

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HEALTH & PRIVACY LIST

VCAT REFERENCE NO. HP19/2010

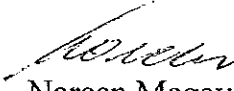
CATCHWORDS

Victorian Civil and Administrative Tribunal Act, section 75, application to strike out complaint

APPLICANT	Jan Roberta Beer
RESPONDENT	Melbourne Water
INTERVENING PARTY	Victorian Privacy Commissioner
WHERE HELD	Melbourne
BEFORE	Noreen Megay, Senior Member
HEARING TYPE	Strike-out hearing
DATE OF HEARING	23 March 2011
DATE OF ORDER	20 April 2011
CITATION	

ORDERS

1. The respondent's application to strike out the complaint is dismissed.
2. No later than 28 May 2011 the applicant is to nominate ten documents (or films or photographs (as may be required) and to file and serve proper particulars in the fashion contemplated in paragraph 32 of these reasons.
3. The matter is to be listed for further directions after 28 May 2011.


Noreen Megay
Senior Member



APPEARANCES:

For Ms Beer

Mr J Delany SC with Ms J Forsyth

For Melbourne Water

Mr M Batskos, solicitor

For Privacy Commissioner

Mr A Bendall, Deputy Commissioner

REASONS FOR DECISION

- 1 The applicant is a person who, for some years, has been active in protesting against the construction of the North-South Pipeline. This was an undertaking designed to bring water to metropolitan Melbourne from the Goulburn Valley. It attracted considerable publicity. She was involved in organizing and attending direct actions against the construction of the pipeline. Over time she has attended the sites of the pipeline construction, or destinations near the sites.
- 2 On 8 February 2010 she made an application under the freedom of information laws seeking the following from the respondent Melbourne Water:
 1. All videotapes, photographs and notes taken by Melbourne Water staff in relation to Plug the Pipe protests or actions on the Sugarloaf pipeline route, and specifically any of the above information taken of myself on the following dates
 - (a) 13 November 2008 at Glenburn on the occasion of a Plug the Pipe protest
 - (b) 17 January 2009 at Killingworth
 - (c) 18 November 2008 at property of G Spencer, Steuart's Rd, Glenburn
 - (d) 30 October 2008 at Glenburn

In relation to this part of the request I am not interested in the personal details of Melbourne Water staff present on these occasions. If the photographs or videotapes include Melbourne Water or other agency staff I would be happy for you to blank out their faces. If this occurs, could you please make notation to this effect giving reasons why the image has been altered.

2. Copies of all notes, reports or other documents created between 1 July 2007 and 30 January 2009 that include my name
- 3 In response to her application, on 1 April 2010 the complainant received 88 documents (out of a possible 102) plus two CDs of video footage. The documents as released by the respondent are exhibited to the affidavit of Elizabeth McKinnon filed with the Tribunal. Ms Beer's complaint to the Privacy Commissioner arises out of the documents to which she obtained access.
- 4 In her complaint to the Privacy Commissioner Ms Beer described the general description of those documents as follows:
 - Records of me attending meetings, including my name, home address, phone number and email address, other meeting notes.
 - Incident reports (author unknown) describing my involvement in protest actions including my full name (over ten separate examples of these)

Sugarloaf Pipeline Alliance weekly and monthly reports describing times I have been to site or participated in protests, including my full name (I am mentioned in over 54 separate examples of these). At times my motor vehicle is described and I am quoted.

Correspondence registers and stakeholder documents when my full name is mentioned.

Photographs taken of me during protest actions at site.

Video footage of me during protest actions at the site.

- 5 Under the heading “How these actions have breached the Information Privacy Principles (IPPs), the complainant sets out some general propositions about how the respondent is, or might be in breach of various protocols. A snapshot of those propositions is as follows:

They might be in breach of IPP 1.1. I do not know what function or activity of Melbourne Water they claim deems the collection of my personal information (the information released to me pursuant to my FOI request) necessary.

They are in breach of IPP 1.2. In particular, following me in my car as detailed on FOI document 18 on 10.11.08 is collection of personal information in an unfair and unreasonably intrusive way. It is also unfair in that the staff driving the vehicle did not identify who they were, as further detailed below in paragraph 10.

They are in breach of IPP 1.3. At no times when photos or footage was taken of me by someone who was an agent for Melbourne Water (I do not know these individuals or who they worked for, whether it was Melbourne Water, or the Sugarloaf Pipeline Alliance, or some other contractor) was the identity of the organisation who was collecting this information provided, or information on how to contact the organisation provided. I was not told whether or not I was able to gain access to the footage, videos or notes that were in relation to me. I was not told the purposes for which the information was collected. I was not told to whom, the information would be disclosed. I was not told if there was a relevant law that required the collection of that particular information. I estimate that this personal information was collected on me across 25-75 separate occasions, and on none of these occasions was I provided any of the above information by the person collecting the information.

That are likely to be in breach of IPP 2.1 –

I suspect that my personal information was simultaneously collected and disclosed to third parties. I have this belief as the information was collected by a wide range of workers on multiple different pipeline sites. As said, I do not know the identities of these workers nor for whom they worked. However I find it likely that the information collected was deposited in a common repository that was accessible by multiple parties.

- 6 Further matters were added to the initial complaint and in February this year, the applicant filed further and better particulars of paragraph 3 of her October 2010 complaint. (That paragraph recited that “in the period from 1 July 2007 to 30 April 2009 (“the period”) the Respondent collected information (“the information”) in relation to the Applicant.”)
- 7 It is the contention of the respondent’s counsel that the complaint as presently particularised should be dismissed. Before turning to the various submissions I propose to make some short comments about the viva voce evidence that was given in the strike-out proceeding and the cross-examination that ensued. It is fair to say that it is not the normal course to call evidence in such applications although such a course is not prohibited and there may well be instances where it is useful or necessary. Mr Mark Facciolo is the freedom of information officer at Melbourne Water. His written statement set out some of the history of this matter and in particular set out how it was that this section 75 application came about. He was cross-examined robustly by counsel for the applicant as to his knowledge of the case and whether he knew what it was the applicant sought. It was clear that the thrust of Mr Delany’s questioning was to elicit a concession from Mr Facciolo that in his view nothing further was required to enable the respondent to answer the case against it. I was not assisted by any of this evidence. Whether the FOI officer understands the substance of the applicant’s claim or not is not of assistance to this tribunal in considering whether a matter should be dismissed or whether the complaint has been properly particularised.
- 8 When the Information Privacy Bill was introduced in Parliament, the then Minister for State and Regional development discussed the evolution of the legislation in the face of modern technology. In his second reading speech he stated that –
-entities that need to collect and use information about people should be able to do so confidently and within a framework that facilitates the exchange of information in a transparent and responsible manner.
- The introduction of the Information Privacy Bill will contribute to the creation of that culture. It will protect the privacy of Victorians by giving people an assurance that only the minimum amount of personal information will be collected and that it will be held securely and used responsibly. It will give agencies and departments of the Victorian government the framework for responsible information management and it will help revive democratic processes and values in this state.
- 9 The Minister’s speech indicates that there is a balance to be struck between government’s need to collect and store personal information and the responsible use of such information. That balance is at the very heart of this application.
- 10 Mr Batskos provided the Tribunal with lengthy submissions supporting his contention that the matter should be dismissed pursuant to section 75 of the

VCAT Act because it was lacking in substance, misconceived, frivolous vexatious or otherwise an abuse of process. Counsel for the applicant and the Commissioner contend otherwise. They submit that the complaint is clear, that discovery should occur and that the matter should be listed for final hearing without further delay.

- 11 Mr Batkos made some submissions about the nature of this initial complaint and whether it can properly to be said to be a “complaint” as contemplated in the legislation and thus whether this Tribunal has the requisite jurisdiction. The thrust of his submission is as follows. This Tribunal may hear a complaint referred to it in various ways. In this proceeding, the complaint was referred to the tribunal pursuant to section 37 of the Information Privacy Act 2000 (“the Act”). He submits that what may be referred to the Tribunal by the Privacy Commission is a “complaint” and that in this case, the referral occurred because the Privacy Commission was unable to conciliate the complaint. “Complaint” is not defined in the Act but what can be dealt with by the Commission (and ultimately by this Tribunal) is one which complies with section 25 of the Act. That is, a complaint may be made by an -

“individual in respect of whom personal information is, or has at any time been, held by an organisation.....about an act or practice that may be an interference with the privacy of the individual.

- 12 Two requirements flow from this. A complaint must be about “personal information” in respect of an individual and it may only be about an act or practice that is “an interference with privacy” of that individual. “Personal information” defined in section 3 of the Act and the phrase “an interference with privacy” is relevantly defined in section 14(3) as follows:

For the purposes of this Act, an act done or practice engaged in by an organisation is an interference with privacy of an individual if, and only if, the act or practice is contrary to, or inconsistent with an Information Privacy Principle

- 13 Mr Batskos’ submission continues in the following vein: _

It follows that if a “complaint” is **not** in respect of “personal information” or is **not** about “an interference with privacy”, it is not a complaint that may be referred to the Tribunal or dealt with by the Tribunal. That is, it is not something in respect of which the Tribunal may make an order or take (or decline to take) action under section 3 of the Act. In the terms of *inter partes* disputes, it does not give rise to a cause of action or any remedy. If a complaint is not about personal information, it is not a complaint that can succeed and in those circumstances it is appropriate to be dismissed under section 75 of the VCAT Act

- 14 Further, in his submission about what constitutes a “complaint” that may be referred to the tribunal, he went on to state-

In short, it is the complaint as *made in writing and lodged* with the Privacy Commissioner which comprises the complaint than can be

referred by the Privacy Commissioner. It follows that the relevant “complaint” cannot be comprised by any summary or other similar document which the Privacy Commissioner’s office prepared during any processes involving the Privacy Commissioner or the staff of the Privacy Commissioner.

15 This submission raises a novel question and in order for that to be properly understood, it is necessary that I set out with some particularity the genesis of this complaint as it appears in the documents presently before this Tribunal.

16 The initiating document (an email) reads as follows:

Request to proceed
Jan Beer
To: Felicity Wright
20/04/2010 01.18 PM

Dear Felicity,

After speaking with Ms Versey, the Privacy Commissioner, I am writing to formally request that your office proceeds with the complaints and investigation procedure regarding the invasion of my privacy by Melbourne Water and the Sugarloaf Alliance, as is evident by the FOI documents that I have received. I am sending you in today's mail, a disc copy of the FOI documents that I received from the Melbourne Water FOI Officer, Mr Mark Facciolo.

I make mention also of the Sugarloaf Alliance, as this was the authority seen as the entity under which all people were working on the pipeline.

Yours sincerely,

Jan Beer

17 From that and more specifically from the words “*as is evident by the FOI documents*” one deduces that the initial complaint concerned, and was limited to whatever was contained in the 88 documents obtained under freedom of information.

18 The next document referred to the Tribunal is headed “**Further matters to be added to Complaint C0434**”. The Tribunal understands (courtesy of the Privacy Commissioner’s written submission) that the applicant, “via her solicitors, raised further written allegation with the Privacy Commissioner, against the respondent, based on information relating to audio recordings included in reasons for decision by Magistrate L H Brear in *Anderson v Winther* (Criminal) [2010] VMC10 (14 April 2010)”.

19 Again, courtesy of the Commissioner’s submissions “the complaint alleged that the respondent had collected a large amount of personal information, including audio recordings and images, about the applicant, which appeared to be in breach of Information Privacy Principles 1.1, 1.2, 1.3, 1.5, 2.1 and 4.1.....”

20 The relevant information about that, along with allegations that various breaches had occurred was followed by the following statement

These particulars of the complaint were prepared by the staff of the Office of the Victorian Privacy Commissioner in accordance with their duty to assist complainants, but this should not be taken as an endorsement of the complaint by the Office.

21 The next document referred to the Tribunal is headed “Attachment 1” although it is not known what it was attached to. It is the document referred to in paragraph 5 herein. It is not signed and the author is unknown and it was clearly not in existence at the time of the initial complaint or at the time of the “Commission-assisted” statement.

22 The corollary of Mr Batskos’ submission seems to be that only the email is the “complaint made in writing and lodged with the Commission” and thus the only part of the complaint that could have referred to the tribunal although he contends even that does not comply with the legislation. But of course that contention fails to take into account section 25(5) of the Information Privacy Act which states –

It is the duty of employees in the office of the Privacy Commission to provide appropriate assistance to an individual who wishes to make a complaint and requires assistance to formulate the complaint.

23 It strikes me that whether or not all the pages referred to the tribunal were in fact prepared by Ms Beer, and whether or not Commission staff assisted in the formulation of the various component documents, she clearly acquiesced in the content by requesting the matter to be referred to this tribunal and by her insistence in pushing ahead with her case. Further, the contents can be no surprise to the respondent as they were (again, according to the Commissioner’s submission) sent to Melbourne Water for comment. I am not persuaded that the argument about the complaint as referred has any merit. It would be wrong to insist that members of the public, fearing an invasion of their privacy, should be expected to prepare their complaint in a legalistic fashion complying in every respect with the infinite requirements of the law.

24 Mr Batskos’ most important submissions about the strike-out application can best be summarised as follows:

- The complaint does not identify any personal information in any or each of the documents in respect of which there is alleged to be a breach.
- The complaint does not identify an interference with privacy adequately or at all in respect of any personal information.
- The complaint makes broad allegations of breaches without any attempt to match any relevant facts with any particular provisions of the Act such as to give rise to an interference with privacy.
- The complaint does not particularise the nature and extent of each and every allegation of interference with privacy and merely makes bald

allegations without particularisation and without reference to personal information.

- The complaint requires Melbourne Water to tease out and speculate upon what might be alleged as an interference with privacy and whether (and if so, how) a generalised statement of injury is in some unparticularised way connected to unparticularised allegations of an interference with privacy such as to preclude the respondent from pleading a proper defence.
- 25 On 4 October 2010 Senior Member Davis ordered the applicant to file and serve particulars of complaint and on 13 October 2010, what purported to be particulars were filed with the Tribunal. Unfortunately this document did not serve to remedy the absence of particulars as once again it made a series of general allegations without referring to any fact or document and without particularising what personal information was the subject of complaint.
- 26 As the complaint presently stands it seems to be that Ms Beer was an objector whose activities gained the attention of the respondent, that she made a freedom of information request and discovered some 88 documents that in some way referred to her and that, *ipso facto*, this constitutes an invasion of her privacy.
- 27 It is true that this Tribunal is not a court of pleadings and in normal circumstances, particularisation is not necessarily a precursor to a defence being filed but there is something to be said for the frustration clearly articulated by the respondent's solicitor. It sought particulars and received little in response.
- 28 It is not necessary for me to repeat the many cases that state that dismissing a case pursuant to section 75 is a drastic step which, if it occurs, denies a litigant his or her day in court. Those cases and the principles flowing from them are well known to the parties and indeed Mr Batskos made a careful summary of them. However, in this case I am not persuaded I should acquiesce to the respondent's request. The fact that the case is poorly particularised is not in my view, sufficient reason to take such a drastic step as striking out the application. It is true that the generality of the complaint is what irks the respondent. For instance, how is it contended that the following extract from document 4 of the released documents is objectionable? The document headed Sugarloaf Pipeline Project, Summary for Discussion Draft, reads as follows:

Questions around water conservation


As part of a discussion related to the other options considered by the government, water tanks were raised by many people in the room. David Downie stated that water tanks were a key component of the water conservation process, but were not sufficient on their own to deliver Melbourne the quantity of water needed. David went on to say that if most people in Melbourne installed a tank, it would cost in the vicinity of \$2.5-3 billion and would deliver approximately 50 GL of

water. Jan Beer questioned this figure, saying that she had seen figures quoted that indicated that tanks would deliver 98G. David reiterated that he believed that it was more like 50 GL

.....

Jan Beer stated that the EES referral doesn't bring out the level of community angst about the pipeline, and doesn't fully indicate the level resistance of landowners.

- 29 Assuming the personal information to be the applicant's name and her presence at a meeting, how is it contended that the meeting and the recording of it was not necessary for one or more of the respondent's functions or activities if it is said, for instance, to be in breach of IPP 1.1? If it is said to be in breach of IPP 1.2, what was the unlawful or unfair means by which the information was collected?
- 30 A cursory glance at the documents in question indicates that many of them are completely unremarkable and indeed some of them are in the public realm and accessible to anyone who cares to seek them out. Of course, I assume it is not just the content of the documents that troubles Ms Beer, I infer it is the method of collection and the "surveillance" of her activities that is at the root of her complaint.
- 31 The orders I intend to make result from a practice that has been utilised in this tribunal in the freedom of information area as a means of avoiding lengthy and irrelevant wrangling over large numbers of documents but allowing the parties to sample and thus to focus on a set of documents that properly explains a complainant's case. The applicant is well represented before the Tribunal and compliance with this should not pose any insurmountable difficulty.
- 32 The applicant is directed to nominate a total of 10 documents (or films or photographs if so desired) falling within the complaint referred to the Tribunal (and within its timeframe) and to particularise properly what constitutes the act or practice, the personal information in question, what constitutes the interference with privacy, how the collection is not for the respondent's functions or activities (if that is contended), which IPP has been breached, and so on.
- 33 The applicant is granted until 28 May 2011 to file and serve these particulars and the matter is to be listed for further directions as soon as possible after that date.
- 34 The respondent's application pursuant to section 75 of the VCAT Act is dismissed.


Noreen Megaw
Senior Member

