

VICTORIAN FOI DECISIONS

Administrative Appeals Tribunal

PESCOTT and DEPARTMENT OF INDUSTRY, TECHNOLOGY AND RESOURCES

No. 870443

D cid d: 26 November 1987 by A.F. Smith (Member).

Consultant's report on Victorian Tourist Commission — whether 'prepared by a Minister' for purposes of s.28(1)(b) — alternative claims for exemption under ss.30(1) and 35(1)(b).

In this case the controversial question of what constitutes a 'Cabinet document', was again the subject of consideration by the Tribunal. The applicant, an opposition Member of Parliament, had sought access to a report prepared by an independent firm of consultants on the instructions of the Minister for Industry, Technology and Resources. The general purpose of the review was to examine the operation of the Victorian Tourism Commission. Central to the respondent's refusal to grant access to the report was the claim that it was exempt pursuant to s.28(1)(b). This provision reads as follows:

28(1) A document is an exempt document if it is: . . .

(b) A document that has been prepared by a Minister for the purpose of submission for consideration by the Cabinet.

The two components of this section which were required to be made out by the respondent were first that the document was 'prepared by a Minister' and secondly that it was prepared 'for the purpose of submission for consideration by the Cabinet'. While the Tribunal was prepared to concede that the report was in fact prepared for submission for consideration by Cabinet, it held that the respondent fell well short of establishing that it was prepared by a Minister. The Minister's involvement in the report included input into the formulation of the terms of reference, the receipt of informal briefs on the progress of the review, a meeting with members of his department and the firm of consultants to discuss the report and the signing of an executive summary of the report. Relying upon the principles outlined by the Supreme Court in *Birrell v Department of the Premier and Cabinet* (1987) 11 *Fol Review* 61, the Tribunal ruled that the Minister's involvement with the report was insufficient to sustain the respondent's claim under s.28(1)(b). It considered the report was at all times and in all senses a report prepared by

the consultants; it was prepared and signed by them and not the Minister.

It should also be noted that the Tribunal rejected the s.28(1) claim notwithstanding that a conclusive certificate had been issued under s.28(4). Consistently with its earlier decision in *Re Birnbauer and Department of Industry Technology and Resources and others* (1986) 1 *VAR* 279 the Tribunal here ruled that it was not precluded from determining whether the document was properly classified as an exempt document despite the issuing of a conclusive certificate.

The second argument raised by the respondent was that the report was exempt under s.30(1). This argument was rejected by the Tribunal on the ground that the report was not 'prepared by an officer or Minister' as required by s.30(1)(a) despite the extended definition of 'officer' in s.5 of the Act. The Tribunal followed the view expressed by King J in *Ryder v Booth* [1985] *VR*869 at 83 where he said:

It is clear that s.30(1) of the Act, is of itself concerned with information generated within an agency, rather than information obtained by an agency from outside.

The respondent also relied on a claim for exemption under s.35(1)(b). It was successful in establishing to the satisfaction of the Tribunal all of the elements of this test apart from the public interest criterion. Having considered all the evidence before it, the Tribunal ruled that it was not in the end persuaded that any harmful consequences would flow from the immediate release of the document. It accordingly ruled that the decision of the respondent should be set aside and that the applicant should be granted access to the report.*

* The respondent has appealed against this decision to the Supreme Court.

NICHOLAS and EILDON AND DISTRICT COMMUNITY HOSPITAL

No. 870584

Decided: 27 November 1987 by E.L. Cooney (Member).

Request by applicant for letter of complaint concerning her — claims for exemption under ss.33 and 35(1)(b).

The applicant was a former employee of the respondent who was dismissed following a letter of complaint by the wife of a hospital patient. The applicant had viewed the letter at a

meeting with hospital management shortly before her dismissal but was subsequently refused access to a copy of it. The respondent relied upon ss.33(1) and 35(1)(b) to justify its decision to refuse the applicant access to the letter.

At the hearing of the application, an officer of the respondent tendered a letter written by the woman who filed the complaint in which she objected to the release of the disputed letter on the grounds that it was communicated in confidence and contained personal information concerning her husband's medical condition.

The Tribunal ruled that the release of the disputed letter would not disclose details of her husband's condition provided one sentence and several words were deleted. It found support in its conclusion from the fact that it was well known in the Eildon community that a complaint had been made concerning the applicant and that the complaint had led to the applicant's dismissal. The document was therefore not considered to be exempt pursuant to s.33.

As it was common knowledge in the township that a complaint had been made in respect of the applicant, the Tribunal also took the view that disclosure of the document would not inhibit other persons making complaints to the respondent. It therefore concluded that the document was not protected from disclosure by reason of s.35(1)(b).

In view of its conclusions, the Tribunal varied the decision of the respondent so as to grant access to the document with certain deletions.

ADAMS and LEGAL AID COMMISSION

No. 86003

Decided: 1 December 1987 by K.R. Howie (Member).

Request for file notes written by an officer of the respondent — whether documents exempt under ss.30(1), 31(1)(a), 35(1)(a)-(b) and 38.

The documents in issue in this case comprised several file notes made by an officer of the respondent following a telephone conversation with the solicitor for the applicant. The discussions related to the applicant's application for legal aid in respect of criminal charges he was facing. The respondent claimed that the documents were exempt under ss.30(1), 31(1)(a), 35(1)(a)-(b) and 38.

Since the file notes merely recorded information exchanged in a conversation between an outside solicitor and an officer of the respondent, the Tribunal was of the view that they were not internal working documents within s.30(1)(a). It also concluded that it was not, in any event, contrary to the public interest to release them.

The respondent's argued in relation to s.31(1)(a) that disclosure of the documents would reasonably be likely to prejudice the administration of the law, namely by making it more difficult for the applicant to obtain the services of solicitors to act on his behalf in the future. The Tribunal, in rejecting this claim, noted that such a possibility was 'simply fanciful'.

The third exemption section relied upon by the respondent was s.35. The Tribunal dismissed the s.35(1)(a) argument without giving any reasons. It also rejected a claim for exemption under s.35(1)(b) on the basis that the conditions for assignment of work from the Legal Aid Commission to a private practitioner did not require confidentiality between the assigned solicitor and the Commission and pointed out that the practitioner was in fact required both to properly inform the Commission and advise clients of information provided to the Commission. It therefore concluded that disclosure of such information communicated between an assigned solicitor and the Commission would not impair the ability of the Commission to obtain similar information from assigned solicitors in the future.

Finally, the Tribunal considered whether s.43 of the *Legal Aid Commission Act 1978* was a provision which attracted the protection of s.38. In its previous decision of *Re Ward and Legal Aid Commission (1987) 2 VAR 22* the Tribunal had decided that the prohibition contained in s.43(1)(b) extended to information or declarations and other documents furnished by or on behalf of an applicant for the purpose of enabling a decision as to whether legal assistance should be granted. In this case, the Tribunal found that the documents did not fall within the scope of the prohibition and that, accordingly, s.38 could not apply to protect the documents from disclosure. The Tribunal was also influenced by a number of public interest factors in determining the s.38 claim. It emphasised the duty of a solicitor to inform his or her client; and to act with strict fairness and openness towards the client. These duties were not, in its opinion, diminished by any obligations imposed on the assigned solicitor by

the Legal Aid Commission and the public interest required an affirmation of these duties.

Having rejected all the respondent's submissions, the Tribunal directed that the applicant should be given access to the documents in issue.

WARD and OFFICE OF CORRECTIONS

No. 860706

Decided: 9 December 1987 by S.J. Williams (Member).

Request for documents relating to prison safety and administration — claims for exemption under ss.30, 31 and 35.

The applicant, a prisoner at Pentridge Gaol had sought access to three groups of documents in the possession of the respondent. The documents in dispute were:

- a book on general defects and faults in 'K' Division at Pentridge;
- a report to the Attorney-General, prepared by the Official Visitors for Sale Prison; and
- a letter from the Deputy Director-General of the respondent to a prison officer.

The general defects book was found to be exempt under s.31(1)(a). The respondent had argued that disclosure of the document would be reasonably likely to prejudice the proper administration of the law, namely the criminal law which resulted in the imprisonment of the applicant and others. The Tribunal accepted evidence given on behalf of the respondent that the documents contained technical information

relating to equipment in 'K' Division and the names of contractors who serviced the equipment. It agreed that the release of the documents would jeopardise the safety of both prison officers and prisoners as it would enable any person to learn the details of the security system in 'K' Division.

Turning to the report prepared by the Official Visitors the Tribunal held that s.35(1)(b) was sufficient to justify refusal to grant access to the document. It noted that one of the duties of the Official Visitor was to report to the Attorney-General following visits to prisons and that any such information was to be treated as confidential. It was therefore satisfied that the report was communicated in confidence. It was also satisfied that the disclosure of such a document would totally undermine the official prison visitors' scheme, which relied heavily on confidential communications between the parties concerned, and that disclosure of the report would therefore be contrary to the public interest.

The final document in dispute was prepared by the Deputy Director-General in relation to a management matter. The Tribunal, which was reluctant to describe the document, accepted the respondent's contention that it was protection from disclosure by s.30(1).

As the Tribunal was not persuaded to exercise its discretion to release any of the documents pursuant to s.50(4) it upheld the decision of the respondent and dismissed the application.

NEXT ISSUE

The important decisions of *Re Birrell and Department of the Premier and Cabinet* and *Re Easdown* which Director of Public Prosecutions which have yet to be formally released by the Administrative Appeals Tribunal will be reported in the next issue of the *FoI Review*.