

# Freedom of Information

# Review

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## Comment

In this issue there are two very different articles. One is an outsider's perspective on the way French journalists have struggled to come to terms with their *Fol Act* and their preference, in face of considerable difficulties, to access information by more effective informal networks. The other article is an attempt to provide a starting platform for the redesign of Fol legislation in Australia. The concept was to provide those individuals and groups, like the Queensland parliamentary review, an opportunity to contemplate how to reconfigure Fol legislation. The objective was to avoid the Victor Perton approach of completely abandoning the legislation in favour of a refurbished, hotwired and full bore parliamentary system cruising on an information superhighway completely neutral in its delivery of information to computer-literate citizens.

At the start of a new decade and century it is clear that John Ralston Saul's 'systems men' still hold the position of gatekeepers in our governmental schemes — where decisions about access to information are not made on the basis of determining an individual's rights to access but where such access is granted as an act of grace or the careful allotment of a favour. Saul wrote:

Knowledge is one of the currencies of systems men just as it was for the courtiers in the halls of Versailles. They require a position in the structure that provides some ability to deny access to others and gain access for themselves. Then they require currency or chips. That is information.

Governments and senior bureaucrats, in the Saul cynical vision of life, use Fol laws to preserve rather than share or disperse the power of official information. A rejigged and IT-enhanced parliamentary system only removes the 'systems men' to cyberspace and does little to allow citizens immediate access to information as of right.

What has struck me about the GST debate in Australia, before and since its passage, was the absence (I could have missed something) of commentary or debate enhanced by those participating in the analysis of this policy having access to a level playing field of information. I would like to see someone evaluate the use of Fol in that policy debate. What was requested, what was released, by whom and how was it used? The same with East Timor — a comparative study that looks at the type and result of requests for US/Canadian military information about involvement in Somalia compared with requests relating to Australia's military involvement in East Timor.

The art of the secret in politics is not the paranoid control of every simple byte of information (like China's latest controls of Internet use) but the timing and degree of access allowed to information. The Royal Commission into the ambulance services tendering in Victoria may well find examples of information shredding and deliberate contraventions or manipulations of the *Fol Act* in that State but the advantage has been in the delay of that access to information.

The Queensland Parliament's Legal, Constitutional and Administrative Review Committee has released a very interesting Discussion Paper on Fol. See <<http://www.parliament.qld.gov.au/committees/lcArcFOI.htm>>.

Rick Snell

# Back to the drawing board

## Preliminary musings on redesigning Australian Freedom of Information

### Introduction

This article attempts to return to basic principles and primary design choices about access to official information in Australia. Other articles have either attempted to weave together the key points of specific law reform suggestions over the past decade and/or have looked at compliance and administration reforms. Yet we seem to be bound to the narrow vision of our original designers who opted for a basic US adversarial/litigant model with a series of patchwork connections. These connections were to incorporate the essential dynamics of a hybrid Westminster system that had evolved during the slow development of Australian government since 1788.

There are a number of 'standard' features, which are essential to an effective freedom of information (Fol) legislative scheme. The components of an ideal Fol model are best adopted as an integrated 'package' to maximise the utility of the legislation and to encourage greater public participation. A balance needs to be struck between the notions that power and secrecy are relative rather than absolute concepts and that government power will not be drastically diluted merely because there is improved citizen access to information.

Any attempt to formulate basic design principles for Fol must begin with a statement of objectives to structure and guide the accompanying policy and process. The objectives of the legislation must be to enhance public access to information and improve overall government accountability. A statement of objectives must be expressed in clear and uncompromising words, which mandate that access is the paramount objective. The very title of the legislation can assist in emphasising these objects — a legislative title of 'Access to Information' would symbolically imply greater openness than does the title 'Freedom of Information'.

An Fol legislative scheme cannot be effective without a commitment from government and its servants to openness and accountability. This commitment must be genuine; it must be long term; and it must be evident not only among Fol officers assigned to process requests, but also among senior bureaucrats, policy advisers and at the ministerial level. To this end, a simple starting point is to avoid direct references to any exemptions to the legislation in the statement of objects. Thus rather than a statement such as 'This Act seeks to ... subject to ...' it would be more appropriate if the statement read: 'This Act will ...'. Minor changes in wording can be of symbolic significance.

Australian Fol legislation has so far failed to achieve an outcome where access to information in the custody of government is the norm, and non-disclosure is a contestable and limited exception. A viable democracy needs and demands an informed citizenry, yet Australian politicians seem prepared to offer us the sad, faded and crumbling relic of our first attempt (the Commonwealth *FoI Act*) or a hasty back to what it was before version (the Bracks formula in Victoria).

### The contemporary relevance of basic design principles

The experiment of Australian Fol legislation has not realised its ambitious objectives. The main problem is resistance to the regime from the government itself. The more restrictive the legislation, the greater the level of government commitment. The fate of Fol legislation can be largely influenced by whether there is a 'political patron' within government — such as a Minister with a genuine commitment to Fol principles — to champion the cause. Australia has produced few ministerial champions.

Contemporary design principles should not be based on notions that the government generally maintains an unfettered discretion over content, distribution and restrictions on the dissemination of information. The design of Fol should first and foremost be to locate access to information as a foundational democratic right. This democratic foundation should be treated as an absolute prerequisite for an effective Australian democracy. It matters not whether the foundation is legitimated by a belated recognition by the High Court that there is a complex and necessary interrelationship between representative democracy, freedom of speech, freedom of expression and freedom of information, or whether its origin is a more fundamental source.

While 'democracy' may have been incorporated in prior Fol designs, it tended to be subordinated to the necessity to protect a large array of government information depicted as sensitive. Indeed the passage of Australian legislation, at both State and Commonwealth levels resembled a game of cards where secrecy, confidentiality and exemptions were regularly played trump cards. Rather than fostering greater openness in government, Fol was often depicted as an alien concept that paradoxically would interfere with attempts to enhance accountability.

We should approach Fol from a new angle, starting with a pro-disclosure emphasis and then carving out more limited exceptions, rather than beginning with blanket exemptions from disclosure and allowing piecemeal disclosures largely at the unfettered discretion of government. Fol has been vulnerable to political maneuvering and the temptation to resist disclosure has been too readily embraced by reliance on widely drafted exemption clauses. We need to reverse the ethos of government secrecy and plan a regime based on a presumption of openness.

A pro-disclosure regime would have a number of different features from the current model. There would be no room for any kind of a ministerial veto power to declare material exempt. The test for non-disclosure would have a high and difficult threshold, for example 'substantial harm', whereby considerations of inconvenience and a default disposition towards non-disclosure would no longer be tolerated. Arguments over non-disclosure would shift from the current preoccupation with categories to actual consideration of the content of documents and whether the release or non-release of that information would contribute to or lessen the public wealth at the moment.

*Basic design principles*

Application to a wide scope of bodies, including private organisations carrying out public functions

There must be a broad definition of 'public authorities' to which the legislation is to apply. FoI must be consistently applied to the public sector as a whole, at national and local levels. The Australian Law Reform Commission, Administrative Review Council and the Commonwealth Ombudsman have adopted the view that governments ought not be excused from accountability by contracting services to the private sector.

More importantly the current reconfiguration of the state should not be assumed to be the final definitive version. Therefore, any access regime should be designed to ensure citizens will have continued access to information in the democratic spectrum regardless of the type of entity or its location (private, public or other sector) which has immediate control over and responsibility for the information. This design principle may necessitate the involvement of other schemes (privacy, data access, etc) but the concept of maintaining actual access, as opposed to theoretical, should be fundamental to any legislative scheme.

*Timely access to information*

When a citizen (journalist, student, MP or day care group) decides they would like to know more or to be more fully informed, the release or non-release of that information should occur within the shortest feasible timeframe. Legislative, administrative and compliance regimes should be designed to ensure that the decision, and outcomes from that decision, treat time as of the essence.

Existing schemes in Australia permit unnecessary delay. These schemes have incorporated excessive maximum processing times which are theoretically only in place to accommodate the small and exceptional range of difficult and problematic requests. Access regimes should be designed to allow for the earliest identification and separate processing of problematic requests. The timely processing of FoI requests is currently only an accidental and uncontrolled by-product of an uncertain and often variable commodity, namely, the good will, ethics and resources of individual FoI officers.

*Narrowly defined and regularly contested exemptions*

Theoretically, exemption clauses in Australian legislation were designed to exclude a minor, albeit significant in terms of content and importance, amount of information. Yet the operation of various exemption schemes has produced the opposite outcome especially when the quality of information released or withheld is factored into the equation.

The problem lies in the fact that once requested information is deemed 'exempt', the refusal to release that information is very rarely challenged. Agencies appear to treat the claim for exemption as a one-off irrevocable 'hard edged' classification of information. Future approaches to access the information, regardless of a change in circumstances and passage of time and events since its original creation and/or classification, are treated by agencies as inappropriate and vexatious use of FoI. Rather than reducing the volume of inaccessible government information the FoI process often seems to remove the possibility of further release.

Exemptions should be designed to serve as a tool of last resort, difficult to justify as the lifespan of the information increases, and subject to reassessment. The information

covered by exemptions should be regularly and vigorously contested. This would mean that agencies claiming exemptions need to re-assess the categorisation of information over time, either by a further request for information or preferably by a mandated reclassification process. In any such access regime the possibility of an agency saying 'we have reconsidered your request of two years ago and now consider that there is no justification to claim the exemption' should be the rule rather than a daydream.

The decision to release or more importantly not to release should revolve around an assessment of the consequences of release in light of the surrounding circumstances at the time of each request or mandatory reclassification program. This necessitates a scheme that allows information to be re-classified subsequent to its initial creation so that documents previously and justifiably exempt can later be released. Whether exempt documents would be eligible for release at a later date would depend on the nature of the information involved and the relative risks of its release.

Moreover, the re-assessment of the classification of documents ought to occur as a matter of routine administration. Typically, assessments of the nature of information have taken place within the charged context of an FoI request, and have been conditioned by subjective considerations of political risk and (often emotive) views on the particular applicant and the use to which the information is to be put. A scheme, which provides an incentive to release information — or at least deters non-disclosure by reliance on blanket exemptions — better serves the objectives of FoI than the current exemption process.

**Redesigning FoI legislation to incorporate a 'substantial harm' test**

Determining the threshold extent of harm against which the disclosure or withholding of information should be judged has practical implications for the operation of freedom of information legislation. In most jurisdictions, information can only be withheld where disclosure would cause 'damage' or 'harm' or 'injury,' with most provisions lacking the requirement that such detriment must be 'substantial' to justify non-disclosure. If the threshold test instead demonstrates a stronger presumption in favour of openness, then access to information is less likely to be obstructed.

The threshold test therefore needs to be framed in more specific and demanding terms. The UK White Paper of 1997 noted that a more stringent test of harm would have the practical effect of reducing the volume of material withheld. This is because an agency cannot point to the general nature of the document and argue that it attracts exemption merely because it falls into a pre-defined category. Information ought not be withheld just because it 'relates' to a matter considered exempt or because it was given to a party 'in confidence'.

Instead, the focus ought to be on the type and extent of harm involved in disclosure of the document. This is aligned with the consequential — as opposed to categorical — approach to disclosure adopted in New Zealand's *Official Information Act*. Rather than raising a bare assertion that the information sought is exempt, the obligation is on agencies to justify not only their initial claim for non-disclosure but to demonstrate a serious threat to the public interest arising from the actual release.

The higher threshold test is necessary to avoid agencies being over-defensive in the release of information, which undermines the spirit and policy underlying freedom of information principles. It would assist in avoiding the tendency towards reflex refusals to release material not previously disclosed, and would encourage authorities to discount inconvenience and speculative risks in determining whether to disclose information. It further means that responses cannot be poorly argued, helping to avoid the time-consuming task of considering or constructing defences to prevent disclosure which may entirely lack foundation or merit.

Several issues need to be resolved when determining the operation of the substantial harm test. For example, would the substantial harm test apply to all disclosures? Can 'substantial harm' result from the cumulative effect of numerous disclosures of similar material over a period of time as well as from a single disclosure?

The interaction between the substantial harm test and the public interest also requires consideration. There is the risk that the results of the substantial harm test may not necessarily be consistent with the public interest, whether the outcome is to disclose or withhold information. This implies a need for an overriding public interest test to determine whether the preliminary decision on whether or not to disclose based on the 'substantial harm' test is itself not perverse.

#### *The nexus between fees and the level and type of access*

The charging policy adopted by the government will affect the volume of access requests handled, especially given that even a modest charging regime has proven to be a significant disincentive. More often it is the selective potential to use fees as a deterrent that is the major problem. The average fee collected at the Commonwealth level has been approximately \$10 a request. However, particular users, especially journalists, can show estimated fees and charges which agencies are prepared to calculate at a potential charge of several thousand dollars. Therefore, the type of charging regime and its underlying principles will be critical. The simplest model is universal free access based on the concept that citizens have a democratic right of access and that information handling is a fixed cost of governance in a Westminster system. This removes the potential for agencies to use fee estimates as a device for non-disclosure.

The basic Australian model of an application fee and then a possible processing fee (with or without discounts or complete waivers) inserts a number of potential deficiencies into FoI legislation. Since the mid-1980s the concept of user pays or an attempt at partial cost recovery has found its way into legislation and/or design considerations. A number of the submissions from Queensland agencies, to the Queensland Legal, Constitutional and Administrative Review Committee, have proposed using fees precisely in order to deter the number of vexatious applicants and what are labelled as fishing expeditions.

The two-tiered charging system as proposed in the UK has several advantages in that it structures charges according to the nature of the request. The concept is that commercial and other heavy users subsidise those who use the legislation for public or public interest purposes. The two-tiered system has also been used in the United States and has been suggested in South Africa and India. The United States' *FoI Act* adopts a differential fee structure. The US approach requires applicants who make

requests for commercial purposes to pay for the cost of copies, searching, and review time, while universities and scientific research organisations are charged for the costs of copies only and all other requestors are charged for copies and search time but not review costs. This type of system privileges 'ordinary' end users over commercial users.

However, it can be difficult in practice to distinguish between requests that are made in the 'public' and 'private' interest respectively, particularly where the request for information is made by incorporated non-government, media or charity-based organisations.

A compromise scheme is that proposed by the Australian Law Reform Commission that would see fees calculated on the amount of information released. The theory is that applicants would self-regulate their requests in order to reduce charges. More skeptical Canberra insiders have advanced the concern that some agencies would attempt to drown troublesome requestors, journalists and opposition parliamentarians, in charges by liberally interpreting requests to include as much documentation as possible.

#### *An independent information commissioner*

Experience with FoI legislation in Australia at both Commonwealth and State levels, as well as in overseas jurisdictions such as New Zealand and Canada, strongly indicates that an external review body is a crucial design feature.

The Western Australian model exemplifies a successful external review system, in that the Commissioner's office is adequately staffed and resourced and performs multiple functions, including having powers to oversee the conciliation and mediation of complaints. This approach, particularly the preference for conciliation and mediation in the resolution of disputes, embodies a fundamental transformation in the application of FoI legislation, namely, the objective to facilitate greater and effective access to information rather than channelling a disputed request towards an adversarial contest whose outcomes are uncertain and often costly.

Whereas current design principles have largely adversarial overtones and structures, a more visionary design would incorporate the benefits of an adversarial model — such as the ability to contest agency determinations and challenge exemptions — while also promoting a proactive role for the review body in improving agency performance. This would involve the incorporation of broad performance criteria into the legislation as constant, benchmark indicators of compliance with the legislation and fulfillment of its objectives.

The experience of the Western Australian Information Commissioner demonstrates the benefits where such a review body additionally adopts a 'hands on' role in the preparation of a 'report card' by which to monitor agency performance and compliance with the legislation, according to a set of performance criteria. The Commissioner can also offer advice and assistance to agencies to improve efficiency and effectiveness of internal administrative procedures. The 'report cards' feature an appraisal of each agency's performance in terms of the average time taken to deal with requests, the fees charged by the agency in processing the requests, the manner in which the agency manages its records, the rate of refusal to release information, the degree of openness and responsiveness within the agency and the effectiveness of its overall administrative framework.

## Fol and the Westminster system

Australia was the first country with a Westminster system to introduce Fol legislation, which represents a shift — albeit small — in the balance of power between the citizen and the state and has philosophical and cultural implications. The problem perceived by Australian governments is that secrecy goes to the heart of power, which is in turn linked to information. Thus, to reduce levels of secrecy via the disclosure of information is to reduce power or at the very least face avoidable and informed criticism or scrutiny. The justifications by the Kennett government in the Victorian Parliament during the passage of the *Freedom of Information Amendment Act 1999*, are an excellent example of the argument that an Fol regime is unnecessary or merely an optional extra in a Westminster system.

A constant theme that emerges when governments or their public servants consider Fol is that Fol sits uneasily with existing Westminster practices and core values. Indeed the argument is advanced that Fol is a potentially hostile and damaging threat to that system of government. Accountability and transparency are seen to be more than adequately catered for with ministerial responsibility, Cabinet collectivity and a vigilant parliamentary process. The Tasmanian government, in justifying its amendment Bill in 1994, did so by detailing the damage, both direct and indirect, that Fol inflicts on a Westminster process. This occurs by exposing the conduct of policy formulation and exchanges between policy advisers and Ministers to potential scrutiny. The Tasmanian government argued that the Westminster system demanded a core area — not just Cabinet but also the policy processes leading to the final Cabinet decision — for governments to think and develop ideas and policies in private.

Current design principles accommodate Westminster principles, even giving them a permanent and lasting predominance, without qualifying their operation. Therefore, Australian Fol legislation has been constructed on the premise that there will always be several classes of government information, determined by their category rather than their content, which will be permanently excluded from release or excluded for significant periods of time.

The preferable approach is that adopted in New Zealand by the Danks Committee. The Committee argued that key principles of the Westminster system ought to continue to apply, and due recognition ought to be given to principles of Cabinet responsibility. However, the application of these principles needed to be modified, and continually modified thereafter, in light of an unavoidable and absolute necessity to practise open government. The proposals of the Danks Committee reflect an evolutionary approach to Fol design, being founded on the idea that citizen-based ownership of information entitles access to it, thereby demanding the modification of other ideas about government which rely on secrecy or processes that necessitate permanent confidentiality.

This is in accord with the notion that the Westminster system is itself evolutionary and need not be depicted as a stagnant set of principles which, though in theory are intended to promote open government, are in practice used by governments as a shield from scrutiny. Shifting the onus of proof from the applicant to the holding agency or Minister as well as narrowing the exemptions to application of the legislation would better reflect the notion that access to information is an entrenched democratic right rather than one dependent on the political climate or on a

reliance on 'tradition' to deter disclosure. Instead, as the Senate Committee concluded, further modifications to the Westminster traditions via Fol will be for the better:

Freedom of information legislation does not relate to any specific system of government, be it a Westminster, presidential or any other system. It is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving.<sup>2</sup>

In Australia, we seem to have missed the concept that legislation like Fol will from time to time require a transformation in the practice and operation of the Westminster system. It is not simply a case of sacred and immutable traditions being protected against an exotic concept. The introduction of Fol legislation is a watershed from which the Westminster system becomes transformed into a more democratic, participatory and open form of government.

The Westminster system is not an end in itself, but merely a means to the end of greater accountability and democratic government. It is in the interests of Ministers to expose advice provided to them to greater public scrutiny so that the quality of that advice can be improved. The Senate Standing Committee on Constitutional and Legal Affairs noted in 1979:

It is not that freedom of information will change our governmental system; it is rather that our changing governmental system is contributing to pressures for freedom of information legislation.<sup>3</sup>

This comment needs to be situated within the context of a debate over whether Fol legislation is necessary at all. At the end of this century of Australian government the issue is how to achieve better implementation and design of access to information legislation, and this requires countering arguments that Fol still does not fit within 'the system'. Such arguments misread the practical operation of the Westminster system and ignore the way in which Fol can enhance those features and make for good government. The challenge will lie in ensuring that Fol enhances the positive features of the Westminster system and that nothing of value is diminished.

## Conclusion

Australia seems not to have embraced the concept that the introduction of Fol in conjunction with the Westminster system, itself a constantly evolving system, was meant to, and needed to, form a symbiotic relationship. The design concepts touched on in this article are meant to encourage reformers to return to first principles and to flesh out both the detail and parameters of the relationship between a Westminster system and Fol legislation.

Debate and discussion about Australian Fol has been dominated by the concept that our only real choice was how to make the American model fit Australian conditions. Rarely have we stopped to contemplate starting from first principles and then constructing a legislative framework, which would accommodate those principles. Of equal importance in the debate, especially from the public service quarter, has been the treatment of the Westminster system as being at the foundation of our government. The Tasmanian Government argued:

the Government adopts the view that the foundation of Australian democratic institutions and their unique expression in Tasmania can continue to be found in the rich tradition, conventions and cultural underpinnings of Westminster style government. This is not a rigid or weak foundation but rather one which is able to accommodate change and diversity, a strength which arises in part from the federal elements of our democracy and in part from its long and hard fought for traditions. This understanding of the cultural foundations of our system of

Government is critical to placing Freedom of Information legislation in context.<sup>4</sup>

In this worldview, the context of Fol is external, and of greater inferiority, to the lasting, albeit flexible, traditions of Westminster. We need to reject that viewpoint. The relationship and configuration of concepts like Fol and Westminster are compatible to the extent that each contributes to the ultimate goal of producing an informed citizenry of a democratic system. If aspects of either concept fail to contribute, or contain elements that are counterproductive to achieving that objective then the concepts need to be adjusted or modified.

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## References

1. See further, Campaign for Freedom of Information (UK) Response to Government's White Paper, March 26 1998. Available: on-line <<http://www.cFol.org.uk/opengov.html>>.
2. 'Freedom of Information', Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, Australian Government Publishing Service, Canberra, 1979, p.55.
3. 'Freedom of Information', above, p.26.
4. Tasmanian Government Submission to the Legislative Council Select Committee on Freedom of Information, 1995, p.5.

# You Don't Know what you've Got until it's Gone

## The French Media's Use of Fol

I have just returned from eight months in France, conducting research on the French Fol law.<sup>1</sup> Each week I would buy at least four newspapers and carefully look through them for discussions on the Fol law or for articles beginning with: 'According to documents provided under Fol...' During my time in France, I discovered only two articles which referred to the French Fol law. This struck me as a stark contrast to the experience of reading daily papers in Australia. While I do not claim to have conducted a thorough survey of French journalists' use of Fol, the almost complete absence of references to Fol prompted me to reflect on the role of the media in promoting Fol. I returned to Australia to find the same debate taking place in the pages of the *Fol Review*. The French experience offers a case study of what can happen when the media does not use the available Fol laws.

### The legislation

The French Fol law was passed in 1978 and is similar to the Australian Fol laws. It sets up a broad right of access, which is then subject to a number of exceptions.<sup>2</sup> There are exceptions for secrets relating to the deliberative processes of government, defence, external affairs, national currency, state security, legal proceedings, the conduct of investigations, commercial secrets as well as for personal information. France also has a very long history of bureaucratic secrecy, which the French Fol law has struggled to break through.<sup>3</sup> So the structure of the law, the length of time it has been in operation and the culture in which it operates are all broadly comparable to the Australian situation.

### Media usage

French commentators and the French Fol Commission (the Commission d'Accès aux Documents Administratifs or CADA) support my informal conclusions that the media is an irregular user of the Fol law.<sup>4</sup> There are no clear statistics on media use in France, although 6 years after the law was introduced, CADA had received only ten appeals from journalists.<sup>5</sup> The poor use made of the French Fol law contrasts with the results of Nigel Waters' survey which revealed that journalists from the *Sydney Morning*

*Herald* made about 35 requests for information over an 18-month period and used Fol requests made by politicians a further 13 times. In all, Fol was mentioned in the paper on over 100 occasions during this period and resulted in a number of significant stories being run.<sup>6</sup> A similar analysis of the use of Fol by reporters from the *Age* and the *Australian Financial Review* over six months showed a reduced level of Fol use, but a total of 89 references to Fol in the *Age* and 16 in the *Australian Financial Review*.<sup>7</sup>

It seems that the French press has very strong contacts within the administration and relies on informal avenues and leaks as a more efficient and effective means of obtaining their information.<sup>8</sup> One recent example involved a fairly controversial report prepared for the Attorney-General on family law reform. On the morning of 14 September 1999 it was leaked to the Christian paper *La Croix*, when the Attorney-General herself was not due to receive a copy until midday that day. Public release had been scheduled for 17 September 1999.<sup>9</sup>

The two articles that I noticed where the French media had used the Fol law reflect both the difficulties and the benefits of the law. The first article appeared in the national paper *Libération*.<sup>10</sup> It concerned a public funded company,<sup>11</sup> run by members of the regional government.<sup>12</sup> A regional auditor's report<sup>13</sup> noted that during a three year period the company had spent a total of \$61,952 (FF 241,614) on food and wine. Two meals in particular stood out as costing \$254 and \$464 per head. Two members of the opposition sought access to a copy of the bills for these meals and, after considerable difficulty and CADA's intervention, were successful. They discovered that the meals were held at a restaurant owned by another member of the local government. The restaurant owner would later be voting on the construction of a car factory by the company in that region. The story was not front page news,<sup>14</sup> and the journalist writing it did not seem too shocked by the story he told. Nonetheless, he hoped that people would be angry enough to react because he argued that there was a need to break the silence and tacit acceptance of this sort of improper use of public funds.

The second article was published in October 1999 in the consumer choice magazine, *Que Choisir*. The article focused on the failure of educational institutions to fix fire safety problems after they had received a notice from the safety commission. In early 1999, the journalist asked each prefecture to provide him with a copy of all the notices issued in 1998. Almost all the prefectures refused to provide the documents. The journalist then went to CADA who provided its opinion on 18 February 1999 saying that the documents fell within the scope of the law and were communicable. After receiving CADA's recommendation, 43 prefectures provided the documents, but a further 57 did not. Of those, 18 did not provide the information and 39 simply did not respond.<sup>15</sup> CADA's opinions are recommendations only, and are not binding on the administration. The journalist could have taken the 57 prefectures on appeal to the Tribunal Administratif, but chose not to.

### Lack of public awareness

Given the extent of the informal networks available to French journalists and the difficulties they have experienced when trying to use the French Fol law it is hardly surprising they prefer the former. During the time I was in France, CADA made no obvious attempt to interact with the media. This has an unfortunate impact on public awareness of Fol in France. French friends who did not work in the area did not know that they had a right of access to government documents. Many lawyers were also unaware of the possibilities of Fol.<sup>16</sup> Because the French legal system is divided into public and private jurisdictions, lawyers who work in the private law jurisdiction never have any reason to litigate against the government. Accordingly, private law lawyers I spoke with were utterly unaware of the French Fol law.

This lack of awareness of the French Fol law can be contrasted with the much greater awareness of the right to access personal files held by the administration. In France this is covered by a different law which regulates data collection and is monitored by a different body, the Commission Nationale de L'informatique et des Libertés (CNIL).<sup>17</sup> This body would appear to have a much more pro-active relationship with the press. During the same eight months there were at least 3 articles about the CNIL in one daily paper alone. One was a double page spread. The French media were also very concerned about issues of government accountability (or 'transparency'<sup>18</sup> as it is generally known as in France). The notion of transparency was used in the press in a wide variety of contexts, ranging from the accountability expected from the European Commission, to the allocation of public housing.<sup>19</sup> French friends I spoke with, (whether lawyers or not) immediately recognised the term 'transparency' and had their own definition of it. Discussion of these issues in the press clearly raised public awareness.

### Conclusion

The blame for the lack of public awareness of Fol in France can hardly be laid solely at the door of the press. Nonetheless, the absence of press coverage in France made me aware of its importance in Australia. Each story beginning with 'according to documents obtained under Fol', gives the Fol regime an excellent advertisement.<sup>20</sup> The article in the magazine *Que Choisir* went one step further and advised readers that they could verify the safety of the schools in their area by seeking access to

documents in the same way as the journalist who had written the article.<sup>21</sup> Even unsuccessful applications can be used in a story about the deficiencies of the Fol legislation. This increases the chances that the public will be familiar with Fol, be prepared to use it themselves or fight to preserve it. The Victorian election showed that public concern when expressed at the ballot box can put Fol at the top of the political agenda.<sup>22</sup> While Australians complain (and rightly so) about the difficulties the media faces in using Fol laws, it should not be forgotten how powerful regular press coverage of Fol can be.

### ANINA JOHNSON

*This paper is based on work done as a Master of Laws (by thesis) student at ANU. The author would like to acknowledge the assistance of the Lionel Murphy Foundation.*

### References

1. The law of 17 July 1978 relating to assorted measures to improve relations between the administration and the public and assorted measures of an administrative, social and fiscal nature (hereafter, the French Fol law): *La loi du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses mesures d'ordre administratif, social et fiscal*.
2. Articles 1, 2 and 6 of the French Fol law.
3. Commission d'Accès aux Documents Administratifs, *L'Accès aux Documents Administratifs*, Report No. 5, 1988, p.18.
4. Laveissère, J., 'Reflexions sur la Pratique Administrative' in Centre Universitaire de Recherches Administratives et Politiques de Picardie (ed.), *Information et Transparence Administratives*, 1988, p.163.
5. Commission d'Accès aux Documents Administratifs, *L'Accès aux Documents Administratifs*, Report No. 3, 1984, p.11.
6. Waters, N., *Print Media Use of Freedom of Information Laws in Australia*, Centre for Independent Journalism, University of Technology, Sydney, 1999. The stories related to the waterfront dispute and the extent of federal government involvement with the stevedoring company Patricks, the High Court Chief Justice's letter of complaint to the Deputy Prime Minister about lack of support, travel allowances paid to Federal MPs, the salary levels of senior executives of the Sydney Olympics committee, overseas study tours by politicians and police staffing levels in rural areas of NSW.
7. The *Age* journalists made five requests, while there were none from AFR. The *Age* also used information gained by opposition MPs on 56 occasions and the AFR on 7. Waters, N., above, ref. 6.
8. Commission d'Accès aux Documents Administratifs, *L'Accès aux Documents Administratifs*, Report No. 3, 1984, p.11
9. Comment by journalist from the radio station France-Inter on 14 September 1999, discussing the leak of the report of the Dekeuwer-Défossez commission on family law reform prepared for the Garde des Sceaux. See also report by B. Grosjean in *Libération*, 15 September 1999, p.2.
10. *Libération*, 13 October 1999, p.9.
11. Known in French as a société d'économie mixte.
12. The Conseil Régionale.
13. The report of the Cour régionale des comptes, which is the regional equivalent of the Cour des comptes.
14. It was on page 9.
15. Blauwe, A d, 'Ecoles, l'insécurité incendie', (1999) 364 *Que Choisir* 14 at 15.
16. Commission d'Accès aux Documents Administratifs, *L'Accès aux Documents Administratifs*, Report No. 3, 1984, p.10.
17. National Commission for Computerisation and Freedoms.
18. The French term is 'transparence'.
19. *Le Monde*, 17 March 1999, p.20; *Libération*, 26 May 1999, p.17.
20. Snell has drawn attention to this in an Australian context, Snell, R., 'In Search of the Freedom of Information Constituency: Case 1 — the Media', (1998) 78 *Fol Review* 81 at 82.
21. Blauwe, A d, 'Ecoles, l'insécurité incendie', (1999) 364 *Que Choisir* 14 at 20.
22. The speech by the Governor Sir James Gobbo at the opening of the Victorian parliament on 3 November 1999 promised that the Labor government would strengthen the Freedom of Information Act: the *Age*, 4 November 1999, p.1.

# VICTORIAN FoI DECISIONS

## VCAT

### GARBUTT and DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT (No. 1997/62239)

**Decided:** 14 December 1998 by Davis PM.

*Section 28(1) (Cabinet documents) — Section 32 (legal professional privilege) — Section 50(4) (public interest override) — Section 33(1) (personal affairs) — inadvertently released documents.*

#### Factual background

In 1997, the Ministers for the Department of Natural Resources and Environment established nine Catchment Management Authorities (CMAs). Each of the CMAs was to be managed by a Board made up of nine appointed members. These 81 positions had been advertised on the basis that the applications would be treated in confidence. The applicant, Garbutt, was concerned about the quality of people who had been appointed to the CMAs and the process for their selection.

#### Procedural history

On 30 June 1997, Garbutt applied to the Department for documents concerning the establishment and appointment of people to the CMAs. Some documents were released but, at the hearing, 16 documents remained in dispute. These documents comprised:

- one document prepared by two government ministers which contained a submission supporting the proposed appointments and a summary of the proposed appointees' details and resumés (the Ministerial Document);
- three ministerial briefing notes relating to the appointment of members to the Boards of the CMAs (the Briefing Notes);
- two preliminary documents used for the purpose of preparing briefing notes and Cabinet submissions concerning appointments to the CMAs (the Preliminary Documents);
- two documents containing summaries of legal advice given

by the Department's solicitor (the Legal Summaries); and

- eight documents containing information about people who had shown interest in obtaining membership of the CMAs, including people who had submitted applications for membership (the Membership Documents).

At the hearing, Garbutt alleged that the Department had not identified all relevant documents. The Department denied this allegation. The Tribunal ruled that it was not competent to investigate this allegation further, noting that 'it was a matter for the Ombudsman'.

#### The decision

The Tribunal affirmed the Department's decision except in relation to one page of a document which had been inadvertently released previously.

#### The reasons for the decision

##### *Section 28(1)(b)*

The Tribunal accepted the Department's evidence that the Ministerial Document was created for the purpose of submission for consideration by the Cabinet. The document was also said to relate to issues that had been before the Cabinet concerning the appointment of members of the Boards of the CMAs. The document was therefore held to be exempt under s.28(1)(b).

##### *Section 28(1)(ba)*

The Briefing Notes had been partially released. In relation to those parts which had not been released, the Tribunal found that the documents were prepared for submission to two government ministers. The documents were held to be exempt under s.28(1)(ba) on the basis that they were prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.

The Department claimed that the Preliminary Documents were prepared by a team of officers who evaluated the applications against the criteria for selection. The documents were created as part of the preliminary process of preparing ministerial

briefings and Cabinet submissions concerning the making of appointments to the CMAs. The Tribunal accepted that these documents were exempt under s.28(1)(ba) as they were prepared for the purpose of instructing or informing the Minister in relation to issues to be considered by Cabinet.

##### *Section 32*

The Legal Summaries had been partially released. The parts remaining in dispute contained a summary of legal advice provided by legal advisers to the Department with respect to the establishment of the CMAs. Garbutt claimed that legal professional privilege did not apply to the documents because the documents only summarised the legal advice; as such, the advice was not being given by a solicitor to a client. The Tribunal rejected Garbutt's submission, preferring the view that a summary of legal advice given to a client is also privileged.

The Tribunal also rejected Garbutt's submission that the Department could not claim privilege because it is not a legal person. According to the Tribunal, the Department is a readily identifiable entity which is capable of being a respondent in an FoI action. The Tribunal considered that it would be 'artificial' and 'ridiculous' if an entity which was capable of being a party to FoI litigation could not claim legal professional privilege pursuant to the *FoI Act*.

##### *Section 50(4)*

Having established that the legal summaries were exempt under s.32, the Tribunal went on to consider whether the public interest required that access to those documents be granted. The Tribunal found that the public interest would not be furthered by release of the documents because the matters contained in the documents did not relate to Garbutt's concerns.

##### *Section 33(1)*

The Membership Documents contained information including lists of names, random samples of applications and resumés, and random

samples of Declarations of Private Interests submitted by applicants.

The Tribunal accepted that these documents contained personal information within the meaning of s.33. The Tribunal rejected Garbutt's submission that, with a number of the documents, it should be possible to remove matters from those documents which identify the people concerned, and release other parts of the documents. The Tribunal observed that the documents often related to people living in small rural areas and it would be possible to identify them from such information as the type of organisations to which they belong.

The Tribunal also accepted that it would be unreasonable to disclose the documents. It did so for three main reasons:

- the Tribunal was of the opinion that it would be extremely detrimental to the people of Victoria if applicants for public positions could not rely on a promise made by the government to keep such applications completely confidential. In particular, the Tribunal was concerned about the impact on applicants' present employment if their unsuccessful applications were made public;
- the Tribunal was also very concerned that disclosure of private affairs such as financial interests would lead to people being reluctant to apply for public positions in future (and, as a result, the people of Victoria may not have the best people serving them);
- the Tribunal observed that the fact that some people may be dissatisfied with the type of people appointed did not justify breaking a promise as to confidentiality.

#### *Inadvertent disclosure*

One page of the documents in dispute had been inadvertently sent by the Department to Garbutt. The Department argued that even though the document was sent to Garbutt and she could do what she wished with that document, it should still be an exempt document and not released. The Department relied on a decision relating to s.28 by the former AAT which found that:

It is the status of the document ... that makes it an exempt document. Even if it contains matters that are in the public knowledge, however that comes about, that does not deprive it of its exempt status. We are not persuaded by the appli-

cant's submission that public knowledge of the document excludes it from exemption. (*Batchelor and Department of Premier and Cabinet* unreported, Judge Fagan P and Coghlan M, 29 January 1998).

The Tribunal distinguished that decision on the basis that the public did not merely have knowledge of the document: the first page of the document was in public hands. The Tribunal observed it would be ridiculous if Garbutt could distribute copies of the document to every Victorian household and yet it remained an exempt and confidential document. The Tribunal found that the reality of the situation was that the document had been released and could no longer be exempt. The Tribunal therefore ordered the release of page 1 of the document.

Garbutt claimed that the release of another document had enabled her to deduce one of the names referred to in two of the membership documents. The Tribunal rejected her submission that the parts of those documents which revealed the name should also be released. Those documents were held to be documents of which Garbutt may have had knowledge but of which the public did not have possession. The Tribunal confirmed that public knowledge of the document 'does not exclude the exemption'. The Tribunal therefore held that the two documents should remain exempt.

#### **Comments**

1. The Tribunal's decision that inadvertent release of a document precludes it from exemption appears at odds with the Commonwealth AAT position. In *Re Scholes and AFP* (1996) 44 ALD 299, the Full Tribunal held that the inadvertent release of Australian Federal Police documents to an applicant did not destroy any claim for exemption in relation to those documents. In my view, the decision of the VCAT more accurately reflects the reality of a situation in which a document containing personal information is inadvertently released. Theoretically, the status of certain documents, such as Cabinet documents, allows them to be exempt and this status may not be altered by inadvertent release. This status does not, however, attach to all documents which are claimed to be exempt. In relation to documents affecting personal privacy, inadvertent release of the documents could effectively destroy the basis of the exemption,

namely the maintenance of privacy. If such released documents became publicly available, it would indeed be 'ridiculous' if the documents were still considered capable of exemption.

2. The Tribunal placed great emphasis on the government's promise to applicants to keep their applications confidential. The Tribunal observed that release of information despite a promise of confidentiality might deter the best applicants from running for government positions. In my view, rather than encourage the best applicants to apply, such a situation enables sub-standard applicants to avoid public scrutiny. If too great an emphasis is placed on the government's promise to retain confidentiality, few government activities could be subject to appropriate public examination. A promise of confidentiality, which can be made with ease, should only be one of many factors in determining whether documents are exempt.

[S.T.M.]

#### **THWAITES and DEPARTMENT OF HUMAN SERVICES (No. 1997/060196)**

**Decided:** 15 December 1998 by Nedovic M.

*Section 30(1) (internal working documents).*

#### **Factual background**

In 1996 the government asked the Department of Human Services to identify Health Care projects that could be appropriate for private sector funding. As a result, the Department created a document consisting of a draft 'wish list' for private sector projects (the Document). The Document was used as a starting point for departmental discussions on the topic. It was not designed to be a final submission or plan, and was subsequently superseded by a publicly announced government policy.

#### **Procedural history**

On 14 July 1997, Thwaites requested access to all documents relating to the possible private sector development or involvement in the proposed new integrated care centres. Thwaites applied to the Tribunal for a review of the Department's deemed decision to refuse access to the documents sought. Prior to the hearing, the Department identified the Document as the only document in dispute.

It claimed that the Document was exempt under s.30 of the Act.

### The decision

The Tribunal affirmed the decision of the Department in all respects.

### The reasons for the decision

#### *Section 30(1)*

The Tribunal found that the Document contained matter in the nature of opinion, advice or recommendation prepared in the course or for the purpose of the deliberative processes involved in the Department's functions. The Tribunal also found that the Document did not contain purely factual material and that the Document could not be disclosed in part.

The Tribunal then went on to consider whether it would be contrary to the public interest to disclose the Document.

The Tribunal observed that it is necessary for the Department to show 'not that the public would not benefit by the release of the document, but rather that it would be contrary to the public interest for the document to be released, in that release would harm the public interest in some way'. The Tribunal rejected Thwaites' submission that it must be satisfied to an extreme degree of satisfaction that public harm would follow before concluding that the Document is exempt. It did accept, however, that the standard of satisfaction required should 'reflect the seriousness of the issue in question'.

In the present case, the Tribunal was satisfied that disclosure of the Document would be contrary to the public interest. It reached this conclusion for four reasons. First, the Document was a draft designed by its authors to be used as a discussion paper. It was used as a 'starting point' for discussions, and contained 'preliminary thoughts'. Secondly, disclosure had the potential to lead to unnecessary debate and confusion resulting from the possibilities considered in the Document, particularly since the Document had been superseded by publicly announced government policy. Thirdly, disclosure would not fairly disclose the reasons for the decision ultimately taken, and may prejudice the integrity of the decision-making process by undermining the certainty of announced government policy. And fourthly, disclosure could unsettle

persons, create controversy and lead to wrong conclusions being drawn.

[J.D.P.]

### HULLS and PARKS VICTORIA (No. 1998/79473)

**Decided:** 10 February 1999 by Davis SM.

*Section 50(2) (jurisdiction of the Tribunal).*

### Procedural history

On 15 June 1998, Parks Victoria received a request from Hulls seeking access to:

All documents concerning travel to Tasmania in July 1997 by Mr Jeff Floyd and any parties accompanying him, including itineraries, travel requisition and allowance forms, briefing notes, correspondence, facsimiles and emails.

Parks Victoria released two documents to Hulls but claimed that the remaining four documents were exempt under ss.30 and 34 of the Act. Hulls appealed to the Tribunal and, after the appeal had been lodged, Parks Victoria claimed that the four documents fell outside the terms of the request. This claim was made on the basis that the documents did not concern Mr Floyd's travel to Tasmania; rather, they concerned what transpired *in* Tasmania.

Parks Victoria submitted that the matter should be dismissed on the basis that the Tribunal no longer had jurisdiction to deal with the documents in dispute. The matter was set down for a preliminary hearing to consider this jurisdictional issue.

### The decision

The Tribunal found that it had jurisdiction to deal with the documents in dispute.

### The reasons for the decision

#### *Section 50(2)*

Parks Victoria contended that the phrase 'in accordance with a request' in s.50(2)(a) limited the Tribunal's jurisdiction so that it can only review refusals to grant access to documents that actually fall within the terms of a request. The Tribunal rejected this contention. It held that its jurisdiction is to review a decision refusing access to documents in accordance with a request where the request for access complied with s.17 of the Act. Thus, the Tribunal did not 'lose' jurisdiction because Parks Victoria formed the view, after

the appeal had been lodged, that the documents fell outside the terms of the request.

*The documents fell within the terms of the request*

In any event, the Tribunal found that, when read as a whole, the request extended to documents concerning the substantive issues considered in the course of the travel and not merely the technical matters and timetabling of that travel. According to the Tribunal, the words 'concerning travel to Tasmania' did not limit the ambit of documents to the mechanics of the travel to and from Tasmania 'but carried with it the reference to what occurred in Tasmania'.

### Costs

Hulls sought an order for costs on the basis that the application had no substance and that 'it was a waste of time'. The Tribunal felt that the appropriate course was to order that the costs of the preliminary hearing be costs in the cause.

[J.D.P.]

### MILDENHALL AND DEPARTMENT OF EDUCATION (No. 1998/026420)

**Decided:** 9 April 1999 by Senior Member Lyons.

*Sections 25A and 53 (jurisdiction of the Tribunal).*

### Procedural history

On 17 March 1998, Mildenhall requested access to certain documents. On 11 May 1998, Mildenhall applied to the Tribunal under s.53(1) for a review of the deemed decision to refuse access to the documents sought.

On 29 July 1998, the respondent Department wrote to Mildenhall stating that:

- (a) at the final hearing, the Department would seek to justify the deemed decision to refuse access by relying on s.25A of the Act (that is, on the basis that the request is voluminous); and
- (b) in the Department's view, the notification and consultation requirements in s.25A(6) did not apply in the context of a deemed refusal and that the Department may simply seek to justify the refusal of access to the documents on the basis of s.25A(1).

On 11 January 1999, the parties requested by consent that the matter be set down for a preliminary hearing on the following issue:

Whether where the respondent has given a deemed refusal of access in accordance with Section 53 of the Freedom of Information Act 1982 and relies upon Section 25A(1) as the basis of the deemed refusal it is required to undertake the procedures described in Section 25A(6).

At the preliminary hearing, the Department conceded that the requirements set out in s.25A(6) are necessary pre-conditions to the making of an *actual decision* under s.25A(1). It submitted, however, that it had not made and was not seeking to make an *actual decision* under that section. Rather, it was seeking to justify the *deemed decision* to refuse access by relying upon s.25A of the Act. Put another way, the Department was seeking to persuade the Tribunal to affirm the deemed decision on the basis of s.25A.

Accordingly, the true question for determination was whether the Tribunal could affirm the deemed decision on the basis of s.25A(1). This, in turn, required the Tribunal to determine whether it could make a decision under s.25A(1) when reviewing a deemed refusal.

### The decision

The Tribunal decided that it did not have the power to make a decision under s.25A(1) on a deemed refusal application and, as such, ordered that the respondent could not rely upon s.25A(1) to justify a deemed refusal.

### The reasons for the decision

Broadly speaking, there were three main reasons for the Tribunal's decision.

First, the Tribunal observed that the Department was deemed to have made a decision and, in such circumstances, it was not open to the Tribunal to entertain any steps that were a precondition to the making of a further decision. According to the Tribunal, it is erroneous to view s.53(1) of the Act as a machinery provision, adding that 'the deemed refusal decision has a finality to it that does not allow the Tribunal to exercise the agency's powers under section 25A(1)'.

Second, the Tribunal observed that if it could exercise the agency's power under s.25A(1) on a deemed

refusal decision, this would allow an agency to frustrate the scheme inherent in ss.25A(1) and (6), 'that is, that section 25A(1) can only be invoked once the steps in section 25A(6) have been implemented'.

And third, the Tribunal observed that if it could exercise the agency's power under s.25A(1) on a deemed refusal decision, an agency could, if it so desired, "string out" the handling of every broad-ranging request for documents that it received'. The Tribunal noted that an agency wishing to conduct its affairs in this way (or an inefficient agency with poor document management practices) could:

- take no action to process the requests within the section 21 time-frame;
- be content to have 'deemed refusal decisions' made under section 53(1) when applicants sought reviews;
- claim section 25A(1) as the reason for such deemed refusal decisions; and
- seek to persuade the Tribunal to make actual decisions under section 25A(1), which would require the Tribunal to ensure that the agency first complied with section 25A(6).

### Comment

Importantly, the Tribunal's decision is confined to a finding that the Tribunal cannot make a decision under s.25A(1) on a deemed refusal application. The Tribunal did not decide whether an agency could make an actual decision under s.25A(1) after a deemed refusal application has been lodged. In my view, the answer to this question (which could have significant ramifications for agencies) has not been determined.

[J.D.P.]

### THWAITES and DEPARTMENT OF HUMAN SERVICES (No. 1998/92157)

**Decided:** 15 April 1999 by Deputy President Coghlan.

*Section 28 (Cabinet documents).*

### Procedural history

On 14 August 1998, Thwaites sought access to all documents relating to the tendering out of the privatisation proposal for the Austin and Repatriation Medical Centre. The respondent Department of Human Services provided access to a number of documents but claimed that eight ministerial briefing notes were exempt. Thwaites applied to the Tribunal for review and, at the

hearing, three of the briefing notes remained in dispute.

### The decision

The Tribunal affirmed the Department's decision in all respects.

### The reasons for the decision

#### *Section 28(1)(ba)*

The Tribunal accepted that one of the briefing notes was prepared for the purpose of briefing the Minister on a matter that was to be considered by the Cabinet itself. Accordingly, the Tribunal found that this briefing note was exempt under s.28(1)(ba).

#### *Section 28(1)(d)*

The Department claimed that the remaining two briefing notes (which had been released in part) were exempt to the extent that they contained details of a decision of the Cabinet or of a Sub-committee of Cabinet.

The Tribunal accepted the Department's evidence and found that the documents were exempt under s.28(1)(d). The Tribunal rejected Thwaites' submission that the Department's evidence was 'quite unsatisfactory'. It also found that 'whilst the issue of a certificate under s.28(4) would have put the matter beyond doubt,' the lack of such a certificate did not mean that it 'should not be satisfied on the evidence that the exemption under s.28(1)(d) had been made out'.

[J.D.P.]

### RICH and VICTORIA LEGAL AID (No. 1998/79614)

**Decided:** 3 May 1999 by Deputy President Galvin

*Section 32 (legal professional privilege) — Section 50(4) (public interest override).*

### Factual background

Rich sought legal aid from Victoria Legal Aid (VLA) in relation to his application for special leave to appeal to the High Court. VLA obtained in-house legal advice on the legal merits of that application. That advice was in the form of a written memorandum (the Memorandum). VLA refused Rich's application for legal aid on the basis that it did not consider that his special leave application had merit.

### Procedural history

Rich sought access to all documents relating to his application for legal

aid. At the hearing, the Memorandum was the only document remaining in dispute. VLA claimed that the Memorandum was exempt under ss.30 and 32(1).

### The Tribunal's decision

The Tribunal affirmed the decision of VLA in all respects.

### The reasons for the decision

#### Section 32(1)

The Tribunal accepted that the sole purpose of the Memorandum was the provision of legal advice by an in-house lawyer to another division of VLA. Accordingly, the Tribunal found that the Memorandum fell within the terms of s.32(1) of the Act.

Indeed, the Tribunal found that the Memorandum was so clearly exempt from disclosure pursuant to s.32 of the Act that there was no need to consider whether the second ground of exemption, s.30 of the Act, had application.

#### Section 50(4)

Section 34 of the *Legal Aid Act 1978* (Vic.) makes provision for request for reconsideration of a decision to refuse legal aid. In the event of a person being dissatisfied with the result of such reconsideration he or she may apply in writing to VLA under s.35 for review of the matter by an independent reviewer whose decision is final. The Tribunal held that ss.34 and 35 provided a mechanism for review which may be seen to satisfy any public interest issue which might arise. The Tribunal also observed that there was no evidence of any relevant public disquiet or of any need for the clearing of the air in relation to the administration of legal aid. And, in any event, the Tribunal found that the public interest, to the extent that there was an interest in the question of the administration of legal aid, was not served by release of the particular legal advice in this case.

[R.B.T.]

### MARSHALL and COUNTRY FIRE AUTHORITY (No. 1999/10037)

**Decided:** 5 October 1999 by Senior Member Ball.

#### Section 34 (business affairs).

### Procedural history

On 25 November 1998, Marshall requested access to a complete copy of the CFA's 'master filing index/register including but not limited to file names, opening and closing dates and file locations'. The CFA refused access to the documents sought and Marshall applied to the Tribunal for a review of that decision.

After the application for review had been filed (but before the hearing), the CFA offered to provide the information sought on two electronic floppy disks (the Disks) with the names of all individuals and companies deleted. Marshall was prepared to accept this offer if the names of the companies were not deleted. The CFA maintained that these names could not be disclosed unless it first consulted the various companies under s.34(3). And, according to the CFA, such a consultation process would substantially and unreasonably divert its resources from its other operations. Accordingly, it relied upon s.25A(1) of the Act to refuse access to the Disks.

### The decision

The Tribunal ordered the release of the Disks with the names of individuals deleted.

### The reasons for the decision

#### Section 34

Section 34(1)(b) relevantly provided that a document is an exempt document if:

- (1) its disclosure under the Act would disclose information 'acquired by' an agency or a Minister from a business, commercial or financial undertaking; and
- (2) the disclosure of that information would be likely to expose the undertaking to disadvantage (see Comments below).

Section 34(3) requires the agency or Minister to consult the undertaking 'which has supplied the relevant document or documents'. Such consultation must occur before the agency or Minister decides whether the disclosure of the information

would be likely to expose the undertaking to disadvantage.

The Tribunal concluded that the information on the Disks (with the names of individuals deleted) could not be regarded as information of the nature referred to in s.34(1). Although the matter is not free from doubt, it would appear that the Tribunal reached this conclusion on the basis that the information was not 'acquired by' the CFA from the companies: see *Re Thwaites and Department of Human Services* (1999) 15 VAR 1. Since the information on the Disks fell outside s.34(1), the obligation to consult the companies under s.34(3) did not arise, which meant that the CFA could not rely on s.25A(1). Accordingly, the Tribunal ordered the release of the Disks with the names of individuals deleted.

### Comments

#### Section 34(1)

The *Freedom of Information (Miscellaneous Amendments) Act 1999*, which commenced operation on 1 January 2000, amended s.34(1). That section now relevantly provides that a document is an exempt document if:

- (1) its disclosure under the Act would disclose information 'acquired by' an agency or a Minister from a business, commercial or financial undertaking; and
- (2) the information relates to:
  - (a) trade secrets; or
  - (b) other matters of a business, commercial or financial nature the disclosure of which would be likely to expose the undertaking unreasonably to disadvantage.

#### Section 34(3)

Counsel for Marshall argued that the obligation to consult under s.34(3) only arose where the document sought was *itself* provided to the agency by the undertaking. The obligation did not arise, so the argument ran, where the document sought was created by the agency yet contained *information* provided by the undertaking.

Unfortunately, the Tribunal did not comment on this argument which is clearly supported by the literal words used in s.34(3). Yet it is very difficult to see why, as a matter of policy, a distinction should be drawn between *documents* provided to the agency on the one hand, and *information*

provided to the agency on the other. In both cases the agency ought to consult the third party and the third party ought to have the right to make a 'reverse FoI' application if the agency makes a decision adverse to that party's interests.

In my view, the fact that s.34(3) arguably requires the above distinction to be drawn highlights the fact that the consultation provisions in the Act are inadequate. It may be hoped that the Bracks government, which has expressed a commitment

to reform the Act beyond the reforms introduced by the *Freedom of Information (Miscellaneous Amendments) Act 1999*, will in fact amend s.34(3) (and its counterpart, s.33(3)) to strengthen the position of third parties in Victoria.

[J.D.P.]

## FEDERAL FoI DECISIONS

### Administrative Appeals Tribunal

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[N.D.]

#### DALE and AUSTRALIAN FEDERAL POLICE (AFP) (No. N96/897)

**Decided:** 24 September 1997 by Deputy President McMahon.

**FOI Act:** Sections 27A; 37(1)(b); 37(2)(a); 41(1).

**AAT Act:** Section 26.

*Application by author/researcher for access to documents concerning murdered prostitute and AFP informant; 'unreasonable' disclosure of personal affairs documents; alteration of a decision after AAT application is made.*

#### Decision

The AAT affirmed the decision, upholding the exemptions claimed by the AFP but varied the decision in respect of documents made available to Dale after the AAT application was made.

#### Facts and background

Dale was writing a book and an academic thesis about the murdered

prostitute Sallie-Anne Huckstepp. Ms Huckstepp was an AFP informant at the time of her death in 1986. She met regularly with Constables Muir and Smith who pretended to be corrupt in order to obtain information from Ms Huckstepp. Constable Smith admitted to having been involved in a sexual relationship with Ms Huckstepp for several months immediately prior to her death.

After submitting an initial FoI request which was widely couched, Dale narrowed the request to seek access only to those documents specifically referring to Ms Huckstepp or her 'employment' by the AFP.

The AFP released some documents with deletions for which exemptions were claimed and also claimed other documents were wholly exempt. The provisions under which the exemptions were sought were ss.37(1)(b), 37(2)(a) and 41(1).

#### Findings on exemption claims

##### Section 37(1)(b)

The documents for which exemption was claimed consisted largely of AFP information reports and an AFP hotline report. The documents revealed, on their face, the source of information provided to the AFP including the names of informants. The AFP gave evidence that information in these sorts of reports is normally kept confidential. One such document included a report of a telephone conversation in which the informant said he was concerned for his life.

The AAT upheld the exemption claimed. The essence of the s.37(1)(b) exemption is to preserve confidentiality for the administration of, in this case, the criminal law. Once that confidentiality is established, 'there is no more to be said'.

##### Section 37(2)(a)

The AAT upheld the exemption claimed. The AAT observed that the prejudice required for the application for this exemption is not confined to prejudice to a defendant.

There was evidence before the AAT that Arthur (Neddy) Smith was awaiting trial for Ms Huckstepp's murder. Smith's lawyers had been shown the relevant material and there was evidence that the lawyers expressed the view that the material would prejudice his case.

There was also evidence that, because of the notoriety of the case and media interest, there was a possibility that potential jurors would be influenced. This would detract from the effectiveness of both the prosecution and the defence.

Dale had indicated that he was prepared to withhold the information until after Neddy Smith's trial. He offered to have this as a condition of release. The AAT indicated clearly that this condition could not be accepted. It would be too difficult to enforce. Once a document is released to an applicant, it is released to the world (*Searle v Public Interest Advocacy Centre* 108 ALR 163 at 179).

##### Section 41(1)

Some of the exempt material concerned people who were unknown to the AFP. The AAT upheld the exemption because these people were only marginally involved and, in the context of a criminal investigation, disclosure of the personal information would be unreasonable.

Most of the information was from people known to the AFP. These included Ms Huckstepp's daughter who objected to release of personal information about her mother. The

AAT held that reference to a deceased person in s.41(1) must mean that the views of survivors must be able to be taken into account.

The AAT applied the test of reasonableness in *Colacovski's* case (100 ALR 111; (1991) 33 *Fol Review* 32), that is, it is essentially a public interest consideration. If disclosure is not relevant to public affairs of government and would only satisfy curiosity, disclosure would be unreasonable.

The AAT agreed with the unreasonableness test in *Scholes and AFP* (1999) 80 *Fol Review* 32: the onus is on the agency to advance material establishing unreasonableness; the mere fact of existence of personal information is not sufficient to establish unreasonableness; and in deciding whether to disclose, the AAT must balance competing public interests.

Dale had argued that the duplicitousness of the AFP officers constituted a public interest relevant to the affairs of government. The AAT rejected the alleged fact of duplicitousness because the material related to Constable Smith's admitted personal relationship with Ms Huckstepp.

Dale also argued that there was a public interest because of the notoriety of the case. The AAT rejected this on the grounds that notoriety alone did not constitute public interest.

The AAT noted that the material withheld under s.41(1) did not include the names of police. It is not the purpose of s.41(1) to protect 'the traditional anonymity' of public servants.

### Variation of decision — section 26 of the AAT Act

An agency cannot alter a decision after an application has been made to the AAT unless the parties consent. That consent occurred in this case. The AFP released further material after the AAT application was made and the AAT, accordingly, affirmed the decision under review subject to this variation.

### Comment

A notable feature of this decision is the clear analysis of the unreasonableness test for the purposes of s.41(1).

[N.D.]

### BAYLISS and DEPARTMENT OF HEALTH AND FAMILY SERVICES (No. Q97/726; Q97/727)

**Decided:** 10 October 1997 by Deputy President S. Forgie.

**Fol Act:** Sections 4, 22, 33, 37, 40, 41, 43, 45.

**AAT Act:** Sections 35, 37.

**Therapeutic Goods Act:** Sections 3, 4, 20.

**Other legislation:** *Customs Act 1901*; *Customs Administration Act 1985*; *Postal Services Act 1975*.

*Access to documents concerning therapeutic goods and their possible unlawful importation and supply; communications between agencies; possible effect on investigations; communications by an authority of a foreign government.*

### Decision

The AAT varied the decision under review by substituting its decision that parts of the documents were exempt and that some documents could be released, with deletions.

### Facts and background

Bayliss is a medical practitioner who was under investigation by the Department of Health and Family Services (DHFS) for possible breach of the *Therapeutic Goods Act 1989* which regulates importation and supply of certain therapeutic goods. Bayliss had been charged with importing and supplying cervical dilators in breach of the legislation.

Baylis submitted two Fol requests, one being for access to a very wide range of documents relating to the evaluation and listing of a variety of dilators while the other request was for access to correspondence between the DHFS and the Australian Customs Service.

At the time of the AAT hearing, Bayliss had been given access to five documents but a further eight documents (identified in both the decision and this summary as Documents 1 to 8) were claimed to be exempt. This decision dealt with seven of those eight documents, Document 4 being the subject of adjourned consideration.

### Findings on exemption claims

#### *Section 33(1)(b)*

Three documents were held by the AAT to contain material which was exempt because disclosure would

divulge confidential communications with authorities of a foreign government. Those three documents were:

A composite document comprising a communication from the Australian Customs Service to the respondent agency and a confidential communication from United States Customs to the Australian Customs Service (Document 5);

A document by the respondent agency to the Australian Customs Service discussing action and information received from the United States Food and Drug Administration (Document 6); and

A communication from the United States Food and Drug Administration to the respondent agency (Document 7).

The Tribunal was satisfied that all of the bodies mentioned above (whether Australian or United States) were 'authorities', even though 'authority' is not defined in the *Fol Act*. In view of its functions, each had the requisite 'stamp of government' upon it.

The AAT was satisfied on the facts that the relevant information had been communicated 'in confidence' for the purposes of s.33(1)(b).

#### *Section 37(1)(a)*

Four documents were held by the AAT to contain material which was exempt because disclosure would, or could reasonably be expected to, prejudice the conduct of an investigation. Those four documents were:

Correspondence from the Australian Customs Service to the respondent agency listing persons suspected of illegal importation (Document 1);

A letter by the respondent agency to the Australian Customs Service containing details of a present and a past investigation (Document 2);

A briefing note or report from the Australian Customs Service in Washington to its Canberra office containing some factual material but also details of enquiries being made pursuant to an investigation (Document 3); and

The document from the respondent agency to the Director of Public Prosecutions identifying subjects of investigation, sources of information and methods of enquiry (Document 8).

The exempt material consisted of the names, and associated information, of people who had been investigated

but who had not been charged; details of types of intelligence and its sources; and details about the focus of an investigation and methods of enquiry.

The AAT rejected the exemption claim in relation to details of people who had been investigated but for whom the time to bring charges had expired. Because there was no possibility of charges in these cases, there was no basis for finding an investigation could be prejudiced.

#### *Section 37(1)(b)*

The AAT upheld the confidential source of information exemption only in relation to one document (Document 8). This concerned information provided in confidence by an authority of a foreign government.

Other claims under this exemption were rejected because the AAT did not accept that the source of information was confidential. The fact alone that information has significance in an investigation does not of itself mean that it will necessarily have come from a confidential source.

#### *Sections 37(2)(b) and 37(2)(c)*

The AAT rejected claims based on protecting procedures for investigation and protecting public safety in relation to Document 1 on the basis of the contents of that document. Disclosure of self-evident procedures would not necessarily prejudice the effectiveness of those procedures. Similarly, disclosure of methods to protect public safety would not automatically prejudice the protection of that public safety.

#### *Section 40*

The AAT rejected exemption claims in respect of all seven documents that disclosure would prejudice the operations of agencies. Again this was based on the Tribunal's examination of the contents of the documents. While certain procedures may have been disclosed in some instances, the AAT was not satisfied that the effectiveness of the agencies would be prejudiced or diminished.

#### *Section 41*

The personal information exemption was claimed in respect of all seven documents but upheld only in relation to Document 1. The AAT considered that disclosure of personal information about people who had not been, or would not be, charged

would be unreasonable. The AAT considered it would be unfair to disclose suspicions which might never be acted upon, for whatever reason.

#### *Section 43(1)(c)*

The AAT upheld a claim in respect of Document 1 that disclosure of information about people identified in Document 1 could unreasonably affect them in their business or professional affairs. The AAT's reasoning was similar to that indicated above in respect of s.41.

#### *Section 45*

The AAT rejected the breach of confidence exemption claim in respect of all four of the documents for which it was claimed. On the evidence, the information contained in the documents had not been imparted in circumstances of confidence or it had not the necessary quality of confidentiality.

#### **Comment**

This was a case in which the DHFS appears to have claimed every exemption it possibly could, many of which were rejected by the AAT.

The decision reinforces the importance of being prepared to release documents with deletions rather than claim exemption for entire documents. In view of the small number of documents and small number of folios involved, the AAT considered that it was possible to make copies with exempt materials deleted.

[N.D.]

#### **KHOH and TELSTRA CORPORATION LTD (No. N96/1594)**

**Decided:** 21 January 1998 by Senior Member M.D. Allen.

**Fol Act:** *Sections 24A, 56(1).*

*Access to personal files; whether access extends to all documents referring to an applicant; reasonable steps to find a document.*

#### **Decision**

The AAT set aside the deemed refusal by the Telstra Corporation Ltd (Telstra) and substituted its decision under which Khoh was entitled to receive her personal file.

#### **Facts and background**

Khoh, who may have been confused about what she was entitled to regarding her personal file under the *Fol Act*, sought access in the

following terms: 'I am writing to request to view my personal files while I was employed by Telstra. I believe that under the *Freedom of Information Act* I have the right to obtain access to my personal records.'

Telstra was apparently unable to find Khoh's personal file until immediately prior to the AAT hearing. Because, presumably, no decision had been made, Khoh engaged the AAT's jurisdiction under s.56(1), the 'deemed refusal' provision.

There was some evidence that, at various times during Khoh's employment with Telstra, these two officers had had documents relating to Khoh on their own files or as loose documents.

Because of Telstra's inability to find Khoh's personal file until close to the AAT hearing, Khoh appears to have been suspicious of Telstra. There were, in particular, two officers of Telstra (one of whom had since ceased to be an employee of it) whom Khoh particularly wished to call as witnesses. One was on holidays and unavailable at the time of the hearing. The other had indicated before leaving Telstra that any papers he had concerning Khoh had been placed on her personal file before he ceased to be an employee.

#### **AAT decision**

The AAT accepted that Telstra had been unable to locate any documents other than those on Khoh's personal file, which had been given to her, by the time of the AAT hearing.

The AAT accepted that Telstra had taken all 'reasonable' steps, as required by s.24A, to find the relevant documents.

The AAT noted that even though there may have been within Telstra some documents referring to Khoh but not located on her personal file, she had been given access to her personal file in response to her *Fol* request. This was all that was required of the agency.

#### **Comment**

The *Fol Act* does not require an agency to search for documents beyond what is reasonable if such a search fails to find a document or if the document does not exist.

What constitutes 'reasonable' will depend on the particular circumstances.

[N.D.]

# OPINION

## 'The Ombudsman's Office is not subject to the Fol Act' — or is it?

In a matter recently before the VCAT, where the Office of the Victorian Ombudsman claimed that it was not subject to the Victorian *Fol Act* (the Act). This claim was presumably made in reliance upon the Freedom of Information Regulations 1998 (the Regulations). For the reasons set out below, it is my view that this claim is without substance.

### The Act

The Act applies to 'agencies' and Ministers. The word 'agency' is defined in s.5 to mean a 'department, council or a prescribed authority'.

The word 'department' is also defined in s.5 to mean a department within the meaning of the *Public Sector Management and Employment Act 1998* or an office specified in s.16(1) of that Act. The offices specified in s.16(1) include:

- (a) the Office of the Legal Ombudsman,
- (b) the Office of the Ombudsman, and
- (c) the Office of the Regulator-General.

It follows that the Office of the Ombudsman and the other two offices are 'departments' within s.5 of the Act. This means that they are 'agencies' within s.5 of the Act, which means that they are subject to the Act.

### The Regulations

At first blush, the Regulations appear to complicate the issue somewhat. This is because reg. 6 purports to exempt (ie exclude) a number of bodies from the operation of the Act. These bodies include: the Office of the

Legal Ombudsman, the Office of the Ombudsman, and the Office of the Regulator-General.

Regulation 6 is directly inconsistent with the Act insofar as it purports to exempt these offices. This is because the Act provides that they are 'departments' (and hence subject to the Act), whereas reg. 6 purports to exempt those offices from the operation of the Act.

It is a fundamental principle of statutory interpretation that regulations are invalid if they contradict or are repugnant to the Act under which they were made.<sup>1</sup> Accordingly, it is my view that reg. 6 is invalid to the extent that it purports to exempt the above offices from the operation of the Act. It follows from this submission that the Office of the Ombudsman and the other two offices are subject to the Act notwithstanding the Regulations.<sup>2</sup>

### Conclusion

It is unusual to find a regulation that directly contradicts a provision of the Act under which it was made.<sup>3</sup> Nevertheless, that is the position with the Regulations. It may only be hoped that the three offices in question are made aware that the apparent 'protection' offered to them by the Regulations is wholly ineffective, and that they must therefore put proper procedures in place for the handling of requests made under the Act.

**JASON PIZER**  
Victorian Bar

### References

- 1 Pearce and Argument, *Delegated Legislation in Australia*, 2nd edition, Butterworths, p.200.
- 2 There is a doubt as to whether the Act authorises the making of the Regulations in the first place. See Kyrrou and Pizer, *Victorian Administrative Law*, LBC Information Services, looseleaf service, at [2695/8].
- 3 Pearce and Argument, above, p.200.

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