VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

WESTERN MINING CORPORATION and DEPARTMENT OF CONSERVATION, FORESTS AND LANDS
No. 880821
Decided: 10 May 1989 by Deputy President J. Galvin and K. Handley (Member).
Request for access to documents prepared in relation to a decision by the Minister not to grant mining exploration licence to the applicant — exemption claimed under s.30 — whether disclosure contrary to the public interest.

Western Mining Corporation Limited ('the applicant') applied to the Minister for Conservation Forests and Lands for a licence to explore certain land within the Deep Lead Flora and Fauna Reserve near Stawell, in Central Victoria. In July 1988 the Acting Minister wrote to the applicant refusing consent to its carrying on mining exploration in the reserve while at the same time giving conditional consent to exploration in other areas. The Acting Minister outlined the decision to refuse consent in the Flora and Fauna Reserve as being based on the fact that the reserve was part of the system of conservation reserves designed to ensure that representative samples of the State's major ecosystems were permanently protected. The applicant then requested access to all documents relating to the decisions. The Department of Conservation Forests and Lands ('the respondent') informed the applicant that there were 9 documents and that access had been refused on the grounds that the documents were exempt under s.30(1). The documents identified were Memoranda and Briefing Notes to the Minister from the Director of National Parks and Wildlife and the Director of Lands and Forests. Of the disputed documents, part were released as consisting of purely factual material.

Section 30(1)

In this case the process of deliberation related to the formulation of a determination by the Minister in respect of the applicant's application for exploration licences. The Tribunal adopted the statement of Lazarus J in *Penhalluriack v Department of Labour and Industry* (County Court, 19 December 1983, p.29, unreported) with respect to the purpose of s.30. That is:

> that the purpose of this provision is to protect the deliberative processes of Government and to ensure that a measure of confidentiality which will enable policy and the like decisions to be taken after the frankest possible interchange of views and ideas between officers of the public service and between them and their Minister, as well as between members of the ministry.

All of the disputed documents were prepared by persons employed within the respondent department for communication to persons within the department save for one of the attachments to a document. Therefore the documents were seen to be generated within the agency. The Tribunal was satisfied that to release any of the disputed documents would disclose matter in the nature of opinion, advise or recommendation prepared by an officer or a Minister in the course of or for the purpose of the deliberative processes. However in order to rely on the exemption, the respondent had to satisfy both paragraphs (a) and (b) of s.3(91).

Public interest

The Tribunal stated that it is well established that its task is to balance the public interest in pursuing the statutory right to access against the public interest in protecting the deliberative processes of government. The respondent lodged with the Tribunal a summary statement of the heads of public interest on which it relied. These heads substantially restated the guidelines laid down by Davies J in *Howard and Treasurer of Commonwealth of Australia* (1985) 3 AAR 169. These guidelines include:

(a) the higher the office of the person between whom the communications pass and the more sensitive the issues involved in this communication, the more likely it will be that the communication should not be disclosed;
(b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
(c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest.
(d) disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
(e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision maker and may prejudice the integrity of the decision making process.

The Tribunal indicated that for a document to succeed in being exempt under s.30(1) the seniority of its creator is a relevant but not a conclusive factor. It accepted that the issues with which the documents were concerned were of a sensitive nature, being in part concerned with the careful resolution of the competing interests of conservation and industry and the related issues of community wellbeing.

With respect to the issues of 'candour and frankness' the respondent contended that there would be a significant effect upon the attitude of officers whose opinions were involved in that they could be inhibited from giving frank advice when exploring different options and actions by the prospect of that advice being made a matter of public knowledge. Whilst the Tribunal gave weight to this opinion it nevertheless recognised that there was a substantial element of speculation in this assessment of consequences.

The Tribunal accepted that draft documents calculated to contribute to a final determination were generally inappropriate for publication. The Tribunal then considered the disadvantage to sound working relations between departments if the documents were accessed. It accepted that to release such a document might well inhibit the frank exchange of information between departments and consequently impede the deliberative process. The Tribunal thought that the same considerations applied in respect of exchanges between divisions of the same department. Those documents variously conveyed the thoughts, opinions, concerns and proposals of offices in a frank and open manner. The Tribunal stated:

> That state of affairs is crucial to the effective operation of the deliberative processes and ought not likely to be impeded or

> discouraged by disclosures . . . In our view, it is those who have been elected to the Parliament and not the public servants who are accountable to the public. The creation of a policy or strategy and the implementation of legislation require proper detailed research and submission from the public service. The public has a right and a need to be reassured on that score. The public servant who has been asked to express an opinion ought to be able to be confident that that opinion may be given, even if it is contrary to other opinions in furthering the overall development of policy. Indeed, it is important that a policy be evolved and resolved by the proper consideration and the balancing of all relevant opinions. The release of documents in the deliberative process would be contrary to the public interest if it had the consequence of placing the independence of the public service in jeopardy or if there resulted a risk of mischievious interpretation of working notes by persons whose motives are different from those of the authors of the notes.

The Tribunal held that in this application most of the documents were completed by senior public servants reporting to departmental heads and to the Minister. Therefore the advice and recommendations within the documents were of a sensitive nature.

The Tribunal clarified that it was not its task to make a determination as to whether the applicant ought to be permitted to carry out exploration in the Deep Lead Flora and Fauna Reserve. The issue rather was to whether there was an outweighing public interest in favour of disclosure of the disputed documents. The Tribunal found that the public interest in favour of exemption outweighed the public interest in favour of access and did not see any reason to exercise the discretion given to it by s.50(4).

[K.R.]

CREMMEN and DIRECTOR OF PUBLIC PROSECUTIONS
No. G890001
Decided: 24 May 1989 by K.R. Howie (Member).
Documents created by DPP preparation officer for criminal trial of applicant — access granted with deletions — exemption claimed under ss.32 and 33 in respect of deleted material.

The applicant sought access to files created by the DPP in relation to his criminal trial in October 1987. Full access was granted to one file and partial access to a second file with the deletion of certain names, addresses and telephone numbers. The DPP claimed the material deleted was exempt under s.32 and 33.

Examining the s.33 claim, the Tribunal had little difficulty in concluding that the deleted material constituted the personal affairs of the persons concerned. It also ruled that disclosure in the present case would be unreasonable. In forming this view, the Tribunal had regard to the applicant's stated intention if the documents were released of writing to the persons concerned seeking information from them.

Three documents created by the preparation officer leading up to the applicant's trial were held to be protected by the legal profession privilege exemption, s.32.

In light of its findings, the Tribunal affirmed the decision of the DPP.

[P.V.]

RABEL and GAS AND FUEL CORPORATION
No. 881009
Decided: 25 May 1989 by Deputy President M. Rizkalla.
Whether disclosure of documents prepared in the course of internal audit by respondent exempt under s.30(1).

The applicant had been employed by the respondent until his resignation on 20 November 1987. In December 1986 he had been suspended for disciplinary reasons. In the previous month the respondent had ordered an internal audit of the office where the applicant had been situated. Believing that the audit reports referred to his conduct and would assist an investigation being conducted by the Ombudsman, the applicant sought access to all documents created in the audit process. Access was granted to a number of documents, the balance being subject to a claim for exemption under s.30.

After reviewing the nature of the internal audit process, the Tribunal found that all documents had been prepared in the performance of the audit investigation which led to the preparation of a draft report and later, a final report. As such the documents were, in the Tribunal's opinion, part of the deliberative process being undertaken by the audit officers and within the ambit of s.30(1)(a). It remained for the Tribunal to decide whether their disclosure would be contrary to the public interest. In support of its position the respondent submitted that it was in the public interest to protect the internal audit process, which enabled the respondent to function efficiently and economically. Disclosure of the working processes, it was contended, would undermine this process. The applicant's case centred around allegations of a cover up by the respondent in its treatment of the applicant, and that disclosure of the documents would reveal this and help clear his name. The Tribunal did not, however, find in any of the documents evidence which supported the applicant's claim. In these circumstances the Tribunal concluded that the public interest in protecting the integrity of the internal audit process outweighed any countervailing public interest in disclosure and affirmed the decision of the respondent.

[P.V.]

LAPIDOS and AUDITOR GENERAL OF VICTORIA
No. 870685
Decided: 31 May 1989 by Deputy President J. Galvin.
Request for documents relating to audit of prisoners' welfare account — claims for exemption under ss.30, 31(1)(d) and 35 — whether disclosure would be contrary to the public interest.

The appellant, who had a long-standing concern in the welfare of prisoners and their treatment in prisons, sought access to audit documents prepared by the Auditor-General in the course of a prisons audit. He alleged that there had been irregularities in the administration of the prisoners' welfare account which had been established to assist prisoners.

The application was narrowed in the course of proceedings to two documents. The first was a portion of an audit inspection report of books and accounts at Ararat Prison. The second was a portion of a letter written by the Director-General of Community Services Victoria who, until 1983 had responsibility for the administration of prisoners and prisons. Both documents were claimed to be exempt under ss.30 and 31(1)(d) and, in addition, it was contended that the Director-General's letter was also exempt under s.35.

The Tribunal on examining the documents ordered the release of factual portions of both documents. In its view none of the exemption sections relied on by the Auditor-

General operated to protect these portions. Next the Tribunal considered whether the balance of the documents were exempt under s.30. Evidence led by the Auditor-General revealed that the audit report had been prepared to obtain a response to some preliminary audit observations. This evidence was enough to prove the first limb of s.30. In addressing the public interest requirement, the Tribunal was influenced by its earlier decision in *Pescott and Auditor-General* (1987) 2 VAR 93 where it had ruled that there was an important public interest in maintaining the confidentiality of the audit process which would rarely be overturned. The applicant, in response, alleged that there had been many irregularities in the administration of the prisoners' account which justified disclosure. Despite the serious claims made by the applicant, the Tribunal was prepared to find that disclosure of the report would be contrary to the public interest.

Addressing the s.31 exemption claim, the Tribunal noted that save for one paragraph, the methods and procedures contained in the report were routine and their release would not be reasonably likely to have any of the effects contemplated by the section.

Finally, the Tribunal had to determine whether the Director-General's letter fell within the ambit of s.35. In the absence of any evidence as to the circumstances in which the letter was conveyed by the Director-General to the respondent, the Tribunal was not satisfied that it had been communicated in confidence.

In light of its rulings, the Tribunal varied the decision of the Auditor-General by ordering the release of factual portions of both documents. The decision of the respondent was otherwise affirmed.

[P.V.]

BIRRELL and VICTORIAN ECONOMIC DEVELOPMENT CORPORATION AND OTHERS
Nos G881023 & G881025
Decided: 7 June 1989 by Jones J (President).
Whether documents transferred from VEDC to RFC after request made still in the possession of the VEDC — meaning of 'possession'.

This decision throws further light on the definition of the terms 'document of an agency' and 'document in the possession of an agency' in the *FoI Act*. It also discusses the duties of agencies that exist in respect of requests received by agencies for documents that, at some point in time, have been in the agency's possession.

By two requests for access dated 28 October 1988 Mark Birrell requested access from the Victorian Economic Development Corporation (VEDC), to a copy of all invoices and receipts (and summary tables) of expenses incurred by the VEDC Board Members and the VEDC General Manager and Managers since 1 February 1987, and copies of the Minutes and Agendas of the VEDC Board Meetings since 1 January 1987.

As no reply was received to those requests within 45 days, Birrell applied to the Tribunal by applications dated 16 December 1988 for review of the refusal by the VEDC to provide access to the documents requested. The failure by an agency to make a decision on a request within 45 days is deemed to be a decision refusing access to the documents, the subject of the request, for the purpose of enabling an appeal to be made to the Tribunal (s.53(1)).

The Department of Management of Budget (DMB) and the Rural Finance Corporation (RFC) were joined as parties to each application. RFC contended that its interests were affected by the decisions in issue because it was the legal transferee of the right title and interest in the assets of the VEDC. DMB contended that its interests were affected because it was the Department responsible for the VEDC as a result of a change in ministerial arrangements effected on or about the 24 October 1988.

The decision in essence determined the effect that the arrangement between the VEDC and the RFC had on the jurisdiction under the *FoI Act*. For the VEDC and RFC submitted that the documents which were the subject of the requests were in the possession of the RFC and as such ceased to be subject to the *FoI Act* and were not subject to the jurisdiction of the Tribunal. Birrell disputed that the documents had left the possession of the VEDC and in any event submitted that they remained subject to the *FoI Act* and were subject to the jurisdiction of the Tribunal.

Submissions

The Tribunal in its decision, referred to the various submissions that had been made. Mr Archibald, QC, Counsel for the RFC, contended that the documents had ceased to be owned or possessed by the VEDC. He contended that for the purpose of the *FoI Act*, 'possession' means actual possession. It does not embrace constructive possession. Further, he contended that the concept of possession under the Act needed to be distinguished from discovery of documents in proceedings before the courts.

Mr Tracey, QC, who appeared on behalf of the VEDC and DMB adopted the submissions of Archibald on the possession issued. Birrell's Counsel, Senator Alston, argued that the right under the *FoI Act* crystalised on the request being made and could not be defeated except in accordance with the Act.

Decision

In construing the *FoI Act* the Tribunal stated that the object and scheme of the Act must be the guiding light. However, it also noted that the provisions of the *FoI Act* could not be interpreted to extend the right of the community to access to government information beyond what Parliament has said the right should be.

In looking at the issue of 'possession' the Tribunal observed that it would vary according to the context in which it was used. Therefore, in this case, the meaning of possession had to be considered in the context of the *FoI Act* and, in particular, in the light of the scheme and object of that Act. It noted that although the US *FoI Act* was differently worded, useful guidance could be obtained by consideration of decisions of US courts on the meaning of 'Agency Records'. Reference was made to *Kissinger v Reporter's Committee for Freedom of the Press,* 445 US 136 (1980), and *Goland v CIA* 607 F.2d 339. Further in *Paisley v CIA* 712 F.2d 686 the court held that read together, *Kissinger* and *Goland* stand for the proposition that the agency to whom the request is directed must have exclusive control of the documents.

The Tribunal also looked at the Federal *FoI Act* and the case of *Mann v Capital Territory Health Commission* (5 August 1983, unreported). The Federal AAT held that trust accounts relating to a trust which, although controlled by the Trustees were physically left in a drawer in a filing cabinet which contained other Commission docu-

ments and which cabinet was located in the Commission's building, were documents in the possession of the Trustees and not of the agency (the Commission). It followed in the present case, in the Tribunal's view, that a situation could arise where an agency has mere custody of documents that would not amount to possession and therefore the documents would not be subject to the *FoI Act* if the person in possession was not an agency under the Act. It referred to the argument that the inclusion of the deeming provisions in the definition of 'official document of a Minister', and in s.15 of the *FoI Act*, evidenced a legislative intent that the definition of 'document of an agency' be limited to actual or physical possession. However the Tribunal concluded:

> I am of the view that such a meaning is too restrictive and does not accord with the scheme and object of the *FOI Act* and the intention of the legislature. I continue to hold the view that possession, for the purposes of whether a document is the document of an agency, embraces legal or constructive possession: that is a right and power to deal with the document in question. A document in the control of an agency is a document of an agency. If the position was otherwise, it is clear, in my view, that the object of the *FoI Act* to provide ready access to Government Information could be easily thwarted.

It then analysed the rights, duties and obligations that arise under the *FoI Act*:

> The right arises in respect of particular documents. It comes into existence as an enforceable right when, and only when, a request is made in accordance with Section 17. The right is to access to a document of an agency for which a request is made. For the right to arise the document must be a document of an agency (that is, in the possession of an agency) when the request is made as a right only attaches to such a document. **The critical point of tim is th point of time when the requ st is mad** . The right that arises is the right to obtain access in accordance with the *FoI Act*, that is by the means laid down in the Act.

The Tribunal questioned whether an agency could part with possession of a document after a valid request has been made under the *FoI Act* with respect to it, and if so, what the effect of such an event would be.

> If access could be defeated by an agency parting with possession after a request is made, the scheme and object of the *FoI Act* would be undermined. It would mean that an applicant could be denied access to a document that he requested and which was in the agency's possession at the time of the request even though it was not caught by the exemption or exception provisions. That, in my view, is not what Parliament intended when enacting the *FoI Act*.

Judge Jones therefore decided that although the documents may currently be in the physical possession of the RFC, they remained under the power and control of the VEDC and in its legal or constructive possession. Documents that are the subject of a request are subject therefore to the *FoI Act* and the jurisdiction of the Tribunal which has the power to decide whether the applicant should have access to them.

In the event that its interpretation of possession was incorrect, the Tribunal proceeded to consider its position. The first issue was whether the VEDC had the power under the *VEDC Act* to transfer or dispose of the documents that were the subject of the requests to the RFC. It stated that although the business of the VEDC appeared to have been subsumed into the RFC, the VEDC continued to exist as a statutory corporation with staff and board members and some limited activity. It concluded that s.36 of the *VEDC Act* did not empower the disposal of the documents that were the subject of Birrell's request. Therefore the documents remained the property of the VEDC and in its possession within the meaning of the *FoI Act*.

The formal decision of the Tribunal was that the applications for review by Birrell were competent and that it had jurisdiction to decide whether Birrell should be given access, pursuant to the *FoI Act*, to the documents that were the subject of the requests.

[K.R.]

PEPPERELL and MINISTRY OF HOUSING AND CONSTRUCTION

Decided: 23 June 1989 by Deputy President J. Galvin.

Reverse FOI application — whether disclosure of correspondence sent by applicant to the Ministry exempt under ss.30, 31 or 35.

Facts

On 30 October 1988, Mr Walden wrote to the Ministry of Housing and Construction under the *FoI Act* requesting a copy of a letter he believed had been written to the Ministry by Mr Pepperell. Walden believed that the letter contained a complaint against him and his family. He also requested a copy of any reply to the letter. The Freedom of Information Manager of the Ministry advised Walden that the letter from Mr Pepperell and the reply were exempt from disclosure pursuant to s.35(1)(b) of the *FoI Act*. Walden then sought internal review of the decision refusing access. On review, the Director-General of the Ministry determined to release the letter holding the view that there was no basis for exemption. Pepperell then applied to the Tribunal seeking review of that decision.

At the time of sending the original letter to the Ministry Pepperell did not indicate to them that it was sent in confidence. He did so after he had become aware that there had been a request for a copy of it. Pepperell, a policeman, confirmed in evidence that he had written the letter as a member of the community and not as a policeman and agreed that it did not deal with any matters affecting the relationship between the police force and the Ministry.

Arguments

Pepperell sought to rely upon ss.30(1)(b), 31(c), (d) and (e) and 35 of the *FoI Act*. By choosing to rely on s.30(1)(b) only and not on s.30(1)(a) and (b) he failed on this ground as both sections needed to be satisfied for the exemption to apply. Section 31(1)(c),(d) and (e) are as follows:

> (1) Subject to this Section, a document is an exempt document if its disclosure under this Act would, or would reasonably likely to —
>
> . . .
>
> (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
>
> (d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
>
> (e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.

The Tribunal stated that the purpose of s.31(1)(c) is to protect the identity of a confidential source and not to protect the substantial contents of the document and that purpose is frustrated in circumstances where the source is known. There was no question that the applicant was the author of the disputed document and it could not be contended with any degree of conviction that the source of the document was confidential. There was no evidence led to establish how the release of the document would have the effect of disclosing methods or procedures for preventing, detecting, investigating or dealing with methods arising

out of breaches or evasions of the law. Further, whilst the applicant had expressed concern for the well being of himself and his family, that anxiety did not establish that there was anything other than a remote possibility of danger. Pepperell needed to show that the disclosure would or would be reasonably likely to cause danger — that there was a chance of such danger occurring which was 'real — not fanciful or remote'. (Referring to *Department of Agriculture and Rural Affairs v Binnie*, Supreme Court, 9 December 1988, unreported).

'Confidence'

In looking at s.35, the Tribunal then had to consider if the documents had been communicated in confidence. In determining whether the information in the letter was communicated in confidence the Tribunal had regard to the document itself, the nature of the information, the purpose for which and the circumstances in which it was provided, and the statement by the applicant that he intended the letter to be confidential. In this case the letter contained no express statement that it was communicated in confidence. It was only after its request for production under the *FoI Act* that the applicant alleged confidentiality. The Tribunal concluded that, having regard to the sensitive nature of the information, to the fact that the applicant, being a police officer, would have an awareness of the need for confidentiality, to the reasonable expectation that information of the kind would ordinarily be received and treated in confidence, and to the evidence of the applicant, the letter was communicated in confidence. However, while he accepted that the intention of the applicant was that the letter be confidential, confidentiality was limited only to those parts of the letter which were not in the public domain.

In order for s.35 to succeed the material not only has to be communicated in confidence but it also has to satisfy either para (a) or para (b). The applicant submitted that the disclosure of the information under the Act would be contrary to the public interest by reason that disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future (s.35(1)(b)). The Tribunal found that it had not been established that other people would not write to the respondent in the future setting out complaints and furnishing information of a similar kind. In fact it was not argued in the case. All that had been submitted was that disclosure would have a detrimental impact upon relations between the Police Department and the Ministry of Housing and Construction. Therefore Pepperell had not made out any of the grounds of exemption on which he had sought to rely. The AAT affirmed the decision of the Ministry and ordered that the material be released to Walden.

[K.R.]

OVERSEAS DEVELOPMENTS

11TH ANNUAL DATA COMMISSIONERS MEETING

Concerns about transborder transfer of personal information and other international issues, especially those connected with the European market, were the main focus of the 11th annual Data Commissioners Conference held this year in West Berlin from 29 August–1 September. With the passage in the past year of data protection/privacy laws in Australia, Japan, the Netherlands and the Republic of Ireland, this was a banner year for data protection. The result was an attendance of over 140 delegates, including data commissioners, their staff and observers from around the world.

The highlight of the three-day meeting was the announcement by a Hungarian delegate, Dr Pal Konyves-Toty of the Central Statistical Office in Budapest, that his country would be shortly enacting a freedom of information and data protection law (along the lines of the present legislation in Ontario and Quebec) with coverage of all sectors of Hungarian society. This represents the first time a member of a communist country from the Eastern Bloc addressed such a gathering and contemplated the enactment of a data protection law. This was taken as an historic event, well received in the meeting place, the Reichstag, the former German Parliament which straddles the wall separating West and East Berlin.

Commenting on why the Hungarian government has come to be the first Eastern Bloc country to take such a measure, Lonyves-Toth told the assembled delegates that 'among socialist countries Hungary was the first to publish official computer statistics, [issue] a decree on software copyright, and a decree concerning the protection of computer equipment against fire'.

A draft Bill combining FoI and data protection has already been approved by the Minister of Justice, who submitted it to the Council of Ministers last January, where it was subsequently approved. The new proposed Hungarian Constitution also recognises every citizen's 'right to the protection of personal data' and, under the subsection on 'Liberties', it states that 'The Constitution among liberties has to acknowledge everybody's right to access information of public interest'.

When the Bill will actually become law was not made clear. Another Hungarian, Professor Dr Laszlo Solyom, architect of the proposed Bill, in a paper submitted to the conference, wrote of the problems they were grappling with in attempting to implement data protection principles and said he hoped to learn from the Berlin conference in order to resolve some of their difficulties. Konyves-Toty also announced that Hungary plans to become a signatory to the Council of Europe's Convention on Data Protection, since their proposed Bill contains the fundamental principles found in the Convention.

Another surprise announcement made during the proceedings was that the United Nations has developed 'Guidelines Concerning Computerised Personal Data Files' which outline the minimum guarantees to be incorporated into national legislation The Guidelines, expected to be passed by the UN General Assembly later this month, were proposed largely at the urging of a former member of France's data protection agency, the Commission on National Liberties (CNIL), Louis Joinet, currently serving in the Office of the French Prime Minister.

Canadian Federal Privacy Commissioner John Grace, addressing the delegates on the merits and the