

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ

Tel: 020 7831 7477

Fax: 020 7831 7461

Email: admin@cfoi.demon.co.uk

Web: www.cfoi.org.uk



THE MINISTERIAL VETO OVERSEAS

Further evidence to the Justice 1 Committee on the
Freedom of Information (Scotland) Bill

December 2001

Hon. President: Godfrey Bradman
Co-Chairs: James Cornford, Neil McIntosh
Director: Maurice Frankel

Parliamentary Co-Chairs: Helen Jackson MP
Archy Kirkwood MP
Richard Shepherd MP

Introduction

The Freedom of Information (Scotland) Bill permits the Information Commissioner's decisions in certain areas to be overruled by a ministerial veto. Some countries' FOI laws, such as those in the USA and South Africa have no veto provisions.¹ They are enforced by the courts whose decisions cannot be overridden by ministers.² However, a ministerial veto does exist in Australia, New Zealand and Ireland. This paper describes the use of the veto in those jurisdictions.

Australia

The Commonwealth Freedom of Information Act 1982 provides a ministerial veto in relation to the exemptions for:

- security, defence and international relations (s. 33)
- relations between the Commonwealth and the States (s. 33A)
- Cabinet documents (s. 34)
- Executive Council documents (s. 35)
- internal working documents (s. 36)

These exemptions can be used either with or without a veto. If a veto is used, it prevents the appeals tribunal from reviewing the exemption claim on its merits.³ The veto was frequently used particularly in the Act's early years, often for internal working documents.⁴

¹ Canada's FOI legislation has traditionally not permitted any veto and this paper originally included Canada in the list of countries with no veto. However, the legislation was amended in December 2001 in light of the attack on the World Trade Centre, to permit a veto on grounds of national security, defence and information supplied in confidence by foreign entities.

² Canada combines an Information Commissioner, who can only recommend disclosure, with a second layer of appeal to the federal court.

³ There is no Information Commissioner under the Australian Commonwealth Act. Complaints go either to the Ombudsman, who has no powers to compel disclosure, or to the Administrative Appeals Tribunal.

⁴ The internal working documents exemption applies to opinion, advice, recommendations, consultations or deliberations relating to an agency's deliberative processes, whose disclosure would be contrary to the public interest. Factual information and scientific or technical reports cannot be withheld under the exemption. [Freedom of Information Act 1982 [Australia], section 36]

There were 7 vetoes in the Act's first 7 months, 6 of them for internal working documents.⁵ In the second year of the Act's operation, there were 20 vetoes, 14 based on the internal working documents exemption.⁶ In the following 2 years the veto was exercised 28 times.⁷ The Treasury alone was responsible for some 40% of all vetoes during this period.

Information whose disclosure was vetoed included:

- information about the expected costs to the private sector of a proposed national identity card
- documents relating to the Australian Bicentennial Authority
- information about the projected size of Government revenue and expenditure
- Cabinet documents relating to an alleged social security benefits conspiracy
- a submission to the Cabinet about a review of the effectiveness of certain Aboriginal health programs
- internal working documents about the transfer of taxation administration policy from one minister to another
- internal working documents about the establishment of a government working party on superannuation
- Government decisions to increase the excise on spirits in the 1978-79 budget (ie some years before the 1982 FOI Act came into force)⁸

Where a certificate has been issued, the Administrative Appeals Tribunal is limited to considering the narrow question of whether there were reasonable grounds for the certificate. If it finds none, the minister must reconsider the decision – but is free to confirm the original veto.

The tribunal has explained:

⁵ Attorney General, Annual Report on the Freedom of Information Act 1982 for period 1.12.82 to 30.6.83, page 112

⁶ Attorney General, 1983-84 Annual Report on the Freedom of Information Act 1982, page 78

⁷ Senate Standing Committee on Legal and Constitutional Affairs, Report on the Operation and Administration of the Freedom of Information Legislation, 1987, page 145

⁸ Attorney General, Annual Report on the Operation of the Freedom of Information Act 1982, for 1983-84 (pages 78-80) and 1987-88 (pages 33-36)

‘To be “reasonable” it is requisite only that they be not fanciful, imaginary or contrived, rather that they be reasonable; that is to say based on reason, namely agreeable to reason, not irrational, absurd or ridiculous...It follows that it is a heavy thing for the Tribunal to reject a certified claim....’

Where a certificate is issued in relation to the internal working documents exemption, where the test is whether disclosure would be “contrary to the public interest”:

“I am not to consider whether the public interest considerations in favour of disclosure outweigh public interest considerations in favour of non disclosure. I am not to consider whether, in issuing the certificate, the Minister displayed an undue level of sensitivity. I am only concerned, as I have said, to establish whether there exist reasonable grounds for the claims.”⁹

This is relevant to the Freedom of Information (Scotland) Bill, where a government veto is available for the policy formulation exemption¹⁰ (amongst others), which is also based on a public interest test. The veto could be judicially reviewed, but only on similarly restrictive grounds.

The conclusive certificate provisions have always been contentious. The Parliamentary committee which considered the Freedom of Information Bill in 1978 concluded:

“There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy.”¹¹

In 1994 two officials from the Attorney General’s department, writing in a personal capacity, concluded:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.

To some extent, the certificate provisions are a hangover from the days before FOI, when the feared impact of the legislation was clearly exaggerated. With reference to

⁹ Deputy President of the Administrative Appeals Tribunal, B J McMahan, 25/7/94, in the case of Gary Charles Corr v Department of the Prime Minister and Cabinet, No A93/140 AAT No 9655.

¹⁰ Section 29(1)

¹¹ Senate Standing Committee on Constitutional and Legal Affairs, ‘Freedom of Information’, Australian Government Publishing Service, Canberra, 1979, report, paras 15.19 - 15.20

the FOI maturity gained by 1994, rather than the FOI terrors apprehended in 1982, we may conclude that the certificate provisions have outlived whatever usefulness they may once have had. The provisions should be removed from the Act, enabling the AAT to reach a determinative decision on the merits of the exempt status of documents.”¹²

The Australian Law Reform Commission concluded in 1995 that:

“it is inappropriate that a Minister is able to issue a conclusive certificate in respect of deliberative process documents. Decisions to withhold documents revealing deliberative processes, which are in the majority of cases the decisions of officials, should always be reviewable.”¹³

New Zealand

A veto under New Zealand’s Official Information Act 1982 can be exercised in relation to all classes of exempt information. When the legislation was introduced, the then Minister of Justice suggested that:

‘it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances’.¹⁴

As in Australia, the veto was used several times in the Act’s first few months. After the Act’s first four years, the Ombudsman (who is the enforcement body) had made 92 formal recommendations, 14 of which had been vetoed.¹⁵

Vetoed information included:

- the successful tender price of wall plugs
- labour market forecasts
- estimates of unregistered unemployed

¹² Tim Moe and Jane Lye, ‘Prospects for Review of FOI. Can the Commonwealth Regain the Initiative?’ 8 July 1994

¹³ Australian Law Reform Commission, ‘Open Government: a Review of the Federal Freedom of Information Act 1982, Report No 77, 1995, para 9.19

¹⁴ Quoted in Baragwanath ‘The Official Information Act – A Real Change in Direction?’ 1984 New Zealand Law Conference – Principal Papers, p 67

¹⁵ New Zealand Law Commission, ‘Review of the Official Information Act 1982’, Report 40, October 1997, para 353. The Law Commission points out that although only 92 formal recommendations were made a greater number of complaints were resolved in the applicant’s favour without a formal recommendation.

- an evaluation on the use of computers in schools
- evaluation reports and a contract relating to a Post Office switching tender
- a proposal to establish an investment bank as part of the Development Finance Corporation¹⁶

According to a leading commentary on the New Zealand Act, the initial experience:

‘showed that public criticism of the responsible Minister by the Opposition was easily stigmatized as political point scoring, and, in any event, easily weathered. In truth, members of Parliament do not ordinarily cross the floor on such issues nor, as the Danks Committee [whose report led to the Act] thought, are incidents of non-disclosure by veto punished by the electorate at the next election.’¹⁷

Most vetoes during the early years were issued during the National Government administration. Although technically exercised by an individual minister, in fact these vetoes were all notified to the Cabinet first.¹⁸

The Labour Government which came to power in 1984 was committed to removing the veto. However, the change was strongly resisted by the Chief Ombudsman, who argued that to allow the Ombudsman to overrule ministers would fundamentally undermine the nature of his office.¹⁹ As a result, the veto was retained but the procedures for its use were tightened up. Amendments introduced in 1987 require that:

- the veto can only be exercised by the Governor General by Order in Council – which in effect requires the decision to be taken by the cabinet collectively;²⁰
- the veto cannot be exercised on grounds not raised at the time of the Ombudsman’s investigation;²¹

¹⁶ M Taggart ‘Freedom of Information in New Zealand’, in N. Marsh (editor) ‘Public Access to Government Held Information: A Comparative Symposium’, London, Stevens & Son, 1987

¹⁷ I Eagles, M Taggart, G. Liddell, *Freedom of Information in New Zealand.*, OUP 1992, p. 569-570

¹⁸ I Eagles et al (see above) page 567

¹⁹ Report of the Ombudsmen for the year ended 31 March 1985.

²⁰ Official Information Act 1982 [New Zealand] section 32(1)

²¹ Official Information Acts 1982 [New Zealand] section 32A(3)

- the veto and reasons for it must be published in the *Gazette*;²²
- the veto can be reviewed by the High Court on the grounds that the government exceeded its powers or was otherwise wrong in law;²³
- the applicant's costs in bringing a High Court review must be paid for by the Crown, regardless of whether or not the challenge is successful.²⁴

Since these changes, the veto has not been used.

Ireland

Ireland's Freedom of Information Act 1997 contains a veto for exemptions for law enforcement, confidential informants, security, defence, international relations or matters relating to Northern Ireland.²⁵

Other exemptions, such as that for policy advice, are not subject to any veto. The Information Commissioner's decision in these areas is final, subject to appeal to the High Court on a point of law.²⁶

To exercise the veto, a cabinet minister issues a certificate stating that he is satisfied that:

- the information is exempt under one of the specified exemptions, most of which contain harm tests, and
- the record is "of sufficient sensitivity or seriousness to justify" a veto.²⁷

A certificate must be reviewed by the Taoiseach (prime minister) jointly with prescribed other ministers no later than every 6-12 months.

²² Official Information Act 1982 [New Zealand] section 32A(1)

²³ Official Information Act 1982 [New Zealand] section 32B(2)

²⁴ Official Information Act 1982 [New Zealand] section 32B(4)

²⁵ Freedom of Information Act 1997 [Ireland], sections 23 and 24

²⁶ Freedom of Information Act 1997 [Ireland], section 42

²⁷ Freedom of Information Act 1997 [Ireland], section 25(1)(a)(ii)

The certificate can be reviewed by the High Court on a point of law.²⁸

The High Court can order the public body to pay the costs of an unsuccessful applicant if it considers that the point of law was of ‘exceptional public importance’ or in other circumstances.²⁹

Only two certificates have been issued since the Act came into force, both by the Minister for Justice, Equality and Law Reform during 2000. The first certified that information was covered by the exemption relating to Northern Ireland and international relations, the other was issued on grounds of the security of the state.³⁰

Conclusion

Both the Australian and New Zealand governments have made significant use of the veto, particularly in the early years. On the face of it, the vetoed documents were not exceptionally sensitive. The veto has been rarely used in Ireland, though this may partly be explained by the fact that its use is restricted to key state interests (defence, international relations, security and law enforcement) and is not available in other areas (such as policy advice) where it has proved most difficult for ministers to resist.

The prospect of Parliamentary criticism does not appear to have deterred ministers from exercising the veto. (In the UK context, a decision by ministers to overrule the Parliamentary Ombudsman under the open government code recently attracted little comment in Parliament, despite the fact that it was the first time such a recommendation had been rejected.³¹)

Some overseas FOI laws operate perfectly well without a veto. We hope the Scotland Bill will be amended to remove the veto provision.

If it is retained:

- it should not be available in relation to policy formulation (as in Ireland);

²⁸ Freedom of Information Act 1997 [Ireland], section 42(2)(a)

²⁹ Freedom of Information Act 1997 [Ireland], section 42(6)

³⁰ Annual report of the Information Commissioner, 2000, Appendix 2.

³¹ A more detailed account is given in the Campaign’s main submission to the Justice 1 committee of 26.11.01

- ministers should have to demonstrate that the consequences of disclosure would be exceptionally serious (as in Ireland). This would be in line with the statement in *An Open Scotland* that the veto was intended for use in relation to "*information of exceptional sensitivity or seriousness*".³² The veto should not be available merely because the First Minister disagrees with the Commissioner's findings.
 - the costs of any judicial review of a certificate should be met from public funds (as in New Zealand and as permitted in Ireland). This is justified by the fact that ministers are overturning a legal right to information after it has been upheld by the Information Commissioner.
-

December 28 2001

³² Paragraph 6.6