

Freedom of Information

Review

ISSN 0817 3532

ISSUE No. 90

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The *Freedom of Information Review* is published six times a year by the Legal Service Bulletin Co-operative Ltd. Articles in the *Fol Review* are refereed.

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Print Post approved PP:338685/00011

This issue may be cited as (2000) 90 *Fol Review*

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Comment

The end of 2000 has seen a number of significant developments in Australia and around the world. At their core these developments highlight the new lease of life that Fol and other access to information legislation have gained locally and at an international level.

The UK Parliament has passed the *Freedom of Information Act*. The UK Fol Act has been heavily criticised and is a far cry from the model envisaged in the White Paper but nevertheless Fol has now arrived at the heart of Westminster, albeit delayed for a few years. There will be a full analysis of this new act in a future issue of the *Fol Review*. In the meantime see the Campaign for Freedom of Information web site at <<http://www.cfoi.org.uk>>.

Transparency International and other non-government organisations like the International Record Management Trust have been holding Information for Accountability Workshops throughout 2000 in various countries including Ghana, Tanzania and PNG. These workshops have explored and articulated the case for Fol legislation in those countries.

Yet *all* is not milk and honey in the world of Fol. In Canada the Information Commissioner has struck severe turbulence because he dared to take a zero tolerance policy towards late responses to access requests and a pro-openness approach to the administration of the Access Law. The Information Commissioner's Report starts with MAYDAY MAYDAY and for the next few pages makes absorbing reading as he details threats to future careers of staff and reports that '[w]hen the Commissioner's subpoenas, searches, and questions come too insistently or too close to the top, the mandarins circle the wagons'. For a blow by blow account see the 2000 Annual Report at <<http://www.opengovernmentcanada.org/>>.

In recent months the Australian media have made a notable return to the Fol playing fields at both State and national level. There have been numerous stories involving both the accessing of information and/or the problems about seeking access. The neglect shown by the Commonwealth government towards the Australian Law Reform Commission reforms may very well haunt them as their agencies continue to issue \$90,000 estimates to process Fol requests. The special leave to appeal by the Commonwealth government over the decision in *Shergold v Tanner* (see Federal Court summary in this issue) presents the High Court judges with a rare opportunity to decide, albeit obliquely, on an Fol matter.

My Christmas wish? That an Australian (or former Australian) media mogul emulates the Florida media owner Joseph L Brechner who donated US \$1million for Fol research and advocacy. Somehow I can't picture the title Kerry Packer — Fol champion, Kerry Stokes — Fol campaigner, or Rupert Murdoch — Fol advocate. I would love to be proved wrong.

Rick Snell

A new vision of access to information: the South African legislation

Introduction

Section 32 of the Constitution of the Republic of South Africa (the Constitution)¹ guarantees the right to access to any information held by the state, or information held by private persons and bodies if the information is required for the exercise and protection of any rights. Section 32 also required the enactment of national legislation to give effect to the right. Pursuant to this, the *Promotion of Access to Information Act* (the Act)² was passed in February 2000. The objects of the Act include not only the fulfilment of this constitutional obligation, but also 'the promotion of a human rights culture and social justice' and the promotion of 'transparency, accountability and effective governance of all public and private bodies' (s.9). It attempts to establish voluntary and mandatory mechanisms or procedures to enable the public 'to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible' (s.9).

There is as yet no indication how the Act will be enforced and interpreted by our courts. However, the fact that the Act is constitutionally mandated must be taken into account in the process of interpreting it. The Act has its genesis in the Constitution and explicitly gives effect to a fundamental constitutional right. As such it is of a quasi-constitutional nature. This means that it should prevail over all other legislation which may conflict with it, even in the absence of an explicit clause to that effect.³ In addition, the rules of constitutional interpretation, rather than the rules of ordinary statutory interpretation, must apply to the Act. A broad and purposive interpretation is to be preferred over a narrow and literal approach in order to ensure that the purpose and objects of the Act are properly fulfilled. This means that the courts must strive to give individuals the fullest possible measure of protection and benefits under the Act.

This note gives a brief overview of some of the main features of the Act and, in particular, discusses the novel advancements in its application to private bodies. The rationale for their inclusion is also discussed in the light of the specific South African constitutional arrangement and conditions.

An overview of the Act

Application

While the Act is in line with many of its counterparts in other countries in facilitating access to information held by public bodies, it is unusual in that it also makes provision for access to information held by private bodies (the latter is commonly referred to as the 'horizontal application' of the Act). This is discussed further below. Subject to the requirements in the Act any record, irrespective of form or medium, under the control or possession of a public or private body may be requested. Access to information held by private bodies, however, is contingent upon it being required for the exercise and protection of a right.⁴ Although this is not clear from the Act itself, it would appear that the rights referred to are not limited to the rights in the Bill of Rights contained in chapter 2 of the Constitution. This is borne out by the broad and generous interpretation the High Court has given to the meaning of

a similar provision under the right to access to information under s.23 of the interim Constitution.⁵ The definition of public body in the Act is very broad, and covers not only state departments but also those functionaries and institutions exercising a public power or performing a public function in terms of any legislation. The Act defines a private body in s.1 as a natural person or partnership carrying out a trade, business or profession or a juristic person.

Procedural requirements

The Act sets out detailed procedural requirements and guidelines including forms and manner of access, notice requirements, time periods and payment of access fees and deposits. There are also requirements relating to notification of third parties who may be affected by a request. However, both public and private bodies may on a voluntary and periodic basis submit to the Minister of Justice a description of what records are automatically available, and how to obtain access to them. In relation to this category of information the body need not follow the procedures set out in the Act (ss.15 and 52).

Enforcement

In the first instance an information officer in the case of a public body, or the head of a private body (the chief executive officer or someone duly appointed by him or her) will make decisions whether or not to grant requests made under the Act. In relation to information held by state departments, provision is made for internal appeals against decisions of information officers. Only after exhausting the internal appeal procedure may a party approach the High Court for relief. A party may approach the High Court directly for relief against a decision made by the head of a private body.

Exemptions

Like access to information legislation in other parts of the world, there is a broad list of exemptions to the exercise of the right. The Act contains a list of both mandatory and non-mandatory grounds of refusal for public and private bodies. For example, the grounds for mandatory non-disclosure — that is, records which *must* be refused — includes records containing information which may violate the privacy of a third party, commercial, confidential or research information of a third party, the safety of individuals and legally privileged records. A record *may* be refused to protect defence, security and international relations, law enforcement and legal proceedings, the economic interests and financial welfare of the country, certain types of operations of public bodies, commercial activities and research information of the body concerned and protection of certain types of property.

Despite the grounds for refusal, however, the Act makes provision for mandatory disclosure in the public interest if the disclosure would reveal evidence of a substantial contravention of the law or an imminent and serious public safety or environmental risk, and the public interest outweighs the harm in the disclosure (ss.46 and 70). There is, however, a category of 'blanket' exclusions from the application of the Act. The Act does not apply to the Cabinet and its committees, the judicial functions of a court or special tribunal and an individual member of

parliament or a provincial legislature acting in that capacity (s.12).

Some commentators have questioned the constitutionality of the blanket exclusion of certain bodies from the Act. Legislation may not limit a right in the Bill of Rights unless it is reasonable and justifiable to do so in an open and democratic society based on human dignity, equality and freedom in terms of s.36 of the Constitution, the free-standing limitation clause. While the Act proclaims that it gives effect to the right to access to information 'in a manner which is subject to justifiable limitations', and which 'balances that right with any other rights' (s.9(b)), there has been concern that the total exclusion of bodies such as the cabinet or its committees may be too severe an erosion of the content of the right to pass constitutional muster.

In addition there has also been concern that the grounds of refusal set out in the Act are too broad and sometimes catch within their ambit information that cannot be justifiably withheld. Related to this concern is the large degree of discretion given to both information officers and the heads of private companies, even in the case of mandatory non-disclosure. These individuals are required to make the subtle legal distinctions required by the Act, exercise a judgment about whether to grant access and whether there are justified grounds for refusal. Heads of private bodies also have to decide whether the information is in fact required for the exercise and protection of rights. In the case of public bodies, the concern is that the South African civil service is grossly under-equipped, both in terms of resources and existing expertise, to be able to properly process requests under the Act. In the case of private bodies, the concern is that private companies have not sufficiently bought into the purpose, rationale and underlying objects of the Act, and may use the discretion conferred by it to frustrate attempts at procurer access to information they have in their possession.

A rationale for horizontal application of the Act

Freedom of information is not only important for its facilitation of an accountable and democratic government in which power is exercised rationally and open to public scrutiny. It is also important in that it is closely linked to other rights. It allows an individual to access information that may have an impact on her so that she can meaningfully exercise the other rights in the Bill of Rights. On this level freedom of information ensures that action which may violate one or other of the fundamental rights is not concealed under a guise of secrecy. Experience in other parts of the world has shown that in the context of equality claims, for example, it is notoriously difficult to prove the existence of discrimination because of a lack of evidence when the discrimination is (as it often is) denied or unconscious. Freedom of information will facilitate such a claim by allowing an open assessment of all the facts surrounding the alleged discrimination. It may also serve as a deterrent to the continued violation of rights if such activity is open to scrutiny. In this way it can be both a protective and preventative mechanism that can be used against the infringement or threat of infringement of a right.

Traditionally Bills of Rights operate between the state and the individual. Their primary purpose is seen to be the protection of the individual against the abuse of power by the state. This is based on the view that vertical relationships between the state and the individual are

characterised by unequal power and are different from relationships between private citizens, which are characterised by more or less equal power. However, recent developments in administrative and constitutional law have challenged this notion, and have recognised that in modern society private bodies are increasingly exercising the kind of power traditionally exercised by the state. The existence and force of private power in modern society, then, provides the impetus and rationale behind extending the application of the Bill of Rights to private relationships. While the precise nature and extent of the application of the South African Bill of Rights still awaits determination by the Constitutional Court, it is clearly not limited to disputes between the state and the individual, and may in certain circumstances apply directly to disputes between private citizens themselves.⁶ Section 8(1) and (2) of the Bill of Rights provides that it applies to all law, and binds a natural and juristic person 'if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. In addition certain rights, including the right to equality, explicitly applies between private citizens.⁷

The rationale behind the horizontal application of the Act must be understood in the context of the application of the South African Bill of Rights as a whole. The Act is novel in providing for access to information held by private bodies if that information is required for the exercise and protection of any rights. If it is to meaningfully perform its instrumental role in facilitating the horizontal exercise of other rights in the Bill of Rights, then it is essential that it makes provision for accessing information in the hands of private bodies. In this way, information relating to corporate governance, for example, could be requested to exercise or protect the right to equality and ensure the absence of discrimination in hiring, promotion and salaries. Such information could also be requested by trade unions to exercise and protect their rights to collective bargaining.

Members of the public may be able to request information on the construction and design of insurance policies or bank account schemes to ensure that there are no discriminatory practices in their implementation and issue. Members of the public could also request information which may affect them as consumers of goods and services such as the quality or safety of products or which may show a risk to the natural environment.⁸ For example information from an oil refinery on the level of toxic emissions may be requested in order to exercise and protect the right to a clean environment.⁹ All these possible instances of access will of course be subject to the list of exemptions in the Act as well as the safeguards to protect and notify third parties who may be affected by a request, and, as such, are not unduly intrusive.

A rationale for the state as requester of information

Concern has been expressed that socio-economic realities in South Africa may seriously limit the scope and application of the Act. There has also been concern that private bodies have the resources and means to routinely defend refusals for requests in the High Court, and that the individuals who would benefit most from the Act would be the relatively privileged. This is not only because of the complex nature of the Act, but also due to institutional obstacles inherent in the judicial system and access to resources which are beyond the reach of most South

Africans. In short, the argument is that disadvantaged South Africans would not be in a position to use the mechanisms in the Act for the exercise and protection of their rights.

The Act makes several attempts to ensure that it is more easily accessible to ordinary South Africans. Public bodies have a duty to assist requesters (s.79), and both public and private bodies are required to publish a manual which must contain certain prescribed details, including sufficient detail to facilitate a request for access to a record of the body (ss.14 and 51). Most important is the role of the Human Rights Commission which is required to publish a guide on how to use the Act, report to the National Assembly on its implementation and empower, inform and educate disadvantaged communities to understand and access the rights in the Act. The Commission may also make recommendations regarding any aspect of the Act, train information officers of public bodies and if possible assist any person wishing to use the Act.¹⁰

Another, albeit more controversial way in which the Act attempts to ensure access is by permitting the state to also be the requester of information in certain circumstances. Traditionally freedom of information legislation is understood as facilitating access of private individuals to information held by the state. The South African version turns this on its head. It provides that a public body may request information held by private bodies if this is required for the exercise and protection of any rights.¹¹ However, when a public body requests such information for the exercise and protection of rights other than its own, it must also be acting in the public interest (s.50(2)).

While this is no doubt a far-reaching innovation, it must again be understood as giving effect to the horizontal application of the rights in the Bill of Rights. Where disadvantaged groups are not in a position to make requests themselves due to lack of resources or information, the state, acting in the public interest, would be able to do so on their behalf. This is in line with the constitutional obligation on the state in s.7 of the Constitution to 'respect, promote and fulfil the rights in the Bill of Rights'. That this is the intention behind empowering the state to request information held by private bodies is evident in s.9(c) of the Act. This provision declares as one of the Act's objects the giving 'effect to the constitutional obligations of the state by promoting a human rights culture and social justice' by allowing public bodies to access information from private bodies. The Act requires a new vision of access to information that goes far beyond that which such legislation traditionally embodies: one which moves beyond the state and the individual pitted against each other in an adversarial type relationship to one in which the state can simultaneously play a proactive role in facilitating the disclosure of information in society. This new vision does of course, also require immense confidence in the ability and willingness of the state to play this role, and is surely *dependent* on it. Those more sceptical of the state's role in freedom of information may argue that such a view is overly optimistic but the stark realities of the South African situation demands urgent measures to make legislation work for disadvantaged groups in this country.

Conclusion

The *Promotion of Access to Information Act* in South Africa is typical of similar legislation in other parts of the world in many respects but it also contains a number of novel provisions designed mainly to ensure maximum

accessibility. The challenge which it presents is to develop a new understanding of access to information legislation in which the state's role as both requester and provider of information is not necessarily incompatible with each other. The extent to which the legislation will be successful in achieving its goals remains to be seen, but both the state and the courts have enormous responsibilities in this regard.

SARAS JAGWANTH

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References

- Act 108 of 1996. Section 32 provides as follows:
 - Everyone has the right of access to —
any information held by the state; and
any information that is held by another person and that is required for the exercise or protection of any rights.
 - National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
- Act 2 of 2000.
- Section 5 of the Act makes explicit reference to this.
- This is required to give effect to s.32(1)(b) of the Constitution.
- See for example *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) and *Le Roux v Direkteur Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T). Note however that this matter has not yet come before the Constitutional Court for interpretation.
- For a discussion of this, see for example H. Cheadle and D. Davis, 'The Application of the 1996 Constitution in the private sphere', (1997) 13 SAJHR 44. See also however C. Sprigman and M. Osborne, 'Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes', (1999) 15 SAJHR 25.
- Section 9(4) of the Bill of Rights provides that no person may unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds contained in s.9(3).
- See Gideon Pimstone, 'Going quietly about their Business: Access to Corporate Information and the Open Democracy Bill', (1999) 15 *South African Journal on Human Rights* 2 at 13.
- See for example *Hekpoort Environmental Preservation Society v Minister of Land Affairs* 1998 (1) SA 349 (CC) where an environmental group based its action on the allegation that a close corporation was causing irreversible damage to underground water.
- For more on the role of the Human Rights Commission see s.83.
- See the definition of 'requester' in s.1.

NSW FoI DECISIONS

Administrative Decisions Tribunal

As this issue of the Review was being finalised the Appeal Panel of the ADT released three decisions. These were the following:

- CHIEF EXECUTIVE, SAS TRUSTEE CORPORATION v DAYKIN (GD) [2000] NSWADTAP 20. Decision: 8 November 2000.
 - DIRECTOR GENERAL, DEPARTMENT OF COMMUNITY SERVICES v LATHAM [2000] NSWADTAP 21. Decision: 1 December 2000
 - X v DIRECTOR GENERAL, DEPARTMENT OF COMMUNITY SERVICES & DIRECTOR GENERAL, DEPARTMENT OF COMMUNITY SERVICES v X [2000] NSWADTAP 23. Decision: 6 December 2000.
- The decisions will be examined in a future issue.

[P.W.]

VICTORIAN FOI DECISION

VCAT

McINTOSH and THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT (No. 2000/59619)

Decided: 21 September 2000 by RJ Ball SM.

Section 50 (applications for review) — Section 51(2) (internal review) of the FoI Act 1982 — Section 98(1)(d) of the Victorian Civil and Administrative Tribunal Act 1998.

Factual background

Government policies pertaining to the flow of water down the Snowy River have been the subject of heated debate in recent years, both within Victoria and between other States. The Victorian Labor Party's election victory in 1999, was in part procured by their endorsement of new standards of water flow for the Snowy River forwarded by newly elected Independent Member for Gippsland East, Craig Ingram. Labor's support of Ingram's environmental policy helped to gain his parliamentary support and thus a viable majority. The applicant, Andrew McIntosh, is the Victorian Liberal Member for Kew; he sought documents from the Department of Natural Resources and Environment (DNRE) relating to the Snowy River water flows.

Procedural history

McIntosh requested documents relating to the flow of water down the Snowy River, capital works carried out to improve flows down the Snowy River, and any proposal or undertakings to improve environmental flows down the Snowy River. On receiving the original decision of the DNRE McIntosh sought internal review. The decision of the internal review affirmed the decision of the original decision maker. McIntosh's application to the VCAT for review was for review of the original decision rather than the internal review decision. The DNRE sought orders to strike out McIntosh's claim, submitting that the Tribunal had no jurisdiction to review the original decision

identified by McIntosh in his application for review.

Decision

The Tribunal found that it did have jurisdiction to review the original decision in the circumstances of the case.

Reasons for the decision

The DNRE argued that the only time an applicant may seek review by the VCAT of an original decision, where an application for internal review has been made and is where the applicant receives no decision within 14 days of making the request for internal review. It was argued that based on s.50 (Applications for Review) and s.51(2) (Internal Review) of the Act the *fresh decision* on internal review supersedes the original decision for the purposes of review by the VCAT. The DNRE maintained that McIntosh had indeed sought internal review and received a decision within 14 days confirming the original decision. However McIntosh's request for review by the Tribunal was directed towards the 'initial decision' rather than the internal review decision. Accordingly, the Tribunal had no jurisdiction to hear McIntosh's request for review of the original decision.

The DNRE went on to compare the Victorian provision to the relevant section of the *Freedom of Information Act 1982* (Cth). The Tribunal commented that while the Acts are similar they are not identical. The DNRE suggested its position was supported by the Commonwealth case *Re Wilson and Australian Federal Police* (1983) 5 ALD 343 at 345: 'The principle officer ... is required to conduct a review and make a fresh decision. It is the fresh decision (not the original decision) which may be reviewed before this Tribunal.' The DNRE also sought to distinguish the *obiter* remarks made by Brooking J in the case *R v Kelly; ex parte Victorian Public Service Board* [1985] VR 825 at 833 to the effect that either decision can be reviewed.

The Tribunal held that it was not necessary to consider the distinction between an appeal made

on the original decision or internal review. It moved then to consider McIntosh's submission.

McIntosh argued a) that he had correctly identified the decision regarding which he had sought VCAT review; and b) that he complied with the procedural requirements of s.51 of the Act, in that he had sought and received an internal review of the original decision. McIntosh also relied on s.98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998*. This section directs the tribunal to 'conduct each proceeding with as little formality and technicality'. The Tribunal accepted the applicant's submissions.

Comment

With respect to the Tribunal, this decision appears inconsistent with standard FoI procedure in all Australian jurisdictions including Victoria. Furthermore it appears as a matter of administrative law and practice to defeat the purpose of having an internal merits review in the first place. The decision should be seen as being limited to the facts and circumstances of the case. It should not be seen as standing for a general proposition that it covers all cases where internal review is sought and obtained. The applicant can opt for external review of the original decision or the review decision.

[D.E.]

FEDERAL FOI DECISIONS

Federal Court

SHERGOLD v TANNER [2000] FCA 1420

Decided: 10 October 2000

Section 33A(2) and Section 36(3) — issuing of certificate by Minister that document is exempt — availability of review of Minister's decision to grant certificate under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

Factual background/procedural history

In December 1997, the respondent (Mr Tanner) sought access to reports pertaining to the 1998 waterfront reforms, by virtue of the *Freedom of Information Act 1982* (Cth). In reply, the appellant (Mr Shergold) issued conclusive certificates under ss.36(3) and 33A(2) of the *Freedom of Information Act* (Cth), stating that disclosure of the documents would, for the most part, be contrary to the public interest. Tanner accepted that the certificates were conclusive, yet sought judicial review of the decision to issue the certificates, as opposed to review of the certificates themselves, under ss.5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and ss.39B(1) and (1A) of the *Judiciary Act 1992* (Cth).

At first instance in the Federal Court, Marshall J held in favour of Tanner, affirming that a decision to issue a conclusive certificate is amenable to judicial review. His Honour's reasoning centred upon the perceived absence of an explicit intention on the part of the legislature to preclude the ADJR Act from applying to decisions to issue conclusive certificates. He observed that the ousting of judicial review is ordinarily accompanied by a 'clear and unmistakable intention to do so',¹ which is particularly necessary in the present case, given that the ADJR Act was operating when the *Freedom of Information Act* was enacted, and therefore any departure from the rights stipulated by the ADJR Act should be manifest within the *Freedom of Information Act*. The appellant subsequently appealed Marshall J's order.

The Full Court decision

Black CJ and Finkelstein J (the majority):

- decisions to issue conclusive certificates are amenable to judicial review.

Burchett J (the minority):

- decisions to issue conclusive certificates are not amenable to judicial review.

The reasons for the decisions

The majority

Black CJ concluded that there is no legislative intention for judicial review to be excluded from decisions to issue conclusive certificates. Arguably, his principal basis for this decision concerned his observation that there is no evident limitation on the operation of the ADJR Act by either the express means provided for in the ADJR Act, such as Schedule 1, or 'some other unmistakably clear language'.² His Honour argued that such a manifest intention is required, due to the distinct and complementary role judicial review plays in the wider, comprehensive Commonwealth administrative law scheme, with s.10 of the ADJR Act cited as evidence of such. Black CJ argued that any exclusion from this role must be clear, and emphasised that despite merits review being specifically provided for in regard to conclusive certificates, this does not imply that judicial review is excluded, with the two mechanisms co-existing in the broader scheme of the *Freedom of Information Act* and Commonwealth administrative law more generally.

Finkelstein J held that decisions to issue conclusive certificates are amenable to judicial review by reason of his analysis of the term 'establishes conclusively'. He stated that ss.33A and 36 of the *Freedom of Information Act* 'do not provide expressly that a certificate conclusively establishes that the requirements for lawful decision making have been satisfied'.³ He also argued that these sections neither do so by implication. Rather, Finkelstein J perceived these sections as simply

providing that a conclusive certificate issued under such provisions establishes conclusively that a document is exempt or that its disclosure is not in the public interest.

The minority

In allowing the appeal and holding that decisions to issue conclusive certificates are exempt from judicial review, Burchett J reasoned that the *Freedom of Information Act* contains an intention for judicial review to be inapplicable to such decisions, given the specific provision for only merits review in s.58, with this being the only challenge to which a conclusive certificate may be subjected. His Honour emphasised the corresponding absence of provisions for judicial review.

Burchett J additionally argued that due to the considerable role of policy and the reliance upon the Minister's satisfaction in regard to conclusive certificates, this further highlights the lack of parliamentary intention to subject the relevant decision to judicial review. He argued that the validity of the decision-making process in this instance rests more with the authority's satisfaction and political considerations than strict legal requirements.

Comment

The majority holding in *Shergold v Tanner* presents an interesting and useful opportunity for the review of conclusive certificates, by allowing the decision-making process, as distinct from the certificates themselves, to be subject to judicial review. This review mechanism appears to be particularly necessary in light of claims that such certificates are redundant. While numerous submissions to the Australian Law Reform Commission Discussion Paper on Freedom of Information submitted that the retention of conclusive certificates is necessary, given their capacity to protect sensitive, high level government information, further submissions regarded such certificates as unnecessary. For instance, concern was expressed in regard to the

prospect of conclusive certificates leaving:

... the [Freedom of Information] Act exposed to changes in political will and bureaucratic commitment to the principles and objectives of the legislation ... The current restraint on the use of these certificates is not cause to allow the damaging potential of this mechanism to go unchecked.⁴

Despite these criticisms, conclusive certificates have been retained. As a consequence, the availability of judicial review in this specific context is likely to form an important safeguard against the questionable

impediment conclusive certificates present to citizens in accessing information.

It should be noted that the High Court is set to consider Shergold's appeal against the Full Court majority order in the new year. This case will be crucial to observe in terms of the limitations that may possibly be placed upon the review of conclusive certificates. Whilst the case will focus more on the interrelationship between the *Freedom of Information Act* and the ADJR Act the High Court's commentary on freedom of

information law more generally will be of great interest.

[E.S.]

References

1. *Tanner v Shergold* [2000] FCA 422, (6 April 2000) para 17.
2. *Shergold v Tanner* [2000] FCA 1420 at para 15.
3. *Shergold v Tanner* [2000] FCA 1420 at para 126.
4. Snell, R., Submission 31, Australian Law Reform Commission, Discussion Paper 59, 'Freedom of Information', para 5.21.

RECENT DEVELOPMENTS

Victorian Public Accounts and Estimates Committee Inquiry into Commercial in Confidence Material and the Public Interest, March 2000¹

Concern has been raised that the 'commercial confidentiality' of information has become a broadly defined and over-used 'catch all' means by which to assert grounds for non-disclosure. Indeed, it is becoming routine practice for 'confidentiality clauses' to be inserted in contracts between government agencies and private sector service providers.

The Thirty Fifth Report to the Victorian Parliament by the Public Accounts and Estimates Committee focuses on the interaction between 'commercial in confidence' material and the public interest. Underlying the Report is the notion that the use of confidentiality clauses ought to be kept to an absolute minimum and that contracts should contain specific terms stating that their contents are *prima facie* public. Such an approach will help to ensure that the changing mechanisms for the delivery of government services do not detract from the availability of information about the provision of those services that is necessary to enhance accountability.

The Committee noted that agencies have been relying on commercial confidentiality exemptions to justify the non-disclosure of information to individual members of parliament, to the Committee itself, to the Auditor General and the community at large. It is claimed that much of the material purporting to fall within this exemption would not be considered to be legitimately commercially sensitive. Indeed, it was suggested that government agencies are using commercial confidentiality as a shield to justify non-disclosure where the information would be likely to be commercially embarrassing for the government.

The report of the Committee was delayed until after the last Victorian election. Nevertheless it represents a new benchmark in the handling of commercial in confidence claims. This proposed new standard will not only apply in the context of FoI but to the operations of accountability watchdogs like the Auditor-General and Ombudsman. After a long period in the 1990s, when secrecy was seen to be the hallmark of the reinvented public administration, it is a sweet paradox to see a unanimous Victorian parliamentary committee report strike a much needed blow for open and transparent government.

Major findings

The Committee received 94 submissions and written responses following various hearings and the preparation of an issues paper. There was a high degree of consensus among the submissions with respect to the following observations:

- the Auditor General should have unrestricted access to commercial in confidence material;

- the changing mechanisms of government service delivery should not have the consequence of decreasing the information available about those services; and
- claims based on commercial confidentiality were now being used too broadly by the public sector as a means of preventing the disclosure of a wide range of information.

Such sentiments are reflected in the Report's key recommendations. The Committee maintained that decisions concerning the disclosure of commercially sensitive information must balance competing interests — the need for government agencies to operate effectively and the need to ensure political and financial accountability. Non-disclosure should not be solely justified on the grounds that agencies would be adversely affected by the information. Non-disclosure can be justified, however, on the grounds that the release of the information would interfere with the proper and efficient performance of government functions to the extent that this outweighs the benefits flowing from the public release of the information.

In short, the Report found:

- the impetus for classifying information about commercial dealings as commercial in confidence has come from within government rather than from the private sector — this practice is totally unacceptable and contrary to the spirit of the Westminster system of governance;
- open and accountable government can be undermined by the overuse of reasons based on commercial sensitivity to deny the parliament and the public access to information;
- the Auditor-General and the Ombudsman should have unrestricted rights of access to commercial information and should be able to publish that material whenever it is in the public interest to do so;
- the decision whether or not to disclose commercially sensitive information should be made according to the general principle that information should be made public unless there is a justifiable reason for withholding access to it.

The Report is comprehensive and makes general recommendations which provide the backbone for more detailed principles to guide government agencies in the use of such material. Several recommendations pertain to amendments of the *Freedom of Information Act 1982* (Vic), particularly so as to broaden its ambit and include additional factors for consideration when exemption of documents is being contested. Of particular utility is the Committee's formulation of general criteria to determine what information is properly deemed as being commercially sensitive and what kinds of information regarding the tendering process for government contracts ought to be publicly revealed.

Commercial in confidence information and the public interest

Commercial in confidence information was considered to be that which was of a commercial nature and would be protected from disclosure by the common law action for breach of confidence. The extent of the duty to treat information as confidential is, however, qualified by public interest considerations. Indeed, the overarching argument for the release of otherwise confidential material is founded on public interest in the good administration of government and the public's right to know about governmental activities.

The Report found that the definition of commercial in confidence material needed to be assessed in light of community expectations about the conduct of responsible government. Accountability and transparency are necessary to ensure that public funds are expended for the purpose for which they were appropriated and that government is administered efficiently and in accordance with the law. The Committee recognised that access to information is a fundamental means by which the electorate can not only assess government performance but also participate in public policy decision-making processes. Permitting the use of the commercial in confidence basis to preclude disclosure of information would undermine public confidence in political accountability.

Stemming from concerns expressed by the Victorian Auditor-General that agencies were denying him access to documents on the grounds that they were 'commercially sensitive', and thus precluding him from performing his investigative functions, the Report considers the nature of confidentiality clauses in contracts between agencies and private sector service providers and the implications of their use on governmental accountability. One of the Committee's terms of reference was to establish what principles should govern the application of commercial confidentiality within the public sector in relation to the Auditor-General and the parliament.

The Committee drew a distinction between material that is generated by or for the government from that which has been provided to the government by third parties. It was noted that the government's primary responsibility does not lie in profit maximisation but in the serving of the public interest and that resistance to disclosure based on the notion that disclosure would disadvantage the government with respect to its competitors lacks conviction. Information generated within government should not be treated as commercial in confidence unless there were reasons to do so that would outweigh the benefits of disclosure.

Moreover, the Committee found that the sensitivity of commercial information is not indefinitely uniform and that although commercial information is valuable when it relates to the future (that is, to plans to not yet implemented or tenders not yet awarded), the sensitivity of such information is significantly reduced after the potential benefits of the transaction in question have been secured by contract.

The Committee found that the public sector, driven by a desire to replicate market conditions, had broadened the scope of commercial confidentiality beyond its previous legal boundaries. Elements in the public sector had transformed a previously limited and carefully delineated legal concept into a catch-all provision that operated with few restrictions.

Government contracts and the tendering process

With respect to the process by which tenders are received for government contracts, the Committee made the following recommendations:

- Legislation should be enacted requiring specified information about all tender documents and the resulting contract to be made publicly available (such as via a free public database available online) once the tender has been awarded. This would mean that confidentiality clauses would be overridden unless an application has been made to restrict publication at the time.
- Public information about tenders should include the identity of the tenderer and the tender price, and, with respect to

major contracts, there should be sufficient information about the relevant performance criteria to enable an assessment of the tender process.

- Other information about tenders which ought to be made public include: the duration of the contract, details of any transfer of assets under the contract, maintenance provisions, any renegotiation or renewal rights, results of cost benefit analyses, sanctions for non-performance, any significant guarantees/undertakings/loans.
- Applicants should be advised that, as a precondition to doing business with the government, they must be prepared for certain details contained in a tender document to be made public. This could be complemented by the insertion of standard clauses.
- Before the closing date of tenders, applicants should notify the relevant agency of their intention to seek exemption of information which would otherwise be required to be made public. The specific harm which would result from the disclosure of the information must be specified.
- The onus of proof would be with the tenderer to show that a claim for commercial in confidence is justified.
- Maximum times may be set for non-disclosure.

There was also a need to ensure some external monitoring of confidentiality claims in contracts. Where confidentiality clauses exist, they must not override legislative provisions requiring the disclosure of information (such as that to be tabled in financial statements or annual reports) nor could non-disclosure be used to limit the capacity of the Auditor-General to report to parliament.

Commercial in confidence material and the *Freedom of Information Act*

The Report considers that the existing blanket exemptions within the *Freedom of Information Act* (Vic) covering information relating to trade secrets are too wide. The Committee recommended that the ambit of the Act should be increased so as to include access to:

- documents that relate directly to the performance of contractor's obligations under the contract; and
- documents that either directly or indirectly relate to contractor services provided to the government in circumstances where the contractor does not supply substantially similar services to the private sector.

The Committee recommended that s.34 of the Act be amended by the insertion of a new subsection that lists considerations to be taken into account when determining whether disclosure of information would expose an agency unreasonably to disadvantage. The Minister or agency would need to establish one or more the following implications (page 125 of the Report):

- there is a real risk that disclosure would prejudice contractual negotiations or the agency's ability to attract, select or retain suitably qualified employees;
- the information is likely to be exploited in a way that does not benefit the general public due to the market power of the enterprise by which it will be exploited; for example, where there is a lack of contestability due to the existence of barriers to entry into that specific market;
- the disclosure may impair important governmental or regulatory functions;
- there is some potential to use the information to realise substantial profits in other jurisdictions;
- there are no considerations in the public interest in favour of disclosure which outweigh considerations of damage to the competitive position of the agency, for instance, the public interest in revealing evidence of some wrongdoing or in shedding light on some matter that has been the subject of ongoing controversy.

A series of other amendments to the Act were also proposed.

Draft Principles for the Treatment of Commercial Information Provided to Agencies

The Committee has included as an Attachment to its Report a set of draft principles by which to guide agencies in the receipt, treatment and disclosure of commercially sensitive information. Such principles are designed to complement existing obligations imposed on agencies which are contained in the *Freedom of Information Act (Vic)*. These guiding principles include:

- agencies need to adhere to the principle of transparency and openness by ensuring as full disclosure as possible;
- where information is supplied voluntarily to an agency, the information providers need to be warned in advance whether any of the information will be treated as confidential and, if so, for how long; information providers also ought to be informed of any legislation which may require publication of the information received;
- the fact that information is of a commercial nature does not automatically mean that it will be treated as commercial in confidence;
- confidentiality should be agreed to only where it is justified by reference to the public interest test.

Other key recommendations

Some of the other key recommendations of the Report include:

- the resolution of confidentiality matters in the public sector should be guided by principles that accord with the rules of law and the values that form the basis for responsible government in Victoria;
- when considering the withholding of information on the grounds of confidentiality, government should observe the general principle that information should be made public unless there is a justifiable reason not to do so;
- decision makers should recognise that commercial in confidence provisions reduce the scrutiny available to parliament and the community over government decision making and use of public funds, and that their use as a tool in managing the government's relationship with service providers should be avoided;
- where information about the government's management of expenditure is limited by confidentiality provisions, the government should provide an explanation to the individual or organisation requesting the information as to the public benefit achieved by agreeing to withhold the terms of the commercial arrangements from scrutiny;
- protocols should be developed for government departments and agencies to follow before the classification of commercial in confidence is applied to material and these protocols ought to be signed off at ministerial level

Relevance of the Report

The reliance on the classification of information as being 'commercially sensitive' so as to justify its non-disclosure is clearly not a trend confined to Victoria. In a recent article in the *Adelaide Advertiser* (4 April, 2000), for example, South Australian Premier John Olsen stated that the disclosure of commercially sensitive information will 'scare off' potential investors who would not appreciate their financial affairs being 'broadcast by any politician at any time in the political heat of the moment'.

It is clear that a middle position between the two extremes — of either permitting unrestricted public access to all information or requiring complete confidentiality — can be found. The public interest test and the general principle that information is *prima facie* to be disclosed sets an appropriate benchmark for the assessment of contracts and other documents held by government agencies.

The Report may provide motive for reforms with respect to FoI currently being considered in Queensland by the Legal Constitutional and Administrative Review Committee. The Committee there has similarly recognised a need for balance between the public interest in accessing government information and the public interest in non-disclosure of that information. In considering its current mandate to reform FoI in Queensland,

the Committee has examined division among members of the Administrative Review Council (ARC) with respect to the most appropriate means by which to ensure only legitimate reliance on commercial-in-confidence exemptions to disclosure. The majority of ARC members believed that guidelines would best assist agencies in determining whether to treat information provided by contractors as confidential, while the minority argued that this would be better facilitated by actual legislative changes.²

The Queensland Committee has called for submissions on whether the current exemption provisions ensure an appropriate balance is struck between the respective public interest in the disclosure and non-disclosure of commercial information. The Committee is also considering ways of ensuring that exemptions are properly relied on and are not misused. The response of the Victorian parliament to the Public Accounts and Estimates Committee's Report will therefore be eagerly awaited.

Conclusion

The release of the Report brings to the attention of parliament the need to develop new procedures for dealing with commercial in confidence material. Still, however, the Committee found itself reiterating basic principles of open government — such as reinforcing the need for ministerial accountability and upholding FoI principles such as transparency and accountability — to guide government administration as it takes a new turn.

The Report is particularly progressive in its recognition of the need for governments to be accountable in the contracting out of services. This confirms the continuing relevance of administrative law and FoI principles beyond traditional means of governance. The theory underlying the Report's recommendations halts the adoption of new ploys by governments to restore secrecy on the grounds that confidentiality is necessary to ensure government-business enterprises (GBEs) remain competitive. The Committee also tabled its *Report into the Inquiry of the Outsourcing of Government Services in the Victorian Public Sector* (March 2000, Report 34).

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Blowing the whistle on the Whistleblowers Protection Bill (Vic)

Public sector whistleblowers are vitally important. They can expose serious governmental misconduct that may otherwise escape scrutiny. Such exposure can help ensure that public organisations and officials are held accountable for their actions. And such accountability can lead to higher standards and better performance in the public sector. This is clearly in the public interest.

Three things flow from this. First, people should be encouraged to 'blow the whistle' on serious governmental wrongdoing. Second, genuine whistleblowers should be protected from reprisals. And third, mechanisms should be put in place to ensure that disclosures are investigated and dealt with in an appropriate manner.

The Whistleblowers Protection Bill, which was introduced into the Victorian Parliament earlier this year, is designed to meet these three objectives. The Bracks government's decision to introduce the Bill is to be applauded. So is its decision to circulate two earlier drafts for public comment. According to the Attorney-General, the submissions received in the course of this consultation process revealed widespread support for the aims, objectives and framework of the Bill. This is not surprising. Unfortunately, however, two aspects of the Bill remain troubling.

The first aspect is this: the Bill prevents persons from obtaining access to documents under the FOI Act to the extent that those documents reveal information 'in relation to' a disclosure made under the Bill. This blanket exclusion – which is separate from another exclusion for documents revealing a whistleblower's identity – is potentially far too broad. This is best illustrated by an example. Suppose that a public servant blew the whistle on a fraudulently conducted government tender by referring the matter to the Ombudsman under the Bill. On one view of the exclusion, the FOI Act would not apply to documents that related to the tender process itself or to documents created in the course of the Ombudsman's investigation.

Why should this be so? Why should those documents be removed from public scrutiny in this way? It is difficult to identify a convincing policy reason for such compelled secrecy. The public servant referred to in the example is unlikely to be dissuaded from blowing the whistle simply because documents relating to the tender process may subsequently be released under FOI. And what if the public servant has a legitimate

grievance about the handling of their disclosure? Why should they be prevented from seeking to hold the Ombudsman accountable for its investigation by endeavouring to obtain access to the investigation documents? Why should they be prevented from seeking access to such documents under FOI? And what if the aggrieved public servant then wanted to 'go public' about the fraudulent tender process and the subsequent investigation? They will not be able to tell the full story if they are prevented from seeking access to the documents held by the Ombudsman.

This leads to the second aspect of concern: the Bill provides that the FOI Act does not apply to the Ombudsman's investigations under the *Ombudsman Act*. Intriguingly, this exclusion has nothing to do with whistleblowers at all. This is because investigations made under the *Ombudsman Act* are different from investigations under the Whistleblowers Bill. As such, the exclusion travels well beyond what may be necessary to protect whistleblowers.

In fact, the combination of the two exclusions shields the Ombudsman from scrutiny in all cases. This is manifestly undesirable. The Ombudsman performs an undeniably important role in our system of government. Nevertheless, the public should be able to seek to hold the Ombudsman accountable for its investigations. It is difficult to achieve that aim without information about how those investigations were conducted. And it is likely to be extremely difficult to obtain such information if the Ombudsman is not subject to FOI.

Critically, as the Bar Council and Law Institute indicated during the public consultation process, the exclusions are unnecessary. There is already adequate protection in the FOI Act to prevent sensitive information held by the Ombudsman from being released. Why, then, should the Ombudsman not be subject to the FOI Act? Why should the watchdog not be watched?

When the Whistleblowers Protection Bill was introduced into Parliament, the Attorney-General announced that 'all Victorians will benefit from the greater scrutiny of the public sector which this bill facilitates'. It is difficult to see how Victorians will benefit from the fact that the Bill removes the Ombudsman from scrutiny.

Jason Pizer

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Another version of this article was published in the *Age*, 4 December 2000, p.15.

The health of FOI in NSW — a long, long, long way to go to recovery

The release of the Annual Report of an Ombudsman or FOI Commissioner is always an excellent way of focusing one's mind on the state of health of FOI laws. As reported elsewhere in this issue, both here and in Canada all is not well.

The NSW Ombudsman's Annual Report for 1999–2000 has been released and its section on FOI makes for interesting and disturbing reading. (It is available on the Ombudsman's web site: <http://www.nswombudsman.nsw.gov.au>).

The following comments are meant to give a glimpse of some of the issues raised by the report.

Need for Review of FOI Act — proliferation of access regimes

The Ombudsman, like his predecessors, again calls for a review of the *FOI Act 1989* (NSW). An additional reason why such a review has become necessary is the fact NSW now has at least three information access regimes under:

- the *FOI Act*
- the *Privacy and Personal Information Protection Act*, and
- the *Local Government Act*

One could probably add two more regimes, one arising from the centralised push for agencies to have their own web sites

and the other, for older documents, under the *State Records Act*.

As the Ombudsman notes:

The existence of three separate systems has created considerable confusion for both users and the public officials responsible for administering the relevant legislation. [Annual Report, p.108]

The incompatibility of the regimes is noted and the report gives a useful précis of the advantages and disadvantages of proceeding under each scheme. An appendix to the report compares provisions of the three acts to illustrate the potential for confusion. Given the comments elsewhere in the report one can imagine gleeful agency decision makers using the confusion to refuse to supply information and to discourage applicants. The refrain 'oh the new privacy laws prevent us telling you this' is something I have heard now, on numerous occasions.

Features of agency conduct

In the absence of any separately issued investigation reports on specific agencies of issues, we have to rely on the Annual Report for some case studies plus other observations arising out of the complaints handling process and the Ombudsman's own audit of agency activities.

The office received 490 written and oral complaints, up from the previous year but not as high as in 1997–1998.

Handling of *Fol* complaints

It is probably not necessary to go past the following comment:

Most *Fol* notices of determination we see are deficient in significant respects. [p.107]

As a result the office will be making a closer examination of the standard of determinations for all the complaints it deals with.

One notable problem, described as 'common' is that agencies give insufficient reasons (required by the Act itself) in their notices of determination:

Our experience is that reasons are often too brief and do not adequately justify the decision. [p.114]

Merely restating the words of an exemption is considered inadequate. In the first of several ironies in the report, one case study of a complaint about a determination by the Attorney-General's Department is scathing about its failure to comply with the Act. If the supreme law making department in the State cannot get it right (willingly or otherwise) what message does that give to other agencies?

The office is receiving an increasing number of complaints about records lost or improperly concealed (p.114) — the complaints represent about 10% of the total. While the report does not give an evaluation of the overall legitimacy of these complaints, it does make observations about how *Fol* 'will only work if agencies make and maintain full and proper records' (p.115).

The report puts agencies on notice that it will 'look closely' at those who regularly lose records or who improperly conceal them. Where do all those little yellow 'Post-it' notes end up I wonder? They are a state record. Some years back the NSW Premier's Department had a committee to look at policy on this subject but as far as I can tell from the Department's Summary of Affairs it has not published one.

On a positive note [and you should do this more often folks] the report states its officers have visited agencies, without notice, to require production of documents or to inspect records areas etc (p.115).

Next year's report might give us the statistics about the number of visits made, the names of the agencies and the results.

I suspect this area of complaint, and related ones, is the 'sleeping giant' of *Fol* non-compliance, and nowhere is this better demonstrated than some comments made about the significance of the *State Records Act*. The report says:

Ignorance of the provisions of the provisions of the State Records Act was demonstrated to us in a recent meeting with a senior manager of an agency. We had suggested that a report given to an agency should be released to a *Fol* applicant. The senior manager was not particularly happy about releasing the report and told us that if he had to release it he would go back to work and destroy all similar documents. He did not appear to be aware, until we pointed out to him, that such an action may be considered a criminal offence under the State Records Act. [p.110]

Who is this senior manager, what agency is he from? Has he destroyed documents before or 'lost' them?

Additionally one of the case studies presented concerns a local council, which upon receiving a request for a copy of some tender documents declared them exempt under cl.7 of the Schedule to the *Fol Act*. Subsequently, once a complaint had been received, the council advised the Ombudsman the tender documents had been returned to the tenderer, without keeping a copy.

In addition to the *State Records Act* offence, I think a case could be made that any attempt to avoid or frustrate the *Fol Act* would constitute the common offence of misconduct as a public official. Would a few prosecutions of some public officials encourage the others to take the *Fol Act* seriously?

Operation of the Ombudsman's Office in the *Fol* area

The report covers the office's activities and it is a matter of regret so few investigations are conducted into *Fol* matters (five commenced but all resolved or discontinued) and even fewer public reports are issued about the conduct of specific agencies (none in the year under review).

On the positive side two matters deserve comment. The Ombudsman has announced a change in the approach it takes to *Fol* matters and he reports on the fourth audit of compliance by agencies with their *Fol* reporting requirements.

As to the first, the office is concentrating on how agencies deal with applications rather than getting into the details of the merits of their decisions. Office procedure has changed to include greater use of suggestions to redetermine applications (under s.52), conducting informal hearings with senior agency officers to deal with issues and raising all complaints with an agency at the same time, rather than taking each matter individually. On this latter approach the office might consider taking all complaints about an agency together (ie the ones about other wrong administrative conduct) as the *Fol* cases are likely to reveal such issues present in other complaints about the agency, and likely to be demonstrated by the very documents a person is seeking.

The Ombudsman's new approach is more labour intensive, so an injection of resources would seem warranted, especially as the results are likely to be more significant. More resources might also mean more reports tabled in Parliament. How much more effective would it be to table a report dealing with all of the *Fol* complaints about an agency, plus details of any meetings with the agency and particulars from the audit of that agency's *Fol* record over a number of years?

As to the audit, 137 agencies were examined via 109, 1998–1999, annual reports. Among things disclosed by the audit, the following are of interest:

- There has been a decline from 81% to 71% in the number of applications granted in full, between 1995–1996 and 1998–1999 (p.118).
- There has been an improvement in compliance with statistical reporting but 'there are still a number of reports that are deficient' (p.120).
- Of 109 reports examined compliance with the statutory assessment requirement was seriously deficient or non-existent in 45 reports (p.121).
- As to the resource impact of *Fol*, the audit showed for most agencies there appeared to be no significant implications (p.121).
- As for Summaries of Affairs there was an improvement from June 1997 to December 1999 but 'a significant reversal of this trend for the June 2000 reporting period' (p.121).

On this last point a list of the some 50 agencies that did not publish a Summary in June is to be sent to the Premier. I hope next year's report tells us what the Premier did.

The second irony in the report concerns a project between the Ombudsman and the Premier's Department to produce a joint *Fol* manual. Currently the Department issues a procedure manual while the Ombudsman issues guidelines. In 1999 both agencies agreed to publish a document combining elements of the two.

Elsewhere in the report a table is produced showing the top 19 agencies (of the 137 audited) which refused access in full or in part on *Fol* applications in over 30% of cases. Coming twelfth in the list is the Premier's Department.

Who is going to 'capture' whom in the joint document enterprise?

Two projects I'd like to see studied further:

- Within agencies what are the grading levels of the people who handle *Fol* applications, and where do they fit in the organisational structure, and what is the grading level of the people who carry out internal reviews? In both categories what training have they received, what riding instructions

have they been given and how independent is the internal review process?

- Who actually uses Fol for non personal requests? We are told about 73% are for personal documents, so one assumes the remaining are for other documents but who is making the requests and why, and what does it tell us? Two of the case studies are about parliamentarians making requests — does

this suggest existing parliamentary accountability mechanisms are deficient [my answer out aloud — Yes]? How many 'citizens' are using Fol to build a case for some other agency to take action on a matter?

Overall a report well worth the read, especially the section dealing with protected disclosures.

[P.W.]

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Editorial Co-ordinator: Elizabeth Boulton
Typesetting and Layout: Last Word
Printing: Thajo Printing Pty Ltd, 4 Yeovil Court, Wheelers Hill 3150
Subscriptions: \$66 a year or \$44 to *Alt. LJ* subscribers, includes GST (annual subscription)
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