

IN FACT



Information Act newsletter

Freedom of Information and Privacy Protection in the NT Public Sector

Issue 3 – September 2006

Bloggers, Bloggers & Bracket creep

In this issue, we highlight the growing prevalence and sophistication of those who profit from buying personal information from corrupt government officials or duping officials into disclosing information about others ('blagging'). We also look at some of the FOI and Privacy Blogs popping up around the world.

And we consider implications for the Territory FOI scheme of the recent High Court decision on refusal of access to Commonwealth information on 'bracket creep' and the first home buyers scheme by virtue of conclusive certificates.



Peter Shoyer
Information Commissioner



Information Thieves Get Smart

Organisations looking to protect personal information from unwanted intrusion should be alert and alarmed! All recent indications suggest that information thieves can be both clever and well organised.

In this class, I include both individuals who steal information in order to commit fraud, and people who inappropriately obtain basic personal information in order to sell it on to others.

Examples of the former appear daily in the media, with thieves misusing documentation and identity information to pretend that they are another

person, usually to access some account or benefit held by the unfortunate victim.

Good examples of the latter class of theft appear in a recent report by the UK Information Commissioner entitled *What Price Privacy? The unlawful trade in confidential personal information*.

In the report, the Commissioner identifies a thriving trade in personal information obtained from government databases. Among the purchasers of information are insurance companies, lenders and creditors, disgruntled former partners, and even journalists.

The suppliers of information are usually private investigators who obtain the information from sources within government in two ways:

- by payments to corrupt public sector employees; or
- by impersonating the data subject or another public official with a need to know the information.

The latter practice, known as “blagging”, is usually conducted by telephone. It has developed to such an extent that Police operations have located “blaggers’ manuals” that set out in detail the steps to be taken in obtaining personal information.

These manuals include advice about different approaches to be used when talking to different organisations, and sample scripts about how to seek information from a variety of sources.

The materials obtained also make it clear that some blaggers take advantage of call centre processes by calling again and again to obtain information piece by piece in order to

build up an array of information that will eventually allow the blagger to convince an operator that they are the individual in question.

The report makes for disturbing reading, and should be of interest to anyone involved in maintaining security and privacy of information on government databases.

http://www.ico.gov.uk/about_us/news_and_views/current_topics/what_price_privacy.aspx

A report prepared slightly closer to home reinforces the reality of the problem in Australia.

Prepared by the Western Australian Corruption and Crime Commission, *Protecting Personal Data in the Public Sector* acknowledges that misuse of government computer systems through unauthorised access and disclosure is a serious problem in WA. It recommends legislative and systemic measures to improve protection of personal information.

<http://www.ccc.wa.gov.au/publications.php>



Office of the Information Commissioner Reading Room

The OIC maintains a Reading Room in our offices at Level 7, 9-11 Cavenagh St.

Available materials include:

- Annual Reports from various jurisdictions
- Federal Privacy Handbook
- FOI and Privacy texts
- FOI and Privacy publications from other jurisdictions
- Information Commissioner Guidelines
- Recent articles of interest.



You are welcome to come to the reading room to browse or we may be able to help you with resources on a particular issue. Please phone 8999 1500 before you come to make sure that the room is available.

Awareness and Training

We have updated our website: <http://www.infocomm.nt.gov.au>, with the addition of several new pages. We now have a *Training and Awareness* page that gives access to a number of additional materials, including online overviews of Privacy and Freedom of Information.

We have also developed a *Training and Events Calendar* that we hope to update regularly to keep people informed of coming events.

In addition, we have established, as part of our *Publications & Decisions* section, pages with links to a variety of submissions made by the Office, and to papers presented by the Commissioner.

There is also now a page that describes the international bodies of which the Office is a member. We will include links to home pages of those bodies soon.

You can access our new guideline on *Hearings and Directions* through our *Guidelines* page. The guideline sets out the approach that will normally be adopted by the Office on a hearing, although it recognises that procedures must be flexible to meet the needs of the particular case.

Usually, a hearing will as far as possible be conducted by way of written submissions and evidence. Sample Information Commissioner directions are included that reflect that approach.



Privacy Awareness Week

Thanks to everyone who supported Privacy Awareness Week in the final week of August. This year it was run in conjunction with the Office of the Federal Privacy Commissioner, Privacy Victoria and Privacy NSW. It is hoped to make it an international event in coming years.

Apart from the launch which many of you attended, our main focus was on promoting awareness through library displays distributed throughout the Territory. Included with our displays were suggestions for privacy oriented books and movies. You might want to curl up and watch one of the following movies on a gloomy day.

Privacy Movies

The Truman Show

Minority Report

1984

Gattaca

The Final Cut

Enemy of the State

The Conversation

FOI and Privacy Blogs

It seems almost everyone is keeping a weblog these days, and those with an interest in FOI and Privacy are not missing out. A few FOI and Privacy blogs are listed below to whet the appetite. Mention of them here should not be taken as an endorsement of any blog or of its particular contents.

Open & Shut, <http://www.foi-privacy.blogspot.com/>. Australia. FOI and Privacy.

FOI, http://blogs.smh.com.au/newsblog/archives/freedom_of_information/index.html. Australia.

FOI and Open Government, <http://foia.blogspot.com/>. UK.

Your Right to Know, <http://www.vrtk.org/>.

Open Secrets, <http://www.bbc.co.uk/blogs/opensecrets/>. UK.

Privacy Law, <http://www.privacylawyer.ca/blog/>. Canada.

You can find blogs from a variety of countries by a simple internet search.

FOI Update

High Court FOI decision

In the last IN FACT, we referred to a High Court challenge by journalist Michael McKinnon to the issue of conclusive certificates by the Federal Treasurer. The certificates enabled Treasury to refuse access to information regarding income tax 'bracket creep' and the First Home Buyers Scheme.

By a majority of 3 to 2, the High Court has rejected that challenge. The judgements of the Court focussed on the precise scope of the limited review that is allowed following the issue of a certificate. That limited review is to be contrasted with the broader scope that takes place in the usual case of a full merits review.

The decision essentially confirms earlier rulings that the power of the Administrative Appeals Tribunal to review a conclusive certificate is very

limited in nature. This means that Commonwealth ministers who are in a position to issue conclusive certificates have significant discretion to refuse access to information by means of the issue of a certificate.

The decision has given rise to considerable criticism of the access scheme under the Commonwealth *Freedom of Information Act*.

It is perhaps worth noting that tribunals and courts are daily charged with making merit-based decisions of great significance to community members. They deal with questions of individual liberty, the disposition of large sums of money, and entitlements to remain in Australia. Yet merits review is not regarded as a sufficient means for protecting the advice and opinions of Commonwealth public servants. That information is judged to require the added protective mechanism of a Ministerial certificate.

However, the purpose of this article is to discuss implications of the High Court decision for the Territory. In that regard, it would appear that the decision has limited value in relation to application of the *Information Act*.

The *Information Act* contains a power to issue an “exemption certificate” (sections 59-64). This is a non-delegable power that can only be exercised by the Chief Minister. It is limited to specific exemptions which do not include the ‘deliberative processes’ exemption. It is limited in duration to 2 years, although further certificates can be issued. An exemption certificate issued after a complaint has been made to the Information Commissioner cannot operate in relation to that complaint.

It is also of note that as of 30 June 2006, and as far as is known, as of the date of publication, no exemption certificate had been issued under the *Information Act*.

The scope for issue of an exemption certificate is therefore far more limited in the Territory than under the

Commonwealth legislation. And, if an exemption certificate is issued, there is no provision setting out a similarly worded mechanism for review by the Commissioner.

Nor does the decision provide a great deal of comment that would be useful in analysing competing public interest considerations in a full merits review that would be conducted absent the issue of an exemption certificate.

While Callinan and Heydon JJ did point to some factors that might, in particular circumstances, give rise to public interest factors going against disclosure of certain deliberative process material, their comments cannot be taken to suggest that such factors would arise in every case.

In a full merits review process of identifying and weighing competing public interest factors, each case must be treated on its merits.

McKinnon v Secretary, Department of Treasury [2006] HCA 45 (6 Sept 2006)
http://www.austlii.edu.au/au/cases/cth/high_ct/2006/45.html

Office provides policy assistance

The Office of the Information Commissioner assists public sector organisations in the development and review of systems, policies and legislation.

We are available to discuss potential issues that proposals raise, particularly relating to the collection and handling of personal information. We aim to identify potential privacy issues and offer options that will protect privacy while promoting the objectives of the proposal.

We welcome approaches from organisations at the earliest possible point in the development or review process.

Recent FOI Decisions

NSW Court of Appeal

<http://www.austlii.edu.au/>

Materials produced by solicitor retained to advise in relation to review of workers compensation regime - Legal professional privilege exemption - deliberative processes exemption - draft documents - confidentiality - no obligation owed to solicitor. *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 (24 April 2006).

Commonwealth AAT

<http://www.austlii.edu.au/>

Applicant sought access to psychological test, personality assessment inventory and his answer sheet - whether would prejudice test or attainment of objects of test -

access refused. *Re Crawley and Centrelink* [2006] AATA 572 (30 June 2006).

WA Information Commissioner

<http://www.foi.wa.gov.au/Decisions2006.htm>

Unsuccessful applicant for Police recruit position refused access to recruitment documents - interview questions and evaluation sheets - psychological test and other materials - whether disclosure could reasonably be expected to impair the effectiveness of procedures or methods for conduct of tests or examinations - whether disclosure could reasonably be expected to prevent the objects of tests or examinations being attained - whether disclosure would be in the public interest. *Re Barndon and Police Force of Western Australia* [2006] WAICmr 13 (16 June 2006).



WAICmr (continued)

Report into executive vehicle scheme - whether the *Tax Administration Act 1953 (Cth)* prevents an application under the FOI Act - deliberative processes - whether disclosure contrary to public interest - whether disclosure could reasonably be expected to prejudice an investigation - whether disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency. *Re Western Australian Newspapers Ltd and Western Power* [2006] WAICmr 10 (19 May 2006).

Tender documents for earthworks at a sporting and equestrian complex - breakdown of pricing information - policy statements - OH&S handbook - personal information exemption - whether the information and documents have a commercial value to a person - information about business, professional, commercial or financial affairs - whether disclosure could reasonably be expected to have an adverse effect - whether disclosure could reasonably be expected to prejudice future supply of information - whether disclosure is in the public interest. *Re Zurich Bay Holdings Pty Ltd and City of Rockingham* [2006] WAICmr 12 (12 June 2006).

Privacy Update

New Zealand Privacy Tort

The New Zealand Court of Appeal confirmed the existence of a tort of breach of privacy in *Hosking v Runting* [2005] 1 NZLR 1, although it did not decide that there was a breach of the tort on the facts of the particular case.

The Court of Appeal has recently elaborated on the elements of the tort, again without finding a breach in the particular case.

In *Television New Zealand Ltd v Rogers* CA 12/06 (7 August 2006) <http://203.97.11.181/jdo/Search.jsp>, the appellant had been charged with murder and acquitted. He sought to enjoin the broadcast of a video recreation of the murder which had been excluded from his trial.

O'Regan and Panckhurst JJ decided that a number of elements of the tort had been made out. However, they confirmed that there is a defence of legitimate public concern available, and gave a strong indication that it would operate in this case, although they ultimately decided the case on whether prior restraint was an appropriate remedy.

This may be compared with the present position in Australia where the High Court raised the prospect for some form of common law privacy protection in *ABC v Lenah Game Meats* (2001) 208 CLR 199, but there have been no significant developments since that decision.



More Compliance Notices

The Victorian Privacy Commissioner has published a detailed report concerning a range of data security issues surrounding Police and Department of Justice (DOJ) databases, respectively known as LEAP and E*Justice.

As a result of the investigations, the Privacy Commissioner has issued Compliance Notices to the Commissioner of Police and the Secretary of DOJ. See *Mr C's case*.

http://www.privacy.vic.gov.au/dir100/priweb.nsf/content/5d37ecb57a98bda7ca256c4d0019e8ad?OpenDocument&ExpandSection=1#_Section1

ALRC Review

As noted in the last edition, the Australian Law Reform Commission has been given a broad-ranging reference to review the Commonwealth *Privacy Act*.

The Act regulates Commonwealth agencies and a large segment of the private sector, including health service providers and credit providers.

Keep an eye on the ALRC website as one or more issues papers on aspects of the review are likely to be distributed for comment in coming months.

<http://www.alrc.gov.au/>

Recent Privacy Case Notes

Federal Privacy Commissioner

<http://www.privacy.gov.au/act/casenotes/index.html>

Default notices relating to bank loan forwarded to wrong address, despite a number of notifications of change of address – Bank failed to take reasonable steps to ensure accuracy – Agreed amount paid in settlement of complaint. *U v Banking Institution* [2006] PrivCmrA 20.

Complainant alleged ex-partner, an employee of utility provider, improperly accessed complainant's accounts – provider did not maintain access audit trail – whether reasonable steps taken to protect information – provider implemented interim measure to address particular concern and indicated new billing system would probably include audit trail. *N v Utility Provider* [2006] PrivCmrA 13.

Law firm used information collected for purpose of representing insurer A for purpose of advising insurer B to reject an unrelated claim – whether disclosure authorised for purpose of investigating unlawful activity – law firm offered apology and compensation. *T v Law Firm* [2006] PrivCmrA 19.

Health service provider disclosed results of tests for sexually transmitted diseases to complainant's partner – amount of compensation agreed, recognising emotional distress and embarrassment. *M v Health Service Provider* [2006] PrivCmrA 12.

Health service provider could not locate health records of child – Provider maintained around 100,000 medical records – evidence of records management system – appeared misplacement of record was due to human error. *V v Health Service Provider* [2006] PrivCmrA 21.

Victorian Privacy Commissioner

<http://www.privacy.vic.gov.au/dir100/priweb.nsf/content/B890E0779DB01AF2CA256EC4001FD44D?OpenDocument>

Complainant's wife subject to surveillance in relation to compensation claim – information about complainant collected incidentally by contracted service provider – whether collection necessary – whether information collected accurate. *Complainant AE v Contracted Service Provider to a Statutory Authority* [2006] VPrivCmr 6.



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