However, the applicant would still need to pass the restrictive 'special circumstances' test. In this regard, it would be difficult to apply the principles developed in *Birrell* because, in the absence of a hearing before the Tribunal, it is difficult to see how the Tribunal could determine whether the relevant issues raised were sufficiently novel, complex or important. This means that the applicant is unlikely to succeed unless he or she can establish that the agency unreasonably withheld material, acted in bad faith, or acted in some other manner as to warrant censure.

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Referenc s

1. New South Wales: *Freedom of Information Act 1989*, s.56(3)(a)(ii) (the District Court may order that the agency or Minister pay the appellant's costs, but only with respect to determinations that access be given to documents after an earlier delayed determination to withhold access to documents);
   South Australia: *Freedom of Information Act 1991*, s.40(2)(b) (the District Court may make orders for costs 'as the justice of the case may require');
   Queensland: *Freedom of Information Act 1992*, s.95 (each party to a review bears their own costs);
   Western Australia: *Freedom of Information Act 1992*, s.84 (each party bears their own costs, however the Information Commissioner has a discretion to order costs against any party where that party has acted unreasonably).
2. *Freedom of Information Act 1982* (Cth), s.66 (this provision is mirrored in the *Freedom of Information Act 1989* (ACT), s.76).
3. *Freedom of Information Act 1982* (Cth), s.66(2).
4. Unreported, AAT Vic., Fagan P, 11 June 1997.
5. Kyrou, E., *Victorian Administrative Law,* The Law Book Company Ltd, 1985, para. 2543/2.
6. See *Re Birnbauer and Department of Industry Technology and Resources (No. 3)* (1986) 1 VAR 279, and *Re Guide Dog Owners and Friends Association and Commissioner for Corporate Affairs* (1988) 2 VAR 405.
7. Unreported, AAT Vic., Fagan P, 11 June 1997, at 4.
8. Unreported, AAT Vic., Fagan P, 11 June 1997, at 3.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

JUST and DEPARTMENT OF JUSTICE
(No. 95/27499)

D cided: 17 July 1996 by Deputy President Macnamara.

Section 50(4) (public interest override).

Factual background

Victoria Park, which is owned by the Collingwood Council, was the Collingwood Football Club's home ground for many years. In 1991, the Council resolved to sell the land occupied by the Football Club's social club, and agreed to lease the remainder of the property. In 1992, after the composition of the Council had changed, the Council sought a declaration from the Supreme Court that it was not obliged to sell the land or grant the lease. The Victorian Parliament then passed the *Collingwood Land (Victoria) Park Act 1992*, which purported to make the sale and the lease binding obligations on the Council. The Council brought an action in the Supreme Court contending that the Act invalidly diminished the jurisdiction of the Supreme Court. This action was successful. The Parliament then passed the *Victoria Park Land Act 1992*, which also purported to make the sale and the lease binding obligations on the Council. Again the Council brought an action in the Supreme Court contending that the Act was invalid. This time the Council's action failed, and the Council's application for special leave to the High Court was rejected.

Procedural history

Just, who was a Councillor at various times while the above events took place, sought access to a number of documents relating to the sale and lease arrangements. He ultimately narrowed his request to five documents. Those documents were prepared by the State's lawyers and contained arguments that the State either considered addressing or actually addressed to the courts.

The respondent Department claimed that the documents were exempt under s.32. Just accepted that the documents were privileged, but contended that the documents should be released pursuant to the public interest override in s.50(4).

The decision

The Tribunal affirmed the Department's decision.

The reasons for the decision

Section 50(4)

The Tribunal made the following general observations about the scope of the public interest override:

- the 'public interest' refers to the benefit of the community in general rather than the benefit or curiosity of any individual;
- where there has been widespread debate and disquiet as to a particular matter, the public interest may require the release of documents that either confirm the grounds for public disquiet or dispel them;
- the public interest will not require the release of otherwise exempt documents if the public interest sought to be achieved by release can be achieved by other means;
- the public interest will not require the release of otherwise exempt documents unless such release 'is clearly adapted to achieve' the asserted public interest or benefit; and

  only public interest considerations 'of a high order' can justify the release of privileged documents.

In the present case, the Tribunal found that the release of the privi-

leged documents would not achieve any of the public benefits that Just was seeking to achieve. Accordingly, the Tribunal held that the public interest did not require the release of those documents.

[J.D.P.]

MAMO and CRIMES COMPENSATION TRIBUNAL (1996) 10 VAR 264

Decided: 7 August 1996 by Deputy President Galvin.

Section 33 (personal affairs) — Section 38 (secrecy provisions).

Factual background

In March 1993, Mamo was convicted of 16 sexual offences against his step-daughter and sentenced to a term of imprisonment of 10 years with a minimum of 8 years (reduced on appeal to eight years imprisonment with a minimum term of six years) (for further information, see *R v Mamo* (unreported, 23 November 1993, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Teague and Coldrey JJ)). Mamo intended to petition for mercy and seek to have his case re-opened by the Court of Appeal on the basis that there was evidence, known to the Crown but not disclosed to his legal representative, of sexual abuse of his step-daughter by another party or parties and, in particular, his brother. It was Mamo's belief that the information would have assisted him in his trial and his appeal and he had apparently also formed the view that the information could 'adversely reflect upon the victim's credibility'. Mamo was aware that his step-daughter had applied to the Crimes Compensation Tribunal (the CCT) for compensation and sought to determine whether any information concerning his step-daughter's application would assist his petition for mercy and his desire to re-open his criminal case.

Procedural history

On 7 December 1994, Mamo requested access from the CCT to all documents regarding himself and his brother as well as information concerning the date of presentation of the application, the identity of the applicant, the dates of payment and amounts that were paid to his step-daughter and the dates and place at which the application was heard. Files 1 to 17 relating to the CCT proceedings were identified as answering the request. The Registrar of the CCT wrote to Mamo on 22 February 1995 refusing the request on the basis that the documents were exempt under s.33(1) of the Act as documents affecting personal privacy. The decision was affirmed by the CCT on internal review.

At the hearing, the CCT also claimed that the documents were exempt pursuant to s.38 of the Act by virtue of ss.9(2), 14(1) and 14(2)(b) of the *Criminal Injuries Compensation Act 1983* (the CICA). One of the documents was also claimed to be exempt by virtue of s.33(6) of the Act, although the CCT made all documents available to the Tribunal. The s.33(6) ground of exemption was not furthered by submissions to the Tribunal and was not considered in detail in the reasons for decision, the Tribunal noting that reliance on the provision appeared to be nominal.

The decision

The Tribunal ordered release of one statement from file 1 and two extracts from file 2. It otherwise affirmed the CCT's decision.

The reasons for the decision

Section 33(1)

Adopting the views expressed in *Re F and Health Department* (1988) 2 VAR 458, 461 and *University of Melbourne v Robinson* [1993] 2 VR 177, 187, the Tribunal stated that the expression 'personal affairs' should be broadly construed to include the contents of the CCT's file in relation to the applicant. It also noted that, in determining whether release of information relating to the personal affairs of any person would be unreasonable, it was required to balance the step-daughter's right to privacy against the public right of access conferred by the Act.

In determining whether the disclosure of the information in the documents would be unreasonable, the Tribunal considered whether such disclosure would advance Mamo's stated purpose in seeking access to the information (namely, to assist his petition for mercy and his desire to re-open his criminal case). The Tribunal noted that the actual relevance of the information was ultimately dependent on 'a determination in another place', but held that it was sufficient for the Tribunal's purposes 'either that it perceives there to be a reasonable likelihood of relevance or that release is reasonable for [the] purposes of clearing the air in regard to some serious suspicion or allegation'.

Applying these principles, the Tribunal found that almost all of the documents in dispute did not contain information that would be likely to advance Mamo's purpose in seeking access and that the release of those documents would, therefore, be unreasonable. It also found that one statement tagged as 'A' in file 1 would be likely to advance Mamo's purpose, and that the possible creation or exacerbation of stress or anxiety which might result 'for a third party' (the third party being Mamo's step-daughter) from the release of that material was unlikely to be sufficient to outweigh the factors in favour of release. Accordingly, the Tribunal found that that material (together with two extracts from file 2) was not exempt under s 33(1).

Section 38

The Tribunal did not consider that the statement tagged as 'A' in file 1 or the extracts from file 2 were exempt under s.38. This was because the relevant sections in the CICA were directed merely to the privacy of hearings and the *possible* prohibition of publication of reports and accounts of proceedings and the names of certain parties. Importantly for s.38, the sections of the CCA did not expressly prohibit the disclosure of such reports and accounts. Even if this analysis was incorrect, the Tribunal indicated that it would exercise its public interest discretion under s.50(4) of the Act in favour of releasing the relevant parts of the documents.

[B.L.R.]

J P AND Y SMITH and DIRECTORATE OF SCHOOL EDUCATION (No. 96/8206)

Decided: 14 August 1996 by Deputy President Macnamara.

Section 30 (internal working documents) — Section 32 (legal professional privilege) — Section 50(4) (public interest override).

Factual background

On 24 November 1994, an excerpt of a play entitled 'Summer of the Aliens' was performed by some Year 11 students at Matthew Flinders Girls Secondary College, Geelong. Mr and Mrs Smith attended the performance with their children, and Mr Smith interrupted the performance and ob-

jected to its contents. He then left the performance. From the date of the performance to July 1995, Mr and Mrs Smith wrote numerous letters to the Director of School Education, the Secretary to the Department of Education, the Board of Studies, the Minister for Education and the Attorney-General. The Director of School Education provided Mr and Mrs Smith with a consolidated response to their letters on 14 July 1995. In that letter, the Director indicated that he proposed to issue a memorandum to State Schools dealing with the selection of curriculum material. At the date of the hearing, this memorandum had not been issued.

Procedural history

On 13 November 1995, Mr and Mrs Smith sought access to further materials either expressly or implicitly referred to in the correspondence received from the respondent Directorate. The Directorate identified a number of documents that fell within the terms of the request. It decided to release some documents either as a whole or in part, and to claim that the remainder of the documents were exempt under ss.30 and 32. This decision was affirmed on internal review and Mr and Mrs Smith applied to the Tribunal for review. At the hearing, 21 documents remained in dispute. Broadly speaking, these documents contained advice provided by or instructions given to the Directorate's Principal Legal Officer relating to the drafting of executive memoranda or of responses to letters from Mr and Mrs Smith.

The decision

The Tribunal affirmed the Directorate's decision.

The reasons for the decision

Section 32

The Tribunal confirmed that legal professional privilege applies to the Crown and its legal advisers, whether they be lawyers in private practice or salaried officers. Accordingly, the Tribunal found that a lawyer-client relationship existed between the Directorate and its salaried Principal Legal Officer.

The Tribunal held that the preparation and settling of drafts by legal advisers constitutes the giving of legal advice. According to the Tribunal, this is because when the lawyer submits the draft 'there is implicit in the submission an assertion and advice that the draft and every word of it is legally satisfactory for the purposes of the person to whom the draft is submitted'. The Tribunal went on to find that the draft documents in the present case were exempt under s.32.

The Tribunal also observed that confidentiality is usually a necessary pre-condition of attracting privilege. The Tribunal went on to note that the disclosure of otherwise non-confidential material may amount to a breach of privilege because it discloses the subject matter of consultations between a lawyer and his or her client (*Propend Finance Pty Ltd and Ors v Commissioner of the Federal Police and Ors* (1995) 128 ALR 657). Applying this principle, the Tribunal held with some hesitation that a passage in a document that referred to matters appearing in the media was privileged.

The Tribunal also commented on a decision of Judge Rowlands in *Setterfield v Minister of Education* (unreported, AAT Vic., 28 June 1985), where his Honour noted that legal advice may lose privileged status if it ceases to be confidential through widespread distribution within an agency (or beyond) or because 'it relates to how a Minister should administer an Act which relates to public rights or duties'. The Tribunal distinguished *Setterfield's* case on the basis that the legal advice in the documents in question was not advice as to how an Act should be administered. The Tribunal also found that His Honour's comments were difficult to square with High Court authority, but was content to find that his Honour's remarks did not apply in the present case.

Section 30

The Tribunal confirmed that a document will be exempt under s.30 if it contains matter in the nature of opinion, recommendation or advice that forms part of the deliberative processes of an agency and if the release of the document would be contrary to the public interest.

The Tribunal observed that an officer in an agency is to be regarded as expressing an opinion or offering advice when he or she submits draft material for use by his or her superior. This is because implicit in the submission is an expression of opinion that the draft is a proper one for the superior to adopt and advice to the superior that the draft is satisfactory for the superior's purposes. The Tribunal also found that releasing draft documents is generally contrary to the public interest. This is because such release has 'the potential for mischief and the undermining of considered judgment'.

The Tribunal found that some of the documents were exempt under s.30 but that three related documents were not exempt under that section because they contained records of facts or alleged facts and not expressions of opinion, recommendation or advice.

Section 50(4)

The Tribunal made a number of observations about the scope of the public interest override in s.50(4).

First, the 'public interest' that may require the Tribunal to override exemptions means public benefit and not public curiosity. Moreover, it is not sufficient for the Tribunal to be satisfied that some outweighing public interest *suggests* that access would be desirable; the public interest must *require* it — that is *demand* it.

Second, the Tribunal noted that the public interest cannot require the disclosure of any document unless the release of that document is calculated to achieve a particular benefit or public interest. The Tribunal stated that common examples of such benefits include the exposure of wrongdoing and the clearing of the air where there is widespread disquiet as to a particular matter.

Third, the Tribunal confirmed that a privileged document will not be released under s.50(4) unless public interest factors of 'a high order' are present.

In the present case, Mr and Mrs Smith submitted that the public interest required that the Directorate's action in formulating the proposed memorandum should be the subject of scrutiny, draft by draft, internal memorandum by internal memorandum, item of correspondence by item of correspondence. The Tribunal rejected this submission for two reasons. First, any such public interest was outweighed by the public interest in not releasing draft documents that contribute to or lead to a final determination. And second, the Tribunal noted that Mr and Mrs Smith were concerned with the ultimate terms of the proposed memorandum. In the Tribunal's view, it is quite open for people to criticise the terms of the final memorandum, but the precise means by which that memo-

randum reached its form was 'at best peripheral'.

The Tribunal concluded that there were no public interest considerations that required the release of the documents, and in particular no public interest considerations of the 'high order' required to justify the release of the privileged documents.

[J.D.P.]

PULLEN and THE ALPINE RESORTS COMMISSION (No. 95/21450)

D cided: 23 August 1996 by Deputy President Macnamara.

Section 28 (Cabinet documents) — Section 30(1) (internal working documents).

Factual background

The Respondent Commission was established under the *Alpine Resorts Act 1983* (the Act). Under s.8(1)(a) of the Act, the Commission (subject to the direction and control of the Minister) is responsible for planning 'the proper establishment, development, promotion and use of Alpine Resorts having regard to environmental, ecological and safety considerations'. Mt Stirling and Mt Buller are 'Alpine Resorts' within the meaning of the Act.

Mt Stirling has not undergone intensive development, but rumours started circulating in late 1993 that it would undergo such development. A local group, the Mt Stirling Development Taskforce (the Taskforce), was formed to oppose this development. The Commission and the Government both reassured the Taskforce that development was not imminent. However, on 17 March 1994, the Minister for Natural Resources announced that Mt Stirling would be developed, with plans for a cable car and downhill skiing. The Taskforce was outraged and public controversy ensued.

Procedural history

On 22 December 1994, Mr Barry Pullen, MP, sought access to: 'All documents created since March 1994 regarding proposals to develop downhill skiing and/or other facilities on Mt Stirling or regarding proposals regarding a mechanical link between Mt Stirling and Mt Buller'.

The Commission granted access to certain documents but denied access to three categories of documents on the grounds that they were exempt under s.28 or s.30(1) of the Act. Pullen sought internal review and the decision was confirmed save in respect of one document, and Pullen applied to the Tribunal for review.

The decision

The Tribunal varied the Commission's decision by granting access to 12 of the 23 documents in dispute.

The reasons for the decision

Section 28(1)

In relation to s.28(1)(ba), the Tribunal accepted that when a document is prepared for the purpose of briefing a Minister about an issue before Cabinet, the exemption is made out regardless of whether the document was in fact used to brief the Minister. Similarly, in relation to s.28(1)(b), the Tribunal found that it was not necessary to prove that Cabinet or one of its committees actually considered the document, so long as it was prepared for the purpose of submission to the Cabinet or one of its committees. The Tribunal found that, to the extent that the exemptions focus on the purpose for which a document was prepared, 'it would seem sufficient that' the purpose described in the exemption was one of the purposes for which the document was prepared. The Tribunal also found that the exemption in s.28(3) does not apply to factual material but only to purely statistical, technical or scientific material.

Applying these principles, the Tribunal upheld most of the exemptions claimed under s.28. However, the Tribunal found that a fax from the Minister to the Commission was not exempt under s.28(1)(b) because there was no evidence to suggest that the document was intended to be placed before Cabinet or a Cabinet Committee. The Tribunal observed that it may be an interesting question as to whether a request by a Minister for a briefing in relation to a matter discussed by Cabinet was covered by the s.28(1)(ba) exemption (as being prepared for the purpose of eliciting a briefing) or whether that exemption applies only to documents forming part of the briefing. On the evidence, the Tribunal found that this question did not arise.

Section 30(1)

The Tribunal found that s.30(1) requires the establishment of two broad matters: that the document bears the general character of an internal working document and that release would be contrary to the public interest.

In relation to the first matter, the Tribunal observed that a document that refines a policy already partly or wholly adopted is properly to be characterised as an internal working document. By contrast, a document that merely records a policy already fully formulated does not bear that characterisation.

The Tribunal also observed that graphic material is not usually exempt under s.30 because such material usually constitutes a recording of fact rather than an expression of advice or opinion (cf s.30(3)). In the present case, however, the Tribunal accepted that the graphic and tabular material in question represented an expression of opinion or advice. This was because the material included numbers and values which were described as 'potential' or 'recommended'.

The Tribunal went on to hold that the following documents were not internal working documents within s.30(1)(a):

- an officer of the Commission's factual responses to a series of questions from the Minister;
- a draft letter recording the terms of a consultancy agreement;
- a document made for the purpose of enabling two of the Commission's officers to consult with one another; and
- a document dealing with the logistics of dispatching material from one officer of the Commission to another.

In relation to the second matter, the Tribunal confirmed that the release of a draft document is generally contrary to the public interest, particularly when the final document has been made public. The Tribunal went on to hold that it would be contrary to the public interest to disclose a draft document that revealed items of substantive policy considered but not adopted by the agency, but it would not be contrary to public interest to disclose a 'draft' document that dealt with 'the proposals for the process of policy-making' or 'the methods of progressing the formulation of policy'.

Section 50(4)

The Tribunal considered whether the exemptions upheld under s.30(1) should be overridden, noting that considerations of the public interest

under s.50(4) may bring up wider public interest considerations than are appropriate for consideration under s.30(1).

The Tribunal accepted that the public had an interest in informed public debate about the management of the State's resources. The Tribunal stated that as the only exemptions upheld under s.30(1) related to a draft Report, and the final Report is available for debate, the informed debate can be had without the release of any exempt document.

Pullen also argued that the documents should be released as there is a public interest in accountability in the allocation of public moneys and there is also a public interest in 'determining whether the integrity of the [Environmental Effects Statement] process is being respected by the Government and the Alpine Resorts Commission'. The Tribunal rejected these arguments, stating that there was nothing in the documents that would shed light on the probity of the relationship between the government agencies and the developer, or that release of the documents would have any bearing on the integrity of the EES process.

[C.M.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

Adapted with permission from Decision Summaries prepared by the Information Access Unit of the Family and Administrative Law Branch of the Commonwealth Attorney-General's Department.

VANDENBERG and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (DSS) (No. Q95/234)

D cided: 8 December 1995 by K.L. Beddoe, Senior Member.

Abstract

Section 25 — refusal of an agency either to confirm or deny the existence of a document where the agency claims a document would, if it existed, be exempt under s.37(1)b).

Section 37(1)(b) — disclosure of existence, non-existence or identity of a confidential source of information.

Section 41(2) — matter relating to the applicant — relevant only to s.41(1) exemption claim.

Issu s

Whether a document would, if it existed, be exempt from disclosure under s.37(1)(b) on the basis that it contained information which could reasonably be expected to disclose the existence or non-existence of a confidential source of information in relation to the enforcement or administration of the law. When an agency may neither confirm nor deny the existence of a document under s.25(2) on the basis that any document confirming its existence or non-existence would itself be an exempt document under s.37(1)(b).

Facts

Mr Vandenberg sought access to a report on his personal affairs, the existence of which he unsuccessfully sought to prove, which he alleged had been made to DSS by another named person. DSS refused the application and pursuant to s.25 neither confirmed nor denied the existence of the document sought by Mr Vandenberg. Part of the hearing was held in the absence of Mr Vandenberg *(AAT Act,* s.35(2)(a)).

Decision

The Tribunal upheld the decision of DSS to refuse the request and to neither confirm nor deny the existence or non-existence of the requested document.

Sections 37(1)(b) and 25 — confidential source of information — information as to existence or non-existence of a document

The Tribunal held that a response to the application otherwise than to neither confirm nor deny the existence of the document sought would disclose either the existence or non-existence of a confidential source of information under s.37(1)(b). [It might also have revealed the identity of the named person as a source if the requested document existed.] A source 'is confidential if the information was provided under an express or implied pledge of confidentiality' (Forster J in *Department of Health v Jephcott* (1985) 9 ALD 35 at 38; also Keely J at 40; (1986) 1 *FoI Review* 14). Forster J also commented that in the case of a document which may or may not exist, agency practice when receiving information of certain kinds might be of assistance, or the presumed contents and apprehension as to those contents, and the relationship of the supposed informant to the person supposedly informed about, 'might enable an inference to be drawn that the information provided, if any, was so provided under an implied pledge of confidentiality'. When considering whether a source is a confidential source the onus is on the agency on the balance of probabilities. The Tribunal found that DSS 'places significant reliance ... on information coming into its possession from external sources, including unsolicited information from third parties'. It held that on the balance of probabilities a document as described by the applicant would contain information provided under an express or implied pledge of confidentiality as to the source of the information in relation to the administration of the *Social Security Act* (see *Re Cunningham and Department of Social Security* (1985) ALN N11), and disclosure of its existence or non-existence in a statement of reasons would breach s.37(1)(b). The decision in *Re Connolly and Department of Finance* (1994) 34 ALD 655; (1995) 57 *FoI Review* 49, which held in part that s.25 could not apply where an exemption claim was made under s.39, was not relevant.

The Tribunal followed *Jephcott* in accepting that there was no reference in s.37(1)(b) to the public interest or to any requirement that there be a 'substantial risk' that the law will be impaired. It also referred to s.37(2A) which is concerned with sources of information who are involved in witness protection pro-