

3. Once the matter is before the Administrative Appeals Tribunal, a business can be involved in very substantial costs as the previous examples illustrate. The *FoI Act* is, as discussed earlier, a service provided to the public partly for their assistance and partly to ensure the openness and quality of decision making within government. Consequently, it is reasonable that the public purse should bear the costs where it is unjust for others to do so. It is manifestly unfair for a business, randomly selected according to the whims of an individual seeking information, to have to incur substantial costs especially where the information was voluntarily provided to assist the Government. The business is in effect the 'meat in the sandwich' in a dispute between an applicant for information and a government agency. Consequently, it is suggested that there

should be a provision allowing costs to be awarded in favour of a business involved in an Administrative Appeals Tribunal hearing where it is unreasonable to expect the business to pay these costs.

4. Finally, in order to minimise this cost the procedure before the Administrative Appeals Tribunal should be changed so that the submissions of the agency involved and the applicant are heard first. If after hearing their submissions the Administrative Appeals Tribunal is not satisfied that the information concerned should not be disclosed, then, and only then, should a business have to make a submission of its own.

Reproduced from *Business Council Bulletin*, No.29/1986

## VICTORIAN FOI DECISIONS

### Administrative Appeals Tribunal

**BINNIE AND OTHERS and DEPARTMENT OF INDUSTRY, TECHNOLOGY AND RESOURCES AND OTHERS**  
(Nos.860187, 860275, 860276, 860307 and 860414)

**Decided:** 2 October 1986 by Rowlands J (President).

*Request for documents relating to a proposed drug and chemical safety evaluation centre — claim for exemption under s.34(4) — whether documents should be released under s.50(4).*

**The facts**

The applicants sought access to three classes of documents. The first was a feasibility study on the proposed centre by consultants for the Department of Management and Budget. The second group were working papers prepared by the consultants during the course of their study. The remaining documents were a series of reports prepared in the United Kingdom on the proposal to establish the centre. All documents were withheld by the respondents in reliance on s.34(4).

**The decision**

Section 34(4) provides:

A document is an exempt document if

- (a) it contains —
  - (i) a trade secret or an agency; or
  - (ii) in the case of an agency engaged in trade or commerce — information of a business, commercial or financial nature

— that would if disclosed under this Act be likely to expose the agency to disadvantage.

The Tribunal had little hesitation in agreeing with the respondents that the documents fell within the purview

of s.34(4). It was satisfied that each agency was 'an agency engaged in trade or commerce' in relation to the proposed centre. It also found that the documents themselves contained information of a business nature relating to the proposed venture's structure and that disclosure of the documents would expose the respondents to disadvantage because it would firstly reduce their capacity to negotiate with potential joint venturers concerning the terms of such a venture and second, would adversely affect their ability to compete with joint venturers against other interests who might desire to set up a similar centre. Accordingly, the Tribunal ruled that the s.34(4) claims had been made out by the respondents.

**The overriding discretion**

Having satisfied itself that the documents fell within s.34(4), the Tribunal proceeded to consider whether the respondents had discharged the onus placed upon them by the overriding public interest provision, s.50(4). There were in its view a number of public interest criteria which favoured the respondents' decisions to refuse access but there were also public interest factors which supported the view that the documents should be disclosed. The respondents submitted that the public interest included the achievement of the benefit to Victoria of the project, the undesirability of impeding that development and the undesirability of the revelation by government of material gained by it in confidence from commercial sources.

For the applicants it was argued that it was desirable for the public to be able to properly consider and debate the question of chemical testing

on animals, and also the question of the centre's economic viability.

The Tribunal recognised the legitimacy of the applicant's public interest claims but nevertheless held that the respondents' competing public interest submissions were sufficiently persuasive to counter those of the applicants. It did however find that the public interest in the public being properly informed on the debate surrounding chemical testing on animals at the centre did require portions of the documents to be released under s.50(4).

The Tribunal refused access to all the documents in issue with the exception of some descriptive portions of the feasibility study and some portions of the consultant's working papers and UK reports which were released under s.50(4) as they related to the issue of cruelty to animals, a matter which the Tribunal acknowledged was of legitimate and justifiable concern to the public.

**CONLAN and RURAL FINANCE COMMISSION**  
(No. 860385)

**Decided:** 22 October 1986 by Rowlands J (President).

*Private valuer's report on applicant's property — assessment of his application for financial assistance — claims for exemption under ss.34(1)(a) and 34(4)(a).*

**The facts**

The applicant had applied to the respondent for financial assistance and part of the process of assessing his request required the respondent to employ a private valuer to carry out a valuation of the property. Officers of the respondent had also prepared a document called the Loan Schedule.

It was portions of these two documents that were the subject of the claims for exemption by the respondent under ss.34(1)(a) and 34(4)(a).

#### The decision

The Tribunal took the view in relation to the s.34(1)(a) claim that, as the information subject to the request was of no substantial value to the valuer once it had been transmitted to the respondent, it was unlikely that it could be categorised as 'business' information and that, even if it did fall within this classification, it was not the type of information that would be protected by the section.

Whilst the Tribunal was prepared to accept that the respondent was an agency engaged in trade or commerce as defined in s.34(4)(a), it was not satisfied that disclosure of the documents in this case would be likely to expose the respondent to any real disadvantage. It concluded that the respondent had failed to discharge the onus imposed on it by s.55(2) and that its argument that disclosure would inhibit the frankness and candour of similar reports in the future could not be accepted. Moreover, the Tribunal recognised that there was a public interest in the respondent fairly discharging its function or assessing requests for financial assistance and that it was only fair in the circumstances that the applicant be granted access to documents which formed the basis of the assessment of his application. The Tribunal accordingly ruled that it was in the public interest that access to the document be allowed pursuant to s.50(4) of the Act.

#### WARD and VICTORIA POLICE (No.860101)

**Decided:** 12 November 1986 by K.R. Howie (Member)

*Police informant — whether identity protected from disclosure under s.31(1)(c) or s.31(1)(e).*

The applicant had sought access to the name of a police informant referred to by the Tribunal as X. The identity of X had been deleted from documents made available by the respondent to the applicant. The Tribunal had to determine whether disclosure of X's identity 'would or would be reasonably likely to' have the effect described in s.31(1)(c) or s.31(1)(e). On the evidence presented before it, the Tribunal was satisfied that X's was a confidential source of information in relation to the enforcement of the law; particularly in view of the fact that the information concerned narcotics related crimes. It found that there was a real risk of physical harm being sustained by X if his identity was revealed. The name of X was therefore held to be exempt pursuant to ss.31(1)(c) and 31(1)(e).

#### EVANS and MINISTRY FOR THE ARTS (No.860293)

**Decided:** 14 November 1986 by J. Rosen (Member).

*Request for access to documents relating to possible establishment of National Aviation Museum in Victoria — claims for exemption under ss.28(1)(b), 28(1)(d), 29 and 30.*

#### The facts

The Commonwealth Government had been considering the establishment of a National Aviation Museum and community groups in Ballarat had been lobbying the Victorian Government to recommend a site at Ballarat. The applicant, a Member of Parliament representing the South Ballarat electorate sought, on behalf of his constituents, access to documents relating to the Victorian Government's consideration of the matter.

#### The decision

The first document considered by the Tribunal was a draft Cabinet submission relating to the proposed museum. In determining the s.28(1)(b) claim by the respondent the Tribunal followed the principles set out in *Re Birrell and Department of the Premier and Cabinet (No.1)* (1986) 4 Fol Review 49. The criteria used in *Birrell* for resolving whether a document was prepared by a Minister had, in the Tribunal's view, been satisfied in this case as the document had been prepared in the Minister's office by one of his personal staff. As the document was created with the intention that it should be considered by Cabinet and had been submitted to the Cabinet Office it was found to have been prepared 'for the purpose of submission for consideration by the Cabinet' and was accordingly held to be an exempt document pursuant to s.28(1)(b).

The second group of documents considered were briefing papers which had been attached to Cabinet submissions on the museum proposal. The Tribunal again upheld the s.28(1)(b) claim in relation to these documents. The purpose of the documents had been to provide the Minister with information for him to submit to Cabinet. The Tribunal held that their character as documents prepared for Cabinet was not diminished even if they were not considered or used by Cabinet as they still formed an integral part of the Cabinet process.

In the alternative, the Tribunal held the documents were exempt under s.30. Both documents, being briefing papers prepared by a Minister for Cabinet, were clearly deliberative in nature and as a result satisfied the conditions of s.30(1)(a). With regard to the public interest test in

s.30(1)(b), the Tribunal reached the conclusion that the protection of the Cabinet process and the prevention of a possible intra-state dispute over the location of the museum outweighed the interests of both the applicant and the Ballarat community in being fully informed on the issue.

The final set of documents in dispute were two letters from the Premier of Victoria to the Prime Minister of Australia. The respondent relied on ss.28(1)(d) and 29 to deny access to them. One letter detailed deliberations and decisions of the Cabinet and was accordingly 'a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet' as stated in s.28(1)(d). The Tribunal also took the view that the documents were exempt under s.29(a). The factors mentioned above in respect of the s.30(1)(b) issue were again relied upon by the Tribunal in forming the opinion that disclosure of the letters would be contrary to the public interest under s.29(a). It was also satisfied that as the letters related to a matter in contention between the Victorian and Commonwealth Governments and negotiations about the museum site were still continuing, disclosure would prejudice relations between Victoria and the Commonwealth. The Tribunal therefore upheld the respondent's decision to refuse access to all the documents in dispute.

#### BILLINGHURST and DEPARTMENT OF INDUSTRY, TECHNOLOGY AND RESOURCES (No. 2)

(No. 860506)

**Decided:** 20 November 1986 by Rowlands J (President).

*Legal professional privilege — s.32.*

The applicant had sought access to a letter prepared by an officer of the respondent agency in his capacity as a lawyer in which he had provided advice to the Minister concerning litigation and legal disputes involving the Department and the applicant. Applying the criteria it had laid down in *Setterfield and Minister for Education* (1986) 2 Fol Review 21, the Tribunal held that the letter fell within the review of s.32 and that the undisclosed portions of it should not be made available to the applicant under the Fol Act.

