

VICTORIAN FOI DECISIONS

Administrative Appeals Tribunal

BATCHELOR and DEPARTMENT OF TRANSPORT (No. 94/014453)

D cided: 23 February 1996 by Presiding Member Levine.

Section 30(1) (internal working documents) — Section 34 (business affairs) — Section 36 (effect on economy) — Section 50(4) (public interest override).

Factual background

In late 1992, the Government started a program of privatising the bus services and awarded a consultancy to Roger Graham & Associates to provide advice to the respondent Department on the model for the contracting out of the Public Transport Corporation's (PTC) fleet of buses. After receiving that advice, the Department engaged Price Waterhouse to evaluate the tenders and to recommend a preferred contractor.

Procedural history

Mr Batchelor, MP, applied for documents relating to the contracting out of the PTC's fleet. The Department released a number of documents in part but claimed that the remainder of those documents and a number of other documents were exempt under ss.30(1), 34 and 36 of the Act. At the hearing, 45 documents remained in dispute.

The decision

The Tribunal varied the Department's decision by granting access to a number of documents either as a whole or in part. It affirmed the decision of the Department in all other respects.

The reasons for the decision

Section 30(1)

The Tribunal made a number of observations about the scope of section 30(1)(b) in the context of the release of tender documents relating to the privatisation of a government service.

The Tribunal took the view that when there is a process of privatisation taking place no potential or actual tenderer may expect the same level of confidentiality that might otherwise arise. This is because a priva-

tisation process raises unique public interest considerations including those involving the purpose and projected outcomes of the process.

The Tribunal also discussed the argument that if potential tenderers have knowledge of the manner in which tenders are evaluated, this would increase the number of complying tenders ensuring increased competition and increased revenue. On the other hand, the Tribunal acknowledged that knowledge of the complete evaluation process may enable tenderers to skew future tenders which might result in non-competing tenders. It found that a balance must be struck and that public interest requirements must not be allowed to detract from the successful implementation of the on-going privatisation of a government service.

The Tribunal also acknowledged that there may be government services where the intrinsic characteristics of the service to be privatised and the effects on users of the service involve public interest considerations that may require the discounting of possible effects of full release on future tenders. The Tribunal found that this was not a case requiring full release.

The Tribunal noted that the possible effects of full release on future tenders may be less important where a substantial proportion of the on-going process has been completed, or where the next prospective tender process will not be conducted until some time in the future when the conditions of the market will almost certainly have changed. Other factors that tend to weigh in favour of full release of tender-related documents include the existence of a management buy-out or evidence that past or present employees of the privatised service were substantially involved in the privatisation process and were reaping benefits from that process. The applicant raised concerns over the various relationships of the parties in this privatisation process but the Tribunal found that there was no evidence for concern.

The Tribunal concluded that the exemption under s.30(1) was substantially upheld in relation to the tender documents because of the effect

of release on future tenders in the imminent privatisation of further bus services.

Section 34(4)(a)

The Tribunal found that the PTC was engaged in trade or commerce in relation to the provision of bus services to the public, either directly or through other arrangements including contracting out to private bus operators. The Tribunal also found that the Department was the agent of the PTC for the purposes of setting up the tendering process. The Tribunal concluded that, if a principal is engaged in trade or commerce, it could not reasonably be suggested that any exemption under the Act could be varied or removed as a result of the fact that its agent — when not acting as its agent — was not engaged in trade or commerce.

The Tribunal went on to conclude that the Department could rely on the exemption in relation to a number of documents.

Section 36(1)(a)

With the exception of one document, the Tribunal rejected the Department's claim that many of the documents in dispute were exempt on the ground that their premature disclosure would be likely to have a substantial effect on the economy of Victoria.

Section 50(4)

The Tribunal ordered the partial release of a number of documents as required by the public interest. It released the categorisation of groupings of tenders to ensure reduction of the number of non-conforming tenders in future arrangements, but held exempt from release methods of calculation and estimations of cost savings. Release would not be in the public interest as it might skew future tenders.

The Tribunal found that acceptance of the privatisation process depended on public satisfaction. The public should have access to information concerning the expected and the actual outcomes of privatisation. Accordingly, the Tribunal noted that otherwise exempt documents that contain information either setting out the successful tenderer's views on why it considers that it can meet the

expected performance standards, or assessing the tenderer's actual performance in meeting the requirements of the service, should be released pursuant to the public interest override.

The Tribunal also ordered the release of records of actual work done by and charges of consultants to the Government as part of the privatisation process.

[C.M.]

MILDENHALL and DEPARTMENT OF TREASURY AND FINANCE (No. 95/27133)

D cited: 18 March 1996 by Deputy President Macnamara.

Sections 28(1)(ba) (Cabinet briefings) — 28(3) (scientific, statistical or technical exception).

Application

On 8 May 1995, Mr Mildenhall, MP, sought access to 'All official documents of the Treasurer including briefings and advice provided by Treasury on the City Link Project'. The respondent Department found that 22 documents fell within the scope of this request. In February 1996, a number of those documents were released as a whole or in part. The material not released was claimed to be exempt under s.28 of the Act.

Decision of the Tribunal

The Tribunal upheld the Department's decision, except in respect of some graphical and tabular material that fell within s.28(3). The Tribunal divided its judgment into two parts. It first dealt with the legal issues raised by the application. It then went on to discuss each document in turn.

Legal issues

Briefing

The principal exemption relied on was s.28(1)(ba), which deals with documents prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet (or a committee or sub-committee of Cabinet). Mildenhall relied on *Cole v Department of Justice* (1994) 8 VAR 114 where 'brief' was interpreted as meaning: 'instruct or inform thoroughly in advance'. The applicant argued that the word 'thoroughly' was an essential part of the definition, so that a briefing could not be exempt under the sub-section unless it had the requisite degree of thoroughness. The Tribunal found that the significant part of the defini-

tion was the reference to instructing and informing, and *Cole's* case did not require the Tribunal to regard thoroughness as an essential part of the concept of briefing. The Tribunal found the applicant's approach would give rise to many problems, particularly where the briefing was partly oral or where the Minister was being briefed by more than one adviser on the same issue. Another problem was said to be the difficulty of deciding whether a particular briefing was 'thorough'.

Section 28(3)

Section 28(3) provides that sub-section (1) of s.28 does not apply to a document to the extent that the document contains 'purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet'.

In *Mildenhall v Department of Premier and Cabinet* (No. 1) (1995) 8 VAR 284, the Tribunal observed that the text of sub-section (3) 'is apt to render the sub-section applicable to documents other than those containing opinion, advice or recommendations'. In the present case, the Tribunal found that while this proposition was correct in the context of the earlier case, it was not correct as an absolute proposition. This is because it is difficult to see how the sub-section could apply to a document or a passage in a document which consisted of factual material (not opinion or advice) which was not of a statistical, scientific or technical nature.

The applicant submitted that the clause: '...unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet' should be construed as relating to detailed discussion and debate in Cabinet: it should not exclude 'raw' material which merely presented options to the Minister.

To consider this submission, the Tribunal examined the legislative history of the provision, including the Report given by the Legal and Constitutional Committee of the Victorian Parliament and the Victorian Government's submission to that Committee. These documents suggested that the disclosure of the mere raw material may in certain circumstances give a clear indication of the substance of the discussion for which the material was to be the basis. The Tribunal found that Parliament had accepted this view, and found that the sub-section did not with-

draw from exemption all scientific, statistical or technical raw material since in many cases that raw material would reveal the substance of the debate itself. The Tribunal acknowledged that this construction gives a very limited operation to the sub-section.

Mildenhall pointed to the purpose behind the Act and ss.3(1) and 13 and argued that the Act should be construed broadly. The Tribunal stated that these provisions provide only limited guidance (*Ryder v Booth*) and that the history and the words of the sub-section itself render it likely to have a narrower rather than a wider operation.

The documents

The first clutch of documents considered were minutes to the Treasurer. The Tribunal found that they were exempt under s.28(1)(ba). Although part of one of the documents was purely scientific, the Tribunal found that the release of that part would give a substantial indication of the substance of the sub-committee's deliberation. This meant that it was excluded from the operation of s.28(3).

Other documents were not 'thorough' but the Tribunal held that they were still covered by s.28(1)(ba) as they attempted to instruct and inform the Minister. The Tribunal accepted that the exemption under s.28(1)(ba) is made out if there is an intention and an expectation that a particular issue will be considered by the Cabinet. The Tribunal went on to note that the exemption is not 'retrospectively divested' if the particular issue is not considered by the Cabinet.

The Tribunal ordered the release of tabular budget projections and the textual commentary under s.28(3). The fact that budgetary projections were by their very nature estimates did not destroy the statistical and technical character of the information. In addition, the release of this information did not disclose the deliberations of Cabinet as the fact that those deliberations had taken place had already been made public.

The Tribunal also ordered the release of graphical and tabular material from a presentation on the basis that the information fell within the exception of s.28(3). The material was of a scientific, statistical or technical nature and its disclosure would not disclose the deliberations of Cabinet because the subject matter was one of the well-known features of the City Link Project.

[C.M.]