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Supreme Court decision on the mistaken release of material determined to be exempt under the *Freedom of Information Act 1982*

In *Commonwealth of Australia as represented by the Department of Industry, Innovation, Science, Research and Tertiary Education v Fairfax Media Ltd & Anor* [2012] NSWSC 1336 (2 November 2012), the Supreme Court of New South Wales granted interim equitable relief to the Commonwealth in respect of confidential documents released in error to an FOI applicant.

The Commonwealth was successful in seeking interlocutory (interim) orders restraining Fairfax from using or disclosing exempt documents that had been inadvertently released following a request for documents under the *Freedom of Information Act 1982* (FOI Act).

Background

A journalist with Fairfax sought access under the FOI Act to a series of documents about government assistance to major manufacturers in the local automotive manufacturing industry.

A decision was made on the FOI request on 21 September 2012 to release one document in full and exempt five documents in their entirety. The decision-maker determined that a further 26 documents relevant to the request were to be released subject to partial redaction in accordance with applicable exemptions and conditional exemptions under the FOI Act.

When the documents were sent to the FOI applicant via email on the same day, the departmental officer mistakenly attached unredacted copies of the documents, including those which were to be released subject to redaction. The unredacted versions of the documents contained confidential information, including information relating to GM Holden Ltd, the second defendant in the proceedings.

The error was discovered on the evening of Friday 21 September 2012. The Commonwealth requested that Fairfax destroy the soft copies of the documents and return the hard copies. Fairfax undertook not to publish the material exempt from production by the decision of 21 September 2012, in advance of the Commonwealth commencing Court proceedings to require the return of the documents and the permanent destruction of soft copies.

The Court ordered that Fairfax be restrained from publishing or dealing with the exempt documents, deliver up any hard copies of the exempt documents to the Court and permanently delete any electronic versions of the exempt documents. Fairfax carried out the orders but applied to the Court for access to the exempted documents on a restricted basis pending final hearing. The final hearing will determine whether the interim restraints on the exempt documents should be made permanent.

Interim orders were made on the afternoon of 24 September 2012. The parties were granted liberty to provide fuller arguments on 2 and 3 October 2012.

Orders and implications

The Commonwealth submitted that the officer concerned was not authorised to send unredacted copies of the documents, an act which was inconsistent with the decision of 21 September 2012. Were it not for the Commonwealth's error, Fairfax would not have had access to the documents. The Commonwealth argued that, as a consequence, Fairfax had no continuing legal right to access the exempt documents. Granting access to the documents would prejudice the Commonwealth's position at a final hearing and subvert the ordinary process of Fairfax applying for the documents under the FOI Act, and would be contrary to the rights of all parties in respect of the exempted documents.

Fairfax claimed that it would be denied procedural fairness because it would not be able to properly put all the arguments it wished to advance at the final hearing unless its legal representatives had at least restricted access to the documents in the interim.

In summary, the Court dismissed Fairfax's application for access to the exempted documents for the following reasons:

- (a) It was not necessary for the Court to provide an informal access regime when one already exists which had not been fully utilised by Fairfax. Fairfax could still exercise its rights under the FOI Act for access to the exempt documents.
- (b) Fairfax would still have an opportunity to argue for access to the exempt documents during the final hearing.
- (c) The granting of access to the documents would qualify or restrict the review entitlements conferred upon the Commonwealth and GM Holden Ltd in the FOI Act.

The judgment reinforces the ability of Commonwealth agencies to seek interlocutory relief in the event of an inadvertent or mistaken release of confidential or exempt documents under the FOI Act. We await the final decision of the Court.

Text of the decision is available at:

<http://www.caselaw.nsw.gov.au/action/PJUDG?s=1000,jgmid=161616>

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