Whether publication requirements concerning certain information modified the application of s.135A and whether s.38(1A), concerning release under the relevant secrecy provision itself, had any operation.

Facts

The applicant (the Association) sought copies of all current reports prepared by the Standards Monitoring Team of the respondent (DHH & CS) in respect of approved aged care nursing homes in Queensland. The Minister had power under s.45D of the *NHA* to determine standards to be observed in provision of care in approved nursing homes. Standards were determined by the Minister on 11 November 1987. Officers of DHH & CS visited each nursing home to obtain information relevant to monitoring the standards and wrote a report on each of them. The Minister also had power under s.45DA to prepare and publish a statement containing information concerning whether the standards had been met and certain other information. A statement was usually but not always published when a report had been prepared. Published statements are required by s.45DA to be made available for public inspection. Copies were provided to the Association of those statements which had been published, but there were reports for which there was no statement. The Association argued that the Minister was required to publish statements under s.45DA and that s.135A of the *NHA* (a 'secrecy' provision) could not frustrate the clear intention that information be published. DHH & CS argued that s.45DA did not modify the provisions of s.135A. A question relating to the Tribunal's jurisdiction to review DHH & CS's decision had been determined in an earlier interlocutory decision (*Re Advocacy for the Aged Association Incorporated and DCSH*; (1992) 39 *FoI Review* 38).

Decision

The Tribunal held that disclosure of the information in the reports was prohibited under s.135A of the NHA and was therefore exempt under s.38 of the *FoI Act*, whether as it stood before it was amended in October 1991 or after.

Differences between 'reports' and 'statements'

The Tribunal was satisfied that the reports of the officers, to which access was sought, were separate from the statements referred to in s.45DA of the *NHA*. The preparation of reports was reasonably incidental to the performance of the duties of the officers to enter nursing homes to monitor compliance with standards. There were differences between those reports and the statements required to be published. Both included information in relation to compliance with the standards, but 'statements' included additional information. However, it was not a relevant consideration in this case whether or not the Minister was under a duty to exercise his powers and prepare and publish such statements. The question was only whether disclosure of the reports was prohibited under s.38 of the *FoI Act*.

Section 38 — application of unamended and amended forms of s.38 to s.135A of the National Health Act 1953

Section 38 was amended on 25 October 1991, between the date of the request and the Tribunal's substantive decision in October 1992. The Tribunal did not have to decide which form of the provision was applicable to the request, since it held that s.38 would apply in either its amended or unamended forms (compare *Re Green and AOTC* in relation to an amendment favourable to the applicant; (1994) 50 *FoI Review* 21). Section 135A, which prohibits the disclosure of information acquired by an officer respecting the affairs of a third person, came within the wording of the unamended s.38 since it identifies information 'respecting the affairs of another person' (*Commissioner of Taxation v Swiss Aluminium Australia Ltd* (1986) 66 ALR 159; applied to s.130 of the *Health Insurance Act 1973*, which is virtually identical to s.135A of the *NHA*, in *Harrigan v Department of Health* (1986) 6 AAR 184; (1987) 7 *FoI Review* 11). As s.135A operates to prohibit disclosure of information in the documents concerning the affairs of the proprietor of the nursing home, its staff and its patients, the information was exempt under the unamended s.38.

Section 135A of the *NHA* was a provision specified in Schedule 3 of the Act as amended on 25 October 1991 and, under the amended s.38, information which s.135A prohibits from disclosure is exempt. Section 38(1A), also introduced on 25 October 1991, provides that s.38 does not prevent the disclosure of information where its disclosure is not prohibited by the relevant secrecy provision, in this case s.135A. The latter section does allow limited disclosure in certain instances, but they did not apply in this case. Section 45DA of the *NHA* was not relevant as it merely permitted the publication of information in statements and, until those statements were published, disclosure of the information was prohibited under s.135A.

[R.F./R.A.]

OVERSEAS DEVELOPMENTS

UK Open Government: Code of Practice

On 4 April 1994 a new Code of Practice came into effect to provide greater access to government information in the United Kingdom. The Code of Practice is based on the Citizens' Charter themes of increased openness and accountability. The Code includes five commitments:

- to give facts and analysis with major policy decisions;
- to open up internal guidelines about departments' dealings with the public;
- to give reasons with administrative decisions;
- to provide information under the Citizens' Charter about public services, what they cost, targets, performance, complaints and redress;
- to answer requests for information.

The Code covers central government departments and public bodies which are subject to investigation by the Parliamentary Ombudsman.

The Code contains a number of novel features that would delight many Australian FoI officers. The applicant writes in for information, as in Australia, but is not provided with access to information or documents but is

provided with answers to their questions. Departments are allowed to set their own response times. If a Department's deadline will not be met the applicant is to be informed of the new deadline. Certain information is free (information in relation to: the reasons for an administrative decision, regulatory requirements affecting a business, standards and performances of services) but each agency is allowed to set charges for providing other types of information. An applicant is able to seek internal review if information is refused, takes too long or appears too costly. If an applicant remains unsatisfied with the outcome of the internal review they must approach the Parliamentary Ombudsman via a Member of Parliament who can recommend but not compel the provision of information.

The Code has been welcome, albeit without wild enthusiasm, by pro-access groups such as the Campaign for Freedom of Information.

> The Code does represent a significant shift in government thinking. At one point the 'open government' policy seemed to offer no more than a series of unrelated individual disclosures . . . goes well beyond that, seeking more systematic openness. But the proposals must meet a stricter test. The government must show that they justify the blocking of the *Right to Know Bill*; that they offer an acceptable alternative to a Freedom of Information Act.[1]

Background to the code of practice

The Code has come into operation after the Government blocked the *Right to Know Bill* and the *Medicines Information Bill* in 1993. The *Right to Know Bill* was an attempt to introduce FoI legislation as it operates in Australia into the United Kingdom. The Bill was introduced into the House of Commons by Labour MP Mark Fisher with strong all-party support. The Bill made substantial progress through the Commons with MPs voting 168-2 to allow the Bill to proceed to the next stage. It was reported:

> but the government arranged for the Bill to be blocked at its next parliamentary stage. Debates on earlier bills were deliberately spun out, allowing only an hour for the *Right to Know Bill* . . . But it has demonstrated that there is enormous support in the House of Commons — including that of a substantial number of Conservative MPs — for freedom of information legislation.[2]

Criticisms of the code

Critics point out that the Code offers no right of access, being a voluntary scheme subject to non-binding arbitration. The code promises to disclose factual information but analysis will only be released if it is volunteered by the government. Access to the Parliamentary Ombudsman can only be via the direct assistance of a Member of Parliament (any MP) who has no obligation to pass the request on to the Ombudsman. Another problem is that the Code:

> sets its sights low. If it aimed at the same level of disclosure as an FoI Act, but substituted the Ombudsman for strict enforcement in order to ease the concept into Whitehall, it would be a different proposition. But the Code's commitment to openness is defined so narrowly that, however well policed, great areas of secrecy will be preserved.[3]

The most serious shortcoming of the Code is that the commitment is to give access to information and not to pre-existing documents or the specific information contained in such documents.

> The Code suffers from one overwhelming central flow: it does not offer access to documents. The government is promising to answer questions, not let people see correspondence, documents, or reports . . . This marks the Code out as a vastly inferior product. The essence of FoI legislation is access to documents.[4]

Maurice Frankel, director of the Campaign for Freedom of Information, described by the Code resembles a form of parliamentary question time for the general public:

> We know how they work: ministers are careful not to lie, but happy to mislead. As Lord Tebbit put it: 'Anybody who holds ministerial office has given replies which might lead the questioner to come to a wrong conclusion. Parliament must not be told a direct untruth but it is quite possible to allow them to mislead themselves . . . The Cabinet Secretary, Sir Robin Butler, offered a glimpse of the Whitehall norm when he explained how ministers' denials of talks with the IRA were compatible with the actual written communications and face-to-face meetings: 'It was a half-answer if you like, but it was an accurate answer . . . This was an answer which was true but not complete, not designed to mislead . . . Half the picture can be true'.[5]

A final set of criticisms levelled at the Code was that the Government's budget for publicising the Code was just $15,000 with the Code beginning life on a bank holiday during a parliamentary recess.[6]

An antipodean postscript

At the Info One Conference in Adelaide last year, two charming Whitehall mandarins were in attendance on a fact-finding tour. The two UK public servants distributed copies of their government's 'Open Government' white paper and absorbed the sight of Australian public servants freely discussing how to achieve maximum access to information by the ordinary citizen. A story that did the rounds at the Conference told of how the visitors were overheard vowing that after what they had heard at the first day of the conference there was no way that FoI legislation should be introduced to the UK.

A further postscript

In a recent letter from Maurice Frankel he noted a slight paradox during the last stages of the debate on the doomed *Right to Know Bill*:

> You may be interested to know that the *Right to Know Bill*, which we drafted, was introduced in the House of Commons last session and debated for 21 hours before finally being talked out. At its Committee stage, instead of arranging for the normal 'wrecking amendments' to be tabled, the government had a series of amendments taken from the Australian *FoI Act* put down instead. These challenged the areas in which we had attempted to go further than the Australian Act (e.g. the exemptions were narrower; fees were lower; no ministerial certificates; and we had a 'public interest override' across all exemptions if there was evidence of abuse of authority, negligence, danger to the public etc. — a statutory form of the 'iniquity' defence under the law of confidence). What followed for much of the Committee was a debate on whether Britain should have a Bill along our proposed lines, or along the lines of the Australian! Unfortunately, this was a somewhat academic exercise, since all knew that the government had no intention of allowing a statute to pass in either form! But it made for a more intelligent debate.[7]

Maybe the Commonwealth Attorney-General's Department in its review of FoI should note how pedestrian our once path-breaking initiative has become in the 1990s.

Rick Sn ll

References

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4. 'Govt offers information — but no documents', *Secrets,* No. 26, August 1993, 2.
5. Frankel, Maurice, 'You want to know a secret? It's a Catch-22', *Independent*, 5 April 1994.
6. Frankel, above.
7. Letter to author, 13 May 1994.