The Commission recognised that the effectiveness of FoI legislation would ultimately depend on whether adequate resources were provided to government agencies to enable them to inform the public of the existence of FoI legislation, and to meet any resultant demand for information. Accordingly, the Commission has recommended that government ensure agencies have sufficient resources and staff to enable them to meet their obligations under FoI legislation (para. 20.37(c) of the FoI Report).

Finally, the commission has recommended that, in order to monitor its effectiveness, a review of the operation of FoI legislation be undertaken two years after its commencement (para. 20.37(d) of the FoI Report).

Conclusion

Opinions will, of course, differ about the merit of the FoI legislation which the Commission has recommended for Queensland. There will be those in government who will express concern that matters previously kept secret will no longer be so. Conversely, there will be those outside government who will express concern that citizens will not have an unrestricted right of access to all information held by government.

Such an impasse demonstrates the difficulty in striking the balance between opening up the processes of government to democratic participation and control while keeping secret those matters which might otherwise erode the democratic process itself. The Commission has recommended legislation which is the result of extensive public participation, mindful of the experience of the Australian jurisdictions which have enacted FoI legislation and which should otherwise ensure that neither of the opinions described above prevail over the other to the detriment of the public interest.

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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

RICKETSON and ROYAL WOMEN'S HOSPITAL
(No. 89/025618)
Decided: 6 December 1989 by Deputy President Judge Hanlon.
Disclosure of the remuneration package of the respondent's Chief Executive unreasonable — claims for exemption under ss.33, 34 and 35.

Ricketson, a journalist, sought access to the remuneration package of the Chief Executive of the Royal Women's Hospital, Mr Henry.

Reliance was placed by the hospital on ss 33, 34 and 35 in refusing access to the document, although the Tribunal only dealt with s.33 at any length in its decision, stating that its findings in respect of s.33 would dispose of the other exemption provisions relied upon by the respondent.

Section 33 of the Act exempts from disclosure a document disclosure of which would involve 'the unreasonable disclosure of information relating to the personal affairs of any person'.

Without examining the issue in any detail, the Tribunal was satisfied that information relating to a person's income is information which relates to his or her personal affairs.

In determining whether disclosure would be unreasonable, the Tribunal stated that the issue involved 'a consideration as to whether or not the public interest involved in the disclosure of the information outweighs the claims to privacy on the part of the person in the situation that Mr Henry is in'.

In formulating the test of unreasonableness in this way, the Tribunal concluded that remuneration packages of executive officers such as Mr Henry were matters of 'legitimate public interest and legitimate disclosure' and that given the information was sought by the applicant in pursuit of the public interest disclosure would not be unreasonable.

The decision of the respondent was therefore set aside and an order to disclose the document was granted.

[P.V.]

WRIGHT and DEPARTMENT OF CONSERVATION FORESTS AND LANDS
(No. 89/261)
Decided: 7 December 1989 by Deputy President Judge Hanlon.
Departmental briefing papers and ministerial correspondence relating to proposed mining project negotiations — claim for exemption under s.30.

Concern about the successful resurrection of the 'frankness and candour' argument has to date centred around several recent decisions of the Commonwealth Administrative Appeals Tribunal (see, for example, J. Waterford 'Old fears find new lease of life at Tribunal' ((1990) 27 *FoI Review* 28). In *Wright* Judge Hanlon appeared to endorse the use of the frankness and candour argument upholding a claim for exemption by the Department under s.30. His Honour's apparent endorsement of the argument appeared without any meaningful examination of the legislative history of the *FoI Act*.

Wright, a journalist, sought access to departmental correspondence and briefings to the Minister on the siting of the dam for what was known as the Benambra mining project and correspondence between Ministers relating to the project. The only exemption provision relied upon by the Department was the deliberative processes exemption, s.30. The applicant contended that the proposed siting of the dam raised a number of important environmental issues and that the possibility of pollution of nearby rivers was of sufficient public interest to justify disclosure.

Noting that the documents concerned a subject of some sensitivity, the Tribunal observed publication of the documents would not be in the public interest as,

> it would tend to be destructive of the system by which our State is governed by an executive made up of ministers, the Crown, who are members of our

Parliament, acting upon the advice of permanent public servants.

Disclosure of the documents would 'inhibit the domain of the public servant seeking to honestly give the best advice possible as a result of which he must canvass a number of options and advance reasons for comparing one to the other'.

Several of the briefing notes prepared for the Minister on the subject were held to be part of the deliberative processes of the department and therefore within the terms of s.30(1)(a). Disclosure of these notes would be contrary to the public interest because in one case the information should 'never see the light of day' and in another case because the documents were not sufficiently germane to the public interest factors cited by the applicant.

The Tribunal ordered the disclosure of some parts of correspondence between Ministers on the issue without providing any detailed reasons, save for finding that one paragraph of a letter should not be disclosed because the Tribunal believed that 'it is not material which ought to be published'.

Further memoranda prepared by departmental officers to the Minister concerning approval to mine and the undertaking of further research was also found to be exempt,

> The language in which each of these memoranda addressed to the Minister is framed in succinct, clear and for those used to perusing communications between public servants, quite direct language, and it is, in my view, important that the capacity for communication of this degree of frankness at the very high echelons in which these documents were circulated about matters as important, and, dare I use the overworked word "sensitive" as these are, should be, in my view, not lightly overturned and I believe that it was that sort of consideration which the Parliament had in mind when s.30 was enacted and I don't believe that any public interest in the outcome of the decisions from which this advice had been given does outweigh the importance of observing the capacity of the Ministers of the government receiving advice of the nature and quality which is contained in those documents.

The final document in dispute was a handwritten table which was also found to be exempt by the Tribunal which explained its reasons in the following terms:

> . . . document No. 14 . . . was only the table and not the frontispiece which was in issue and the evidence convinced me that that is personal jottings of a personal concern and I could not remember any argument about it and I think that covers all of the documents which were argued about . . .

Except for the release of part of a letter passing between Ministers, the decision of the Department to refuse access to the balance of the documents was affirmed.

[P.V.]

PERRIN and DEPARTMENT OF LABOUR
(No. 90/465)
Decided: 22 June 1990 by M. Harding (Member).
Whether job applications and associated documents are exempt under s.33 — whether disclosure would be unreasonable.
The applicant, a Member of the Victorian Parliament, sought access to all documents relating to the appointment of a management position within the Department of Labour. The applicant suspected that the successful candidate might have obtained the position because of his alleged friendship with the Minister for Labour.

The Department relied on s.33, the personal affairs exemption, to refuse access to the documents in dispute. Following a preliminary conference some of the unsuccessful candidates agreed to the release of their applications. This case concerned those applications for which consent to release was not given to the Department.

The applicant argued that information in a person's *curriculum vitae* is not a personal affair. In support of this argument, he referred to several Federal cases including *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 and *Jones and Attorney-General's Department* (unreported) 20 February 1989. These cases gave a comparatively narrow meaning to the phrase 'personal affairs'. The Tribunal distinguished these decisions on the basis that they did not deal with the issue of disclosing the identity of a person as in the present case.

Having distinguished these cases, the Tribunal was satisfied after referring to several of its earlier decisions, that a person's decision to apply for a position of the type in question is a personal affair. Indeed, the Tribunal went so far as to rule that a *curriculum vitae* is a personal affair.

Having reached this view, it remained to be decided whether disclosure of the disputed documents was unreasonable. In making this decision the Tribunal interpreted reasonableness in the context of disclosure to the world at large (for a discussion of the interest of the applicant and the exemptions see P. Bayne (1989) 24 *FoI Review* 62). The Tribunal heard evidence from the Human Resources Manager of the Department to the effect that applicants assumed their applications were confidential and that disclosure might have a dilatory effect on persons applying for positions. The Department also tendered public service guidelines which emphasised the confidentiality of job applications. On the basis of this evidence the Tribunal was satisfied that disclosure of the documents would be unreasonable, thereby satisfying all the requirements of s.33. It did, however, order the release of two documents which, with the deletion of certain material, put the documents outside the scope of the exemption.

[P.V.]

HEZKY and VICTORIA POLICE (No. 2)
(No. 89/43242)
Decided: 29 June 1990 by Deputy President M. Rizkalla.
Application under s.39 to amend personal records — whether police report concerning the applicant was inaccurate incomplete out of date or misleading.
Section 39 of the *FoI Act* enables a person to apply for the correction or amendment of documents concerning his or her personal affairs where the information is inaccurate incomplete out of date or misleading.

The applicant had obtained from the police a report prepared by an Inspector of the Internal Investigations Department following a number of complaints by the applicant concerning her treatment by police when she had been arrested.

The applicant subsequently applied under s.39 for substantial amendments to be made to the report on the basis that it contained inaccurate and misleading information.

In examining the scope of s.39 the Tribunal referred to the Victorian County Court decision of *G v Health Commission of Victoria* (unreported) 17 June 1984, in which Judge Rendit described the purpose of the section in the following terms:

> Section 39 is about ensuring that personal information concerning an applicant and read by third persons, does not unfairly harm the applicant or misrepresent personal facts about the per-

son. There is concern that the third persons reading the personal information do not get the wrong impression. It is a safeguard to prevent this occurring that rights are given to an applicant under s.39, to correct his personal record.

The Tribunal also noted that s.39 did not operate so as to allow the Tribunal to substitute an applicant's opinions for those of the author of the document.

The Tribunal then proceeded to independently consider some 14 amendment applications. In respect of a number of the paragraphs in question, the Tribunal was satisfied that there were factual inaccuracies which the Tribunal proceeded to amend. Statements like the applicant had been 'found on doctor's private property' and that 'she had sprayed paint on a doctor's surgery' were found to be factually in error.

Of the 14 separate complaints dealt with by the Tribunal, it ordered seven amendments because of factual inaccuracies. The remainder of Ms Hezky's amendment requests were refused on the basis that the relevant criteria in s.39 had not been met.

[P.V.]

O'SULLIVAN and VICTORIA POLICE (No. 10)
(No. G90/4095)
Decided: 27 June 1990 by M. Harding (Member).
Access sought to crime report, criminal history sheet and search warrant details — claim for exemption under s.33.

In June 1988 the applicant's vehicle had been damaged by an unknown person with a hammer. He reported the matter to the police, following which an investigation was undertaken and certain documents prepared. While the applicant claimed that he had suspicions about who committed the crime, no charges were ever laid by the police. The applicant sought access to a crime report, details of a search warrant and a criminal history sheet which were created in the course of the police investigation. All three documents contained information about a possible suspect. The only exemption in question was s.33. In considering this exemption the Tribunal was satisfied that the name and address of the suspect in question fell within the description of 'personal affairs' in s.33 and that disclosure of the documents would be unreasonable since they would 'be detrimental to the suspect both in his personal life and business life'. In reaching this view the Tribunal took account of the fact that no charges were laid against the suspect.

[P.V.]

O'SULLIVAN and VICTORIA POLICE (No. 11)
(No. 90/8619 and 90/11527)
Decided: 3 July 1990 by Deputy President Galvin and J. Maughan (Member).
Request for documents prepared in relation to an application by the police to review a magistrate's court decision — claim for exemption under s.32. — whether a photograph was exempt under s.31(1)(c).

The first of these two applications concerned a request by the applicant for six reports and a legal opinion prepared in the course of an application by the respondent to review a magistrate's court decision. All of the documents were claimed to be exempt under the legal professional privilege exemption, s.32.

After examining the documents in dispute, the Tribunal was of the opinion that all of the documents were related to the process of reviewing the magistrate's decision in the particular case. After referring to the sole purpose test which was most recently affirmed by the High Court in *Waterford v The Commonwealth* (1987) 61 ALJR 350, the Tribunal was satisfied that all of the documents in dispute constituted steps in the pursuit and the giving of legal advice in relation to the proposed review of the magistrate's decision and brought into existence for no other purpose than the seeking and giving of such advice. They therefore fell within the scope of the legal professional privilege exemption.

The second of these applications concerned a request for a photograph. Section 5(1) of the *Fol Act* defines 'document' in broad terms that include photographs. The respondent claimed that the photograph was exempt under s.31(1)(c) which provides that a document is an exempt document, if its disclosure under this Act would, or would be reasonably likely to '(c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law'. After hearing evidence in private by an officer of the respondent, the Tribunal was satisfied that the photograph was provided in confidence and that granting access to it would be reasonably likely to disclose the identity of the person who gave the photograph to the respondent. The Tribunal was also satisfied that the photograph was obtained by the respondent in relation to its enforcement of the law. It was therefore satisfied that the requirements of s.31(1)(c) had been met and affirmed the decision of the respondent not to grant access to the document in question.

[P.V.]

GUTHRIE and VICTORIA POLICE (No. 88/986)
Decided: 4 October 1990 by Deputy President Galvin.
Request for diary notes made by a police officer — claim for exemption under s.31(1)(c) — whether document should be disclosed in public interest under s.50(4).

The document in dispute in this case was a police case book which contained diary notes made by a police officer relating to the applicant. The document was claimed to be exempt under s.31(1)(c) — the confidential sources exemption.

The Tribunal outlined at some length the history of a dispute between the applicant and a neighbour, which at one stage had led to the applicant being sent to a psychiatric institution, from which she was almost immediately discharged. Evidence was led by the police that parts of the diary notes in question related to a confidential source of information disclosure of which would be reasonably likely to enable a person to ascertain the identity of that source. Having read the document, the Tribunal formed the view that disclosure of it would reveal the identity of a source of information in relation to the enforcement or administration of law, and it was therefore exempt under s.31(1)(c).

The applicant further submitted that the Tribunal should disclose the information under s.50(4) — the Tribunal's overriding public interest discretion. She argued that there was a need to disclose the full circumstances surrounding her committal to a psychiatric institution and public knowledge that police investigations are fair and impartial. The Tribunal was not persuaded by any of these factors to exercise its discre-

tion in favour of the applicant. The decision of the respondent was therefore affirmed.

[P.V.]

LAPIDOS and OFFICE OF CORRECTIONS (No. 5)
(No. 90/16686)

Decided: 5 November 1990 by Deputy President Galvin.

Request for access to documents concerning Klu Klux clan activities in Victorian prisons — claims for exemption under ss.31 and 33 — whether Tribunal should order release in the public interest.

This application concerned Ku Klux Klan activity in Victorian prisons. Lapidos had requested access to all documents relating to Ku Klux Klan activity in Victorian prisons and had specifically included in his request 'copies of all photographs, statements, reports etc in the recent investigation of such matters and any reports, documents etc produced as a result'. Lapidos intended to use the documents 'in order to independently consider the investigation and subsequent action with a view to airing the result and issues publicly'. As such, the basis of Lapidos's application was that there was an overriding public interest in disclosure of the documents.

There were 91 documents in dispute, the general nature of which was: investigation report, letters to officers charged or requiring explanations, officers' explanations, letters preferring charges, transcript of hearing and exhibits, memorandum of the Director of Prisons setting out the findings and penalties. The respondent claimed that all documents save one were exempt under s.31(1)(a) of the *FoI Act*. It was not contended that the release of the documents would prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement of the law, but the respondent confined its arguments to the issue of prejudice to the proper administration of the law in a particular instance.

The Tribunal held that 'administration of the law' has been given a wide interpretation referring to *Re Binnie and Department of Agriculture and Rural Affairs and Ors* 1 VAR 361 at 365 where the Tribunal referred to Peter Bayne's book *Freedom of Information*:

> The concept of 'the administration of the law . . . in a particular instance' is more extensive than the concepts of 'investigation' and 'enforcement' and is not limited to activity which contemplates a particular proceeding concerning a (possible) past or (possible) future breach of the law. 'Administration' would clearly embrace preventative activity . . . but more generally could embrace activity which simply collects information in documentary form in order to monitor whether a particular person is complying with the law.

The Tribunal accepted that the expression 'administration of the law' embraces the administration of management of prisons and prisoners and their classification in prison (*Mallinder and Office of Corrections* 2 VAR 566 at 580).

The Tribunal then considered the meaning of the phrase 'in a particular instance'. It held that the word 'particular' when coupled with the word 'instance' intensified the degree of particularity required to that of identification of a specific case, not merely a broad identification area of the administration of the law. The Tribunal considered that although it might be fairly concluded from the evidence of the three prison officers called by the respondent that release of information of the kind contained in most of the documents in dispute would ordinarily have the consequence of prejudicing the investigatory and disciplinary processes of the respondent, in the special circumstances of this case it was more probable than not that responsible prison officers would not react in other subsequent and more ordinary circumstances by refusing to cooperate with the respondent. The consequence of disclosure would be even less likely where sensitive, personal and identifying material is excised from the information before it is released. In the event that the Tribunal was wrong in finding that disclosure of the documents (save for one) would not prejudice the proper administration of the law, it was unable in any event to identify a particular case in which prejudice might occur.

The only case in which prejudice could arise was that of an investigation which had long concluded. It could not therefore be said that prejudice might arise in respect of that particular case from the subsequent release of information.

The respondent also relied on s.33, the personal affairs exemption, in respect of all the documents in dispute. Given the breadth of meaning of 'personal affairs of a person' the Tribunal had no difficulty in concluding that, save for certain minor and formal matters, the information contained in the documents in dispute was information relating to the personal affairs of a person. Such a conclusion was reached not only by reference to the documents individually but by reference to them collectively in their particular context. The Tribunal then considered whether disclosure of that information would be unreasonable. In balancing the individual's right to privacy on the one hand against the statutory right of the community to access information on the other, the Tribunal took into account the fact that the circumstances of the matter were somewhat special and it did not imagine that any officer would, in providing information, have failed to advert to the possibility, if not the probability, that the matter might become public. The Tribunal then considered the overriding public interest s.50(4).

The Tribunal stated that it was concerned with allegations of an alarming kind. The Ku Klux Klan is an organisation notorious for views and activities born of bigotry, racism and the pursuit of white supremacy. The very occurrence of the behaviour described, even on a few isolated occasions, therefore gave rise to a need for assurance to the public that such incidents are uncharacteristic (if indeed they are) and to know the contrary if they are not.

That is as much in the interests of the prison officers and the prisoners as it is in the interests of the public. The Tribunal therefore stated that in the circumstances of the case, release of the information would greatly assist the reader to determine whether the investigation was adequate or inadequate. Public interest demands an awareness of either situation and overrides other public interests in preserving confidentiality and avoidance of the risk of the consequences of some departure therefrom.

In endeavouring to find a solution which was based upon a perception that the public interest required release and also preserving the privacy of the officers and prisoners involved in order to minimise any risk of the possibility of the consequences referred to by the respondent, the Tribunal excluded certain names and addresses of both prisoners and officers, certain designations of both

prisoners and officers, details which would enable the reader to determine the identity of certain persons, irrelevant matter, details of charges not proven, subsequent responses from any officer to the outcome of proceedings and related materials and correspondence. The Tribunal also excluded material which it would have released save for certain identifying references in the respondent's schedule of documents in dispute.

[K.R.]

OVERSEAS DEVELOPMENTS

UNITED STATES

Leahy to introduce new FoIA amendments

Senator Patrick Leahy (D-Vt), Chairman of the Senate Subcommittee on Technology and the Law, will introduce a new package of FoIA amendments after the Easter congressional recess aimed at resolving problems with controversial court decisions and, particularly, with the release and availability of electronic records.

Peppered throughout the amendments are references to electronic records. To clarify that electronic records are subject to the FoIA, the amendments would include a definition of records for the first time. Under the amendments records would be 'books, papers, maps, photographs, data, computer programs, machine readable materials, and computerized, digitized, and electronic information, regardless of the medium by which it is stored or other documentary materials, regardless of physical form or characteristics'. Further, Section (a)(3) would be amended with the addition of provisions requiring agencies to release non-exempt records 'in any form in which such records are maintained by that agency as requested by any person' and requiring 'reasonable efforts to provide records in a form requested by any person even where such records are not usually maintained in that form'.

The Bill would also accomplish some of what was sought last year through the information provisions of the *Paperwork Reduction Act* reauthorization, which failed to pass in the last days of Congress. In Section (a)(1), which deals with agencies' affirmative responsibilities to publish certain types of information in the *Federal Register* and to make certain types of information available in public reading rooms, the Bill would include provisions for disseminating *Federal Register* notes electronically as well as in print. It would also require agencies to publish 'an index of information currently accessible or stored in an electronic form by the agency' and 'a description of any new government database system with a statement of how it will enhance agency FoIA operations'.

Other procedural changes would include requirement that agencies provide a list of documents responsive to a request, regardless of whether the request is granted or denied. If such a list is available, it would include responsive agency electronic records as well. The agency would not have to provide such a list if it could show that such a list would itself be exempt. When making a denial, agencies would continue to provide the name and title or position of the person making the determination, but the Bill would add a requirement that the agency identify 'the total number of documents, records, or pages considered by the agency to have been responsive to the request'.

Several of the exemptions come in for specific changes. Exemption 1 (national security) would be changed to require an agency not only to show the records were properly classified, but that disclosure of the records could reasonably be expected to cause identifiable damage to national defense or foreign policy and that the need to protect the information outweighed the public interest in disclosure. Exemption 3 (other statutes) would have its second prong modified to read: 'particular types of matters to be withheld, in which case denial of access to any record or portion of a record must specify how the release of the specific information involved would cause the particular harm intended by Congress to be avoided'. A new section under (a)(1) would also be added, requiring agencies to publish 'a complete list of all statutes that the agency head or general counsel relies upon to authorize the agency to withhold information under subsection (b)(3) of this section, together with a specific description of the scope of the information covered'.

There would also be a new section addressing how potential Exemption 3 statutes would be reviewed in Congress. The new provisions would require that no new statute enacted after 30 days after the date of enactment of these FoIA amendments could qualify as an Exemption 3 statute unless it met with the requirements of this section. Within 180 days after enactment of the amendments, any agency wishing to rely on a (b)(3) statute passed before enactment of the amendments or within 30 days of enactment would have to publish a list of all those statutes in the *Federal Register* along with a description of their scope. There would also be a final compilation of all such statutes published 180 days after enactment. After the 180-day period, 'no agency may rely on any statute not listed, unless such a statute is enacted after such period'. After six years after the date of enactment, no statute may be relied on to withhold information under Exemption 3 unless these requirements have been met.

The provisions would also call for referral of any potential (b)(3) Bills to the congressional subcommittees with FoIA jurisdiction. Any Bills that have not been referred through this process would be ineligible for floor consideration.

Exemption 5 (deliberative process) would also be modified, with the addition of a subsection indicating that 'records withholdable under this subsection shall only be withheld if the interest of the agency in withholding the records outweighs the public interest in disclosure, with respect to matters affecting the public's health, safety, or other important public interests'.

Exemption 7 would come in for several changes. First, the threshold language would be modified to overturn the Supreme Court's holding in *John Doe Agency v John Doe Corp.* The new language would delete the word 'compiled' and would substitute the phrase 'originally created or acquired solely' for law enforcement purposes. Exemption 7(D) would come in for the most radical change, effectively overturning the recent DC Circuit holdings in *Schmerler v FBI* and *Dow Jones v Dept of Justice* and also putting limits on the government's argument that confidential sources should remain confidential indefinitely. The language of the exemption would be modified to require an agency claiming a confidential source to base that claim on 'demonstrable facts and circumstances', thus doing away with the presumption of confidentiality granted by the DC Circuit. The exemption would also be modified to indicate that information provided by a confidential source shall not be withheld '20 years after the date of the source's last communication with the agency, unless confidentiality is necessary to protect the life or physical safety of any individual'.

Finally, Exemption 8 (bank examination records) would be modified to provide for disclosure unless the agency could show that 'disclosure would directly injure the financial stability of an institution'.

The Bill includes some rewards for the agencies and some interesting propositions. Perhaps the most controversial element of the Bill would be the extension of the Act to Congress and the Administrative Office of the US Courts. As for rewards to agencies, the Bill would include a new