

Freedom of Information

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Comment

A beautiful still spring morning in Hobart after several days of rain, snow and wind. Hard at times like these to stay indoors and reflect upon FoI and the problems that dog something that on the drawing board looks like a simple proposition — maximum access and secrecy as a limited option. My thought processes have in part been assisted by reading briefing papers from 150 law students on their judgments on the effectiveness of FoI.

An issue that has come up in class discussions has been how the public service especially, but not exclusively, smaller agencies and institutions cope with peaks in workloads. Surge capacity. FoI is probably one of the most unpredictable processes for managers in the public service in terms of budgets, staffing allocations and workflow predictions. Requests (with few exceptions) have to be accepted, processed and determined within statutory timelines with the prospect of review of decisions sparking further workload demands at higher levels within the organisation.

Furthermore FoI requests can, and frequently do, spill over divisional lines, challenge chains of command and resurrect information about long retired decisions, programs, policies and problems. Few agencies, if any, have the capacity to allocate, train, resource and continually support enough staff to be readily available to deal with surges in demand from FoI users expected or unexpected.

Surges can occur in a multitude of ways. A series of deaths in a prison or a bus crash may generate requests from relatives, lobby groups, opposition members of parliament or the media. A story in another jurisdiction about police strip searches might inspire a number of journalists in a second jurisdiction to replicate that story. An enthusiastic journalism teacher or law academic might decide it would be great practical experience for their 150 students to lodge a handful of applications each to several agencies for a project.

Surge capacity is relative. A Tasmanian Government agency, not small, almost went into meltdown when it received 35 requests from the same politician on the same day. The problem was that this series of requests was more than it had received in the previous few years combined. The key decision-makers in the agency instead of dealing (processing, negotiating, determining etc) with the requests went to the battlelines on a matter of principle. What followed was a lengthy frustrating standoff between the agency, applicant and external review body.

The Canadian Access to Information Task Force in its final report *Access to Information: Making it Work for Canadians*, June 2002 made some suggestions about redressing this problem including budgeting for access requests as part of a regular program delivery and being prepared to hire in staff to deal with unexpected surges. I would like to examine this topic in more detail in a future article. I would appreciate hearing from FoI Officers and managers about how they handle or manage peaks in workload. Email me at <r.snell@utas.edu.au>.

Rick Snell

Courts split over Fol defamation threat to whistleblowers

Introduction

Suppose you are a 'whistleblower' and you write a letter to a government department that defames a person. And suppose that person retrieves the document by virtue of the *Freedom of Information Act* (Fol Act). The whistleblower would be protected by the Act from a defamation action, right? Wrong. Or, more correctly, it depends on what state you live in. As a result of recent decisions in Queensland and New South Wales, authors of documents subject to discovery under the Fol Act may find they are not protected from actions for defamation.

This is despite the operation of s 91 sub-s 91(1)(b) of the Commonwealth *Freedom of Information Act 1982*. The meaning of this provision, which is mirrored in the Fol legislation of the states, has been the subject of a number of conflicting decisions. Section 91 provides:

- (1) Where access has been given to a document and:
- (a) the access was required or permitted by this Act to be given or would, but for the operation of subsection 12(2) or of that subsection 12(3), or of that subsection as modified by regulations made in pursuance of subsection 12(3), having so required to be given; or
 - (b) the access was authorised by a Minister, or by an officer having authority under section 23 or 54, to make decisions in respect of requests, in the bona fide belief that the access was required by this Act to be given;

no action of defamation or breach of confidence or infringement of copyright lies against the commonwealth, an agency, a Minister or officer by reason of the authorising or giving of the access, and no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of the access lies against the author of the document or any other person by reason of that author or other person having supplied the document to any agency or Minister.

The matter of what for the purposes of this article may be described as the 'protection from defamation action clause' arose most recently in *Pal v Weir*¹ in Cairns before White DCJ. In an action for damages for defamation the plaintiff's action was based on two alleged publications. One of these included publication of a letter concerning the plaintiff to the then Queensland Premier, a number of Members of Parliament, a local government officer and the producer of the ABC Television Four Corners program. White DC J took the view that the construction of paragraph (d) should be approached in a manner consistent with, and against the background of the provisions of the Queensland *Defamation Act 1899* especially as it relates to publication.² Although the *Defamation Act* does not define what publication means the cases dealing with the tort of defamation maintain the plaintiff must establish that the material complained of has been communicated to a third person.³ The first point White DCJ raised was that what is protected by the Fol Act is 'any publication'. The second point, according to his Honour, was that the protected publication is *not* any publication involved in the supplying of the document to an agency or minister but a publication involved in, or resulting from 'the giving of access'. His Honour argued that if the legislature intended

to protect the original publication of the document to an agency or minister from an action for defamation or breach of confidence, it could have easily said so, but it did not. Secondly, in His Honour's view, paragraph (b) did not protect documents: it only protected publications. Furthermore, it did not protect all publications of a document, only those 'involved in or resulting from the giving of the access'.⁴ His Honour could not be persuaded that the publication of a letter by supplying it to an agency or minister could possibly be characterised as being involved in or resulting from the giving of access.

A contrary view

The matter also arose in July last year in NSW in *Ainsworth v Burden*⁵ but the decision there was the reverse. There, the plaintiff acting under the *Freedom of Information Act 1989* (NSW), obtained a copy of a letter written by the defendant to a Minister of the Crown which allegedly defamed him. He brought an action for defamation based on the publication to the Minister. The defendant applied for the action to be permanently stayed on the ground that the publication was the subject of absolute privilege under s 64(1)(b) of the Act that essentially mirrors the Commonwealth Fol Act. Simpson J held that the publication of the letter to the Minister was protected by sub-s (1)(b). Her Honour indicated she preferred a plain words interpretation of the sub-section that protects the author of a document who has supplied the document to a Minister, against actions for defamation as a result of a grant of access to the document.⁶ Significantly though, her interpretation was reached by excluding the words of limitation, namely: 'publication involved in, or resulting from, the giving of access'.

Her Honour agreed with the proposition that the purpose behind the Fol Act supports the notion that the author of a document is protected in respect of the original publication of that document, where the plaintiff comes into possession of the document as a result of the Fol Act. This simply means that the legislature determined that the Act would not become a source of material to be used against individuals providing information to government Ministers or agencies. It was Her Honour's view that the sub-section was constructed in such a way that a plaintiff who comes into possession of a defamatory document by means other than the Act is not prevented from taking action. It is only where the procedures provided by the Act have the effect of disclosing a document that the protection afforded by the section arises.

Her Honour was guided by a decision by the Full Court of the Supreme Court of South Australia in *Morgan v Mal-lard*.⁷ There a document, which the appellant claimed defamed her, came into her hands as a result of the process of discovery. It was held that, absent a grant of leave, the plaintiff could not use the document so produced in order to found an action for defamation. However, in coming to that view, the Full Court considered whether the appellant would be able to use the same

letter if she obtained it as a result of an application under the *Freedom of Information Act 1991* (SA).

Bleby J, with whom Mullighan and Wicks JJ agreed, wrote:

(31) In this case, to the extent that the letter in question has been produced to the appellant under the provisions of the Freedom of Information Act 1991, s50 (1)(b) would prevent her from using it for the purpose of maintaining the present action for defamation. That is because it is the subject of protection under s51 (b) as a document produced by reason of the author having supplied it to Workcover Corp. However, because it was also supplied to her in a different capacity, as a litigant in the Magistrate's Court, she may be able to use it either with the consent of the respondent or by leave of that Court.⁸

A similar question came before JC Gibson DCJ in *McFarlane v the Commonwealth of Australia*⁹ Again the legislation contained substantially the same provisions to s 91 of the *Freedom of Information Act 1982* (Cth). Gibson DCJ came to a conclusion similar to that reached in *Morgan*.

The latest decision

However, when *Ainsworth v Burden*¹⁰ came on appeal before the New South Wales Court of Appeal in April of this year it was held the section only protected publications pursuant to the Act, and did not protect the original publication to the Minister. The Full Bench following *Pal v Weir* said the statutory language must be construed in the context of the general principles of the law of defamation.¹¹ That is, each republication of defamatory matter is a new publication, which exposes the republisher to liability in defamation. Republication may also expose the original publisher to further liability where the republication was the natural and probable result of the original publication¹² either on a fresh cause of action or for increased damages on the original cause of action.¹³ It was their Honour's view that, in the absence of statutory protection, public authorities and their employees who, under FoI legislation, released documents containing defamatory imputations against third parties, or who were involved in the decision-making process heading to such release, would be exposed to actions for defamation.¹⁴

People writing to a Minister, public authority, or a public servant complaining of alleged crimes, other wrongdoing or alleged abuses in public administration, may be protected by qualified privilege under common law or statute, subject to the condition at common law that the publication must not be more extensive than the privilege justifies.¹⁵ Therefore, according to the Full Bench in *Ainsworth v Burden*, without statutory protection a person publishing defamatory matter to a public servant or politician, on what otherwise would have been an occasion of qualified privilege, loses that privilege if republication to third persons was the natural and probable result of that publication. Republication pursuant to the legislation would be outside the protection of the qualified privilege which would not protect publication to third persons.¹⁶ While this argument may be legally correct, one wonders whether a 'whistleblower' would have this degree of knowledge of what constitutes defamation when writing a letter on what he or she genuinely thinks is a matter in the

public interest. Ignorance of the law is, of course, no excuse but surely the FoI Act should be devoid of legal technicalities if it is to do the job Parliament intended. It is unlikely to achieve this level of user friendliness if a whistleblower has to seek legal advice before writing a letter to the relevant public official.

Protection from republication

Section 64 (1)(a) protects public officials from liability for republication of defamatory matter pursuant to the Act. Section 64(1)(b) extends that protection to the author and other persons. Protection for other people was necessary because someone other than the author may have sent the document to the public official. For example, an employee may have made a report to his employer, which the latter sent to the public official. The employer would have republished the defamatory material and thus been exposed, like the author, to defamation proceedings arising out of its further republication pursuant to the Act unless statutory protection had been provided. But its protection is limited to 'any publication involved in, or resulting from, the giving of access' under the Act. As noted above, these were not considered words of limitation by the Primary Judge. Protection is conferred by s 64(1)(b) where liability could arise because ('by reason of') the author or other person supplied the document to a public official. According to Handley JA, with whom Hodgson JA and Grove J agreed, that is the reason for protection being given. However, in their opinion the words 'by reason of' do not define its scope. This is defined by the words 'in respect of any publication involved in, or resulting from the giving of access'. Protection is not given in respect of other publications, made to the public official or anyone else.¹⁷ Under this reasoning the section gives no protection to the author or other person merely because the plaintiff became aware of the document by obtaining access to it under the Act and would not otherwise have known that he had been defamed, or been in a position to prove this. The protection is not given against the use of the document; it is given against an action for defamation in respect of defined publications.

In the opinion of Handley JA, the evident purpose of s 64 was to ensure that the Act did not widen liability for defamation by a side wind. There is nothing in s 64 to indicate that it was intended to protect publications made independently of the Act.

This interpretation was previously reached by Deputy President Forgie of the Administrative Appeals Tribunal in the Queensland case *Re McKinnon & Powell v Department of Immigration and Ethnic Affairs*.¹⁸ This matter concerned the Commonwealth provision. Deputy President Forgie held:

The focus of s 91 is solely upon the republication of the matter in a document released under the FoI Act. It does not in any way attract the liability of the original author of the document when he or she sends or gives it to a Minister or agency. The initial transmission of the matter in the document is itself publication of the matter and something in respect of which an action for defamation may be brought. Section 91 does not protect the author of the document in respect of that original publication.¹⁹

This construction of the legislation was accepted by Handley JA in *Ainsworth v Burden* where he said the important words of limitation were: '[publication] involved in, or resulting from, the giving of access'.²⁰ If parliament had wished to protect defamatory publications made independently of this Act, he said, the result could have been achieved by omitting these words from s 64(1)(b).²¹ In this writer's opinion this would appear to be the correct legal interpretation but it offends the spirit of Fol legislation. The challenge now is to persuade parliament to amend the legislation that omits the limiting words in the interests of Fol.

Summary

The fact that Australian courts are split over the interpretation of the defamation protection clause is highly unsatisfactory. The interpretation of the protection clause obviously leads to a balancing act between protecting an individual's reputation as opposed to the public interest in preserving the spirit of Fol. It must be remembered Fol was designed as one of the few tools available to the public to help ensure the integrity of our public officials. If a balancing test is required then surely it should come down on the side of Fol rather than the protection of an individual's reputation. As a result of the most recent decisions concerning the protection from defamation clause our 'whistleblowers' could now be forgiven if they kept 'their powder dry' for fear of a defamation writ to the detriment of the wider public interest. This is surely not what our legislators intended. It is over to them to fix it.

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An update on Access to Information in South Africa New directions in transparency¹

A brief description of the Promotion of Access to Information Act

South Africa's new freedom of information legislation — the *Promotion of Access to Information Act 2 of 2000* (PAIA) — came fully into effect on 15 February 2002.² The Act is general freedom of information (Fol) legislation, largely modeled on the Fol laws of the United States and Commonwealth jurisdictions.³ It is, however, unusual in at least two respects. First, it is based on and is backed up by a specific constitutional right of access to information, entrenched in the South African Bill of Rights. Secondly, this right, and as a consequence, the Act, is applicable not only to information in government hands but also to information held in the private sector.

The Act applies to *records* held by *public bodies* and *private bodies*, irrespective of what date the records were created. Public bodies are defined as including any functionary or entity in any branch of the state at any of its three levels: legislatures, courts, members of the executive or

any government or state department at national, provincial or local level.⁴ The definition also includes functionaries or institutions that are classifiable as part of the private sector when they exercise a public power or function. Private bodies are defined as any person or entity that is not a public body and that is not a natural person carrying on a trade, business or profession.⁵ Putting the definition of public and private body together, the Act has extensive but not universal application. Essentially, the only bodies that are not covered by the AIA are natural persons in their private capacity. All other legal persons are either public or private bodies under the Act.

The Act creates a statutory right of access on request to any record⁶ held by a public body, with the exception of records held by the Cabinet, court records and records held by members of parliament and provincial legislatures. The Act provides a similar statutory right of access to records held by private bodies, to the extent that the requester can show that a requested record is required for the exercise or protection of the rights of any person.

Both private and public bodies are under a duty to provide access to a requested record, or part of it,⁷ unless refusal of the request is permitted or required by one or more of a list of grounds in the Act.⁸ The grounds of refusal limit the constitutional right of access to information in order to protect other fundamental rights and important aspects of the public interest.⁹ The Act provides mechanisms for the resolution of disputes over access to information in the form of a limited system of internal appeals within public bodies and review by the ordinary courts.

The heart of the Act is in its Parts 2 and 3. Part 2 covers access to information held by public bodies while Part 3 covers private bodies. Both Parts have the same structure: the Act grants a right to request records in the possession or under the control of public or private bodies and then specifies the grounds on which access to requested records may or must be refused by a public or private body. The remainder of the Act applies to both public and private bodies. Part 1 contains general definitions and application provisions that define the scope and form of information to which the Act applies. Part 4 contains the enforcement and dispute-resolution mechanisms of the Act — internal appeals against decisions of certain public bodies to a higher authority within the body; and appeals to courts. Part 5 allocates training, promotion and monitoring functions to the South African Human Rights Commission.¹⁰ Part 6 covers some transitional arrangements; and Part 7 contains additional general provisions, notably criminal penalties for destruction or concealment of records and a grant of regulatory powers to the Minister of Justice and Constitutional Development.

Origins of the Act

The entrenchment of a constitutional right of access to official information in the interim Constitution¹¹ was, like much else in South Africa's constitutional revolution, motivated by a desire not to repeat the mistakes of the past. The apartheid state's obsession with official secrecy has been well documented.¹² A characteristic of authoritarian states is their desire to control information and their obsession with secrecy and the apartheid state — both authoritarian and singularly unrepresentative of the people it ruled — was no different.¹³ Anxious to ensure that the 'almost claustrophobic culture of secrecy'¹⁴ that had developed in governmental institutions would not be allowed to undermine the goals of political transformation and democracy, the negotiators of the interim Constitution placed two measures in the document. The first was a right in the interim Bill of Rights: s 23 of the interim Constitution provided as follows:

23. Access to information

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

The reversal of past practice brought about by this provision was dramatic. Access to information in the hands of the state was now a right rather than a privilege. The entrenchment of the right in the Bill of Rights meant that legislation restricting access to official information was a

limitation of the right and would be unconstitutional and invalid unless justifiable in terms of the limitation clause in the Constitution.¹⁵ Section 23 was one of the more heavily-litigated rights in the interim Constitution and, as a result, there is a reasonably detailed jurisprudence dealing with its interpretation and application.¹⁶

In addition to the constitutional right, the drafters of the interim Constitution ensured that there would be similar guarantees of freedom of information in the 'final' Constitution by means of Constitutional Principle IX (CP IX) which required the constitution to make provision for 'freedom of information so that there can be open and accountable administration at all levels of government'.¹⁷

1996 Constitution

Enacted in compliance with CP IX, the access to information right in the 1996 Constitution¹⁸ greatly expanded the scope of the equivalent right in the interim Constitution. It also required the enactment of supplementary legislation to 'give effect to' the right:

32. Access to information

- (1) Everyone has the right of access to
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) 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.

It is worth pointing out that, in relation to information held by the state, the 1996 right eliminates the proviso contained in s 23 of the interim Constitution that the information requested must be 'required for the exercise or protection' of the rights of the requester. Moreover, s 32(1)(b) expands the reach of the right of access to information to information held by private persons to the extent required for the exercise or protection of rights. However, the constitutional provision in the 1996 Constitution was to be supplemented by national legislation before it came into operation. The rights in s 32(1) were suspended for a period of three years. During the period of suspension, in terms of item 23 of Schedule 6 of the Constitution, a placeholder provision substantially similar to s 23 of the interim Constitution continued to apply.¹⁹

Promotion of Access to Information Act

The 1996 Constitution required the enactment of national legislation giving effect to the right of access to information within a period of three years after commencement of the 1996 Constitution (ie by 3 February 2000). The process of drafting the PAIA began as early as 1994, with the appointment by Deputy-President Mbeki of a task team on open democracy, made up of legal academics and politicians.²⁰ The team's efforts resulted in a draft Open Democracy Bill which was presented to Cabinet in 1996. It was recommended that the Act should take the form of omnibus legislation that would do the work that, in other jurisdictions, was usually done by separate Freedom of Information Acts, Privacy Acts, Open Meetings Acts (also known as Government in the Sunshine Acts) and Whistleblower Protection Acts. The draft Bill that was submitted to

Cabinet also provided for two specific oversight and implementation institutions: an independent Open Democracy Commission and specialised Information Courts.

After considering the draft Bill over a period of more than a year, the Cabinet introduced a modified version of the Open Democracy Bill into Parliament as Bill 67 of 1998. The most important modifications made to the draft Bill were the deletion of the Open Meetings provisions of the Bill, and the removal of the provisions of the draft Bill relating to the Open Democracy Commission and Information Courts were removed. The Cabinet draft instead provided that most of the functions of the proposed Commission were to be performed by the South African Human Rights Commission. Judicial enforcement of the rights in the legislation would be by way of urgent application to the ordinary courts and not to purpose-created information courts.

The Open Democracy Bill was introduced in parliament in 1998 and was finally passed in 2000. Substantial changes were made to the Bill during the parliamentary process. The Whistleblowers chapter of the Bill was removed, with the intention of enacting it subsequently as a separate piece of legislation.²¹ The same went for the privacy and data-protection components of the Open Democracy Bill.²² There was also considerable elaboration of the Bill's provisions dealing with the right of access to information in private hands.

The Bill was passed by parliament in January 2000 and assented to by the President on 2 February 2000, under the name of the *Promotion of Access to Information Act 2 of 2000*.²³ The Act has been amended twice. Both amendments can be considered technical.²⁴

Implementation of the South African Act

What practical impact has the Act had in the two or so years since its commencement? This is rather difficult to measure. The South African Human Rights Commission, which has the task of compiling statistical data on the use of the Act, will report to parliament by the end of 2003 for the first time in a detailed focused manner on the implementation of the PAIA and its underlying constitutional right.²⁵ Accordingly, any assessment at this stage is necessarily impressionistic and anecdotal and should be treated with appropriate caution.

Two recent reports by the two leading non-governmental organisations that are promoting the Act take the view that the pace of implementation is slow. In April 2002, the Open Democracy Advice Centre (ODAC)²⁶ published the results of its pilot survey on the way to a full-scale legislation implementation report. In both the public and the private sector, the ODAC survey found that there was only minimal awareness of the legislation. Of the public sector bodies, more than half (54%) were unaware of the Act. One out of six (16%) were aware of the Act but not implementing it. Only 30% were both aware of the Act and were implementing it. The situation was worse in the private sector: only 11% (6 out of 56 private bodies) were implementing the Act. These six bodies were using their

existing systems for the collection and dissemination of information as the system to comply with the Act.

The ODAC report also questioned respondents about their progress in compiling a manual to assist users of the Act. South Africa originally required compilation of these manuals by July 2002, although the date was later shifted to February 2003. As of the April 2002 report, only 9% of the public bodies had begun to compile their manual of records; the similar figure for the private sector was 6%.

At the end of 2002, the South African History Archive (SAHA), the other leading organisation and an active user of the access to information legislation, also assessed the implementation of the Act to date.²⁷ In their view, 'use of PAIA by the public in its first two years of operation has been extremely limited'. According to SAHA, there were three reasons for this. 'Freedom of information, as an idea and as a culture, has not yet taken root in the country. The media have given very little coverage to PAIA. And the fact that very few section 14 and section 51 manuals have been published means that the public does not have ready access to information about the resources available to it.'

Not all was bleak, SAHA reported. There were government bodies — notably the South African National Defence Force (SANDF) — who were responding to the Act professionally and efficiently. The SANDF has appointed deputy information officers, secured training for staff, created an effective mechanism for dealing with requests, and displayed diligence and courtesy in all its dealings with SAHA. For instance, in several cases the SANDF released a record with certain pieces of information in it 'masked' (ie, physical severance of information restricted in terms of PAIA). In other words, the existence of restricted information in the record did not place the whole record outside of SAHA's reach. This well-resourced compliance by the SANDF was however not repeated across the public service as a whole.

As part of the run-up to its 2003 access to information report to parliament, the South African Human Rights Commission sponsored a series of consultations on improving the implementation of the right to access to information. The aim was to come up with a series of recommendations to parliament and to other government bodies, such as the Department of Justice, which are significant participants in the development of the access to information or openness regime. One of the major issues under discussion was the improvement of the enforcement of the PAIA by adding a body with binding enforcement power at a level between the implementing public and private bodies and the courts. At the time of writing, the Commission was in the midst of preparing its report.

Cases and applications

While South Africa's Access to Information laws are still very new, there are already several instances where they have been put to use. This section describes an ongoing effort to use the *Promotion of Access to Information Act* to get TRC records, a successful recent South African court case, and the importance that the South African

Constitutional Court has placed on transparency in the push for socio-economic rights.

Truth and access to information

In May 2001, an independent non-governmental organisation, the South African History Archive (SAHA) submitted a request in support of an archival project designed to access Truth and Reconciliation Commission (TRC) records. The TRC has issued its final report on human rights violations during the apartheid era but it collected many more documents than it was able to use. Moreover, some of the records were known as 'sensitive'. At the Department of Justice, the responsible department for PAIA, administrative confusion led to it taking over an hour simply to register the single request, and even then the officials concerned were unable to supply a receipt for the request fee. The request was for a list of a set of 'sensitive' TRC records that had been given to Justice in 1999 and was simply seeking confirmation of precisely what records were involved. Justice first claimed that they have no TRC records in their custody and then claimed that the National Intelligence Agency would first have to be consulted before a response could be given. In 2002, the issue of the TRC records became a talking point on radio talk shows as the National Archives, the Department of Justice, and the National Intelligence Agency all denied having the TRC records. Finally, the National Archives admitted that it had actual possession of the records. SAHA lodged a formal complaint against the Department of Justice, related to 34 boxes of 'sensitive' TRC records, with both the Human Rights Commission and the Public Protector. In January 2003, SAHA launched a High Court action. The parties then agreed that an analysis of the records would be done in terms of PAIA with a deadline of June 2003. After the deadline passed and further negotiations, SAHA sent a letter to the state attorney giving a deadline by which to file court papers.

The lengthy and ongoing episode over these TRC files (seen by many as the heritage of the post-apartheid nation) shows both the bureaucratic confusion regarding the implementation of a new piece of legislation and the degree to which 'sensitive' records will continue to be seen as the property of national intelligence agencies.

South Africa's first case: arms deals and access to information

South Africa's first decided judicial decision under the *Promotion of Access to Information Act 2 of 2000* is *C²ℙ Systems (Pty) Ltd v Fakie NO (Office of the Auditor General)*.²⁸ *C²ℙ v Fakie NO* is a case that has its roots in the controversial purchase by the post-apartheid government of weapons and arms systems conservatively estimated at 30 billion rand. After allegations of misconduct were raised, the Auditor General and several other government bodies conducted a joint investigation into the arms purchases. This investigation reported to Parliament that it did not find any major problems with the arms purchases. Parliament accepted this report.

One disappointed bidder for a sub-contract in the arms deal submitted a request in terms of the PAIA. *C²ℙ*

Systems, the bidder, asked to obtain all draft copies of the Auditor General's report to parliament and all 'audit files' that that Auditor General had collected during his investigation into the arms purchase together with the Auditor General's correspondence on the investigation.

The Auditor General refused the request, citing three reasons that the South African Act gives as grounds for non-disclosure: (1) that granting the request would substantially and unreasonably divert the Auditor General from his regular business of auditing public departments and agencies, (2) that the information was supplied in confidence by third parties, and (3) that the information related to defence and security matters would should not be disclosed.

C²ℙ Systems went to court to force disclosure. In Court, the Auditor General argued that 'the very broadness of the request renders it practically impossible for me to have complied with the request'. The Auditor General then went through the different categories of documents and noted which section of the Act applied.

In its written reply, *C²ℙ* Systems for the first time limited its request considerably. In this second document filed in court, the applicant was now asking for what became known as the 'reduced record'. This was the state of play when the case came before Hartenberg J in the High Court in Pretoria.

The court judgment was a clear victory for access to information. Judge Hartzenberg first rejected an argument by the government that the application be dismissed. The court used a presumption in the South Africa Act (s 2(1)) to interpret the Act in favour of the requester not the government. The judge said this would result in a system that would be quick and user-friendly rather than slow and cumbersome.

On the main issue, the court decided against the Auditor General. The Auditor General was essentially arguing that the documents were too many for him to go through and analyse in terms of the Act. Judge Hartzenberg rejected this, stating '[i]t is not good enough to hide behind generalities'.

The court expressed views very favourable to requesters of information. Interpreting a section of the Act on operations of public bodies (s 44), the court found the object of the grounds for refusal to be that '[s]enior and junior officials must be able to talk freely about the development of policy matters and their interaction at a stage before finalisation should not at that stage be accessible'. However, the judge quickly went on to note that in his view the section 'does not deal with historic situations. The joint report has been finalised and accepted by parliament. At this stage the draft reports are only of historic importance and cannot obstruct the joint commission in its work.' The court thus effectively put a time limit on the use of this ground of refusal.

The court's order covered several different matters. In addition to providing records relevant to the allegations of influence in the selection of tender recipients, the government was ordered to provide within 40 days all draft copies of its investigative report into the arms deal transactions,

all records to which it had no objection, and a list of the records to which it did object with a description of the document or record; the basis for the objection; and an indication if the objection related to the whole document or only to portions thereof and if so, to which portion.

The judge said that he would accept legitimate reasons of confidentiality or national security but made it clear that specific documents would have to be identified for those specific reasons in order to justify non-disclosure. Because of the controversy over the arms deal and the need to dispell suspicions, the judge even went so far as to state that if 'the first respondent has to employ extra staff it must be done'. According to the court, the government needed to identify specific documents with specific objections.

The court's order for the government to come forward with a list of documents is similar to the standard *Vaughn* index in USA FoIA practice. This practice was also developed through litigation. This case's greatest legacy may be one of procedure. While the procedure remains as yet untested, it may be possible in terms of South African civil procedure to obtain such a 'CCII Systems list' without resort to a court order. Most likely, the applicant will interpret the order for the list to include 'the basis for the objection' to go beyond the citation of a legal provision and to include a justification for the application of the objection to the record.

In December 2002, the government filed a notice of application for leave to appeal to the Supreme Court of Appeal or alternatively to the Constitutional Court. In March 2003, the Auditor-General withdrew his appeal of the decision and agreed to apply the provisions of the AIA and to hand over the documents that were not protected from disclosure. CCII began to receive documents in May. However, CCII has not received all documents, including most of the Auditor-General's draft report to parliament. CCII instituted a contempt of court action in June 2003 and has been receiving more documents.

Although not directly related to the CCII Systems matter, the PAIA has also figured prominently in events more broadly connected with the arms deal: in particular the events surrounding the decision not to prosecute the Deputy President Jacob Zuma despite a prima facie case of corruption. Zuma has cited provisions of the Act in his attempt to gain access to some of the documents underlying the investigation conducted by the National Director of Public Prosecutions. No decision had been reported at the time of writing.

Transparency and socio-economic rights: down to the district nurse

The Constitutional Court of South Africa has recently underlined the importance of transparency to the effective protection of the socio-economic rights in the Constitution. In July 2002 the Court ordered the government to provide a universal programme to combat mother-to-child transmission of HIV.²⁹ The Court made the point that transparency and access to information was part of a reasonable government programme to protect socio-economic rights. It said that: 'In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and

patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.'³¹

Private bodies and access to information

The most recent PAIA case is one that has even the company lawyers interested. It applies the Act in the context of private bodies. In *Davis v Clutchco (Pty) Ltd*,³¹ the Cape High Court ordered that a number of financial documents, including the company's cash book from the date it commenced business to date, be disclosed to the PAIA requester. The requester was a 30% minority shareholder who would not have enjoyed these rights of disclosure under the South African companies legislation. He wished to determine the value of his shares but was initially refused access to this information due to a fall-out within the family business. He thus resorted to the PAIA. Noting that the company had not specified any grounds in its initial refusal and that the reasons subsequently advanced were not sanctioned by the PAIA, Judge Meer ordered disclosure. To some extent, the court's decision was tailored for the private sphere. For instance, the court prohibited the applicant from disclosing the information in the documents to the public. *Davis v Clutchco* demonstrates that the right of access to information, at least in the South African jurisdiction, can be as transformative in the private sphere as in the public.

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Information in this article current as of 16 September 2003.

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References

1. An earlier version of this note was published in the Commonwealth Human Rights Initiative Freedom of Information Report.
2. The Act is available at <<http://www.law.wits.ac.za/rula/documents.html>>.
3. A good deal of the wording of the Act has been drawn from foreign English-language models, particularly the federal Australian and Canadian FoI and privacy legislation and, to a lesser extent, that of the United States, New Zealand and Ireland. See, further, Iain Currie and Jonathan Klaaren, *The Promotion of Access to Information Act Commentary* (Cape Town: Juta, 2002) [2.11].
4. Section 1 sv 'public body'.
5. Section 1 sv 'private body'.
6. Section 1 defines a record as 'any recorded information ... regardless of form or medium ... in the possession or under the control of ... [a] public or private body ... whether or not it was created by that public or private body, respectively'. Records are subject to the Act whether created before or after its commencement: s 3.
7. A body is required to sever a disclosable part of a record from a non-disclosable remainder, wherever this is 'reasonably' (ie practically) possible: s 28.
8. The grounds are of two types. Mandatory grounds require the refusal of access to records or parts of records containing certain information. Discretionary grounds allow the holding body to refuse or grant a request in its discretion. As a rule of thumb, where rights or interests of parties other than the requester and the holding body are implicated, refusal is mandatory. Where the rights or interest of the body that holds the record are implicated, refusal is in the discretion of the body itself. Where the public interest is implicated (for

- example, records containing defence, security or international relations information), refusal is usually discretionary.
- The Act also has a narrow public-interest override: s 46 (public bodies) and s 70 (private bodies). The override requires disclosure of a record notwithstanding the application of one or more grounds of refusal, where the record contains information revealing a substantial contravention of the law, or a serious and imminent public safety and environmental risk.
9. For example, s 34 (public bodies) and s 63 (private bodies) protects the constitutional right to privacy by prohibiting disclosure of personal information of third parties. Sections 36, 42(3), 64 and 68 protect commercial interests and property rights of public and private bodies and of third parties.
 10. The Commission is one of several 'State institutions supporting constitutional democracy' established by Chapter 9 of the 1996 Constitution. According to s 184(1) of the Constitution, the Commission's primary functions are to promote the protection, development and attainment of human rights and to 'monitor and assess the observance of human rights in the Republic'.
 11. *Constitution of the Republic of South Africa, Act 200 of 1993* (interim Constitution). As its name indicates, the interim Constitution was intended to have a limited period of operation: governing only the first part of South Africa's two-stage transition from apartheid to constitutional democracy. The interim Constitution was the product of political negotiations between former belligerents that took place between 1991 and 1993. Though it contained a comprehensive Bill of Rights and was fully justiciable, the most important task of the interim Constitution was to set out the procedures for the negotiation and drafting of a permanent Constitution. It also contained a list of 34 non-negotiable 'Constitutional Principles' — a blueprint for the new constitution that would be written and adopted by the Parliament elected in 1994, sitting as the 'Constitutional Assembly'. Once the 1996 Constitution was adopted the interim Constitution fell away. There is a brief but helpful description of the constitutional transition in the *First Certification* decision of the Constitutional Court of South Africa: *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras 5-13. (Decisions of the Constitutional Court of South Africa are available at <<http://www.concourt.gov.za>> at 16 September 2003). See, also, Iain Currie and Johan de Waal, *The New Constitutional & Administrative Law* Vol 1 (Cape Town: Juta, 2001) 57-71.
 12. The extent of the legal restrictions on information and free expression in the apartheid era is charted in Kelsey Stuart, *The Newspaperman's Guide to the Law* (Cape Town: Juta 1977). See also Anthony Mathews, *The Darker Reaches of Government: Access to Information about Public Administration in Three Societies* (Cape Town: Juta, 1978) and Christopher Merrett, *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa* (Cape Town: David Philip, 1994).
 13. This has been documented copiously by the South African Truth Commission. See Truth and Reconciliation Commission of South Africa *Report* (Cape Town, Government Printer, 1998) Volume 2 Chapter 2, paras 10-19. Commenting generally, the Truth Commission noted that, while 'all governments are, to a greater or lesser extent, uncomfortable with the notion of transparency, preferring to operate beyond the glare of public scrutiny', in apartheid South Africa 'government secrecy was a way of life'. *Report* Volume 1, Chapter 8, para 24.
 14. *Ibid* Volume I, Chapter 8, para 26.
 15. Section 33 of the interim Constitution contained a 'general limitation clause' (along the lines of s 1 of the Canadian Charter of Rights and Freedoms), permitting limitations of fundamental rights by law of general application to the extent reasonable and justifiable in an open and democratic society based on freedom and equality. The limitation clause in the 1996 Constitution is considered further below.
 16. For a survey of the case law on s 23 and item 23 of the Sixth Schedule to the 1996 Constitution, see Johan de Waal et al, *The Bill of Rights Handbook* (3rd ed, Cape Town: Juta, 2000) chapter 29.
 17. In order to ensure that the final Constitution conformed to the Principles, the Constitutional Court was required to certify the draft final constitutional text. The process is described in the Constitutional Court's two certification judgments: *First Certification* judgment (note 3 above) paras 14—25; *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (*Second Certification* judgment) 1997 (2) SA 97 (CC) paras 1—15.
 18. *Constitution of the Republic of South Africa Act 108 of 1996*.
 19. The three-year suspension of the access to information right proposed in the draft Constitution was challenged during the constitutional certification process (see n 8 above). It was contended that the result of the suspension was that the draft text failed to give effect to CPIX, which, as we have seen, required the constitution to make provision for 'freedom of information so that there can be open and accountable administration at all levels of government'. According to the Constitutional Court the qualified right of access to information in s 23 interim Constitution and item 23 of the Sixth Schedule (allowing access to information only to the extent 'required for the exercise or protection' of the rights of the requester) was a transitional measure that did not comply with CP IX. The Court went on to hold that it was permissible for the Constitutional Assembly to make provision for the phasing-in of a proper access to information regime, consisting of an unqualified constitutional right and a legislative regime that set out 'the practical requirements for the enforcement of the right and the definition of its limits'. *First Certification* judgment (note 3 above) para 83.
 20. The drafting history of the Open Democracy Bill up to its introduction in Parliament as Bill 67 of 1998 is outlined in J White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *South African Journal on Human Rights* 65.
 21. This resulted in the *Protected Disclosures Act 26 of 2000*. The Act is, however, a significant reduction of the intended scope of the whistleblowers chapter of the Open Democracy Bill. In essence, the Bill aimed at protecting people disclosing evidence of maladministration, illegality or corruption by granting them immunity from civil or criminal liability or employment-related penalties. The Protected Disclosures Act, by contrast, is concerned only with the employment relationship. The Act prohibits employers from subjecting whistle-blowing employees to 'occupational detriment' (any adverse change in their conditions of employment).
 22. In February 2002, the Minister of Justice appointed a working committee of the South African Law Reform Commission to draft legislation dealing with privacy and data protection.
 23. The Act (with the exception of ss 10, 14, 15 and 51) came into operation on 9 March 2001. The remaining four sections (dealing with the obligations of public and private bodies to publish indexes of records in their possession) came into effect on 15 February 2002.
 24. Sections 20-24 of the *Judicial Matters Amendment Act 42 of 2001* made a number of textual corrections to the Act. The *Promotion of Access to Information Amendment Act 54 of 2002* introduces technical changes to the Act's provisions dealing with the powers of magistrates' courts.
 25. Section 84 requires the Commission to gather data on the number of requests received and processed by public bodies.
 26. The Centre is based in Cape Town and has the mission of using the Act to promote open democracy: <<http://www.opendemocracy.org.za>> at 16 September 2003.
 27. Verne Harris 'Using the Promotion of Access to Information Act' (December 2002). SAHA uses the Act to obtain, archive and provide public access to material relating to the struggle against apartheid: <<http://www.wits.ac.za/saha>> at 16 September 2003.
 28. Decided by the Pretoria High Court on 25 November 2002, currently unreported <<http://www.armsdeal-vpo.co.za>> at 16 September 2003.
 29. *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC). The basis for the case was an alleged violation of the right of access to health care services in s 27(1) of the 1996 Constitution.
 30. *Ibid* para 123.
 31. See <www.law.wits.ac.za/rula/davis.doc> at 16 September 2003.

The honeymoon is over: Ireland rows back on FoI

The Irish *Freedom of Information Act* (FoI Act) was passed in April 1997 and came into force a year later. Five years later the Act has been amended for the first time. The FoI regimes of many jurisdictions have enjoyed 'honeymoon' periods with the scope of the legislation being restricted once this period has ended. In Ireland's case, the changes introduced by the *FoI (Amendment) Act 2003* are significant. This article will set out the main changes to the Irish FoI regime which have been introduced with the passing of the *FoI (Amendment) Act 2003* and will seek to gauge the potential impact of these changes.¹

IMPETUS FOR CHANGE

The main impetus for amendment of the Act came, at least on a formal basis, largely from the report of a group of senior civil servants known as the Report of the High Level Review Group on the Freedom of Information Act 1997 (HLRG Report). However, it was clear long before this group was constituted that the government and some public servants were becoming uneasy about certain aspects of the operation of the existing FoI legislation. Reservations about the activities of so called 'serial requesters' and with regard to the effect of FoI on decision-making processes in government had been expressed by senior politicians² and a group of senior FoI administrators (the FoI Civil Service Users Network) had produced a report (CSUN Report)³ in December 1999 which advocated a number of amendments to the Act. This report was also influential in the framing of the amendment Bill.

The High Level Review Group, which consisted of five Secretaries General of government Departments, commenced its work in June 2002. Its brief was primarily to examine the issues of protection of Cabinet records; the status of correspondence between Ministers; and the status of submissions from officials of Ministers. It appears that the examination of the Cabinet issue was precipitated by the imminent arrival on 21 April 2003 of the fifth anniversary of the original implementation of the Act. The significance of that date lay in a provision of the original Act which allowed for disclosure of certain Cabinet records five years after the government decision to which they related had been made. April 2003 would have been the first occasion on which records could be disclosed on foot of this provision. The HLRG reported to the Taoiseach (Prime Minister) in December 2002 and their recommendations were passed on to the Minister for Finance to draft into legislation.

The Bill was published on 28 February 2003 and it was introduced to the Seanad (Senate) on 4 March. There was considerable controversy over the fact that the HLRG did not consult with anyone, apart from Cabinet members, in the preparation of its Report. In particular, the Group was castigated for not consulting with the Information Commissioner. The government, in bringing forward its legislative proposals, did not consult with the Commissioner either, nor did it consult with other bodies

or individuals such as the government appointed Citizens' Advisory Group on FoI, the media, voluntary and community bodies or academic and other commentators. The Opposition was trenchant in its criticism of the failure to consult and of the proposed amendments. On 11 March, the Information Commissioner published a commentary entitled *The Application and Operation of Certain Provisions of the Freedom of Information Act, 1997* (Information Commissioner's Commentary)⁴ which indicated a number of difficulties that would arise from the proposed changes to the Act. As a result of the growing controversy generated by the Bill, the Joint Select Committee on Finance and the Public Service held public hearings on 13 March at which the members of the High Level Review Group, the Information Commissioner, representatives of the media, voluntary bodies and academics gave evidence. On concluding its hearings, the Committee issued a statement recommending significant changes to the Bill. However, the Bill was passed unamended by the Seanad on 20 March. In the course of the Seanad debate, the Minister for Finance indicated that he would consider 'tweaking' the Bill to accommodate amendments at committee stage in the Dail.⁵ In the event, the only significant change was the decision not to amend provisions relating to retrospective access to personal information.

Apart from the Reports of the High Level Group and the FoI Civil Service Users Network and the Information Commissioner's Commentary, two other documents issued by the Information Commissioner also had an influence on the shape of the Bill. They were: *The Information Commissioner's Suggested Amendments to the Freedom of Information Act, 1997*,⁶ and *Discussion Paper on Refusal of FoI Requests to Ensure 'Personal Safety'*⁷ (Personal Safety Discussion Paper). The Bill was passed on 9 April. It was signed into law by the President on 11 April after the government had put an early-signature motion through the Seanad on the 10 April, giving the President five days in which to act.

CHANGES AND POTENTIAL IMPACT

Changes to the exemption provisions:

Changes to section 19: the Cabinet records exemption

The amendments to s 19 are significant. As had been expected, the time limit for disclosure of past Cabinet documents has been extended from 5 to 10 years. Under the original Act, Cabinet records, apart from those relating to Cabinet discussions, would have become subject to disclosure where the record related to a decision of the government made more than five years prior to the receipt of the request. The introduction of this amendment in early April 2003 meant that the provision allowing for access to records about Cabinet decisions which were more than five years old would not begin to operate from the fifth anniversary of the coming into force of the Act (21 April 2003) as had originally been provided for, but would

instead be delayed a further 5 years. This amendment had been recommended by the HLRG who argued that as experience was gained in the operation of the FoI Act, it had become evident that a five year moratorium on the release of Cabinet records was too short. The Group took the view that it did not give Ministers the assurance that they require to commit views freely to the record if those views are to be divulged in such a relatively short period of time.

There are three other major changes to the Cabinet records exemption:

The operation of the entirety of the s 19 exemption has been made mandatory. Under the original Act, the head of the relevant public body had the discretion, except in the case of records of Cabinet discussions, to decide whether or not to refuse access to requested records on the basis that they came within the scope of s 19. The introduction of this amendment had been suggested by the HLRG on the grounds that the use of the discretionary 'may' had resulted in uncertainty on the part of key decision makers as to the circumstances in which access to Cabinet records might be granted.

A new ground for refusing access to records under s 19 has been introduced: s 19(1)(aa). This provision, which is concerned with the pre-deliberative stage of the Cabinet process, has two limbs. In the first place, access must be refused in the case of communications between members of the government on matters under consideration or proposed to be submitted to the government. The introduction of this amendment had been suggested by the HLRG on the basis that there was a need for space for the exchange of views between Ministers on matters that have a direct bearing upon the exercise of collective responsibility. The responsible Minister had referred to the aim of the amendment as being 'to give Ministers the freedom to exchange frank views on pending or live government agenda items'.⁸

The other limb of s 19(1)(aa) requires requests to be refused where they concern communications between members of the government, who are part of a group to which a matter has been referred by the government for consideration, provided the communication relates to that matter. The HLRG had recommended the extension of the exemption to include records of working groups of officials set up by Cabinet to further an item under consideration at a Cabinet meeting. The basis of this recommendation was that such working groups operate in direct support of the Cabinet process and are intended primarily to assist Cabinet finalise its deliberations.

Section 19 is also amended in respect of the exemption of materials used to brief government members in relation to matters before Cabinet. Section 19(1)(c) of the Principal Act protected such records only where they were for use solely for the purpose of the transaction of business of the government at a meeting of the government. The amendment extends the scope of this provision to provide for refusal of access in cases where the material in question is for use 'primarily' for the purpose of transacting such business. This amendment had been suggested by the HLRG on the grounds that the use of

the word 'solely' had tended to be overly restrictive and to cause unnecessary doubts about the eligibility for exemption of genuine Cabinet records, which incidentally might be applied to other purposes. The Minister, in introducing this amendment, stated that the substitution of the word 'primarily' would not fundamentally alter the fact that the original purpose for which a record was created remains the key determinant of its status.⁹

Paragraph (e) has the effect of extending significantly the definition of 'government' for the purposes of s 19.¹⁰ It includes within the definition of 'government', committees appointed by the government made up of:

- members of the government, or
- a member or members of the government together with one or more Ministers of State and/or the Attorney General, or
- committees of officials.

In the case of committees of officials, they will only come within the scope of the definition of government in certain circumstances:

- the committee must have been appointed by the government for the purpose of assisting the government in relation to a particular matter that has been submitted to the government for their consideration;
- the committee must have been requested by the government to report directly to them in relation to the matter; and
- the Secretary General to the government must have certified in writing at the time of the appointment of the committee that it was a committee of officials falling within the scope of paragraph (e)(i)(b).

'Officials' is broadly defined to cover civil servants, special advisers and people who may be prescribed.

Potential impact

The potential impact of the changes to s 19 is very significant. The introduction of the additional grounds of exemption will make it very difficult to access pre-deliberative Cabinet materials. Given that the thrust of the Cabinet records exemption is to protect the Cabinet process itself, it is significant that the new provision includes material which has not been, and may never be, brought to Cabinet. The extension of the exemption to communications relating to matters proposed to be submitted to government is vague — no time frame for such submission is referred to. The broad definition of 'government' goes way beyond the scope of Cabinet records exemptions in other jurisdictions and was referred to by the Information Commissioner as 'constitutionally unrecognisable'. There is scope for confusion arising from the use of this definition. Overall the amended provision has the effect of extending the protection of the Cabinet records exemption to records which are exchanged between a wide variety of people, none of whom need to be Cabinet members, on matters which may never come before the Cabinet. The result is an exemption provision which extends protection of Cabinet records far beyond that of any of its overseas counterparts.

Changes to s 20: the deliberative processes exemption

There are two main changes to s 20. The first is the insertion of a new subsection (1A) which gives Secretaries General the power to issue a certificate to the effect that a requested record contains matter relating to the ongoing deliberative processes of a Department of State. The deliberative processes exemption was designed to protect the decision-making processes of public bodies. Once the deliberations are over, the requested material is generally disclosed. In contested cases, decisions as to whether deliberations are complete had, under the original Act, been a matter for the Information Commissioner. The effect of the amendment is that where such a certificate has been issued by a Secretary General, access to records concerning the process must be refused. There is no appeal against the granting of such a certificate. There is provision for the revocation of the certificate where the Secretary General concerned is satisfied that the deliberative processes have ended. Each Secretary General is required to report to the Information Commissioner annually and in writing on the number of certificates issued and revoked by him or her.

An unusual aspect of this provision is that it permits a Secretary General to issue a certificate in respect of records held by any public body — all that is required is that the records in question concern the deliberative processes of any Department of State. It is not clear where the impetus to introduce this amendment came from. It was not recommended in the reports of either the HLRG or the CSUN.

The other major change to s 20 concerns the alteration of the public interest test which applies to its operation. Under the Principal Act, access to a record concerning deliberative processes could only be refused if its disclosure could be shown by the government department or agency concerned to be contrary to the public interest. This has been amended to allow for refusal unless, in the opinion of the head of the public body concerned, the public interest would, on balance, be better served by granting than by refusing access. This change was suggested by the HLRG on the basis that it would bring the public interest test in the deliberative processes exemption into line with the public interest tests in the other exemption provisions.

Potential impact

There are a number of potential difficulties with the provisions regarding the issuing of a certificate under s 20 by a Secretary General. While the power to issue certificates of this nature is given to Secretaries General, the head of a Department of State for the purposes of the FoI Act is the Minister having charge of that Department. The Information Commissioner in his Commentary gave an example of the possible operation of this provision which involved the Minister for Finance being required to refuse to grant a request for access to a record which was certified by the Secretary General of the Department of Justice, Equality and Law Reform to relate to the deliberative processes of the Department of Agriculture and Food.

The Commissioner pointed out that having regard to the functions of Secretaries General of Departments in general, and to the provisions of the Public Service Management Act, 1997 in particular, it would seem inappropriate that a Minister, as head of a Department, would be required to comply with a certificate issued by the Secretary General of his Department. In addition, he stated that it would seem inappropriate, having regard to the same considerations, that a Secretary General of one Department could issue a certificate in respect of the deliberative processes of another Department.

The Minister sought to justify this amendment on the basis that the question of whether the deliberative process is ended can be difficult and that the government had decided that more certainty was needed in this area in order that records relating to ongoing deliberations will be released into the public domain prematurely in such a way as to undermine the process of government.¹¹ The Minister stated during the course of the Select Committee debate that allowing for the possibility of the Secretary General of one Department of State to issue a certificate in respect of records held by another Department of State was necessary because of the high volume of exchange of records between Departments and the possibility of a requester seeking records from a Department other than the Department which was the author of such records.¹² He went on to say that there would be no question of a Secretary General certifying material against the wishes of the Secretary General of the Department concerned.

It is difficult to determine the potential impact of the Secretaries General power to issue a certificate under s 20 as no similar provision is to be found in overseas FoI legislation. The nearest counterpart is the conclusive certificate mechanism which allows a Minister to issue a certificate declaring that a record is exempt by virtue of s 23 (law enforcement or public safety), or s 24 (security, defence and international relations).¹³ The Minister must be satisfied that the record is of 'sufficient sensitivity or seriousness' to justify the issue of the certificate. The effect of the issuance of such a certificate is to establish, conclusively, that the record is exempt and it cannot, therefore, be subject to internal review or to review by the Information Commissioner. There is, however, provision for appeal against the issue of a certificate to the High Court on a point of law.¹⁴ This provision has been little used either because it has not been deemed necessary or because of a feeling that the issuing of such a certificate could result in a Minister receiving unfavourable publicity. The new provision has shifted the responsibility for withholding records on to the Secretaries General. They did not ask for this responsibility and it is unlikely they would welcome it.

With regard to the alteration of the public interest test, the new test is weaker than that which was previously in place since the latter had required the head of a public body who sought to withhold records under this exemption provision to show that disclosure would be against the public interest. The Review of the Queensland FoI Act of 2001 which considered whether an identical public interest test in the Queensland Act should be altered in a

manner similar to that adopted by our amendment Act concluded that it would be 'preferable to retain the provision as it currently stands, with the public interest test as a separate and additional test necessary to establish that material is exempt'.¹⁵

Changes to section 24

The exemption relating to security, defence and international relations (s 24) has been significantly amended. Under the original Act, s 24 was a harm-based exemption. Access could only be refused if harm to the interests covered by the exemption could be established. The original exemption also contained a list of examples of information to which the exemption might apply. Inclusion in this list did not mean that the record would be exempt, it was always necessary to meet the requirements of the harm test which were that disclosure could reasonably be expected to adversely affect either the security of the state, the defence of the state, the international relations of the state or matters relating to Northern Ireland. While the HLRG had recommended consideration of the introduction of alternative or additional measures which would provide an enhanced degree of protection to communications in the conduct of international relations, they had not been any more specific. The Minister sought to justify this amendment on the basis that it is essential 'that we are in a position to guarantee security to our interlocutors on information passed to us in confidence. Otherwise we will not be granted privilege to access sensitive material ... What could reasonably be expected to cause harm is subject to interpretation and uncertainty'.¹⁶

Potential impact

The effect of the amendment is add to the exemption a second limb which requires that access be refused to anything coming within the scope of the list of examples, regardless of whether disclosure would result in any harm or not. For example, one item on the list is communications between a Minister and a diplomatic mission of the State. This means that access to a communication of this kind on an entirely innocuous topic would have to be refused. The overall effect of this amendment is to transform this exemption from a harm-based to a class-type exemption and this goes very much against the basic thrust of FoI legislation which is that information should only be withheld for good reason. The original provision was closely modelled on its federal Canadian counterpart and it is worth noting that in a post 9/11 review of the Canadian Act¹⁷ no change to the corresponding exemption was recommended. Instead, the role of the list of examples as mere examples of the type of information which *might* come within the scope of the exemption, subject to the operation of the harm test was emphasised.

Exemption of records relating to tribunals

Section 22 (Parliamentary, Court and certain other matters) has been amended to exempt records relating to tribunals. The new exemption, the application of which is discretionary, applies during the course of the tribunal's work and also prior to the formal appointment of the

tribunal. The exemption does not apply in respect of records relating to the general administration of the tribunal. This exemption supplements the exclusion from the scope of the Act under s 46(1)(a) of certain records held by tribunals.

Potential impact

This exemption is very broad in scope. As the former Information Commissioner pointed out in his Commentary, whereas the existing exclusion is limited to records held by tribunals to which the 1921 Act applies, the new exemption is not limited to records of these tribunals. Further, the new exemption applies regardless of which public body holds the records. It is also very broadly framed in so far it applies to records which 'relate to' the appointment, or proposed appointment of, or business or proceedings of tribunals or bodies appointed to inquire into specified matters.

Exemption of records where there is danger to life or safety

A new ground of exemption has also been added to s 23, the law enforcement and public safety exemption. It applies where the granting of access to the requested record could reasonably be expected to endanger the life or safety of any person. The Information Commissioner issued a Discussion Paper on this issue¹⁸ which concluded by noting that while the FoI Act does not have a specific exemption to ensure the personal safety of third parties or their property, it does have a number of provisions which might be invoked to achieve the same purpose. There was limited support in the Discussion Paper for the introduction of a specific 'personal safety' exemption. The Commissioner was of the view that while such a provision might be useful, its invocation could cause difficulties because it would put the requester on notice that some people are in fear of him/her. The amendment seeks to address this difficulty by including the new ground of exemption within the scope of the 'neither confirm nor deny' provision of s 23.

Potential impact

This provision is not likely to have any serious negative impact on the operation of FoI provided that it is strictly interpreted and not used in a way which allows for refusal on grounds which fall short of danger to life or safety.

Definition of factual information

The Amendment Act introduces to the Act a definition of factual information: 'information of a statistical, economic or empirical nature together with any analysis thereof'. The definition of factual information is significant because such information is excluded from the scope of the Cabinet and deliberative processes exemption. The Civil Service Users Network report had recommended that factual information be defined 'for the purposes of clarity'. The HLRG examined this issue and referred to a view which had been put forward to the effect that the observations of Ministers on the policy proposals in a memorandum for government were factual on the basis

that as a matter of fact they reflected the views of the Ministers concerned. The Group took the view that this approach to the interpretation of 'factual information' was too expansive and argued instead that what had been intended was that there should be access to factual information which underlies a particular proposal but that this would generally be 'of a statistical or the like nature'. It recommended that factual information be defined as 'information of a statistical or econometric/empirical nature that has been used to provide an informed background to a government decision'. During the debate before the Select Committee, the Minister also referred to advice from the Attorney General which drew a distinction between factual information which was said to comprehend things 'which are known to have occurred, to exist or to be true in the sense of being tangible facts or figures' and 'proposals, opinions or consultations' which should not be regarded as factual. The amendment adopted the approach advocated by the HLRG by referring to information of a statistical, econometric or empirical nature thereby arguably narrowing the potential scope of 'factual information' for the purposes of the Act.

Potential impact

The term 'factual' had been given a reasonably broad interpretation by the Information Commissioner so this is an attempt to limit its scope. The saving grace is, however, that the definition is said to *include* statistical, econometric etc information. In other words, the use of the word 'includes' means that it could be interpreted more broadly by the Information Commissioner. Also the definition includes within its scope analyses of factual information.

Manifestly unreasonable requests

Paragraph (b) is designed to deal with the issue of 'serial requesters' which had been identified in the CSUN Report and in newspaper reports as a problem in the operation of the Act. The purpose of the amendment was to clear up any doubt as to whether a request can be refused on the grounds that it is frivolous or vexatious in such circumstances.

Potential impact

Whether this amendment was needed in the light of the Information Commissioner's decision in *Mr ABW and the Department of Enterprise, Trade and Employment*¹⁹ is debatable. In that case, the Commissioner held that the phrase 'frivolous and vexatious' as set out in the original Act covers the concept of abuse of process. He identified certain patterns of conduct which, in his view, constituted an abuse of the processes set out in the Act and which would entitle a public body to refuse a request on the grounds that it is frivolous or vexatious. These were: submission of a series of requests on the same topic; where the number of requests submitted by the requester is very large; requests which abuse the provisions of the Act dealing with fees; and requests made in bad faith.

Extension of 'neither confirm nor deny provisions'

The Act introduced 'neither confirm nor deny' provisions for requests to which the confidentiality, commercially sensitive information and the personal information exemptions apply. Under the original Act, a provision of this nature was to be found only in the exemptions relating to meetings of the government; legal professional privilege; law enforcement; and security, defence and international relations. This provision permits the head of public body to refuse to confirm or deny the existence of a record if the record is covered by any of the relevant exemptions. The justification put forward by the Minister for the extension of the 'neither confirm nor deny provisions' concerned the protection of proposals submitted by a political party to the Department of Finance for costing in the run up to a general election. The Minister stated that while such information was exempt under s 26, there was no explicit power to refuse to confirm or deny the existence both of the information received by political parties and the records generated by the Department. According to the Minister, the amendments would address this and would 'provide for the long-standing arrangements whereby political parties can be assured of a high level of confidentiality relating to the costing arrangements carried out on their behalf'.²⁰

Potential impact

While 'neither confirm nor deny provisions' provisions are to be found in overseas FoI Acts the scope for using such a mechanism is now much broader in Ireland. Generally speaking, such provisions are confined in overseas FoI legislation to records concerning highly delicate international negotiations or security matters.

New exclusions

Two new exclusions are provided for under the amendment Act. The new paragraph (da) of s 46(1) excludes from the Act, records held by public bodies relating to the costing, assessment or consideration of any proposal of a political party carried out for or on behalf of that party. The purpose of this amendment, as explained by the Minister of State, was to safeguard what was referred to as the important practice whereby political parties have been able to have their policy proposals costed in confidence by the Department of Finance.²¹

Paragraph (db) of s 46(1) excludes records given to members of the government or Ministers of State in connection with proceedings of the Houses of the Oireachtas including question time. The Minister of State justified the introduction of this exclusion on the grounds that 'in order to be fully briefed prior to appearing before either House, Ministers require the full range of views and opinions from officials and advisers on the various complex issues involved, expressed in a totally candid and frank manner'.²² The Minister went on to say that the same argument applies in respect of parliamentary questions noting that while the answers to parliamentary questions are a matter of public record, it 'completely inappropriate' that

FoI be used to gain access to other documents and notes which are often attached to such answers to give the Minister a wider understanding of a particular issue.

Potential impact

The provision relating to proposals of political parties has no counterpart overseas. The FoI Act already exempts private papers of Oireachtas (parliament) members and records created for or held by an office holder and which relate to the functions and activities of (i) the office holder as a member of the Oireachtas or a political party, or (ii) a political party. It is therefore not clear why this amendment was introduced.

With regard to supporting material for parliamentary questions, the Information Commissioner noted in his Commentary that in his experience this type of material had generally been released as a matter of course. Such material will now be excluded entirely from the scope of the Act regardless of its sensitivity or lack thereof.

Fees

The Act introduced significant changes to the fee regime. These consist of the charging of an application fee, a fee for an application for internal review and a fee for an appeal to the Information Commissioner. No such fees may be levied in respect of requests for access to personal information. The amount of the fee was set by Regulations which came into effect on 7 July 2003.²³ The application fee has been set at 15 Euros per application. The fee for internal review is 75 Euros and the fee in respect of an appeal to the Information Commissioner is 150 Euros. The Minister of State justified the introduction of the new fee regime on the grounds that each request varies on cost from 400–600 Euros and that the intention was to strike a balance and not to discourage responsible use of the Act.²⁴

The proposal to introduce an application fee was endorsed by the HLRG largely on the basis that existing arrangements had not worked in practice with fees being charged only in a very small proportion of cases. It did not recommend the introduction of fees for either internal or external review.

Potential impact

The fact that fees have not been charged or collected is an issue of enforcement of existing fee provisions and not a justification for the introduction of a new type of fee. There is a lack of unanimity on the charging of application fees across comparable jurisdictions. While application fees exist in Australia and federal Canada, no such fees are charged at provincial level in Canada, in the US or New Zealand, nor will an application fee form part of the UK charging regime. In the case of those jurisdictions which do charge application fees, their fees for copying and search and retrieval tend to be much lower than those charged in Ireland. The introduction of an application fee may deter applicants from making requests for information other than personal information. It is also possible that the introduction of an application fee will inhibit public bodies from making information available outside of the Act.

Bodies operating in straitened financial circumstances might be tempted to keep certain records within the scope of FoI so as to justify charging for access to them.

The charging of fees for internal review is likely to deter the bringing of such appeals. It will also have a knock on effect on the bringing of applications for external review since submission to internal review is, in almost all cases, a pre-requisite to such external review applications. Internal review is a feature of Australian FoI regimes. The jurisdictions of Western Australia and Queensland which operate under an Information Commissioner do not impose fees for internal review. While the Australian federal FoI regime imposes a charge of \$40, the abolition of this charge was recommended by the Australian Law Reform Commission/Administrative Review Council Report on the basis that internal review is an integral part of an agency's decision making process.²⁵ The introduction of a fee for internal review was rejected by the review of the Queensland FoI Act for the same reason.²⁶

In the case of external review, while fees for court hearings and the handling of appeals by tribunals are common, those jurisdictions which provide for external review of FoI decisions by Information Commissioners do not tend to charge fees for so doing. This is the case in the States of Queensland and Western Australia which have FoI regimes which are closest to that of Ireland. The Canadian Information Commissioner jurisdictions, with one exception, do not have such charges either, the exception being Ontario which imposes the modest fee of \$25.

One way of attempting to determine the impact of the charging of fees for external review on the number of appeals which are brought is to examine the figures for external review in the various jurisdictions in Australia and in Ireland: Western Australia and Queensland do not charge for external review while Victoria and federal Australia (both of which jurisdictions operate with a tribunal model of review) do impose charges for external review.

| | Fee for external review | Level of external review* |
|-------------------|-------------------------|---------------------------|
| Ireland | 0 | 3.7% |
| Western Australia | 0 | 3.5% |
| Queensland | 0 | 3.0% |
| Victoria | \$170 | 0.9% |
| Australia | \$574 | 0.4% |

**Average of three years of most up to date figures available from Annual Reports.*

While decisions as to whether or not to bring an appeal are undoubtedly based on a whole range of factors, it is interesting to note that those jurisdictions which impose a fee for external review have a significantly lower level of external review applications.

CONCLUSION

The amendment of the Irish FoI Act has altered its character substantially. In its original form, the Act was a relatively progressive measure by international standards. While it would be going too far to say that it has been entirely emasculated by its amendment, it has certainly been weakened considerably.

What is most disappointing about the amendment process is the manner in which it was carried out. There are problems in the operation of the FoI Act which could well benefit from a thorough review such as has taken place in most other jurisdictions once the legislation has been in place for a significant period of time. This legislation was rushed in without sufficient consultation. Many issues have been addressed in a knee jerk fashion while others remain unaddressed. These include the problem of the integration of the FoI Act with other related pieces of legislation, principally the Data Protection Act but also the Archives Act, the Official Secrets Act and the provisions regarding access to environmental information. Other issues which have not been addressed include the relationship between FoI and discovery, the issue of records management and the extension of the scope of the FoI Act to include the Gardai (the police force). All of these issues deserve thorough examination but the opportunity to do so has been missed for the foreseeable future.

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