

Freedom of Information

Review

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Editor: Rick Snell
tel 03 62 26 2062 fax 03 62 26 7623
email: R.Snell@utas.edu.au
Web site: <http://www.comlaw.utas.edu.au/law/foi/>

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Comment

In this issue Maeve McDonagh updates us on developments in the European Union. It is interesting to see the same issues about principles of access versus the width, extent and nature of exemptions play out across all jurisdictions. The experience in the United Kingdom, and now at the wider level in the European Union, exemplifies the difficulty in translating a simple and clear principle of access into applied policy and practice. The irony is how simple the process to transform tentative experiments in access back towards the norms of secrecy; whether by amendment, practice, deliberate changes in administrative compliance or by allowing the ravages of budget cutbacks to flow unhindered into areas dealing with providing access to information. The struggle for access can take decades but be lost in moments.

Shane Sody provides an update on developments in South Australia. In addition he mounts a very strong case for the incorporation of a 'public interest override' into the South Australian legislation. Shane's article follows on with several themes from the earlier article by Greg Terrill. He contends very strongly that the original conception of the South Australian legislation as striking an appropriate balance between access and the exemption of particular documents in the public interest has become in practice 'a handbook for exemption of particular documents which can be labelled appropriately to achieve this outcome'.

In Australia we still wait for the outcomes of the two State reviews into FoI, namely South Australia and Queensland and the public unveiling of the Northern Territory's version of access to information legislation. The Queensland and South Australian reviews should produce further additions to an already overflowing list of positive reforms to the legislation, policy and practice of FoI in Australia. The Bracks Labor Government in Victoria may be contemplating further reforms, while in Tasmania the Bacon Labor Government still has a very large commitment to open government to actually deliver upon.

On an international level the Canadian Minister of Justice has announced a review into the Canadian Federal FoI and Privacy legislation. There have also been suggestions of proposed revisions to the Ontario legislation.

Meanwhile the New Zealand Ombudsman has slipped onto the web at <www.ombudsmen.govt.nz>. Documents and information from the web site include the ten Practice Guidelines developed by the Ombudsmen, the Quarterly Review and the 1999 Annual Report. Disappointingly the Ombudsmen's Compendium of Case Notes is not available online and still must be purchased for NZ\$25. It is not a large amount of money but it is a pity that such a valuable resource for users, researchers and those wanting to learn from the New Zealand model is still so restricted.

Rick Snell

Access to documents of the European Institutions

Introduction

Eyebrows were raised in the corridors of power of the European Union earlier this year as a result of what to some Brussels mandarins was a rather unseemly public row between the President of the European Commission, Mr Prodi and the European Ombudsman, Mr Söderman. That the disagreement was played out in public in the *Wall Street Journal*, added to the sense of outrage in Brussels. The source of the tension between these top level officials was the contents of the proposed Regulation on public access to documents of the institutions of the European Union¹ (the proposed Regulation) which was adopted by the European Commission in January 2000. Mr Söderman, who has long been a champion of access to information of the institutions of the European Union, published an article in which he vigorously attacked the proposal. He described it as having been 'secretly drafted' and went on to criticise its substance referring to the list of exemptions from the right of access as being 'without precedent in the modern world'. He suggested that should the proposal be adopted 'there probably won't be a document in the EU's possession that couldn't legally be withheld from public scrutiny'. To the surprise of many, Mr Prodi chose to defend the proposed Regulation in the same newspaper. He refuted the allegation that the proposals had been secretly drafted and argued that the Regulation, if adopted, will give 'the EU a regime on access to documents that compares favourably to some of the most progressive in the world'. Mr Prodi also wrote to the President of the European Parliament which has responsibility for the appointment of the Ombudsman, complaining of the publication by Mr Söderman of his criticisms of the proposal in the press and describing his article as 'polemic and extreme'.²

The aim of this paper is to briefly analyse the main provisions of the proposed Regulation to see whether, as Mr Söderman suggests, it amounts to 'token measures of transparency'.

Background

The Regulation is being introduced on foot of Article 255 of the Treaty of Amsterdam which for the first time provided explicit legal recognition of a right of access to documents of the European institutions. It provides as follows:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined in accordance with paragraphs 2 and 3.
2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 189b within two years of the entry into force of the Treaty.
3. Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents.

Article 255 requires the adoption of implementing legislation within two years of the Amsterdam Treaty coming into force (ie by 1 May 2001). The process of adoption is that of co-decision which requires that the implementing legislation be adopted by the European Parliament and Council as well as the Commission.

Prior to Amsterdam, the legal basis of the right of access to documents of the institutions had been somewhat uncertain. Following the inclusion in the Maastricht Treaty of a declaration on the right of access to information which linked that right with the democratic nature of the institutions and the public's confidence in the administration, the Council and the Commission had adopted a common Code of Conduct concerning public access to Council and Commission documents.³ Each of these institutions then implemented the Code of Conduct through a decision, Council Decision 93/731 of December 20, 1993 (the Council Decision) and Commission Decision 94/40 of February 8, 1994, (the Commission Decision).⁴ In 1997, the European Parliament also adopted a Decision on public access to its documents.⁵

The status and scope of the Council and Commission Decisions have been examined by the Community Courts on a number of occasions.⁶ In general, the approach of the Courts has been to characterise the pre-Amsterdam measures on access as being concerned with the internal functioning of the institutions rather than being imbued with the status of a general principle of Community law.⁷ The focus of interpretation of the right of access, in the earlier case law in particular, has been on procedural issues such as whether reasons were given for a denial of access.⁸ Substantive issues concerning the interpretation of the exceptions to the right of access have received less attention.⁹

With the inclusion of Article 255 in the Amsterdam treaty, the right of access to information of the institutions has taken on an enhanced status. A bolder approach on the part of the Courts to the interpretation of the right of access is therefore to be expected in the future. Much depends, however, on the terms in which the right of access are fleshed out in the implementing legislation.

The proposed Regulation

Principle of access

Article 1 of the Regulation sets out the general principle underpinning the access right. It is expressed as 'the right to the widest possible access to the documents of the institutions'. This declaration on the scope of the access right is supported by paragraph 4 of the recitals which states that the purpose of the Regulation is to 'widen access to documents as far as possible, in line with the principle of openness'. The formulation of the principle of access in such strong terms will doubtless assist the Courts in their deliberations on the extent of the access right.

Publication of information

One aspect of the proposed Regulation which distinguishes it from its counterparts in the common law world is that it does little in terms of imposing obligations on the institutions to actively disseminate information about their activities. Article 9 merely requires the institutions to inform the public of the rights they enjoy as a result of the Regulation and to provide access to a register of documents. These requirements fall far short of the common law requirements which generally require publication of two types of information by public authorities.¹⁰ In the first place, information concerning the functions of the body concerned, the types of records it holds and arrangements

for obtaining access to such documents must be made available. The second type of information, publication of which is mandated, is sometimes referred to as the 'internal law' of the body concerned. It consists of the rules relied on by the body concerned in exercising its decision-making functions. The omission of similar obligations from the text of the proposed Regulation is surprising.

Scope

The practical impact of Article 255 is limited by the fact that it confers a right of access only in respect of documents of three of the institutions of the European Community, namely the Parliament, the Council and the Commission. Other institutions such as the Courts, the Committee of the Regions, the Economic and Social Committee, the Court of Auditors and a whole range of agencies such as EUROPOL, Eurostat, the Trade Mark Agency are excluded.¹¹

The proposed Regulation introduces an important change to the scope of the access right in terms of its application to documents supplied to the institutions by third parties. There had been serious doubts as to the applicability of the pre-Amsterdam measures to third party documents. The Parliament Decision was clearly limited to documents drawn up by that institution¹² while the recitals to the Council Decision stated that documents written by a person body or institution outside the Council are excluded from its scope. In all three Decisions, there was a provision to the effect that where the requested document is written by a third party, including a natural or legal person, a Member State, a Community institution or an international body, the application for access must be sent to the author and not to the institution.¹³ The application of this 'authorship rule' was considered by the Court of First Instance (the CFI) in *Interporc Im und Export GmbH (Interporc II)*.¹⁴ The Court upheld the Commission's reliance on the authorship rule to justify its decision to refuse access to documents of which the Member States were authors.¹⁵ Thus it appeared that the disclosure of documents sent by Member States to Community institutions could not be required under the pre-Amsterdam access provisions.

This important restriction on the scope of the access right is set to be removed by the adoption of the proposed Regulation which provides a right of access to 'all documents held by the institutions, that is to say documents drawn up by them or received from third parties and in their possession'.¹⁶ Third party is defined as 'any natural or legal person or any entity outside the institution including the Member States, other Community and non-Community institutions and bodies and non-member countries'.¹⁷ Thus any record which has been received by the European Parliament, the Council or the Commission from a Member State will be subject to the Community access regime. The right of access to documents from third parties will, however, be limited to those sent to institutions after the date of entry into force of the Regulation.¹⁸ Another important limitation on the right of access to third part documents is set out in Declaration 35 to the Amsterdam Treaty. It allows Member States to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. While this Declaration does not have the status of a Treaty provision or of a protocol, the Court of Justice would give due consideration to it in any relevant case coming before the Court.

Definition of documents

The right of access conferred by the Regulation applies to 'documents' as opposed to information. Document is defined as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording). The pre-Amsterdam provisions also conferred a right of access to documents rather than information. This fact had formed the basis of arguments adduced on behalf of the Council that it was not obliged to grant partial access to documents. These were rejected by the CFI which held that the right of access imposes on the institution concerned an obligation to consider whether partial access may be granted to information not covered by the exceptions. The basis of these decisions was the principles of the right to information and of proportionality.¹⁹

The definition of document contains one of the most significant limitations on the scope of the Regulation. Only 'administrative documents' are to be included. These are defined as 'documents concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility excluding texts for internal use such as discussion documents, opinions of departments and informal messages'.²⁰ The Explanatory Memorandum to the Regulations sheds further light on the types of document to be excluded under this provision. It lists as excluded 'documents expressing individual opinions or reflecting free and frank discussions or provision of advice as part of internal consultations and deliberations as well as informal messages such as e-mail messages which can be considered as the equivalent of telephone conversations'. This limitation on the type of documents covered by the Regulation marks an important departure from pre-Amsterdam access rights which applied to all documents produced by the institutions. This approach is also at odds with FoI legislation in common law jurisdictions where internal documents are protected by way of exemption provisions which may, or may not, be applicable depending on the circumstances. The applicability of such exemptions depends on issues such as whether the document concerns deliberative processes, whether it relates to a decision already taken or to be taken in the future, and whether its disclosure would be in the public interest.²¹ The removal from the scope of the right of access of this entire class of documents weakens the impact of the Regulation significantly.

Exceptions

The exceptions to the right of access are set out in Article 4. Each is a mandatory, harm-based, exception requiring requests for access to be refused where disclosure could significantly undermine any one of four major interests namely: the public interest; privacy; commercial and economic interests; and confidentiality. Article 4 provides as follows:

The institutions shall refuse access to documents where disclosure could significantly undermine the protection of:

(a) the public interest and in particular:

- public security
- defence and international relations
- relations between and/or with the Member States or Community or non-
- Community institutions,
- financial or economic interests,
- monetary stability,

- the stability of the Community's legal order,
 - court proceedings,
 - inspections, investigations and audits,
 - infringement proceedings, including the preparatory stages thereof,
 - the effective functioning of the institutions;
- (b) privacy and the individual, and in particular:
- personal files,
 - information, opinions and assessments given in confidence with a view to recruitments or appointments,
 - an individual's personal details or document containing information such as medical secrets which, if disclosed, might constitute an infringement of privacy or facilitate such an infringement;
- (c) commercial and industrial secrecy or the economic interests of a specific natural or legal person and in particular:
- business and commercial secrets,
 - intellectual and industrial property,
 - industrial, financial, banking and commercial information, including information relating to business relations or contracts,
 - information on costs and tenders in connection with award procedures;
- (d) confidentiality as requested by the third party that supplied the document or the information, or as required by the legislation of the member State.

While space does not allow for a detailed analysis of each of these exceptions, some general points can be made concerning the changes they introduce to the pre-Amsterdam exceptions and more generally on their formulation.

While the four main exceptions to the right of access allowed under the proposed Regulation also appeared in the pre-Amsterdam provisions, the list of specific interests mentioned under these exceptions has been considerably expanded upon. For example, the public interest exception in the proposed Regulation includes a number of grounds for refusing access which were not listed in the pre-Amsterdam measures such as: defence, relations between and/or with the Member States or Community or non-Community institutions, financial or economic interests, the stability of the Community legal order, audits, infringement proceedings and the effective functioning of the institutions. Thus the scope of the exceptions in the proposed Regulation would appear to be much broader than that of the exceptions provided for under the pre-Amsterdam measures.

It could be argued however that the scope of the exceptions in the pre-Amsterdam measures were already potentially as broad as those in the Regulation. This is because the formulation of the public interest exception in the pre-Amsterdam provisions has been interpreted by the CFI as not being limited to the list of interests specifically mentioned in its text.²² The wording which introduces the list of specific interests protected by the Regulation differs only slightly from that employed in the pre-Amsterdam provisions.²³ However it is arguable that the former could not be interpreted as being open-ended on the grounds that paragraph 2 of Article 255 requires that any limits on the right of access be explicitly set out in the implementing legislation. Thus it would appear that the list of exceptions contained in the proposed Regulation can only be interpreted as being exhaustive.

The application of all of the exceptions is mandatory. This marks another change from the pre-Amsterdam provisions on access. The Commission and Council

Decisions contained two distinct types of exception, mandatory and discretionary. The only discretionary exception was that concerned with protection of the confidentiality of the institutions proceedings. This is the only exception contained in the pre-Amsterdam measures which has been omitted from the proposed Regulation.²⁴ In applying this exception, the CFI had imported into it a type of public interest test reminiscent of those found in most common law FoI Acts. The CFI held that in applying the discretionary exemption, the institution in question was obliged to 'genuinely balance the interest of citizens in gaining access its documents against any interest of its own in maintaining the confidentiality of its own deliberations.'²⁵ No such balancing of interests is required in the case of any of the exceptions set out in the proposed Regulation since the application of each of them is mandatory. It appears from the case law that all that is required in the case of the application of the mandatory exceptions is that the institutions refer to the particular exception being relied on and state the reasons why it is applicable.²⁶

While the exclusion from the list of exceptions in the proposed Regulation of the exception concerning confidentiality of the institutions' proceedings is to be welcomed, the fact that all exceptions are now mandatory is a retrograde step. It is ironic and perhaps somewhat telling that the only reference to the public interest in the proposed Regulation is in the context of its use as a justification to withhold documents from disclosure.

One element of the proposed Regulation which compares favourably with the exceptions in the pre-Amsterdam measures is the fact that the harm test is expressed in terms of a requirement that disclosure *significantly undermine* the specified interest. The earlier provisions merely required that the interest in question be *undermined*. The significantly undermine standard is also relatively high when compared with the standards employed in harm tests in the common law jurisdictions.

The standard of proof required in establishing the necessary degree of harm is that disclosure 'could' significantly undermine a particular interest. In cases concerning the application of the pre-Amsterdam measures 'could undermine' standard, the CFI has held that this requires the institution in question to consider whether disclosure 'is in fact likely to undermine one of the facets of public interest protected ...'²⁷

A final notable feature of the proposed Regulation is Article 8 which prohibits the reproduction for commercial purposes of documents acquired under the Regulation. It also prohibits the exploitation of such documents for any other economic purpose without the prior authorisation of the right-holder. This restrictive approach to the use of documents obtained under the Regulation is in sharp contrast to the tone of the recently published Commission Green Paper on Public Sector Information in the Information Society²⁸ which extols the benefits of commercialisation of public sector information. The Green Paper refers to the role of public sector information in stimulating economic growth and development and points to the example of the US of which it is said that 'a very active policy of both access to and commercial exploitation of public sector information ... has greatly stimulated the development of the US information industry'.²⁹ While the Green Paper is referred to in the Explanatory Memorandum to the proposed Regulation as one of the documents to which the Commission has given special consideration

in drawing up the proposal, no effort is made to reconcile the contradictory elements of the two documents.

Conclusion

Article 255 of the Amsterdam Treaty forms the basis of a fully-fledged right of access to documents of the European institutions. The instrument of its implementation falls short of expectations however. The restricted scope of the proposed Regulation is evident in a number of its features. These include: the omission of active obligations requiring publication of information concerning the institutions; the exclusion from the scope of the Regulation of internal documents; the extensive list of exceptions; the fact that all the exceptions are mandatory in nature; and the absence of any express public interest override provisions. The potential impact of one of the redeeming features of the proposed Regulation namely the extension of the scope of the access right to documents emanating from third parties is lessened by the limitation imposed by Declaration 35 on access to documents of Member States.

The proposed Regulation on public access to documents of the European institutions is, as Mr Söderman suggests, a very disappointing document. Its development echoes that of UK access provisions in that legislation which had been eagerly anticipated has fallen short of expectations even to the extent of being weaker in a number of respects than measures of inferior legal status already in place. It is hoped that at least the most objectionable aspects of the proposed Regulation will be remedied before it becomes law.

MAEVE McDONAGH

Maeve McDonagh is a Lecturer in Law, University College, Cork, Ireland.

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3. 93/730/EC, [1993] OJ L340/41.
4. Respectively [1993] OJ L340/43 and [1994] OJ L46/58.
5. Parliament Decision on public access to Documents 10 July 1997, [1997] OJ L263/27.
6. Case C-58/94 *Netherlands v Council* [1996] ECR I-2169; Case T-105/95 *WWF v Commission* [1997] ECR II-313; *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765; *Interporc Im- und Export v Commission* [1998] ECR II-231 (Interporc I); Case T-174/95 *Svenska Journalistförbundet v Council* [1988] ECR II-2289; Case T-14/98 *Hautala v Council*, unreported, judgment of 19 July 1999; Case T-83/96 *Van der Wal v Commission* [1998] ECR

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7. *Netherlands v Council*, *ibid.*, *Van der Wal*, *ibid.*
8. *WWF v Commission*, *op. cit.*, above, ref.6; *Interporc Im- und Export v Commission* (Interporc I), *op. cit.*, above, ref.6; *Hautala v Council*, *op. cit.*, above, ref.6.
9. See Curtin, D., 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?' 37 *Common Market Law Review* (2000), 7; Öberg, U., 'Recent Developments in Public Access to Documents held by European Community Institutions', (1998) 74 *FoI Review* 22.
10. See for example: Ireland: Freedom of Information Act 1997, ss.15 & 16; Australia: Freedom of Information Act 1982 (Cth), Part II; Canada: Access to Information Act RSC, 1985, s.5; New Zealand: Official Information Act, 1982, Part III, US: Freedom of Information Act, 1966, s.552(a)(1).
11. Curtin argues, however, that since Article 1 of the Treaty of the European Union refers to open decision making as being one of the objects and purposes of the Treaty, all institutions, organs and other bodies operating within the framework of activity of the European Union are subject to this principle. This, she suggests, implies that the internal access rules of such bodies should be interpreted in the light of the new Treaty-based emphasis on open decision making: Curtin, *op. cit.*, above, ref.9, pp.28-29.
12. Parliament Decision, Article 1(2).
13. Council Decision, Article 2(2), Commission Decision, Article 1, Parliament Decision Article 2(3).
14. *op. cit.*, above, ref.6.
15. *ibid.*, para.74.
16. Article 2(1).
17. Article 3(f).
18. Article 2(1).
19. *Hautala v Council*, *op. cit.*, above, ref.6; *Kuijjer v Council*, *op. cit.*, above, ref.6. This judgment has been appealed by the Council to the European Court of Justice: see Case C-353/99 P, pending.
20. Article 3(a).
21. See for example: Ireland: Freedom of Information Act 1997, s.20; Australia: Freedom of Information Act 1982 (Cth), s.36; Canada: Access to Information Act R.S.C., 1985, s.21; New Zealand: Official Information Act, 1982, s.9(2)(f) and (g), US: Freedom of Information Act, 1966, Exemption 5.
22. *Carlsen v Commission*, *op. cit.*, above, ref.6.
23. The exception in the pre-Amsterdam provisions was set out as follows: 'the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)'.
24. *ibid.*, Article 4(2).
25. *Carvel v E.U. Council*, *op. cit.*, above, ref.6, at para.65.
26. *WWF v Commission*, *op. cit.*, above, n.6; *Interporc Im- und Export v Commission* (Interporc I), *op. cit.*, above, ref.6.
27. *Svenska Journalistförbundet v Council*, *op. cit.*, above, ref.6; *Hautala v Council*, *op. cit.*, above, ref.6.
28. COM (1998) 585.
29. *ibid.*, p.1, n.3.

A Charter to Withhold Information The South Australian Freedom of Information Act

The *Freedom of Information Act 1991* (SA) was enacted nine years after the Commonwealth and Victoria, and one year after NSW had enacted similar legislation. It was claimed at the time that South Australia had 'drawn on the experience of the operation and administration of the legislation in these other jurisdictions' to produce legislation which 'strikes a balance between rights of access to information on the one hand and the exemption of particular documents *in the public interest* on the other'.¹

This claim appears to have largely succeeded, when viewed from the perspective of a person seeking access

to documents concerning their own personal affairs. But in contrast, access to information about broader policy and administrative matters is not balanced 'in the public interest'. In particular, the protection of 'business affairs' (both those of the State government and of private interests) is not subject to any evaluation of the 'public interest' (discussed under 'Other Information' below). Contrary to the Act itself (s.54(3)(a)), full statistics are not collected.² From those that are collected it is apparent that many hundreds of FoI applications are refused or granted only partially each year, in reliance on

exemptions which are not subject to any 'public interest' test (discussed below under 'Accountability'). Furthermore the District Court has rejected an interpretation of the *FoI Act* which relies on the objects of the Act to create a presumption in favour of disclosure.³

Rather than striking a balance, the role of the Act appears to be providing a set of instructions for withholding all but the most innocuous information.

The purpose of the Act

Freedom of Information legislation 'stands legal and administrative traditions on their heads'.⁴ Before the existence of *FoI* statutes, administrators had no common law duty to give access to documents held by departments, whether personal or policy information. In contrast, the *FoI Act* now gives persons (including corporate persons) a 'legally enforceable right to be given access to an agency's documents' subject to many exemptions in the Act (s.12). It also gives a person the right to 'apply for the amendment of [personal] records if ... the information is, in the person's opinion, incomplete, incorrect, out-of-date or misleading' (s.30).

Its introduction to the South Australian jurisdiction was said to be 'based on three major premises relating to a democratic society, namely:

- 1) The individual has a right to know what information is contained in government records about him or herself;
- 2) A government that is open to public scrutiny is more accountable to the people who elect it;
- 3) Where people are informed about government policies, they are more likely to become involved in policy making and in government itself.⁵

Even for those who do not wish 'to become involved in policy-making and in government itself' a statutory right to obtain information can be said to enhance the democratic process, by enabling more informed voting choices.⁶ Freedom of Information legislation is also claimed to promote government responsiveness:

The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of 'powerlessness' and alienation.⁷

It is also said to 'enable individuals to protect their privacy' and to be an 'important weapon in exposing potentially corrupt activity'.⁸

The objects of the Act:

are to extend, *as far as possible*, the rights of the public (a) to obtain access to information held by the government; and (b) to ensure that records held by the government concerning the personal affairs of members of the public are not incomplete, incorrect, out-of-date or misleading. [s.3 emphasis added]

Insofar as the objects of the Act and the 'premises' on which it is 'based' affect personal information, there appears to be little or no argument about this philosophy.⁹ However, in the case of other government information of broader interest, the 'premises' and the objects of the Act are in tension with the Act's own explicit provisions, and also with current government policies of outsourcing and privatisation. There is broad scope within the Act to withhold information in relation to business affairs, and the competitiveness of government agencies engaged in commercial activities (see discussion under 'Other Information' below).

One purpose of the Act, therefore, seems to be to *prevent* government decisions pertaining to the economy (whether as a competitor, contractor or a regulator) from

being 'open to public scrutiny' and therefore from being 'accountable to the people who elect it'.

Exempt agencies, exempt documents, and exempt matter

Apart from the right to access documents (s.12) and the right to *apply* to amend personal records (s.30), the Act also requires government agencies to make available to the public information about their structure, functions, decision making (and any opportunities for public participation therein), as well as the type of documents held, and how any personal records may be amended (s.9). 'Information statements' containing these details are usually published in each agency's annual report, and a more basic 'information summary' is published in the Government Gazette. Both must be available for inspection and purchase at each agency (s.10).

Despite this, the Act does not purport to cover the whole of government. More than 20 'exempt agencies' are listed in Schedule 2 of the Act, and others are added in the regulations.¹⁰ 'Exempt agencies' are not 'agencies' for purposes of the Act (s.4(1)), and so are exempt from s.9 requirements to publish 'information statements' and information summaries'.¹¹

Of greater significance is the list of 'exempt documents' in Schedule 1. There are 20 classes of 'exempt documents.' An agency may claim that a document fits into any one of these categories and on that basis deny access (s.20(1)(a)).

... agencies tend to play 'Pick An Exemption, Any Exemption Will Do' when they deal with non-personal information requests ... [C]urrent practice appears to place the onus on the requester of information to demonstrate that the exemption being claimed is invalid.¹²

Although s.20(1) appears to give an agency a discretion to release an 'exempt' document, this discretion appears never to be used. Exemptions are invoked for the purpose of denying access, either partially or fully.¹³ This is presumably because an officer who permits access to an exempt document, to which he or she is not *required* to give access may expose him or herself to civil or even criminal consequences under other Acts or regulations.¹⁴ For the purposes of this discussion, therefore, it will be assumed that 'exempt' documents are not accessible.

An agency has a discretion to release a document with 'exempt matter' deleted (s.20(4)). The Act does not define 'exempt matter' but this is an option which is frequently used, to give partial access to documents.¹⁵

Thirteen categories of assessment

In practice, the outcome of an *FoI* application is that access is granted in full, in part (s.20(4)), or refused.¹⁶ However, before reaching one of these decisions, documents must be assessed under a number of criteria in the Act, some of which involve an evaluation of the public interest. (See *Tables 1 and 2.*)

TABLE 1

A document sought under the *FoI Act* (SA) will be or become accessible if it

1	must be published under the Act ¹⁷
2	is already publicly available for inspection or purchase ¹⁸
3	will become publicly available in future, (but in the meantime access may be deferred) ¹⁹

4	is not exempt ²⁰
5	contains matter the disclosure of which would, on balance, not be <i>contrary to</i> the public interest, and hence is not exempt ²¹
6	contains matter the disclosure of which would on balance, be <i>in</i> the public interest, and hence is not exempt ²²
7	contains matter the disclosure of which would, on balance, not be contrary to the public interest, and hence is not exempt, but the release of which may be opposed by a party who must be consulted ²³

TABLE 2

A document sought under the *FoI Act* (SA) will not be accessible if it

8	is exempt ²⁴
9	is exempt and restricted ²⁵
10	contains matter the disclosure of which would, on balance, be contrary to the public interest, and hence is exempt ²⁶
11	is exempt, and which could not be released anyway without first consulting with another party ²⁷
12	is exempt, restricted, and subject to a Ministerial certificate preventing its release ²⁸
13	is held by an exempt agency ²⁹

Personal information

FoI applications are categorised by the government as one of two types: either 'personal affairs' or 'other'.³⁰ 'Personal affairs' include financial affairs; criminal records; marital or other personal relationships; employment records; personal qualities or attributes (s.4(1)). Throughout the Act, the right to access documents about an applicant's own 'personal affairs' is accorded a different status to the right to access other government documents. For example, there is no exclusionary rule pertaining specifically to an applicant's personal information *per se*.³¹ On the contrary, some categories of documents which are 'exempt' to most applicants, are not exempt when requested by those to whom they pertain.³² The greater rights to 'personal' information are also reflected in the Act's objects (s.3), an agency's duties of publication (s.9), an agency's right (otherwise) to withhold documents created pre-1987,³³ and above all, in the right to apply for amendment of personal records (s.30), which would be meaningless unless one could first access such records.³⁴ Viewed overall, therefore, the Act clearly gives much greater access to an applicant's own personal information than it does to other forms of information held by government.

Although the Act makes much of one's own personal information accessible, third parties who seek personal information about others are much less likely to be successful. Documents are exempt from disclosure (to persons other than the applicant) if they contain 'matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)'.³⁵

This clause has been relied on to prevent a father using FoI to find out whether his own primary-school age son held a School Card.³⁶ It has even been used to protect a *company's* 'personal affairs.' Under the SA *FoI Act*, in the Ombudsman's view, a company is entitled to protect information about the 'aggregate wages paid by an employer to its employees' as being its 'personal affairs'.³⁷

'Other' information

'Other' information may relate to government policies or practices, reports, recommendations, letters, opinions, administrative records etc. Many of these types of documents are potentially subject to the various exemptions in the Act. Space does not permit discussion of all of them, so a few examples will suffice.

Restricted documents

As noted above, a document may be both 'restricted' and 'exempt.' A 'restricted' document is merely one type of 'exempt' document, albeit one that may attract a Ministerial certificate. The categories of 'restricted' documents include documents prepared for Cabinet or Executive Council (even preliminary drafts) and briefing papers prepared for Ministers on matters proposed to go before Cabinet.³⁸ It also includes documents which would be exempted under equivalent FoI laws in other jurisdictions,³⁹ and documents 'affecting law enforcement and public safety'.⁴⁰

A Minister may issue a certificate (s.46) declaring that a specified document is 'restricted'.⁴¹ The 'propriety' of such a certificate is not to be questioned in external review by the Ombudsman or Police Complaints Authority (s.39(4)). However, the issue of a Ministerial certificate may be challenged in the District Court (s.43(1)). The court might not be satisfied that there were 'reasonable grounds' (s.43(4)(b)) for the Minister's action, but that is not sufficient to ensure the document's release. Notwithstanding the Court's view, the Premier may 'confirm' the Minister's certificate (s.43(7)).

Cabinet documents

These represent one type of 'restricted' documents. Provisions in FoI legislation limiting or preventing access to Cabinet documents are common to all Australian jurisdictions. They have come under criticism for their broad nature:

A Minister or official with sufficient influence to have a document placed before Cabinet, now holds the power, in practical terms, to veto access to any document under the *FoI Act* by adopting this mechanism.⁴²

In one case in Queensland, documents were placed before Cabinet *after* they had become the subject of an FoI application, preventing any access to them.⁴³ However, the exemption is usually seen as necessary to protect Cabinet confidentiality.

It is not in the public interest to expose Cabinet documents to the balancing process contained in most other exemptions or to risk undermining the process of collective Cabinet decision making. To breach the 'Cabinet oyster' would be to alter our system of government fundamentally.⁴⁴

'Business affairs' and the public interest

The FoI Act protects business affairs from disclosure in a number of ways. Documents are exempt if to release them would disclose:

- 'trade secrets',
- information of 'commercial value ... which could reasonably be expected to [be] destroy[ed] or diminish[ed] by such disclosure, or
- 'business professional commercial or financial affairs ... the disclosure of which could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the government'.⁴⁵

A further clause appears to cover similar ground and more, providing broadly that documents are exempt if disclosure could 'prejudice the competitiveness' of any agency engaged in commercial activities.⁴⁶ None of these four exemptions is subject to any 'public interest' test.

In respect of the 'business affairs' provisions,⁴⁷ the South Australian Fol statute is unique in Australia. The Victorian, Queensland, WA, and Tasmanian statutes use an explicit 'public interest' test in their equivalent 'business affairs' sub-sections.⁴⁸ The Commonwealth and New South Wales statutes also import a quasi-public interest test, by using the qualifying word 'unreasonably'.⁴⁹ But in South Australia, an 'adverse effect' on 'business affairs' does not have to be direct, or pecuniary, nor is it required to be an adverse effect 'on balance'. Any effect, even 'slight' is sufficient to found an exemption, as long as it is 'not something so de minimus that it would properly be regarded as inconsequential'.⁵⁰

Finn⁵¹ has argued that these provisions prevent the public evaluating major outsourcing public policy initiatives, such as the \$1.5 billion, 15-year contract between SA Water and United Water, signed in 1996. The major benefits of this contract were claimed to be cost savings, export development, and the growth of a new water industry in SA. However, documents which might verify these claimed benefits remain unavailable. Neither is it possible to obtain, through Fol or otherwise, details of how performance standards are monitored or enforced, how legal and financial responsibilities are allocated, or how any rival companies might bid to take over at the end of the 15-year contract if all relevant documentation is exempt as United Water's 'business affairs'.

Freedom of Information legislation ought to play a pivotal role in ensuring a full flow of key information so that outsourcing contracts can be fully and fairly assessed in an informed public and democratic debate. However ... the privilege accorded to business affairs renders this impossible.⁵²

Accountability of the Fol process

There are three mechanisms providing some form of accountability for the Fol process in South Australia. *First*, internal review is available (s.29) unless the initial determination was made by a Minister or by the principal officer of an agency (s.29(6)).

Second, external review may be sought by the Ombudsman or the Police Complaints Authority under s.39,⁵³ or by the District Court (s.40). Both are merits reviews.⁵⁴ The Ombudsman or PCA may direct an agency to make another determination in specified terms (s.39(3)(b)), although the Act is silent on the consequences of an agency not complying with such a direction. The Court may 'confirm, vary or reverse the determination' or make other orders to fit the justice of the case (s.40(2)).

There are two main distinctions between review by the District Court and a s.39 review:

- neither the Ombudsman nor PCA may question the propriety of a Ministerial certificate under s.46 (s.39(4)) — contrast the District Court's powers discussed above on restricted documents);
- review by the Court must be instituted within 60 days of the initial determination (s.41(1)).

There is no time limit for instituting a s.39 review.⁵⁵

The *third* method of accountability for the Fol process is provided by the Minister for Administrative Services, who is obliged to report to Parliament each year on the

Act's administration (s.54). As part of that report, 'each agency must furnish ... such information as the Minister requires' (s.54(3)). However this obligation is not enforced. As a result, data collected is incomplete,⁵⁶ and hence unreliable. The report itself rejects agencies' estimations of the cost of complying with the Act, making its own estimate which is more than six times greater.⁵⁷ Figures on external review are also seriously underestimated. 'Agencies providing statistics reported that a total of 23 determinations were taken to the Ombudsman or the Police Complaints Authority for external review'.⁵⁸ The Ombudsman reports that in the same period, in fact, 85 applications were received, and 69 reviews were finalised.⁵⁹ The *Fol Act* Annual Report for 1998/99 also neglects any mention of Ministerial certificates issued.⁶⁰

Nevertheless, on the figures provided from 1998/99 there were 6781 applications, of which 6034 were finalised: 87% of applicants were granted full access, 8% partial access, and 5% were refused. Of 802 applications which were determined by refusing or restricting access, 524 of these (or 65%) were because the document sought was exempt. *Table 3* categorises the specific exemptions claimed, corresponding to the clauses of Schedule 1 in the *Freedom of Information Act*.

Most of the exemptions claimed have no 'public interest' component in their statutory wording. For example, claims of 'personal affairs' or 'legal professional privilege' (in which the 'public interest' is not a relevant consideration) were the two most popular choices for exemptions. At least 79% of reported exemptions claimed (588 in total) had no public interest component.⁶¹ In contrast, no exemptions were claimed at all in respect of clauses 14 (affecting the economy of the State) or 15 (affecting State financial or property interests). These clauses have a public interest test to be satisfied before a document is deemed exempt.

When the *Freedom of Information Act* was introduced to State Parliament in 1991, it was described as striking 'a balance between rights of access to information on the one hand and the exemption of particular documents *in the public interest* on the other'.⁶² It appears that it has become in practice, a handbook for exemption of particular documents which can be labelled appropriately to achieve this outcome.

TABLE 3
Fol exemptions claimed 1998/99⁶³

		No. of exemptions	Public interest test in Act?
1/2	Cabinet/Executive Council documents	3	no
3	Exempt under interstate Fol Acts	4	no
4	Affecting law enforcement & public safety	52	partial (mostly no)
5	Inter-governmental or local government relations	1	yes
6	Affecting personal affairs ⁶⁴	255	no
6A	Exempt electoral records	0	no
7	Affecting business affairs	26	no
8	Affecting the conduct of research	6	no
9	Internal working documents	89	yes

		No. of exemptions	Public interest test in Act?
10	Subject to legal professional privilege	168	no
11	Relating to judicial functions etc	10	no
12	Subject of secrecy provisions	66	no
13	Containing confidential material	49	partial
14	Affecting the economy of the State	0	yes
15	Affecting State financial or property interests	0	yes
16	Concerning the operation of agencies	18	yes
17	Subject to contempt	0	no
18	Arising out of companies/securities legislation	0	no
19	Private documents in public library or archival collection	0	no
Total⁶⁵		747	

Hope for broader access?

A 'public interest' override?

To address these issues, the SA Ombudsman has proposed inserting into the FoI Act either a general 'public interest override', to apply to the Act as a whole, or alternatively, 'public interest' balancing tests in specific clauses of Schedule 1.⁶⁶

The Ombudsman draws attention to the NSW FoI Act which contains the former feature:

[E]ven where access to a document has been validly refused on the basis that it is an exempt document, the Ombudsman of NSW may still recommend release of the document concerned if he is of the opinion that this would, on balance, be in the public interest. This is not the case with the South Australian legislation.⁶⁷

There is similar 'public interest over-ride' provision in Victorian legislation, which allows the Victorian AAT to over-ride exemptions made out by agencies.⁶⁸ In each case, it is only during external review (not at the initial application) when the 'public interest override' is applied. This allows an agency at first instance to make a quick decision based on the categories of exemptions in the statute, and leaves wider questions of the general public interest to the relatively few applications that become subject to external review.

A 'leaning' approach?

It has been argued⁶⁹ that the 'objects' section of FoI legislation should be interpreted by administrators and courts as implying a presumption in favour of the release of information, or a 'leaning' approach to interpretation to 'counterbalance the natural tendency of government and bureaucrats to lean towards the avoidance of public scrutiny'.⁷⁰ There is dicta of the High Court⁷¹ to support this view. It has also been endorsed by individual judges in State Supreme Courts in NSW⁷² and Victoria.⁷³ However, the argument has been twice rejected by a Full Court of the Federal Court,⁷⁴ on the latter occasion with the benefit of considering the High Court's dicta.

When the issue fell for consideration in South Australia, Lunn J reviewed these authorities and elected to

follow the judgments of the Federal Court.⁷⁵ Thus, notwithstanding the objects of the SA Act 'to extend *as far as possible*, the rights of the public to obtain access to information' (s.3, emphasis added) there is no presumption or 'leaning' interpretation favoured in South Australia.

Recommendations for reform of the FoI Act are expected to be made later this year by the SA parliament's Legislative Review Committee, which has been examining the Act and its operation since July 1997.

Conclusion

There are times when official secrecy is in the public interest. Official secrecy is important for law enforcement, personal privacy, and the protection of trade secrets, among other purposes. In most cases, however, it is a question of balance: whether secrecy in the particular context is of greater value than the benefits of openness, accountability and informed decision making which supposedly are the premises on which the FoI Act (SA) was based.

The unstated assumption in the FoI Act is that the listing of each exempt agency, and each class of exempt documents is, of itself, necessarily in the public interest. Having these categories of exempt documents and exempt agencies avoids a potentially time-consuming and uncertain process of assessing each FoI application against a wide range of factors which might be said to be 'in the public interest' in any given case. This argument is not without merit. Clearly an Act with no categories of exempt documents would be unworkable for this reason. A balance needs to be struck.

However, the South Australian Act has failed to achieve a reasonable balance. It unnecessarily excludes any consideration of the public interest from too many categories of exempt documents. Not surprisingly, it is these categories which are relied on most often when decisions are taken to refuse or limit access to documents.

To redress the balance, the Act needs to include provisions for a 'public interest override' to be applied in external merits review, and a clear direction that interpretation of the Act should be done with a presumption in favour of disclosure.

Shane Sody

Shane Sody is a final-year honours student in law at the University of Adelaide. He is also a researcher/adviser to Ian Gillfillan, Australian Democrats MLC in the South Australian parliament.

References

1. Sumner, The Hon C., (Attorney-General) *Freedom of Information Bill 1991* Explanation, Legislative Council Hansard 14 February 1991 at 2931 (emphasis added).
2. Lawson, Hon R., (Minister for Administrative Services) *FoI Act (SA) Annual Report 1998/99* at 5 (see discussion under 'Accountability of the FoI process').
3. *Iplex Info Tech v Dept of Info Tech Services SA* (No 2) D3782 [1998] 3782 SADC (26 March 1998) (see discussion under 'Hope for broader access').
4. Bayne P (1988) 'Freedom of Information: Democracy and the Protection of the Processes and Decisions of Government' 62 ALJ 538 at 538.
5. Sumner, The Hon C., ref 1, above.
6. Dalton, L., 'FoI — the Irony of the Information Age', [1994] *Law Institute Journal* 848.
7. Commonwealth Ombudsman *Annual Report 1994-95*, AGPS, Canberra at 33.
8. Australian Law Reform Commission Report No 77, and Administrative Review Council Report No 40, (1995) *Open Government: A Review of the Federal Freedom of Information Act 1982*, AGPS, Canberra, at §2.3 (hereafter cited as ALRC-ARC Review).
9. There is however discussion about the extent to which the costs of access may prevent the objects being realised. Space does not

- permit discussion of the costs issue here. See, in relation to the Commonwealth *Fol Act*: Ardagh, A., (1987) 'The Walls of Secrecy Are Going Up Again', 12 *Leg Serv Bull* 21.
10. The *Freedom of Information (Exempt Agency) Regulations 1993* exempts the Senior Secondary Assessment Board, the South Australian Independent Industry Regulator, and all State-owned electricity corporations.
 11. Although the SA Ombudsman considers this matter is ambiguous and needs to be clarified: SA Ombudsman *Annual Report 1998/99* at 76.
 12. Snell, R., 'The Torchlight Starts to Glow a Little Brighter: Interpretation of Fol Legislation Revisited', (1995) 2 *AJ Admin L* 197 at 198. The comments were made regarding Australian jurisdictions generally, not SA in particular.
 13. The *Fol Act Annual Report 1998/99* gives no examples of any 'exempt' document being released.
 14. This issue is discussed in relation to the Commonwealth *Fol Act*, in the ALRC-ARC *Review* (1995) §4.22, 4.23.
 15. *Fol Act Annual Report 1998/99* at 7.
 16. A failure to make a determination within 45 days is a deemed refusal: s.19.
 17. Information Statements or Information summaries under s.9.
 18. s.20(1)(b) or (c); Sched 1, cl.2(2)(a)(i).
 19. s.21.
 20. Sched 1, cl.1(2), 2(2)(a)(ii), 2(2)(b), 6(3), 7(2), 8(2), 9(2), 10(2), and 12(2). This is also the default position which covers all documents not otherwise dealt with under the Act.
 21. Sched 1, cl.9, 13, 14, 15 and 16.
 22. Sched 1, cl.4(2). It is not apparent why this sub-clause alone contains a positive public interest test, as distinct from the negative public interest tests in the other clauses.
 23. *Fol Act* (SA) s.25 and Sched 1, cl.5. The other government or council then has review and appeal rights if the agency determines to release the document.
 24. Schedule 1, cl.6A, 10, 11, 12, 17, 18 and 19 are examples of documents in this category.
 25. Strangely, the classification of a document as 'restricted' under the Act adds nothing to its classification as 'exempt' s.4(1). Restricted documents are merely one type of 'exempt' documents unless they are also subject to a Ministerial certificate (see below): Sched 1, cl.1, 2, 3, 4(1), 4(3).
 26. The Act in theory allows for a document to be released in these circumstances under an agency's discretion in s.20(1) and the exemption categories in Sched 1, cl.4(2), 9, 13, 14, 15 and 16. However given that exemptions, in practice, are always claimed for the purpose of not releasing a document, it seems very unlikely that any agency would make such a self-contradictory determination.
 27. Sched 1, cl.6, 7, and 8 corresponding to ss. 26, 27 and 28. The other party then has review and appeal rights if the agency determines to release the document under s.20(1). As observed above this does not happen in practice.
 28. s.46, and s.20(3).
 29. s.4(1) and Sched 2. Exempt agencies are not subject to the Act, although Councils (which are exempt agencies under the Act) are subject to a similar Fol regime under the *Local Government Act 1934*. Since the passage of the *Local Government Act 1999*, there has been before State parliament a Bill to incorporate the Fol provisions of the *Local Government Act 1934* into the *Fol Act 1991*. At time of writing (August 2000) this Bill was still before the House of Assembly.
 30. *Fol Act* (SA) *Annual Report 1998-99* at 6.
 31. Although such personal information may be unobtainable in a particular instance if it fits into any of the classes of 'exempt documents' in Sched 1, or is held by an 'exempt agency' in Sched 2.
 32. Sched 1, cl.6(3), 7(2), 8(2).
 33. s.20(2)(a) specifies that this ground cannot be relied upon to withhold documents concerning the personal affairs of the applicant.
 34. The right to apply to amend one's personal records does not place an agency under any obligation to amend records, unless they are in fact 'incomplete, incorrect, out-of-date or misleading'. *Kronen v South Australian Police* DCCIV-97-1049 Judgment No. D3815 [1998] 3815 SADC (21 May 1998).
 35. *Fol Act* (SA) Sched 1, cl.6(1).
 36. In an external review, the Ombudsman found it would have been 'an unreasonable disclosure of information concerning the personal affairs of the boy's mother.' SA Ombudsman *Annual Report 1998/99* at 90.
 37. The High Court has decided that under the Commonwealth *Fol Act*, a corporate entity cannot have 'personal affairs' — *News Corporation v NCSC* (1984) 52 ALR 277. However the SA Ombudsman came to a different view based on what he considers to be 'material differences between the two Acts'. SA Ombudsman *Annual Report 1998/99* at 92.
 38. *Fol Act* (SA) Sched 1, cl.1, 2.
 39. Sched 1, cl.3.
 40. Sched 1, cl.4.
 41. Any of those covered by Schedule 1, Part 1 (cl.1-4.) That is, documents from Cabinet, Executive Council, those that are exempt under Fol laws of other jurisdictions, or in respect of law enforcement and public safety.
 42. The Queensland Information Commissioner, quoted in Rubenstein, K. 'The Extended Reach of Cabinet Documents: Lessons from Victoria and Queensland', (1996) 3 *AJ Admin L* 134 at 137.
 43. *Re Beanland and Department of Justice and Attorney General* (unreported, Information Commissioner of Queensland, Decision No. 95026, 14 November 1995).
 44. ALRC-ARC *Review* § 9.8.
 45. *Fol Act* (SA) Sched 1, cl.7.
 46. Sched 1, cl.16(2).
 47. s.27 and Sched 1 cl.7(1)(c).
 48. *Fol Act* (Qld) s 45(1); *Fol Act* (Tas) s 31, 32; *Fol Act* (Vic) s 34; *Fol Act* (WA) Sch 1, cl 4.
 49. *Fol Act* (Cth) s43, '...unreasonably affect that person adversely...' and *Fol Act* (NSW) cl.7(1)(c) '... could reasonably be expected to have an unreasonable adverse effect ...'
 50. *Ipex Info Tech v Dept of Info Tech Services SA* (No 2) D3782 [1998] 3782 SADC (26 March 1998).
 51. Finn, C., 'Getting the Good Oil: Freedom of Information and Contracting Out', (1998) 5 *A J Admin L* 113.
 52. Finn at 127.
 53. Review by the PCA applies only to determinations 'made by an officer of the Police Force, or the Minister responsible for the administration of the Police Force in that capacity' s.39(2).
 54. A District Court appeal 'will be by way of re-hearing' — s.42(1) while the Ombudsman has 'the same investigative powers as are conferred on the Ombudsman by the *Ombudsman Act 1972*' — s.39(3)(a).
 55. The SA Ombudsman in his *Annual Report 1998/99* describes this as an 'obvious oversight' and suggests the time limit for a s.39 review should also be 60 days.
 56. In 1998/99, only 74% of agencies completed annual statistical returns. In 1997/98 the return rate was approximately 79%, and in 1996/97 approximately 57% — *Fol Act Annual Report 1998/99* at 5.
 57. Agencies which provided statistical information estimated it had cost them a total of \$160,000 to comply with the Act. The report concludes the true cost as 'no less than \$1,000,000', *Fol Act Annual Report 1998/99* at 15.
 58. *Fol Act, Annual Report 1998/99* at 17.
 59. SA Ombudsman *Annual Report 1998/99* at 74.
 60. As required by s.54(2)(a). It may be, of course, that no certificates were issued during the year, but in compliance with the Act this should have been reported as zero.
 61. This figure depends upon a conservative assumption that in 50% of exemptions claimed under cl.4 and 13, the public interest was relevant.
 62. Sumner, The Hon C. (Attorney-General). *Freedom of Information Bill 1991* Explanation. Legislative Council *Hansard* 14 February 1991 at 2931 (emphasis added).
 63. *Fol Act* (SA), *Annual Report 1998/99*.
 64. Presumably most if not all of these would be for documents concerning the personal affairs of those other than the applicant.
 65. There are more exemptions claimed (747) than applications for documents deemed fully or partially exempt (524) because agencies may cite more than one reason why a document is exempt.
 66. SA Ombudsman *Annual Report 1998/99* at 75-78.
 67. SA Ombudsman *Annual Report 1998/99* at 78, referring to *Fol Act* (NSW) s.52(6).
 68. *Fol Act* (Vic), s.50(4). See Finn, C at 116ff for a discussion of how this provision has been used to effect in obtaining information about controversial Victorian government tenders and contracts.
 69. Snell, R., 'The Torchlight Starts to Glow a Little Brighter: Interpretation of Fol Legislation Revisited', (1995) 2 *AJ Admin L* 197.
 70. NSW Ombudsman *Freedom of Information - The Way Ahead*, Special Report Jan 1995, cited by Snell at 197.
 71. *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at 153.
 72. *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 per Kirby P at 626-7.
 73. *Accident Compensation Commission v Croom* [1991] 2 VR 322 per Young CJ at 323, and *Sobh v Police Force of Victoria* [1994] 1 VR 41 per Ashley J at 61.
 74. *News Corporation Ltd v NCSC* (1984) 52 ALR 277 at 279; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at 167-8.
 75. *Ipex Info Tech v Dept of Info Tech Services SA* (No 2) D3782 [1998] 3782 SADC (26 March 1998).

VICTORIAN FoI DECISION

VCAT

LOVE and THE UNIVERSITY OF MELBOURNE

(No 1999/74161)

Decided: 16 May 2000 by Ball SM.

Section 33(1) (personal affairs) — Section 35(1)(b) (confidential information) — Section 50(4) (public interest override).

Factual background

Love was an academic previously employed by the respondent University. Between 1992 and 1999 Love applied for a number of positions within the University. His applications were unsuccessful.

Procedural history

Love requested access to a number of documents relating to various academic positions at the University that had been advertised between 1992 and 1999. The University provided access to a number of documents but refused access to others. Those documents fell into two main categories: the curricula vitae of unsuccessful applicants, and internal documents that referred to the names and other personal details of those applicants. Love applied to the Tribunal for a review of the University's decision.

The decision

The Tribunal affirmed the University's decision.

The reasons for the decision

Section 33(1)

The Tribunal was satisfied that all of the documents in dispute contained information relating to the personal affairs of the unsuccessful applicants. It went on to conclude that the disclosure of those documents would be unreasonable. It reached this conclusion for four main reasons. First, applicants for academic positions hold a fair expectation and belief that documentation associated with their applications would be kept confidential. Second, disclosure of the mere fact that a person had unsuccessfully applied for a position could cause that person embarrassment if their current employer (or a prospective employer) found out about that application. Third, knowledge that such information might be disclosed could adversely affect the number and calibre of applicants for future academic positions. And fourth, there was no public interest in disclosure of the documents; rather, the request was made to satisfy Love's curiosity and private interest only.

Accordingly, the Tribunal found that the documents were exempt under s.33(1).

Section 35(1)(b)

The Tribunal found that the curricula vitae of the unsuccessful applicants were provided in confidence. It also found that their disclosure would damage the University and its academic selection processes, and that disclosure would be reasonably likely to impair the University's ability to obtain similar information in the future.

Accordingly, the Tribunal found that the curricula vitae were exempt under s.35(1)(b).

Section 50(4)

The Tribunal did not accept that the public interest required the disclosure of the documents in dispute. It noted that Love may have a personal interest in disclosure of the documents, but that this did not equate to the public interest.

Comment

Strictly speaking, it was not necessary for the Tribunal to consider whether the public interest required the disclosure of the documents in dispute pursuant to s.50(4) of the Act. This is because the Tribunal found that all of those documents were exempt under s.33(1), and s.50(4) does not apply to documents found to be exempt under that section.

[J.D.P.]

FEDERAL FoI DECISIONS

FEDERAL COURT OF AUSTRALIA

JOHNSON TILES PTY LTD v ESSO AUSTRALIA LTD [2000] FCA 495

Decided: 17 April 2000 by Merkel J.

Limitations on the right of access.

Factual background

On 25 September 1998 an explosion occurred at the Longford gas plant. Federal Court proceedings were commenced shortly after that explosion. Esso and various State Entities (the

State Entities) are parties to those proceedings.

In November 1999 the State Entities applied to the Court for an order limiting the nature and extent of the discovery they were required to make. The Court made this order on 3 December 1999 (the Discovery order).

Procedural history

Between 10 December 1999 and 24 December 1999 Esso lodged 321

FoI requests with the State Entities. These requests:

- (a) related to matters that were likely to arise as issues in the course of the Federal Court proceedings;
- (b) were presumably made in order to obtain documents to assist Esso in the presentation and conduct of its case in those proceedings; and
- (c) were significantly wider in scope than the Discovery order.

The State Entities initially claimed that the requests did not provide sufficient information to identify the documents sought. Before determining whether the requests were valid under s.17, however, the State Entities claimed that the requests interfered with the Federal Court proceedings.

Accordingly, on 3 March 2000, the State of Victoria applied to the Court for orders that the requests be withdrawn and that the State Entities were not required to process them until the hearing and determination of the Federal Court proceedings. The State claimed that the requests were an abuse of process, had the tendency to interfere with the administration of justice, and were vexatious or oppressive in that they undermined the integrity of the Court's discovery processes.

The decision

The Court refused to make the orders sought.

The reasons for the decision

The Court considered whether there were any limitations on the right of a litigant to request documents of a government agency under the *FoI Act* to assist in the preparation and conduct of the litigant's case against the agency. The Court made the following observations about this issue in the course of its judgment:

- the right of access is not affected by the fact that there is pending or potential litigation between the person making the request and the agency to whom the request is made;
- full disclosure by government agencies under *FoI* legislation is a public right and in the public interest, irrespective of the status or need of the person making the request;
- the legislative policy of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other person;

- the legislature has not made any general exemption in respect of agencies involved in litigation. It certainly could have so provided;
- the Act gives litigants a collateral, but lawful, means of seeking to obtain and present the evidence needed for the presentation and conduct of the litigant's case.

Accordingly, the Court was not satisfied that the requests constituted an abuse of process or had the tendency to interfere with the administration of justice.

Nevertheless, the Court went on to observe that the right of access to documents under the *FoI Act* cannot be exercised in a manner that is vexatious or oppressive in the sense that it interferes with or undermines the integrity of the processes of the Court.

The Court was not satisfied, however, that processing the *FoI* requests was likely to interfere with or undermine the integrity of the Court's processes. This was because 'processing' the requests in this instance did not necessarily require the State Entities to identify, locate and collate all relevant documents. Rather, they first had to determine whether the requests were valid under s.17 and, if they were, whether they were voluminous under s.25A. The Court was not persuaded that the resources required to carry out those tasks would interfere with the ability of the State Entities to comply with the Discovery order.

Accordingly, the Court found that Esso's conduct in making the requests and in asserting that it was entitled to have them processed was not vexatious or oppressive conduct. The Court therefore refused to make the orders sought.

[J.D.P.]

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**Correspondence to Legal Service Bulletin Co-op.,
C/- Faculty of Law, Monash University, Clayton 3800**

Tel. (03) 9544 0974 email: L.boulton@law.monash.edu.au