PUTTING THE "O" BACK INTO FOI

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Introduction

The *Freedom of Information (Miscellaneous Amendments) Act* 1999 (Vic) ("Amendment Act") was assented to on 21 December 1999 and commenced on 1 January 2000. As the Attorney-General stated during debate on the Bill for the Amendment Act, the Government enacted the Amendment Act as part of its freedom of information policy and to put the "O" back into FOI. It is from that statement that this seminar is named.

This paper elaborates on the changes made by the Amendment Act to the exemptions in the Victorian *Freedom of Information Act* 1982 ("FOI Act"), in particular the changes that were made to:

(a) Section 28(1)(b) in relation to Cabinet documents;

(b) Section 33 in relation to unreasonable disclosure of information relating to the personal affairs of any person; and

(c) Section 34 in relation to what has generally become known as the 'commercial in confidence exemption'.

This paper examines some of the legal issues and some practical matters arising out of the amendments to exemptions in the FOI Act.

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Section 28(1)(b): cabinet documents

Before the Amendment Act, there were two possible types of exempt documents under section 28(1)(b) (ignoring for present purposes all of the other types of cabinet documents under the remaining paragraphs of section 28(1)). First, a cabinet submission prepared by (or for) a Minister or by an agency for submission to Cabinet was exempt. Secondly, a document considered by Cabinet relating to issues presently or previously before the Cabinet was also exempt.[1]

The Government was concerned that s28(1)(b) as it was before the Amendment Act was, in relation to the second type of exempt Cabinet document, broad enough to cover any document that may have been considered by Cabinet without actually being part of a Cabinet submission. This was because there was no need to assess the purpose for which it was prepared for the exemption to be made out. It was enough that it related to issues that were or had been before the Cabinet. It was theoretically possible for a whole bundle of documents relating to an issue to be put before Cabinet, thereby attracting the exemption under the second limb of section 28(1)(b). The Amendment Act removed this second type of document from the exemption in section 28(1)(b).

Section 28(1)(b) of the FOI Act now provides that a document is an exempt document if it is "a document that has been prepared by a Minister or on his behalf or by an agency for the purpose of submission for consideration by the Cabinet."

This means that a document will no longer fall within the Cabinet document exemption merely because it was considered by Cabinet and is related to issues that are, or have been, before

Cabinet. It must, in effect, have been prepared as a formal Cabinet submission. This may raise some difficult issues in relation to attachments to Cabinet submissions. I believe that it would be reasonable for attachments to be treated as part of the submission where they are directly relevant to the submission and not merely attached in order to attract exemption. It is expected that there will be some guidance shortly from the Cabinet office about what constitutes a formal Cabinet submission for the purposes of section 28(1)(b) of the FOI Act.

It should be noted that the change to this paragraph has not affected the application of this exemption where a document has been prepared for the purpose of submission for consideration by Cabinet and it does not actually come before Cabinet.[2]

Section 33: Personal affairs information

The Amendment Act made significant amendments to the treatment of personal information. Before the most recent amendments, Part IIIA was inserted into the FOI Act to deal with "personal information". "Personal information" was defined as meaning any information:

(a) that identifies any person or discloses their address or location; or

(b) from which any person's identity, address or location can reasonably be determined.

Except in certain circumstances, disclosure of personal information was prohibited. If a person wanted to get access to it, it was necessary to apply to the Victorian Civil and Administrative Tribunal ("VCAT") for an order granting access to the whole document.

The Amendment Act repealed Part IIIA and made it clear that personal information, as previously defined, must now be dealt with under s33 of the FOI Act. Section 33 provides that a document is exempt if it would disclose information relating to the affairs of any person (including a deceased person) and disclosure would be unreasonable.

There were two important changes to s33. First, s33(9) of the FOI Act has been amended so that the phrase "information relating to the affairs of any person" now expressly includes what was defined as "personal information" under the now repealed Part IIIA. That is, information:

(a) that identifies any person or discloses his or her address or location; or

(b) from which any person's identity, address or location can reasonably be determined.

There had been a number of inconsistent decisions emanating from the VCAT, and its predecessor, the AAT, as to whether the names, addresses and other identifying information about public servants related to their 'personal affairs' for the purposes of s33 of the FOI Act. The amendment to s33(9) makes it clear once and for all that such identifying details in relation to any natural person, whether public servant or otherwise, qualify as information relating to the personal affairs of any person. The main issue will therefore be whether disclosure is unreasonable in all the circumstances. The onus is, of course, on the agency to establish the exemption.

So, for example, if the *Frankston Hospital case* were to occur today, there would be no doubt that the nurses' names on the rosters would be information 'relating to their personal affairs' under s33 of the FOI Act. The only issue that would have to be determined would be whether disclosure would be unreasonable in all the circumstances.

That then brings us to the second amendment to s33 of the FOI Act. A new provision, s33(2A), was inserted into the FOI Act by the Amendment Act. It deals specifically with one aspect of the question of when disclosure is unreasonable. It is now clear that agencies, in determining whether disclosure of a document falling within section 33 would be unreasonable,

must consider whether disclosure would, or would be reasonably likely to, endanger the life or physical safety of any person. This, of course, is in addition to any other matters an agency would otherwise consider in determining the issue of unreasonableness. An interesting question that arises is whether the phrase "endanger life or physical safety" will be interpreted by the VCAT as extending to situations where disclosure may cause emotional harm.

That phrase also appears in s31(1)(e) of the FOI Act. Cases interpreting it in that context will no doubt provide some guidance on the interpretation of s33(2A).

A further amendment of a procedural nature is also relevant to decisions refusing access under s33 of the FOI Act. The Amendment Act introduced a new s53A into the FOI Act. That section provides that where an agency refuses access to documents under s33 and the applicant applies for review to the VCAT, the agency now has certain additional procedural obligations. Once the agency is notified by the VCAT that an application for review has been lodged, it must, if practicable to do so, notify the persons to whom the information in the documents relates (ie the person concerned or the next of kin where the information is about a deceased person) of certain things.

The notice must be in writing and must inform the person to whom it is directed of the right to intervene in the review proceeding. It must also request that person to inform the VCAT within 21 days as to whether he or she intends to intervene. This procedural amendment will raise some difficult questions for the VCAT, namely, what comprises the "right to intervene"? Does it mean that the third person will be able to produce written or oral submissions? Can any involvement of that person be held in camera? If so, are there any natural justice issues that arise against the applicant? If one issue is the identity of the individual concerned, how can that individual's right to intervene be balanced against the applicant's right to a fair hearing, particularly where the applicant is not legally represented?

Section 34: Commercial in confidence

The main change introduced by the Amendment Act in the area of 'commercial in confidence' documents is the introduction of a requirement that there be an *unreasonable* disadvantage caused by disclosure of commercially sensitive documents of external businesses and agencies.

Until now, the most commonly used commercial exemption was s34(1)(a) of the FOI Act as it stood prior to the amendments. That section provided that a document was exempt if it contained information acquired by an agency from a business, commercial or financial undertaking *and* either of two further conditions were satisfied. These conditions were, first the information related to trade secrets, and secondly, the information related to other matters of a business, commercial or financial nature.

As that second condition was comparatively easy to satisfy, agencies rarely used the first limb of s34(1)(a) dealing with trade secrets. It also meant that because of the ease of satisfying the second condition of s34(1)(a), the old s34(1)(b) was not relied on very often. As you would recall the old s34(1)(b) provided that a document was exempt if it:

(a) contained information acquired from a business, commercial or financial undertaking; and

(b) the disclosure of it would have been likely to expose the undertaking to disadvantage.

The amendments have had two effects on s34(1) of the FOI Act. First, where there is information of a business, commercial or financial nature acquired by an agency from an external business, it will only be exempt if *in addition* disclosure would be likely to expose the business *unreasonably* to disadvantage.[3] This means that it is no longer enough if the

information is merely business, commercial or financial information. Its disclosure must in addition be likely to expose the undertaking unreasonably to disadvantage. This means that it is not enough if there is a *mere possibility* of disadvantage. It must be *likely* to occur. This suggests a test of being more probable than not in all of the circumstances that the relevant kind of disadvantage will occur.

It also means that it is not enough if it is likely there will be *some* disadvantage arising from the disclosure. That disadvantage must be *unreasonable*. This raises the question of how do you determine whether an undertaking would be unreasonably disadvantaged by the disclosure? The FOI Act itself gives some guidance. Section 34(2) of the FOI Act has been amended to specify that in deciding whether disclosure would expose an undertaking unreasonably to disadvantage, certain factors may be taken into account. Those factors are set out in s34(2) and include:

(a) whether the information is generally available to competitors of the undertaking;

(b) whether the information would be exempt matter if it were generated by an agency;

(c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and

(d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking - for example, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls.

Section 34(2) goes on to state that an agency may also take into account any other considerations that in its opinion are relevant. This, in conjunction with the reference to "unreasonable disadvantage", suggests that all of the circumstances may be taken into account and that there should be a balancing or weighing up of all factors for and against disclosure; similar to the reference to "unreasonable disclosure" in the exemption dealing with personal privacy. It will be interesting to see if the VCAT will interpret the reference to "unreasonably" in s34 as justifying consideration of the purpose for which the information is sought.

It is very important to note that the exemption in s34(1)(b) *cannot* be relied upon unless the agency first notifies the undertaking which supplied the relevant document that the agency has received a request for access to the document[4]. That notification must take place before any reliance is placed upon s34(1)(b). The notice must seek the business undertaking's views as to whether disclosure of the document in question should occur.

The second effect that the amendments have had on s34(1) is that the trade secrets aspect of section 34(1) has been separated from the concept of "other information of a business commercial or financial nature." Section 34(1)(a) of the FOI Act now provides that a document containing information acquired by an agency from an external business is exempt if the information relates to trade secrets. That is all. There is no need to show that there would be any unreasonable disadvantage.

But what is information relating to "trade secrets"? Some old Victorian FOI cases have determined that the term "trade secrets" in the previous version of s34(1)(a) was to be given its normal legal meaning and is not confined to production processes which may be secret.[5] That same meaning is likely to apply to "trade secrets" in the amended s34(1)(a). But how far will it extend? Only time will tell.

Some of the factors considered relevant in determining whether something is a "trade secret" include:

(a) whether the information is of a technical character (although subsequent cases have suggested that it can be non-technical business information as well)[6];

(b) the extent to which the information is known outside the business of the owner of the information;

(c) the extent to which the information is known by persons engaged in the owner's business;

(d) measures taken by the owner to guard the secrecy of the information;

(e) the value of the information to the owner and to his competitors;

(f) the effort and money spent by the owner in developing the information; and

(g) the ease or difficulty with which others might acquire or duplicate the secret.'

In the author's view, the scope of what is meant by the term 'trade secret' will probably come into consideration sooner rather than later, given that there is no additional requirement to consult with businesses before that exemption is claimed, and the fact that the concept of "trade secret" at common law is a flexible notion.

The Amendment Act also amended s.34(4) of the FOI Act Now, where the documents in question contain trade secrets of an agency,[8] or the agency is engaged in trade or commerce and the documents contain information of a business commercial or financial nature, it is necessary to also show that disclosure would be likely to expose the agency *unreasonably* to disadvantage before the documents are exempt under section 34(4). The same considerations of unreasonableness I already discussed would appear to be equally applicable here.

One interesting feature of s34(4) is that, unlike the exemption relating to information acquired by agencies from businesses (where if there is a trade secret there is no need to show any unreasonable disadvantage caused by disclosure), where a trade secret of an agency is involved, there is nevertheless an additional requirement for disclosure of it to unreasonably disadvantage the agency before the exemption is made out.

Conclusion

In the author's view, the amendments introduced by the Amendment Act will indeed have the practical effect of narrowing the three exemptions discussed here. This will in turn result in greater access to documents. However, it is equally clear that the FOI Act as amended will probably give rise to some legal issues that will in the not too distant future require clarification by the VCAT and possibly the Supreme Court.

Endnotes

1 This second category of documents was inserted into the FOI Act in 1993.
2 *Re Birnbauer and Department of Industry, Technology and Resources* (1986) 1 VAR 279.
3 Section 34(1)(b).
4 Section 34(3).
5 *Re Gill and Department of Industry, Technology & Resources* (1985) 1 VAR 97, 106. See also *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, 49; *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, 193.
6 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163.
7 *Re Bankers Trust Australia Ltd and Ministry of Transport* (1989) 3 VAR 33, 38-9 referring to *Organon (Aust) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588, 593-4 (Fed Crt).
8 There would not appear to be a requirement that the agency be engaged in trade or commerce before it can have a trade secret.