Council did not recommend changes to the exemptions to the *FoI Act*.

In the case of the s.45 exemption, the government has to establish the elements of a general law breach of confidence action. The elements of such an action are onerous, in particular the requirement that a given document must be 'inherently confidential'. Therefore, the mere fact that a document is marked confidential, or that the contractor and government agency have agreed to treat it as such, would not suffice to bring the documents within s.45.

Similarly, the categories of documents to which s.43 applies are quite limited, and do not cover ordinary business matters. Generally, this exemption would only apply where the release of the information would be reasonably likely to have an adverse effect on the contractor's business affairs and such an adverse effect is unreasonable.

The role of the FoI commissioner in issuing guidelines and training, as well as overseeing agencies' FoI performance would be especially important in relation to these exemptions. The majority of the Council, therefore, was of the opinion that with appropriate guidelines, and subject to its being used correctly, the legislation, in its current form, would not inappropriately exclude information.

In contrast, a minority of Council members were of the opinion that guidelines would not be enough, in practice, to prevent a diminution in FoI rights in the contracting out context. They proposed a number of legislative amendments which would apply in the contracting out situation. In particular, they suggested that ss.43(1)(b) and 43(1)(c)(ii) be furnished with unreasonableness tests. In this way s.43(1)(b) would exempt information only if disclosure would be unreasonable. Section 43(1)(c)(ii) would exempt information only if disclosure would unreasonably prejudice the future supply of information to the Commonwealth. In the case of s.45, documents would not be exempt if it were in the public interest that they be disclosed.

Conclusion

The task of balancing the rightful wish of contractors to preserve their business interests against the legitimate anxiety that there will be a rise in the number of documents claimed to be exempt under ss.43 and 45 is but one of the difficult issues dealt with in the Council's Report. Current developments in governmental processes and their consequences on the administrative law system merit a wide debate, not only regarding FoI, in all interested quarters. The Council's Report will provide a framework for this debate. Arguably, if its recommendations were implemented, they would provide a fair, effective and inexpensive means of ensuring the continued realisation of the aims for which the administrative law system was initially set up.

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The views expressed in this article are personal to the author, and should not be taken to be those of the Council.

Copies of the *Contracting Out of Government Services Report* are available on:
http://crgow1/webvol/WOTL/aghome/other/arc/arc42_report/arc42.htm.
Otherwise, contact the Administrative Review Council:
Tel: +61 2 6250 5800. Robert Garran Offices, National Circuit, Barton, ACT 2600.

References

1. *Contracting out of Government Services Report*, Report No. 42, August 1998.
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FoI, the Crimes Act and Yes, Minister

The lessons of the following experience with FoI are both positive and negative. On the one hand, much of what was discovered would almost certainly not have come to light without FoI. On the other hand, what was found highlights practices and attitudes that need to change before the underlying open government purposes of FoI can be achieved. The implementation of a specific ALRC/ARC recommendation may be a step in the right direction.

In May 1995, I made the following FoI application:

> Access is sought to all documents relating to any study undertaken since 1 July 1993, and/or proposed to be undertaken, into the environmental consequences of any nuclear accident that might affect Australia. Such studies include, but are not restricted to, any relating to the accidental release of nuclear material in the Indonesian area.

The same application was sent to the Commonwealth Department of the Environment, and to the CSIRO.

At the time of the application some individuals and community groups were publicly expressing safety concerns about Indonesia's nuclear power generation plans. Moreover, it was well known to atmospheric scientists and to informed environmentalists that computer modelling tools existed to investigate the environmental consequences of hypothetical nuclear accidents. Since Chernobyl, many accounts of such investigations had appeared in the scientific literature,[1] and a few had appeared in the mainstream media. So one would not have needed to be Sherlock Holmes to suspect that the Australian government might have some interest in the same matters.

It turned out that there were indeed many documents within the scope of my application. They all related to a study commissioned by the Department of Foreign Affairs and Trade (DFAT). The purpose of the study was to investigate the environmental effects of a hypothetical accidental release of nuclear material from specified sources in the Indonesian area. Some documents, including those relating to the terms of reference of the study and its scientific methodology, were released. Other documents, relating to interim results of the study, which was still in progress, were claimed as exempt. On appeal to the Administrative Appeals Tribunal, but before the appeal could be heard, the DFAT agreed to provide deferred access to the documents it had previously

claimed as exempt. The final report of the study was publicly released in July 1998.[2] Probably because of more recent events in Indonesia, the report received minimal attention in the media.

Among the documents initially released to me, in 1995, was a Memorandum of Understanding (MOU) between the DFAT and the other participating government agencies. The MOU, dated 19 January 1995, included a provision that:

> ... information relating to the study [should be] conveyed only to staff ... who have a strict need to know that information, and that [... the scientists involved ...] are made aware of their obligations under Section 70 of the *Commonwealth Crimes Act 1914*.

In other words, the existence of a project to investigate the effects of a hypothetical nuclear accident in Indonesia, which the participating scientists were forbidden to reveal under threat of sanctions via the *Crimes Act,* was made known to me under FoI. Why had the scientists been constrained to secrecy? At first, I put it down to just another manifestation of the the old public service 'mushroom' culture. Maybe there was an element of that, but other documents suggested another, more specific factor.

The documents initially released to me contained references to a DFAT 'briefing note', which was not itself among the documents identified as within the scope of my first application. In July 1996, I made application for that 'briefing note' which, somewhat to my surprise, was released without objection. It was a briefing note, dated 19 January 1995, to the Minister for Foreign Affairs and Trade (Senator Gareth Evans) in the previous Labor government, by that time out of office. The note reminded the Minister that during a Senate Question Time on 23 November 1993, Senator Margetts (Greens) had asked Evans to '... establish an inquiry to investigate the risks associated with Indonesia's nuclear power program'. Evans had responded that '... there is no reason to believe that any such inquiry would be likely to achieve any useful purpose'.

The briefing note raised the possibility of Evans being asked the question, 'Why has the government undertaken a study of the impact on Australia of a nuclear accident in Indonesia, when it has previously said an inquiry was not necessary?' The DFAT briefing note indicated that the study commissioned was 'quite limited in scope' and was not 'the kind of full-scale inquiry of the type suggested by Senator Margetts'.

It seems to me that both the DFAT and Evans may have realised that a response along the above lines would be less than convincing, and that it would be better, at least in terms of political theatre, if the need to respond to such a question did not arise. And what would be the best way to avoid such a contingency? Correct! Not that I suggest that the confidentiality clause in the MOU was introduced at the behest of the Minister. More likely it was simply a case of a Sir Humphrey in the DFAT discharging his unwritten responsibility as a ministerial minder. And why then was the DFAT briefing note released so readily when I sought it? By July 1996, Sir Humphrey had a new boy, Alexander Downer, to care for. The release of the Evans briefing note would, at the least, do the new Minister no harm. Roosters and feather dusters!

The conclusion that Australian domestic politics, rather than considerations of Australia's relations with Indonesia, lay behind the secrecy provisions in the MOU, is confirmed by other material in the briefing note. The note also reveals that the head of the Indonesian Atomic Energy Commission had already been informed by DFAT of the Australian study, in January 1995. The briefing note further suggested a form of words by which Evans might explain the rationale for the Australian study to his Indonesian counterpart, and might also offer to share the progress results of the study. All of this at the same time as the existence of the study was not to be disclosed to the Australian community!

A hypothetical question. Suppose one of the participating scientists decided to make it known publicly that the study was in progress. Given that the same information would have been available to anyone who might ask, under FoI, do the bureaucrats then go ahead and seek prosecution under the *Crimes Act* (maximum penalty, two years imprisonment)? Perhaps not, but who would take the risk?

One of the themes of the ALRC/ARC 1995 Review of the *FoI Act*[3] was the way in which secrecy provisions in other Acts are in 'direct, head-on statutory conflict' with the principles of FoI.[4] The preceding story is surely a case in point. The Review recommended as follows:

> Individual officers, including those not authorised under the FoI Act, should not be subject to any disciplinary or criminal offence for disclosing information which would normally be given to any member of the public seeking that information.[5]

Like so many other recommendations of the ALRC/ARC Review, the day cannot come too soon.

Bob Seaman

Bob Seaman is a research scientist with ample opportunity to observe the bureaucracy.

Copies of documents obtained under FoI, and referred to in the article, are available through the Editor.

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5. ALRC/ARC report, ref. 3 above, para. 4.28.