

CHAPTER 12

LAW ENFORCEMENT, SECRECY PROVISIONS AND AGENCY OPERATIONS

Section 37

12.1 Section 37 was the exemption second most commonly relied upon in 1985-86. Nearly 23% of all of the claims for exemption relied upon section 37 - in contrast to 32.7% in 1984-85. Of those claims for exemption made in 1985-86 under section 37, 44.9% relied upon paragraph 37(2)(b) - disclosing the lawful methods/procedures for dealing with breaches or evasions of the law -; and 43.3% relied upon paragraph 37(1)(a) - prejudicing the enforcement/proper administration of the law in a particular instance.¹

12.2 Section 37, like section 33 and 33A, adopts the 'would, or could reasonably be expected to' standard. Section 37 is not available when there is only the mere risk of prejudice.² However, it is available if there is some reasonable expectation of the occurrence of one of the nominated events.³

Paragraph 37(1)(a): enforcement or proper administration of the law

12.3 Difficulties may arise when people seek access to documents which may be relevant to an investigation into a possible breach of law but prior to the initiation of any investigation. In the Committee's view, it would be improper to

1. FOI Annual Report 1985-86, pp. 32 and 41.

2. News Corporation Ltd v National Companies and Securities Commission (1984) 57 ALR 550.

3. Attorney-General's Department v Cockcroft (1986) 64 ALR 97. Re A.B. and Australian Taxation Office (1986) 10 ALN 249, p. 250.

pressure an FOI applicant into making a statement relating to the possible breach as a condition of releasing documents under the FOI Act.⁴

12.4 The Committee does not object to agencies inviting applicants to volunteer statements where this might suffice to overcome the possibility of prejudice to the conduct of an investigation. However, the Committee emphasises that any such invitation should be accompanied by clear advice that applicants are not obliged to provide the agency with a statement.⁵

Paragraph 37(1)(c): protecting life and physical safety

12.5 Australians for Racial Equality expressed concern that the FOI Act permits the disclosure of the identities and addresses of its leading members, thereby exposing them to verbal and physical attack by extremist opponents.⁶ A similar concern was reported in the 'Sydney Morning Herald', relating to members of the Sydney Muslim community.⁷

12.6 The Department of Immigration and Ethnic Affairs also addressed this problem in its submission to the Committee. The Department was particularly concerned that paragraph 37(1)(c) might be available only when there is a real possibility of danger.⁸ Consequently, the Department of Immigration and Ethnic Affairs suggested that there should be a lower standard of proof applied in respect of this exemption. The Department suggested that a test along the following lines might be appropriate:

4. It was alleged that this has occurred once - Evidence pp. 896-99 (Welfare Rights Centre). However, this allegation was denied in a letter from the Department of Social Security to the Welfare Rights Centre, dated 21 May 1986.

5. See also letter from the Welfare Rights Centre to the secretary of the Committee dated 1 September 1986, p. 3.

6. Submission from Australians for Racial Equity, p. 1.

7. 'Sydney Morning Herald', 3 December 1985.

8. Submission from the Department of Immigration and Ethnic Affairs, p. 19 (Evidence, p. 707).

a reasonable suspicion or belief based on cogent assertions or evaluations.⁹

12.7 The Committee notes this concern. However, the Committee does not accept the suggestion. In the Committee's view, the test 'would, or could reasonably be expected to ... endanger the life or physical safety of any person' is adequate to deal with the potentiality for danger to persons resulting from the disclosure of documents under the FOI Act.

12.8 In some cases, where the release of documents may have resulted in a risk of danger to the life or physical safety of persons, the release is attributable less to deficiencies in the FOI Act than it is to administrative errors.¹⁰ As is noted in paragraph 12.18 below, the representative of the Australian Federal Police at the Committee's hearings suggested to the Committee that the occasional release of a document which should have been withheld was a result of the Australian Federal Police's 'own administrative complexity rather than any application of the Act itself'.¹¹

Mosaic or jigsaw factor

12.9 Agencies drew the Committee's attention to the problem posed by what was described as the 'mosaic' effect. Mosaic factors may colour otherwise innocuous information. Agencies may be ignorant of the applicants' background knowledge. For instance, what might otherwise be an innocuous item of

9. Submission from the Department of Immigration and Ethnic Affairs, p. 20 (Evidence, p. 708).

10. The Committee notes that on 3 December 1985 the 'Sydney Morning Herald' reported Mr McKinnon, then Secretary of the Department of Immigration and Ethnic Affairs, as having: 'agreed that documents might have been withheld if the department had known their contents were going to be used as part of an attack on individuals'.

11. Evidence, p. 487.

information may be just the piece of information necessary to complete an applicant's knowledge on a subject.¹²

12.10 According to the Australian Federal Police:

It has been the experience of the FBI in America that several requests made by different members of a group can result in the group being able to piece together quite substantial portions of FBI intelligence holdings in respect to that group.¹³

12.11 The Australian Federal Police informed the Committee that there is evidence that mosaic requests are being lodged in Australia.¹⁴

12.12 Although the Committee acknowledges the difficulties which may be presented by mosaic requests, the Committee remains of the view that access should not be refused because of applicants' motives.

12.13 This is so for several reasons. In practice, the categories of documents which may form part of a mosaic in this sense are not susceptible to precise definition. Consequently, it would be necessary to entitle agencies to consider the motives of applicants who seek access to a whole range of documents. As was discussed previously, the Committee does not consider that applicants' motives should be taken into account for the purpose of determining whether access should be granted. Further, were agencies to consider applicants' motives, this would only reduce,

12. Evidence, p. 492 (Australian Federal Police). See also IDC Report, p. D13 (mosaic factor in release put informant's life at risk - had to be moved interstate).

13. Submission from the Australian Federal Police, p. 9 (Evidence, p. 466). See also submission from the Attorney-General's Department, pp. 37-38 (Evidence, pp. 42-43). The submission from the Australian Customs Service, pp. 24 and 31, notes that mosaic factors may arise in contexts other than law enforcement, such as business.

14. Submission from the Australian Federal Police, p. 9 (Evidence, p. 466).

but not eliminate in entirety, mosaic requests since such requests would be filtered through a series of, as it were, 'innocent' agents.

12.14 Senator Stone dissents from paragraphs 12.12 and 12.13.

12.15 The Inter-Departmental Committee identified as an option the amendment of the Act so as to exclude the section 22 obligation to make deletions, where exemption is claimed under paragraph 33(1)(a) or section 37.

This would help minimise disclosure of sensitive information as a result of ignorance or oversight because the decision-maker failed to adequately address the 'mosaic' or 'jig-saw' problem ... or where deletion of a finite number of printed characters still enabled deleted information to be deduced by an applicant.¹⁵

12.16 The Committee does not recommend adopting this option. The Committee recognises that this option would assist in overcoming the mosaic problem, at least marginally. However, the price would be a drastic reduction in access rights. In 1985-86, section 37 was relied on to make deletions in 4789 cases, but to refuse access in only 417 cases.¹⁶

12.17 The Committee recognises that it may be necessary to bear in mind the possibility of mosaic or jigsaw requests. In the Committee's view, the problems posed by such requests are better resolved by administrative action (and vigilance) than by legislative amendment.

12.18 In reaching this conclusion, the Committee notes the comments by Inspector Saunders of the Australian Federal Police at the Committee's hearings. Discussing the question of mosaic

15. IDC Report, p. D8.

16. FOI Annual Report 1985-86, pp. 216-19.

(or, as he termed it, 'jigsaw') requests, Inspector Saunders commented:

[T]his is a problem. Of course, the difficulty is in being able to identify it as a problem at the time. We have experienced similar requests coming from different directions, or from different applicants. It is not always possible to say that they are related, and indeed there is a difficulty again in the consistency in what is released. We are looking at the human error, which is our main problem in this, I believe.¹⁷

12.19 The Committee has no recommendations for legislative amendment in this respect. However, the problem is noted especially for the attention of freedom of information officers in agencies which have not yet encountered it.

Crime intelligence information

12.20 The IDC recommended amending sub-section 7(2A) to extend the present exemption of documents received from security agencies to documents received from 'crime intelligence agencies'. Regulations would identify the relevant crime intelligence agencies.¹⁸ The IDC offered no detailed argument in support of this recommendation.

12.21 The IDC's aim appeared to be to avoid the cost of line-by-line scrutiny of documents that turn out to be exempt. If it is the case that all, or almost all, of documents received by agencies from 'crime intelligence agencies' prove on examination to be exempt, the Committee would accept the blanket exemption of documents from such sources by sub-section 7(2A) exemption of such documents.

17. Evidence, p. 490. See also p. 491 (Inspector Saunders).

18. IDC Report, p. 47 (Option B15). See also the submission from the Australian Customs Service, p. 27.

12.22 The Committee is not convinced, however, that there is a clearly identifiable category of documents received from 'crime intelligence agencies'. This is so for two reasons. First, in Australia and overseas, many such agencies are merely sections, divisions or offices within police forces. The Committee is conscious of the difficulty of providing a precise definition of 'crime intelligence agencies'. Secondly, exempting documents 'received from' crime intelligence agencies may invite other agencies to attempt to evade the Act by filtering their documents through such 'crime intelligence agencies'.

12.23 The Committee would not want to create a mechanism by which blanket exemption could be given for documents with police forces simply by routing them through the forces' crime intelligence units. This possibility is largely avoided at present since the Commonwealth controls the structure and activities of all the organisations presently listed in sub-section 7(2A). Overseas or State organisations would not be subject to this check.

12.24 The Committee considers that documents created by or in the possession of 'crime intelligence agencies' properly so called should receive specific protection.

12.25 The Committee recommends that 'crime intelligence agencies' be specifically identified by express inclusion in Schedule 2 of the FOI Act, and that documents that have originated with, or have been received from, such specified 'crime intelligence agencies' be brought within the protection of sub-section 7(2A).

12.26 The IDC also recommended amendment of the Act 'to exempt (e.g. for 5 years) documents containing crime intelligence information'.¹⁹ Again, no detailed argument was provided in support of the recommendation. In the absence of such argument,

19. IDC Report, p. 47 (Option B16).

the Committee regards the recommended amendment as unnecessary, even unhelpful. There would be considerable uncertainty and scope for argument over what was or was not 'crime intelligence information'.²⁰

Section 38: secrecy

12.27 Section 38 of the FOI Act provides that:

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exemptions or qualifications.

12.28 There is some uncertainty over the meaning of this section. The Law Institute of Victoria described the judicial interpretation of section 38 as 'confusing and contradictory'.²¹ However, in the five years that the FOI Act has been in force, judicial interpretation of section 38 has settled some of the initial uncertainty about the ambit of the exemption.²² According to the Attorney-General's Department, the Administrative Appeals Tribunal and the Federal Court have developed a

line on the interpretation of section 38 of the FOI Act which has made it clear that the more general secrecy provisions [in other Acts] do not operate to provide an exemption.²³

20. Cf. Re Anderson and Australian Federal Police (1986) 4 AAR 414, p. 423.

21. Submission from the Law Institute of Victoria, p. 4. (Evidence, p. 377). See also, for example, submissions from the New South Wales Law Society, p. 3; the Australian Patents, Trade Marks and Designs Offices, pp. 20-21.

22. For a summary of Federal Court decisions on Section 38 see Harrigan v Department of Health (1986) 72 ALR 293, pp. 294-95.

23. Evidence, p. 177.

12.29 The Committee noted the suggestion that the FOI Act should be amended by the inclusion of a formal listing of the secrecy provisions contemplated by section 38 so as to remove the residual uncertainty as to the application of the section.²⁴ This could be done by listing in a schedule of the Act, or by listing in regulations.

12.30 In 1979, the Committee recommended that the secrecy provision should be supplemented by a scheduled list of secrecy provisions.²⁵ That recommendation was not accepted by the then Government.²⁶ Nonetheless, the Committee repeats that recommendation here.

12.31 The Committee recommends that there be an exhaustive list of secrecy provisions, and that that list of secrecy provisions be contained in a schedule to the FOI Act rather than in regulations.

12.32 In the Committee's view, any provision which restricts the application of the FOI Act should be apparent on the face of the FOI Act. This should be true of both existing provisions and provisions contained in any future legislation.

12.33 The Committee is concerned that there has not yet been any comprehensive review of the secrecy provisions for their compatibility in the FOI Act, despite the Government having stated in its response to the Committee's 1979 Report that a review of existing secrecy provisions was in progress.²⁷ In 1986-87, the Attorney-General's Department resumed its work on the review of secrecy provisions, but the review has yet to be

 24. E.g. Evidence 494 (Australian Federal Police); submissions from 'The Age' pp. 33-34 (Evidence, p. 218-19); the Australian Taxation Office, p. 8 (Evidence, pp. 658 and 679-80); Political Reference Service Ltd, pp. 17-18 (Evidence, pp. 967-68).

25. 1979 Report, para. 21.13(a).

26. Senate, Hansard 11 September 1980, p. 803 (Senator Durack).

27. Ibid.

finalised.²⁸ According to Mr Lindsay Curtis, if the Department

had proceeded immediately to a review of secrecy provisions we may very well have ended up with a less satisfactory situation from the point of view of openness than we now have. If we had reviewed secrecy provisions very quickly after the Act came into force we would have been under pressure to retain a lot of secrecy provisions because agencies would feel that they needed the protection that those provisions gave.²⁹

12.34 The Committee urges the Attorney-General's Department to undertake a complete review of the secrecy provisions for their compatibility with the FOI Act³⁰ and, that, as soon as possible after that review has been completed, the Government present a report upon the review of secrecy provisions.

12.35 In expressing this view, the Committee notes the advice of the Attorney-General's Department that:

The change in scope of the review of secrecy provisions to include a review of their impact on the detection of fraud and other abuses will add to the work involved in completing the review [of secrecy provisions]. It is not possible to estimate how much of the review will be taken up by this new aspect but it will clearly form a significant part. No date has been set by the Government for completion of the review. This Department hopes to be in a position to issue a discussion paper in the near future.³¹

12.36 'The Age' suggested that the Committee should examine each secrecy provision nominated for future inclusion in the list

28. FOI Annual Report 1986-87, pp. 30 and 73.

29. Evidence, p. 177.

30. See also the joint submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 25 (Evidence, p. 874).

31. Third supplementary submission from the Attorney-General's Department, p. 4 (para. 12.).

for the compatibility of that provision with the FOI Act.³² The Committee does not regard this suggestion as practical. It would introduce unnecessary delays into the legislative process if every alteration to the list of secrecy provisions had to be referred to the Committee

12.37 It is proposed to amend section 38 by the Privacy (Consequential Amendments) Bill, cl. 6. The following sub-section is to be added:

(2) Where a person requests access to a document, this section does not apply in relation to the document so far as it contains information that relates to the personal affairs of the person.

12.38 The Committee endorses this amendment. However, the Committee notes that this amendment may pose problems in respect of some secrecy provisions - such as section 87 of the Complaints (Australian Federal Police) Act 1981 which precludes people from gaining access to information held about themselves by the Investigation Division of the Australian Federal Police.³³

12.39 In practice, these difficulties may be more apparent than real. Where an applicant requests access to documents falling within a secrecy provision the application of which is precluded by sub-section 38(2), the document may be exempt under one of the other exemptions. For instance, when a person applies for access to documents relating to a Australian Federal Police internal investigation into the applicant's conduct (the substance of the documents covered by section 87 of the Complaints (AFP) Act), the request may be denied under section 37 of the FOI Act.

32. Submission from 'The Age', p. 34 (Evidence, p. 219).

33. The Administrative Appeals Tribunal has held that section 87 is a relevant secrecy provision: Re Corbett and the Australian Federal Police, (1986) 9 ALN 194. For expression of doubt whether this decision is consistent with Federal Court interpretation of section 38, see Evidence, p. 494 (Australian Federal Police).

12.40 There is one minor aspect of this amendment to which the Committee draws attention. Section 41 of the FOI Act uses the phrases 'personal affairs of any person' and 'matters relating to that person'. The proposed sub-section 38(2), which was presumably drafted with an eye to section 41, refers to 'the personal affairs of the person'.

Section 39

12.41 The Committee makes no recommendations in respect of section 39.

Section 40

12.42 Section 40 is designed to exempt from disclosure documents concerning certain operations of agencies. It is becoming increasingly popular as a ground of exemption, accounting for 52% of all exemption claims in 1985-86 as compared to 30.2% in the previous year,³⁴ and 13.1% in 1983-84.³⁵ The Commissioner of Taxation was the agency responsible for 93% of the total exemptions claimed under section 40 in 1985-86, using it on 11,018 occasions to make deletions and on 35 occasions to refuse access entirely.³⁶

12.43 Paragraph 40(1)(d) provides for exemption where a grant of access might 'have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'. There were 3097 claims for exemption under this paragraph in 1985-86.³⁷ The Commissioner of Taxation used the paragraph on 2894 occasions to make deletions from the requested document and on a further 11 occasions to refuse access altogether.³⁸

34. FOI Annual Report 1985-86, p. 32.

35. FOI Annual Report 1983-84, p. 64.

36. FOI Annual Report 1985-86, pp. 44, 237 and 239.

37. FOI Annual Report 1985-86, p. 44.

38. Ibid., pp. 247-48.

12.44 Inspector Saunders of the Australian Federal Police suggested that this paragraph

has become a sort of stand-by clause where frankly you are having trouble finding anything else to use and you feel that it should be exempted.³⁹

12.45 The Law Institute of Victoria suggested that paragraph 40(1)(d) has been used by agencies which lack the confidence to invoke section 36.⁴⁰ The Law Institute recommended that paragraph 40(1)(d) should be repealed since it is available in respect of few documents which would not also fall within section 36. However, the Committee notes that the Administrative Appeals Tribunal, having given the provisions separate meanings, has treated the sections as having distinct roles.⁴¹

12.46 The Committee considers that there is no real need for this exemption. Section 24 and other exemption provisions provide sufficient basis to ensure that an agency is not required to disclose a document the disclosure of which would cause substantial damage to the operations of the agency.⁴²

12.47 Accordingly, the Committee recommends the repeal of paragraph 40(1)(d).

12.48 Senator Stone dissents from this recommendation.

39. Evidence, p. 490.

40. Submission from the Law Institute of Victoria, p. 5 (Evidence, p. 378).

41. E.g. Re Brennan and Law Society of the Australian Capital Territory (No. 2) (1985) 8 ALD 10, p. 17; Re Mr and Mrs AD and Department of Territories (1985) 9 ALN 156, p. 156.

42. Submission from 'The Age', p. 35 (Evidence, p. 220).

