

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z848/2020

CATCHWORDS

Review and Regulation List - *Victorian Civil and Administrative Tribunal Act 1998* – section 104 - Whether applicant may summon witnesses.

APPLICANT	Nicholas Davies
RESPONDENT	Victoria Police
WHERE HELD	Melbourne
BEFORE	W Boddison, Member
HEARING TYPE	Hearing via video conference
DATE OF HEARING	30 September 2021
DATE OF ORDER	11 November 2021
CITATION	Davies v Victoria Police (Review and Regulation) [2021] VCAT 1348

ORDER

1. In this proceeding, witness summonses are not to be issued to:
 - Detective Sergeant Ashley Penry;
 - Detective Senior Constable Rick Mokos;
 - Superintendent Paul Stephen Hollowood; and
 - Assistant Commissioner Robert Hill.
2. The Tribunal directs that no other witness summonses are to be issued in this proceeding without leave of the Tribunal.
3. The proceeding is listed for an administrative mention on 10 December 2021 by which time the parties may jointly request the Tribunal to make orders to list the proceeding for hearing.
4. Any request must be accompanied by the filing of a joint electronic Tribunal Book containing all the material upon which the parties will seek to rely at the hearing, including written submissions and copies of key authorities to be relied upon. The Tribunal Book must be indexed with page numbering. No further documents may be filed after this date without the leave of the Tribunal.

5. The respondent shall be responsible for the compilation of the joint Tribunal Book.
6. In order for the Tribunal to determine whether the matter can proceed, the parties must also **jointly**:
 - (a) specify the likely duration of the hearing;
 - (b) specify whether witnesses are required to give evidence and, if so, how many;
 - (c) provide **at least 3 dates** over the next 3 months when all necessary participants in the proceeding (ie relevant parties/counsel/witnesses) will be available to attend the hearing particularly noting any (un)available dates of any witnesses or lawyers;
 - (d) advise the Tribunal of any other matters that may impact on the hearing process, such as the need for an interpreter or another form of assistance; and
 - (e) advise the Tribunal as to the preferred hearing process (see below).
7. The parties are directed to respond promptly to all registry requests for information (including about their access to technology) and to cooperate with the Tribunal's requirements for the conduct of the hearing.
8. All contact with the Tribunal must include the VCAT case number, and the date of the administrative mention.

Note: Whether or not a proceeding is suitable to be listed for hearing will depend on a number of factors namely:

For a teleconference: All participants (including witnesses) having access to a reliable telephone line and a reliable speaker function. The participants must be available to remain on the telephone for the duration of the hearing.

For a video conference: All participants (including witnesses) having access to a computer, mobile phone or other device with reliable internet access, a camera and microphone. The parties must be available to remain online for the duration of the hearing process.

On the papers without a hearing: Whether the parties are able to produce an agreed statement of facts and written submissions for each party on the legal issue/s to be determined by the Tribunal.

W Boddison
Member

APPEARANCES:

For Applicant

Mr J D Catlin of Counsel

For Respondent

Mr Batskos, solicitor, FOI solutions

REASONS

BACKGROUND

- 1 In September 2020 Mr Davies made a request of the Victoria Police under the *Freedom of Information Act 1982* (FOI Act) for:
 - Copies (including any drafts) of any station registers, running sheets, daybooks, arrest records, photographs, statements or entries of any description in relation to Professor Brett Sutton between [certain dates].
- 2 Victoria Police determined that “any documents which match the terms of your request, should they exist, would be exempt in accordance with the provisions of sections 25A(5) and 33 of the Act.” Mr Davies sought review of that decision and the Victorian Information Commissioner (OVIC) refused to grant access to the documents requested by him, from Victoria Police, on the same basis.
- 3 In October 2020, Mr Davies applied to VCAT for a review of OVIC’s decision.
- 4 Mr Davies indicated that he wished to summons four witnesses to attend and give evidence at the substantive hearing of this matter. These witnesses were
 - Detective Sergeant Ashley Penry;
 - Detective Senior Constable Rick Mokos;
 - Superintendent Paul Stephen Hollowood; and
 - Assistant Commissioner Robert Hill.
- 5 Under s104 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act), the principal registrar may, at the request of a party and must if directed by VCAT, issue a summons requiring a person to attend VCAT to give evidence or to produce documents or both. The matter is dealt with as an application for leave to issue a summons.
- 6 When determining these applications, VCAT requires the party requesting the issue of the summons to provide information as to the topics on which the witness to whom the summons is to relate will give evidence or is expected to give evidence, either by way of a list of questions or an outline of the evidence expected. Orders were made in this matter to this effect.
- 7 In deciding whether to exercise its discretion to grant leave to issue a summons, VCAT’s considerations include whether the evidence that is to be given would be relevant; whether the summons has been issued for an improper purpose and whether the summons is oppressive.

What are the issues?

- 8 The critical issue and starting point, is: “Whether or not there is evidence, capable of being relevant to any of the issues in the case, which can be extracted from proposed witnesses”.¹
- 9 Firstly I must consider what are the issues. The parties submit the issues in the case involve sections 25A(5), 33 and 50(4) of the FOI Act.
- 10 Section 25A(5) states:
- (5) An agency or Minister may refuse to grant access to the documents in accordance with the request without having identified any or all of the documents to which the request relates and without specifying, in respect of each document, the provision or provisions of this Act under which that document is claimed to be an exempt document if—
- (a) it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents; and
- (b) either—
- (i) it is apparent from the nature of the documents as so described that no obligation would arise under section 25 in relation to any of those documents to grant access to an edited copy of the document; or
- (ii) it is apparent, from the request or as a result of consultation by the agency or Minister with the person making the request, that the person would not wish to have access to an edited copy of the document.
- 11 Section 33(1) states:
- (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).
- 12 Section 33(6) states:
- (6) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be an exempt document by virtue of this section.
- 13 Section 50(4) states:
- On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), section 31A, or in

¹ *Roberts v Victoria Police* [2003] VCAT 2028 at [8]

section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.

- 14 Victoria Police in refusing the application relied on section 25A(5) of the FOI Act, so had not conducted a search for any documents that might have fallen within the scope of Mr Davis' request.

Mr Davies' submissions

- 15 Mr Davies submits that the 'critical issue' for determination is to consider whether the evidence proposed to be given by the witnesses is likely to be relevant to the public interest override under section 50(4) of the FOI Act. He submits sections 25A(5) and 33(6) do not inform the questions to be asked under section 104.
- 16 This is because Victoria Police's decision to rely on section 25A(5) of the FOI Act and not conduct a search for documents, enlivened the public interest override under section 50(4) of the FOI Act.² It did so in a way that prevails over section 33(6) of the FOI Act. Therefore VCAT's paramount task is to engage with section 50(4) of the FOI Act; it is not to engage with sections 25A(5) or s 33(6) of the FOI Act.
- 17 Mr Davies contends that VCAT must inspect the documents [if any] which fall within the scope of the request when determining the public interest override under sections 50(4).
- 18 Mr Davies submits the evidence of the proposed witnesses "is likely capable of being relevant to whether the public interest requires a search for documents within the scope of the FOI request". Further the public interest in disclosing the existence or non-existence of the documents sought by the applicant is overwhelmingly great.
- 19 In outlining what the public interest is, Mr Davies submitted "the public interest is in knowing whether Professor Brett Sutton, the Chief Health Officer of Victoria, is a person of interest and/or a suspect in an open police investigation into corruption, misuse of public office and conspiracy to pervert the course of justice, in circumstances where Professor Brett Sutton has effected the most serious curtailments of the human rights and civil liberties of the Victorian population to an extent unparalleled by any other time in the history of the Australian nation." The witnesses' evidence is relevant to tending to show "illegality, impropriety, sharp practice or wrongdoing."
- 20 In relation to the evidence the witness can give:
- Detective Sergeant Ashley Penry's and Detective Senior Constable Rick Mokos', evidence is proposed to authenticate their briefing note³ and to provide evidence as to whom it was circulated, whether

² *Victorian Casino & Gaming Authority v Halls*, (1998) 4 VR 718.

³ Sergeant Penry is purported to be the author of a document dated 22 June 2020 that is claimed to be a leaked briefing note.

Professor Brett Sutton has been interviewed or contacted regarding the issues in the briefing note, and whether a brief of persecution was recommended. The reasons the briefing note came into existence which evidences alleged wrongdoing or impropriety of Professor Brett Sutton. Why the brief was re-directed to a different investigation team.

- Superintendent Paul Stephen Hollowood's and Assistant Commissioner Robert Hill's, evidence will concern the briefing note, and the status of any police investigation arising out of it. Their evidence is expected to tend to show, "illegality, impropriety, sharp practice or wrongdoing" of Professor Brett Sutton in relation to the forced closure of I Cook Foods Pty Ltd. Expanded in oral submissions to provide evidence as to whether the investigation into I Cook Foods Pty Ltd was sidelined by person within Victoria Police and if so by whom.
- All the witnesses' evidence will be responsive to that of Inspector Craig Matters as to Police record keeping powers. (Inspector Craig Matters has provided a statement regarding Victoria police's record keeping).

21 In addition Mr Davies submits the witnesses would also give evidence as to whether there are in fact any documents that fall within the scope of the request.

Victoria Police submissions

22 Victoria Police submits in respect of each of the proposed summonses:

- (i) it is highly unlikely to produce any relevant, probative evidence
- (ii) it is not sought to be issued for any legitimate forensic purpose
- (iii) it is an abuse of the Tribunal's process and is sought for an ulterior purpose and/or a fishing exercise
- (iv) it would unnecessarily prolong the hearing.

23 Victoria Police submits that as the request was refused under section 25A(5) of the FOI Act, VCAT must determine *from the terms of the request*⁴ whether information about whether or not the documents sought by the applicant existed, if included on a hypothetical or notional document, would cause that document to be exempt under section 33(1) of the FOI Act. A task that is undertaken without having any actual documents before it. It is about whether the hypothetical or notional document would be exempt, not about whether there are any documents sought actually in existence and, if so, whether they are exempt.

24 VCAT must determine from the terms of the request, and the nature of the documents so described, without having identified any of the documents, whether they would, if they existed, all be exempt under section 33(1) of

⁴ Original emphasis

the FOI Act. That is, if the documents existed, would they all be exempt under section 33(1) because they would unreasonably disclose information relating to the personal affairs of Professor Brett Sutton.

- 25 If so, VCAT must then determine whether, if the documents sought existed:
- (a) the applicant would not wish to have access to an edited copy of the document with exempt matter deleted; or
 - (b) it is apparent from the nature of the documents as described in the request that no obligation would arise to grant access to an edited copy.
- 26 The nature of the documents may be informed by evidence from Victoria Police as to what documents such as those sought, are likely to contain or would usually contain, were they to exist.
- 27 Victoria Police submits section 25A(5) in conjunction with section 33(1) applies. Therefore the application of section 50(4) of the FOI Act does not arise for consideration in this case as section 33 is expressly excluded from the operation of section 50(4).
- 28 Further, Victoria Police submits if Mr Davies was successful in the substantive application the outcome would be that Victoria Police would be required to process the application, identify the documents, if any, that fall within the scope of the request and claim any relevant exemption. In doing so, if an exemption was claimed under section 33, section 50(4) does not apply.
- 29 Victoria Police also submits that Mr Davies failed to set out properly an outline of the evidence he expects the summoned persons to give. This means there is no way to assess the potential relevance of any proposed witness' evidence as the nature of the evidence intended to be led or adduced has not been (or adequately been) identified.

DECISION

Is the evidence of the proposed witnesses relevant to the issues to be determined?

- 30 Victoria Police refused the request on the basis that any documents (if they exist) which fell within the terms of the request, would be exempt in accordance with the provisions of section 33(1) of the FOI Act and therefore section 25A(5) applied.
- 31 It has been observed having regard to the objects of the FOI Act, and to the creation of a legally enforceable right to obtain access to documents in accordance with the FOI Act, compliance with the preconditions in section 25A(5) must be strict.⁵ If VCAT was to determine that section 25A(5) does not apply then Victoria Police would have to process the request, claim any relevant exemptions and Mr Davies would have the ordinary review rights.

⁵ Davis v Office of the Premier (General) [2011] VCAT 1629 at [17]

- 32 OVIC refused access on the same basis as Victoria Police and determined that in accordance with section 25A(5), Victoria Police was not required to process the applicant's request.
- 33 Therefore, the primary issues involve examining the nature of documents as described in the request, to determine what documents and types of documents fall within the request and then deciding whether all the documents that fall within the request would be exempt and whether it is practicable to provide a copy of the documents with the exempt material deleted.
- 34 This does not require a determination of whether any such documents exist. In fact, the section specifically contemplates that the documents will not be identified as it is the nature of documents, described in the request, that is the subject of the inquiry. This involves looking at what hypothetical documents that might fall within the terms of the request and deciding whether all documents would be exempt. In this case whether they would be exempt under section 33(1).
- 35 Mr Davies submits that the police would know what documents were likely to exist as some of them would be proforma documents. He claims it is Kafkaesque pretending the documents may or may not exist and inconceivable that the Tribunal would determine the substantive issues without having examined the documents.
- 36 However, this was a refusal based on section 25A(5) which clearly envisages that an assessment will be made on hypothetical documents. The purpose of the section is to obviate the need for an agency to invest time and resources into a search for documents that would ultimately all be found to be exempt. Section 33(6) also contemplates that a decision will be made without disclosing whether any documents actually exist that fall within the scope of the request.
- 37 As noted by both parties, the Supreme Court in *Victorian Casino & Gaming Authority v Halls*⁶ stated that the public interest override applies to section 25A(5), although this approach has received academic criticism. As I understand it, the crux of Mr Davies' argument is that public interest override requires the search to be undertaken for the documents [if any] that fall within the scope of the request and that Victoria Police should not refuse the request on the basis of section 25A(5).
- 38 Mr Davies submits the public interest is demonstrated by the fact there is a parliamentary inquiry into the closure of I Cook Foods Pty Ltd, Professor Brett Sutton made the order to close I Cook Foods Pty Ltd and the fact Professor Brett Sutton now has extraordinary powers. Mr Davies claims it is in the public interest to determine whether Professor Brett Sutton is a fit and proper person to wield these powers. Professor Brett Sutton is a person of interest to the public and there are allegations of dishonesty offences.

⁶ [1998] 4 VR 718.

- 39 Mr Davies stresses that the witnesses are going to be hostile witnesses and for that reason it is difficult for him to provide details of the evidence they would give. The submissions were couched in terms of *they may give evidence relevant to the public interest or might be capable of providing* relevant information regarding corruption of public figures.
- 40 For the following reasons, in my view the witnesses would not assist with the issue as to whether Victoria Police should be able to rely on section 25A(5) and section 33(1) in not processing the request.
- 41 As far as the witnesses are proposed to provide evidence as to whether any documents actually exist that fall within the scope of the request, that in my view is not a relevant consideration. Whether any actual existing document is exempt only becomes relevant if Victoria Police are required to process the request and are not permitted to rely on 25A(5).
- 42 The proposed witnesses' evidence would not assist VCAT to determine whether *from the nature of the documents as described in the request*, the documents would be exempt under section 33. It would not assist to determine whether Victoria Police can establish that every document that falls within the scope of the request would be an exempt document under section 33(1).
- 43 Confirming the existence of the briefing note or to whom it has been circulated or whether there has been a police investigation does not assist the determination of this issue.
- 44 The question of whether Professor Brett Sutton is a fit and proper person to wield "extraordinary powers", does not assist to determine whether the types of documents covered by the request would be exempt under section 33(1).
- 45 It is submitted that the public interest of exposing corruption was a relevant issue. However very little material has been provided as to what evidence the witnesses are expected to give. It is submitted that their evidence is expected to tend to show, "illegality, impropriety, sharp practice or wrongdoing" of Professor Brett Sutton in relation to the forced closure of I Cook Foods Pty Ltd." This appears to be speculative, particularly bearing in mind the way the proposed evidence is described in very vague terms. The additional material provided from the Legal and Social Issues Standing Committee Inquiry into the closure of I Cook Foods Pty Ltd does not take the matter any further.
- 46 After weighing all the material, overall there is not a sufficient basis to conclude that the proposed witnesses will provide evidence that is relevant to the issues of this case.

Is there an improper purpose in issuing the summons?

- 47 Additionally, Mr Davies by proposing to call these witnesses appears to be trying to find out the very information that is sought to be ascertained from

the request and is claimed to be exempt. Whether any actual existing document is exempt only becomes relevant if Victoria Police are required to process the request. The vague nature of the evidence claiming to be adduced is also indicative that the proposed summons amounts to a fishing expedition.

- 48 Accordingly I direct that witness summonses not be issued as Mr Davies seeks and, for completeness, that no witness summonses are to be issued in this proceeding without leave of the Tribunal.

W Boddison
Member