

Freedom of Information

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Contents

Article

Freedom of information and authors:
an unsung treasure trove
by Matthew Ricketson 38

Victorian Fol decisions 29
Patrick 29, Birrell 30, Ryan 31

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Comment

The prospect of law reform in Australian Fol yet again looms large on the horizon. The Queensland Government, after a series of stories in the *Courier-Mail*, has resurrected the Queensland parliamentary inquiry into Fol (lapsed since the last election). The NSW parliamentary inquiry is still underway and the incoming Labor government in the Northern Territory has promised Fol legislation in the Northern Territory. In an unexpected turn of events, the South Australian government has introduced the majority of the Upper House Select Committee's recommendations in the *Freedom of Information (Miscellaneous) Amendment Bill*. These amendments had been preceded by the government's publication in March 2001 of 'A New Dimension in Contracting with the South Australian Government'. Both these reforms marked a major turnaround in the South Australian government's attitude and approach to freedom of information issues.

Frequently I field calls from reporters looking for a league table of the best, but more often the worst, performing jurisdictions in Fol matters. I can hear in their voices across the phone line their disappointment when I start to add qualifications and fine shadings of grey to what initially promised to be a catchy and dogmatic judgment that their State was the worst for this or that reason. The media want stories but bad news stories. The power of my Fol stories was brought home to me recently when I gave a talk to Fol officers at the Adelaide Town Hall. An Fol officer, who I have great respect for, literally jumped across the table and snarled 'Snell.....' She was upset by my arguments at the South Australian Legislative Council Select Committee on Fol Committee about compliance practices, especially negative activities (time delays, fee impositions). She rightly believed that my testimony to the Committee overshadowed the thousands of positive stories, stories which public servants like her have difficulty getting to the surface due to the requirements of secrecy and confidentiality.

I would love to see more of the good news because I think the power of story telling weaves a strong influence in the public service. However, most of the stories told by us on the outside are negative (look through the *Fol Review* and the newspapers) and public servants often only concentrate on the horror stories (the serial applicant, the damage caused by the release of information or the motives of some requesters). Legislation that produces such an endless supply of negative news struggles for legitimacy and support. This is not an argument for Fol supporters to surrender their vigilance against non-compliance and negative reforms (the tone of the Beattie government in Queensland is enough to call us to our battle stations), but to temper their critiques with the power of the positive.

The following message from a public servant in response to the compliance article in (2001) 93 *Fol Review* presents this case for good news stories far better than I can. The words have been adjusted slightly to remove reference to the jurisdiction involved, but otherwise convey the original meaning.

Continued on p. 32.

Freedom of Information and authors: an unsung treasure trove

One of the most common complaints journalists make about Freedom of Information legislation is that the time required to pursue documents is a serious problem for anyone working to a tight deadline. And that is true, but what about journalists liberated from the tyranny of the daily deadline? That is, journalists working on books.

A small but growing number of journalists write books. I would actually argue that most experienced journalists worth their salt have a book in them, either because they have covered some long running court case or royal commission and because over time journalists see and hear a lot about how power is exercised in official and unofficial circles. One of the research tools at their disposal is Fol. Yet it still seems that Fol is underused for this purpose in Australia, whether by journalists or other authors of contemporary non-fiction. I have no hard data for this assertion, but as a journalist and as a regular book reviewer over the past 15 years, I have seen only a small number of non-fiction books published in Australia that have drawn on Fol. In the United States, by comparison, journalists and other authors have made regular, profitable use of Fol for their books.

It is possible that various Australian authors have used Fol for their non-fiction books but have not said so in their endnotes or source notes, and it is possible that their use of Fol formed only a minor part of their overall research. For example I used Fol in the course of researching a biography of Australian children's author Paul Jennings that was published last year, but evidence of this research appears nowhere in the book. When Jennings was in grade five at Bentleigh West primary in Melbourne in 1954 he suffered at the hands of a sadistic teacher. I was told by Jennings and others that there had been an Education Department investigation into the teacher's unnecessarily heavy strapping of Jennings and other children and that the teacher had been moved to another school. I applied under Fol to the Victorian Education Department for any relevant records but was denied access under s.33(1), which exempts documents that 'involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)'.

I could have appealed against the department's decision, but in the end decided against it. During the research I found out the teacher concerned was dead, as was the school principal at the time. I had sufficient material from a variety of sources to be confident of the teacher's portrayal in the book. I had interviewed not only Jennings but his sister, Ruth, four other former pupils at Bentleigh West, a former parent and two former teachers. This small use of Fol is not included in the book's endnotes, though it would have been if I had chosen to pursue the Fol appeal.

Fol unfolds a sad tale

The earliest example I know of the use of Fol in Australia for a book is Ric Throssell's poignant autobiography, *My Father's Son*, published in 1989 by Heinemann Australia. Throssell was a career public servant in the Department of Foreign Affairs, the son of a Victoria Cross winner and one of Australia's leading writers, Katharine Susannah Prichard. The book is poignant partly because Ric Throssell's father suffered deep psychic scars after fighting in the first World War and when his son was 11, Hugo

Throssell killed himself with his service revolver. Equally poignant is that while Throssell was a war hero and Prichard a respected writer, she was also a founding member of the Communist Party of Australia. As a result, they were both treated as potential traitors by various police bureaus and intelligence services. Their son was subjected to the same snooping throughout his working life and his career was stymied on the strength of an anonymous and unaccountable informer to ASIO.

Throssell spent 40 years, from 1943 to 1983, in the Commonwealth public service, mainly in the Department of Foreign Affairs (and its predecessor, the Department of External Affairs). His work as a diplomat was deemed worthy of promotion but promotion was withheld. The grounds for refusal kept shifting. First, there were suggestions he was indiscreet. When Throssell batted that away, he was deemed to have poor judgment by his departmental secretary, Sir Arthur Tange, because he refused to answer questions on his 'associations' in his private life. What for Tange was a lapse in common sense was for Throssell an inalienable democratic right: the freedom of belief. Judge me on my actions, not my beliefs, Throssell consistently argued. This is precisely what did not happen. From his schooldays, Throssell was judged — prejudged really — on his beliefs. Or, more precisely, on what various officers in the Australian Security Intelligence Organisation (ASIO) and its predecessors thought he believed, and they were none too precise in their snooping. From the start, intelligence officers seemed convinced that because Throssell's mother was a communist, he was too. They traded in rumour and innuendo. One report of a telephone conversation between two officers identified Throssell as 'the person who has been with us for a long time and has a mother ...' (p.293). This would be laughable if it wasn't so chilling. As English playwright Tom Stoppard observed in his 1988 play *Hapgood* about the paranoia of spooks: 'you get what you interrogate for'.

Throughout his career, Throssell was refused a clearance that would have given him access to top-secret documents on the ground that he was a security risk. Says who? Throssell was never able to find out. Even inquiries he made in retirement, which coincided with the enactment of Commonwealth Fol legislation, shed only partial light on the shadows. Persistent use of the Fol Act enabled him to see enough to know that at every point in his career when he was about to be promoted or his appeals against rejected promotion applications to succeed, the spidery hand of allegations from ASIO caught him in its web. Throssell's application to the Administrative Appeals Tribunal (AAT) was rejected on the ground that the danger to national security of the release of decades old ASIO documents outweighed his right to know his accusers and the substance of their accusations. A further twist of the knife: the Tribunal heard evidence in camera. The secret documents were read by clerks, typists and officers of the court, while Throssell and his lawyer, Fol expert Peter Bayne, sat outside in frustration.

Throssell's unfulfilled quest makes sad reading, and underscores the limitations of the Fol Act, but at least he was able to gain access to material that previously had been hidden from him and through that Throssell was heartened to see how many of his superiors thought

highly of his work even though they had seemed implacably opposed to his promotion applications. The many documents Throssell reprints in his book give off a whiff of embarrassment, even of bureaucratic cowardice.

Using the Archives Act

The Archives Act proved as useful for Throssell as did Fol, and a number of other authors have used the Australian archives for journalistic books, or books of contemporary history. Where many federal and State government bureaucrats still resist the basic objects of maximum possible disclosure outlined in Fol Acts, archivists are trained to be helpful and to aid release of information. Among those Australian journalists to use the archives are: Brian Toohey and William Pinwill's 1989 history of the Australian Secret Intelligence Service, *Oyster*; Fiona Capp, whose 1993 *Writers Defiled* explored in detail the surveillance by ASIO of a host of writers and artists, and David McKnight's 1994 *Australia's Spies and their Secrets*. All three books drew on an impressive range of sources, but neither Capp's nor McKnight's books could have been written without access to declassified government documents held in the Australian archives. Toohey and Pinwill relied on leaked documents as well as declassified material.

Toohey and Pinwill worked overseas and learnt to use the United States Fol Act, as did author and academic Des Ball in the 1985 book he co-authored with Jeffrey Richelson, *The Ties That Bind*, which detailed for the first time the networks of intelligence cooperation between the UKUSA countries; that is, between the United States, the United Kingdom, Canada, Australia and New Zealand. Use of the US Fol Act for Australian books is limited, of course, to topics in which the activities of Australian governments and their agencies impinge on the US, but it has proved a fruitful avenue for these authors primarily because of the two countries' differing traditions of record-keeping and access. It was the American journalist and gadfly I.F. Stone who once remarked that all a journalist needed to do for a story was follow the massive paper trail created by US government departments and agencies and eventually they would find evidence of a government contradicting itself. Various Australian journalists have also reported that American bureaucrats are far more helpful in making information available than their Australian counterparts, who were reared in a Whitehall nest. Bureaucratic culture in Australia stems from a country, England, that has only just gained an Fol Act, or at least a semblance of one, and whose attitudes to freedom of information were satirised, or should that be documented, in the TV series *Yes Minister*.

Some authors of journalistic books have drawn on government documents and other public records without recourse to Fol or even the Archives Act. In Western Australia, Estelle Blackburn re-investigated two murders from the 1960s that she concluded were committed by the notorious serial killer Eric Edgar Cooke but which had been pinned on two other men, John Button and Darryl Beamish. Both men had served long gaol terms after being wrongfully convicted of the murders of Rosemary Anderson and Jillian Brewer respectively. Blackburn's revelations were published in *Broken Lives* in 1998 and prompted the re-opening of the cases, which were heard earlier this year (2001). At the time of writing (August) the judge's decision was imminent. Blackburn had started with the manuscript of an autobiography that John Button had written; he had tried unsuccessfully for 25 years to

clear his name but had neither the investigative powers to persuade authorities to act on his pleas nor the literary skills to attract a publisher. Blackburn was an experienced journalist and, equally important in this case, a former press secretary to three Labor premiers, Brian Burke, Peter Dowding and Carmen Lawrence. As she recounted in an article for the March 2001 issue of *HQ* magazine: 'Doors that were jammed shut for Button were opened for me. Eight years working for government gave me the networks and know-how, and I gained every file I needed.' She simply rang the heads of various departments holding police, prison, legal and court records and was able to gain access, though she did tell me that she used Fol to gain some peripheral health records.

War criminals and Fol

Perhaps the most significant recent example of an Australian journalist using Fol for a book is of Mark Aarons' revelations about the entry of Nazi war criminals into Australia after the end of World War II. It was Aarons' five part series for ABC Radio National's *Background Briefing* program in 1986 that prodded the Hawke Labor government to appoint retired senior public servant Andrew Menzies to inquire into Aarons' allegations. How did these men find safe haven in Australia? Was it lax immigration screening procedures or did the allied intelligence agencies, then swiftly switching their attention to the Cold War, turn a blind eye to the war criminals on the ground that they could be useful in the fight against communism, as Aarons controversially alleged? Why were they not brought to trial when the allegations were first made in the late 1940s by survivors of the Holocaust who had also settled in Australia? Menzies' report in late 1986 confirmed that Nazi war criminals had indeed entered Australia and recommended the setting up of a Special Investigations Unit (SIU) to gather evidence against any major war criminals still living in Australia. He did not find evidence of a conspiracy within the Allied intelligence agencies, including ASIO and its predecessor, to use war criminals.

Aarons expanded on his radio series in his 1989 book *Sanctuary*, in which he made extensive use of the Australian Archives Act and the US Fol Act for his research. He also acknowledged that some Department of Foreign Affairs documents he cited had come to him via another ABC journalist's Fol request. Most journalists would have left the issue there and moved on, but Aarons has not. He co-authored two other books about the issue (*Ratlines: How the Vatican's Nazi networks betrayed Western intelligence to the Soviets* and *The Secret War against the Jews: How Western espionage betrayed the Jewish people*) and watched in dismay as the task of bringing people to trial for events that occurred half a world away half a century earlier proved too difficult. A court of law proved incompatible with finding historical truth. The SIU was disbanded by the Keating government in the mid-1990s. The issue has sputtered along in recent years as wrangling continued over the extradition of alleged war criminal Konrad Kalejs back to his country of origin, Latvia.

This year Aarons updated and expanded *Sanctuary* — 649 pages compared to 385. The book has a new title, *War Criminals Welcome*, a new publisher, Black Inc, and broadens the scope of the investigation to take in wars post 1945, such as the 1990s Balkans civil war, the war in Afghanistan and Pol Pot's reign of terror in Cambodia. War criminals from these conflicts have been able to settle in Australia, he asserts. Important though the enlarged

scope is, it is Aarons's tireless unearthing of hitherto hidden documents about World War II and its aftermath that accounts for most of the additional pages. He has continued to apply for declassified documents under both the US and Australian Fol and Archives Acts, with startling results. Investigating a Byelorussian mass killer who had been used by both American and Australian intelligence agencies, Aarons applied for Nikolai Alferchik's ASIO file in 1993. Seven years later he was given access to 67 pages of a 190-page file. Most of the 67 pages were in any case innocuous — magazine articles and insignificant ASIO letters. Any intelligence reports or memos that were released were heavily censored. Fortunately, Aarons had already been given access in 1992 under the US Fol Act and Archives Act to declassified documents that outlined Alferchik's work with US intelligence agencies.

He commented on the file: 'It does not withhold either the actual intelligence the files contained or the secret codes, which are virtually identical to those routinely withheld by ASIO. Even the names of career US agents are released, as well as the identity of paid sub-agents and sources.¹ Through document after document, Aarons relentlessly builds his case that ASIO knowingly used Nazi war criminals and collaborators as intelligence sources in the post-war period. This conclusion is buttressed through devastating interview material from Bob Greenwood, QC, the former head of the Special Investigations Unit, who publicly confirms for the first time as far as I know, his support for Aarons's thesis. Greenwood had seen the original ASIO documents and laments that ASIO officers resisted his investigation of some alleged war criminals who had been sources for ASIO.² Aarons makes a mockery of Andrew Menzies' report in his conclusion.

Back in the USA

It is clear Aarons is acutely aware of the potential for his work in US archives and it may be this stems from his collaborations with John Loftus, an American author. Fol is a commonly used resource in the US among journalists writing books. Among them are:

* *Sideshow* by William Shawcross, 1979. Shawcross, an English journalist, drew heavily on documents released under Fol to reveal details of the secret bombing campaign of Cambodia in 1969 during the Vietnam war.

* *The Agency: The Rise and Decline of the CIA*, by John Ranelagh, 1986. A former commissioning editor for Channel Four in England and author of two books, Ranelagh was staggered by the number of documents he could obtain under Fol about the agency for his unauthorised history. 'There is nothing like this Act in any other country, and it tells us something about the United States ... it is a testament to democratic self-confidence'. Of course, Australia has had Fol legislation since 1982 but Ranelagh's astonishment is understandable in someone raised in a country burdened by the Official Secrets Act.

* *A Bright Shining Lie*, by Neil Sheehan, 1988. Sheehan covered the Vietnam war for the *New York Times* and in this epic (861 pages) Pulitzer prize-winning book he tells the story of the war through the life and death of Lt Col John Vann. In an afterword Sheehan says the primary source was Vann's substantial papers, which were released to him under Fol.

* *Blowback*, by Christopher Simpson, 1988. Simpson's book provided the first comprehensive account of the shocking story of the US government's recruitment of high-ranking Nazis and collaborators after the war to help fight the Cold war. Declassified documents released under Fol form the spine of the book; government agencies withheld many documents, but many more were released and are listed in an 11-page appendix.

* *Armand Hammer: Telling the Untold Story*, by Steve Weinberg, 1989. A former director of Investigative Reporters and Editors in the US and a journalism academic, Weinberg used Fol among numerous other sources in his biography, which revealed a darker, even criminal, side to the rich industrialist and philanthropist's carefully crafted public image.

* *J. Edgar Hoover: The Man and the Secrets*, by Curt Gentry, 1991. The author of several books of contemporary history including one on the U-2 spy flight scandal and another on murderer Charles Manson, Gentry needed the Fol Act to prise out of the Federal Bureau of Investigation (FBI) documents about the powerful agency and its loathsome boss. Much remained hidden, but Fol proved essential in peeling away layers of secrecy.

* *Case Closed: Lee Harvey Oswald and the Assassination of JFK*, by Gerald Posner, 1993. As with Hoover and the FBI, the assassination of John F. Kennedy has spawned a mini-industry. Gentry and Posner are just two of numerous journalists who have written books about these continuing mysteries. Posner acknowledges his debt to these previous researchers who between them have gained access under Fol to over a million pages of government documents about the assassination. One of these researchers is English journalist Anthony Summers, who has written books about both Hoover and the JFK assassination and most recently a scathing biography of Richard Nixon. (He is scheduled to be a guest at the Melbourne Writers' Festival in August 2001).

* *Walt Disney: Hollywood's Dark Prince*, by Marc Eliot, 1994. Eliot was the first to look beyond the Disney archives, which painted a portrait of Uncle Walt as confected as any of his films. Eliot hired a researcher, Karen Douglass, who gained access under Fol to Disney's FBI file. Given 451 out of 570 pages, Douglass appealed and six months later was rewarded with a further 100 pages. They revealed that Disney had been an FBI informer for nearly three decades and that during a wholly justified strike in 1941 by the studio's animators he formed links with organised crime figures to break the strike.

These journalists have achieved remarkable results through their investigative diligence and willingness to persist with lengthy battles with bureaucracies over access, but it would be misleading to suggest that time is the researcher's only enemy. Too many government agencies are quarantined from any scrutiny at all. In Australia the intelligence agencies fall into this category as do various semi-government authorities, especially in Victoria under legislation that was passed by the Kennett Liberal government. Even in the US, the National Security Agency is exempt from Fol, according to James Bamford in his 1983 history of the agency, *The Puzzle Palace*. There are too many exemptions to disclosure that are too often rigidly interpreted. Too often, agencies release documents with so much material blacked out they look like a Rorschach test, according to Jonathan Kwitney, a former *Wall Street Journal* investigative

reporter, citing the case of the CIA's release of its file on the Nugan Hand bank in his 1987 book *The Crimes of Patriots: A True Tale of Dope, Dirty Money and the CIA*.

These lists of Australian and American journalistic books that have drawn on FoI in their research is suggestive rather than comprehensive. It is a use of FoI that has not been documented but one that is underused and underrated, as I hope is clear from this article. In the interests of expanding this list I would welcome any further examples. I can be contacted through Rick Snell, the

editor of FoI Review, or by email on matthew.ricketson@rmit.edu.au.

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1. Aarons, Mark, *War Criminals Welcome*, Black Inc, Melbourne, 2001, p.189.
2. Aarons, Mark, above, p.187-8.

VICTORIAN FOI DECISIONS

Victorian Civil and Administrative Tribunal (VCAT)

PATRICK and BAYSIDE CITY COUNCIL (No. 1996/33703 and 1998/20276)

Decided: 7 January 2000 by Senior Member R.J. Ball.

Section 22 and the Freedom of Information (Access Charges) Regulations 1993 (access charges) — Section 50(2)(c) (review of decisions regarding charges) — Section 59(1) (Tribunal's power to make orders regarding charges) — Section 109 of the Victorian Civil and Administrative Tribunal Act 1998 (costs).

Background facts

Section 22 of the *Freedom of Information Act 1982* (Vic) (the Act) and the *Freedom of Information (Access Charges) Regulations 1993* (the Regulations) provide that a person who makes a request under the Act is liable to pay a charge in accordance with the Regulations before access is given to the documents sought. The Regulations prescribe charges based, for example, on the amount of time spent searching for documents or the number of pages copied and provided to the person. A person may apply to the Tribunal for review of a decision as to the amount of a charge, but only if the person has first complained to the Ombudsman and the Ombudsman has certified that the matter is one of sufficient importance for the Tribunal to consider (s.50(2)(c)). In an application for review, the Tribunal may order that any charge be reduced or waived (s.59(1)) but the Tribunal has no jurisdiction to do so if it affirms the decision the subject of the application for review (s.59(2)).

Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) governs awards of costs by the Tribunal. Under that section, the general position is that each party to a proceeding bears its own costs. However, the Tribunal has a discretion to order that a party, including an applicant, pay another party's costs if 'it is fair to do so' having regard to certain matters specified in s.109.

Procedural history

This proceeding involved two separate applications for review of decisions made by the Bayside City Council (the Council) to refuse access to documents sought by Patrick.

Patrick made the first application in September 1996. That application related to a range of documents that the Council claimed were exempt under the Act, including documents relating to a proposed Electoral Tribunal that Patrick sought to have established, documents relating to the use of a lane-way adjoining Patrick's property, and documents relating to liquor licensing issues for a particular nightclub.

It appears that Patrick made the second application in 1998 but that it was then the subject of a number of Tribunal directions, culminating in Patrick making an amended request for access in February 1999. The request related to a range of documents, including documents created in connection with three separate Magistrates Court proceedings brought by Patrick against the Council, and documents relating to a particular town-planning dispute. The Council granted access to some of the documents sought by Patrick

subject to the payment of various charges under the Regulations for search time and copying, but appears to have refused access to the remainder of the documents sought on the ground that they were exempt under various sections of the Act.

Access was refused to other documents sought by Patrick, such as documents relating to a tender for the Council's legal services, documents regarding complaints about Councillors and Council employees, and documents showing the Council's expenditure on food and beverages for all of its meetings since it had been established, but it is not clear whether they were part of the first application or the second application.

On the Friday before the hearing, Patrick withdrew that part of the second application that related to the town-planning dispute.

At the hearing, the issues were:

- whether the documents in dispute were exempt under the Act;
- what the amount of the charges under the Regulations should be, and whether they should be reduced or waived; and
- whether a costs order should be made under s.109 of the VCAT Act.

Decision

The Tribunal:

- affirmed the Council's decisions in relation to the documents in dispute;
- refused to make an order reducing or waiving any charges under the Regulations; and
- ordered that Patrick pay part of the Council's costs in relation to

the withdrawal of that part of the second application that related to the town planning dispute, and rejected Patrick's contention that he was entitled to a costs order in his favour.

Reasons for the decision

The documents were exempt

The Tribunal affirmed the Council's decisions that the documents in dispute were exempt. The Tribunal also held that the public interest did not require that access be granted to the documents in dispute. In this regard, the Tribunal accepted the Council's assertion that Patrick was simply 'seeking to gratify his curiosity' and agreed that 'it is necessary to distinguish between "what is in the public interest and what is of interest to know"'.

Charges under the Regulations

In respect of the charges that the Council claimed were required to be paid by Patrick before access was granted to some of the documents he sought, the Tribunal noted that there was no evidence that the Ombudsman had certified that the matter was one of sufficient importance for the Tribunal to consider. Nonetheless, the Tribunal considered that s.59 appeared to give it jurisdiction to reduce or waive the charges. However, the Tribunal concluded that in this particular case it could not do so because it had affirmed the Council's decisions that the documents in dispute were exempt.

Section 109 of the VCAT Act

The Council sought an order that Patrick pay its costs in respect of the second application. (The Council conceded that it was not entitled to such an order in respect of the first application because the first application pre-dated s.109 of the VCAT Act, and because the predecessor to s.109 only empowered the Tribunal to award costs against respondents, not applicants.)

One of the matters specified in s.109 that the Tribunal may have regard to is whether a party conducted a proceeding in a way that unnecessarily disadvantaged another party. In this regard, the Tribunal stated that:

the Tribunal accepts that the late withdrawal by Mr Patrick on the Friday prior to the hearing of part of his request put the [Council] to unnecessary disadvantage in that it was obliged to

prepare its case in anticipation of this part of the application proceeding.

Another of the matters specified in s.109 is the relative strength of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law. In this regard, the Tribunal held that 'a significant part of [Patrick's] claim ... had no tenable basis in fact or law'.

The Tribunal concluded that Patrick should pay some part of the costs incurred by the Council in defending the second application. The Tribunal did so without expressly stating which of the above matters its decision was based on (or whether its decision was based on both of those matters) (see Comment below). However, a subsequent passage in the decision suggests that the Tribunal's decision may have been based solely on the second matter referred to above. In that passage, the Tribunal said that:

While the Tribunal accepts that it is important that a lay person should be able to come before the Tribunal and not be affected by threat of costs, the Tribunal is of the view nevertheless that a Council should not be put to unreasonable expense in defending freedom of information applications in circumstances where a request has no tenable basis in fact or law and which incurs the expenditure of ratepayers' funds.

For the sake of completeness, it appears that Patrick made an application for an award of costs in his favour to compensate him for the time spent in preparing his case and other time spent pursuing his applications. The Tribunal accepted the Council's submission that Patrick was not entitled to an award of costs. In so doing the Tribunal noted that:

'Costs' for the purpose of [s.109] means monies paid or liabilities incurred for professional legal services and does not include compensation for time spent by a litigant who was not a lawyer in preparing and conducting his case.

For further discussion of s.109 of the VCAT Act, see *Baird and VicRoads* (1999) 80 *Fol Review* 27.

Comment

It would be surprising if one of the reasons why the Tribunal made an award of costs against Patrick were because he withdrew part of his application on the eve of the hearing. It is not uncommon for applicants to withdraw part or all of an application, or for that matter for respondents to grant access to documents, on the eve of a hearing. It is submitted that it

is in the interests of all parties, and of the Tribunal, for parties to continue to do so (in terms of the time and expense saved by avoiding or shortening a hearing). Parties may be deterred from doing so, however, if it would expose them to a real risk of a costs order being made against them. The Tribunal has previously refused to make costs orders to penalise such conduct (see for example *Re EL Yencken & Co Pty Ltd and Ministry for Planning and Environment (No 2)* (1989) 3 VAR 25).

[J.J.W.]

BIRRELL and DEPARTMENT OF STATE AND REGIONAL DEVELOPMENT (No. 2001/53)

Decided: 14 June 2001.

Factual background

The Victorian Labor government set up a Strategic Advice Unit within Industrial Relations Victoria as a workplace liaison unit in late 2000. It is designed to advise and inform the government on the industrial relations climate in Victoria, investigate workplace strategies, and recommend best practices in implementing government policies.

Procedural history

The Hon. Mark Birrell MP is the Leader of the Opposition in the Victorian Legislative Council and Shadow Minister for Industry, Science and Technology. On 12 September 2000 he requested information about the role, budget and functions of the new Strategic Advice Unit from the Department of State and Regional Development (DSRD) under the *Freedom of Information Act 1982* (Vic) (the Act). The request also encompassed the names and remuneration details of each member of the unit, the advertising, interview process and selection of staff for the Unit and the curriculum vitae (CV) of each of the successful applicants (with private addresses or telephone numbers deleted).

By letter dated 1 November 2000 the DSRD informed the applicant that the majority of documents requested were exempt under the Act and that partial access could be granted to some documents. Mr Birrell then requested internal review and the DSRD subsequently confirmed the original decision to withhold the

documents. The applicant sought a review of the DSRD's decision from the *Victorian Civil and Administrative Tribunal* (VCAT).

Decision

The Tribunal upheld the DSRD's decision with exception of one partially exempt letter entitled Document B.

Reason for decision

Section 28 (cabinet documents)

Senior Member Megay accepted the evidence of Mr Corney, Director of Policy and Legislative Services, for the DSRD that the documents were prepared for the purpose of briefing a Minister on submissions to Cabinet. She held that the documents were clearly Cabinet documents and thus exempt.

Section 30(1) (internal working documents)

(a) The Tribunal was satisfied that each of the documents in question was an internal working document.

(b) The VCAT was further satisfied that it would be contrary to the public interest to release the documents. Senior Member Megay, citing evidence from Mr Corney, said that the documents reflected possibilities considered but not eventually pursued and this would tend towards public confusion. She said that the final product of the deliberative process had been fully released and therefore it was unnecessary to divulge the preliminary thought processes, drafts and ongoing alterations that evolved prior to finalisation of this process.

Section 33 (personal affairs)

The CVs of successful job applicants: The VCAT affirmed the DSRD's decision to withhold the CVs of the successful applicants for senior positions in the Strategic Advice Unit. Senior Member Megay found that the CVs contained personal affairs information and that releasing the documents would be an unreasonable invasion of the privacy of the applicants.

Senior Member Megay insisted that the identity and motivation of the applicant for acquiring the information is a crucial consideration when balancing whether disclosure is unreasonable. The Tribunal had difficulty in deciphering the applicant's interest in gaining access to the

information. However, it was inferred from cross-examination that the applicant may have wished to ascertain the suitability of the candidates for their positions and perhaps establish the union connection of each job applicant. Senior Member Megay maintained that most of this information was revealed during the cross-examination of Mr Foster. The Tribunal also noted that while none of the people whose CVs were in question intervened, they had not consented to release. Furthermore there was no suggestion of impropriety in the employment process.

In considering the circumstances in which the information was obtained, the Tribunal commented that there was no evidence that standard public sector employment procedures were not followed. Furthermore it was considered that community expectations about employment applications favoured the individual's right to privacy; and in absence of a strong mandate for disclosure it would be unreasonable to release the curriculum vitae.

Document B: The VCAT found that in the circumstances it would not be unreasonable to release the remainder of the Document B and ordered that the document be released. Document B, which had been partially released, was a letter containing a contractual arrangement for consultancy services between the DSRD and Mr Neil. Mr Neil gave evidence stating that he did not want his hourly rate to be released for competitive reasons. He also gave evidence that he would not be earning any other income during his five-year contract with the DSRD, which commenced in December 2000. Senior Member Megay rejected Mr Neil's claim of competitive disadvantage, as he was not permitted to undertake private work for the duration of his contract.

[D.E.]

RYAN and MOYNE SHIRE COUNCIL (No. 2000/082288)

Decided: 28 June 2001.

Factual background

In September 1998 Moyne Shire Council authorised consultants to draft design alternatives for the construction of a new Visitor Information Centre (VIC) on a site called 'Railway Place' in Port Fairy. At the

same time the Council also decided to advertise its intention to sell the land housing the former VIC. Considerable community opposition arose to the Council's decision to relocate the VIC and sell the land. Some community groups considered that the decision could set a dangerous precedent in favour of selling public space for private development and feared the loss of public space such moves could entail. Following the Council's decision there were many protests and public rallies opposing the proposed relocation and development.

Despite various submissions opposing the Council's proposal in July 1999 the Council approved a Master Plan, placed it on public exhibition and requested public submissions. In September 1999 the Council considered some 21 submissions, 15 of which opposed the development. In December 1999 the Council sought advice from a law firm regarding the legal necessity of the Council obtaining a planning permit to complete the development. During a 'Special Council Meeting' of the Council it was revealed that the legal opinion obtained advised that a permit was 'not required for either the use of any building and works in respect of the proposed Visitor Information Centre'.

Procedural history

On 18 June 2000 Mr Lesley Ryan made a request to the Council for access to a legal opinion that suggested that the new VIC at Port Fairy did not require a planning permit. The Council notified Ryan by letter dated 28 July 2000 that the document was exempt pursuant to s.32(1) of the *Freedom of Information Act 1982* (Vic) (the Act). The applicant requested internal review on 4 August 2000 and on the 18 August the Chief Executive Officer of the Council maintained the original decision. On 13 October 2000 Mr Ryan applied to the VCAT for review of the decision.

Decision

The VACT confirmed the Council's decision.

Reason for decision

Section 32(1) (legal professional privilege)

The applicant conceded that the document was clearly exempt under legal professional privilege. Mr Ryan

however sought to override the exemption using the public interest override in s.50(4) of the Act.

Section 50(4) (public interest override)

The Hon Justice Kellam maintained that s.50(4) can only operate so as to displace the exemption for legal professional privilege on public interest grounds of the highest order. He found that in the circumstances there was no public interest of sufficiently high order to override legal professional privilege.

Following *Chadwick v Department of Property & Services* (1987) 1 VR 444, he cited public confidence in the integrity of the democratic process as capable of overriding the exemption. He additionally raised *DPP v Smith* [1991] 1 VR 63 as illustrating that the public interest in the proper administration of criminal justice was capable of enlivening s.50(4) against s.32(1).

The Hon Justice Kellam conceded that while criticism might be levelled at the Council's planning process,

there was no evidence to suggest that release of the document would make the process more transparent or amount to a 'clearing of the air'. He stated that the applicant's suspicion was based on many factors and would not be relieved by release of the letter of advice. Releasing the letter of advice, he continued, would also fail to resolve the contentious issues between the applicant and others and the Council regarding the legality of the Council not applying for a planning permit for relocating the VIC. The Tribunal informed the applicant that legal advice and remedies were open to disaffected individuals regarding the Council's decision not to obtain a permit. The Tribunal suggested that the applicant was merely curious as to the legal advice given to the Council. Following *DPP v Smith* [1991] 1 VR 63 it was stated that the public interest override does not operate so as to merely gratify curiosity.

[D.E.]

PR2K: the Inaugural National Conference on the Public Right to Know

University of Technology, Sydney
26-28 October, 2001

This year, the Australian Centre for Independent Journalism hosts the first in a series of annual conferences on the Public Right to Know. The series anticipates a referendum vote in the coming decade on amending the Constitution to include a Bill of Rights. The conferences are dedicated to debating the merits or otherwise, content and manner of an Australian Bill of Rights, with particular reference to the Public Right to Know.

The inaugural conference will combine academic debate across a range of disciplines, with papers and presentations from politicians, lawyers, artists and activists.

Places are strictly limited according to seating capacity in conference venues, so register early to avoid bitter disappointment.

Conference fee is \$187 or \$127.50 concession (only \$99 if registering before September 28)

Registration fee includes all conference sessions and opening night drinks. Conference dinner is not included.

For more information and to print out a registration form, visit the website at

www.acij.uts.edu.au/pr2k

or contact: ACIJ Manager Meredith Jones

Meredith.Jones@uts.edu.au

(02) 951 4 2295

Comment continued from front page

Thank you very much for the faxed article. Compliance is definitely the issue — and we need to move beyond broad brush statements for shock value and start understanding the complexities of it and the levers. I think that Terrill is helpful in pointing out that FoI operates in three dimensions of government: political, bureaucratic and legal; each one of these dimensions is working on different assumptions. No wonder the public servants involved feel conflictual pressures. It would follow I would think that we should be looking to ensure that the levers are to be found at many levels and that only a combination of them will effect change. For example I do not believe that leadership, as important as it is, can generate by itself sustained positive compliance.

One of the soft levers I'm intrigued with, is story telling — the power of telling the right stories(how positive compliance is achieved, how people have solved the problematic issues, how the minister did the right thing, how the Minister visibly supported his FoI Co-ordinator, how the Premier posts proactively all his expenses on his website etc) incorporating them in the lore of the institutions as a way of integrating new behaviours in organisational culture.

By the same token, I wonder how much damage we create by circulating the wrong stories (from the very very bad such as how requesters and FoI co-ordinators were tricked, but also how all Ministers are against FoI etc). In this context I wonder about the culture changing potential of statements such as 'the love of secrecy is so deeply ingrained in the public service that they will go to any lengths to maintain secrets' by Information Commissioners.

I am not talking of being soft with the public service or praising poor performance but contributing to the creation of a 'can do' attitude and a folklore of heroes the very people you want to influence, the public servants, can identify and empathise with. From what I read recently, I understand that this is a key requisite for a 'learning' story to work.

Rick Snell

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