

Serious Fraud Office decision to withhold information under the SFO Act found not to be unreasonable in Ombudsmen Act terms

Legislation	Ombudsmen Act 1975, Serious Fraud Office Act 1990, Official Information Act 1982
Agency	Serious Fraud Office
Ombudsman	Sir Brian Elwood
Case number(s)	W40038
Date	1998

The secrecy provisions of Serious Fraud Office Act 1990 and its relationship with Official Information Act were considered in an investigation involving the Serious Fraud Office—a complaint had been made to that agency about an allegation of fraud by a bank official and the agency found no evidence of fraud—the complainant pursued the matter in court, requesting information from the SFO which was declined on the basis of the SFO’s discretion to withhold information—the Ombudsman concluded the OIA did not apply to the information at issue but under the Ombudsmen Act the withholding of the information could be considered (being a decision in terms of the Ombudsmen Act)—the Ombudsman found the SFO’s use of discretion was not unreasonable

A complaint was laid with the Serious Fraud Office (SFO) that a certain bank official had acted fraudulently in respect of a company’s bank account. The SFO investigated the matter, but ultimately concluded that no ‘serious or complex’ fraud had been committed which it was appropriate for the SFO to pursue. However, the SFO did conclude that there was evidence of lesser fraud, and the SFO referred the matter to the Police accordingly.

The Company decided to pursue civil action against the bank in question, and requested the SFO to supply all information held by the SFO in relation to the Company’s affairs. Section 36 of the *Serious Fraud Office Act* requires every member of the SFO to observe ‘the strictest secrecy’ in relation to information obtained by the Director of the SFO pursuant to the exercise of his powers conferred by section 5 or section 9 of the Act, and information derived from or based upon any such information. In this case, the information at issue was within the scope of section 36.

The SFO is subject to the *Official Information Act*. However, section 52(3) states that the provisions of the Act do not derogate from provisions in other legislation which may restrict the availability of official information. In the circumstances, the Official Information Act did not apply to the information at issue. Section 36 of the *Serious Fraud Office Act* sets out certain discretionary powers under which the Director may disclose information otherwise protected by the section. In particular, the Director may disclose such information ‘to any person who the Director is satisfied has a proper interest in receiving such information’. The Company submitted that it had such a proper interest.

Pursuant to section 13 of the *Ombudsmen Act*, an Ombudsman may investigate any act, omission, decision or recommendation by certain specified organisations, including the SFO, relating to a matter of administration and affecting a person in his or its personal capacity. In the circumstances, the Company complained that the Director’s decision to decline to provide it with the information was ‘unreasonable, unjust, oppressive or improperly discriminatory’ and ‘wrong’ within the meaning of s 22(1)(b) and (d) of the *Ombudsmen Act*. The SFO Director noted he had far reaching powers under the *Serious Fraud Office Act*, and considered incumbent upon him to ensure that these powers were never abused by permitting them to be used as a convenient source of otherwise protected information.

Where an Ombudsman investigates the exercise of a discretion pursuant to section 13 of the *Ombudsmen Act*, the issue is whether the decision was unreasonable, unjust, oppressive or improperly discriminatory or ‘wrong’ ... within the meaning of section 22 of the *Ombudsmen Act*. In this context conduct may be considered ‘unreasonable’, ‘if there is material to support the view that the relevant decision-maker had acted otherwise than in conformity with the standards reasonably to be expected of such an office holder’. *Commissioner of Police v The Ombudsman* (30044/94, Supreme Court of New South Wales, Administrative Division). It is not an Ombudsman’s function to substitute his own discretion for that of a decision-maker where such discretion has been properly and reasonably exercised, simply because he might have come to a different view.

In the present case, the arguments of the Director were accepted. It was noted that the concerns of Parliament with regard to the dissemination of such information were reflected by section 36 and related provisions within the *Serious Fraud Office Act*, which effectively excluded the application of the *Official Information Act*. In the circumstances, the decision of the Director of the SFO to decline to provide the information at issue in the exercise of his discretion was neither ‘unreasonable, unjust, oppressive or improperly discriminatory’ nor was it ‘wrong’ within the meaning of section 22(1)(b) and (d) of the *Ombudsmen Act*.

Comment

By virtue of the Company’s civil action against the bank, it had access to civil legal procedures which could enable it to gain access to any information of relevance to its case. The Police were pursuing certain criminal proceedings as a result of their separate investigation of the original allegations.

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