

Official Information and MP Spending Details.

Notes for RNZ Nine To Noon Media Law slot

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1. Today I thought I'd talk about aspects of the law relating to official information, in the light of the ongoing story about release of details of MP's spending.
2. As almost everybody must know by now, the Department of Internal Affairs spent months this year collating thousands of pages of credit card transactions and receipts from MPs' spending between 2003 and 2010 and released it under the Official Information Act on June 10. The documents have been trawled through by journalists, but obviously not all of them. The Stuff website now has posted the receipts online and asked for the help of the public to sift through the claims and receipts. This is 'to find out which MPs have been wasting tax dollars and who deserves further attention'.
3. Stuff has also posted instructions for the public to use when carrying out this exercise, as was done by the Guardian newspaper overseas recently during a similar expose. Every receipt posted has buttons nearby which the public can click to tell the journalists whether it is worth further investigation. Notes can be added before the information is submitted. If the person is unsure, they can skip to another random receipt.
4. The public has been given examples of what sort of things to look for, such as:
 - Items that cost much more than they should (eg: \$1000 suits, \$200 bottles of wine);

- Large sums spend in short periods of time (eg: \$1000 in restaurant bills is alright for a month, not for a day);
 - Strange explanations from MPs (Do they keep losing their luggage on overseas trips? Do they give vague reasons for large bills?);
 - No details on the bill (eg: \$2000 on "room charges" in a hotel bill, with no more info);
 - Things that have no business being paid for by the public ie: personal spending (eg: movie tickets, new cars, home electricity bills).
5. The public are also told to look around a bit, for example, at pages nearby to receipts that explain (or try to explain) why the purchase was made, which means clicking the Previous and Next buttons to see if there's more information nearby.
6. Now, this is a good story and it is good use of the Official Information Act. The Act, which has delivered a freedom of information regime to us since 1982, well before the UK, for example, is not seen as very useful by media for fast-breaking stories, because of the time limits for return of the information. However, for stories like this, it can deliver an awful lot of information. There is high public interest in the issue of MP's spending and until very recently, it was regarded as a private area. Back in May 2009, Lockwood Smith ruled out opening MP's expenses claims to the public, saying it would infringe on their private lives. Things have changed, which is good. However, as we shall see, there are risks attached to how the media has dealt with the information, in particular in harnessing citizen journalism.
7. *Official information* is any information held by a minister or one of the listed departments and organisations subject to the Act. There is no express requirement that the information be in written or other permanent form. A

judge once said that the concept of official information was of 'astonishing breadth' and embraced 'any knowledge, however gained or held'. It probably covers even information held only in the memory of officials.

8. It is a main purpose of the Act 'to increase progressively the availability of official information to the people of New Zealand'. Section 5 lays down 'the principle of availability', which reads as follows:

- Principle of availability—The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

9. Generally speaking, therefore, a member of the public will be supplied with the information he or she requests unless there is good reason for withholding it. The Act defines what constitute 'good reasons'.

10. There are five conclusive reasons to withhold. They cover things like prejudicing:

- the security or defence of New Zealand,
- or the entrusting of confidential information to the Government by other governments,
- or the maintenance of the law;
- or endangering the safety of any person;
- or damaging seriously the economy of New Zealand by releasing information about exchange rates or taxation etc.

11. There are other, non-conclusive reasons, where balancing and weighing of competing interests are required. Some examples are: Information may be withheld if the withholding is necessary to:

- protect privacy;
- protect against disclosure of trade secrets;
- Avoid prejudice to measures protecting the health or safety of members of the public;
- Maintain the effective conduct of public affairs;
- Maintain legal professional privilege.

12. Here, Internal Affairs has collated and released thousands of pages of information. The Act protects the author of the information, and the person who supplies it to the requester, from the consequences of such publication, provided the information has been made available in good faith.¹ Furthermore, the Act provides that the supply of information under it does not, for the purposes of the law relating to defamation, breach of confidence, or infringement of copyright, constitute an authorisation or approval of publication.²

13. Therefore, it is a serious error to assume that if information is supplied to an inquirer under the Act it is necessarily safe for that person to publish it to the world. If the information supplied contains some defamatory material, or some confidential material, or material in contempt of court, for instance, publication in the media may well render the publisher liable to court action. Likewise, much of the information supplied is likely to be subject to copyright, and reproduction of it in the media could well be a breach of copyright.

14. The Tony Veitch case involved an example of this possibility arising. On 21 May 2009, Mr Veitch sought and obtained an urgent interim injunction to prevent publication of any information on the police file relating to the assault charge against him. The file had been released to the media following a

¹S 48.

²S 48.

request under the Official Information Act 1982. Mr Veitch's counsel applied ex parte for the injunction, against the police on the ground that it was released in breach of an undertaking given by them that he would be consulted first, and against the media defendants on the ground that some of the information was confidential and had therefore been published in breach of a common law duty of confidentiality. After hearing from media, the judge made a temporary holding order for five days, to allow the parties to fully consider and then argue the application.

15. Before the order expired, Mr Veitch's lawyer released a press statement in which he indicated the application would not be pursued. He noted that release of the file by police appeared unprecedented and that allegations in the file had never been tested in court and were therefore unreliable. Attached to the press release was a copy of legal advice given to Mr Veitch on the matter. This advice essentially boiled down to a pragmatic statement that the state of the law is so uncertain as to make the continuation of litigation stressful, lengthy and expensive.

16. In fact, the police would have been protected under the Official Information Act from civil or criminal proceedings, so long as they had acted in good faith. As to the media, liability for breach of confidence can follow if a third party recipient has acted unconscionably in relation to the acquisition of the information or in the way it has been employed. One of the factors to be considered in particular is the state of knowledge of the acquirer of the confidential information. The significant obstacle faced by Mr Veitch would have been to attempt to construe the receipt of information under an Official Information Act request as imputing knowledge of confidentiality. This appears difficult in the circumstances, although not impossible. In my

view, if information in the file was clearly confidential on the face of it, then media should not be allowed to argue that release under the Act cures that confidentiality and prevents the imputation to them of the required state of mind for breach. Mr Veitch's lawyers clearly saw this as arguable, but too fraught with difficulty to justify continued litigation.

17. Therefore, if media publish such information, then they carry the risks of attracting common law liability at the same time. So, Fairfax carried the risk in publishing the thousands of pages of expenses material without looking at them beforehand.

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