tion of the site, the nature of the present land use, the nature of past land use, was all information properly characterised as 'purely factual'. While this information appeared to be 'clearly of a factual nature' the Tribunal was happy to categorise the information as 'opinion, advice or recommendation' because the information would not have found its way onto the EPA database unless someone within the EPA had formed the *opinion* that the particular sites in question should be included on the database. In the light of the findings the Tribunal affirmed the decision of the EPA not to disclose the information sought by the applicant.

[P.V.]

KENNEDY and VICTORIAN ACCIDENT REHABILITATION COUNCIL
(No. 90/36021)
Decided: 12 November 1991 by L. Cooney (Member).

Reverse FoI application by director of a company — respondent agreed to release to third party a letter sent by the respondent to the applicant's company — whether the Tribunal had jurisdiction to hear the application.

Section 34(1) of the *FoI Act* protects from disclosure 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 the Act would be likely to expose the undertaking to disadvantage.

Before making a judgment under sub-section (1) as to whether disclosure of the information would expose an undertaking to disadvantage, an agency is required to notify the undertaking which has supplied the documents that it has received a request and is obliged to seek the undertaking's view as to whether disclosure should occur and advise the undertaking of its right to review the decision in the event that the agency decides to release the documents.

Section 50(2) gives 'an applicant the right to apply to the Tribunal in relation to a decision made by an agency to disclose a document contrary to the applicant's view is obtained under s.34(3)'.

In the present case, the respondent had decided that it would disclose to a third party a copy of a letter which the respondent had sent to the applicant's company. According to evidence given by the applicant, her company was now in receivership. She attempted to rely upon s.50(2)(e) as the basis upon which the Tribunal had jurisdiction to hear the case.

Despite s.50(2)(e) being clearly enacted to enable an undertaking to challenge an agency's decision to release documents containing commercial information, the Tribunal ruled that it had no jurisdiction to hear the case because Mrs Kennedy was not 'an applicant' as defined in the Act. Applicant is defined in s.5(1) in the following terms:

> (1) In this Act, except insofar as the context or subject matter otherwise indicates or requires —
>
> 'applicant' means a person who has made a request in accordance with s.17 or has applied under s.12(1) for a statement published by a principal officer to be altered.

While the Tribunal acknowledged that Parliament had clearly intended to offer a right of review by undertakings referred to in s.34(3)(b), it considered that Mrs Kennedy did not fall within the definition because she had not made a request under the *FoI Act* as envisaged by the definition of applicant.

It also ruled against the applicant on several other grounds —

> (a) The undertaking in the present case was a company called CPS Management Pty Ltd and not the applicant, who was a director of the company. This became even clearer in view of the company's entry into receivership or liquidation.
>
> (b) Reverse FoI rights are dependent upon the documents falling within s.34(1). Because the document in the present case had been provided by the respondent to the company, and not from the company to the agency, s.34(1) could not have been relied upon to refuse access to documents.

In view of its findings, the Tribunal ruled that it lacked jurisdiction to review the respondent's decision.

[P.V.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

CULLEN and AUSTRALIAN FEDERAL POLICE
(No. A90/89)
Decided: 16 August 1991 by Deputy President R.K. Todd.

Review of decision to deny access to documents of the Australian Federal Police — whether s.24 applies only to identification, location or collation of documents — whether Re Timmins and National Media Liaison Service correctly decided.

The applicant, in the context of the application, was acting in the interests of a Mr L.H. Ainsworth who, for a number of years, had a substantial business in relation to the manufacture and sale of poker machines. In 1984, allegations were made against the Ainsworth organisation by a rival organisation which, according to Mr Ainsworth, had been picked up by the New South Wales Police Force. Mr Ainsworth claimed that the allegations were false and had been conveyed, in 'official police documents' from Australia, to authorities in Nevada and Puerto Rico, where Ainsworth machines were being exported. Access was sought to the documents so that information claimed to be false could be corrected.

Although no findings were made to these claims, the respondent conceded that it held documents containing information on the Ainsworth companies and that other law enforcement agencies in Australia and overseas had access to that information. It further conceded that such information might be used by these agencies in assessing licensing applications by the Ainsworth group.

The request for access was stated in two parts: the first referred to documents in respect of which specific claims of exemption had been made (the 'Part 1 documents') and the second to 'any other documents

relating to the Ainsworth organisation or Mr Ainsworth himself held by the Federal Police', against which request s.24 had been invoked (the 'Part 2 documents').

The Part 1 documents

The Tribunal considered briefly affidavit evidence tendered by a Mr J.C. Perrin, former Deputy Commissioner of the New South Wales Police Force in which Mr Perrin offered his perceptions as to the lack of adverse effect on police intelligence gathering which would be occasioned by the release of the documents. The Tribunal stated that such evidence is of little value and that no reliance could be placed on it. This is because the effect (or otherwise) which disclosure would occasion is a matter which can only be determined by examination of the documents concerned. Accordingly, the Tribunal considered itself to be in a far better position to assess the claims of exemption.

Claims for exemption under ss.33, 37, 40, 41, and 45 were then considered in respect of a large number of Part 1 documents, with the Tribunal, in general, stating only its conclusion so as not to reveal the contents of the documents. Without offering detailed reasons, the Tribunal upheld the respondent's decision to refuse access to the documents.

It was noted by the Tribunal that one of the disputed documents had come into the hands of Mr Ainsworth by an undisclosed route. The Tribunal ruled that, to the extent that it enabled the existence of a source of information to be identified, the document was exempt under s.39(1)(b) and the fact that it somehow had been made public did not detract from its exempt character. The Tribunal stated —

> If a document has been officially released into the public domain, particularly if there has been a partial official release which without the release of another document or documents would constitute unfairness (*Re Downie and Department of Territories* (1985) 8 ALD 496), that is one thing. But the 'leak' of a document, as such and without more, has no such effect. It does not corrupt the quality of the claim of exemption. The question is what is the quality of that claim.

The Part 2 documents

Section 24:

> 24.(1) Where —
>
> (a) a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter; and
>
> (b) the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all that documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations, or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or of the office of the Minister,
>
> the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken.

Opposing evidence was tendered relating to the size of the task of identification, location and collation of the documents requested. In support of its argument against granting access, the respondent stated that six files had been identified as being files which might contain information falling within the terms of the application and that the six files contained a total of 4711 folios. Although the respondent tendered affidavit evidence stating that the task would require senior officers who would necessarily be diverted from other areas of work, in its final submission it conceded that the task of identification etc. would probably not be very time consuming and could be assigned to a couple of junior constables. For the applicant, the evidence of Mr Perrin deposed that the files would be indexed, cross-indexed and cross-referenced so as to facilitate easy location and collation. The respondent accordingly sought to argue that, while the documents might be easily located, the voluminousness of the task of assessing whether or not the documents were exempt was such as to attract the application of s.24.

The Tribunal found this issue to be a matter of some concern and considered the case to be not entirely on all fours with its previous decision in *Re Timmins and National Media Liaison Service* (1986) 9 ALN N196. In the earlier case, the Tribunal considered the work of identifying, locating and collating the documents in question to be quite small. However, the work of assessing the documents for the purpose of deciding whether or not any claims for exemption should be made was very substantial having regard to the resources of the respondent agency. The Tribunal in that case held that the two tasks were quite distinct and that the task contemplated by s.24 was the former only. Accordingly, in the present case, although the Tribunal expressed itself to be 'very conscious of the size of the task facing the respondent in assessing the status in terms of potential claims of exemption of 4711 folios of documents', it saw no alternative but to rule that the claim for the application of s.24 must fail.

The Tribunal ruled that it was not satisfied, on the balance of probabilities, that the respondent had made out a claim of refusal of access under s.24 insofar as that claim related merely to the identification, location and/or collation of the documents in question. As there had been no appeal from the decision in *Re Timmins* and the legislation had not been amended as a result, the Tribunal expressed itself satisfied that the decision in the case had correctly interpreted the way in which s.24 works. Accordingly, although the factual circumstances in the present case differed, the application of *Re Timmins* precluded the respondent from successfully relying on s.24.

The decision in relation to the Part 1 documents was accordingly affirmed, while the decision in relation to the Part 2 documents was set aside and the matter remitted to the respondent for reconsideration in accordance with the direction that s.24 was of no application.

[G.W.]

MIDLAND METAL OVERSEAS LTD and COLLECTOR OF CUSTOMS AND ORS

(No. N91/408)

Decided: 23 August 1991 by Deputy President B.J. McMahon.

Request for access to documents relating to importation — claims for exemption under ss.43 and 45 — whether disclosure would constitute breach of confidence — 'marks and numbers' contained in documents also endorsed on exterior of goods — whether information 'common knowledge' — whether release of documents would affect the competitiveness of the importer.

The applicant had requested access to documents relating to the importation of wire and cable from New

Zealand over a specified period. Access was denied under ss.43 and 45 which provide as follows:

> 43(1) A document is an exempt document if its disclosure under this act would disclose —
>
> . . .
>
> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information —
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
>
> (ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
>
> . . .
>
> s.45(1) A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.

The Tribunal referred to evidence concerning the extensive nature of information supplied by agents when arranging for customs clearance of imported goods and to the fact that the information was treated as confidential by the respondent. It noted that details such as the country of origin of goods and the name of the ship which brought them to Australia were confidential because they could give an informed observer a good idea of the importer's operating costs and would enable a competitor to work out what contribution freight made to the costs to be quoted by a competitor. It also noted that confidentiality was equally important to the respondent because it encouraged a free and frank disclosure of information by the importer.

Some of the information contained in the subject documents consisted of 'marks and numbers' endorsed on the outside of the goods shipped which showed sufficient information to identify the goods and to give instructions to the end user. There was evidence to the effect that cable drums were usually transported on open trucks without any attempt to hide or obscure markings and that there was no developed practice whereby purchasers were required to delete markings or to undertake to keep them confidential.

The Tribunal first considered the position under s.45 and noted that its requirements were usefully summarised in the following passage in *Re Minter Ellison and Australian Customs Service* 17 ALD 474 at 478:

> Since the decision of the Full Court of the Federal Court in *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 13 ALD 254, it may be taken to be settled law that the effect of s.45(1) of the Act is as set out in the following passage from the judgment of Jenkinson J (at 258) with whom Sweeney J agreed:
>
> [T]he language of s.45(1) is not inapt to confer exempt status on a document which contains confidential information received under circumstances importing an obligation of confidence, without regard to those considerations of public policy to which courts have allowed an influence in determining whether to grant or withhold remedies for 'breach of confidence' in exercise of equitable or common law jurisdiction.
>
> On that basis, if the respondent is to succeed under this head of exemption, we must be satisfied first, that the documents contain confidential information, second, that that information was received by the respondent in circumstances importing an obligation of confidence, and third, if these two conditions are satisfied, that the information contained in those of the documents already in the hands of the applicant has not lost its inherent quality of confidence.

It noted that some support for the dissenting judgment of Gummow J could be found in his later decision in *Smith Kline and French Laboratories (Aust.) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 which had since been upheld on appeal ((1991) 99 ALR 679) but concluded that it was nevertheless bound by the decision of the majority in *Corrs Pavey*.

Applying the criteria in *Minter Ellison* the Tribunal concluded that the documents contained confidential information received under circumstances importing an obligation of confidence. In its view the nature of the information contained in the documents, the care taken to safeguard them while in the custody of the respondent, the strict instructions to the respondent's staff concerning the need to preserve secrecy and the views of the importers themselves all pointed to the confidential nature of the information.

Moreover, unlike the facts in *Minter Ellison*, the importations in the present application were for commercial purposes and that information was sought by a direct competitor.

The Tribunal rejected on three grounds an argument to the effect that the limited publication of 'marks and numbers' caused the quality of confidentiality to be lost, at any rate in respect of information contained in them. First, it found that the confidentiality relied upon was the totality of the material coming from a guaranteed source and that this material was not dispersed on the sides of drums. Secondly, there was no evidence that the drums referred to in the evidence were imported, let alone imported from New Zealand. Finally it pointed out that the disclosure of the limited material contained in marks and numbers was not any wider than considered in *Attorney-General's Department v Cockcroft* 64 ALR 97. As in *Baueris v Commonwealth of Australia* 75 ALR 327, 329 it could not be said (as required to establish loss of confidentiality) that all the material required in respect of every importer of cables from New Zealand had become public property or a matter of public knowledge.

The Tribunal then went on to consider s.43 and commented that, while exemption could probably be claimed under paras (6) and (c)(ii), it was not necessary to consider these as para. (c)(i) was available and had been established to its satisfaction. It noted that the concept of public interest in the meaning of 'unreasonable' had been discarded by a Tribunal presided over by the President in *Re Schering Pty Ltd and Department of Community Services and Health and Public Interest Advocacy Centre* (No. 7245 16 August 1991). It concluded that disclosure of the documents which clearly contained information about the business, commercial or financial affairs of a number of undertakings would not have an effect on the business affairs of those undertakings which was not merely incidental or trivial. The evidence was that in a highly competitive market, that disclosure would give such an edge to the competitors of the parties joined that it would have to be regarded as an unreasonable effect.

The Tribunal concluded that the respondent had discharged its onus under s.61 and affirmed the decision under review.

[M.P.]

PUBLIC INTEREST ADVOCACY CENTRE and DEPARTMENT OF COMMUNITY SERVICES AND HEALTH AND SEARLE AUSTRALIA PTY LTD
(Nos N88/1222 and N89/529)

Decided: 19 September 1991 by Justice D.F. O'Connor (President), Mrs J.H. McClintock (Member) and Dr M.E.C. Thorpe (Member).

Request for access to documents relating to an intrauterine contraceptive device Copper-7 — ambit of the request — extent of participation in proceedings by the party joined — whether evidence and submissions of party joined limited to grounds of exemption in s.43 — meaning of 'document' under the Freedom of Information Act — extent of Tribunal's powers on review — 'prior documents' — whether communications with overseas regulatory agencies exempt under s.33(1)(a)(iii) — whether documents which disclose identity of external evaluators, doctors who agree to be triallists and overseas agencies exempt under s.40(1)(d) — meaning of 'public interest' — whether documents relate to 'personal affairs' within s.41(1) — meaning of 'trade secrets' in s.43(1)(a) — whether information relating to health and safety testing can be 'trade secret' — whether documents exempt pursuant to s.43(1)(b) — whether 'commercial value' can attach to the compilation of material otherwise publicly available — meaning of 'unreasonable' in s.43(1)(c)(i) — whether there can be prejudice to the future supply of information within the meaning of s.43(1)(c)(ii) in circumstances where companies are seeking approval in accordance with guidelines to market devices in Australia — tests to be applied in considering 'breach of confidence' in s.45(1).

The facts in this case were similar to those in *Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd* ((1992) *FoI Review* 22).

The Tribunal first considered a number of preliminary issues. Two of these, the meaning of the word 'document' and the extent of participation in the proceedings by the party joined, were decided in an identical manner to that in the *Schering case*. Two further arguments by the respondent that the ambit of the request did not extend to an ancillary product, Cu-7(s), and that the Tribunal's powers on review were confined to a consideration of the grounds of exemption relied upon by the decision-maker were rejected. The Tribunal referred to *Mitsubishi Motors Australia Ltd v Department of Transport* (1986) 12 FCR 156, 162, where the Federal Court stated that the Tribunal was not to be constrained in the proper exercise of its functions by the way in which the decision maker had seen fit to exercise his powers.

Prior documents — s.12(2)

Counsel for the applicant sought to question whether a number of documents which were claimed to be prior documents under s.12(2) were in fact prior documents but did not produce any evidence to dispute the accuracy of the dates shown on documents or of the schedules showing the dates on which they came into the respondent's possession or any evidence to show that disclosure was necessary to enable 'a proper understanding' of documents to which the applicant had been granted access. The Tribunal commented that, while it was empowered under s.58(c) to decide matters which *under the FoI Act* could have been decided by the decision maker, that did not encompass making a decision to provide access other than under the provisions of that Act.

Section 33

Several documents were claimed to be exempt under s.33(1)(a)(iii) which provides:

> 33(1) A document is an exempt document if the disclosure of the document under the Act would be contrary to the public interest for the reason that the disclosure —
>
> (a) would, or could reasonably be expected to, cause damage to —
>
> (iii) the international relations of the Commonwealth.

In *Re Maher and Attorney-General's Department* (1985) 3 AAR Davies J (at 409) stated that the mere possibility of damage was not sufficient to bring a document within the terms of s.33(1)(a)(iii). He further stated:

> However, I do not accept that it is necessary to find loss or damage which can be proved in monetary terms. The phrase 'damage to international relations of the Commonwealth' comprehends intangible damage to Australia's reputation, though such damage may be difficult to assess . . . There must be cause and effect which can reasonably be anticipated. But if it can reasonably be anticipated that disclosure of the document would lessen the confidence which another country would place on the Government of Australia, that is a sufficient ground for a finding that the disclosure of the document could reasonably be expected to damage international relations. Trust and confidence are intangible aspects of international relations.

Having read the documents, the Tribunal considered that they were not exempt under s.33(1)(a)(iii). They were ordinary business documents and simply disclosed that the agencies consulted on matters of mutual interest. Disclosure of the fact that they did so would not of itself destroy the trust and confidence between these agencies. Furthermore, the documents were not marked confidential nor was any restriction placed on their use.

Section 40(1)(d)

The respondent also relied on s.40(1)(d) which provides:

> 40.(1) Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to —
>
> . . .
>
> (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency . . .
>
> (2) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

It claimed that the documents were exempt by reason of the fact that they disclosed the identities of external evaluators, doctors who agreed to be triallists and overseas agencies. As in the *Schering* matter the Tribunal concluded that disclosure of the identity of external evaluators and also in this case, of triallists, would have a substantial adverse effect on the proper and efficient conduct of the respondent. It was not, however, satisfied that disclosure of the fact that the respondent obtained information on therapeutic substances from particular overseas agencies would have such effect.

In considering the question of public interest, the Tribunal referred to a comment in *Re Rae and the Department of the Prime Minister and Cabinet* (1986) 12 ALD 584, 600 (a case concerning s.33A which contains a similar public interest requirement to that in s.40) that once the respondent establishes that a document satisfies the primary test then

an onus is placed on the applicant to make out a positive case with respect to public interest. It also reiterated the comments regarding *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113 which it had made in the *Schering case* (see above). Having taken into account the public interest in the public knowing from whom the respondent receives information when it evaluates therapeutic goods and the competing interest of the Department in being able to obtain sound advice to enable it to fulfil its responsibilities, the Tribunal was not satisfied that, on balance, it would be in the public interest to release the identity of external evaluators and triallists.

Section 41

Section 41(1) provides:

> 41.(1) 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 respondent claimed exemption under s.41 in respect of various documents comprising correspondence from members of the public and material from medical practitioners regarding adverse effects of the devices.

The Tribunal referred to definition of 'unreasonable' in *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257, and held that the material in question related to 'personal affairs' in that it related to the medical histories of individuals. Its disclosure, insofar as it identified individual patients would be unreasonable in that it related to highly personal information communicated in confidence concerning complications arising out of the use of intrauterine devices. The Tribunal, however, rejected an argument that adverse reaction reports prepared by doctors were exempt on the basis that doctors could be identified through their handwriting.

Section 43

As was the case in *Schering*, both the respondent and party joined submitted that a large number of documents were exempt under s.43. The Tribunal took an identical approach to these claims for exemption to that outlined above in relation to the *Schering case.*

Section 45

A further claim for exemption under s.45 was again treated in a similar fashion to the treatment which it received in the *Schering case.*

Conduct of the Department

The Tribunal concluded by making similar criticisms to those which it had voiced in the *Schering case.*

Comment

It is curious that the Tribunal in the context of s.42 cited with apparent approval a passage from *Re Chandra* which referred to the need to balance competing interests while at the same time adhering to the narrow definition of 'unreasonably affect' in s.43(1)(c)(i) which it adopted in the *Schering* matter.

[M.P.]

GORDON and DEPARTMENT OF SOCIAL SECURITY

(No. V90/850)

Decided: 23 September 1991 by R.A. Balmford, Senior Member.

Review of decision made on review under s.54 to amend documents relating to applicant — whether amendment should be by deletion of information or by annotation — appropriateness of deletion of government records considered.

The applicant had, on three separate occasions, lodged with the respondent claims for invalid pension under the *Social Security Act* 1947. All three claims were rejected. Following an appeal to the Social Security Appeals Tribunal for review of the third decision to reject his claim, the applicant was successful in his claim for an invalid pension.

During 1990, the applicant made several requests to the respondent, in effect requesting all documents on his invalid pension file. Copies of these documents were provided to him. The applicant subsequently wrote to the Tribunal, sending a copy to the respondent, requesting certain deletions from and amendments to his medical records. In effect, the applicant requested that all medical reports, other than that of a Dr Wilson, be deleted. The letter was treated as a request to the respondent under s.48 and acted upon accordingly.

The respondent refused to alter the documents as requested, but advised the applicant that a notation had been placed on each of those which were medical reports. The notations were in the following terms, with a copy of the applicant's letter attached in each case:

> Please note!!
>
> When reading the medical report of
>
> Dr [Redston]
>
> hereunder please note the comments provided by Mr Gordon.
>
> These comments must be read in conjunction with the report at any time that the Medical Report is used in relation to an administrative decision concerning Mr Gordon's entitlement.

The applicant lodged a further request repeating his earlier request and also requesting amendment of two further documents, being documents generated within the respondent Department by departmental officers. He indicated that he would agree to 'annotations and amendments being placed directly on to those documents' and that, in the case of the reports of Dr Wilson which he considered illegible, he would be satisfied if they could be typed.

The respondent once again refused to delete the medical reports and requested further information as to the amendments the applicant sought in regard to the other documents. The applicant applied for internal review of this decision. The review officer replied to the applicant, stating that the decision had been made to amend the documents by adding cross-references to the applicant's letter, but that no information would be deleted. In respect of this decision, the applicant applied to the Tribunal. The sole issue for determination, therefore, concerned the method by which the documents were to be amended under s.48.

Section 48

> 48. Where a person (in this Part referred to as the 'claimant') who is an Australian citizen, or whose continued presence in Australia is not subject to any limitation as to time imposed by law, claims that a document of an agency or an official document of a Minister to which access has been lawfully provided to the claimant, whether under this Act or otherwise contains information relating to his personal affairs —
>
> (a) that is incomplete, incorrect, out of date or misleading; and
>
> (b) that has been used, is being used or is available for use by the agency or Minister for an administrative purpose,
>
> he may request the agency or Minister to amend the record of that information kept by the agency or Minister.

Having established that all other criteria for the section existed, the

Tribunal turned to consider whether, in terms of paragraph 48(a), each of the documents in question contained information which was 'incomplete, incorrect, out of date or misleading'.

In support of his argument that all but Dr Wilson's reports fell within s.48(a), the applicant relied on reasons given by the SSAT when reviewing the decision to reject his pension application. In its judgment, the SSAT had indicated that the report of Dr Wilson should be preferred to the other reports, to which it considered 'little attention should be paid'. On this basis, the applicant urged that the other reports were 'incomplete, incorrect, out of date or misleading'.

The Tribunal rejected this reasoning, stating that the SSAT review involved the adjudication between conflicting medical opinions and that the result of such a review cannot, in the absence of specific evidence, be used as a basis for determining whether a particular report contains information which is 'incomplete, incorrect, out of date or misleading'. The Tribunal referred to *Re Cox and Department of Defence* (1990) 20 ALD 499 as an example of a case in which, in the context of a s.48 application, specific expert evidence may be used in determining whether reports contain information which is incomplete, out of date or misleading. In the present case, where no specialist medical evidence was tendered other than the applicant reading from a medical textbook, the Tribunal concluded that it was not able to determine whether the medical reports in question fell within s.48(a).

In respect of the departmental records mentioned in the applicant's second request, conversely, the Tribunal found two to contain information which could be described as 'incorrect and misleading' in that they went considerably further than the statements in the medical report on which they were apparently based.

Method of amendment

The Tribunal emphasised that the decision before it was not the decision to amend the subject documents; that decision had been made by the respondent and had not been challenged. Rather, the question before the Tribunal was solely the method of amendment to be adopted in regard to the two documents found to contain incorrect information. The Tribunal also considered, in the context of the medical reports, the appropriateness of deletion on the hypothesis that they were correct.

The departmental documents

The Tribunal considered it appropriate that the notations already added to the record of information contained in each of the two documents should incorporate the following passage:

> The reference in this document to Mr Gordon's jogging is incorrect and misleading. It misrepresents the following passage in Dr Baker's report of 5 September 1989: 'Can even jog/walk up to 3 miles on a good day'.

The medical reports

The Tribunal then considered the appropriateness or otherwise of relisting the matter in order to enable the parties to call medical witnesses in respect of the medical reports. Taking into account the potential expense, delay and inconvenience of that course, the Tribunal decided not to relist the matter, and cited as the determining factor in its decision the fact that, were the reports to fall within s.48(a), it would nevertheless affirm the decision under review. The reasoning upon which this conclusion was reached was that given by the Tribunal in its decision in *Re Wiseman and Department of Transport* (1984) 12 ALD 707, where the Tribunal considered at length the question of amending government records.

The Tribunal in *Re Wiseman* warned against the 'kind of artificiality' which can result from overzealous amendments, and observed that the 'process of continuous alteration' of records, as exemplified in Orwell's *Nineteen Eighty Four*, was an activity which Parliament cannot be taken to have contemplated when enacting Part V. It added:

> The amendment of government records is a serious matter, which Parliament cannot have intended to be lightly undertaken. The addition of a notation, on the other hand, does not give rise to these difficulties, and may well be, in most cases, the appropriate way of giving effect to the interest of the individual in accuracy of records.

The Tribunal in the present case adopted the preceding passage as the correct approach to be taken when dealing with the amendment of government records. Stating that it appreciated the applicant's concern for the accuracy of information held, it nevertheless declared that the medical reports must stand as reflecting the view of the medical examiner at the date of the examination described. Such material can always be tested, where necessary; deletion, however, was not a course to be commended and the Tribunal doubted whether, in fact, it possessed such power. In this regard, the Tribunal cited *Re Cox* which contained the following observation:

> The applicant's primary claim is for the removal of certain documents from his files. It is a nice question whether the tribunal has power to order removal of a document from a record. I know of no case, and was referred to none, in which the tribunal has understood the power of 'altering the record' (see s.50(1)) to include ordering the removal of a document or documents.

The Tribunal in *Re Cox* added that, even if disputed, reports would at the very least remain part of the background to an applicant's situation and would need to be referred to if ever a report on such history was called for. This reasoning was adopted by the Tribunal in the present case which concluded by stating that, were there evidence before it that any of the medical reports were 'incomplete, incorrect, out of date or misleading', for the reasons given in *Wiseman* and *Cox*, it considered the appropriate course of action would be amendment by way of appropriate notation, rather than removing or altering the record itself.

[G.W.]

WARREN and DEPARTMENT OF DEFENCE
(No. N90/575)

Decided: 14 October 1991 by The Hon. Justice P.J. Moss, Presidential Member.

Request by former Army officer — prior agreement between the parties as to ambit of claim — whether any evidence respondent in possession of relevant documentation not produced to applicant.

On 7 July 1981 the applicant was discharged from the Australian Regular Army in which he then held the rank of Major. Although prior to his discharge the applicant was given an opportunity to read reports by superior officers which were adverse to his continuation in office, the applicant alleged that his discharge was forced upon him and was brought about by 'corrupt and weak senior officers', and the result of

'collusion' between his then superior officers.

In 1984 the applicant requested from the respondent copies of documentation relating to his discharge. Between March and June of that year, a large number of documents was provided to the applicant and no application to review was lodged by him. Subsequently, in 1990, the applicant made a further request for all documents relating to him from the date of his discharge. No response was made to the applicant within the statutory deadline of 30 days and, accordingly, there was a deemed refusal by virtue of the provisions of s.56(1). The applicant then applied to the Tribunal for review of the deemed refusal.

At the hearing, evidence was tendered of an agreement reached between the applicant and respondent as to the ambit of the applicant's claim. This agreement related to two groups of documentation: the first comprised all documents relating to the applicant and various submissions made by him to the Governor-General, Prime Minister and various Ministers in relation to his claim; the second related to one specified document. By the time of the hearing, the latter document had been supplied to the applicant. In respect of the first group, however, the respondent claimed that certain documents had previously been provided to the applicant, while others were not in the Department's possession. The latter claim was disputed by the applicant.

The Tribunal considered affidavit evidence of a Mr F.X. Crowe tendered on behalf of the respondent and accepted his explanations as to the respondent's failure to supply the applicant with the documentation requested. With the exception of one document, Mr Crowe maintained that the relevant documentation was not in the possession of the respondent, either because it had been destroyed in accordance with the *Archives Act* or had never been received by the Department. The Tribunal accordingly declared itself satisfied that the respondent had taken all reasonable steps to search for and produce such documentation to the applicant.

With respect to the remaining document — described by the applicant as an 'unflattering brief' relating to him — Mr Crowe contended that this had previously been supplied to the applicant, a contention not disputed by the applicant.

The deemed refusal was accordingly affirmed.

[G.W.]

ADVOCACY FOR THE AGED ASSOCIATION INCORPORATED and DEPARTMENT OF COMMUNITY SERVICES AND HEALTH

(No. Q91/158)

Decided: 24 October 1991 by Deputy President S.A. Forgie.

Review of decision purported to be made pursuant to s.54(2) — decision not made by principal or authorised officer — whether Tribunal has jurisdiction to consider application for review.

On 20 February 1990 the applicant requested from the respondent copies of certain reports prepared by the Department of Community Services and Health Standards Monitoring Team relating to their assessment of approved aged care nursing homes in Queensland. These documents had previously been requested by the applicant, but the request had been refused by the respondent. The second request was answered by a letter dated 6 March 1991 signed by Mariya Ignatievsky, Manager, Aged and Community Care which stated: 'I have now considered your request, and have made decisions as set out below'. After setting out her decision the Manager concluded her letter by saying: 'I have made this decision under powers authorised pursuant to section 54(2) of the *Fol Act*. In [sic] enclose an information sheet setting out your appeal rights under the Act'.

The applicant sought review of the decision by the Tribunal. However, the issue arose as to whether or not the Tribunal had jurisdiction under s.55, as Ms Ignatievsky was not empowered to make such a decision.

Section 55

> 55.(1) Subject to this section, an application may be made to the Administrative Appeals Tribunal for review of —
>
> (a) a decision refusing to grant access to a document in accordance with a request or deferring the provision of access to a document;
>
> . . .
>
> (2) Subject to sub-section (3), where, in relation to a decision referred to in paragraph (1)(a) or (c), a person is or has been entitled to apply under section 54 for a review of the decision, that person is not entitled to make an application under sub-section (1) in relation to that decision, but may make such an application in respect of the decision made on such a review.

Section 54 of the Act provides:

> 54.(1) Where a decision has been made, in relation to a request to an agency, otherwise than by the responsible Minister or principal officer of the agency, being —
>
> (a) a decision refusing to grant access to a document in accordance with a request or deferring the provision of access to a document; or
>
> (b) . . .
>
> the applicant may, within 28 days after the day on which that decision is notified to him or within such further period as the principal officer of the agency allows, apply in writing to the principal officer of the agency for a review of the decision in accordance with this section.
>
> (2) Subject to sub-section (3), where an application for review of a decision is made to the principal officer in accordance with sub-section (1), he shall forthwith arrange for himself or a person (not being the person who made the decision) authorised by him to conduct such reviews to review the decision and make a fresh decision.

As the decision contained in Ms Ignatievsky's letter had not been made by the Minister or principal officer, an application for review under s.55 could only be lodged in the Tribunal after a decision had been made on an application for review made pursuant to s.54(1). Although Ms Ignatievsky had purported to have made her decision pursuant to s.54(2), the Tribunal stated that this could not have been the case:

> While the decision of which review was sought in these proceedings was expressed to have been made pursuant to sub-section 54(2) of the *Fol Act*, it cannot properly have been made pursuant to that sub-section. No application for review has been made pursuant to sub-section 54(1) and it cannot be made for there has been no decision made in relation to the Association's request for access to information. Even if an application had been properly made pursuant to sub-section 54(1), Ms Mariya Ignatievsky is not an officer nor an officer authorised by the principal officer to make such decisions.

It was argued by the applicant that the Tribunal nevertheless had jurisdiction to review on the basis that, as the decision was purported to have been made pursuant to s.54(2), the respondent could not be heard to deny that it had been properly made. On this point, the respondent disagreed but indicated that a strong view had not been adopted either way.

The Tribunal noted that it was not aware of any previous case dealing with the problem raised by the present case. However, it observed that a similar situation had been considered by the Full Court of the Federal Court in the customs jurisdiction in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 when dealing with an appeal from the Tribunal decision in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167. In that case, a decision had been made to cancel a warehouse licence in the absence of any statutory power to make such a decision. The majority of the Full Court held that the Tribunal nevertheless had power to entertain an application made to it to review such a decision.

The Tribunal quoted extensively from the Full Court judgment which was based primarily upon the definition of 'decision' contained in s.3(3) of the *Administrative Appeals Tribunal Act* 1975. As Bowen CJ in the Full Court observed:

> In the *Administrative Appeals Tribunal Act* a wide meaning is given to the word 'decision' by s.3(3). In s.25 it appears to me that the word simply refers to a decision in fact made, regardless of whether or not it is a legally effective decision.

Smithers J, who together with Bowen CJ comprised the majority in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*, looked to the nature and objects of the *Administrative Appeals Tribunal Act*, stating that:

> [I] find it difficult to think that the *Administrative Appeals Tribunal Act* provides for review of decisions which are invalid because of the non-fulfilment of some condition essential to the exercise of power conditionally residing in the decision-maker or of some other error destroying the validity of the decision but not of the decisions made in circumstances where the power to make a decision on the matter decided was completely absent. It would seem that in each case although in fact a decision has been made, each so far as legal effect is concerned is a nullity.

Adopting this reasoning, the Tribunal ruled that, despite the fact that a decision could not properly be made pursuant to sub-section 54(2), a decision, in fact, had been made under that sub-section and the Tribunal was accordingly authorised to conduct a review.

The Tribunal noted, however, that there had been some indication at the hearing that the parties might be able to reach an agreement as to the documents and, consequently, adjourned further consideration to a date to be fixed.

[G.W.]

RECENT DEVELOPMENTS

FoI AND THE PRIVACY ACT

The Commonwealth Attorney-General's Department has recently released the following instruction on the relationship between the *FoI Act* and the *Privacy Act*.

This memorandum deals with the *Privacy Act* 1988 and focuses on its relationship with the *Freedom of Information Act* 1982.

2. The *Privacy Act* commenced on 1 January 1989. It makes provision for the protection of privacy of individuals in relation to records of personal information held by Commonwealth agencies and tax file number information. The *Privacy Act* contains separate sets of guidelines in relation to personal information and to tax file number information.

Information policy principles

3. The guidelines applying to personal information are known as the Information Privacy Principles (IPPs). There are 11 separate IPPs, all contained in s.14 of the *Privacy Act*. They define the standard to be adhered to by Commonwealth agencies in the collection, storage, handling, use and dissemination of personal information.

4. 'Personal information' is defined in the following terms in s.6(1) of the *Privacy Act*:

> 'personal information' means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

A similar definition of 'Personal Information' appears in s.4 of the *Freedom of Information Act*.

5. The *Privacy Act* identifies as 'an interference with privacy' an act or practice of an agency if that act or practice breaches one or more of the IPPs (s.13(a)). Under s.16, agencies are prohibited from doing acts or engaging in practices that breach any of the IPPs. The *Privacy Act* provides for a Privacy Commissioner whose functions include the investigation of acts or practices of agencies that may breach the IPPs and the provision of guidelines for the control of such acts or practices. The Privacy Commissioner's functions are set out in full in s.27 of the *Privacy Act*.

Tax file number guidelines

6. The guidelines applying to the collection, storage, use and security of tax file number information (TFN guidelines) are provided for by s.17 of the *Privacy Act*. They are issued by the Privacy Commissioner and are disallowable instruments. The first issue of TFN guidelines occurred in May 1990, and the guidelines became effective in October 1990.

7. TFN guidelines as interim guidelines are analogous to the IPPs. However, they have application beyond Commonwealth agencies and apply also to non-government bodies and other persons such as private employers, tax accountants, financial advisers and solicitors. The Privacy Commissioner has similar powers in relation to TFN guidelines as he or she has in respect of the IPPs (see s.28).

Nature of the legislation

8. It is not within the scope of this memorandum to undertake a detailed consideration of the provisions of the IPPs or the TFN guidelines. However, in summary, both sets of guidelines include prohibition on the unauthorised use and disclosure of personal information or tax file number information.

9. On a superficial analysis, it might be thought that the underlying philosophies and some of the specific provisions of the *FoI Act* and the *Privacy Act* are, if not