18. For example see 'Notice of Decision Where Request Has Been Sent To Correct Agency But Information Is Not In Possession of Agency,' Tasmanian FoI Unit.
19. Queensland Freedom of Information Annual Report 1992-1993, 37.
20. In *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* Decision No 93002 S15 1993, 2.
21. Apandy, Natasha, 'Freedom of Information: The Adequacy of Statement of Reasons in Tasmania', 1993 Principles of Public Law Research Paper.
22. A very good example of such a statement of reasons is to be found in Memorandum No.26 at Attachment A, Example 1, 41.
23. In *re Wade*, 969 F.2d 241, 249 n.11 (7th Cir. 1992).
24. *Weisberg v United States Dept of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).
25. 607 F.2d at 370.
26. *Oglesby v Department of the Army*, 920 F.2d at 68.
27. See US Department of Justice, *Freedom of Information Act Guide and Privacy Act Overview*, September 1993 edition, 330.
28. *Pollack v Bureau of Prisons*, 879 F.2d 406, 409 (8th Cir. 1989).
29. *Vaughn v Rosen*, 484 F.2d 820 (DC Cir. 1973).
30. See US Department of Justice, *Freedom of Information Act Guide and Privacy Act Overview*, September 1993 edition, 340-354.
31. The example in Attachment A of Memorandum No. 26 would be such a statement of reasons.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

GARBUTT and MINISTER FOR COMMUNITY SERVICES (No. 93/8913)

Decided: 17 January 1994 by Deputy President R.J. Ball.

Section 30(1)(a) and (b) — document raising policy issues for incoming Liberal Government on responsibility for Community Residential Services for disabled persons. Whether contrary to the public interest to disclose matters in the nature of opinion advice or recommendation.

The applicant had made a request on 22 December 1992 to the FoI Officer of the Department of Health and Community Services, for access to all documents relating to or connected with the decision to resume direct management of all staff in Community Residential Services, previously managed by Regional Residential Associations. She did not receive a response to this request within the 45 days set out in s.21 of the Act and so the applicant applied to the AAT asserting that there was a deemed refusal of her request pursuant to s.53 of the Act.

In responding to the application made to the AAT, the FoI officer for Health and Community Services advised that one document had been identified, a briefing document, and that it had been withheld under s.30(1)(a) and (b) of the Act.

In argument before the Tribunal the applicant drew attention to the general objectives of the Act of disclosure of information, and in particular that s.30(1)(b) was a separate requirement, to s.30(1)(a) in that even if the material fell under s.30(1)(a) it must also be contrary to the public interest to disclose it, and that it was for the respondent to prove its exempt status.

The respondent gave evidence on the background of the document which had been prepared following the election of the Liberal Government and it was claimed that it involved a frank and comprehensive analysis of the options available to the Minister and the decisions he could take. The author of the document was one of the eight most senior persons in the department. It was asserted that the document was unusual in that it involved issues that related to the formulation of policy and that there were related issues which would normally be taken to Cabinet for decision. It was also stated that the author was unusually frank in her observations and views and that the document was marked confidential, which was a rare practice, and had limited circulation in the department.

In deciding whether the document fell under s.30(1)(b) in being contrary to the public interest to disclose, the Tribunal adopted the comments of former President Smith in his decision *Wagen v Community Services Victoria* (unreported, 21 November 1991). In that case President Smith referred to the often quoted Commonwealth case of *Howard v Treasurer of the Commonwealth* (1985) 3 AAR 169 which lists five matters to be taken into account in such a decision. The three that the Tribunal held to be particularly apposite in this case were the high office of the persons who were concerned with the document, that the disclosure of communications in the course of the development and subsequent promulgation of policy tends not to be in the public interest, and that the disclosure may inhibit frankness and candour in future pre-decisional communications. With those matters in mind the Tribunal affirmed the decision of the Department not to release the document.

[K.R.]

PERCY and DIRECTOR OF PUBLIC PROSECUTIONS (No. 93/34804)

Decided: 18 January 1994 by Deputy President Galvin.

Documents relating to proceedings for manslaughter, s.32, 35(1)(b) and 50(4).

The applicant was the mother of Samuel Percy and the documents she sought from the DPP related to the Supreme Court proceedings against two men who had pleaded guilty to the manslaughter of her son.

The DPP had refused access to a memorandum of advice from prosecuting counsel to the solicitor for the DPP relating to offers by each of the accused to plead guilty, and a letter from a solicitor of the Legal Aid Commission to the DPP formally offering a plea of guilty to manslaughter on behalf of one of the accused.

The Tribunal accepted that the memorandum of advice was protected by legal professional privilege and was therefore exempt pursuant to s.32 of the Act. In relation to the letter from the solicitor, the Tribunal accepted the evidence from the solicitor that the letter had been sent on the basis of being confidential and that if it were released it would impair the ability of the DPP to obtain similar information from the Legal Aid Commission which represented a large number of persons charged with serious criminal offences. The

solicitor had also stated that communications of that kind were 'a very real part of . . . negotiating strategy and practice' and that publication would inhibit frankness in communication on behalf of its clients with the consequence that the client's interests would not be well served. In accepting that evidence and from an examination of the document itself the Tribunal held that the document was exempt pursuant to s.35(1)(b).

In looking then at the public interest factors and the discretion conferred upon the Tribunal under s.50(4), it decided that there were no overriding factors that required access to be given. While the Tribunal accepted that there was anxiety on the part of the applicant to know the full circumstances of the legal pursuit to conviction and punishment of those responsible for her son's death, and that it would alleviate the uncertainty that she had or may have of some untoward or sinister element in what occurred in the course of the Supreme Court hearing, it was unable to make out a public interest sufficient to require the release of the information which the Act had otherwise precluded from access.

[K.R.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

RUSSO and AUSTRALIAN SECURITIES COMMISSION (No. V92/494)

D cid d: 31 July 1992 by R.A. Balmford (Senior Member), R.C. Gilham and B.H. Pascoe (Members).

Abstract

Section 36(1) and (5) — deliberative documents — public interest — 'frankness and candour' not diminished by disclosure — other public interest factors not applicable here — information not sensitive — positive public interest in disclosure of response to representations by Member of Parliament — possibility of oral not written reports not relevant — purely factual material.

Section 37(1)(a) — not reasonable to expect disclosure to prejudice *investigation or enforcement or administration of the law — exemption only applies to prejudice 'in a particular instance' — cannot extend to future unspecified instances — concept of 'prejudice to the database' not helpful.*

Section 37(2)(b) — disclosure of lawful methods or procedures — information already disclosed by agency not capable of further disclosure — information about routine administrative matters not subject to exemption.

Issues

Whether disclosure of deliberative process documents would be contrary to the public interest on the ground that disclosure would diminish frankness and candour between officers. Information not sensitive. Whether the law enforcement exemptions could protect information concerning routine administrative practices. Information already released by agency outside the FoI Act not protected by exemption.

Facts

Mr Russo, at one time a director of a number of companies operating fitness centres, lodged various complaints relating to those companies with the Victorian Corporate Affairs Commission and subsequently the ASC. All documents and relevant staff were transferred to the ASC after its establishment. Mr Russo was dissatisfied with the ASC's investigation of his complaints and sought access to documents relating to them. The documents consisted of internal memoranda and file notes as well as an unsigned statement by an outside person recorded by an ASC officer. The ASC claimed exemption for the documents under ss.36(1) and 37(1)(a) and 37(2)(b).

Decision

The ASC made some concessions during the course of the hearing. The Tribunal set the ASC's decision aside and decided that none of the relevant documents was exempt.

Section 37(2)(b) — lawful methods or procedures for law enforcement

The ASC claimed that disclosure of certain documents would reveal that an ASC employee (Mr McLeod) had, in investigating Mr Russo's complaint 'employed the method of speaking informally on the telephone to a former co-director of Mr Russo'. It claimed that disclosure of this information would make it more difficult to speak to that person informally in the future. Mr Russo was already aware that Mr McLeod had spoken to the former co-director. The Tribunal held that, as the information had already been disclosed, it was not susceptible of further disclosure, and it was unnecessary to consider the merits of the submission. The ASC also claimed that disclosure of the fact that Mr McLeod had, because of other priorities, deferred replying to a letter from Mr Russo until he returned from leave, would disclose that staff of the ASC allocated priorities to matters which came before them. In the Tribunal's view, disclosure of that particular method or procedure was on a par with 'disclosing that the respondent uses pens, pencils, desks, chairs and filing cabinets in the investigation of possible breaches of the Corporations Law'. There was nothing capable of disclosure within the meaning of s.37(2)(b).

Section 37(1)(a) — prejudice conduct of investigation of breach, or enforcement or proper administration, of law in a particular instance

The ASC claimed that disclosure of certain documents obtained in the course of an ongoing investigation could reasonably be expected to prejudice the conduct of the investigation and any future investigations, or to prejudice the enforcement or proper administration of the law in particular future instances. It referred to prejudice to an ongoing confidential database of which the documents formed part. As no useful evidence was given as to the intended meaning of the expression 'prejudice the database', the Tribunal disregarded it. No claim of confi-