VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP732/2014

CATCHWORDS

DOMESTIC BUILDING: public interest immunity; production of documents pursuant to a summons to produce; whether production of documents is in the public interest; authorities considered.

FIRST APPLICANT	Profield Building and Design Pty Ltd (ACN: 150 342 653)
SECOND APPLICANT	Profield Pty Ltd (ACN: 007 221 856)
RESPONDENT	Mr Georg Friedrich
FIRST RESPONDENT TO COUNTERCLAIM	Mr John Isador Goodman
SECOND RESPONDENT TO COUNTERCLAIM	Profield Pty Ltd (ACN: 007 221 856)
INTERVENOR	Victorian Building Austhority
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	4 February 2016
DATE OF ORDER	1 March 2016
CITATION	Profield Building and Design Pty Ltd v Friedrich (Building and Property) [2016] VCAT 323

ORDER

1. The undated *Statement* of Mr Robert Michelmore and the *Record of Interview* of Mr Friedrich, being two documents produced in answer to a Summons issued by the Principal Registrar at the request of the Respondent are to be made available to the parties for inspection and copying, provided those documents are only used for the purpose of prosecuting or defending the issues the subject of this proceeding.

2. The *Investigation File Summary* of Mr Michelmore, being a document produced in answer to a Summons issued by the Principal Registrar at the request of the Respondent, is to be placed in a sealed envelope and

returned to the Intervenor. No party, other than the Intervenor, may inspect that document.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr N Phillpott of counsel
For the Respondent	Mr G Friedrich, in person
For Respondents to Counterclaim	Mr N Phillpott of counsel
For the Intervenor	Mr D Bozinoski, solicitor

REASONS

1. On 23 December 2015 and following a request by the Respondent, the Principal Registrar issued a *Summons to Appear* requiring Mr Robert Michelmore of *Ryt Business Solutions* to appear before the Tribunal and produce the following documents:

> All witness statements and any documents containing outcomes or recommendations as a result of your investigation, on behalf of the Victorian Building Authority, into the conduct of the Builder Mr John Goodman, DB-U 23211.

2. *Ryt Business Solutions* or Mr Michelmore was appointed by the Building Practitioners Board (**'the Board'**) to conduct an investigation into a complaint made to the Victorian Building Authority (**'the VBA'**) against Mr Goodman, who is the First Respondent to Counterclaim in this proceeding. The appointment of Mr Michelmore was made under s 177 of the *Building Act 1993*. That section provides, in part:

> (1) The Building Practitioners Board may appoint a person to report and make recommendations to it on whether or not it should hold an inquiry into the conduct or ability to practise of a registered building practitioner.

3. On 12 January 2016, documents answering the *Summons to Appear* (**'the Documents'**) were filed with the Tribunal by the VBA. Under cover of letter of that same day, the VBA requested that the Documents not be inspected by any party, prior to it being heard as to whether the Documents should be available for inspection. Given that request, the Documents were placed in a sealed envelope pending further order of the Tribunal.

4. On 4 February 2016, the Tribunal convened a directions hearing, at which time the VBA was given leave to intervene for the purpose of opposing any inspection of the Documents. Mr Bozinoski, an in-house solicitor of the VBA, appeared on its behalf. The Respondent appeared in person and the Applicants were represented by Mr Phillpott of counsel.

5. Mr Bozinoski submitted that it would not be in the public interest for the Documents to be made available for inspection because they related to information obtained by Mr Michelmore in the course of his appointment. Mr Bozinoski said that the Board had not yet determined whether an inquiry conducted under s 178 of the *Building Act 1993* was warranted. He submitted that in those circumstances, releasing the Documents for inspection would undermine the investigative processes adopted by the Board or the VBA because potential witnesses might be reluctant in the future to willingly assist the Board or the VBA if what they said during the course of an interview was made public during the course of a inter-party civil dispute.

6. Mr Phillpott joined with the VBA in opposing inspection of the Documents on the grounds advanced by the VBA. He further argued that the Documents were irrelevant to any issue in the proceeding.

PUBLIC INTEREST IMMUNITY

7. The principle of public interest immunity was enunciated by Gibbs ACJ in *Sankey v Whitlam*,[1] where his Honour said:

> The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v Rimmer* as follows:
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> > "There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."
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> It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. [Footnotes omitted.][2]

8. In *Royal Women's Hospital v Medical Practitioners Board*,[3] the Medical Practitioners Board of Victoria (**'the MPB'**), as part of its investigation of a complaint made against the Royal Women's Hospital, sought access to a woman's medical records kept at that hospital. The woman declined to consent to the release of the medical records and as a consequence, the hospital and the woman's treating medical practitioners refused to release her records or supply information about her treatment in the hospital. The MPB later executed a search warrant, which it had obtained from a Magistrate under the *Medical Practice Act 1994* and seized the medical records, which were then lodged with the Magistrates' Court. The hospital applied for an order that the seized documents be returned to it. That application was refused by the Magistrate on the basis that they were not protected from disclosure on the ground of public interest immunity. On appeal, the Court of Appeal highlighted that before a court undertakes the balancing test referred to by Gibbs ACJ in *Sankey v Whitlam*, there is a

[1] (1978) 142 CLR 1.
[2] Ibid at 38.
[3] (2006) 15 VR 22.

threshold hurdle; namely, that the class of documents in question must be governmental in character. Her Honour, Warren CJ cited Spigelman CJ in *R v Young,*[4] who said:

> Public interest immunity arises because of "the need to safeguard the proper functioning *of the executive arm of government and of the public service*" (emphasis added), to use the formulation of Stephen J in *Sankey v Whitlam* (at 56) described as "the reasons customarily given" for the immunity. This formulation was adopted by Mason CJ, Brennan J, Deane J, Dawson J, Gaudron J and McHugh J in *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 619, and described by their Honours as "the ordinary reason supporting a claim for public service immunity".
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> [58] The dividing line between private and public interests is not always easy to draw. Public institutions – relevantly, in the present case, hospitals – provide private services, indistinguishable from the same services provided by private institutions.

9. In *Royal Women's Hospital v Medical Practitioners Board* the court determined that the hospital's claim of public interest immunity failed at the threshold; in that, it could not be said that the medical records were governmental in character.

10. In the present case, the Documents were brought into existence by an individual, appointed by the Board pursuant to s 177 of the *Building Act 1993*. As highlighted above, that provision permits the Board to appoint a person to report and make recommendations to it on whether or not it should hold an inquiry into the conduct of a registered building practitioner. In my view, the mere fact that the Documents were brought into existence by a private person is of no consequence. The sole purpose of the Documents being brought into existence was to enable the Board to carry out its functions as an instrument of government; namely, whether there should be an investigation and inquiry conducted under the *Building Act 1993*. Consequently, I find that the threshold question as to whether the Documents are governmental in character has been answered in favour of the VBA.

Should the Documents be released?

11. During the course of the oral hearing, I indicated to the parties that I would not look at the Documents prior to determining whether the public interest weighed against their release. Although this was not raised by either party, I suggested this course in order to avoid any future application of apprehended bias - resulting from me reading documents which were inadmissible but which contained prejudicial statements or allegations against the First Respondent to Counterclaim. However, upon reflection and having regard to the judgment of Gibbs ACJ in *Sankey v*

[4] (1999) NSWLR 681 at 693-4.

Whitlam cited above, deciding which aspect of the public interest predominates requires me to consider the probative value of the documents against any harm to the proper functioning of executive government. Therefore, it is unavoidable that I must look at the Documents in order to determine where the public interest lies.

12. The Documents comprise three separate documents:

    (a) an *Investigation File Summary*, prepared by Robert Michelmore the investigator appointed by the Board;

    (b) a written *Record of Interview* of Mr Georg Friedrich, the Respondent in this proceeding; and

    (c) a written *Statement* from Mr Robert Michelmore, recounting his interview with Mr Goodman.

13. In my view, the *Investigation File Summary* is of limited probative value, notwithstanding that it expresses the views of Mr Michelmore as to whether Mr Goodman has breached his obligations under the *Domestic Building Contracts Act 1995* or *Building Act 1993*. This is because Mr Michelmore's opinion is not a matter which the Tribunal will take into account in deciding whether the Applicants or the First Respondent to Counterclaim breached their contractual obligations with the Respondent. The Tribunal must decide those issues based on evidence it hears in the proceeding. It cannot abrogate its responsibility to determine those issues by relying upon the opinion of another person.

14. In relation to the *Record of Interview* of Mr Friedrich and the written *Statement* from Mr Michelmore, I am of the view that the documents are, at least to some extent, relevant to the issues raised in this proceeding. In particular, there are matters set out in those documents which touch upon the claims made by Mr Friedrich in this proceeding, albeit that their relevance is peripheral.

15. In weighing where the public interest lies, Mr Bozinoski submitted that there would be harm in releasing the Documents, even if the documents were only released for use in this proceeding and not for any other collateral purpose. In particular, he argued that release of the *Statement of Interview* and written *Statement* of Mr Michelmore would undermine the investigative processes of the Board because witnesses would be hesitant to commit to voluntary examination if what they said was to be made available in civil litigation.

16. I do not accept that proposition. In my view, it would be open to subpoenae those persons to give oral evidence in this proceeding and to ask those persons what they said to the investigator during the course of their interview. Providing the subject matter of what they said was relevant to the issues in the proceeding, I see no reason why that evidence would be excluded from the proceeding. Moreover, I do not accept that Mr Michelmore's *Statement* of his interview with Mr Goodman would

undermine the investigative processes of the Board because, according to that statement, Mr Michelmore made it abundantly clear to Mr Goodman that he was not obligated to say or do anything unless he wished to do so and that anything he said or did would be recorded and may be given in evidence.

17. Accordingly, I find that the public interest - *that a court of justice in performing its functions should not be denied access to relevant evidence* - weighs in favour of the *Record of Interview* and the *Statement* of Mr Michelmore being released for the purpose of this litigation. I do not find the public interest immunity attaches to either of those two documents.

18. The position in relation to the *Investigation File Summary* is different. First, and for the reasons which I have already articulated, I do not consider that the document has any probative value. Second, I accept that the document was intended to be "in-house" and that the opinion expressed therein was to be frank and robust to allow the Board to evaluate whether it should conduct an inquiry. I also accept that if the *Investigation File Summary* was to be made available in civil litigation, the process of setting out the views and opinions of investigators may be compromised for fear of litigation or castigation. In my opinion, an investigator appointed under s 177 of the *Building Act 1993* should be able to communicate freely with the Board without fear that his or her communication will be made public during the course of inter-party civil litigation, at least until such time as the Board decides to conduct an inquiry. Therefore, I find that the disclosure of the *Investigation File Summary* would be injurious to the public interest, while adding little or nothing to the administration of justice. Accordingly, I will order that this document be placed in a sealed envelope and returned to the VBA.

SENIOR MEMBER E. RIEGLER