Victoria's new FoI Bill: some long overdue reforms but still room for improvement

The *Freedom of Information (Miscellaneous Amendments) Bill 1999*, which received its first Reading on 10 November 1999, makes some important and positive changes to the *Freedom of Information Act 1982* (Vic). However, while the government is to be applauded for acting so swiftly to give effect to its election commitment to strengthen freedom of information, it arguably needs to go somewhat further if it is to produce an Act which achieves proper public accountability and full public confidence in respect of the government's operations, especially in its commercial dealings.

As foreshadowed in October's Editorial Comment, the Bill is primarily designed to remedy some glaring deficiencies in the exemption provisions relating to Cabinet documents, personal information about individuals and information of a commercial nature. It also introduces a new requirement for Ministers to report to Parliament in respect of appeals from decisions of the Victorian Civil and Administrative Tribunal (VCAT), and removes fees payable in respect of certain FoI applications, including those relating to requests for access to an applicant's own personal information.

Amendment of exemption provisions

Cabinet documents

An important feature of the Bill is that it seeks to amend a paragraph in the exemption provision for Cabinet documents which, as currently worded, provides clear potential for abuse, especially in the case of highly controversial documents.

Section 28(1)(b) exempts from disclosure two separate categories of documents. The first comprises documents that have been prepared by a Minister or on his or her behalf for the purpose of submission for consideration by the Cabinet. The second, which was introduced via amending legislation in 1993, consists of documents that have been considered by the Cabinet and which are related to issues that are, or have been, before the Cabinet.

In the case of the former, the fact that a document does not reach Cabinet does not matter provided that it was brought into existence for that purpose.[1] In the case of the latter, the circumstances in which the document was prepared are totally irrelevant.[2] In other words, it is not necessary for it to have been prepared for the purpose of submission to Cabinet or for it to have the status of a formal Cabinet submission. As a result, there is scope for a document to be submitted for consideration by the Cabinet as a means for avoiding its disclosure.[3] The only restriction is that it must relate to issues that are or have been before the Cabinet.

The Bill proposes to revert back to the original wording of s.34(1)(b) which was confined to documents 'prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.

Documents affecting personal privacy

Another important feature of the Bill is that it is designed to repeal the amendments in respect of personal information which were introduced by the *Freedom of Information Amendment Act 1999* (Vic) in response to the so-called 'Coulston affair'.[4] This reform is urgently required for practical as well as policy reasons. From a policy standpoint, the amendments substantially undermined the democratic objectives of the legislation. In particular, by preventing access to any identifying information about individuals they precluded access to documents which shed light on the activities or actions of any public officers whose identity in relation to those actions/activities was not already known to an applicant. In addition, they also created an immense workload for FoI officers who are required to remove from all documents to which they provide access any identifying information about individuals whose identity was not already known to applicants. These deletions are mandatory irrespective of whether or not the information subject is likely to object to the disclosure of identifying information.

The Bill does not simply repeal the amendments, it also deals with the concerns raised by the *Coulston* case. It does so by including a specific requirement to consider the issue of whether disclosure of information is likely to endanger the life or physical safety of any person in assessing the reasonableness of disclosure under s.33. This ensures not only that decision makers turn their mind to this issue but also that the VCAT does so when exercising its review powers, irrespective of whether or not the issue is specifically argued by those appearing for respondents.[5]

Third party business information

The Bill is also designed to make some long overdue amendments to the exemption provision that protects third party business affairs. Section 34(1) was inexplicably enacted with the word 'or' rather than 'and' separating paragraphs (a) and (b), despite the fact it was originally drafted with the intention that both paragraphs would need to be satisfied before a document was exempt.

It provides that a document is an exempt document if its disclosure under the Act would disclose information acquired from a business, commercial or financial undertaking[6] and

(a) the information relates to trade secrets or other matters of a business, commercial or financial nature; or
(b) the disclosure of the information under the Act would be likely to expose the undertaking to disadvantage.

The use of the word 'or' has been interpreted[7] so as to have the effect that a document is exempt if it satisfies either part of the test. This means that paragraph (b) is largely superfluous while paragraph (a) exempts third party business information irrespective of whether or not its disclosure is likely to result in any harm to the information subject. Furthermore, while s.34(1) was designed to protect the business information of third parties (as opposed to those of agencies which are protected under s.34(4)), it has come to be used as an effective shield for commercial dealings by government agencies which involve third parties.

The amended wording contained in the Bill is a significant improvement in several respects. The proposed new s.34(1)(b), which applies to matters of a business, commercial or financial nature other than trade secrets, requires not only a likelihood of some specific adverse

effect but also some assessment of its weight relative to any factors in favour of disclosure. It achieves the latter by importing a requirement of 'unreasonableness'. This has been interpreted in the context of the equivalent provision in the Commonwealth Act (and also in the context of the personal privacy provisions in both the Victorian and the Commonwealth Act) as requiring a balancing of the interests for and against disclosure.[8] An important consideration is the likely consequence of disclosure to a business competitor which must be balanced against the public interest in furthering the democratic objective of the legislation (including the objective of enhancing government accountability for its expenditure of public revenue).

Agency business information

Finally, the Bill also provides for the inclusion of an unreasonableness criterion in the exemption provision which protects the business affairs of government agencies.

Section 34(4) currently provides that a document is exempt if it contains a trade secret of an agency or, in the case of an agency engaged in trade and commerce, information of a business, commercial or financial nature if disclosure of that material under the Act would be likely to expose the agency to disadvantage. An agency may be regarded as being engaged in trade and commerce even where these constitute a part of its overall activities[9] and it is not necessary that an agency's objectives include a requirement to make profit, provided that its objectives have a 'commercial focus'.[10] This contrasts with the *Freedom of Information Act 1982* (Cth), s.40(1)(d) which requires an agency to demonstrate that disclosure *could reasonably be expected* to have a *substantial* adverse effect *on the proper and efficient performance of an agency's functions.*

As with the test in s.34(1)(a) discussed above, the current wording of s.34(4) is premised on the assumption that any adverse effect on an agency's business affairs will always be such as to outweigh any public interest in disclosure. In other words, there is an assumption that the protection of agencies from harm to their business affairs should always take precedence over the interest in public accountability. This means, for example, that information revealing evidence of wrongdoing by a government agency may be withheld on the basis that its disclosure will result in some minor harm to its business affairs. In contrast, the exemption provisions in s.40(1) of the Commonwealth Act, including s.40(1)(d), are subject to an additional requirement in s.40(2) that the disclosure must also be contrary to the public interest.

While the VCAT has an overriding discretion to require disclosure where it concludes that the public interest requires disclosure, this is not shared by the decision maker who is not protected from civil and criminal liability if he or she decides to grant access to an exempt document. Given the cost of seeking review, and the fact that applicants now face the added risk that they may have costs awarded against them, the fact that public interest considerations may be taken into account in the context of external review will not have much impact on the majority of applications. Furthermore, the public interest override has arguably been narrowed in its operation as a result of the recent decision by the Victorian Court of Appeal in *Hulls v Department of Treasury & Finance.*[11]

As discussed above, the 'unreasonableness' criterion requires a balancing of the interests for and against disclosure thereby bringing it into line with the Commonwealth approach.

Suggested areas of improvement

Trade secrets

It is arguable that the across-the-board exemption for trade secrets in the proposed new s.34(1)(a) is unduly wide. As with the equivalent Commonwealth provision on which it is based, it is premised on the assumption that the harm resulting from the disclosure of information which falls within the description of a trade secret will always be such as to outweigh any public interest in disclosure. In other words, it is assumed that the protection of third party trade secrets should always take precedence over the interest in public accountability.

The expression 'trade secrets' in s.43(1)(a) of the *Freedom of Information Act 1982* (Cth) has been interpreted broadly as having its ordinary English meaning as opposed to some narrower technical meaning deriving from the common law protection of trade secrets. It encompasses any confidential informational asset of a business including 'past history and even current information, such as mere financial particulars', although such information must be such that it is used or useable in the trade.[12] This test does not impose any threshold requirement and therefore potentially may operate to protect information of a trivial character (at least, as assessed from the standpoint of the third party) in circumstances where the agency has an interest in non-disclosure. This means, for example, that information that reveals evidence of corrupt dealings between a contractor and a government agency may be withheld on the basis that its disclosure will result in the disclosure of a trade secret (however minor) belonging to the contractor.

This approach should be contrasted with that in the US where the expression 'trade secret' in Exemption 4 of the US *Freedom of Information Act*[13] has been narrowly defined as requiring a 'direct relationship' between the trade secret and the productive process. It has been defined as:

> A secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.[14]

It is arguable that the Bill should either contain a narrow definition of trade secrets or should be amended so as to subject trade secrets to an unreasonableness test or some other public interest balancing test.

List of relevant criteria to assist in determining unreasonableness

Section 34(2) contains an inclusive list of criteria to assist decision makers in determining whether or not disclosure would expose an undertaking to disadvantage. This list has not attracted much attention to date due to the redundancy of para (b).

Under the Bill, s.34(2) is to be amended by the insertion of the word 'unreasonably'. However, while the requirement to consider unreasonableness requires a balancing of the competing interests for and against disclosure as well as whether or not disclosure is likely to have an adverse effect, the list of factors has not been expanded. This is unfortunate as decision makers would arguably benefit from some additional guidance. Moreover, a more extensive list would counter the unfortunate tendency to assume that the disclosure of any

information of a commercial nature is automatically harmful and that the harm of disclosing such information will always outweigh the public interest in disclosure.

While it is neither feasible nor desirable to provide an exhaustive list, it should not be difficult to come up with some specific examples of factors which should weigh for and against disclosure in addition to the public interest factors mentioned already in (d). For example, if there is a real risk that disclosure would prejudice contractual negotiations then that is a factor which should weigh against disclosure. Conversely, the fact that a document contains evidence of some wrong-doing should weigh in favour of disclosure. Other relevant factors include the nature and competitiveness of the particular market involved,[15] whether the document sheds light on the activities of the government, whether disclosure is required in the interests of public health or safety, and whether the information was provided voluntarily or under compulsion.

In the case of information volunteered by a third party, the critical question is whether or not it was provided on the understanding that it would be treated as confidential. Information which was not provided in confidence arguably should not be exempt. Where there is an understanding of confidentiality, the critical issues are whether any undertaking by an agency was properly given and what fairness requires. Ideally any undertakings should be kept to a minimum and third parties should be made aware of this before providing any information. This situation is best dealt with by guidelines as discussed below.

Information which is provided in confidence in circumstances where its disclosure may prejudice the agency itself either in terms of its commercial position or its future supply of information should arguably be dealt with under s.34(4).

Finally where information is provided under compulsion, the predominant issue is one of potential unfairness. Most legislation that requires the provision of commercially sensitive information contains specific secrecy provisions which provide a basis for exemption under s.38.

It would also be useful to include a provision equivalent to s.34(2) which provides an inclusive list of criteria to assist in determining whether or not disclosure would expose an agency unreasonably to disadvantage.

Oth r matt rs that require prompt attention

Apart from changes to the business affairs exemption, which has been poorly drafted from the outset, the reforms contained in the Bill will take Victoria back to the pre-1993 position. Arguably, however, government needs to go further if it is to produce an Act that creates the level of transparency required to restore public confidence in Victoria. In particular, given that Victoria has gone much further with reforms which seek to harness market-based mechanisms and to expose public services to competition, consideration needs to be given to the development of measures which ensure that these mechanisms are fully transparent.

There have been three main developments that impact on access to information. The first is that there has been a progressive narrowing of the role of government and a consequent narrowing of the range of bodies which clearly fall within the ambit of the Act. A second important change is that there has been a preference for market mechanisms in place of traditional administrative law ones, including an increased use of contracts. Third, the delivery of government services has become more competitive, with more and more services being outsourced to the private sector.

One of the consequences of these changes is that a significant proportion of the information generated and held by what is left of the government sector is of a business nature. Access to this information in Victoria has increasingly been restricted by claims that it is commercially confidential. As a result, government accountability via information disclosure has tended to diminish in proportion to the increased level of commercialisation.

While the proposed changes will go some way towards dealing with these problems, two other matters which are also worthy of consideration are positive disclosure requirements and the issuing of guidelines on commercial confidentiality.

Positive disclosure requirements

The *Freedom of Information Act* serves an important purpose in improving the transparency of government and thereby enhancing public accountability. However, the time and cost involved in making FoI requests act as substantial deterrents to access except in the limited context of access to applicants' own records where access may be perceived as yielding more direct benefits to individual applicants. At the same time, advances in technology have made it much simpler and less costly for the government to disseminate information about its activities. Consideration should therefore be given to requiring agencies to move to a situation where the information of the type specified in Part II of the Act is required to be made available over the Internet. In addition, there should also be consideration as to whether other sorts of information should also be made available on a routine basis as currently occurs in the United States.[16]

One category that arguably should be considered for positive disclosure is government contracts. While it is not suggested that complete copies of every contract should be published, there are strong arguments for the disclosure/publication of specific types of information such as the overall price, the performance criteria agreed upon and the duration of the contract.

Commonwealth agencies are required to publicise some details of their contracts in the Commonwealth (Purchasing and Disposals) Gazette.[17] However, these requirements are fairly minimal and should be contrasted with those in the United States where there is a federal requirement under Securities and Exchange Commission rules that publicly listed companies must lodge their procurement contracts for inspection. In the case of contracts between the government and private sector the holder of the contract generally wins the contract with a formal bid listing the total price which is routinely made public.[18]

Guidelines

As noted in the ARC's Report on Contracting Out,[19] the ACT government has released draft Principles and Guidelines for the Treatment of Commercial Information. Such guidelines potentially have a very important role to play given the general level of misunderstanding which flows from the inherent ambiguity of terms such as commercial confidentiality and commercial in confidence. They can also play an invaluable role in ensuring fairness. While it may be appropriate in some circumstances for the private interests of contractors to give way to the

broader public interest in ensuring government accountability, fairness requires that they should have a clear understanding of the rules that govern disclosure before any information is provided by them.

It is clearly unrealistic to expect guidelines to make up for inherent deficiencies in the drafting of individual exemption provisions. However, to the extent that exemptions contain tests of public interest or reasonableness, guidelines can also serve a very useful purpose in clarifying the sorts of factors that are relevant in assessing competing public interests and in spelling out the types of documents that would normally be accessible.[20]

In the United States, individual agencies have developed procedures for determining the confidentiality status of commercial information they receive. The EPA, for example, has developed a very systematic approach which includes sending a notice to suppliers of information that is the subject of requests for access which requires them to specify a range of matters. These include the portions of information claimed to require confidential treatment, the period of time for which this is desired, and the purpose for which the information was supplied. Moreover, where a business asserts that disclosure of information is likely to result in substantial harmful effects on its competitive position, it is required to specify what those harmful effects would be and why they should be viewed as substantial. It is also required to provide an explanation of the causal relationship between disclosure and such harmful effects.[21]

Summary

While the amendments are themselves very positive, they arguably do not go quite far enough. In particular, the government should as a matter of priority:

- amend the Bill to reduce the potential width of the trade secrets provision either by including a specific definition of trade secrets or, preferably, by including a test of unreasonableness or some other public interest type test;
- broaden the list of criteria in s.34(2) and include another provision with an inclusive list of criteria to be considered in applying s.34(4);
- include either in this Bill or in a second one a provision which empowers the Minister to issue a set of guidelines concerning the treatment of commercial information; and
- provide a statutory framework for positive reporting of prescribed matters.

MOIRA PATERSON

Moira Paterson is a senior lecturer in law at Monash University.

References

1. *Re Birnbauer and Department of Industry, Technology and Resources* (1986) 1 VAR 279.
2. *Re Pullen and Alpine Resorts Commissioner* (AAT, Macnamara DP, 23 August 1996).
3. *Re Mildenhall and Department of Premier and Cabinet (1995) 8 VAR 284.*
4. The legislation was enacted in response to a public outcry following the disclosure of the names of nurses who were on duty at Frankston hospital to a convicted murderer who sought them in order in an attempt to get evidence to support his alibi that he was visiting his wife in hospital at the time when the murders took place. The hospital refused access in reliance on s.33 but the decision was overturned by the VCAT in *Re Coulston and Frankston Hospital* (Senior Member Megay, 22 November 1998).
5. This is important as the decision of the VCAT in the *Coulston* case resulted from the fact that the doctor who represented the hospital at the hearing did not raise any arguments in support of the claim for exemption under s.33 (presumably on the incorrect assumption that these were self-evident). For a useful discussion see Mick Batskos 'Recent Developments in Freedom of Information in Victoria', (1999) 20 *AIAL Forum* 22.
6. The expression 'business, commercial or financial undertaking' has been interepreted as meaning a body other than the agency itself (*Re Marple and Department of Agriculture* (1995) 9 VAR 29). However a body may still qualify as such even where there is some element of control by government officers (*Re Mildenhall and Department of Treasury* (1994) 7 VAR 342.
7. See *Gill* v *Department of Industry Technology and Resources* [1987] VR 681.
8. *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111. This approach is consistent with that taken to the criterion of unreasonable disclosure in s.41 by the Federal Court in *Colakovski v Australian Telecommunications Commission* (1991) 100 ALR 111: see M. Paterson, 'Freedom of Information and Privacy: A Reasonable Balance?', (1992) 66 *Law Institute Journal* 1001.
9. See *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441.
10. See *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427.
11. [1999] VSCA 117. The court took the view that rather than requiring the tribunal to balance competing public interests, s.50(4) required it to determine whether considerations public interest were so strong as to outweigh, or override, those factors by which the documents are exempt documents.
12. *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, 174.
13. 5 USC s.552 (6)(4).
14. *Public Citizen Health Research Group v FDA* 704F2d 1280, 1288 (DC Cir, 1983. The relevant section of the *US Justice Department's Guide to the Freedom of Information Act* is accessible at <http://www.usdoj.gov/oip/exemption4.htm#trade>.
15. These include the particular market activity to which the information relates; the characteristics of that market activity, eg, the number of competitors and the degree of competition; the criteria on which the tender contracts are awarded and how the information at issues relates to these criteria; and the degree to which the information could be said to reveal a tenderer's marketing/pricing strategy which a competitor, if he or she knew it would be able to use to obtain a competitive advantage. This information is used to assess both the nature of the prejudice or disadvantage which is expected to result from disclosure and the likelihood of such a prejudice or disadvantage occurring. See NZ Ombudsman's Case Notes accessed at <http://www.liinz.org.nz/liinz/other/ombudsmen/casenotes/10vol2/A242.html>
16. These reports are accessible at <http://www.usdoj.gov/04foia/fy98.html>. See also the DOJ's Guidelines for Agency Preparation and Submission of Annual FOIA Reports which are accessible at <http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_3/page2.htm>.
17. Administrative Review Council, Report No 42, *The Contracting out of Government Services,* Canberra, 1998, para [5.52].
18. F.T. O'Reilly, *Federal Information Disclosure,* 2nd edn, 1991, ss.14.13.
19. Administrative Review Council, Report No 42, *The Contracting out of Government Services,* Canberra, 1998, ch. 5.
20. The Industry Commission in its 1996 report on tendering and contracting out in the public sector highlighted the types of things it felt should be released in any circumstance. In the case of contracts and competitive tendering these included the specifications for the service, the criteria for the tender evaluation, and the criteria for the measurement of the performance of the service provider against those criteria. See Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies (1996)*, Recommendation, no 1.1 at p. 95.
21. Code of Federal Regulations, Title 40, Vol 1, Parts 1 to 51, s.2.204 'Initial Action by EPA Office' accessed 16/11.99 at <http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=2098117360+3+0+0&WAISaction=retrieve>.