

CHAPTER 10

INTER-GOVERNMENTAL RELATIONS

Section 33

10.1 The Committee accepts that there must continue to be an exemption protecting the security, defence or international relations of the Commonwealth. According to the Attorney-General's Department, '[e]xperience indicates that the Act is working well in this area'.¹ The Department of Foreign Affairs said in its submission that '[s]o far, the provisions of the Act have provided adequate protection for documents which the Department has needed to withhold from release'.²

10.2 The Committee's recommendations in respect of the public interest clause in section 33 (documents affecting national security, defence or international relations), were included in chapter 9.

Security classification of documents

10.3 The Committee received no evidence that the classification system in the present Protective Security Manual has had any adverse effect on the granting of FOI access.³ It

1. Submission from the Attorney-General's Department, p. 43 (Evidence, p. 48).

2. Submission from Department of Foreign Affairs, Attachment B, p. 1 (Evidence, p. 1079).

3. The Protective Security Handbook, which was discussed in the Committee's 1979 Report, has been replaced by the Protective Security Manual. See 1979 Report, paras. 16.8-16.29.

appears to be clearly understood by FOI decision-makers that the fact that a document bears a security classification does not establish conclusively that it is exempt under FOI.⁴

10.4 The Committee regards it as important that this relationship between security classifications and FOI access should be stressed during the training of FOI decision-makers. Provided that this is done, the Committee sees no need to pursue in this report those of its 1979 recommendations relating to security classifications which have not been implemented.

Section 33A: Commonwealth/State relations

10.5 In practice, section 33A has proved to be more controversial than section 33. Agencies which rely upon section 33A - for example the Department of Local Government and Administrative Services (DOLGAS) and the Department of Health - expressed doubts whether section 33A provided sufficient protection for 'State' documents.

10.6 There is evidence of some general concern amongst agencies having dealings with States that States see the Act as according them insufficient protection from disclosure of 'their' documents.⁵ DOLGAS informed the Committee that

DOLGAS officers are reasonably certain that the existence of the FOI Act is inhibiting full information being made available officially by [one particular] State.⁶

4. Submissions from the Department of Defence, p. 17; and the Department of Foreign Affairs, p. 13 (Evidence, p. 1068).

5. Submissions from the Australian National Parks & Wildlife Service, p. 2; the Great Barrier Reef Marine Park Authority, p. 1; the Department of Arts, Heritage & Environment, p. 4; the Department of Health, p. 11 (Evidence, p. 1231); the Department of Local Government and Administrative Services, p. 10; the Department of Transport p. 3; the Department of Resources and Energy, p. 3; and supplementary submission from the Commonwealth Ombudsman, p. 3; (Evidence, p. 1343).

6. Submission, p. 10.

10.7 By and large, it is the States' apprehensions that documents may be released by the Administrative Appeals Tribunal that generates the concern, not the result in decided cases.

10.8 Nonetheless, the Committee notes that the Tribunal in its recent decisions has interpreted section 33A as giving a State a de facto veto over the release of documents.⁷ A more recent interpretation by the Full Court of the Federal Court, however, suggests that the view of the State should be given considerable weight but should not be treated as determinative.⁸

10.9 The Committee considers that this latter, more authoritative interpretation strikes the appropriate balance between the interests of FOI applicants, the States and the Commonwealth.

10.10 In view of this, the Committee considers that section 33A is adequate, subject to the amendments recommended above in chapter 9 and below in paragraph 10.18. Further amendments to give greater protection to State interests are not warranted. In particular, the Committee does not accept that a State government should be automatically entitled to veto the release of documents in the custody of the Commonwealth.

Local government

10.11 DOLGAS advised the Committee that the success of many Commonwealth schemes in which the Department engages to provide for financial assistance to local government authorities depend upon the provision of full and frank information by the local governmental authorities to the Department.⁹ DOLGAS suggested

7. E.g. Re Rac and Department of Prime Minister and Cabinet (4 March 1986); Re State of Queensland and Department of Aviation (1986) 11 ALN 28; Re Guy and Department of Transport (8 May 1987).

8. Arnold v State of Queensland (1987) 73 ALR 607.

9. Submission from the Department of Local Government and Administrative Services, p. 11.

that

the role of local government as the third sphere of Australian government be recognised within the context of the FOI Act by the inclusion of provisions similar to sections 26A, 33A and 58F. The effect would be to require an agency to consult the relevant local government authority before disclosing a document which that authority might reasonably wish to contend is exempt and to permit that authority to be joined in proceedings before the Administrative Appeals Tribunal in support of exemption.¹⁰

10.12 In a separate letter, the Minister for Local Government and Administrative Services also pressed this view upon the Committee.¹¹

10.13 The Committee, with the exception of Senator Stone, does not accept this suggestion. For historical, political and legal reasons, the status of local government in Australia is significantly different from that of the States.

Ministerial councils

10.14 The Ministerial Council for Companies and Securities enjoys special protection under the FOI Act. Section 47 specifically exempts documents prepared for, furnished to, or in the possession of the Council or the National Companies and Securities Commission or which would disclose the deliberations of the Ministerial Council. However, this is the only Ministerial Council to receive particular protection.¹²

10. Submission from the Department of Local Government and Administrative Services, p. 11.

11. Submission from the Hon. Tom Uren, then Minister for Local Government and Administrative Services, pp. 1-2.

12. The Committee notes that the Report of the Senate Standing Committee on Constitutional and Legal Affairs, The Role of Parliament in Relation to the National Companies Scheme, (Parliamentary Paper No. 113/1987) recommended that the Commonwealth Parliament should enact comprehensive companies legislation.

10.15 The Department of Transport, which provides secretariat service to several ministerial councils, such as the Australian Transport Advisory Council, informed the Committee that the possibility of the release of the ministerial council documents is of concern to the States. According to the Department of Transport, this concern 'could well lead to a situation where State Government Ministers are unwilling to provide documents for these Councils or to canvass unpopular options at meetings of the Councils'.¹³ Consequently, the Department of Transport submission suggested that, for the purposes of the FOI Act, all documents originating from, or prepared for, Federal/State ministerial councils should be placed in the same category as Cabinet or Executive Council documents.¹⁴

10.16 The Committee accepts that concern exists over the possibility of release, although it is not aware of any case in which identifiable harm has resulted from the release under FOI of any ministerial council document under the FOI Act. The Committee agrees that some increased protection against release is warranted. The Committee regards the type of protection given by section 47 as appropriate.

10.17 Any attempt to increase the protection against disclosure of ministerial council documents raises problems of definition. The expression 'ministerial council' is not a term of art. It is used to refer to a variety of bodies established by various means with differing classes of membership and differing classes of powers and functions.¹⁵ For this reason, the Committee does not regard it as practicable to adapt section 47 to deal with all ministerial councils. In addition, such an adaptation

13. Submission from the Department of Transport, p. 3.

14. Submission from the Department of Transport, p. 3. See also submission from the Queensland Government, pp. 5-6.

15. See generally, Advisory Council for Inter-Governmental Relations, Ministerial Councils: Information Paper [ACIR. Hobart. 1986] chapter 3.

may result in conferral of a greater degree of protection than a particular council regards as necessary.

10.18 The Committee recommends that, where a ministerial council formally so requests, exemption be conferred upon that council by inclusion within Schedule 2 of the Act.

10.19 The effect of this should be to confer a degree of exemption upon the council's documents, irrespective of which agency has possession of those documents. The degree of exemption should be no greater than is provided in section 47. By appropriate specification in the schedule, it could be less.