

The Cain Government's recent moves to exempt key government agencies and documents from the operation of the Act (by way of regulation) is at odds with our beliefs.

After the election we will therefore amend the Act to specifically include those agencies in the operation of the Act. We will also end Labor's moves to use secrecy regulations as a backdoor way of amending the legislation.

The *Freedom of Information Act* has the ability to influence in a very beneficial way the process of governing Victoria. We give a firm commitment to abide by the letter and spirit of this vital piece of legislation.

References

1. *Freedom of Information*, AGPS 1979, para. 3.4 at p.21.
2. *ibid*, para. 3.7 at p.22.
3. Correspondence between writer and Victorian Ombudsman, 6.10.87
4. Rowlands, J, *Birrell v Department of Premier and Cabinet* (unreported), 26.6.86.
5. Cain, J, MP, address to AIPS Seminar, 12.4.81.
6. Dunn, I., President of Law Institute, *Age*, 4.12.87.

MARK BIRRELL

Mark Birrell is a Liberal MP and Shadow Minister for Health in Victoria.

VICTORIAN FOI DECISIONS

Administrative Appeals Tribunal

VENTURA MOTORS and METROPOLITAN TRANSIT AUTHORITY No. 871047

Decided: 18 May 1988 by J. Rosen (Member).

Documents relating to changes in arrangements made by the respondent in the subsidisation of private bus services — claims for exemption under ss.30, 32, 34(1)(a), 35(1)(a) and 36(b).

The facts

The respondent authority (MTA) was responsible for the provision and management of public transport in Victoria, including the government bus system. Its responsibilities also extended to the regulation and co-ordination of private bus operators which included the applicant.

The MTA was dissatisfied with the ad hoc arrangements under which the private bus operators were subsidised and in 1984 it conducted a review with the assistance of a firm of accountants in association with the Bus Proprietors Association (BPA). The report that followed led to the introduction of contractual arrangements between the MTA and private bus operators. However, not all operators managed to secure an agreement when the Government announced deadline expired which resulted in those operators being financially disadvantaged. The applicant was such an operator and subsequently commenced legal proceedings in the Supreme Court claiming retrospective payment of the subsidies. In the meantime, it sought access from the MTA to all documents relating to the changes in arrangements made by the MTA in subsidisation of private bus services.

The decision

There were a number of documents

that remained in dispute between the parties and the Tribunal dealt with each document individually. The outcome of the Tribunal's examination of the 5 claims for exemption made by the MTA was as follows:

Section 30

A portion of a letter from the Managing Director of the MTA to the Minister of Transport which contained the Managing Director's opinion of the MTA's potential liability in respect of claims made by private bus operators was held to be exempt under s.30. The release of the document, which included legal and accounting advice was in the Tribunal's view contrary to public interest having regard in particular to the litigation which currently existed between the parties. Another document which related to a proposed internal enquiry into allegations made by private bus operators against MTA's officers was also held to be protected under s.30. The Tribunal ruled that both limbs of s.30 had been satisfied having regard in relation to the public interest criterion to the highly contentious nature of the questions raised and the absence of any response by the officers concerned.

A memorandum prepared by the MTA's finance officer which was used as a negotiating tool in discussions between the MTA and private bus operators was in the Tribunal's view 'a classic working document' clearly falling within the terms of s.30(1)(a). It ruled that it was exempt under s.30 because disclosure of views concerning cost estimates to be used in negotiations would be contrary to public interest. A similar memorandum containing a response to a request by the private bus operators for indexation of their claim was also held to be exempt under s.30.

The Tribunal refused to uphold arguments for exemption based upon s.30 in relation to many of the remaining documents in dispute. Documents that the Tribunal ordered to be released either because it was in the public interest to do so (s.30(1)(b)) or because they contained factual information (s.30(3)) included a memorandum detailing the likely reaction of the BPA to further discussions, documents detailing the identity of certain private bus operators who received payments from the MTA, details of budget bids made by the MTA and briefing notes containing budgetary and financial matters concerning the MTA's operations.

Section 32

Applying the sole purpose test enunciated in *Baker v Campbell* (1983) 57 ALJR 749, the Tribunal determined the following documents were exempt under s.32:

- a discussion paper prepared by the MTA's solicitor on legal issues affecting claims for retrospective payments by private bus operators;
- a document prepared by the MTA's accountants for the purpose of submission to the MTA's solicitor for legal advice;
- an inter-office memorandum written by the MTA's solicitor.

A briefing paper prepared to advise the Minister on the current position of the retrospectivity claims was found to be outside the ambit of s.32 and the Tribunal ordered its release.

Section 34(1)(a)

Most of the claims by the MTA that the documents in dispute were exempt under s.34(1)(a) were rejected by the Tribunal, primarily because it was not satisfied that the relevant information was acquired from a business,

commercial or financial undertaking. In relation to some documents, the Tribunal held that as they merely recorded a transaction between a private bus operator and the MTA (i.e. the amount the MTA intended to pay an operator in settlement of the claim) they were not protected under the section. Documents which the Tribunal was prepared to find were exempt included an accountant's report on the private bus operators' claims and analysis of them and a schedule concerning private bus operations which recorded mathematical calculations for a range of replacement buses.

Section 35(1)(a)

To satisfy this section the Tribunal considered that the MTA needed to prove:

1. Disclosure of the documents would disclose information on matter communicated in confidence by or on behalf of a person to the MTA.
2. The information would be exempt matter if it was generated by the MTA.

To satisfy the second requirement the MTA needed to prove that the documents in dispute fell within s.30. The Tribunal ruled against the MTA in many instances either because the documents contained factual material and were therefore excluded from s.30 by virtue of s.30(3) or alternatively the public interest criterion had not been made out. Generally, the Tribunal took the view that the public interest in the public knowing the circumstances concerning claims against the MTA totalling \$8.1m by businesses which provide bus services to the community outweighed any countervailing public interest factors in non-disclosure. The relatively few documents that the MTA managed to persuade the Tribunal were exempt under s.35(1)(a) included an accountant's analysis of private bus operators' claims, a letter by accountants containing a breakdown of the private bus operators' claims and a letter to an officer of the MTA from their accountants commenting on the MTA's position about the applicant's claim to retrospective payments.

Section 36(b)

A report summary prepared by the MTA's accountants relating to private bus operators' contracts which contained terms of reference, a summary of negotiations and industry statistics was asserted by the MTA to be exempt under s.36(b).

This provision reads:

a document is an exempt document if

- (b) its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use or guidance of, officers of an agency or the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiations, any execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to financial property or personnel management and assessment interests of the Crown or of an agency.

The Tribunal rejected the MTA's submission. It observed that while the terms of reference indicated the report was to be used by the MTA for its assistance in the manner specified in the particular paragraph in question, it did not disclose 'instructions issued to or provided for the use or guidance of officers of an agency' as required by s.36(b).

The formal decision

The decision of the MTA was affirmed in part by the Tribunal and varied in respect to the balance of the documents which it ordered the release of, in some cases in accordance with an approved schedule.

SOO LIN SENG and VICTORIA POLICE

No. 870934

Decided: 9 June 1988 by Jones J (President).

Complaint made by applicant to Internal Investigation Department (IID) about police conduct following an investigation of him — request for record of interview between IID officer and police officer subject to the complaint — access refused under ss.31(1)(a), 33, 35(1)(b) and 38.

The applicant had been the subject of a police investigation following the theft of goods from a large department store. Aggrieved by the way in which the police officer handling the investigation had conducted his enquiries the applicant lodged a complaint with the Internal Investigation Department (IID) which was later found to be justified. Prior to the applicant being advised of the IID's decision he commenced legal proceedings against the department store and a number of police officers claiming damages for wrongful imprisonment. Against this background the applicant sought access to all documents from the police IID file. By the time the case came before the Tribunal the only document that remained in dispute was a record of interview between an

IID officer and the police officer who was the subject of the inquiry. Part of this document had been released to the applicant and the respondent contended that the remaining portions were exempt by virtue of ss.31(1)(a), 33, 35(1)(b) and 38.

After hearing all of the evidence the Tribunal made the following findings:

- The IID is divided into separate units each of which takes steps to protect the confidentiality of the information it receives from the public at large, the police force and other units within the IID.
- In the majority of cases the IID is able to give an assurance to a witness that unless charges are laid against police the statements given by witnesses will remain confidential.
- A significant proportion of witnesses seek an assurance of confidentiality.
- It is of considerable assistance to the IID in obtaining information to be able to give an assurance of confidentiality to a witness, civilian or police, notwithstanding that the police have certain powers to acquire information from police in matters of police discipline.
- Most people (including police and civilians) interviewed by the IID believe that the information they give will remain confidential. In most cases they are told of this or it is implicit in their dealings with the IID.
- As far as possible the IID endeavours to maintain the confidentiality of witnesses' statements.
- That witnesses, particularly suspect police officers, would be less likely to co-operate and provide full and frank responses to IID investigations if their responses, including records of interview, could be disclosed to outside persons such as complainants.

Relying upon these findings, the Tribunal decided that the record of interview was exempt under s.35(1)(b). Disclosure of the record would in its view be contrary to the public interest as police officers would be less likely to co-operate and provide full and frank answers to questions directed to them in IID investigations in the future.

The Tribunal also upheld the respondent's contention that the document was protected under s.31(1)(a). This provision provides:

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to:

- (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.

The respondent offered two alternative grounds in support of its submission. First it argued that the disclosure of the document would prejudice the investigation of the applicant's complaint. The argument was rejected by the Tribunal because it considered the applicant's complaint had been finalised and that the proper administration of the law with respect to the police officers in question had been completed. The second argument which met with the approval of the Tribunal was that release of the document would be reasonably likely to prejudice the civil

proceedings initiated by the applicant against the police officers and others. The Tribunal observed:

The information would be relevant to those proceedings. Issues could arise in those proceedings as to discovery and production of the document in dispute . . . the resolution of those issues is . . . a matter for the civil court and should not be pre-empted or prejudiced by disclosure of the document in dispute to the applicant under the Act.

The Tribunal went on to state that if s.31(1)(a) was the only exemption section applicable, it may have deferred a final decision on access until after the conclusion of the civil proceedings.

A further claim for exemption under s.33 was also upheld by the Tribunal. In its view the co-operation of the police officer with the IID in a dispute which concerned his professional

duties related to the officer's personal affairs. Disclosure would, according to the Tribunal, be unreasonable having regard to the confidential nature of the investigation and the likelihood that the officer concerned would not wish to have the information disclosed.

The remaining exemption provision argued by the respondent, s.38, was rejected by the Tribunal. For reasons similar to those stated in its earlier decision of *Easdown and Director of Public Prosecutions and ors* (1988) 14 *Fol Review* 15 the Tribunal ruled that s.86Q of the *Police Regulation Act* was not an enactment which attracted the protection of s.38.

As the Tribunal was not persuaded to exercise its power under s.50(4) to release the documents in the public interest, it ordered that the decision of the respondent to deny access to the record of interview be affirmed.

FEDERAL FOI DECISIONS

Federal Court

DEPARTMENT OF SOCIAL SECURITY v DYRENFURTH No. VG109 of 1987

D cited: 5 May 1988 by Sweeney, Keely and Ryan JJ.

Meaning of 'information relating to the personal affairs of any person' in s.41 — whether the Tribunal erred in law in interpreting ss.40(1)(c) and 41.

This case was an appeal by the department from a decision of the Tribunal refusing to uphold claims for exemption under ss.40(1)(c) and 41. (See *Dyrenfurth and Department of Social Security* (1987) 9 *Fol Review* 33).

The court first directed its attention to whether the Tribunal erred in law in construing s.41. This provision provides:

- (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).

Central to the court's consideration of this section was the Federal Court decision of *Young v Wicks* (1986) 5 *Fol*

Review 71 in which Beaumont J held that the reference to 'personal affairs' was intended to refer to matters of private concern to an individual thereby excluding from the operation of the section documents relating to the work performance of a government employee. The Department argued that this interpretation was too narrow and should be construed in the same manner as Tribunal decisions on s.48 which extended its meaning to assessment of work performance of government appointees. Reluctant to be drawn on providing a definitive interpretation of the phrase 'personal affairs' the Court observed that:

It cannot be laid down by way of definition that an assessment of the capacity or previous work performance of any employee or prospective employee necessarily contains 'information relating to the "personal affairs" of that person. Equally, however, it is not permissible to construe the phrase, as the Tribunal appears to have done, as being incapable of application to information contained in an assessment of capacity

or work performance. We do not understand Beaumont to have adopted in *Young v Wicks* or *Re Williams*, any such rigidly exclusionary interpretation of the phrase.

The closest the court came to clarifying the meaning of 'personal affairs' was to indicate its view that:

Information relating to the personal affairs of a person such as information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations may legitimately be regarded as affecting the work performance, capacity or suitability for appointment or promotion of that person.

In these circumstances the court considered that it was 'conceivable' that such information may relate to the personal affairs of a person. It held that the Tribunal had erred in law in construing the decision of Beaumont J.

The court rejected the other ground of appeal based upon s.40(1)(c), but in view of the error of law made by the Tribunal in its interpretation of s.41 the court allowed the appeal and remitted the case back to the Tribunal to be heard and decided according to law.

IN BRIEF

BUREAUCRATS THWART FOI LAWS, SAYS REPORT TO PREMIER By Denis Muller

Sections of the Victorian bureaucracy deliberately set out to circumvent the freedom of information laws, according to a highly critical report by

an officer of the Department of Premier and Cabinet.

The report, a copy of which has been given to 'The Age', poses this fundamental question about the Department of Premier and Cabinet itself:

'A decision is needed on whether . . . the department . . . will comply with the *Fol Act* and the *Public Records Act* in the correct and complete recording, managing and storing of information.'

It was written 10 months ago by Mr