
Legal notes

Preserving the confidentiality of information provided to the ACCC

The Commission relies heavily on information provided by those who know of conduct that may contravene the Trade Practices Act. The sources of such information vary from consumers and competitors who are affected by unlawful behaviour, to current or former employees of companies engaging in such conduct. In many cases, such as proposed mergers, the Commission will actively seek information from market participants.

In most cases the person providing the information may want it to remain confidential, either fearing repercussions or because it may reveal sensitive details relating to the provider's own commercial activities.

The Commission has a long-standing policy of not disclosing sensitive information provided in confidence, except with the permission of the provider or where required to do so by law. The rationale for this policy was first stated in the Trade Practices Commission 1981–82 *Annual Report* and more recently reproduced in the Commission's 1999 publication *Making markets work*:

... the TPC will not disclose what it receives in confidence from commercial sources unless ordered to do so by the Administrative Appeals Tribunal. The reason is that the TPC must keep faith with those who give information in confidence; that is the only way to maintain the flow of confidential information that is necessary for its work. The TPC is not seeking to protect itself in this but rather those who trust the TPC with the confidential information.

While the Commission will do all it can to preserve the confidentiality of sensitive commercial information, third parties can still seek access to such information against the wishes of the provider through several avenues, including Freedom of Information. However, a recent decision of the Administrative Appeals Tribunal has confirmed the Commission's ability to resist the release of such information where it remains sensitive.

Access under the Freedom of Information Act 1982

The Commission's policy on the release of confidential information was recently put to the test before the Administrative Appeals Tribunal in the matter of *Re Telstra Corporation Limited and Australian Competition and Consumer Commission*.²¹ This matter involved a request under the FOI Act for access to documents created by and provided to the Commission in the course of an investigation.

Section 11 of the FOI Act provides that every person has a legally enforceable right to obtain access to any document of an agency which is not an exempt document. The documents sought by the applicant in this case included commercial information provided to the Commission by several of Telstra's competitors, as well as internal documents analysing this information and providing advice to the Commission.

The applicant's request encompassed over 300 documents. After consulting with the people who provided the information, the Commission released 120 in full and 34 in part. In the

21 [2000] AATA 71 (decision of McMahon DP dated 7 February 2000).

months leading up to the hearing, the number of documents in dispute was further reduced as the applicant narrowed its request. The Commission also released most of its internal documents and several others, which contained information initially regarded as confidential, but which were later released with the consent of the providers. During this process, the Commission consistently applied its policy of not releasing information provided by commercial sources without their consent.

The tribunal was ultimately asked to rule on the status of two documents in their entirety and parts of another six. All of the material sought was commercial information provided to the Commission in confidence and in each case the provider of the information wanted it to remain confidential.

The tribunal held that all of the information sought was exempt from disclosure under ss 40(1)(d) and 43(1)(c)(ii) of the FOI Act.

Section 40(1)(d) provides that a document is exempt if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency. However, a document is not exempt under this section where its release would, on balance, be in the public interest.

Section 43(1)(c)(ii) provides that a document is exempt if its release would disclose information relating to a person's business, commercial or financial affairs, where disclosure could reasonably be expected to prejudice the future supply of such information to the Commonwealth or an agency.

In paragraph 14 of its decision the tribunal stated that:

The Commission largely depends upon the whole-hearted cooperation of suppliers of information in order to carry out its functions effectively. The degree of dependence placed on this information greatly assists in determining that its absence will present a real likelihood of prejudice ...

and at paragraph 35:

In many ways it is the fact of the release of a document recording this information, rather than the information itself which is crucial. Both section 40 and 43 speak of disclosure of the

relevant document. The claim under subsection 40(1)(d) is not dependent upon the confidential nature of the information, although I have no doubt that the information in these two documents was regarded by all parties as confidential. The release of the document containing such information, however, whether or not the material had been deliberately or accidentally made known to the applicant, could reasonably be expected to have a substantial adverse effect in the future on the way in which the Commission gathers its information in the telecommunications field and carries out its regulatory duties.

In short, the tribunal acknowledged the Commission's need to obtain confidential commercial information, as well as the prejudice which it would suffer if the flow of such information dried up because of fears about the possibility of release under the FOI Act. The tribunal also recognised the strong public interest in the Commission being able to obtain information to carry out its responsibilities.

This is the second time the tribunal has been asked to order the release of confidential commercial information provided to the Commission. In 1992 the Motor Trades Association of Australia sought access under the FOI Act to documents relating to the Trade Practices Commission's discussions about the wholesale and retail price of petrol and the voluntary self-regulation of the petroleum industry.²² On both occasions now, the tribunal has held that information provided to the Commission in confidence is exempt from release under ss 40(1)(d) and 43(1)(c)(ii) of the FOI Act.

Obviously each case will still need to be judged on its merits. For example, under s. 40(1)(d), the tribunal needs to balance the public interest in preserving confidentiality against the public interest in favour of disclosure. In the Telstra matter, it was argued that a factor in favour of release was that the documents could illustrate the decision-making processes leading to action by the Commission which affected Telstra's legal and commercial interests. The tribunal rejected this submission, holding that FOI should not be regarded as a substitute for discovery in litigation.

22 *Motor Trades Association of Australia v Trade Practices Commission* [1993] ATPR ¶41-201.

The Commission's argument was significantly strengthened because the businesses, which opposed release of the documents, were prepared to give evidence of the prejudice they would suffer. While a successful case can still be made without this evidence (as in the MTAA case), its value cannot be understated.

Access by other means

Information can still be sought through other avenues, e.g. by subpoena or discovery. While the Commission's ability to resist the production of documents in these cases is more limited, courts can take steps to preserve, as far as possible, the confidentiality of such information. The Commission will continue to seek to preserve the confidentiality of such information when the provider requests it.

Conclusion

The tribunal's decision in the Telstra matter, combined with its earlier decision in MTAA, confirms that the FOI Act makes substantial provision for preserving the confidentiality of sensitive commercial information provided to regulatory and enforcement agencies, despite the general right of access to documents created under the Act.

Where businesses, employees and other members of the public provide sensitive information to the Commission, they can be reasonably assured that confidentiality will be preserved under FOI, especially where the provider is prepared to give evidence to the tribunal explaining how they will be affected and why they oppose release.