



Victoria Government Gazette

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Freedom of Information Act 1982

STATEMENT OF REASONS FOR SEEKING LEAVE TO APPEAL

Introduction

1. On 17 July 2006, the Victorian Civil and Administrative Tribunal (“VCAT”) constituted by Her Honour Judge Davis, Vice President of VCAT, made a decision in the matter of Louise Asher v Department of Infrastructure [2006] VCAT 1375.
2. The VCAT ordered the part release to the applicant of six documents in respect of which exemption had been claimed under s 28(1)(b), (c) and (d) of the **Freedom of Information Act 1982** (“the FOI Act”). Her Honour found that parts of each of the six documents were exempt under s 30(1) of the FOI Act.
3. Section 28(1)(b) and (d) respectively exempt a document from disclosure if it was prepared by an agency for the purpose of submission for consideration by the Cabinet, or if its disclosure would involve the disclosure of any deliberation of the Cabinet. A copy of, or draft of, or extract from, a document that was prepared by an agency for the purpose of submission for consideration by the Cabinet, or that was prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet, is exempt under s 28(1)(c) of the FOI Act.
4. For the reasons set out in this statement the public interest is served by the Department appealing from the order of the VCAT.
5. As the decision was made by a Vice President of the VCAT, section 148(1) of the **Victorian Civil and Administrative Act 1998** limits any appeal to questions of law and requires that an appeal be made to the Court of Appeal with the leave of that Court.
6. On 7 August 2006 I caused to be lodged with the Court of Appeal a summons seeking leave to appeal from the order of the VCAT.
7. This notice sets out a brief statement of reasons for seeking leave to appeal and is provided in accordance with section 65AB(1) of the FOI Act.

Statement of Reasons for Seeking Leave to Appeal

8. Leave to appeal against the order of the VCAT has been sought because the Tribunal made errors of law regarding the proper construction of sections 28(1)(b), (c) and (d) of the FOI Act.
 - 8.1 Her Honour wrongly construed section 28(1)(b) of the FOI Act by requiring that the purpose for which a document was prepared by an agency be determined by reference to whether the document was submitted to Cabinet by the agency which prepared the document.
 - 8.2 Her Honour wrongly construed section 28(1)(c) of the FOI Act as operating to preclude a document for which exemption was claimed under section 28(1)(c) from being a draft and therefore exempt unless the person who prepared the document, or caused it to be prepared, characterised it as a draft, and unless the document was marked as “draft”.
 - 8.3 Her Honour wrongly construed section 28(1)(c) of the FOI Act as operating to preclude a document for which exemption was claimed under section 28(1)(c), from being a draft and therefore exempt if the document was reformatted and edited by the agency that submitted it to Cabinet.
 - 8.4 Her Honour wrongly construed section 28(1)(d) of the FOI Act by precluding a document from exemption, on the basis that it would involve the disclosure of deliberations of Cabinet, unless the document was the actual submission before Cabinet.

SPECIAL

9. On the proper construction of sections 28(1)(b), (c) and (d) of the FOI Act, a finding that the documents 1 to 6 were not exempt under those provisions was not open on the evidence before the VCAT. In coming to the finding that the exemptions under s 28(1) were not made in respect of documents 1 to 6, the Tribunal also failed to take into account logically probative evidence.
10. Further, the Tribunal's conclusions that documents 1 to 6, were not exempt under section 28(1) of the FOI Act were so unreasonable that no reasonable tribunal could have come to those conclusions on the evidence before it.
11. The questions of law raised by the decision of the VCAT are of wide importance. The public interest in maintaining the confidentiality of Cabinet deliberations is recognised by the common law and reflected in section 28(1) of the FOI Act. In this matter, officers could not have given evidence of the kind required by the Tribunal to make out the claim for exemption under s 28(1)(d) without infringing the privilege which attaches to the deliberations of Cabinet.
12. It is in the interest of good government that the VCAT apply the correct legal tests in relation to the exemption for Cabinet documents under section 28(1) of the FOI Act.

Dated 8 August 2006

HOWARD RONALDSON
Secretary to the Department of Infrastructure

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