

VICTORIAN FOI DECISIONS

Administrative Appeals Tribunal

O'SULLIVAN and VICTORIA POLICE (No. 4) No. 89/46953

Decided: 22 March 1990 by Deputy President Judge Fricke.

Access to informations brought against several persons for assault — exemption claimed under ss. 33 and 35.

Two groups of documents were in dispute in these proceedings. The first group of documents was only referred to by the Tribunal in its reasons for decision as 'tapes'. After listening to the tapes, the Tribunal was satisfied that they were exempt under s.33, without giving any detailed reasons.

The remaining documents were informations (a kind of summons used for criminal charges) brought against Frank and Jennifer Dearing for allegedly assaulting the applicant and another person. The charges were later heard before a Magistrates Court. The Tribunal rejected a claim for exemption under s.33 again without providing detailed reasons. While it was not prepared to find the informations in question exempt, the Tribunal was not prepared to state as a general rule that an information could never be exempt under s.33.

The decision of the police was therefore affirmed in respect of the tapes and set aside in respect of the informations.

[P.V.]

O'SULLIVAN and VICTORIA POLICE (No. 5) No. 89/39673

Decided: 23 March 1990 by Deputy President Judge Fricke.

Request for police record of third party — claim for exemption under s.33 — whether application vexatious.

The applicant sought access to two documents. The first document was not identified in the Tribunal's reasons but the Tribunal dismissed the application in relation to the document under s.48(1)(b) of the *Administrative Appeals Tribunal Act* 1984. This provision reads:

Where

(b) the tribunal decides that the application is vexatious or frivolous

... the tribunal may dismiss the application without proceeding to review the decision or, if the Tribunal has commenced to review the decision, without completing the review.

No reasons were given as to why the Tribunal concluded the application was vexatious or frivolous although the Tribunal made the following observation:

I am satisfied that the applicant and Sutcliffe are working in loose collaboration in relation to their many applications under the *Freedom of Information Act* 1982. Sutcliffe was present at the present hearing, and was frequently conferring with the applicant during the course of the hearing. The applicant called Sutcliffe as a witness at the hearing. When Counsel for the respondent suggested that the applicant might simply have asked Mr Sutcliffe for a copy of his police record, rather than engaging in the bureaucratic procedures under the *Freedom of Information Act*, and then applying for review of the decision, the applicant became quite indignant. He apparently prefers to utilise his right as a citizen to bring proceedings under the *Freedom of Information Act* 1982 to engaging in the simple exercise of requesting a document from an associate.

The second document in dispute was the police record of Sutcliffe. A claim for exemption under s.33 was upheld.

[P.V.]

FORSTER and LA TROBE UNIVERSITY (No. 88/0940)

Decided: 28 March 1990 by Judge Jones (President).

Request for copies of videotapes of monkey experiments — reliance upon s.23(3)(c) to provide access in the form sought by the applicant — dispute over ownership of copyright in tapes.

In dispute in this case were a number of videotapes of monkeys that were used in behavioural experiments. Evidence was led by the University that a Professor Jones, who was a member of the Department of Psychiatry at Melbourne University, had developed the idea of observing the behaviour of monkeys that were removed from a group. The actual videotaping of the monkeys was per-

formed by a student, Susan Roberts, who performed her work under Professor Jones's supervision. He paid her approximately \$2000 for this work out of funds made available by Melbourne University. At the conclusion of the research Professor Jones kept a number of the tapes but a few remained with the University. The University indicated that it intended to return the outstanding tapes to Professor Jones.

The applicant was allowed to view the videotapes but the University refused to provide her with a copy of them. Section 23(3)(c) of the *FOI Act* provides that if the form of access requested by the applicant 'would involve an infringement of copyright subsisting in a person other than the State', then access in that form may be refused and access given in another form.

Counsel for the applicant disputed that Professor Jones had copyright in the videotapes. In resolving this issue the Tribunal had to consider the provisions of the *Copyright Act* 1958. For the purposes of the *Copyright Act* a videotape is a film, and under the Act the maker of the film is the owner of any copyright (s.98(2)). Section 98(3) provides that where a person makes for valuable consideration an agreement with another person for the making of a film by the other person and the film is made in pursuance of the agreement, the first person is, in the absence of any agreement to the contrary, the owner of any copyright subsisting in the film.

After reviewing all the evidence presented to it, the Tribunal found that the tapes were made by Professor Jones and that he was therefore the owner of copyright in the tapes. It also indicated that if this conclusion was wrong, the Professor held copyright under s.98(3) of the *Copyright Act*.

In view of this finding, the Tribunal held that the University was entitled to rely upon s.23(3)(c) to refuse access to the tapes in the form sought by the applicant.

[P.V.]

HEZKY and VICTORIA POLICE (No. 89/35875)

Decided: 29 March 1990 by Judge Duggan (President).

Request for report prepared by Internal Investigations Department of the Victoria Police in response to a complaint by the applicant — claims for exemption under ss.31, 33, 35.

The applicant had been arrested and conveyed to Willsmere Psychiatric Hospital on a number of occasions in 1985 and 1986. Following these events, she complained to the Internal Investigations Department of the Police (IID) about the treatment that she received at the hands of the police. She sought access to a report prepared by an Inspector Tricker who investigated the applicant's complaints. Access to the report was refused under ss.31, 33, and 35 although the only section considered by the Tribunal was s.35. In deciding whether the requirements of this section had been met in the present case, the Tribunal adopted the findings made in its early decision of *Stewart and Victoria Police* (1987) 15 *Fol Review* 27. The findings made by the Tribunal in *Stewart* were to the effect that confidentiality was an integral part of investigations conducted by the IID without which it could not effectively function.

The Tribunal in the present case agreed with the finding in *Stewart* that it was in the public interest that there be an effective method of investigating complaints against members of the Victoria Police and upheld the claim for exemption under s.35.

The Tribunal did, however, order the release of one paragraph of the report which contained a list of persons who were to be notified of the outcome of IID investigations. Save for the disclosure of this paragraph, the decision of the respondent was affirmed.

[P.V.]

HEFFERNAN and PUBLIC TRANSPORT CORPORATION (No. 89/31680)

Decided: 3 April 1990 by Deputy President Judge Fricke.

Access sought to documents relating to joint venture project involving the respondent — claim for exemption under s.34.

The respondent's predecessor, the Metropolitan Transit Authority, was part of a consortium that had been engaged to undertake the design

and construction of the Kowloon-Canton Light Rail System in Hong Kong. The applicant sought access to documents relating to the formation and implementation of the consortium.

The only exemption section in dispute was s.34(1) which provides:

A document is an exempt document if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking and —

- (a) the information relates to trade secrets or other matters of a business, commercial or financial nature; or
- (b) the disclosure of the information under this Act would be likely to expose the undertaking to disadvantage.

The documents in dispute contained information which the respondent had obtained from Leighton Contractors (Asia) Ltd, its partner in the consortium. The Tribunal was satisfied that the information was obtained from a business undertaking which related to matters of a business, commercial or financial nature, and on this basis upheld the claim for exemption under s.34(1)(a).

The decision of the respondent was therefore affirmed.

[P.V.]

SUTCLIFFE and VICTORIA POLICE (No. 2) (No. G89/2163)

Decided: 3 April 1990 by Deputy President Judge Fricke.

Claim for exemption under s.31(1)(c) in respect of part of the report.

The applicant's shooter's licence had been cancelled following a police raid of his premises which found a large number of firearms and ammunition. Following discussions with the police the applicant agreed to undergo a psychiatric examination and later requested access to a copy of the report. The respondent refused to make available the full report, citing s.31(1)(c) which provides:

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

...

- (c) disclose, or enable a person to ascertain, the identity of the confidential source of information in relation to the enforcement or administration of the law.

The Tribunal decided that deleted material would be reasonably likely to disclose the identity of a confidential source of information in relation to the enforcement of the *Firearms*

Act 1958, and on this basis upheld the respondent's decision.

[P.V.]

SUTCLIFFE and VICTORIA POLICE (No. 3) (No. 89/38566)

Decided: 3 April 1990 by Deputy President Judge Fricke.

Access sought to mailing list of persons that held shooters' licences — claim for exemption under s.33.

The applicant sought access to the mailing list of names and addresses of all persons in Victoria who held shooters' licences. Evidence was led that approximately 290 000 shooters' licences had been issued in Victoria.

The Tribunal was satisfied that s.33, the personal affairs exemption, had been made out in the present case and affirmed the decision under review.

[P.V.]

SUTCLIFFE and VICTORIA POLICE (No. 4) (No. 90/2401)

Decided: 3 April 1990 by Deputy President Judge Fricke.

Access sought to Victoria Police's Internal Investigations Department file relating to the applicant — claims for exemption under ss.30, 31, 35.

In a brief decision the Tribunal upheld the respondent's decision to refuse the applicant access to a number of documents held by the Internal Investigations Department of the Victoria Police relating to a complaint by the applicant about police behaviour following a raid on his house.

The Tribunal held, without providing any detailed reasons, that the documents were exempt under ss.30, 31 and 35. It noted that the reason underlying its decision was the same as that in *Stewart and Victoria Police* (1987) 2 VAR 192.

[P.V.]

SUTCLIFFE and VICTORIA POLICE (No. 5) (No. 89/29150)

Decided: 5 April 1990 by Deputy President Judge Fricke.

Access sought to any documents provided to respondent by BHP associated with cancellation of applicant's shooter's licence — respondent refused to confirm or

deny the existence of any documents in accordance with s.27(2)(b) on the basis that the document would, if it existed, be exempt under s.31(1).

The applicant sought access to any documents in the possession of the Victoria Police which had been obtained from Broken Hill Pty Co. Ltd (BHP).

Section 27(2)(b) enables an agency, when giving notice to an applicant of its decision, to 'state the decision in terms which neither confirm nor deny the existence of any document which on the grounds specified in s.28 or s.31 would be an exempt document'. In relying upon this provision the respondent submitted that the documents would be exempt under s.31(1)(c) which protects confidential sources of information in relation to the enforcement or administration of the law.

The Tribunal was satisfied after reviewing the evidence that if the documents did exist, s.31(1)(c) would be made out and therefore affirmed the decision of the respondent to neither confirm nor deny that the documents held by the respondent contained information provided by BHP.

[P.V.]

LAPIDOS and OFFICE OF CORRECTIONS (No. 3)
(Nos. 88/0972 and 88/1203)

Decided: 9 April 1990 by Deputy President Judge Fricke.

Access sought to file of deceased prisoner — preliminary issue as to whether the documents were exempt under s.33.

The applicant had acted on behalf of a deceased prisoner, Alex Tsmarkis, who was murdered in August 1988. The applicant sought access to a number of files relating to Tsmarkis and in reviewing the respondent's decision to refuse access to the documents, the Tribunal ruled on the preliminary issue of whether any of the documents were exempt under s.33. This section provides for the exemption of documents, the disclosure of which 'would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)'.

Before his death Tsmarkis had given the applicant a written authority to obtain documents on his behalf. The applicant gave evidence

that he had been a friend of Tsmarkis and sought access to the documents in an attempt to have Tsmarkis judged more favourably. In considering the application of s.33 in respect of persons who had died the Tribunal observed:

Plainly, s.33 . . . recognises that the legitimate interest of relatives in being protected against revelations of personal affairs of a person may survive that person. That is not to say that the relatives enjoy the same claim to protection as did the person concerned. The strength of their claim to protection against disclosure will generally be somewhat attenuated, and may indeed, after the passage of years, be so truncated as to have no weight at all.

In reaching its view that the requirements of s.33 had not been met by the respondent in the case, the Tribunal took into account that the applicant had acted for Tsmarkis in his lifetime and that there was a public interest in the disclosure of information relating to penal administration.

Apart from ordering the deletion of parts of the documents which related to persons still living the Tribunal ruled that s.33 did not protect from disclosure information relating to Tsmarkis. It therefore set the decision aside and remitted the matter for consideration by the respondent in accordance with its directions.

[P.V.]

SUTCLIFFE and VICTORIA POLICE (No. 6)
(No. 89/30484)

Decided: 9 April 1990 by Deputy President Judge Fricke.

Request for copy of a shooter's licence cancellation notice — claim for exemption under s.33(1).

The applicant sought access to a copy of a shooter's licence cancellation notice concerning a Mr Warren Jansen. Access to the document was refused by the respondent under s.33.

The respondent had asked Jansen whether he would be prepared to release the document, and Jansen responded that he did not want the applicant to obtain access to the document.

The Tribunal held that s.33 had been made out in the present case. It noted that a person's name and address constituted personal information and that disclosure of the document would involve unreasonable disclosure of information relating to Jansen. The reasons for decision did not provide any detail of

the actual information on the document which was of a personal nature.

[P.V.]

WISELENSKI and OFFICE OF CORRECTIONS
(No. 89/0411)

Decided: 11 April 1990 by Judge Duggan (President).

Access sought to parole officer's report and pre-sentence report concerning applicant — claims for exemption under ss.31(1)(a) and (e).

The applicant had been charged and convicted of a number of offences including rape and armed robbery. After serving a number of terms of imprisonment he was released in August 1989. The first document in dispute was a parole officer's report. Documents of this nature had been considered by the Tribunal in great detail in *Mallinder and Office of Corrections 2 VAR 566*. The Tribunal followed the *Mallinder* decision and held that the report was exempt under s.31(1)(a) and (e). The second document in dispute was a pre-sentence report. The Tribunal noted that the law now requires any material upon which a sentencing judge relies must be disclosed to the person affected by that material. It followed that in the Tribunal's view this practice would normally be sufficient for it to hold that the public interest requires that access to pre-sentence reports be granted. However, in the present case it declined to adopt what it considered to be the general rule because of the 'irrational and emotionally highly unstable' condition of the applicant. The Tribunal observed that the applicant behaved in proceedings before it as if he was profoundly disturbed and that in view of his behaviour, the Tribunal was concerned about the physical safety of the author of the report and her informant. Section 31(1)(e) provides for the exemption of documents disclosure of which would be unreasonably likely to 'endanger the lives or physical safety of persons engaged in or in connection with law enforcement and the persons who have provided confidential information in relation to the enforcement or administration of the law'. While recognising there were 'powerful reasons' for the disclosure of pre-sentence reports in most cases, the Tribunal ultimately decided that disclosure of the report would be reasonably likely to endanger the

physical safety of Mrs Hobbs and her informant and therefore upheld the respondent's claim for exemption under this provision.

[P.V.]

RABEL and GAS AND FUEL CORPORATION OF VICTORIA (No. 89/1366)

Decided: 18 April 1990 by J Brether-ton (Member).

Access sought to documents relating to the suspension, dismissal and reappointment of employees of the respondent — claims for exemption under ss.30, 33, and 36.

The applicant sought access to three classes of documents held by the respondent relating to decisions to suspend employees, dismiss employees, and reappoint employees of the respondent who had been suspended. The documents in dispute related to a number of past and present employees of the respondent. The only exemption provision dealt with by the Tribunal was s.33, which provides exemption for documents the disclosure of which 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'. The Tribunal had little difficulty in finding that information in the documents, which related to allegations of misconduct of persons, was personal information disclosure of which would be unreasonable in the circumstances. It was not moved by the applicant's suggestion that all personal information which would enable the identification of persons be deleted from the documents, to alter its view that the documents were exempt under s.33. It noted that even with this deletion of personal information, it would still not be a very difficult task to trace the identity of

the persons concerned and that in any event deletion of the details would result in many of the documents being meaningless and in some cases inaccurate and misleading.

It therefore upheld the decision of the respondent not to grant access to the documents in dispute.

[P.V.]

ARDLEY and DEPARTMENT OF HEALTH (No. 89/3671)

Decided: 2 May 1990 by Deputy President Judge Fricke.

Request for documents relating to the applicant and her mother — claims for exemption under s.30, 33 and 35.

The applicant, who had been diagnosed as a paranoid schizophrenic, sought access to documents relating to herself and her mother, both of whom had been treated by medical officers of the respondent. The Tribunal upheld a claim for exemption under s.33 in respect of eight documents relating to the applicant's mother. The Tribunal's written reasons did not detail the nature of the documents found exempt under this provision.

Several other documents, which were only described by the Tribunal as 'internal documents within the Health Department' were released to the applicant with certain deletions being made to protect from disclosure information found to be exempt under s.35(1)(b).

Accordingly the decision of the respondent was affirmed in relation to documents concerning the applicant's mother, and set aside in relation to several other internal documents in the possession of the respondent.

[P.V.]

PERTON and PORT OF MELBOURNE AUTHORITY (No. 89/0877)

Decided: 7 May 1990 by J. Rosen (Member).

Access sought to redundancy agreement between the union member and the respondent — claim for exemption under s.33.

The applicant, a Member of Parliament, sought access to documents relating to a redundancy agreement between a Mr David Taplin and the respondent. Information had anonymously been sent to the Leader of the Opposition Party, State Parliament, which made a number of allegations against Mr Taplin, including an allegation that the redundancy agreement was a 'sweetheart deal' after Mr Taplin had failed to obtain a position with the respondent. The documents in dispute concerning Taplin included a superannuation contribution sheet, a severance pay statement, and a retrenchment benefit notice. The Tribunal was satisfied that all of these documents, which concerned Taplin's financial affairs, were matters of private concern to him disclosure of which would be unreasonable. It followed that these documents were exempt under s.33.

The Tribunal did, however, order the release of one document, a letter from the respondent to Taplin advising him of redundancy arrangements. The Tribunal was not satisfied that the letter contained information relating to Taplin's personal affairs. Apart from this document, the decision of the respondent was affirmed.

[P.V.]