prospect of conclusive certificates leaving:

> ... the [*Freedom of Information*] Act exposed to changes in political will and bureaucratic commitment to the principles and objectives of the legislation ... The current restraint on the use of these certificates is not cause to allow the damaging potential of this mechanism to go unchecked.[4]

Despite these criticisms, conclusive certificates have been retained. As a consequence, the availability of judicial review in this specific context is likely to form an important safeguard against the questionable impediment conclusive certificates present to citizens in accessing information.

It should be noted that the High Court is set to consider Shergold's appeal against the Full Court majority order in the new year. This case will be crucial to observe in terms of the limitations that may possibly be placed upon the review of conclusive certificates. Whilst the case will focus more on the interrelationship between the *Freedom of Information Act* and the ADJR Act the High Court's commentary on freedom of information law more generally will be of great interest.

[E.S.]

References

1. *Tanner v Shergold* [2000] FCA 422, (6 April 2000) para 17.
2. *Shergold v Tanner* [2000] FCA 1420 at para 15.
3. *Shergold v Tanner* [2000] FCA 1420 at para 126.
4. Snell, R., Submission 31, Australian Law Reform Commission, Discussion Paper 59, 'Freedom of Information', para 5.21.

RECENT DEVELOPMENTS

Victorian Public Accounts and Estimates Committee Inquiry into Commercial in Confidence Material and the Public Interest, March 2000[1]

Concern has been raised that the 'commercial confidentiality' of information has become a broadly defined and over-used 'catch all' means by which to assert grounds for non-disclosure. Indeed, it is becoming routine practice for 'confidentiality clauses' to be inserted in contracts between government agencies and private sector service providers.

The Thirty Fifth Report to the Victorian Parliament by the Public Accounts and Estimates Committee focuses on the interaction between 'commercial in confidence' material and the public interest. Underlying the Report is the notion that the use of confidentiality clauses ought to be kept to an absolute minimum and that contracts should contain specific terms stating that their contents are *prima facie* public. Such an approach will help to ensure that the changing mechanisms for the delivery of government services do not detract from the availability of information about the provision of those services that is necessary to enhance accountability.

The Committee noted that agencies have been relying on commercial confidentiality exemptions to justify the non-disclosure of information to individual members of parliament, to the Committee itself, to the Auditor General and the community at large. It is claimed that much of the material purporting to fall within this exemption would not be considered to be legitimately commercially sensitive. Indeed, it was suggested that government agencies are using commercial confidentiality as a shield to justify non-disclosure where the information would be likely to be commercially embarrassing for the government.

The report of the Committee was delayed until after the last Victorian election. Nevertheless it represents a new benchmark in the handling of commercial in confidence claims. This proposed new standard will not only apply in the context of FoI but to the operations of accountability watchdogs like the Auditor-General and Ombudsman. After a long period in the 1990s, when secrecy was seen to be the hallmark of the reinvented public administration, it is a sweet paradox to see a unanimous Victorian parliamentary committee report strike a much needed blow for open and transparent government.

Major findings

The Committee received 94 submissions and written responses following various hearings and the preparation of an issues paper. There was a high degree of consensus among the submissions with respect to the following observations:

- the Auditor General should have unrestricted access to commercial in confidence material;
- the changing mechanisms of government service delivery should not have the consequence of decreasing the information available about those services; and
- claims based on commercial confidentiality were now being used too broadly by the public sector as a means of preventing the disclosure of a wide range of information.

Such sentiments are reflected in the Report's key recommendations. The Committee maintained that decisions concerning the disclosure of commercially sensitive information must balance competing interests — the need for government agencies to operate effectively and the need to ensure political and financial accountability. Non-disclosure should not be solely justified on the grounds that agencies would be adversely affected by the information. Non-disclosure can be justified, however, on the grounds that the release of the information would interfere with the proper and efficient performance of government functions to the extent that this outweighs the benefits flowing from the public release of the information.

In short, the Report found:

- the impetus for classifying information about commercial dealings as commercial in confidence has come from within government rather than from the private sector — this practice is totally unacceptable and contrary to the spirit of the Westminster system of governance;
- open and accountable government can be undermined by the overuse of reasons based on commercial sensitivity to deny the parliament and the public access to information;
- the Auditor-General and the Ombudsman should have unrestricted rights of access to commercial information and should be able to publish that material whenever it is in the public interest to do so;
- the decision whether or not to disclose commercially sensitive information should be made according to the general principle that information should be made public unless there is a justifiable reason for withholding access to it.

The Report is comprehensive and makes general recommendations which provide the backbone for more detailed principles to guide government agencies in the use of such material. Several recommendations pertain to amendments of the *Freedom of Information Act 1982* (Vic), particularly so as to broaden its ambit and include additional factors for consideration when exemption of documents is being contested. Of particular utility is the Committee's formulation of general criteria to determine what information is properly deemed as being commercially sensitive and what kinds of information regarding the tendering process for government contracts ought to be publicly revealed.

Commercial in confidence information and the public interest

Commercial in confidence information was considered to be that which was of a commercial nature and would be protected from disclosure by the common law action for breach of confidence. The extent of the duty to treat information as confidential is, however, qualified by public interest considerations. Indeed, the overarching argument for the release of otherwise confidential material is founded on public interest in the good administration of government and the public's right to know about governmental activities.

The Report found that the definition of commercial in confidence material needed to be assessed in light of community expectations about the conduct of responsible government. Accountability and transparency are necessary to ensure that public funds are expended for the purpose for which they were appropriated and that government is administered efficiently and in accordance with the law. The Committee recognised that access to information is a fundamental means by which the electorate can not only assess government performance but also participate in public policy decision-making processes. Permitting the use of the commercial in confidence basis to preclude disclosure of information would undermine public confidence in political accountability.

Stemming from concerns expressed by the Victorian Auditor-General that agencies were denying him access to documents on the grounds that they were 'commercially sensitive', and thus precluding him from performing his investigative functions, the Report considers the nature of confidentiality clauses in contracts between agencies and private sector service providers and the implications of their use on governmental accountability. One of the Committee's terms of reference was to establish what principles should govern the application of commercial confidentiality within the public sector in relation to the Auditor-General and the parliament.

The Committee drew a distinction between material that is generated by or for the government from that which has been provided to the government by third parties. It was noted that the government's primary responsibility does not lie in profit maximisation but in the serving of the public interest and that resistance to disclosure based on the notion that disclosure would disadvantage the government with respect to its competitors lacks conviction. Information generated within government should not be treated as commercial in confidence unless there were reasons to do so that would outweigh the benefits of disclosure.

Moreover, the Committee found that the sensitivity of commercial information is not indefinitely uniform and that although commercial information is valuable when it relates to the future (that is, to plans to not yet implemented or tenders not yet awarded), the sensitivity of such information is significantly reduced after the potential benefits of the transaction in question have been secured by contract.

The Committee found that the public sector, driven by a desire to replicate market conditions, had broadened the scope of commercial confidentiality beyond its previous legal boundaries. Elements in the public sector had transformed a previously limited and carefully delineated legal concept into a catch-all provision that operated with few restrictions.

Government contracts and the tendering process

With respect to the process by which tenders are received for government contracts, the Committee made the following recommendations:

Legislation should be enacted requiring specified information about all tender documents and the resulting contract to be made publicly available (such as via a free public database available online) once the tender has been awarded. This would mean that confidentiality clauses would be overridden unless an application has been made to restrict publication at the time.

Public information about tenders should include the identity of the tenderer and the tender price, and, with respect to major contracts, there should be sufficient information about the relevant performance criteria to enable an assessment of the tender process.

Other information about tenders which ought to be made public include: the duration of the contract, details of any transfer of assets under the contract, maintenance provisions, any renegotiation or renewal rights, results of cost benefit analyses, sanctions for non-performance, any significant guarantees/undertakings/loans.

- Applicants should be advised that, as a precondition to doing business with the government, they must be prepared for certain details contained in a tender document to be made public. This could be complemented by the insertion of standard clauses.
- Before the closing date of tenders, applicants should notify the relevant agency of their intention to seek exemption of information which would otherwise be required to be made public. The specific harm which would result from the disclosure of the information must be specified.
- The onus of proof would be with the tenderer to show that a claim for commercial in confidence is justified.
- Maximum times may be set for non-disclosure.

There was also a need to ensure some external monitoring of confidentiality claims in contracts. Where confidentiality clauses exist, they must not override legislative provisions requiring the disclosure of information (such as that to be tabled in financial statements or annual reports) nor could non-disclosure be used to limit the capacity of the Auditor-General to report to parliament.

Commercial in confidence material and the *Freedom of Information Act*

The Report considers that the existing blanket exemptions within the *Freedom of Information Act* (Vic) covering information relating to trade secrets are too wide. The Committee recommended that the ambit of the Act should be increased so as to include access to:

- documents that relate directly to the performance of contractor's obligations under the contract; and
- documents that either directly or indirectly relate to contractor services provided to the government in circumstances where the contractor does not supply substantially similar services to the private sector.

The Committee recommended that s.34 of the Act be amended by the insertion of a new subsection that lists considerations to be taken into account when determining whether disclosure of information would expose an agency unreasonably to disadvantage. The Minister or agency would need to establish one or more the following implications (page 125 of the Report):

- there is a real risk that disclosure would prejudice contractual negotiations or the agency's ability to attract, select or retain suitably qualified employees;
- the information is likely to be exploited in a way that does not benefit the general public due to the market power of the enterprise by which it will be exploited; for example, where there is a lack of contestability due to the existence of barriers to entry into that specific market;
- the disclosure may impair important governmental or regulatory functions;
- there is some potential to use the information to realise substantial profits in other jurisdictions;
- there are no considerations in the public interest in favour of disclosure which outweigh considerations of damage to the competitive position of the agency, for instance, the public interest in revealing evidence of some wrongdoing or in shedding light on some matter that has been the subject of ongoing controversy.

A series of other amendments to the Act were also proposed.

Draft Principles for the Treatment of Commercial Information Provided to Agencies

The Committee has included as an Attachment to its Report a set of draft principles by which to guide agencies in the receipt, treatment and disclosure of commercially sensitive information. Such principles are designed to complement existing obligations imposed on agencies which are contained in the *Freedom of Information Act* (Vic). These guiding principles include:

- agencies need to adhere to the principle of transparency and openness by ensuring as full disclosure as possible;

  where information is supplied voluntarily to an agency, the information providers need to be warned in advance whether any of the information will be treated as confidential and, if so, for how long; information providers also ought to be informed of any legislation which may require publication of the information received;

  the fact that information is of a commercial nature does not automatically mean that it will be treated as commercial in confidence;

  confidentiality should be agreed to only where it is justified by reference to the public interest test.

Other key recommendations

Some of the other key recommendations of the Report include:

- the resolution of confidentiality matters in the public sector should be guided by principles that accord with the rules of law and the values that form the basis for responsible government in Victoria;

  when considering the withholding of information on the grounds of confidentiality, government should observe the general principle that information should be made public unless there is a justifiable reason not to do so;

  decision makers should recognise that commercial in confidence provisions reduce the scrutiny available to parliament and the community over government decision making and use of public funds, and that their use as a tool in managing the government's relationship with service providers should be avoided;
- where information about the government's management of expenditure is limited by confidentiality provisions, the government should provide an explanation to the individual or organisation requesting the information as to the public benefit achieved by agreeing to withhold the terms of the commercial arrangements from scrutiny;

  protocols should be developed for government departments and agencies to follow before the classification of commercial in confidence is applied to material and these protocols ought to be signed off at ministerial level

Relevance of the Report

The reliance on the classification of information as being 'commercially sensitive' so as to justify its non-disclosure is clearly not a trend confined to Victoria. In a recent article in the *Adelaide Advertiser* (4 April, 2000), for example, South Australian Premier John Olsen stated that the disclosure of commercially sensitive information will 'scare off' potential investors who would not appreciate their financial affairs being 'broadcast by any politician at any time in the political heat of the moment'.

It is clear that a middle position between the two extremes — of either permitting unrestricted public access to all information or requiring complete confidentiality — can be found. The public interest test and the general principle that information is prima facie to be disclosed sets an appropriate benchmark for the assessment of contracts and other documents held by government agencies.

The Report may provide motive for reforms with respect to FoI currently being considered in Queensland by the Legal Constitutional and Administrative Review Committee. The Committee there has similarly recognised a need for balance between the public interest in accessing government information and the public interest in non-disclosure of that information. In considering its current mandate to reform FoI in Queensland, the Committee has examined division among members of the Administrative Review Council (ARC) with respect to the most appropriate means by which to ensure only legitimate reliance on commercial-in-confidence exemptions to disclosure. The majority of ARC members believed that guidelines would best assist agencies in determining whether to treat information provided by contractors as confidential, while the minority argued that this would be better facilitated by actual legislative changes.[2]

The Queensland Committee has called for submissions on whether the current exemption provisions ensure an appropriate balance is struck between the respective public interest in the disclosure and non-disclosure of commercial information. The Committee is also considering ways of ensuring that exemptions are properly relied on and are not misused. The response of the Victorian parliament to the Public Accounts and Estimates Committee's Report will therefore be eagerly awaited.

Conclusion

The release of the Report brings to the attention of parliament the need to develop new procedures for dealing with commercial in confidence material. Still, however, the Committee found itself reiterating basic principles of open government — such as reinforcing the need for ministerial accountability and upholding FoI principles such as transparency and accounta4bility — to guide government administration as it takes a new turn.

The Report is particularly progressive in its recognition of the need for governments to be accountable in the contracting out of services. This confirms the continuing relevance of administrative law and FoI principles beyond traditional means of governance. The theory underlying the Report's recommendations halts the adoption of new ploys by governments to restore secrecy on the grounds that confidentiality is necessary to ensure government-business enterprises (GBEs) remain competitive. The Committee also tabled its *Report into the Inquiry of the Outsourcing of Government Services in the Victorian Public Sector* (March 2000, Report 34).

References

1. Public Accounts and Estimates Committee, Thirty Fifth Report to Parliament, *Inquiry Into Commercial In Confidence Material and the Public Interest*, No 19 Session 2000, Government Printer for the State of Victoria, March 2000.
2. *Administrative Review Council, The Contracting Out of Government Services*, Report No 42, CanPrint Communications Pty Ltd, Canberra, August 1998, cited in Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland, Discussion Paper No 1*, Legislative Assembly of Queensland (undated), p.25.

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