there was no finding that there had been a breach of any Treasury Regulations.[70] The Tribunal noted that the respondent called no evidence and there was no evidence that the material would be detrimental to the suppliers of the information, or that it was supplied in confidence.[71] The *Leeds Media* case[72] was cited in support that release "will remove the disputed matters from the arena of

conjecture, speculation and rumour". The Tribunal also said, after noting the fact that there was no evidence of any detrimental effect to the private businesses that "(b)usiness and commercial organisations dealing with government, in the absence of unusual or special circumstances, must expect that release of material provided by them is very much a possibility if not a likelihood." [73]

This decision is also of significance for a thoughtful analysis of the difficulties of the wide possible interpretation of the words "business, commercial or financial nature" in paragraph 34(1)(a) given by Murray J in *Gill's* case.[74] The analysis makes it clear that there is conflict in the authorities and that if there is any doubt as to whether matter comes within that category then consistent with section 3 of the Act[75] disclosure would follow. The decision is strongly confirmatory of a "pre-disposition to disclose" approach which has now been endorsed by the Australian Law Reform Commission and the Administrative Review Council.[76]

These cases have all related to commercial contracts with government. The principle that, in general, the community is entitled to know what use is being made of public funds has also been applied to the personnel area where the individual came from the private sector.

Thus in the *Eslake* case[77] the employee, a high level officer engaged in the State Audit, was seconded from a private sector organisation. The Tribunal said that disclosure of government expenditure details "should not be able to be circumvented by the secondment of a person, rather than the use of a consultant or a public servant".[78] In that case the public interest in accountability was sufficient to override subsection 34(1) of the Freedom of Information Act because the respondent argued that details of the fee for the secondment of the individual constituted information caught under subsection 34(1). It further argued that release of that information would cause problems within the private sector organisation because executive salaries were a closely guarded secret and release of the salary paid to Mr Eslake would expose him to being headhunted and create resentment within the organisation.

On the basis of the public interest in accountability the Tribunal would not accept that this justified the material being exempt. A further consideration was that a corporation that agrees to its employee being seconded and enters into an arrangement with the government for the payment to it from public funds of an amount in respect of the secondment, "ought not to expect to keep the amount of the payment confidential" for the same reason that a person who is an individual government sector employee who has been paid ought not to expect that the amount of the payment should be kept confidential.[79] The only matter which remains confidential is the individual configuration of the remuneration package of a public servant. This is presumably on the basis that how an individual takes his or her package within a "total cost to the government" remuneration is a matter for the person even though it has been argued[80] that this was government sanctioned tax avoidance.

In another "political" case the principles accepted in these cases were accepted and it was said the tribunal had "on many occasions, recognised the public interest in knowing the amounts paid not only to public servants but to others who provide services to the State".[81]

On the other hand, where release of personal information given in confidence did not relate to a matter of current relevance, and its release would give rise to competitive disadvantage, the AAT had no hesitation in finding that release was unreasonable.[82]

Accountability and confidentiality

In the next three cases there were major political controversies and the public interest arguments for release came into direct conflict with the need for the government agencies to protect commercial confidences. How the AAT resolved this conflict was very unsatisfactory for applicants because the AAT fell back on the argument that there were existing adequate accountability mechanisms which would serve the public interest. The outcomes were thus different from the broad public interest considerations in favour of release that commanded support in earlier leading cases and in some of the cases just considered.[83]

The Grand Prix case[84]

In this case an Opposition frontbencher sought documents "relating to the awarding of the Formula 1 Grand Prix to Victoria". The documents in dispute related mainly to financial arrangements between the agency and a government sponsored corporation (Melbourne Major Events Co Pty Ltd) which had been made a joined party to the appeal. The documents were generated over a fairly short period and appeared to document the government's involvement in providing some sort of financial accommodation to the corporation. It had an agreement with the promoters to host the race at a major public park close to the city . The documents were almost all covered by sections 34, 32 and 30 of the Freedom of Information Act. Many of the matters in the documents were covered by a confidentiality agreement entered into between the joined party and the promoters.

The applicant raised a number of democratic accountability grounds associated with the awarding of the race, the issue of accountability of government sponsored corporations, the issue of the public being able to evaluate the costs and benefits of the race. It was held that the grounds raised probably did not meet the test laid down in *Smith's* case[85] and the grounds were re-formulated as follows:

(a) the right of the public to know the nature and extent of the potential financial liability of the government by reason of the arrangements it has made to support the staging of the Grand Prix;

(b) the public interest in the accountability of the decision-making process and the transparency of the liabilities incurred by the government or government sponsored corporations;

(c) the interest of the public in ensuring that publicly appointed officials in publicly sponsored corporations are beyond criticism concerning conflict of interest;

(d) the right of the public to have access to information concerning the use of a public park where there is public controversy as to its use.[86]

It may be argued that the comment of the Tribunal in finding that these grounds were seen as "different aspects of a 'right to know' something of importance in the context of s3 of the Act" was wrong.[87] The grounds, it may be argued, were not aspects of a "right to know" but were aspects of the public interest in the proper functioning of a democracy.[88] The accountability arguments were rejected on the basis that there were other accountability mechanisms in place in legislation, including the power of the Auditor-General to conduct certain audits of bodies corporate that have received a public grant. The accountability also was said to include "the general scrutiny of the action of the executive government through the Parliament and its committees all in the end responsible to the electorate at the ballot box. If the community desires methods and levels of government accountability over and above those

presently provided by law, that is a matter to be pursued by legislative change"[89]

The Tribunal then said that the issue was not that the public is being denied the information about the liability of the government or the accountability of the decision-making process but "rather of the public being permitted to know and have such accountability at the time and place and to the extent permitted by the general law of the land unless the public interest "requires" access to the pursued documents".[90] This analysis gives no weight at all to the political speech cases.[91] It gives no weight to the fact that it is information itself which provides or assists in the accountability. It gives no weight to the fact that the Act is a new accountability mechanism, designed to complement existing mechanisms. It gives no weight to the interest of the community, through their elected representatives, in the involvement in policy formation or in participation. It fails to recognise that documents have been released in the past even though there were existing accountability mechanisms.

The Tribunal did accept that some of the aspects of public interest relied upon "more particularly as re-formulated, do qualify for recognition as aspects of the public interest as that notion is to be understood".[92] They were held to be of insufficient weight. In balancing the public interest in confidentiality and the disclosure considerations the Tribunal held that the claim for disclosure on the ground of accountability failed because there was no reason to think that public accountability will in the end be avoided. Where the information remains confidential the public interest is served by maintenance of confidentiality, particularly where the claim for confidentiality is not a sham or spurious. Also it was held that it was not a case where there was "any issue of illegality, unlawfulness, irregularity, antinomy, impropriety or sharp practice by any of the parties involved."[93]

This case can be seen as a victory and a defeat. It is a victory in that there is a recognition of a very wide set of accountability and public interest claims. On the evidence the claims were not made out but it is clear that in certain circumstances they could be made out. Further, claims on behalf of a relatively small group, the users of the Park, fanned by a limited but vocal media campaign, were enough to deserve recognition as aspects of the public interest. The sentiments expressed can be used in later cases. The disappointing aspect of the case is the endorsement of existing accountability mechanisms, particularly on the issue of timing. The Tribunal seems to conclude that because in the long run the extent of government funds will be revealed or audited by the Auditor General, then that is enough. In the light of the political speech cases, this devalues the values of participation, and fails to recognise that existing accountability mechanisms have failed in the past.[94]

Tabcorp documents case

Unfortunately the same principles were applied in another case involving the same parties but a different public controversy.[95] This case dealt with the appointment of the project manager and principal adviser (Centaurus) to the government in a major privatisation project. The documents related to the involvement of various private sector organisations in the tendering process which led to the appointment. The documents contained material which had been supplied in confidence and indeed one particular document was a confidentiality agreement. Some of the matter related to the personal affairs of members of the tender panel. The evidence was that release of the documents would give rise to a competitive disadvantage to the firms involved and would inhibit the provision of proper information to government in the future.[96]

The public interest grounds relied on by the applicant were somewhat thin in that he

acknowledged "that there is no discernible public interest in the appointment of Centaurus save in relation to the haste with which the process of appointment was carried out."[97] The other general grounds argued, that there should be full disclosure because there was taxpayer's money involved, and that the information would contribute to the lessons to be learnt from this privatisation exercise, were rejected.[98] Two other matters which were argued were also held not to require release. These were that Centaurus was involved in policy, and that the confidentiality agreement was a way of getting around the Act. It was held on the evidence that neither of the matters were made out. There is an inference in the decision that if either of those factors did exist then they could be grounds where the public interest would demand release.[99] The ultimate argument supporting non-release was that the "privatization exercise was subject to both audit by the Auditor-General and approved by the State Tender Board, those measures combining to constitute scrutiny or potential scrutiny on the public's behalf."[100]

This decision is of some importance as it confirms the significance of the external review process itself as an accountability mechanism. While the documents were, it seems, of only historical interest, the AAT was prepared to scrutinise by reference to the content of the documents each of the public interest arguments raised. While none were made out at least the public knows that there was nothing untoward about this aspect of the privatisation process.

The Casino documents case[101]

The third of the "political" cases where the applicant was faced with a wall of confidentiality was in a request for documents relating to the assessment of bids and awarding of contracts for the Melbourne Casino. The request covered a period both before and after the decision to award the contract to the joined party, Crown Casino Ltd. The function of the respondent agency was to seek expressions of interest for a casino licence and then recommend to the relevant minister a preferred applicant and the proposed terms and conditions. The *Casino Control Act 1991* contained a very wide secrecy provision[102] and this provision was relied on to argue that the documents were exempt under section 38 of the Freedom of Information Act. Evidence was led about the highly sensitive nature of the documents and the process of selecting the successful bidder. Crown Casino Ltd gave evidence that its competitive position would be damaged by release of the information. The respondent agency gave evidence that the information was commercially sensitive and that release would impair its ability to obtain proper advice in the future.

The public interest grounds argued by the applicant were that there was a major public controversy about the bidding and licensing process leading to a loss of public confidence in the process, the joined party and the respondent. There were suggestions of conflict of interest, increased bids at a late stage and changes to the design. It was argued that the public had an interest in release of the documents because of the public interest in the Casino and the licensing process. Confidence could only be restored by disclosure of the deliberations of the respondent which led to the granting of the licence.

The AAT accepted the argument that there was a public interest in the granting of the casino licence. It rejected the argument that the public interest required disclosure of the licensing process to restore an alleged loss of public confidence in the licensing process, the casinos and the respondent:

> In the Tribunal's view, if it could be established that there has been a breakdown in the licensing process or if some illegality, impropriety or potential wrongdoing can be demonstrated, and the documents would reveal that, then it would be in the public interest to release the documents.[103]

The Tribunal then held that the documents did not throw light on the various allegations made by the applicant. The applicant had not proved the facts to show that would reveal any wrongdoing or impropriety.[104] There was thus no basis to release the documents to clear the air.

The Tribunal was prepared to accept a public interest in "people being informed of the processes of and having confidence in agencies such as the Authority and those agencies being accountable for their decisions."[105]This public interest had, however, to be considered in the context of the secrecy provision in the Casino Control Act[106] as well as the other provisions of the Act which allowed the Authority to choose whether to operate in public or private, or to give reasons for its decision. The Tribunal accepted the submissions that the material went far beyond what would have been supplied and used in a normal commercial transaction. It also accepted that there would be less frankness and candour shown by outside experts and that release of the documents, or part of them could tend to mislead.[107] The Tribunal clearly rejected evidence led from the applicant that the "corporate sector ... was aware that information it provided could become public."[108]

This decision was attacked by the applicant as "disappointing and deplorable." The AAT had "assert(ed) in effect that the cloak of commercial confidentiality outweighed the public's democratic right to be informed."[109] The decision is consistent with earlier decisions such as the *Grand Prix* case[110] and *Gill's* case.[111] The decision is defensible because the competing public interests are properly balanced in a reasonable argument. The legislative structure established for the Authority cannot be ignored in deciding where the proper balance lies. Unfortunately an applicant will rarely be in a position to lead evidence which points to wrongdoing. It will always be in the interests of government to deny any such wrongdoing. The external review process has the advantage that the public interest arguments can get a public airing, even if the process is expensive.[112] It will always be a matter of judgment as to when it is necessary to "clear the air."[113] The Tribunal here has at least articulated principles of public accountability which show that in certain circumstances release will be ordered to vindicate an accountability principle.

An alternative argument is that the decision is not consistent with earlier cases such as *Re Lapidos and Office of Corrections (No 4)*,[114] *Re Smith and Attorney-General's Department*[115] and *Re Robinson and University of Melbourne*.[116] In all these cases documents were released to allow the public to satisfy itself in relation to the public interest grounds argued. In the *Casino Documents* case,[117] as opposed to the *Grand Prix* case,[118] it could be argued that given the size and importance of the project the public interest did require that the relevant documents, or at least some of them be released to satisfy the public interest issues raised. A further argument is that the Respondent in the former case conceded that the FOI Act did apply to the respondent Authority. Given that this can be seen as a recognition that in certain circumstances the powers of the Tribunal in subsection 50(4) could be exercised.

Conclusion

This review of the recent public interest cases involving commercial information supports the view expressed in *Gill's* case[119] that the business information exemption is drafted in strong terms. The protection which the exemption provides was also noted in the 1989 review of the Victorian Act.[120] The AAT has been very reluctant to over-ride business or agency confidences. It may be argued that the accountability rationale of the Act has been met by the fact that in all cases the Tribunal has been anxious to record the fact that the documents do not reveal anything untoward. The circumstances in which the public interest would require release of

matter which is the subject of a confidentiality agreement or which has been received in explicit circumstances of confidence remain unknown, and will need to be the subject of further exploration.

The AAT to date has been very generous to business, but has tempered this upholding of exemptions with an articulation of accountability principles that is consistent with the underlying philosophy of the Act and the sentiments in the political speech cases. The public interest will always be an evolving concept. The challenge for those involved in freedom of information is to ensure that the application of the Act, and in particular subsection 50(4), keeps pace with the requirements of accountability and participation identified in the political speech cases.

Endnotes

1 Subsection 50(4) of the Victorian FOI Act provides as follows:

> "On the hearing of an application for review the Tribunal shall have, in addition, to any other power, the same powers as an agency or a minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 31(3) or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act" (emphasis added).

2 *Freedom of Information Act 1982* (Vic) section 3.

3 Ibid.

4 See *Re Gill and DITR* (1985) 1 VAR 97, 103.

5 See Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, *Freedom of Information* (1978) Ch 2, Bayne *Freedom of Information* (1984) Ch 1, Australian Law Reform Commission Issues Paper 12 "Freedom of Information"(1994) ("ALRC IP 12") Ch 2, and Australian Law Reform Commission and Administrative Review Council, Open Government : a review of the federal Freedom of Information Act 1982 (1995) (ALRC 77) Ch 3.

6 *Parliamentary Debates (Vic.) Legislative Assembly 1982 v. 367* 1061 [Second reading speech].

7 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 108 ("Television"), *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ("Nationwide News"), *Theophanous v The Herald & Weekly Times Limited and Anor* (1994) 124 ALR 1 ("Theophanous"), *Stephens and Ors v West Australian Newspapers Limited* (1994) 124 ALR 80 ("Stephens") and *Cunliffe and Anor v The Commonwealth of Australia* (1994) 124 ALR 120.

8 (1992) 177 CLR 108.

9 Ibid 137-138.

10 Ibid.

11 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75.

12 Ibid.

13 177 CLR at 211.

14 Ibid at 212.

15 Ibid at 231.

16 (1994) 124 ALR 1, 52.

17 Ibid at 58.

18 (1994) 124 ALR 80.

19 Ibid at 114.

20 ALRC 77 para 2-4.

21 See ALRC 1P 12 at 5.12 for a discussion of the different types of tests.

22 1979 Senate Report, see above note 5, at 5.28, quoted in ALRC IP12 above note 5 at 5.11.

23 1979 Senate Report, see above note 5, para 19.27.

24 *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64; For the most recent consideration of the matter see O'Connor J in *Re Cleary and Department of Treasury* (1993) 18 AAR 83 at 87-8.

25 (1986) 160 CLR 145, 153.

26 [1994] 1 VR 41.

27 Ibid, Ashley J at 61, approving comments of Young CJ in *Accident Compensation Commission v Croom* [1991] VR 322 at 323.

28 Ibid at 54.

29 Ibid at 56. Note also that the New Zealand case relied on makes reference to the "deliberate and significant" conferment by Parliament of a "right" of access, with the word being described as "strong". (See Cooke P in *Commissioner of Police v. Ombudsman* [1988] 1 NZLR385 at 389).

30 (1987) 73 ALR 607.

31 Ibid at 617.

32 Ibid. See also the comments of Kirby P in *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 at 627.

33 *Ryder v Booth* [1985] VR 869 at 877 per Gray J. See also the comments of Kirby P in *Perrins* case (1993) 31 NSWLR 606 at 612 where he contrasts the "radical" nature of the FOI legislation with the previous common law and statutory position.

34 ALRC 77 para. 4.2 (see above note 5).

35 Ibid para. 4.3.

36 See *Re Gill and DITR* (1985) 1 VAR 97 and *Re Thomas and Royal Women's Hospital* (1988) 2 VAR 587. See the emphasis added in the *Casino Documents* case 8VAR 212, 232, but cf *Re Mildenhall and Vic Roads* (19 February 1996, Judge Fagan P, at 72).

37 (1986) 1 VAR 345.

38 Ibid at 348.

39 Ibid at 353.

40 1 VAR 97.

41 Ibid at 103.

42 [1991] I VR 63, 75.

43 Ibid.

44 (1991) 5 VAR 78, 89.

45 (1991) 5 VAR 213.

46 [1993] 2 VR 177, 182.

47 [1991] 1 VR 63.

48 AAT of Vic., Galvin DP, 21 January 1994.

49 At 26.

50 *Robinson's* case [1993] 2 VR 177 at 182.

51 Above at 33.

52 [1991] 1 VR 63.

53 Ibid at 39. cf *O'Farrell v Road Construction Authority* (County Court of Victoria, Judge Hewitt, 19 December 1984) "the public weal" at 12.

54 Ibid.

55 At 41. The comments here are very similar to the comments made in *Re Thwaites and Department of Justice* (AAT of Vic, J Rosen PM, 8 February 1994).

56 At 40. Cf *Re Mildenhall and Casino and Gaming Authority* (AAT of Vic., R Ball DP, 16 January 1996).

57 Ibid. The comments here are similar to those in *Re Pescott and Victorian Tourism Commission (No 2)* (1988) 2 VAR 437 at 454 where commercial documents were not released on the basis that "there is no indication in the documents of illegal or improper practices or use of funds, which the public interest would require be disclosed." See however *Re Mildenhall and Department of Treasury* (AAT of Vic., J Galvin DP, 15 January 1996).

58 (1985) 1 VAR 97 at 103.

59 *Re Thwaites and Department of Premier and Cabinet*, (AAT of Vic. J Rosen PM, 23 March 1994).

60 Ibid at 22

61 (1992) 177 CLR 108 at 138, see note 7 above.

62 *Leeds Media* case at 38.

63 Ibid.

64 Ibid at 40.

65 177 CLR 106

66 *Re Thwaites and Department of Health and Community Services* (AAT of Vic, P. Nedovic PM, 22 August 1994).

67 Ibid at 13.

68 [1991] 1 VR 63.

69 *Office Renovations* case ibid note 66 at 16.

70 Ibid at 18.

71 Ibid at 18.

72 Above note 59.

73 *Office Renovations* case above at note 66 at 18.

74 [1987] VR 681 at 687.

75 *Office Renovations* case above note 66 at 15.

76 ALRC 77 (see note 5).

77 *Re Thwaites and Department of The Treasury* (AAT of Vic., J A Bretherton PM, 11 April 1994).

78 Ibid at 12.

79 Ibid.

80 In *Re Forbes* (1993) 6 VAR 53.

81 *Re Cole and Department of Justice* (1994) 8 VAR 114, 130. See also the comments in *Re Lamont and Department of Arts, Sports and Tourism* (AAT of Vic, JA Bretherton PM, 11 April 1994) where it was held that the public had an interest in knowing what claims are made for payment from the public purse by senior public servants. For a case involving a more lowly public servant where the public interest justified release see *Re Atkinson and Public Transport Commission* (1992) 5 VAR 255.

82 *Tabcorp Documents* case 8 VAR 102.

83 Eg *Easdown* (1987) 2 VAR 102, *Chadwick* (1987) 1 VAR 444 and *Perton* (1992) 5 VAR 290.

84 *Re Mildenhall and Department of Treasury*, (1994) 7 VAR 342.

85 [1991] 1 VR 63.

86 7 VAR at 371.

87 Ibid.

88 See the comments in "Report of the Royal Commission into Commercial Activities of Government and Other Matters" (1992) (Perth) at 2.5-6. See also the reference at 371 in the *Grand Prix* case.

89 Ibid 372.

90 Ibid .

91 Above note 7.

92 Ibid at 374.

93 Ibid at 375, cf *Gill's* case 1 VAR 97 at 103. See also *Re Blums and Department of Premier and Cabinet* (1992) 5 VAR 290.

94 See WA Royal Commission Report at 2.6. See also the comments in the *State Bank of NSW* case (1991) 5 VAR 78, 89.

95 *Re Mildenhall and Department of Treasury*, (No 2) (1994) 8 VAR 102.

96 Ibid at 106. Such an argument is easy to make but hard to refute.

97 Ibid at 110.

98 Ibid.

99 Ibid at 111.

100 Ibid.

101 *Re David Syme & Co Ltd and Victorian Casino & Gaming Authority* (1995) 8 VAR 212 (*Casino Documents* case).

102 Section 151.

103 *Casino Documents* case at 229.

104 Ibid at 230.

105 Ibid at 231.

106 Section 151.

107 *Casino Documents* case at 231.

108 I Munro "The Battle to Reveal Casino Papers" *The Age* 11 December 1994.

109 "Secrecy rules, for your information" *The Age*, 26 February 1995.

110 7 VAR 342.

111 (1987) 1 VAR 97.

112 According to the Applicant "tens of thousands of dollars" See ibid f 108.

113 See, eg *Easdown's* case (1987) 2 VAR 102, and *Re Lapidos and OOC (No 4)* (1989) 4 VAR 283.

114 (1989) 4 VAR 283.

115 (1989) 2 VAR 543, confirmed on appeal, [1991] VR 63.

116 (1991) 5 VAR 231.

117 8 VAR 212.

118 7 VAR 342.

119 (1987) 1 VAR 97 at 103.

120 Legal and Constitutional Committee of the Victorian Parliament *Report upon Freedom of Information in Victoria* (1989) at 4.32. See also ALRC 77 at para 10.31 recommending retention of existing Commonwealth section 43.