23. NSW Ombudsman, ref. 15 above, p.40.
24. *The Queensland Information Commissioner*, 6th Annual Report 1997–98, p.17.
25. Though the ALRC has given some support to this change, the Commission is of the opinion that generally the *status quo* is to be preferred.
26. The government acknowledged the recommendation of the WA Information Commissioner. In the Attorney General's Report based on Statutory Review, 31 October 1997, it is stated that the Government is committed to the principle and that it will be enshrined in the *Government Records Bill* to be introduced into Parliament. It is questionable whether this is not more appropriately an issue for FoI legislation.
27. Report No. 1, August 1995, p.79. The Commission recommended that a charge must be waived if the applicant is impecunious or if it is in the public interest.
28. The WA government considered this issue in the review. However, it did not reach a conclusion but left the State Supply Commission to examine the issue and, if necessary, will consider an amendment to the Act at a later date.
29. 1997–98 *Annual Report*, p.7.
30. Administrative Review Council, *The Contracting Out of Government Services — Access to Information*, Discussion Paper, December 1997.
31. 1997–98 *Western Australian Annual Report*, p.7.

FoI in Victoria: A right of access under siege

In the traditional slow news month of January, a story that involved a convicted murderer's use of FoI to obtain the names of hospital staff was sure to attract maximum coverage. 'A killer's list ... 51 live in fear' screamed a *Herald Sun* headline. The controversy intensified when Premier Jeff Kennett weighed in to defend the safety of public servants, lambasting the Victorian Civil and Administrative Tribunal (the Tribunal) and foreshadowing changes to FoI. The case serves as yet another illustration, if one were needed, of the ongoing vulnerability of FoI to government attack.

Background

Ashley Mervyn Coulston was convicted of the 1992 murders of three young people. He is seeking to have his case reopened in order to prove an alibi that on the night of the murders, he was visiting his partner in Frankston Hospital. Coulston made an FoI application to the hospital, seeking details of nursing and clerical staff rostered on that night. The hospital rejected the application on the grounds of the s.33 personal privacy exemption. Coulston sought review of the decision in the Tribunal. In November 1998, the Tribunal made an order for disclosure of the documents. The Hospital did not appeal against the decision and released the names of the 51 staff to Coulston in December 1998.

Premier Jeff Kennett had much to say about the case and about FoI: that the decision was outrageous and unacceptable; that the use and interpretation of FoI had 'gone beyond the pale of decency'; that he had had concerns about the Tribunal and FoI for some time; that ever since its introduction, FoI has been consistently expanded and at times misused; that there would be a review of FoI; and that he would not hesitate to scrap FoI if this was the best way to protect public servants.

Comment

A volatile mix of political agendas and point scoring, news values and public outrage distorted reactions to the *Coulston* case. The lessons to be learned should be confined to the particular circumstances, for it appears that the shortcomings lay with the handling of the case rather than with the Act itself. The hospital, apparently relying on legal advice that the documents would fall within the personal privacy exemption, was not legally represented at the Tribunal hearing. It appears that detailed submissions on the relevant law were not made. The hospital did not lodge an appeal or seek government assistance. The staff whose names were disclosed were not informed about the application or decision, which would have provided an opportunity for the case against disclosure to be contested more vigorously.

Unfortunately the case became the vehicle for an attack on the legitimacy of FoI and the role of independent decision makers, and the purported justification for possible further erosion of FoI in Victoria.

This is not the first time that Mr Kennett has criticised FoI or suggested contentious 'reforms'. In 1997, Mr Kennett argued that public servants' time was being wasted by frivolous FoI requests and mooted the removal of the right to appeal to a tribunal, which would be replaced with appeal to a government-appointed commissioner.

The track record of the Kennett government, aside from the 1993 extension of FoI to local government, is of legislative change that has reduced the scope of FoI and created disincentives to its use. In 1993, the cabinet documents exemption was widened, state owned enterprises were exempted from the Act, and application fees were introduced along with the removal of the threshold on fees. In 1998, legislative amendment created the possibility that unsuccessful appellants could be required to pay costs. The fee to lodge an appeal was also raised from $157 to $170.

These changes, actual or proposed, represent several of the 'deadly sins' of FoI identified by Justice Michael Kirby in a 1997 speech to the British section of the International Commission of Jurists: 'keep it secret' through numerous and overly broad exemptions; 'grant exemptions' so that certain bodies are not subject to FoI; 'up costs and fees', putting FoI beyond the reach of ordinary citizens; and 'weaken independent decision-makers' who can stand up to government and require that sensitive information be provided.

The reporting of the *Coulston* decision and the ensuing public debate may have given members of the public the impression that the right of access created by FoI is so expansive and liable to misuse as to be dangerous. However, readers of this publication will be familiar with a different story altogether — a right of access curtailed at the outset by exemptions, subject to further diminution by defensive administration and narrow interpretation, and that may be time consuming and expensive for the user. Yet for all this, FoI has served Victorians well in recent times, providing them with information about the Intergraph contract, the privatisation of the Cranbourne ambulance service, the government's Grand Prix entertainment expenses, and the use of government credit cards. Could it be that the *Coulston* case, removed from the rough and tumble of politics, provided a seemingly altruistic justification for an attack on the source of these discomforting disclosures?

Questions along the lines of how a convicted murderer could have access to FoI seemed to suggest that the use of FoI should be restricted, reminiscent of the encryption debate. The fact that Coulston remains in jail and is trying to overturn his conviction was too readily overlooked. The Act creates a right of access to government documents and does not distinguish between worthy and unworthy applicants or requests. To attempt to restrict access to FoI to certain persons or certain purposes would be a disastrous development that would create a further means of stymying legitimate requests.

None of this is to say that FoI as we know it is beyond reproach. By all means let there be debate about FoI, for without questioning and re-evaluation, we risk being left with an atrophied system. The debate should be about how to improve access and develop a pro-disclosure culture, both in government and among the public. FoI is not some relic of the 1960s and 1970s that has outlived its use. If this were so, why has the idea been embraced by Ireland, which has recently introduced FoI, and by the Blair government, which has made it a key element of its program?

FoI is just one of the tools that underpins the community's right to know, and, were the culture of government more pro-disclosure, formal applications and appeals would be measures of last resort. But we should be particularly wary of claims that the information abundance made possible by technological change does away with the need for FoI. In many cases, FoI will still be necessary to get access to the kinds of documents that will not find their way onto web sites or into glossy brochures. The aims of accountability and participation remain as relevant and necessary as ever, as does, unfortunately, the need for vigilance against erosion of FoI.

JENNY MULLALY

Jenny Mullaly is a researcher at the Communications Law Centre, which, together with the Australian section of the International Commission of Jurists, is holding a conference on freedom of information in Melbourne on 19–20 August. For further information, call (03) 9248 1278 or send email to comslaw@dingo.vut.edu.au.

VICTORIAN FoI DECISIONS

AAT / VCAT

STEVENS and MELBOURNE MAGISTRATES' COURT (No. 1995/022882)

Decided: 24 March 1998 by Deputy President Dimtscheff.

Section 33(6) (personal affairs).

Factual background

Stevens was convicted of certain offences. In an attempt to exonerate himself, Stevens sought access to certain documents that he believed were in the possession of the Crimes Compensation Tribunal (the CCT).

Procedural history

Stevens requested access to files and documents in the possession of the CCT. The CCT apparently refused to confirm or deny the existence of the documents pursuant to s.33(6). This decision was affirmed on internal review on 24 March 1995 and, on 30 June 1995, Stevens applied to the Tribunal for review.

Th decision

The Tribunal affirmed the decision of the CCT, and, accordingly, dismissed the application.

The reasons for the decision

Section 33(6) states that an agency is not required to give information about the existence or non-existence of a document where such information, if included in a document of the agency, would, if the latter document were released, involve the unreasonable disclosure of information relating to the personal affairs of any person.

The Tribunal noted that, in practical terms, reliance on s.33(6) will necessarily require a respondent to present their case in general terms. According to the Tribunal, a respondent may rely on s.33(6) if it establishes that 'should a document exist [that document] would hypothetically be exempt pursuant to the provisions of s.33(1)'.

The Tribunal further noted that the invocation of s.33(6) prevented the Tribunal from perusing any disputed documents as was normally its discretion pursuant to s.33(1), on the basis that to do so would indicate to the applicant that the documents sought were, in fact, in existence (*Re O'Sullivan and Department of Health and Community Services (No.2)* (1995) 9 VAR 1).

The Tribunal found on the balance of probabilities that the respondent had 'fulfilled [the] necessary criteria' in this matter and accordingly, affirmed the respondent's decision.

Comments

In my view, the Tribunal misunderstood the approach to be adopted when determining whether a document is exempt under s.33(6). The Tribunal approached s.33(6) on the basis that it required a respondent to show that, should the actual documents exist, those documents would hypothetically be exempt under s.33(1).

In fact, s.33(6) is not concerned with the hypothetical scenario described. Rather, s.33(6) requires the Tribunal to assess whether a hypothetical document containing a reference *as to the existence or non-existence of the actual documents* would be exempt under s.33(1).

Furthermore, it appears that the Tribunal did not actually have jurisdiction to hear Stevens' application. Section 52 of the Act requires that an application for review be lodged with the Tribunal within 60 days of notification of the relevant decision. (The AAT has no power to grant an extension of time within which the application may be lodged; the position is different under the VCAT regime because s.52 has been amended.) Accordingly, it would appear that Stevens' application was not made within time — Stevens was notified of the decision on or about 24 March