VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

General List **No. 1999/057919**

CATCHWORDS

General List, Freedom of Information, Records of Council Election, Freedom of Information Act 1982 Sections 31(1)(a) and Section 38

Applicant	Anthony van der Craats
Respondent	City of Melbourne
Where Heard	At Melbourne
Before	M.F. Macnamara, Deputy President
Date of Hearing	25 November, 1999
Date of Order	25 November, 1999

ORDER

Twenty-eight days from this day access be granted to the document claimed to be exempt in the proceeding

M.F. MACNAMARA
DEPUTY PRESIDENT

APPEARANCES

For the Applicant:	Appeared in person
For the Respondent:	Mr Bastkos of FOI Solutions

REASONS FOR DECISION

1. Mr van der Craats was an unsuccessful candidate for election to the Melbourne City Council in its election in March 1999. He sought election as one of five councillors representing the entire municipal district, rather than representing any particular ward. No less than 23 candidates offered themselves for election.

2. On the 14th of May he requested the respondent, Melbourne City Council to furnish a copy of the data file on disk with all ballots recorded for the MCC elections March 1999.

3. By way of background I should note that as the **Local Government Act 1989** now provides for, (and the election for the entire municipal district in 1999 and it seems that election in 1996 was conducted by) the use of a computer based counting system rather than the traditional manual system. This entailed a series of operators, in this case, about 20, inputting data from the ballot papers which were obtained in the course of a postal vote, into computer terminals. It is that data which forms the basis for the disk material which Mr van der Craats seeks.

4. He says, and this is conceded, that similar information was furnished to him subsequent to the 1996 election at which he was also unsuccessful in his bid for election. On this occasion also, though there is some debate about it, Mr van der Craats says he was given to understand that he would receive this information. This is not entirely admitted by the Council. At any rate, ultimately, upon reflection and consideration the Council officer responsible for this matter, Mr Gifford, determined that it would be improper to furnish the disk to Mr van der Craats. Accordingly, Mr van der Craats has brought this proceeding in the Tribunal seeking a review pursuant to Section 50 of the **Freedom of Information Act 1982** of Council's determination not to furnish him with the disk.

5. At the forefront of Council's submission were the provisions to be found in Schedule 3 of the **Local Government Act 1989** governing elections. It is common ground that these provisions applied to this election despite the fact that it was conducted as a computer counted postal vote. The most important provision relied upon is to be found in Clause 15 of the relevant Schedule. It is headed *"Disposal of Ballot Papers"*. Sub-clause (1) states:

"(1) As soon as practicable after the completion of the count of votes or in the case of the voters' roll the scrutiny of the voters' roll, the returning officer must—

(a) enclose in one or more separate packets—

(i) the parcels of used ballot-papers; and

(ii) the parcels of spoilt ballot-papers; and

(iii) the parcels of ballot-papers set aside; and

(iv) all parcels, copies of voters' rolls, books or other papers used in connection with the election; and

(b) secure the packets; and

(c) write on the packet—

(i) a description of the contents; and (i) a description of the contents; and

(ii) the name of the ward; and

(iii) the date of polling; and

(d) sign the writing on the packet.

(2) The returning officer must deliver the parcels to the Chief Executive Officer.

(3) The Chief Executive Officer must keep the parcels safely and secretly for 3 years.

(4) After 3 years the Chief Executive Officer must cause the parcels to be destroyed in his or her presence or in the presence of an authorised person.

(5) The Chief Executive Officer may permit a sealed packet or sealed parcel to be opened only as specifically provided by or under this Act."

6. I will turn shortly to the respects in which Mr Bastkos on behalf of the respondent Council submitted that this provision interacted with the **Freedom of Information Act**.

7. For present purposes I consider how he submits of its own force, it requires a secrecy regime to be observed with respect to the computer disk which Mr van der Craats is seeking. His primary submission was that the computer disk included the self same information as was to be found on the used ballot papers. Mr Bastkos

submitted and I did not understand Mr van der Craats to disagree, that a used ballot paper was one which contained the same information which was to be found on the computer disk. Since there was an identity of information between the ballot paper and the disk, therefore one should regard the disk and the ballot paper as having an identity. Secondly, he submitted that if that were incorrect, that sub-paragraph (4) referring to all parcels, copies of voters' rolls, books or other papers used in connection with the election, comprehended the computer disk. He did not as I understand him, submit that the disk was to be regarded as *"other papers"*. He did submit however, that it could be regarded as a book or books. Accordingly in Mr Bastkos' submission there was an obligation cast upon the Chief Executive Officer of his client, to retain amongst other things, this disk, safely and secretly for three years and then to destroy it, not to make it available to Mr van der Craats or anybody else but only make it available in certain specified circumstances which are to be found in the **Local Government Act** and the regulations governing elections.

8. One particular circumstance in which in a general sense ballot papers preserved in the manner described in Regulation 15 might be required to be resorted to would be in a count back. This is a procedure which has recently been introduced for Local Government elections whereby when a casual vacancy arises the preferences of the retiring candidate can be redistributed so that the person next eligible according to the people's vote can take the retiring candidate's place and the cost and inconvenience of a by-election may be avoided.

9. The arrangements for such a count back are to be found in Schedule 3A of the **Local Government Act 1989**. Clause 2 of that schedule provides for the candidates who stood at the principal election to be invited and to be given 14 days to decide whether they wished to participate in the re-count. Clauses 9 and 10 of that Schedule deal with the process of re-count. Clause 9 is headed:

"Count back may be conducted using existing electronic database."

10. Clause 10 is headed:

"Retrieval and opening of ballot papers."

11. These two clauses establish a regime of, in the case of Clause 9 a re-count by reference to electronic data, such as we are concerned with here and in the case of Clause 10 the physical ballot papers.

12. Clause 10(1) says:

> *"This Clause applies if neither Clause 9.1 nor 2 applies."*

13. So it appears that recourse is first to be had to the electronic information and only if it is unavailable or non-existent because a manual count has been conducted are the parcels of ballot papers to be retrieved.

14. Sub-clause (2) of Clause 9 says:

> *"The Returning Officer may conduct a countback of votes by using the electronic form of the ballot-papers if she or he certifies in writing that she or he is satisfied, after conducting any tests that she or he considers to be appropriate, that the electronic form of the ballot papers is an accurate copy of all the valid ballot-papers that were cast at the relevant election."*

15. Clause 10 provides specifically for the opening of the parcels and packets which have been established in accordance with Clause 15 of Schedule 3. I should for completeness mention, slightly out of order, that with respect to the regime established by Clause 15 of Schedule 3 for the preservation of the ballot papers, regard should also be had to Regulation 88 of the **Local Government Elections Regulations 1995** which makes some more specific provisions as to the subject matter of Clause 15. I did not however understand Mr Bastkos to suggest that that affected the operation and purport of Clause 15.

16. I return therefore in light of Clauses 9 and 10 of Schedule 3A to the correctness of the submissions made by Mr Bastkos that this disk can be seen as the identical subject matter as the used ballot papers or if not that, should be regarded as amongst the associated books and papers which are also required to be maintained in the packets. What is striking in a comparison between Clauses 9 and 10 of Schedule 3A is that Clause 10 makes specific provision for the opening of packets and parcels by the Chief Executive Officer. Clause 9 makes no such provision. The assumption appears to be that the disk is relatively freely available and has not been sequestered for secret preservation in accordance with the Clause 15 regime. Merely to say that a

particular document contains the same information as another document or group of documents is not to say that the two are the same thing. It says no more than that they contain the same information. Clauses 9 and 10 of Schedule 3A make specific and separate provision for the disk and the primary material including the ballot papers. To my mind they show that the two are different and that the disk is not intended to be sequestered as required by Clause 15. To the extent that Mr Bastkos' submissions proceed upon that footing, I reject them.

17. Mr Bastkos first took me to Section 31(1)(a) of the **Freedom of Information Act** which is one of the two exemptions relied upon by Council. Section 31(1)(a) provides:

> *"(1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—*
>
> *(a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;"*

18. He referred me to a decision of the Full Court of the Supreme Court of Victoria as to the operation of that exemption in the matter of Sobh v Police Force of Victoria [1994] 1 VR 41. At page 55 Nathan J said:

> *"As to what the law may be there is no doubt. It includes both the civil and criminal law of the State of Victoria. That law is expressed by statute, regulation and the case in common law. Accident Compensation in Croom 1991 2 VR 322 already referred to acknowledges the width of the term "in this section". Young CJ at page 324 said:*
>
> > *"But the administration of the law indicates something concerned with the process of the enforcement of legal rights and duties."*

Earlier on the same page His Honour said:

> *"Prejudice is not a term of legal art. It means to impede or derogate from. Its content is governed by the matters which may be impeded or derogated from which in this case is the administration of the law."*

19. I will not trouble at this stage to go to the relatively large case law from the Administrative Appeals Tribunal and this Tribunal as to what is comprehended by the administration of the law. The flavour of the dictum of Young CJ which was approved by Nathan J in Sobh's case and relied upon by Mr Bastkos seems to me to indicate that what is contemplated is proceedings judicial or quasi-judicial.

However, I will assume for the purposes of the argument that the administration of the law is a wider concept still.

20. Mr Bastkos submitted that if this disk were released, the administration of the law would be impeded to the extent that the Chief Executive Officer of his client would be impeded and prevented from his duty in upholding the terms of Clause 15 of Schedule 3 of the **Local Government Act**. In fact, he will be called upon, according to Mr Bastkos's submission to breach the terms of that clause. For reasons that I have already given , I do not believe that the clause operates with respect to this computer disk and accordingly I reject that submission.

21. A more general submission was made, this time relying upon the formulation to be found in Nathan's J judgment in Sobh's case as to the meaning of *"prejudice"* in so far as it refers to derogation. Mr Bastkos submitted and in cross-examination Mr van der Craats ultimately did not disagree that the information to be found upon this disk if properly analysed and manipulated, would permit a skilled individual (and Mr van der Craats said one would not have to be especially skilled because these sorts of matters are not in his words *"rocket science"*) to ascertain upon a countback who would be victorious from amongst the unsuccessful candidates and to make calculations such as that candidate X would succeed if he could prevail upon Candidate Y to remain in the race when invited in accordance with Clause 2 of Regulation 3A but have Candidate Z withdraw. In these circumstances, Mr Bastkos submits the democratic election would be rendered a farce to the outrage of voters and the administration of the law would be derogated from. Mr van der Craats' answer is that the votes have been cast and they cannot be changed. Any improper inducements to a particular candidate to withdraw, such as a bribe would be a criminal offence under Section 59 of the **Local Government Act** and therefore one should not assume that such a thing would occur because the penalty is very harsh, namely two years imprisonment.

22. I reject the submission that the suggested use of the disk which was referred to in various respects as *"orchestrating"* the result would amount to a prejudice to the administration of the law. It may or may not be that ratepayers would be disapproving of such a process. The mere fact that information or particular measures or strategies can be used to produce a result which many in the community

would deplore, does not to my mind show that there is any prejudice to the administration of the law. If release of particular documents under the **Freedom of Information Act** permitted a tax payer to minimise his tax, many people might be outraged but I do not believe that that would amount to a prejudice to the administration of the law. I must say speaking for myself as a citizen, the process which is described here as orchestration, does not strike me as especially outrageous. Every electoral system produces means of manipulation and calls for particular tactics which may achieve particular results. In a single electorate first past the post election, the standing of more than one candidate in the same interest or allegedly in the same interest may prejudice the likelihood that that particular interest will be victorious. That tactic is sometimes described as the use of one or more spoilers. In more elaborate electoral systems one may consider other tactics. It may be in a compulsory preferential system that the standing of multiple candidates in the same general interest might maximise the likelihood that one of them would achieve victory by resort to the preferences of the other. These are tactics, they may be savoury, they may be unsavoury but to my mind neither they nor what is suggested could be done here, amounts to a prejudice of the administration of the law. Accordingly I reject the exemption which is said to be based upon Section 31(1)(a).

23. This then brings me to Section 38 of the **Freedom of Information Act** which is the other and perhaps principal exemption relied upon by Mr Bastkos. That states:

> *"A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications."*

24. There is quite a bit of law as to what for the purposes of that exemption is regarded as sufficient specificity. Mr Bastkos referred me to Harrigan v Department of Health (1986) 72 ALR 293, 294-5. It is unnecessary in the view that I take to say anything as to those principles. I will accept for the purposes of these reasons that other things being equal, the operation of the provisions relied upon by Mr Bastkos is to be regarded as sufficiently *"specific"* to attract the operation of Section 38.

25. Mr Bastkos however made a particular and sophisticated submission based upon the decision in Department of Premier and Cabinet and Birrell (No. 2) [1990] VR 51, 52 where Murphy J of the Supreme Court of Victoria said:

> *"The information contained in that document must be "of a kind" to which the enactment in question "specifically" applies before the document containing it is "exempt" under Section 38 of the Act. It is the information that is in the document which must give it the quality must make it of the class that is "specifically" made the subject of the enactment in question which proscribes persons from disclosing that kind of information. It is not the document itself to which the enactment should refer."*

26. Mr Bastkos says that the content of the ballot papers is by force of Clause 15 rendered the subject of a secrecy provision and therefore likewise there is an enactment in force, namely Clause 15 of Schedule 3 which operates for the purposes of Section 38 of the **Freedom of Information Act** to create the relevant exemption. Mr Bastkos referred me to a decision of the Administrative Appeals Tribunal of Victoria in the matter of Corrs Chambers Westgarth v The Legal Aid Commission (1996) 10 VAR 388 where the Tribunal had to consider the operation of the **Legal Aid Act 1978** Sections 43(1) and (2). Those two sections created specific restrictions on the Legal Aid Commission as to the disclosure of certain documents and information. The Tribunal upheld an exemption under Section 38.

27. Mr Bastkos however conceded that the Tribunal made no particular distinction in its reasons between the references in the two sub-sections to documents and information and the reasons were quite consistent with the Tribunal having focussed upon the reference to a restriction on release of information and having given no heed whatsoever to the reference to the release of the documents.

28. With that excursus I return to Clause 15 and consider whether Clause 15 in its terms applies to information or applies to documents. There is nothing in Clause 15 which specifically refers to information as distinct from documents. The Chief Executive Officer is obliged to keep the parcels which he is required to prepare safely and secretly but it is a quite possible interpretation of Clause 15 and to my mind in this circumstance, the preferable one, that the objective is to maintain the ballot papers for three years should they need to be referred to, not to keep the information contained in them a secret. After all, in all elections including council elections and I have been taken to the detailed provisions, candidates are permitted to have

scrutineers present. Where the election is conducted manually, the scrutineer is permitted to observe the ballot papers as they are being counted. A scrutineer is perfectly entitled to view the trend of preferences. Indeed we are all familiar with the television panel coverage of the progress of State and Federal elections in which party heavyweights who are included on the panels as experts from time to time retire to receive special information as to the drift of preferences in vital polling booths. That is not something which is prohibited by any electoral law at all. In so far as Mr Bastkos made a submission early in his case that such a thing might be contrary to Section 60 of the **Local Government Act** headed *"Infringement of Secrecy"* I would reject it and I did not understand Mr Bastkos to press that submission. What is intended to remain secret about an election is who any individual voter voted for. Given that that is the key point of the secret ballot system, and that scrutineers are permitted to view individual ballot papers either as they are being keyed in or as they are being made the subject of a manual count, I cannot think that there is any regime intended to be imposed by Clause 15 to render the content of the ballot papers as distinct from the vote which an individual ascertainable voter cast, a secret. Accordingly, I likewise reject the submission based upon Section 38 of the **Freedom of Information Act**.

29. To my mind there is nothing in the **Local Government Act** or regulations viewed individually which would prohibit the release of this disk and for reasons given, no alchemy operating on Section 38 of the **Freedom of Information Act** can somehow conjure a prohibition out of the air. Particularly since the section relied upon refers to documents and not to information in contra distinction to the formulation relied upon by Mr Bastkos from Birrell's case.

30. Having rejected both of the exemptions which are relied upon by the respondent it is unnecessary for me to say anything as to the public interest arguments pressed by either of the parties. Accordingly I will order that 28 days from this day access be granted to the document claimed to be exempt in the proceeding.

MFM:RB