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Comment

The path of FoI reform still continues in Australia and internationally. The first article is an overview of changes to Finnish FoI with the Access to Official Documents Act 1999. The Finnish reforms to a 1952 Act highlight the necessity for continual work on access to information rather than relying on a single piece of legislation achieving greater access overnight. The second article is a critical overview of the Senate Legal and Constitutional Legislation Committee Inquiry. Readers will be well aware of my mounting frustration over the treatment, at the Commonwealth level, of the ALRC/ARC reforms. The title of my article, on the Senate Inquiry, indicates that rather than being lost without trace at least Senator Murray's private member's bill has kept the ALRC/ARC on the agenda.

The NSW Parliamentary Committee on the Ombudsman has announced an inquiry into the NSW *Freedom of Information Act*. A background paper by Abigail Rath*, Freedom of Information and Open Government*, has been produced by the NSW Parliamentary Library Research Service (No.3 of 2000). I would urge all readers to make a submission to this inquiry. As you will see in my article on the Senate Inquiry too few people contributed to that process and it would be useful for more journalists, academics and applicants to let the Committee know how the NSW Act operates and what could be reformed.

Meanwhile the Canadian Access to Information Review Task Force is still conducting its review of the *Access to Information Act*. The Access to Information Task Force has developed a consultation paper on reform of the Access to Information Act, Alasdair Roberts has posted the consultation paper (in PDF format) on his website: <http://update.foilaw.net>. There are also some additions to the Task Force's own website, including an html version of the consultation paper. Their web address is: <http://www.atirtf-geai.gc.ca/>. The Task Force and responsible Minister have come under strong criticism for not revealing their views on a number of previous proposals for reform. In the period before the next issue of the *FoI Review* I will be spending a few days in Ottawa consulting with the Task Force so should be able to provide an update on Canadian developments from an Australian viewpoint.

Over the past 12 months my email inbox has been increasingly filled by requests for interviews or information from journalism and law students set assignment topics on freedom of information. This trend has been pleasing because, from my own experience, undergraduate research projects often lead to a life-long interest in the topic you were assigned. In addition a number of law, journalism and public administration postgraduates have contacted me about their research topics. Hopefully this spread of undergraduate and postgraduate research interest will see a renewed and cross-disciplinary interest in freedom of information by the Australian academy.

Rick Snell

Right of access to documents: new Finnish legislation

Summary

Detailed rules governing access to administrative documents are laid down in the new Act on Access to Official Documents of 1999. The Act is based on the principle of general access to official documents, denoting an assumption of openness. The openness principle as such is the same as in the old access act of 1952 but the regulatory framework has been updated.

Under the new Act the authorities have not only the duty to respond to requests for access, they have also an active obligation to provide information and promote openness. For this purpose, they must produce guides, statistics and other publications, as well as information materials on their services and practices and on the social conditions and developments in their field of competence. Good practice on information management is a new concept denoting the obligation to see to the appropriate availability, usability, protection, integrity and other matters of quality pertaining to documents and information management systems.

Background of the new legislation

The principle of access to government documents has a longstanding tradition in Finnish law dating back to a constitutional enactment from 1776 when Finland was under Swedish rule (Act on the Freedom of Publishing and the Right of Access to Official Documents). While it is true that this constitutional principle of openness has been interpreted and applied in a varied manner, narrowly and less narrowly, the principle itself has prevailed over the centuries, albeit without the support of detailed legislation governing access to government information.

The era of modern access legislation cannot, however, be said to have been formally initiated until in 1952 when the Act on Access to Documents in Public Administration was adopted. The Act was expressly based on the presumption of openness and, for the first time, it provided for a general statutory right of free access to official administrative and judicial documents. Under this Act, while access to draft documents could be obtained at the discretion of the authority, secret and internal documents were exempt from free access. The 1952 Act was amended several times to include, for example, provisions granting the party in administrative proceedings broader access and also in order to update the concept of document to cover other than paper documents.

Gradually criticism of the old Act grew for a number of reasons: the grounds of secrecy were defined quite broadly leaving plenty of lee-way for the authorities to apply them in a secretive fashion; openness of the preparatory stages of decision-making procedure was considered unsatisfactory because the grant of access to draft documents was discretionary; transparency of issues related to EU decision making was limited; the concept of official document had failed short of the development of information technology; the accommodation of privacy with openness was vaguely regulated etc.

These and similar reasons led to the project of reforming the access legislation. A constitutional reform and update of the basic rights catalogue in 1995 gave additional impetus to the ongoing drafting of a completely new law. In this reform, access to administrative documents was defined as a fundamental constitutional right and openness consequently gained the status of a constitutional principle.

The government Bill of 1998 was based on intensive preparation in which an accommodation of two competing concerns proved to be crucial. On the one hand, the principle of general access to government-held information should be defined clearly and so that it would also be easy to make the principle function effectively in practice. On the other hand, the drafters had to consider strong opinions quite unfavourable to increased openness. Among the proponents of narrower concept of openness were several government departments and the Central Bank. They insisted on limiting the applicability of the access legislation mainly by defining the grounds of secrecy more extensively.

The accommodation of these two (there were others, to be sure) leading considerations found a less satisfactory result in the text of the Bill. Consequently, it was subjected to strong criticism in the Parliament. One of the main points in the parliamentary criticism was that the grounds of secrecy were far too open-ended and that no compelling reasons could support narrowing openness as much as was proposed. A broadly defined catalogue of grounds of secrecy could also jeopardise the public nature of judicial proceedings. A further point voiced in the Parliament's deliberations emphasised the constitutional principle of openness and insisted that the discretionary powers of the authority should be more expressly constrained in all cases where the result could be a negative answer to a request to gain access.

As a result of the comprehensive critique, the Parliament decided to make considerable amendments to the Bill. For instance, a majority of the provisions concerning secrecy were actually rewritten in a more exact way. All the amendments had the objective of giving more precision to the provisions of the Act and extending the scope of openness. In this respect, the alterations were clear improvements. However, some provisions still remain open to considerably differing interpretations and the structure of the Act is rather complicated which is unlikely to facilitate its application.

The new Act entered into force on 1 December 1999. It is only in the long term that it will be possible to determine to what extent it brings about a genuine reform of the right of access to information. Initially this will, of course, depend predominately on how the authorities will apply it. Active information seekers and the future case law will gradually also have an impact on the availability of information and its limits.

Principle of general access to information held by public authorities

The right of access to official documents is included as a fundamental right in the new Constitution Act of 1999.[1] Section 12(2) lays down the principle of openness and the right of access to government documents:

> The documents and other records in the possession of public authorities shall be public unless their publicity has been separately restricted by Act of Parliament for compelling reasons. Everyone shall have the right to obtain information from public documents and records.

Judicially, and particularly from the point of view of the normative hierarchy, it is significant that the principle of open access to administrative and judicial documents has been defined as a basic constitutional right and not merely an interpretative principle. Access to government-held

information in a recorded form enjoys a constitutional status. Right of access may thus be invoked by anyone regardless of citizenship or the purpose for which that right is exercised. Since access to documents and other records is a basic right it also takes precedence over ordinary legislation. For instance, if the application of a statute would be in evident conflict with the access right, the access provision in the Constitution would be given primacy in judicial proceedings concerning that application.

Together with the guarantees of freedom of expression and freedom of information in s.12(1) Constitution Act, the access right forms a vital component of an open government. An additional stimulus to a functioning access legislation is found in s.14(3) of the Constitution Act defining a positive obligation on the administrative authorities to promote openness: 'It shall be the task of public authorities to promote the opportunities of the individual to participate in the activities of society and to influence decision-making affecting him'.

The right of free access to administrative documents forms one of the most significant guarantees of the transparency and openness of public administration. More detailed rules governing access to administrative documents are laid down in the new Act on Access to Official Documents of 1999[2] (Access Act). The Act is based on the *principle of general access* to official documents, denoting an assumption of openness. According to the general principle stipulated in Section 1 of the Access Act, all official documents shall be public, unless specifically otherwise provided in this Act or another Act.

The Access Act also sets out the objectives of its application. Section 3 lists the goals as: promotion of openness and good practice on information management, the provision to private individuals and corporations of an opportunity to monitor and influence the exercise of public authority, to observe the use of public resources, to freely form an opinion, and to protect their rights and interest. The list is intended to serve as more than a mere declaration of good intentions. It must be taken seriously because, pursuant to s.17, the authorities are under a duty to take the list into consideration when making any decision under the Access Act. The objectives of the Act, consequently, are meant to inform all instances of its application.

Obligation to promote openness

Under the Access Act the authorities have not only the duty to respond to requests for access, they have also an active obligation to provide information and promote openness. There are several provisions to this effect in the new Act. The authorities must actively produce and disseminate information on their activities. For this purpose, they must produce guides, statistics and other publications, as well as information materials on their services and practices and on the social conditions and developments in their field of competence (s.20). The authorities must also ensure the accessibility of this information by making it available in libraries and on the Internet.

Good practice on information management is a new concept denoting the obligation to see to the appropriate availability, usability, protection, integrity and other matters of quality pertaining to documents and information management systems (s.18). An element of the good practice is the obligation to arrange the documents, information management and data systems in a manner that facilitates the operation of the openness principle.

Scope of application

The Access Act contains provisions on the general right of access to official documents and how this right is exercised in practice. In addition, it defines active duties of the authorities to promote access and good practice in information management. A considerable part of the Act is devoted to defining the grounds of document secrecy, the official's duty of non-disclosure, and other restrictions of access that are considered necessary for the protection of public or private interests. An important safeguard of access is the comprehensive reviewability of decisions taken pursuant to the Act.

The Access Act takes the mid-road with regard to its applicability to information. The Act guarantees access to government held information to the extent it is documented or stored while the restrictions of access extend to cover even undocumented information. The Act thus defines primarily access to official documents and the information contained therein. Government-held information as such, irrespective of whether it is stored or documented, comes under the scope of the law mainly pursuant to provisions concerning non-disclosure.

Document

The right of access is applicable to a variety of documents regardless of their external configuration and manner of storage. Since the use of the term *document* is not restricted to written texts or pictures only, the Act is applicable even to information stored in a specific form such as electronic documents, data disks and files, tapes as well as visual presentations, maps and x-ray pictures. A recording is considered a document even if it can be comprehended only by means of technical aids. The same applies to any message that can be deciphered only by means of a computer, an audio or video recorder or some other technical device.

Government bodies

With respect to the organisation of the administrative entities, the scope of application of the Access Act is fairly wide. It comprises all state, regional and municipal authorities as well as judicial bodies; for example, ministries, administrative authorities, courts, tribunals and representative bodies. However, access to Parliament documents is regulated solely in the Constitution.

In a rapidly transforming environment of public administration it is important that access to information is extended also to semi-public organisations to the extent that they perform public functions. The solution to this consideration is twofold. First, the Access Act extends to formally private bodies such as corporations, associations and foundations to the extent that they are authorised to *exercise public authority*. For instance, a private undertaking may be authorised to register and inspect motor vehicles. These activities are considered to constitute an exercise of public authority and thus the Access Act is applicable to them. Second, the access rule also applies to bodies undertaking public duties under express *commission* if the commission contract is concluded with a public subject. As a result, the new Act is applicable for instance, to a private nursing home or a private care institution for the elderly to the extent it undertakes a commissioned municipal task.

The extension of the scope of the Act to private bodies implies that most of the indirect public administration comes under the application of the access rules. For the sake of exactness, it should be added that a private body does not fall under the scope of the Act simply due to the fact that it is owned by the state or a municipality or because it receives public subsidies or operates under the supervision of a public authority. Thus, for instance, a municipal corporation may escape the principle of public access if and to the extent it is not vested with any public authority. The same can be said of an association receiving state funding and a company licensed to operate in a regulated field of economic activity.

Official documents

For a document to be qualified as public and generally accessible, it must be prepared by or delivered to a public authority and be in the possession of that authority. This definition means that both documents issued by an authority and documents received by an authority count as official. Even an initially private document thus becomes an official document once a public authority has duly received it. As a rule, it is the recipient authority that decides, by applying the Access Act, whether access can be granted to an official document.

Since the official quality is defined exclusively by the Access Act, the sender has no power to bind the authority in this respect by requiring confidential treatment or by making similar reservations. The same rule applies to documents emanating from other states and international organisations such as the EU. The grounds of secrecy protecting, for example, personal integrity, vital professional and economic interests and the ability of the state to participate in international co-operation govern the balance of interests in this respect.

Gaining access to an official document

Presumption of accessibility

Since the Access Act is based on the presumption of openness, access to documents is the predominant rule, whereas secrecy is the exception that must in each case have an express legal base. Everyone is presumed to have a general right to examine the contents of an official document and obtain information contained therein, subject only to exceptions provided in law. In addition, the exceptions must be construed narrowly.

In many cases it is possible that a document contains both secret (for example, health data or commercial secrets) and public information. Such a document is not considered completely but only partially secret and the public information in it must be made available. When only a part of a document is secret, access must be granted to the public part of the document if this is possible without disclosing the secret part (s.10). The authorities are also under an obligation to manage their documents and data systems so as to guarantee access to public information without disclosing secret information. In this respect, the presumption of access extends not just to the document as a whole but also to the public information contained therein. Release of information is therefore assessed on a 'contents basis'.

The access right extends to Finnish citizens and foreigners without distinction. No reason needs to be given when exercising this right. In fact, an authority is expressly forbidden to demand verification either of the identity of the person requesting information, or of the purpose of the information sought, unless knowledge of that purpose is essential to the exercise of discretion by the authority (s.13(1)). Such discretion may be necessary if the document is secret and the information contained in it may therefore be disclosed only to certain persons or to limited groups of persons or for specific purposes.

The procedure for obtaining access

To obtain access to an official document one must request it from the authority keeping the document or the official responsible for the care of the document. It is not necessary to be able to give a detailed description of the document since the authority must provide help in finding the document. This duty has its limits, however. If the request does not contain any specification of the document or fails to provide any details of the information sought, the authority does not have a duty to conduct extensive examinations or searches to locate the document or the information.

An individual may exercise the right of access in several ways. The person requesting an official document is entitled to obtain a copy of it for a fixed charge. Alternatively, the person has the right to read the document and make a copy of it at the premises of the administrative body provided that the office space allows this and it does not cause considerable inconvenience. Access to a document must be granted in the requested manner unless this would cause unreasonable harm to the authority's normal activities. In most cases, the document itself is made accessible by allowing the individual to read and copy it on the premises of the authority or by supplying oral information of its contents. The minimum requirement for proper access is that the authority supplies a copy or an official transcription of the document requested.

If the document can be read or apprehended only with the use of technical devices, the authority shall make necessary equipment available or provide a transcription. The applicant must be given the appropriate equipment for reading, seeing or hearing its contents or otherwise retrieving information from it. Such arrangements could, for instance, include providing access to a computer or the use of a CD-ROM reader. At the permission of the authority it is also possible to have a copy of an EDP recording or to gain direct electronic access to its database. Official registers of decisions are generally accessible electronically.

Time limits

A request must be considered without delay, and access to an official document shall be granted as soon as possible (s.14(2)). In the established practice 'without delay' has been considered to allow a maximum of a couple of workdays for assessing and processing ordinary requests for access. Despite well-founded criticism during the Parliament deliberations, the Access Act approves of a considerably slacker procedure: in any event access must be granted within two weeks from the arrival of the request. If the number of the requested documents is large, if they contain secret parts or if the request otherwise requires an irregular amount of work, access must be provided within one month.

Guarantees of access and remedies

In cases where the right to access has been denied by a public official, sufficient information must be provided for

the reasons of the refusal. The individual who has requested the document may also require that the official refer the matter to the authority in question for a formal decision. That decision is always reviewable in an administrative court. In addition, it should be noted that all decisions taken pursuant to the Access Act are reviewable. Thus decisions to grant access to, for example, a secret document are also subject to review.

The applicant or a directly interested party has the right to make an administrative appeal against the decision according to the rules applicable to ordinary appeals against that authority. The appeal would in most cases be heard by an Administrative Court in the first instance, while the Supreme Administrative Court is the court of last instance in all such appeals.

Preparatory documents

In day-to-day administrative practice official documents under preparation, in the process of being drafted or otherwise incomplete constitute an important category. Because of their formal incompleteness, internal character, or preliminary nature they will not be generally accessible until the issue in question has been decided. As a consequence of such a deferral, preparatory documents will be subject to the right of access at the latest after the decision is made (s.6).

This rule applies also to internal documents such as outlines, aides-mémoire and other memoranda drawn up by a public official. A small group of preparatory documents may still remain inaccessible under the Access Act. This group includes notes kept by an individual official, drafts, which have not yet been released for presentation or other consideration, and internal communications unless they contain information that must be archived. The group is expected to remain limited.

The reason for the special status of preparatory documents has traditionally been a presumed need to ensure the undisturbed functioning of the administration and the requirements of confidentiality. That kind of deference for purely administrative considerations has lost most of its justification over time, since it is just the preparatory documents that are significant for the general monitoring of administrative activity and for influencing official action. After all the outcome of an administrative procedure will quite often be determined already at the drafting stage.

In any case, there is an obvious tension between these two conflicting arguments – the need to protect confidentiality of drafting decisions and the need to ensure sufficient openness at the preparatory stage of decision making. The new Act has resolved this tension by a general stipulation to the effect that an authority has been reserved discretion to disclose a preparatory document before the decision has been made (s.9), while the most important preparatory documents are generally accessible when they have been completed.

Since it is at the discretion of the authority to disclose a preparatory document before the decision is taken, there is no general right to obtain information in it. In administrative practice draft documents are usually disclosed relatively easily, but attitudes vary concerning the dissemination of information at the preparatory stage. For these reasons and in order to guarantee the operation of the openness principle the Access Act introduces three important constraints to the discretion.

The first constraint concerns studies, statistics, and other comparable accounts if they contain information on the alternatives, reasons and impacts pertaining to a project of general importance. They will be public as soon as they have accomplished their purpose of providing that information. No discretion is thus left to the authority once such a study or account has been completed. A second constraint applies to the scope of the discretion itself. Access to information in preparatory documents may not be restricted unduly or any more than is necessary to protect the interests in question; also the persons requesting information must be treated equally. Third, the access legislation also includes an important amendment of the Penal Code; the disclosure of information in preparatory documents is decriminalised. This amendment has as its specific purpose to encourage the authorities to participate in public debate in their areas and also to facilitate the exchange of opinions at the preparatory stage.

The authorities also have a general duty to keep available documents on legislative reform projects and of pending projects of general importance. At request, the authority must also provide access to information on the stage of consideration, alternatives and impact assessments on legislative and administrative projects of general importance (s.19).

Secret documents and non-disclosure

Criteria of secrecy

As such, the principle of public access to official documents would require that practically all documents produced or received by the public administration be made generally available and that the information held by public officials could be disseminated without restrictions. Such an extensive and limitless accessibility has been considered unfeasible for various reasons based on the need to protect legitimate private and general interests. In order to accommodate such interests access to official documents and disclosure of information held by public authorities are subject to certain qualifications and limits.

Section 12(2) of the Constitution Act stipulates that the restrictions of access to information must be based on compelling grounds and have a separate statutory basis in an enactment by the Parliament. In the Access Act the qualifications are defined in provisions determining the grounds of official secrecy and defining the duty not to disclose confidential information.

To protect such legitimate interests as personal integrity, commercial confidentiality and national security, access has been restricted with regard to information about, for example, issues falling under the core areas of foreign policy, privacy, business secrets and professional confidence. One reason for restrictions is that the personal data obtained in the course of government work needs to be protected because of its sensitivity. The operations of authorities can also not be wholly public in matters dealing with national security or crime prevention. These reasons account for the majority of express secrecy or confidentiality provisions. Furthermore, rapid advances in automatic data processing set new demands on protection of privacy, currently being met by developing data protection.

The list of the criteria of secrecy in s.24 of the *Access Act* is based on the following interests which may be protected by keeping the official documents secret:

- personal integrity and other important personal interests in health care, social services, taxation or public supervision;
- protection of private business interests;

- the economic interests of the State and the municipalities;
- protection of the nature;
- prevention and prosecution of crime;
- safeguarding judicial proceedings and data protection;
- the security of the state and its relations with foreign powers; and
- interests of defense.

The grounds of secrecy

The most central grounds of secrecy have been codified in s.24 of the *Access Act*. The section has been divided into 32 paragraphs each defining a separate ground of secrecy. The relatively detailed regulation has made it possible to repeal about 120 separate provisions on secrecy. Still, s.24 is not exclusive since there remain a number of specific provisions on secrecy in the material legislation concerning, for example, taxation, health care, and social welfare. In addition, there are duties of professional secrecy under other areas of legislation regarding persons who are not in public office, for example, advocates and physicians in private practice.

The grounds of secrecy in s.24 have been formulated following three different methods. *Mandatory secrecy* is the strictest and most comprehensive of these methods since its interpretation is independent of the case-by-case consequences of access. This method has been particularly used in the protection of privacy, personal integrity, professional secrets relating to private business, national security and foreign policy documents. In these cases the secrecy is absolute.

The other two methods are based on an evaluation of the possible detrimental consequences of access. In the application of these provisions the authority must always first consider whether and to what extent the disclosure would cause harm, injury or damage to the interests protected by the secrecy provision. Part of these provisions is based on *a presumption of accessibility:* access must be denied only if disclosure would have adverse consequences. For instance, documents concerning the relationship of Finland with international organisations, such as the EU, are secret if access to them could damage or compromise Finland's international relations or its ability to participate in international cooperation (s.24(2)).

Another part of the provisions is based on *a presumption of secrecy:* access to the document may be granted only if there manifestly will be no such consequences. For instance, the documents of the security police are secret, unless it is obvious that access will not compromise state security (s.24(9)). Accordingly, access to these documents may be refused only provided that such harmful consequences are likely to take place. This means that there must be very good and weighty reasons for gaining access to the security documents, but secrecy is not considered to be total.

Since documents are regarded as secret only if and to the extent this is separately provided for in an Act of Parliament, no particular procedure of classification (or de-classification) is necessary, nor is it performed in actual practice. Any document can thus be declared secret by law and *secret* is the only category of restrictions of access. Public authorities or officials, on the other hand, lack an independent power of assigning secrecy to official documents. Instead, it is their duty, applying the relevant legislative provisions, to determine whether an official document may be supplied or whether it is to be kept secret pursuant to the relevant provisions.

Duty of non-disclosure

Public officials are under the duty not to disclose to any unauthorised person a secret document or information contained in it or to make an official document available in any other way. That obligation extends also to information, which has been proclaimed confidential by a superior official or body pursuant to an express provision in an Act of Parliament. The duty not to disclose confidential information is binding on public officials even after leaving the service. The wrongful disclosure of a secret document or confidential information is subject to criminal liability. Provisions imposing penalties for such offences are contained in the Penal Code (Chapter 40, Section 6).

Inside the public administration, secrecy means that information may not be made available to other authorities. Secrecy also applies within an authority, especially between functionally different operational units or branches of the authority. Authorities or public officials are not entitled to share secret documents and confidential information solely on the basis of imperative reasons requiring disclosure. Disclosure of secret documents within the administration to other administrative branches as well as sharing of secret information between authorities is usually possible only pursuant to an express legislative provision. The consent of the concerned person may also make such information sharing possible (s.29).

Even official secrecy fails to remain unconditional and absolute. Secret documents and confidential information may be disclosed in certain cases, to qualified recipients, and under specific circumstances. The most important of such exceptions are made to guarantee procedural rights and especially in order to satisfy the maxim 'audi alteram partem'. In other cases the authority holding a secret may provide access to it, if there is a specific provision on such access or in an act, or the person whose interests are protected by the secrecy provision consents to the access (s.26).

Openness of the administrative procedure

The principle that the meetings of elected decision-making bodies shall be open to the general public may be derived from s.16 of the Constitution Act. In administrative procedure the principle applies especially in municipal administration. According to s.57 of the Municipal Act (1996/365) the meetings of the directly elected municipal council that exercises the decision-making powers of the municipality, shall be held in public. It is only in exceptional cases that the municipal council may meet behind closed doors. The other municipal bodies may decide to hold open meetings but in general their meetings are not open.

The meetings of the Council of State and other state authorities are generally held behind closed doors but public hearings may be arranged whenever the case is of interest to a larger group of people.

The party's access to case documents

According to the principle of public access to administrative documents laid down in the Constitution Act, documents kept by an authority are public which denotes for everyone the right to obtain information from public documents and records. By definition such documents are accessible to all, including the party in the administrative procedure. What makes the party's access specific, however, is that it is

potentially wider than the general right of access. Secret, confidential and draft documents may also fall within the purview of 'access to parties', in which case the parties concerned are allowed more extensive access to the documents than the general public. Parties in an administrative procedure may have access even to a secret document if it either has affected or may affect the outcome of the procedure.

The justification for the wider access rights of a party lies in the significance of the right to be heard. The party should basically be entitled to unrestricted insight into the material the administrative authority may deal with and use as the basis for its conclusions. Wider access enables the party both to defend his or her rights and to simultaneously ascertain that the case is being handled in a fair and objective manner. Despite the importance attaching to the party's wider access, in administrative matters the access right is not unconditional and the relevant authority enjoys a fairly wide margin of discretion in determining whether the disclosure to a party is necessary or possible.

The basic rule of the party's wider right to insight is laid down in s.11 of the Access Act. Section 11(1) provides quite broadly that an applicant, appellant and anyone whose right, interest or obligation in a matter is concerned (a party) is entitled to have access to the contents of a document even though the document is not public, if those contents may be or may have been of influence in the consideration of his/her case. However, the scope of application of this generous rule is subject to a number of limitations. A party may be denied access to a document in an administrative procedure, for example, if the disclosure of that document would adversely affect a very important public or private interest. Access may also be denied to the presentation memorandum and the proposal for the decision until the case has been resolved by the authority. These limitations notwithstanding, the party is always entitled to access to the decision taken in his or her case.

Even though the limitations to the party's access to the documents in the file are worded broadly the authorities must construe and apply the exceptions narrowly. There are two main reasons for this rule of interpretation. First, the limits on party's access constitute an exception to the right to be heard laid down as a basic constitutional right. Since the authorities must choose the interpretation, which in a given case is most conducive to the attainment of the goals of a basic rights provision, limited application of the exception is necessary. Second, the exceptions, if applied broadly, would weaken the fairness and erode the legitimacy of the administrative proceedings.

The two considerations mean that the protection of the privacy or confidentiality of one party cannot automatically be used to the detriment of the legitimate interests and the rights of access of other parties. The authority may rather be said to be under a duty to balance in each individual case the interests protected by confidentiality and the interests to fair hearing in administrative procedures.

Future challenges

The new Act is undoubtedly an improvement on the present situation because of the up-to-date and express regulation of access and its limits. Yet, the text of the Act itself is perhaps not as transparent as it should be. Some of the provisions are so complicated that both the authorities and information-seekers are likely to encounter major difficulties in their interpretation and application. The grounds of secrecy are now clearly and comprehensively defined, but clarity has also resulted in an almost impenetrable jungle of detailed secrecy provisions. To some extent it may be that these and similar deficiencies are unavoidable in a modern information society; any attempt at a clear-cut and simple regulation of access to government information may simply prove to be unfeasible.

Access regimes should almost by definition be themselves accessible, that is, understandable and easily applicable. It is accessibility in this sense that, somewhat paradoxically, is perhaps the biggest challenge facing the application of the new Act. It will most likely take a while before a settled case law will emerge and give needed guidance in the most complicated issues. Other challenges include the rapid development of information technology and the role of government information as a resource for commercial exploitation.[3] It may very well be that the new Act requires amendments faster than has been foreseen at the drafting stage. In the meanwhile, the long tradition of open government will also play a vital role in the implementation of the new Act.

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3. See Public Sector Information: A Key Resource for Europe. Green paper on public sector information in the information society. European Commission COM(1998)585 <http://www.echo.lu/legal/en/access.html>.

Salvaging the planks from the good ship Open Government

A critique of the Senate Legal and Constitutional Legislation Committee Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000

On a late March evening I walked away from the Senate meeting room down long empty corridors not convinced that Senator Andrew Murray's private member's Bill would make any real difference. I had attended the one and only public hearing as the lone private citizen representative. At the end of the hearing there were a few minor victories which reform advocates could have taken away. Yes, the Attorney-General's Department (AGD) had received a little bit of stick for sitting on the vast majority of reforms of the Australian Law Reform Commission and Administrative Review Council joint report in 1996. Yes, the AGD had been told that a general response of 'we disagree with that provision' (no reason or alternative offered) or 'we think no action is necessary' (no justification) was not

an adequate approach to a Report that was almost two years in the making. Yes, it was a poignant moment when the ALRC President Professor Weisbrot dryly observed that of the 17 ARC members and 12 ALRC members involved in that 1996 Report only the typesetter remains in place. Yet it seemed as if we were fossicking around the wreckage of the 1996 reforms salvaging bits and pieces rather than embracing a carefully considered reform agenda with the zest needed to get past the indifference of the current government.

The report of the Senate Committee delivered in early April shows that significant parts of the ALRC/ARC reform package have managed to survive the five-year exile in the wilderness imposed on the reforms by the Howard government. In a number of areas such as the objects clause, fees and charges, time limits and the FoI Commissioner the Committee has resurrected key reforms. However in some areas, in particular the exemption provisions, in my view the Committee has reached an unfathomable position of discarding (for the foreseeable future) any attempt at addressing the key deficiencies in the FoI exemption processes.

Senator Murray, who joined in the majority report, has reserved the right to re-introduce various amendments to the Bill. On behalf of those committed to a functional FoI process in Australia I hope that he does not hesitate to do so. For many years the AGD played a proud and vital role in the fight for, defence of and acceptance of FoI by Commonwealth agencies and their ministers. The manner and content of the AGD's contributions of the to this Inquiry process, in my mind, has inflicted untold damage on the reform process and in some areas returned the Commonwealth mindset on FoI to a pre-1983 position. In a number of respects the submissions by the AGD were minimalist, negative and a significant retreat from the concept of open government. In the political climate within which the AGD staff has had to operate under the current government, it is not surprising that the submissions had this tenor.

Senator Cooney delivering a minority members' report indicates that the ALP disagrees with the majority report particularly in regard to its conclusions on exemptions, internal review and comments made in relation to commercial in confidence. It is to be hoped that the Democrats and the ALP can find common ground and salvage much more of the ALRC/ARC Report recommendations. The ALP members joined in supporting the recommendations in regard to the Information Commissioner.

While it was disappointing that so few contributed submissions (a total of 18) a number who did, in particular Chris Finn (Adelaide Law School) and Ron Fraser (formerly of AGD and now an Information Consultant) made very important contributions. No doubt there is a sense of reform fatigue among many academics, journalists and non-government organisations. In addition, many may have believed that the logic, substantial canvassing of issues, and considered recommendations of the ALRC/ARC Report in 1996 was sufficient to carry the day. Alas that expectation was not met although few would have predicted the change in attitude that would occur in the AGD over the past five years.

Nevertheless, fatigue and the expected trumps with the ALRC/ARC report excepted, Australian journalists, media organisations and their proprietors ought to hang their heads in shame. Excluding the Communications Law Centre no part of the Fourth Estate could be motivated enough to make a submission or report on this Committee's inquiry. No news organisation could see the value of even allocating a cadet journalist to the task of attending the one and only public hearing. I have been intrigued while participating in parliamentary inquiries in FoI in Tasmania, Queensland, South Australia and now at Commonwealth level by the remarkable absence from, and lack of interest in, these forums shown by the Fourth Estate. There have been the odd exception. While it may be wishful thinking to expect Rupert Murdoch, Kerry Packer or Kerry Stokes to emulate their US counterparts and contribute financially to the cause of FoI, is it too much to expect their employees and media organisations to contribute in terms of reporting, submissions and the occasional strategic reflection about FoI?

Object of the Act — Section 3

The Committee endorsed this reform to reword the objects clause of the Act to emphasise its accountability objectives, the need to adopt a pro-disclosure approach (in part by removing references to the exemptions) and that it was the intention of Parliament that the *FoI Act* should be interpreted so as to give effect to the principles of representative democracy.

The Committee, acting on the advice of the AGD rejected the proposal to insert a new subsection 4(5A) that would have excluded government embarrassment from the criteria to be used in determining whether the disclosure of information is in the public interest. The Committee accepted AGD's advice that case law in the Federal Court and AAT had already achieved this position.

Refusals of requests

The Committee accepted that s.24 of the Act be redrafted to require agencies to consult and assist applicants prior to a request being rejected on grounds that it is a 'substantial and unreasonable diversion of resources'. The Committee also supported the proposal that a blanket refusal using s.24 no longer be permissible.

Statements of reasons

The Committee accepted the proposal for the amendment to s.26 which would require specific detailing of what an agency considers to be the public interest factors in denying a request.

Exemptions

The Committee rejected the repeal of certain exemption provisions as recommended by the Open Government Report (recommendations 50, 58, 69, 70, 71 and 72). The Committee used the arguments advanced by myself (that we need to re-examine the way exemptions are handled) as a justification to do nothing in the short term. Paradoxically the Committee seemed to endorse the concept that 'longer term legislative change may be necessary' (para 3.64). The Committee seemed assured that the advent of an FoI Commissioner and an emphasis on the pro-disclosure nature of the *FoI Act* would mean that 'the existing exemption and conclusive certificate regime can continue pending legislative change with longer term vision' (para 3.64).

In a major blow for accountability and the long-term efficacy of the *FoI Act* the Committee made no specific recommendations about how the 'pending legislative change with longer term vision' would occur in relation to exemptions. Instead of recommending an inquiry into the

longer-term needs of an exemptions regime by the ALRC or a further review by the Senate Legal and Constitutional Legislation Committee, the issue is left in the air with no identifiable mechanism to move towards that legislative change.

This section of the Committee's report raises more questions than it answers. On the one hand it seems to acknowledge the strong case made for the reform of various exemptions by the ALRC/ARC Report and the majority of those giving evidence yet is prepared to allow the current system to continue for an unspecified period. On the other hand, despite a general dissatisfaction with the AGD's submission (see transcript of Evidence, Monday 5 March relating to the appearance by the representatives from AGD), the Committee seemed willing to accept without much discussion the supplementary submissions by the Department in regard to exemptions.

The Committee has performed a major disservice to the case for reform of the exemptions by the approach it has adopted which is in large part to do nothing. The way exemptions are applied, their capacity for misuse and the inherent advantage they give to those inclined to non-disclosure demanded a more considered and sophisticated approach. Yet throughout this part of the Report the Committee would detail the case for reform and then end each subsection with a counter proposition by the AGD which in most cases was a simplistic and poorly substantiated opposition to the proposal. See the discussion on the Cabinet Exemption proposal from para 3.37-3.40. If this is all that is required to counter the arguments advanced in the ALRC/ARC Report and by those who made submissions to this inquiry it is a sad day for law reform in Australia.

A few reforms to the exemption provisions did make it past the Committee's general do-nothing stance. This included the changes to limit the exemption status of documents affecting personal privacy and the amendment of s.44 (legal professional privilege) to clarify that the test to be applied to this exemption is the dominant purpose test. The Committee also supported the AGD's submission that the Defence Signals Directorate and the Defence Intelligence Organisation remain exempt agencies in Schedule 2 of the *FoI Act*. The Committee endorsed the ALRC/ARC's recommendation concerning importing Information Privacy Principle 11 into the personal privacy exemption (s.41). Despite the fact that this will *reduce* access under the Act and create considerable problems for FoI decision makers, the Committee seems to have thought it was *limiting* the scope of the exemption.

Amendment and annotation of personal records

The Committee supported most of the proposed changes in the Bill in regard to this area of the *FoI Act*.

Review arrangements

The Committee rejected the ALRC/ARC proposal to allow an applicant to elect to forgo internal review and strongly recommended retaining internal review as a prerequisite for external review. This would have allowed an applicant to go straight to the AAT if it is plain that an agency is not likely to budge on major issues, and would mean that agencies could not rely on being able to drop unsustainable exemptions at internal review if challenged. The Committee also rejected the ability of the AAT to exercise a public interest over-ride akin to s.50(4) of the Victorian *FoI Act 1982*.

FoI Commissioner

In one of the longest sections of its report the Committee endorses the concept of an FoI Commissioner as proposed by the ALRC/ARC Report but situated (largely due to cost saving reasons) in the Ombudsman's office. The Committee seemed to give little consideration to many of the roles proposed for the Commissioner apart from a concentration on the reporting, general monitoring and statistical collecting functions. Other parts of the Report rely heavily (that is, the comments in regard to exemptions) on an active role by the FoI Commissioner in promoting best practice and ensuring compliance with the Act. In an early part of the report the Committee specifically rejects the concept that the new commissioner should play an auditing role on the way agencies handle requests.

Time limits

The Committee accepted a 21-day limit for the processing of FoI requests with the suggestion that a maximum time frame be imposed for provision of information once a request for access is granted. This reform will be a significant contribution to avoiding one of the major deficiencies in Commonwealth FoI practice namely time delays.

Charges and fees

In a further significant development the Committee has accepted the proposed changes to charges and fees outlined in the ALRC/ARC Report.

Conclusion

Those interested in a revitalised and effective access to information regime owe a large debt of gratitude to Senator Murray for preventing the ALRC/ARC reforms from sinking completely from sight at the Commonwealth level. It will be a great thesis topic for a future postgraduate student to explain how an exhaustive, and in my view exemplary, reform process almost slipped from sight. The ALRC/ARC reforms have rejuvenated and inspired FoI law reform both within Australia and internationally.

While I have lambasted the Committee's conclusions on exemptions they have partly redeemed themselves by recognising a need to rethink FoI in the longer term. Their grave error is to offer no short-term fixes to an exemption system which is so in need of repair. The ALP minority report and Senator Murray's reserving of a right to re-introduce various amendments still offers a slender hope that both the content and the ethos of the ALRC/ARC reforms can be rescued.

Rick Snell
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VICTORIAN FoI DECISION

Victorian Civil and Administrative Tribunal (VCAT)

WILSON and DEPARTMENT OF PREMIER AND CABINET (No. 2000/065381)

Decided: 5 January 2001

Sections 25A(1) and (5) (whether respondent obliged to process request) — Section 28(1) and (3) (Cabinet documents) — Section 30(1) (internal working documents).

Factual background

Prior to the 1999 Victorian State election the opposition Labor Party endorsed an Employment and Skills policy. The policy stated that a Labor government would include a 'whole of government push for growth in jobs, with every Cabinet proposal requiring a Jobs Growth Impact Statement'. After the 1999 election the Victorian Labor Party formed government. Mr Wilson is now a member of the Legislative Assembly representing seat of Bennetswood for the Victorian Opposition.

Procedural history

Wilson made a request to the Department of Premier and Cabinet (the Department) on 12 April 2000 under the *Freedom of Information Act 1982* (Vic) (the Act). The documents he sought included any proposals or plans to introduce a jobs impact statement with every Cabinet proposal and any jobs impact statements prepared or submitted by government Ministers, staff or consultants.

The Department divided the request into two parts. The first part related to proposals or plans to introduce a Jobs Growth Impact Statement (JGIS) with every Cabinet proposal and the second related to actual impact statements that were prepared or submitted. Exemptions were claimed for the bulk of documents referred to in part one of Wilson's request. The Department refused to process the second part of the request based on s.25A(5) of the Act.

On 6 June 2000 Wilson requested an internal review of the decision. He also suggested a modification of his initial request that would involve the Department creating a list of the JGIS provided to Cabinet with detailed descriptions of the documents and authors. Wilson's modified request was also rejected.

During the course of the hearing the respondent released some documents in part which comprised email covering letters or memoranda. However, the bulk of information relating to the first part of Wilson's request was withheld.

The decision

The VCAT affirmed the Department's decision.

Reason for the decision

Sections 25A(1) and (5) and section 28(1) and (3)

The VCAT first examined the unprocessed portion of the application. Sections 25A(1) and (5) and 28(1) and (3) of the *Act* were considered in conjunction.

The Department suggested that s.25A(1) and (5) of the *Act* justified its refusal to process the second half of Wilson's request. The request sought documents that had been prepared by a Minister or on their behalf for the purpose of submission for consideration by Cabinet. The Department maintained that it was obvious from the documents described in Wilson's request that they would all be exempt pursuant to s.28(1)(b) of the Act.

The Department's Senior Freedom of Information Officer, Ms Patitucci, provided evidence that processing the request would substantially and unreasonably divert her from her other projects within the Department. She said there were more than 500 documents comprising approximately 300-400 Cabinet submissions and copies of these documents in various locations. Ms Patitucci claimed that the existing resources for freedom of information did not extend to support the task of processing the request. Ms Patitucci also considered that creating a list would be as equally burdensome as processing the request in full and that creating such a list could disclose exempt material such as Cabinet deliberations.

Wilson insisted that there was no basis to the Department's blanket objection to creating the list of documents. In support of this contention Wilson cited one occasion where the Department had previously created a list of documents. He suggested that it was a proper and reasonable step to prepare a 'road map' of the documents consistent with s.25(6) of the *Act* and that it need not disclose deliberations. It was further submitted that some of the material in the proposals would be released under s.28(3) of the Act.

The Tribunal held that the Department was authorised to refuse to process the second part of Wilson's request based on s.25A(5) of the Act. In *Victorian Casino and Gaming Authority v Hulls* [1998] 4 VR 718 it was deemed appropriate to issue directions under s.56(1) of the Act requiring an agency to produce documents or a list of documents without first examining whether the agency's decision under s.25A should be affirmed. While s.56(1) has now been repealed, the Tribunal can make similar orders under s.80 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). However the VCAT, endorsing Kyrou and Pizer the editors of *Victorian Administrative Law*, felt that to grant such orders in the present case would undermine the purpose of s.25A, which is to prevent unreasonable demands on agency resources.

The VCAT distinguished this case from the *Hulls* case based on the operation of the public interest override. Deputy President MacNamara stressed that while in the current case s.50(4) does not override the s.28 Cabinet exemption, whereas in the *Hulls* case production of the documents or a list was considered essential to consider the application of the public interest override.

The VCAT was also satisfied that documents would be exempt under s.28(b) of the Act. Deputy President MacNamara believed the Impact Statements would not be released under s.28(3) of the Act as they would primarily contain projections and opinions that were not merely scientific, technical or statistical. He saw no need to examine the Department's reliance on s.25(1).

Sections 30(1) and 28(1)(b), (ba) and (c)

The Tribunal examined the 12 exempt documents requested in the first part of Wilson's application. The documents included draft statements and responses, final drafts, email covering letters, memoranda and copies of these. In light of evidence from the Department, the VCAT upheld the Department's decision and found the documents to be exempt under s.30(1)(a) and (b) and/or s.28(1)(b), (ba) or (c) of the Act.

[D.E.]

TOWIE and VICTORIAN LAWYERS RPA LTD (No. 2000/037840)

Decided: 5 February 2001

Sections 5(1) (definition of 'prescribed authority' paragraphs (a)(i) and (b)), 5(2) and 13 of the Freedom of information Act 1982 (Vic).

Section 50 (jurisdiction of the Tribunal) of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).

Factual background

The Professional Standards Division of Victorian Lawyers RPA Limited (VLRPA) handles complaints regarding the conduct of the legal profession. Dr Towie has made many complaints against solicitors that have been handled both by the VLRPA and its predecessor, the Law Institute of Victoria.

Procedural history

On 13 April 2000 the applicant made his original request for access to documents using the *Freedom of information Act 1982* (Vic) (the Act). Towie requested access to all written notes and communications whatsoever in relation to complaints he brought to the Law Institute or the VLRPA with regard to certain solicitors. On 14 April 2000 the Professional Standards Division of VLRPA dismissed the request as neither the VLRPA or the Law Institute are subject to the Act.

On 18 May 2000 Towie applied to the VCAT for review of both the decision denying access to the file and the decision that the Act did not apply to the VLRPA. He claimed the decision was a denial of natural justice as the Act applies to the VLRPA regardless of its privatised status. The matter was adjourned several times and finally set down for a directions hearing on whether or not the VCAT has the jurisdiction to review the decision of the VLRPA under s.50 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the VCAT Act).

Decision

The Tribunal dismissed Towie's application for review.

Reason for decision

Section 5 (1): definition of 'prescribed authority' paragraphs (a)(i) and (b)

The VCAT first examined whether or not the VLRPA was an 'agency' in accordance with the Act. Section 5(1) of the *Act* defines 'agency' as a 'a department council or a prescribed authority'. The VLRPA submitted that it was not an agency or a 'prescribed authority' established for a public purpose as defined by s.5(1) the Act. The VLRPA reasoned that as an incorporated body it fell outside the definition by virtue of s.5(1) 'prescribed authority' paragraph (a)(i) of the Act. The VLRPA claimed that it was further excluded from the definition of prescribed authority within the Act under s.5(1) 'prescribed authority' paragraph (b). Towie conceded that the VLRPA is an incorporated company.

The Tribunal held that the VLRPA is not a 'prescribed authority' as defined by s.5(1) of the Act. Deputy President Coghlan confirmed that even if the VLRPA was a body corporate established for a public purpose by or in accordance with an Act, it would still attract the explicit exclusion within s.5(1) 'prescribed authority' paragraph (a)(i) of the Act as it is an incorporated company.

Section 5(2)

Towie raised further issues pertaining to the status of the Professional Standards Division (the Division) of the VLRPA. Among the issues raised he claimed that the Division, which made the original decision refusing access to the documents, fell within s.5(2) of the Act and was therefore obliged to process the request. Towie stated that the Division is separate from the VLRPA and is therefore an unincorporated body. Towie argued that the Division falls within s.5(2) of the Act as it is established in accordance with requirements within the *Legal Practice Act 1996*. Moreover he suggested that the Division was established to assist the Legal Practice Board (the Board) which is clearly a 'prescribed authority' under the Act.

The VLRPA stated that Towie's reference to s.5(2) of the Act was misconceived. The VLRPA insisted that the Division has no separate existence from the VLRPA nor is it a body established by or in accordance with the provisions of an Act. The VLRPA maintained that Professional Standards was not established for the purpose of assisting or performing functions connected with a prescribed authority. The VLRPA concluded by stating that even if Professional Standards was deemed to be an unincorporated body within s.5(2) of the Act, it would not be deemed to be a prescribed authority but rather merely contained within a 'prescribed authority.'

The VCAT found no evidence to support any of Towie's contentions regarding the Professional Standards Division and s.5(2) of the Act. The Tribunal saw no discernible difference between the VLRPA and the Division. Deputy President Coghlan affirmed the VLRPA's conclusions and held that there was nothing within the *Legal Practice Act 1996* suggesting the Division was established to assist the Board.

Consultant

The second part of Towie's submissions was entitled 'consultant'. Dr Towie contended that there was an implied contract for services between the VLRPA and the Board. Accordingly, he continued, many of the terms and conditions of their contractual relationship were based in accordance with the provision of a statute.

The VLRPA argued that Dr Towie's assertions were unfounded. The VLRPA maintained that s.299 of the *Legal Practice Act 1996* merely gives an applicant such as the VLRPA accreditation and status as an RPA, thereby authorising it to perform functions and exercise the powers conferred on all RPA's by that Act.

The Tribunal accepted the VLRPA 's submission that the *Legal Practice Act 1996* itself affirms that the relationship is not contractual.

Agent

The third section of Towie's contentions were headed 'Agent'. In this section he submitted that the VLRPA and all of its employees and agents undertaking functions outlined in the *Legal Practice Act 1996* are delegates or agents of the Board and/or the VLRPA. Towie also introduced the equitable doctrine of ostensible authority so as to prevent the VLRPA from asserting it is not an agent of the Board.

The VLRPA asserted that even if the VLRPA were an agent of the Board this did not mean the VLRPA itself was an agency under the Act. The VLRPA argued that the powers and functions of the Board were distinct from those of an RPA. It continued that while the Board may delegate its powers and functions to bodies there is no such arrangement with the VLRPA. Furthermore the VLRPA claimed that Towie's reliance on the equitable doctrine of ostensible authority lacked sufficient evidence and was thus without substance.

The Tribunal upheld the VLRPA's submissions.

Section 13

The VCAT held that there is no legally enforceable right to request documents from the VLRPA under the Act.

Section 50 of the VCAT Act

Accordingly Deputy President Coghlan found the Tribunal had no jurisdiction to review the decision made by the VLRPA refusing to process Towie's request for documents.

[D.E.]

LOVE and THE UNIVERSITY OF MELBOURNE (No. 042163/2000)

Decided: 13 February 2000.

Section 30(1) (internal working documents) — Section 32 (legal professional privilege) — Section 33 (personal affairs) — Section 35 (information communicated in confidence) — Section 50(4) (public interest override).

Factual background

Dr Love is an academic who has held numerous lecturing positions at the University of Melbourne (the University) as an Ashworth Lecturer in Social Theory between 1989 and 1992. In 1998 Love was unsuccessful in his application for two academic positions as a Sociology lecturer within the University's Department of Political Science.

Procedural history

In November 1999 Love sought access to documents relating to the appointment process for the two lecturing positions he was unsuccessful in attaining in 1998. The University released some documents to Love at first instance and again upon internal review. Overwhelmingly though the University's original decision and decision upon internal review confirmed that many documents were exempt.

Love applied to the VCAT for review of the University's decision to refuse access to further documents. While Love's application for VCAT review was out of time, in August 2000 the Tribunal granted him extension. The documents he requested included:

- any document containing the decision or reasons for the decision not to proceed with the recommendation of the selection panel to appoint two persons to the first position; and
- any document containing discussion about the propriety or impropriety of the decision to split the first position.

In September 2000 the Tribunal permitted Love to amend the dates and types of documents requested in his application for VCAT review. The University claimed the remaining documents were exempt pursuant to ss.30(1), 32, 33and 35 of the *Freedom of Information Act 1982* (Vic) (the Act).

The decision

The VCAT affirmed the University's decision in respect of certain documents and ordered the partial release of other documents. The Tribunal ordered that the remaining documents be released to Love.

Reasons for the decision

Section 30(1)(a) (internal working documents)

The Tribunal confirmed that the members of the Panel were 'officers' of the University under s.5 of the Act and are thus 'officers' within s.30(1)(a). Senior Member Walker found many of the documents, with some exceptions, were not deliberative in themselves, nor did they offer advice, opinion or make recommendation. He observed that the documents were created after the deliberative process and they dealt mainly with historical events and the author's view about what had transpired. However, he found s.30(1)(a) to apply because the information in the documents divulged the deliberations, opinions and advice of the committee and the Human Relations staff at the time of the decision.

Section 30(1)(b)

On balance the Tribunal accepted section 30(1)(b) applied to some of the documents and thus precluded release. However Senior Member Walker was not convinced that the University had fully established that it would be contrary to the public interest to release all the documents. The University submitted some nine grounds upon which disclosure would be contrary to the public interest. Nevertheless in the circumstances the Tribunal disagreed with most of the University's contentions about s.30(1)(b) of the *Act*. The VCAT though did accept that disclosure of documents containing value judgements and statements of opinion by peers of Love could lead to disharmony within academic circles. Such statements it was held may also be prejudicial to candidates who have no opportunity to qualify their statements.

In applying the public interest test the Tribunal balanced the list of factors furnished by the authority *Hulls and Victorian Casino and Gaming Authority* (1997) 12 VAR 483. Senior Member Walker added to this list of factors: 'some public scrutiny of an appointment process such as this'. He suggested that the documents represent 'a poor understanding on the part of many of the officers as to the manner in which they should have proceeded'. He continued that had the officers known the documents would be released the may have exercised greater care.

Section 32 (legal professional privilege)

The Tribunal affirmed the University's submission in respect of two documents. It applied the 'dominant purpose' test endorsed in *Esso Resources Ltd v The Commissioner of Taxation* (1999) 74 ALJR 339. The VCAT found the statements were prepared solely for the purpose of legal proceedings threatened by Mr Frankel thus attracted the exemption.

Section 33 (personal affairs)

The VCAT defined 'personal affairs' information to include names of candidates, the fact they have applied for positions, the curriculum vitae of candidates and the assessments of applicants by the selection committee or one of its members. The Tribunal noted that, contrary to the University's submission, Love did have a public interest in the release of the documents; namely to ensure that the selection processes in universities are fair and just. However the VCAT considered that the privacy interests of the individual applicants outweighed Love's interest and it would be unreasonable to release such personal affairs information. The Tribunal upheld the exemption in respect of three documents and granted partial release to a copy of one document with appropriate deletions.

Section 35 (information communicated in confidence)

The VCAT agreed with many of the University's submissions regarding the nature of the document. Senior Member Walker recognised that both the personal information about Love and the evaluations about them by the committee members were highly sensitive and communicated in confidence. He acknowledged that releasing such information would disclose information communicated to the University in confidence. However, he disagreed that the communications between the committee members themselves amounted to communications in confidence. Even though such communications occurred in relation to the appointments process and involved the receipt of confidential information, the Tribunal was not satisfied that the information was communicated in confidence to the University.

Section 50(4) (public interest override)

The Tribunal found that there is a public interest in scrutinising academic appointments to the University and demonstrating that there was no dishonesty or impropriety. But Senior Member Walker held that the public interest did not operate so heavily in the present case as to require production of the documents the Tribunal has found exempt. He considered that the non-exempt documents pending release would sufficiently satisfy the public interest in this case.

Comment

Aspects of this decision remain unclear especially in relation to the Tribunal's application of s.35(1). It would seem to follow from this decision that information communicated to third persons outside a committee, but within an agency, about matters within a committee will not enliven s.35(1). While the decision seems at odds with *Birnbauer and Inner Eastern Health Care Network* (1999) 16 VAR 9, it should not be interpreted as a general proposition that such information sits outside s.35(1) of the *Act*. Rather it reflects the particular facts of the case as the Tribunal was not satisfied with the evidence of Ms Bare for the University in relation to this point.

[D.E.]

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