believing something and keeping it to oneself and complaining to a public official of the same matter.

Was the statement that 'Mr Bennett complained to the Ombudsman that Professor Rohde had conspired with an examiner to fail him' incorrect or misleading?

Mr Bennett had used the term 'corroboration' in reference to dealings between Associate Professor Rohde and Examiner B. Dunford J held that this was quite different from 'conspiracy'. In addition, there was nothing in correspondence or elsewhere to suggest a conspiracy to fail Mr Bennett.

Referring to *Re Leverett v Australian Telecommunications Commission* 8 ALD N135 and *World Series Cricket v Parrish* (1977) 1 ATPR par 40-040, Dunford J stated that 'incorrect' involves anything that is not in accordance with fact or is erroneous or inaccurate, and that 'misleading' includes giving a wrong impression. He was satisfied that the notation or statement was both incorrect and misleading.

In case the matter went further, he stated that having regard to the correspondence between the parties, it was not possible for the decision maker to have been satisfied that the records were not incomplete or misleading. He noted that there was again a 'world of difference' between suggesting or alleging improper corroboration on a thesis, and working together or collaboration or conspiracy to fail someone in a thesis.

Order made

Dunford J considered that it was not appropriate to order an amendment. The original note had been Associate Professor Rohde's, and any amendment made by him (the judge) would obviously not be by the same author. Instead, he ordered the deletion of the last ten words 'that I had conspired with an examiner to fail him'. The note then read 'Dan, this is the most important letter, you should note that at one stage B. Bennett complained to the Ombudsman'.

The determination was disallowed and the university was ordered to pay Mr Bennett's costs.

[A.H.]

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

PERTON and DEPARTMENT OF PREMIER AND CABINET (No. 91/034691)

Decid d: 15 April 1992 by Judge Smith, President.

Request for access to documents relating to consultant services for study on public attitudes — claims for exemption under s.30(1).

The applicant, then an Opposition MP, had requested access to documents relating to consultant services provided by Australian Community Research to conduct a study on public attitudes to financial and asset management under the Cabinet's Public Attitudes Monitoring Program. The only document in dispute was the survey report which was claimed to be exempt under s.30. This report had been commissioned with a view to its use by the Cabinet as part of its budget process and had been discussed by Cabinet.

Section 30 provides that:

> 30. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under the Act —
>
> (a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the Government; and
>
> (b) would be contrary to the public interest.
>
> . . .
>
> (3) This section does not apply to a document by reason only of purely factual material contained in the document.

The Tribunal first considered whether the document fell within para (1)(a).

It concluded that the document did not appear to express any opinion, contain any advice (as distinct from information) or make any recommendation. It was simply there to assist the Cabinet in its decision-making processes and was predecisional in that it did not represent any concluded decision although it was not a draft or provisional document. The furnishing of the report by the ACT (being a 'consultant') to the respondent did, however, in its view, constitute a 'consultation', or at least a step along the way in the consultation between ACR and the respondent and was clearly submitted for the purpose of the deliberative processes of the Cabinet. The Tribunal therefore held that the release of the report would disclose matter being consultation that has taken place between officers (that is to say ACR) and the respondent and the Cabinet, for the purposes of the deliberative processes involved in the functions of the Government.

Insofar as the public interest issue was concerned, the Tribunal applied the criteria formulated in *Re Howard and Treasury of the Commonwealth* (1985) 3 AAR 169, 177-8, which were cited with approval in its earlier decision in *Re Tanner and Department of Industry, Technology and Resources* (1987) 2 VAR 65. These criteria are as follows:

1. The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed.
2. Disclosure of communications made in the course of the development and consequent promulgation of policy tends not to be in the public interest.
3. Disclosure which will inhibit frankness and candour in future predecisional communications is likely to be contrary to the public interest.
4. Disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest.
5. 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.

Applying these criteria the Tribunal noted that while it could readily be seen that the persons to whom the communication was made

were holders of very high office indeed, the Cabinet positions themselves, but that the same could not be said of the ACR. Nor could it be said that the issues canvassed in the survey were sensitive ones. The information in the document was not matter of a confidential nature likely to have harmful consequences to any individual within society if it were made available to the general public. There was no information going to issues of the security of the State, or of a kind which, if disclosed, would be likely to impair the ability of the government to engage in its normal functions or to affect its relationship with those entities, be they entities within the private sector or the public sector, or whether they are intrastate, interstate, or foreign entities, with which the Government must deal from time to time.

As to the second consideration, the information in the report was no more than a statement of the attitudes of the community as a whole to a variety of issues relating to State finances. In no sense could it fairly be regarded as representing the informed and considered opinions of persons, expert or otherwise, responsible for advising Government on these issues.

Likewise it had not been suggested that potential interviewees in any future public attitude surveys were likely to lack candour and frankness in the opinions they expressed, if this document were to be released. Given that the identity of individual interviewees was not revealed it would defy logic to suggest that future surveys could be jeopardised by disclosure.

In the view of the Tribunal, the fourth criterion was the one which should carry the greatest weight with the respondent, given evidence by the Director of the Policy and Research Branch that he thought disclosure might skew debate. It was not, however, persuaded that there was any real danger of the consequences suggested. It noted that public opinion polls were now commonplace in relation to all manner of issues, and queried whether publication of the results of these by the media led to confusion or unnecessary debate. It also expressed the view that *some* confusion and *some* unnecessary debate was to be preferred to public ignorance and no public debate (both within and outside Parliament) about what were considered to be the great issues of the day. Such was the stuff of which strong and vigorous democracies were made.

Finally, the Tribunal concluded that the final consideration did not have any application to this case. The document did not reveal any reasons for the community attitudes which it recorded nor did it contain any reasons for any decisions later taken by the Government. Decisions arrived at by the Government were usually publicly explained when or after they were announced. No unfairness to the decision maker here was involved nor was the Tribunal able to see any likelihood of prejudice to the integrity of the decision making process.

In the light of these conclusions the Tribunal was not satisfied that the respondent had discharged the onus of establishing that release of the report would be 'contrary to the public interest' within s.30(1)(b). It went further in expressing the view that disclosure was in the public interest for the reason that the public had a right to know about the findings of a survey which was on a subject of considerable importance to the people of Victoria, which had been commissioned by its Government at the taxpayers' expense and so that there might be a better informed debate on the issues.

[M.P.]

STOCKDALE and HEALTH DEPARTMENT OF VICTORIA (No. 1991/29147)

Decided: 1 September 1992 by Mrs M. Rizkalla (Deputy President).

Request for access to documents relating to counselling of applicant's son — allegations of sexual abuse by the applicant — claims for exemption under ss.30, 32, 33 and 35(1)(b) — applicability of s.50(4).

The applicant had requested access to documents relating to counselling of his son which resulted from allegations of sexual abuse by the applicant. The documents comprised an initial contact form, a letter of referral from a doctor, an assessment report by a family therapist, a letter to a solicitor regarding the assessment and further related documentation.

The respondent claimed that the documents were exempt under ss.30, 32, 33 and 35(1)(b).

Section 33

Section 33(1) reads as follows —

> A document is an exempt document if its disclosure under this act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

The Tribunal held that all except four of the documents could on their face be said to relate to the personal affairs of the applicant's ex-wife and son. In making this assessment it took into account the definition given in the case of *E v The Health Department* (1988) 2 VAR 455 where the Tribunal held that the expression 'personal affairs' had a broad application relating to the private behaviour, home life or personal family relationships of individuals.

To determine whether release of the documents would be unreasonable, the Tribunal applied the test outlined in the case of *Phillip Page v Metropolitan Transit Authority* (1988) 2 VAR 243 where Judge Jones stated at pp.245-6 that

> Whether disclosure of information would be unreasonable requires a balancing of interest: the right to personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the information and the object of the act to extend as far as possible the right of the community to access to information in the possession of government or agencies. . . . More particularly, this balancing of interest requires a consideration of all circumstances including the interests that the applicant has in the information in question, the nature of the information that will be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance. It is apparent that the purpose of s.33(1) of the Act is to prevent the unreasonable invasion of the privacy of third parties.

Taking into account all the material before it including the documents themselves and the evidence presented to it, the Tribunal was satisfied that, on balance, it would be unreasonable for the documents in question to be released to the applicant. Despite the fact that there was no doubt that the applicant had a strong sense of grievance in regard to the way in which the allegations of sexual abuse against him were dealt with by the family therapist and service in question and that he had a strong sense of purpose in trying to convince his family and others of his innocence, it was not satisfied that this overrode the very significant confidentiality attached to the infor-

mation in this case. The Tribunal noted in this regard that, in its view, the documentation in issue would have gone in no way towards a resolution of the question of the applicant's guilt or innocence. It also noted that it was not concerned in this matter in making any judgments as to the truth or otherwise of allegations made regarding the applicant. That issue was only relevant to the extent to which it could justify the release of documents which otherwise would not be available to the applicant and, having looked at all the circumstances, it was not satisfied that the applicant's purpose and concerns overrode the right to the exemption in s.33(1). The Tribunal also commented that it was of the view that, if anything, the release of the documents involved might well have a disturbing and damaging effect in regard to the relationship between the applicant and his son, even if that were only in the short term, given that his son and ex-wife would feel betrayed were the information to be released after receiving and relying upon assurances that such personal details and information would not be released.

Legal professional privilege

The remaining four documents were claimed to be exempt under s.32 because they would be privileged from production in legal proceedings on the ground of legal professional privilege. The Tribunal found that each of them was exempt under this section and went on to consider the possible operation of s.50(4) which provides as follows:

> 50(4) On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in s.28, s.31(3), or in s.33) where the Tribunal is of the opinion that the public interest requires that access to the document should be granted under this Act.

The respondent argued that there was a public interest in making certain that natural justice had been applied to him by the family therapist in scrutinising the methods utilised by her and in helping establish his innocence of the allegations made against him. In the Tribunal's view, none of these issues applied in regard to the four documents in a way that would justify granting an order of access to them under s.50(4).

Section 35(1)(b)

Section 35(1)(b) reads as follows —

> The disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Although it was not necessary for the Tribunal to consider the operation of s.35(1)(b) given its conclusion that all of the documents were exempt under either ss.32 or 33, it went on to express the view that the documents brought into being by the family therapist during the course of counselling and support services offered to the applicant's son and ex-wife and the information communicated by the referring doctor was also exempt under s.35(1)(b). There was no question in this case that the information communicated in these documents was communicated in confidence to the agency or that it was extremely probable that the agency's work would be impaired to a substantial degree if this information were released to the applicant. It accepted evidence given by the respondent to the effect that both clients and other agencies would feel betrayed and let down were an agency such as the agency involved in this case to disclose or be forced to disclose information gained in the circumstances of this case. The confidential nature of the matters communicated to an agency of this sort was paramount and it would only be where circumstances made it clear that there was an overriding public interest that such information would be disclosed. As it had determined that there was no such overriding public interest, the application in this case would fail.

The Tribunal accordingly affirmed the respondent's decision.

[M.P.]

DE BEER and VICTORIA POLICE (NOS. 1 AND 2)
(Nos. 92/22300 and 92/32893)

Decided: 17 December 1992 by K.R. Howie (Member).

Reports and statements made by police officers in the course of inquiry by the Police Internal Investigations Department — claims for exemption under ss.30, 33 and 35(1)(b).

In two separate judgments totalling two pages, the Tribunal made very brief rulings on requests by the applicant for reports and statements made by police officers in the course of inquiry by the police Internal Investigations Department (IID).

The Tribunal ruled that statements made to two police officers to the IID were exempt under s.35(1)(b) as they contained information communicated in confidence disclosure of which would impair the ability of the respondent to obtain similar information in the future.

The Tribunal also ruled that a sentence in a report by an inspector to the IID was not exempt under ss.33 or 35.

A portion of another police report containing personal information relating to another police officer was found to be exempt under s.33.

In the light of its findings the decisions of the respondent were varied to release certain parts of police reports.

[P.V.]