and substantially different from the final versions. The Tribunal found that to release the drafts would expose the parties to disadvantage in that it would expose their negotiating positions to competitors and would lead to the drawing of unwarranted conclusions as to their financial affairs and position with commercial and market consequences. On this basis it found the documents were exempt from release under s.34(1)(b).

Section 50(4)

The Tribunal went on to consider whether the documents found to be exempt under s.32 or s.34 should be released pursuant to the public interest override in s.50(4).

The Tribunal stated that it had to decide whether the public interest in disclosure had been demonstrated to the extent that it outweighed the competing interest of protecting exempt documents under the *FoI Act* from disclosure and hence required that access be granted to the documents. The Tribunal accepted the definition of 'public interest' propounded in *DPP v Smith* [1991] VR 63. It noted that the case law is clear that there is a need to distinguish between what is in the public interest and what is of interest for the public to know.

So far as the draft documents were concerned, the Tribunal noted that there have been a number of decisions of the Tribunal which have indicated that the release of draft documents was generally contrary to the public interest. These cases lent weight to the view that there is a substantial hurdle to be overcome before one could form an opinion that the public interest requires their release. In this case the Tribunal found that it would be misleading and mischievous to release the draft documents.

In relation to the other material, the Tribunal found that its release would expose the PTC's negotiating position, considerations and legal advice not only to the public but particularly to the OneLink consortium with which the PTC has an ongoing contractual relationship. This was a factor which weighed heavily against the public interest requiring its release.

The Tribunal therefore found that the public interest did not require access to be granted to any of the documents and that it should not exercise its discretion under s.50(4).

[M.R.F.]

FEDERAL FoI DECISION

Adapted with permission from Decision Summaries prepared by the Information Access Unit of the Family and Administrative Law Branch of the Commonwealth Attorney-General's Department.

BARTLETT and SECRETARY, DEPARTMENT OF SOCIAL SECURITY (DSS) (No. T95/160)

D cid d: 7 June 1996 Deputy President A.M. Blow.

Abstract

Section 37(1)(a) — prejudice the conduct of an investigation of a breach, or possible breach of the law — investigation completed rather than dormant.

- *Section 37(1)(b) — disclose, or enable a person to ascertain, the identity of a confidential source of information — information provided to DSS on possible breaches of the law — implication of confidentiality.*
- *Section 37(2)(b) — disclose lawful methods or procedures for dealing with matters arising out of breaches or evasions of the law — standard or obvious methods.*

  Section 41(1) — unreasonable disclosure of personal information — effect of consent to release — fictitious identities.

Issues

Whether the investigation to which the document related was completed or whether it was merely dormant (s.37(1)(a)). Whether it should be implied that information supplied by an informant had been supplied in confidence where the informant denounced another person to DSS (s.37(1)(b). Whether there was anything in the referral that would disclose anything other than standard or obvious methods of investigating a breach or evasion of the law (s.37(2)(b)). Whether it was unreasonable to disclose personal information (s.41(1)) where the persons referred to had consented to disclosure or were fictitious.

Facts

By the time of the hearing, the only issue related to substantial deletions from a referral by DSS to the Australian Federal Police (AFP) concerning possible breaches of the law. The referral contained information on who denounced Mr Bartlett to DSS.

Decision

The Tribunal rejected the claims for exemption under s.37(1)(a) and (2)(b) and s.41(1) but held that the referral contained exempt material under s.37(1)(b) which could be deleted under s.22(1). It remitted the matter to DSS with the direction that it grant access to the document with the relevant passages omitted.

Section 37(1)(a) — prejudice the conduct of an investigation

The Tribunal rejected the argument based on s.37(1)(a). DSS conceded that the AFP investigation commenced as a result of the referral had been concluded, but contended that the investigation should be regarded as dormant rather than completed. Mr Bartlett had not been charged with any offence. On 9 October 1995 a solicitor from the Australian Government Solicitor's office had written to Mr Bartlett informing him that he would not be prosecuted in relation to alleged breaches of the Social Security Act 1991 or in relation to possible breaches of the Financial Transactions Reports Act 1988. The Tribunal, therefore, believed that there was no basis for thinking that the investigation to which the referral related would ever be revived. The referral also related to two other individuals but there were no AFP investigations on foot concerning them so far as DSS was aware. It was not suggested that disclosure of anything in the referral might prejudice the enforcement of the law in some other respect.

Section 37(1)(b) — disclose the existence of a confidential source of information

The Tribunal's view was that disclosure of parts of the referral could reasonably be expected to enable Mr Bartlett or anyone else to ascertain the identity of a confidential source of information. The referral contained information as to who denounced Mr Bartlett to officers of DSS. There was other information in the document which, if disclosed to Mr Bartlett, could reasonably be expected to enable him to ascertain the identity or one or more individuals who denounced him. The document contained information as to the category of person who gave information, at least one allegation not previously made known to Mr Bartlett and information as to when certain allegations were made. The Tribunal stated that, even where confidentiality is not expressly agreed upon between the informant and the official to whom information is provided, it should ordinarily be implied that information provided by a member of the public to an officer of DSS as to possible breaches of the law is provided under a pledge of confidentiality (McKenzie v Secretary, Department of Social Security (1986) 65 ALR 645; (1986) 6 FoI Review 83). There was no reason to hold otherwise on the evidence in this case. (See Comments in para. 1 below.)

Section 37(2)(b) — disclose lawful methods or procedures for investigating breaches of the law

The Tribunal found that there was nothing in the referral that disclosed any method or procedure that would be any surprise to anyone. The methods or procedures included checks of Medicare records, inspection of bank records, comparisons of handwriting on different documents and discussions with bank officers, officers of the Australian Taxation Office and officers of the Commonwealth Employment Service. The Tribunal found that it was abundantly clear that disclosure of the methods or procedures referred to would not prejudice their effectiveness and, therefore, rejected the argument based on s.37(2)(b).

Section 41(1) — unreasonable disclosure of personal information

The Tribunal found that there was no basis for the view that disclosure of any part of the document would involve the unreasonable disclosure of personal information about anybody. Information that would disclose the 'personal affairs' of an informant should not be disclosed (but see Comment in para. 2 below). Two persons named in the document attended the hearing, gave evidence as to their identities and consented to the release to the applicant of any personal information about themselves contained in the document. It followed that the disclosure of any personal information about either of them would not be unreasonable. Two other persons were named in the document but all the evidence before the Tribunal suggested that those two persons had never existed.

Comments

1. McKenzie (above) is not adequate authority for the proposition for which it was invoked in this case. See Comment on the approach of a differently constituted Tribunal in Re Caldow and DSS, (1998) 75 FoI Review 47 at 48 (especially Comment at paras 1-2). Note that in the earlier application by Mr Bartlett, Re Bartlett and DSS, unreported, 5 February and 8 March 1993, the s.37(1)(a) exemption was upheld, but the circumstances had changed since then.

2. The Tribunal's continued use of the obsolete phrase 'personal affairs' is unfortunate as it may lead to confusion between the meaning of that phrase as used in the Act prior to the amendment of the Act in 1991, and the meaning of the phrase 'personal information', defined in s.4(1) of the Act, which has been substituted for the phrase 'information relating to the personal affairs of (a) person'. The Tribunal's decision on s.37(1)(b) was overturned by the Federal Court on 25 June 1997 on the basis that the Tribunal had used a test of 'reasonable possibility' rather than 'reasonable expectation'. The matter was remitted to the Tribunal for decision according to law.

[R.F./G.H.]

Freedom of Information — Friend or Foe?

Freedom of Information laws have been with us in Australia for more than 15 years. But have they opened up the workings of government in the way that their creators hoped? Despite some high profile successes in flushing out information about key public issues, FoI has not become a routine tool for journalists. The processes are generally too slow, cumbersome and costly in relation to the unpredictable rewards.

A new project at the Australian Centre for Independent Journalism hopes to collate practical experience of journalists around Australia in making FoI requests. From this will come some practical guidance on what works and what doesn't, and how to make better use of the law. Busy journalists can't hope to be experts in the arcane bureaucratic processes and maze of exemptions. But some central guidelines and signposts, available through the Internet, could make the FoI source much more accessible. As a first stage, the ACIJ would like to hear from journalists, editors and media lawyers with FoI experience. If you have an example of FoI documents being the foundation for a major story, great. But even if it just an anecdote, a useful contact or a whinge about how it was a waste of time, we would still like to hear from you.

Please contact Nigel Waters on (02) 9810 8013 or watersn@zip.com.au, or the ACIJ at (02) 9514 2488 or email: acij@uts.edu.au

Editorial Co-ordinator: Elizabeth Boulton **Typesetting and Layout:** Last Word
Printing: Thajo Printing, 4 Yeovil Court, Mulgrave
Subscriptions: $40 a year or $30 to *Alt. LJ* subscribers (6 issues)
Correspondence to Legal Service Bulletin Co-op., C/- Faculty of Law, Monash University, Clayton 3168 Tel. (03) 9544 0974

A concern of many writers, academics and reformers, in the early stages of the legislation's operation, was the extent to which the news media and especially print journalists picked up and used FoI. Journalists like Jack Waterford or Paul Chadwick were held up as paragons because they had used and continued to resort to FoI to find, develop, explore and add substance to their stories. In the first Queensland Annual Freedom of Information Report it was stated that:

> The communications media play a vital role in maintenance of our democratic system, one of which the media themselves are self consciously aware. FoI offers the media a powerful investigative tool to open government to public scrutiny, to criticise the rationale for decisions rather than simply reporting the fact of decisions being made, to expose incompetence, malice and wrongdoing in public administration. In the hands of a skilled journalist, FoI can expose the thought processes of government; it can fill in the background; it can lay bare underlying assumptions and values. Every story beginning 'Material revealed under FoI today ...' will be a minor victory for the legislation.[8]

Yet the experience in Tasmania throws considerable doubt on the ability or acceptance of the media to perform either educative,[9] publicity[10] or accountability[11] functions in conjunction with FoI. A series of undergraduate research studies in Tasmania undertaken between 1993–1998 confirm the low usage by journalists of FoI. The studies indicated that media use of the *Freedom of Information Act* had been minimal, and that journalists perceived many impediments to using FoI. These studies have confirmed a number of points made by other studies of the relationship between the media and FoI.[12]

The relative failure of the Australian media to consistently use FoI and to perform an active disseminating role has major ramifications. FoI legislation was designed and enacted on the basis of its efficacy as a mechanism which would allow the citizen to become aware of, and if motivated involved in, the policy formulation process before the executive and/or bureaucracy had determined their final and often non-negotiable positions. Yet Hazell notes that this direct empowerment in the absence of informational go-betweens was overly optimistic:

> with the wisdom of hindsight it was naive to suppose that individual citizens ever would be the major users of the legislation. The public are seldom direct consumers of government information: they rely on others (the media, interest groups, political parties) to process the information for them and to select items which will appeal to their own particular range of interests and prejudices.[13]

The theory

The perceived wisdom about the relationship between FoI and the media centers around an interplay between the media's Fourth Estate role and the argument that FoI cannot be effective without public awareness of its existence and effective use. The media is seen as having a crucial role to play in the success of FoI in two ways: by ensuring public awareness of the legislation, and by using FoI to render its role as democratic watchdog more effective.

As the media is the major disseminator of information in our society, public awareness of FoI is strongly dependent on media coverage. Due to the scarcity of media and governmental publicity for FoI, the public is likely to remain largely ignorant of FoI's powerful potential. The media has a responsibility to inform the community about FoI, thereby promoting the Act's aim of public participation in democracy.[14]

The media plays a crucial role in the democratic process as a watchdog over government, and use of FoI is critical to its effective fulfilment of this role. Some consider the media to be the fourth element in the democratic process, with the role of reporting on the other components — the executive, Parliament and the government.[15] If the media is to effectively carry out this role, it must obtain accurate, unbiased information and ensure it reaches the public. Use of FoI facilitates this process. The major public benefits of media FoI use have been identified as:

- 'FoI and a free press are two of the several checks and balances essential in a true democracy.'[16]
- The media can educate the public in the importance and use of FoI.[17]
- FoI allows journalists to set the news agenda rather than just reacting to politicians and press releases.[18]
- Active and organised media use of FoI will '... enrich the amount, quality and credibility of media reporting of government ...'[19] and will educate journalists and the public about governmental processes.
- By using FoI the media participates in the democratic process.
- By pursuing appeals, the media can test the weak points of FoI legislation, and ensure interpretation of the Act by higher authorities.[20]

As Zelman Cowan argued:

> It is the responsibility of the press to inform the public so it can bring its influence to bear in an informed and intelligent manner; The press is thus an essential cog in the machinery of self-governance. To whatever extent the press fails to meet these responsibilities, democracy suffers.[21]

The practice

A study by Nigel Waters demonstrated the relatively low use of FoI by journalists.[22] As with the Tasmanian studies, Waters research (see *Table 1*) shows that the Australian media have a tendency to wait for others to use FoI and then piggyback a story of the requests that are brought to their attention.

Table 1
References to FoI in the *Sydney Morning Herald*, 1.1.95–30.6.95[23]

References to:	
FoI requests by *Herald* or other journalists	10
FoI requests by opposition politicians	8
FoI requests by individuals or public interest groups	5
FoI law reform in Australia	16
FoI laws and requests overseas	3
Trivial or humorous references	4
Total	**46**

Jack Waterford has been highly critical of the lack of use of FoI by fellow journalists.[24] Waterford has also pointed out that the low usage is further marred by inappropriate and unskilled use:

> If a relatively full disclosure by a public servant or administrator reveals no obvious points of attack, research is most often promptly halted and attention is then focused on some other project. All too often, journalists drop the ball precisely when