for exemption under ss.31(1)(c) and 33 — whether practicable to grant access to tapes with deletions.

This matter arose out of an investigation by officers of the respondent following a complaint made to it by the applicant. The applicant had been studying at an Institute of Technology and the Institute had refused to permit him to continue his studies. Following the complaint by the applicant, an officer of the respondent sought and obtained from a senior member of the Institute's staff the name of a Reader capable of making a fair assessment of the applicant's complaint. An interview between an officer of the respondent and the Reader followed and, upon the respondent advising the applicant that his complaint could not be substantiated, the applicant sought access to the taped interview.

The respondent claimed that the tape was exempt pursuant to s.31(1)(c) and 33(1) and that, in any event, it was impracticable to provide the tapes in a form suitable for disclosure.

First, the Tribunal directed its attention to the s.31(1)(c) claim. It was satisfied on the evidence before it that release of the tapes would disclose the identity of the Reader and that, having regard to the way the Reader's services were obtained, the terms and manner in which he assisted and advised the respondent and his subsequent concern about the release of the tapes, that the Reader was a 'confidential source of information'. Despite making this finding, it did not uphold the respondent's claim under s.31(1)(c) on the basis that the tapes did not disclose a confidential source of information in relation to the enforcement or administration of the law as required by the section. The *Ombudsman Act,* in its opinion, was not the type of legislation envisaged to be protected by this provision, but rather it was directed towards 'the Criminal Law and provisions which might be generally described as of a regulatory nature'.

The Tribunal then turned its attention to s.33(1). The evidence presented by the respondent clearly indicated that the Reader gave his assistance on the understanding that his services were provided more as a favour than in the performance of any contract of services to provide professional advice, and that he wished the content of the tapes to remain confidential. The Tribunal accepted that release of the tapes to the applicant would involve the unreasonable disclosure of information relating to the personal affairs of the applicant and accordingly upheld the s.33 claim by the respondent.

It was then required to decide whether it was appropriate to release the tapes with the necessary deletions made, as provided by s.25(b). Not without some reluctance, it concluded that it was practicable to release the tapes as a written transcript provided that the necessary deletions were made. The meaning of 'practicable' that it adopted was 'capable of being carried out in action, feasible'.

The Tribunal therefore ruled that the respondent provide the applicant with a written transcript of the tapes with such deletions as were required to remove any comments which could identify the reader.

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

MITSUBISHI MOTORS AUSTRALIA LIMITED and DEPARTMENT OF TRADE AND ORS
No. S85/66
Decided: 17 June 1986 by Fisher J (Presidential Member), Deputy President Layton and D.B. Williams (Member).
Order under s.30(1A) AAT Act for joinder of parties — parties seeking to be joined had requested information — reverse-FoI proceedings.
This matter concerned an application by two persons (the Paynes) under s.30(1A) of the *Administrative Appeals Tribunal Act* 1975 to be joined as parties in a reverse FoI suit which had been brought by Mitsubishi Motors to oppose the respondent's decision to grant them access to certain documents under the *FoI Act.* Section 30(1A) requires the Tribunal to be satisfied that the parties seeking to be joined are persons 'whose interests are affected by the decision'.

The Tribunal concluded that the Paynes satisfied these requirements as they had initiated the request for information which was the foundation for these proceedings and were persons who specifically sought access to the documents in dispute. Furthermore, the decision the subject of review specifically affected their request. They therefore had, prima facie, 'a real or direct interest, a genuine affection of interest in the subject matter of the review'. (*Re C and Collector of Customs (NSW)* 5 ALN N222.)

It rejected a submission to the effect that it should exercise its discretion to refuse to join the Paynes as parties because they could not be parties to proceedings under s.59 and, if they were joined, could in the course of the hearing gain access to the very material which was claimed to be exempt. In its view, s.59 was concerned solely with the initiation of proceedings not with joinder and, moreover, s.59(2) which required the respondent to give the Paynes notice of the reverse-FoI suit, contemplated that they were entitled to be involved. The Tribunal also took the view that the possibility of the Paynes gaining access to the disputed documents was more a procedural concern than a matter of substance which should affect the exercise of its discretion under s.30(1A). Furthermore, its powers under s.35(2) of the *AAT Act* and s.63 of the *FoI Act* were, in its view, sufficient to ensure that the applicant's concern about the possibility of disclosure was adequately dealt with.

For these reasons, the Tribunal made the order requested.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED and DEPARTMENT OF RESOURCES AND ENERGY
No. V13/1985
Decided: 5 February 1987 by Jenkinson J (Presidential Member)
Claims for exemption under ss.34(1)(d) and 42 — whether disclosure of portion of opinion amounts to waiver of access.

The applicant had been granted access to documents from which there had been deleted passages which were claimed to be exempt for the reason that they were documents the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet (s.34(1)(d)). In addition, he had been refused access to a legal opinion of the Solicitor-General which was claimed to be exempt under s.42, the legal professional privilege exemption. The Tribunal affirmed the decisions to make the deletions under s.34 and then proceeded to examine the claim for exemption under s.42.

Counsel for the applicant did not question that the documents consisted of statements of legal advice furnished by the Solicitor-General in exercise of his function to provide the Commonwealth with legal advice. Moreover, in view of the decision of the Full Court of the Federal Court in *Waterford v. Department of Treasury* (1985) 7 ALD 93 (currently on appeal to the High Court), he felt unable to proceed with a submission to the effect that the doctrine of legal professional privilege would protect

communications between a government agency and its legal advisers, only where it could be established that the disclosure would be contrary to the public interest. He, however, argued that documents to which the applicant had been granted access contained statements of one or more of the legal opinions contained in the document in question, and that this amounted to a waiver of the privilege. This claim was rejected on two separate bases.

First, the Tribunal pointed to the fact that the provision did not require that the document should be privileged, but rather that it should be 'of such a nature that it would be privileged'. As a result, in its opinion, the nature of the document was determined by reference to acts and events which preceded or were contemporaneous with its creation and was unaffected by subsequent events of the kind which might amount to a waiver of privilege. Its attention was drawn to a reference to waiver in *Waterford* but it took the view that it was made in relation to the general law context of the privilege.

Alternatively, the Tribunal held that there had not in fact been any conduct sufficient to amount to a waiver of the privilege. In the first place, it doubted whether a decision by a statutorily designated person, in performance of a function prescribed by the *FoI Act*, could be regarded also as an exercise on behalf of the Commonwealth of a liberty to waive a privilege, not of the agency, but of the Commonwealth. Further, it held that the doctrine of waiver had been evolved in the context of resolution of competition between the interests of opposed litigants, and the question of fairness to an opposing litigant was a substantial consideration in determining what amounted to a waiver. In contrast, in the administration of the *FoI Act*, no interest of a litigant claimed attention as such. It concluded that there was nothing to suggest that the person who made the decision to grant access might have supposed that this could result in a waiver of privilege in respect of the written opinion, and that no consideration of fairness to the applicant or any other person moved to a conclusion that the privilege had been waived.

The Tribunal accordingly affirmed each of the decisions the subject of the application for review.

HAZELTINE and AUSTRALIAN NATIONAL PARKS AND WILDLIFE SERVICE
No. A86/74
Decided: 11 February 1987 by Dr A.P. Renouf (Senior Member), N.J. Atwood and C.G. Woodard (Members)

Applicant unsuccessful in application for promotion — sought access to work-assessments of officer promoted for previous ten years — claim for exemption under s.40.

The applicant, who had been unsuccessful in an application for promotion, had sought access to documents containing assessments of the work capacity and performance over the past ten years of the successful applicant. Access was denied under s.40(1)(c), on the basis that it would have a substantial adverse effect on the management or assessment of personnel by the respondent.

The Tribunal, after referring to the interpretations of 'substantial adverse effect' in *Harris v. ABC* (1983) ALR 551, 554, *Re Heaney* 6 ALD 310 and *Re James* 6 ALD 687 found that the necessary degree of seriousness or significance existed with regard to the application here. In its view, if the application were to succeed, there would be no good reason why work assessments, current as well as past, should not be brought into the public domain at request of an individual, a consequence which would make it difficult, if not impossible, for the Commonwealth to manage or assess its personnel properly. In particular, it accepted that staff assessments required candour which would be much harder to obtain if they were subject to disclosure and that disclosure would, at best, put at risk the respect and confidence of lower-ranking officers in their supervisors.

With regard to the public interest test in s.40(2), the Tribunal endorsed the approach set out in its earlier decision of *Re Mann and Australian Taxation Office* (1985) 3 AAR 261, 273-4 to the effect that the grounds in s.40(1) were, of their very nature, such that satisfaction of them would make disclosure prima facie contrary to the public interest. In this case, the thrust of the applicant's case was that the successful appointee's work competence was not of the order required for the position to which he was appointed, and that there was a public interest in enabling the applicant so to demonstrate. The Tribunal, however, was not prepared to accept that this was sufficient to outweigh the public interest against disclosure inherent in s.40(1)(c). It stressed that the request for access here was very different from the one in *Re Williams* 8 ALD 219 which was relied on by the applicant.

The Tribunal accordingly affirmed the decision under review.

WARD and AUSTRALIAN FEDERAL POLICE
No. V85/414
Decided: 20 February 1987 by Deputy President I.R. Thompson, H.E. Hallowes (Senior Member) and H.C. Trinick (Member)

Request for access to documents on applicant's police file — claims for exemption under ss.33A(1)(b), 37(1)(a), (b) and (c) and 37(2)(b).

The applicant had been either partially or totally denied access to five documents on his personal file. The claim for exemption in respect of the first document related to a passage which contained information supplied by the Victorian Police. The passage was claimed to be exempt under s.33A(1)(b) on the basis that its disclosure would divulge information communicated in confidence by a state authority. The Victorian Police had been consulted and declined to agree to access being granted.

The Tribunal was satisfied on inspection of the document that the passage in question came within the ambit of s.33A(1)(b) and that its disclosure would not be in the public interest within the terms of s.33A(5). It accepted that the public interest would be adversely affected by access, in that such information might not be supplied to the respondent in future thereby impairing its ability to do its work. Moreover, it found that there was no credible evidence before it to support the applicant's assertion that access would enable him to establish that he had been convicted on the basis of perjured evidence. It did, however, indicate that, had there been credible evidence to this effect, it would have been sufficient to outweigh the adverse effects of disclosure.

The second document in issue contained a passage containing details of a person who supplied information to a narcotics agent. The Tribunal was prepared to accept that the provision of access to that passage might deter future potential informants. It was not persuaded by a submission by the applicant in which he suggested that the person concerned had contacted police because he himself had first approached the media and in which he listed the names of persons of whom he thought one might be the informant in question, suggesting that none of them would object to the release of information to him. The Tribunal pointed out that other information obtained as a result of FoI applications had been stolen from the applicant's prison cell, so there was a substantial risk that any information provided to him would come into the hands of persons in the illicit drug trade and violent action would be taken against the informant named in the document. The contents of the deleted passage were such that even if the name of the informant was deleted, it would be possible for his or her name to be readily discovered. In view of this, the Tribunal upheld the claim for exemption under s.37(1)(c) in respect of the entire passage.

The third document in issue contained a passage which evaluated

information provided in confidence by a number of persons including the Victorian Police and Victorian Railway Investigating Officers. The Tribunal upheld a claim for exemption under s.33A(1)(b) and commented that none of the information would have assisted the applicant, nor was it otherwise of such a nature that its disclosure would be in public interest. It, however, rejected an additional claim under s.41, the personal privacy provision. The information which referred to the names of a number of persons as informants and to a statement by the applicant as to an alleged relationship between himself and another person, and the nature of that other person's business did not, in its view, relate to the personal affairs of any of the persons named (*Young v. Wicks*, 5 *FoI Review* 71). It also rejected a claim for exemption under s.37(2)(b) except in relation to a reference to a docket number; it accepted that a person knowing the details of the docket number of a particular investigation might be able to mislead officers into thinking that had authority to obtain information about it. It, however, commented that the procedure for investigation which was revealed in the document was one which would have been expected so that its effectiveness could not be expected to be prejudiced by disclosure. Finally, although s.37(1)(b) was not relied upon by the respondent, it held that one particular passage would disclose the identity of a confidential source of information in relation to the administration of the law.

The fourth document was also claimed to be exempt under s.37(2)(b) in respect of two paragraphs. The first disclosed a method of investigation, namely, the referral of information to another body for investigation. The Tribunal found that, although such a method would not necessarily be expected, it was difficult to see how disclosure could reasonably be expected to prejudice its effectiveness. The second paragraph related to discussions with the applicant of a method by which he might assist in furthering the investigation. As he was therefore already aware of the method, the Tribunal was unable to see how its effectiveness would be prejudiced by disclosure. It accordingly rejected the claim for exemption in respect of both paragraphs.

The final document, a report by a narcotics agent, contained information received by him from an unidentified person, together with handwritten notes by other persons relating to action taken by them, and also a statement of the manner in which such information is graded. The Tribunal upheld a claim for exemption under s.37(1)(a) on the basis that, if the applicant was not the informant, knowledge of the information by him or any other person to whom it was communicated by him could reasonably be expected to prejudice the conduct of an investigation of a possible breach of the law. It also upheld a claim for exemption under s.37(2)(b).

ANDERSON and AUSTRALIAN FEDERAL POLICE (No. 2)
No. N83/645
Decided: 27 February 1987 by Deputy President A.N. Hall
Request for access to documents relating to the applicant — large number in issue — Tribunal previously determined claims of exemption in respect of representative documents — claims of exemption under ss. 33, 33A, 37 and 41 determined in accordance with earlier reasons.

The background to this matter was previously as follows. In its earlier decision in Re Anderson and Australian Federal Police (No. 1) (1986) 4 AAR 414, the Tribunal had dealt with a number of documents considered to be representative of the 14 categories of documents which were claimed to be exempt. At a subsequent directions hearing both parties had indicated that they did not consider it necessary for the Tribunal to hear further evidence or submissions in relation to the outstanding documents. In view of this, the Tribunal proceeded to examine claims for exemption under ss.33, 33A, 37 and 41 in accordance with its earlier reasons for decision.

GREGORY and DEPARTMENT OF DEFENCE
No. S86/332
Decided: 5 March 1987 by Deputy President R.A. Layton
Jurisdiction — access granted after expiry of time limit for access decision and application for review — whether the Tribunal has jurisdiction without internal review in relation to the deemed decision or the subsequent decision — position with regard to s.37 statements.

The applicant who had sought access to his personnel and medical files had applied for review under ss.55 and 56 when the agency did not respond within the time limit required in s.19(3)(b). He was subsequently provided with access to a number of documents, but he was dissatisfied with the access granted (being the provision of copies) and stated that some of the documents were of poor quality. He therefore requested the Tribunal to proceed with his application for review.

The Tribunal first considered the question as to whether it had the jurisdiction to consider the application for review, given that the applicant had not requested any internal review. After examining ss.54, 55 and 56, it concluded that internal review was not required where a decision was deemed to have been made under s.56. It, however, found that subsequent decisions to grant access introduced a separate and 'fresh' decision, and that it had no jurisdiction to review such a decision until the applicant had sought internal review. It rejected an argument to the effect that s.56(5) allowed it to extend the original application for review to include the subsequent decision. In its view, the words 'other than a decision to grant, without deferment, access to the document' made it clear that it could not be used to extend the original application to include review of the subsequent decision. In the absence of any provision which specifically dealt with the procedure to be followed in a situation like the present, it considered that the two decisions were to be taken as separate matters, although they might, as a matter of procedure, be heard together if both proceeded to a review hearing.

Finally, the Tribunal considered the question whether the respondent was obliged to provide the statement of documents required under s.37 of the Administrative Appeals Tribunal Act 1975. After considering the effect of ss.33 and 37, it concluded that it could not give directions which had the effect of nullifying a statutory provision such as s.37, although it could grant an extension of time. It therefore directed that the documents should be lodged within 21 days.

In view of its conclusion in relation to the question of jurisdiction, the Tribunal directed that the matter should not be set down for a preliminary conference pending the outcome of any internal review.

BROOKER AND COMMISSIONER FOR EMPLOYEES' COMPENSATION
No. W86/114
Decided: 6 March 1986 by Deputy President R.D. Nicholson
Statement accompanying application for compensation — claims for exemption under ss.40, 41, 45.

The applicant had sought access to a statement accompanying an application for compensation lodged by a person who had been under her supervision. She sought access in order that she could take up the matter further if, as she suspected, it contained allegations which cast a slur on her capacity as officer and also to consider whether any such allegations warranted civil proceedings. Access was denied in reliance on ss.40, 41 and 45.

Agency Operations
In view of the fact that the applicant

had made a statement which was not contradicted by evidence of the respondent, to the effect that the author of the document had since been transferred to another department, the Tribunal held that there was no evidence on which to find that the release of the statement would have any of the effects referred to in ss.40(1)(c), (d) or (e) as a consequence of any impact that its release might have had on the working relationship between the applicant and the author.

Personal Privacy

The Tribunal, after referring to its earlier decisions on the meaning of 'personal affairs' as summarised in *Re Anderson and Department of Immigration and Ethnic Affairs* (1986) 4 AAR 414, 430-34, 3 FoI Review 42 and to the Federal Court's interpretation of ss.41 in *Young v. Wicks* (1986) 5 *FoI Review* 71, concluded that the information in the statement relating to the alleged work-related ill-health of its author, did contain information relating to its author's personal affairs.

With regard to the question of the 'reasonableness' of disclosure, the Tribunal referred to its earlier decision in *Re Chandra* (1984) 6 ALN 257, in which it identified relevant considerations as including the nature of the information in question, the circumstances in which it was obtained, the likelihood that the person concerned would not wish to have it disclosed and its current relevance. It also referred to the fact that there was a public interest in a person having access to a document affecting his or her interests. (*Re Burns* (1984) 6 ALD 193), and that the motives of the applicant in seeking disclosure were a relevant factor to be considered (*Re Shewcroft* (1985) 7 ALN N307). It concluded that, in the circumstances, disclosure of the information relating to the personal affairs of the author of the statement would be unreasonable.

Confidentiality

The statement is question was required to be submitted as a precondition to compensation being payable and was not marked confidential. The Tribunal referred to its earlier decisions in *Re Witheford* (1983) 5 ALD 534 and *Re Maher* (1985) 7 ALD 731 and commented that in interpreting s.45(1), the object of the *FoI Act* as set out in s.3(1) was to be borne in mind.

In its view, it would have been the expectation of any person completing such a claim and additional statement that, once lodged, neither would be subjected to disclosure to the public or to a specific person. Furthermore, it took the view that this expectation would not have been changed as a consequence of the enactment of the *FoI Act*. The Tribunal therefore concluded that the statement was communicated and received under an inferred understanding that it would be kept confidential.

The Tribunal rejected an argument that oral statements made by the author had resulted in the contents of the statement ceasing to be confidential. It held that there was insufficient evidence to substantiate the claim. It also rejected an argument that the allegations sought could be released to the applicant as they related to conduct undertaken by her and were not in their nature confidential as far as she was concerned. It drew a distinction between involvement in factual circumstances and knowledge of expression of opinion concerning these circumstances and pointed out the latter was not known to the applicant. Furthermore, it commented that there was nothing to suggest that the information was communicated on the footing that its confidentiality was to be qualified to the extent that it could be communicated to the applicant.

Finally, the Tribunal refused to attach any particular weight to the fact that the applicant sought access to information about herself; in its opinion its duty was to determine whether the document if disclosed, would result in a breach of confidence (cf. *Boots v. Department of Immigration and Ethnic Affairs* (1986) 6 *FoI Review* 1984).

Formal Decision

In view of its finding that the respondent had discharged its onus under s.61 in relation to ss.41 and 45, the Tribunal affirmed the decision under review.

HILLOCK and ABORIGINAL DEVELOPMENT CORPORATION
No. S85/98

Decided: 16 March 1986 by Deputy President R.A. Layton

Costs — whether applicant 'successful or substantially successful' within s.66(1)(b) — operation of ss.66(2)(b) and (c) where matter settled without Tribunal's decision.

The background to this matter was briefly as follows. The applicant had sought and been refused access to documents relating to a report and comments made to the respondent by a person whom the applicant was in the course of suing for defamation. He had applied for review by the Tribunal and subsequently, prior to any decision by the Tribunal but subsequent to the settlement of the defamation proceedings, was granted access to many of the documents in dispute. He had in fact failed to avail himself of access to many of the documents made available to him.

The Tribunal found that, although the applicant had been given access to a large number of documents, this was, in part, due to changed circumstances brought about by a settlement of his defamation action rather than as a result of his application for review. Further, his failure to take access to the majority of documents which were released, including those documents of central concern to him, suggested that he had already had access to them from another source or was no longer interested in them. In addition, some of the documents to which he did obtain physical access appeared to be outside the purview of his original application for access and could not therefore be said to have been made available due to his application for review. It therefore concluded that he had not been successful or substantially successful within the meaning of s.66(1)(b).

In view of its finding that in relation to s.66(1)(b), it was not necessary for the Tribunal to consider the application of s.66(2). It, nevertheless, offered the following comments in relation to that provision.

Turning first to the question of 'financial hardship' in s.66(2)(a) (which unlike (b), (c) and (d), was a matter to be mandatorily considered even though the application had not proceeded to a decision), it reiterated its previously expressed view (see *Re Hounslow* 7 ALN N362), that the hardship criterion required a demonstration of 'severe circumstances'. After considering in detail the applicant's financial position, it concluded that he did not fulfil the necessary requirements. It commented that there was no reason why he could not meet the payment of the costs of $1,391 over a period of time.

As to s.66(2)(b), namely whether the release of the documents would be of benefit to the general public, the Tribunal once again concluded that the applicant failed to satisfy the required criterion. It took the view that the documents to which the applicant had sought access, were of particular interest to himself rather than of general interest or benefit to the public. (Reference was made to *Re Lianos* (No. 2) 9 ALD 43 and *Re Chan*).

As to s.66(2)(c), namely, whether access would be of commercial benefit to the applicant, the Tribunal commented that it was clear the applicant had sought access to the documents because he was concerned about comments which reflected badly on him in his professional capacity and therefore related to his professional standing and future employment. It therefore concluded that there was a commercial benefit to the applicant in making his application.

Finally, with regard to s.66(2)(d) and the question of the reasonableness of the decision which had been

the subject of review, it concluded that the decision denying access to the documents was initially reasonable on the information before the respondent. It was also satisfied that there had not been any unreasonable delay in granting access.

In view of its conclusions, the Tribunal refused to make the recommendation sought.

BOEHM and COMMONWEALTH OMBUDSMAN (NO. 2)
Nos. V83/84 and 83/350
Decided: 25 March 1987 by Jenkinson J (Presidential Member)
Refusal to grant access to part of document containing handwritten notes disclosing the identity of another complainant — claim for exemption under s.40(1)(d).

The document in question was a typed memorandum by one of the Ombudsman's officers for the consideration of his superiors. The material which had been deleted from it comprised handwritten notes which consisted of a surname followed by the word 'file'. The name was that of a person who had made a complaint to the respondent similar to that made by the applicant.

The Tribunal accepted as reasonable an argument by the respondent to the effect that persons who were minded to make complaints to him would be deterred from taking such a course if their identities, and the fact that they had made a complaint, were likely to be disclosed under the *FoI Act* for no better reason than that it had proved convenient for one of his officers to jot down a reference to a file by the name of the complainant simply as an aide-memoir. Furthermore, it was satisfied that, if the respondent and his officers were constantly required to take thought to avoid the jotting down on files of useful and time saving notes of this kind, this would have a substantial adverse effect on the respondent's operations. It accordingly upheld the claim for exemption under s.40(1)(d).

The Tribunal also held that disclosure of the notes would not be in the public interest and that s.40(2) accordingly had no operation. It took the view that, although the applicant had an interest in discovering the identity of another complainant in respect of the same scheme about which he was concerned, it was not in the public interest that the acquisition of such knowledge should turn on the mere hazard of such a jotting.

DYRENFURTH and DEPARTMENT OF SOCIAL SECURITY
No.V86/452
Decided: 15 April 1987 by Deputy president R.K. Todd, R.A. Balmford (Senior Member) and L.J. Cohn (Member).

Reports on unsuccessful applicants for senior position — claim for exemption under ss.40(1)(c), 41, 43(1)(c)(i) and 45.

The background to this matter was briefly as follows. The applicant had unsuccessfully applied for appointment to a senior position in the respondent's department. Of the four applicants who had ultimately remained in the running for the position, two had been interviewed and two, including the applicant, had not received interviews; none were, however, successful. The documents in issue concerned a comparative assessment of the four applicants and individual assessments of the two who received interviews.

Section 40(1)(c)
The Tribunal commented that disclosure of the kind of matter contained in the documents in question could in broad terms reasonably be expected to have the following effects:

(a) It could in some circumstances lead to difficulties between those concerned in the selection process, particularly if those persons were associated with one another in their employment.
(b) It would be quite possible for the effects mentioned in (a) to extend further to affect the proper and efficient conduct of the operations of the agency.
(c) There was ground for considering that it would result in a substantial diminution of candour and frankness in written reports, assessments and references thereby leading to a reduction in the reliability and value of such documentation or a greater emphasis on oral reports; and
(d) It would probably also in general terms lead to persons who were unlikely to be successful being less likely to be inclined to apply for appointment.

Nevertheless, the Tribunal emphasised that in the case of s.40(1) it was necessary for it to have regard to the consequences of disclosure of the particular documents in question. It was influenced in this regard by the respondent's practice in relation to the disclosure of such documents as outlined in its internal guidelines, a practice which it decribed as a 'generous one'. In its view, although it was not bound by them, they existed as a fact and their existence seemed to undermine the suggestion of adverse consequence.

The main thrust of the respondent's argument for exemption was that there was an increased apprehension of the required adverse effect because the situation arose in the Senior Executiv service. The Tribunal accepted that there was strong competition for these appointments and that there might be some difficulties in the working relationship between such competitors if the documents were disclosed, depending on their contents. It, however, considered that, although the comments made about the candidates were candid, they were expressed with moderation. It was consequently unable to conclude that they came within s.40(1)(c).

Finally, the Tribunal commented that its emphasis on the need to refer to information contained in the particular document differed from that in *Re Hazeltine* (see above). It did not, however, disagree with the conclusion in that case as much of the documentary material in question was created prior to the enactment of the *FoI Act* (See *Re Witherford* 5 ALD 534, 542).

Section 45
The Tribunal also rejected a claim for exemption under s.45 on the basis that it could find no evidence from which it could infer a relationship of confidence in the Public Service context in relation to reports about candidates from within the Public Service. In its view, the fact that applications and interviews were treated as confidential did not impress with the quality of confidence the assessments made of candidates by selection panels. It emphasised that the documents in question did not refer in any way, either expressly or impliedly to the contents of any referees' reports.

Sections 41 and 43(1)(c)(i)
A claim for exemption under the personal privacy provision was also rejected by the Tribunal. Applying the test is *Young v Wicks, FoI Review* 71, it was not in its view possible to classify any document as one which contained information referring to matters of private concern to the individual (see also *Re Williams* 8 ALD 219, 221). Finally, the Tribunal held that there was absolutely no foundation for a claim for exemption under s.43(1)(c).

BRADBURY and COMMOWEALTH OMBUDSMAN
No. W86/264
Decided: 24 April 1987 by J.O. Ballard (Senior Member), D.B. Travers and N.J. Atwood (Members)

The background to this matter was briefly as follows. The applicant had sought access to a number of documents in the possession of the respondent's office in Perth. All of the documents were made available to him for inspection and, when he failed to inspect them within the time prescribed for inspection, copies were sent free of charge to his solicitor. These copies were now in storage in Perth. He had subsequently come to Canberra and sought access to the same documents which were now

located in Canberra. The respondent agreed to provide the documents again in copy form but, in all the circumstances, indicated that an appropriate copying fee should be charged. The applicant brought these proceedings because he wanted direct access rather than copies. There was evidence to the effect that he had caused disruption to the work of the respondent's office in both Perth and Canberra.

The Tribunal concluded that the applicant had been given a reasonable opportunity to inspect the documents in question, and that the Ombudsman and his office had behaved with exemplary restraint in the face of what could be best described as harassment. It accordingly affirmed the respondent's decision in refusing the applicant the right to inspect the documents and to provide copies instead.

FEDERAL COURT

MITSUBISHI MOTORS AUSTRALIA LIMITED v DEPARTMENT OF TRANSPORT AND ORS
(1986) 68 ALR 626
Decided: 21 October 1986 by C.J. Bowen, Beaumont and J.J. Wilcox
Document subject to submissions under s.27, not exempt under s.43 — review under s.59 — whether Tribunal has power to declare exemption under other provisions of FoI Act.

This case concerned an application to define the jurisdiction of the AAT when reviewing a decision regarding a claim for exemption under s.43. The question of law, which was referred to the Federal Court under s.45 of the Administrative Appeals Tribunal Act, was —

> Whether the Administrative Appeals Tribunal, when reviewing the respondent's decision pursuant to s.59 . . . that a document, so far as it contains certain information, is not an exempt document under s.43 of the Act, is, as a matter of law, obliged or, alternatively, empowered to decide whether the document is an exempt document under that, or any other, provision of Part IV of the Act.

The court answered as follows:
(a) As to the claim for exemption under s.43 — Yes.
(b) As to a claim for exemption under any other provision of Part IV — No.

The court held that ss.27, 43 and 59 envisaged a procedure which provided a right of review only in respect of a decision that a document was not exempt under s.43. It pointed out that both ss.27(2) and 59(1) spoke of a decision that the document was not an exempt document under s.43 (and not of a decision in respect of any other claim for exemption), and that neither provision referred to a decision to grant access to a document.

It rejected an argument to the effect that s.59(1) should be given a more expansive definition by necessary implication (see *Minister for Immigration and Ethnic Affairs v. Mayer* (1985) 61 ALR 609), and commented that this was not a case where, in the absence of such an implication, the provision would be without effect. In its view, s.59 had the effect of enabling the AAT, on the application of an affected person, to review a decision that a document was not exempt under s.43; the fact that it did not also permit the Tribunal, at the instance of that person, to review the decision in relation to other grounds of exemption did not mean that it lacked legislative content.

The Court also rejected arguments to the effect that it would be 'absurd', 'capricious' and 'irrational' (in the sense explained in *Cooper Brookes (Wollongong) Pty Ltd. v. FCT* (1981) 35 ALR 151) to deny a construction of s.59(1) that would allow review of all claims of exemption, and that s.58(1) should be construed as conferring jurisdiction on the Tribunal to decide any claim of exemption rejected by the decision-maker. It also concluded that there was no analogy of pendant or accrued jurisdiction between the present case and Chapter III of the Federal Constitution.

Finally, the Court noted that the applicant had sought to tender a statement of reasons of the decision-maker furnished under s.37 of the *Administrative Appeals Tribunal Act.* It took the view that this statement was inadmissible as its jurisdiction under s.45 of the *Administrative Appeals Tribunal Act* was to hear and determine the question of law referred to it and it could not therefore go beyond the material contained in the special case.

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