Failing the Information Game

For Stiglitz FOI is a necessary information tool to both improve public policy dialogue between public sector decision-makers and citizens and to restore or increase the level of trust within a political system. Stiglitz 2002.

If I, as a civil servant, write a Cabinet paper which I expect to be sought for public release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Marie Shroff, currently New Zealand Privacy Commissioner and previously Secretary of Cabinet and Clerk of the Executive Council for 15 years (2005).

Peter Costello and his Treasury officials probably celebrated long and hard the High Court’s judgment over Michael McKinnon, the FOI editor of The Australian, but this was no victory for good government in Australia. Scarce departmental resources diverted to protect stale data and old policy recommendations. But more worryingly, this was done to protect a classic Westminster approach to ideas that is inefficient and ineffective in the information age. Rather than fighting a rearguard action against modern principles of transparent and accountable public administration, Treasury, and other agencies, should embrace the marketplace of ideas.

In the 21st century the main game is information. Relying on dysfunctional records systems and administering information as a static and low value resource is not the way to stay in the game. Compounding this 19th century style of information management is an attitude or mindset that prefers, or craves, the need for secrecy instead of exploiting the energy and opportunities that come from vibrant information flows.

The problem is recognised at senior levels in Canberra but the search for a solution is government-centric and anchored to an antiquated conception of information management. In his recent Valedictory Lecture, Ric Smith, retiring Secretary for the Department of Defence, recognised the impact of the information revolution but perceived the issue as one simply of better internal management rather than embracing the opportunities of networking and information exchange with those outside the ranks of the public service. Dr Peter Shergold, in responding to the lecture stated 'the pressures, which Ric describes so eloquently, of turning that information into knowledge at the disposal of government, underlies (at least for me) many of the public service challenges implicit in the findings of ... the Cole Commission'. Yet neither Smith or Shergold, or other Departmental Secretaries, seem receptive to some of the ideas from the field of information economics which could assist in this information conversion task, or would change the perception towards FOI as being a valuable information tool rather than a troublesome problem.

Joseph Stiglitz, the 2002 Nobel Prize winner for Economics, has argued that public policy marketplaces (as with the private sector) become more distorted, inefficient and dysfunctional as the asymmetries of information deepen between citizens, government, media and the Opposition increase ( Stiglitz 2002). Information imperfection favours the government of the day and the existing bureaucratic leadership and they have great incentives (retaining of public

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office and power or simply to avoid accounting for mistakes) to increase those asymmetries of information or information imperfections further. Campaigns or ideas for improved FOI laws and practices, greater campaign funding disclosure and public interest disclosure laws will therefore be seen as unnecessary or even undesirable. Yet for Stiglitz the most undesirable outcome is the decline in political contestability and the quality of public governance that accompanies high levels of information imperfection in a political system (Stiglitz 2001).

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The public sector dividends from FOI and greater open government have been exhaustively recounted but include improved records management, higher quality decision-making and the capacity to detect and be informed of shortcomings in administrative processes. Yet these dividends have been largely uncollected, as public service managers have dismissed FOI either as a threat to ‘normal operations’ or merely an occasional intrusion that is suffered as an intangible and minor community service obligation. Over the last two decades tremendous effort, resources and importance have been devoted to ensuring all levels of public sector decision-making meet stringent requirements of financial management, integrity and pro-active responsibility. In sad contrast the pursuit of democratic integrity has been left as an optional extra. Ignorance or a lack of rigour in scrutiny are unacceptable defences to charges of lapses in financial accountability. Yet ‘I wasn’t told’, ‘I didn’t check’ are plausible and defensible defences when the issue is non-financial accountability.

The leadership of the Australian public sector have allowed FOI to operate on the fringes of public sector decision-making but have quarantined it from areas of important and controversial decision-making, whether by the use of conclusive certificates, ambit exemption claims, exorbitant fee calculations or simply excessive delaying tactics. In the terminology of Stiglitz the preference has been for, and even to increase, information imperfections for the unfounded fear that greater openness threatens rational, informed and candid decision-making. All qualities that are difficult to find in the Palmer Inquiry, the AWB Royal Commission and the recent Commonwealth Ombudsman reports on Immigration Detention.

FOI has for too long been a neglected tool of public administration or used for its secondary purpose—providing citizens access to their personal affairs information (in most years ninety per cent plus of requests are for personal information). A process that in the 21st century should be routine, unproblematic and in most cases not requiring resort to the Freedom of Information Act. It is time to use the legislation to remove the unnecessary information barriers between citizens and the state (as compared to New Zealand), reap the accountability and efficiency dividends and use the legislation as a 21st century information tool rather than treat it as an unnecessary legacy of the Woodstock generation.

Alasdair Roberts (2004), a Canadian academic based at Syracuse University, and Paul Monk (2002) have argued that the public sector often deprive themselves of a critical commodity—namely informed external advice and critiques—by over-zealously protecting their information holdings. These authors argue that greater transparency empowers or enables citizens to contribute to public policy at a higher analytical level. In part this is linked to the debates over open versus closed source software. Indeed, a driving force behind the eventual embracing of FOI in New Zealand was the realisation of the benefits it could bring to public policy development, implementation and evaluation.

A more immediate necessity to revive FOI is the need to deal with the issue of trust in the public service. Federal Ministers can use Chinese Walls, alternative activity (preferring to read magazines to departmental briefings) and techniques of plausible deniability to distance themselves from accountability or responsibility—the public service is left with the problem of broken trust. Trust is an essential element in any marketplace, whether for goods and services or the trading of ideas. The curse of high levels of information asymmetry is that mistrust festers and misplaced trust takes longer to recover. For Stiglitz FOI is a necessary information tool to both improve public policy dialogue between public sector decision-makers and citizens and to restore or increase the level of trust within a political system (Stiglitz 2002).

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An ideal public sector governance model hinges on two things: effective records management and access to information. Effective records management captures information and evidence of business so as to enable organisations to provide proof of being transparent; to enable them to account and be held to account; and to be able to prove that they transact all public affairs within the confines of the law. Access to information,
especially by virtue of FOI legislation, enables citizens to ascertain the level of transparency of public sector organisations. Citizens are then afforded a legally sanctioned, and non-rationed, opportunity to hold organisations accountable for their performance as well as to enable them to evaluate whether all the organisational functions were conducted within the ambit of the relevant laws and regulations. The 2003-04 report *Recordkeeping in Large Commonwealth Organisations* released by the Australian National Audit Office, argued that records management 'is a key component of any organisation's good corporate governance and critical to its accountability and performance'. The same report also argued that 'sound recordkeeping can assist an organisation's performance by: better informing decisions; exploiting corporate knowledge; supporting collaborative approaches; and not wasting resources, for example, by unnecessary searches for information and/or redoing work'.

A more effective, responsive and citizen-centric FOI scheme is not the sole, or even the best, way of creating a culture of access to government information, but it is a necessary pre-requisite.

In 2002 the Canadian Access to Information Review Task Force recommended that government institutions manage their FOI responsibilities in the same way that they manage other programs, and establish resource planning mechanisms, including resource forecasting, performance measurement and system analysis, as part of their operations (Access to Information Review Task Force 2002). FOI has been a part of the Commonwealth public service framework for twenty three years but it is administered and funded as a temporary, ad hoc and marginal exercise rather than as a key and permanent part of the Government's information management efforts.

At several critical junctures Australian public sector decision-makers, law makers and the judiciary have squandered opportunities to create or enhance the informational infrastructure necessary for an information age. When critical decisions have had to be made the preference has always been to favour non-disclosure over disclosure or to accept only the changes that would cause the least disruption to a classical conception of Westminster governance.

The AWB Royal Commission Report and the Commonwealth Ombudsman reports on Immigration Detention now join a long line of official critiques over the last ten years that have found various areas of the federal bureaucracy riddled with information asymmetries, dysfunctional information flows and a remarkable incapacity to deliver, and act upon, timely, high quality and relevant information to those who need, or ought, to know.

Yet senior officials, including agency heads, wax lyrical about the threats to 'effective and sound' decision-making that would occur if the *Freedom of Information Act* was allowed to put more information in the public domain. We are warned that senior professional civil servants would hesitate to record full and accurate information, that they would resort to oral briefings to avoid leaving an accountability trail and that their advice would become timid, insipid and spineless.

However you must wonder what would have happened in DFAT (AWB), Immigration (Rau and Tampa) and Defence (Children Overboard and Tampa) if the 106 reform recommendations from the joint 1996 Australian Law Reform Commission and Administrative Review Council report, *Open Government*, had been implemented. The Cole Commission revealed to full public scrutiny a container load of documents which if requested under FOI would have remained hidden. The wheels of decision-making in Canberra did not fall off or grind to a halt with the revelations. Indeed we ought to expect that warnings of future problems or program failures will be better assessed and somehow penetrate to a Minister's early warning system so as to avoid similar embarrassment before any future inquiry.

Professor John McMillan, in his reports on Immigration Detention, paints a picture of systemic failures in records management, a fundamental disjoint between training and culture on the one hand and the requirements of legislation and acceptable governance on the other. All deficiencies which an effective FOI process can assist in addressing and removing.

Pleas for secrecy, or a high level of sheltered protection, which the majority of High Court judges in the *McKinnon* case were sympathetic towards, pose a threat to effective public sector governance and its democratic integrity. The AWB Commission has indicated that we may need to start rethinking our views on secrecy, non-disclosure and information transparency. Attorney General, Philip Ruddock, has asked the Australian Law Reform Commission to conduct a review of legal professional privilege, following one of the recommendations from the Cole AWB Royal Commission. Blanket claims for non-disclosure have the potential to be abused or at the very least to encourage sloppy information management practices, whether they are blanket claims for legal professional privilege, all Cabinet information or the use of Conclusive Certificates to protect internal working documents that have the perceived potential to raise critical questions about government policies.

In a recent case study involving nine separate FOI requests for access to documents in relation to kickbacks paid to the Hussein regime in Iraq by the Australian Wheat Board, Alhadeff (2006), a student intern working for Kelvin Thompson, then Opposition spokesperson on public accountability, was able to demonstrate the limited effectiveness of using FOI requests to access information. Alhadeff concluded:
Overall, the principal problem which Thomson’s requests revealed is the government-fostered culture of frustrating contentious FOI requests. The responses received from DFAT suggests the decision-makers attempted to exempt as much information as possible, instead of reviewing requests with a view to releasing information unless there is ‘good reason to withhold it’. It is this culture of resistance to access requests which represents the most significant challenge to FOI in Australia.

Sometimes the simplest comparisons can be the most telling. New Zealand implemented the Official Information Act at the same time as Australia’s FOI Act in 1983. A visit to the websites of New Zealand government agencies will reveal a plethora of Cabinet Papers, minutes and internal policy documents that have been released under the Official Information Act. See the New Zealand Ministry for Environment Climate Change web pages for an example (http://www.climatechange.govt.nz/resources/cabinet/index.html) which provide access to Cabinet documents dated as recently as October 2006. The release of this type of material has often embarrassed the New Zealand government, posed difficulties in trying to persuade informed critics and limited the capacity to spin a policy development when the media has access to the full set of policy and briefing papers. Yet there has been little sign of the nightmare scenarios that have been painted by senior Australian civil servants ever since Senator Lionel Murphy tabled a proposal for a FOI Act at the first full Cabinet meeting in 1973.

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Not every cabinet document is released in New Zealand. However the decision about release is conducted on the basis of each document’s information content and the assessment of benefit and risk of releasing the information. In Australia no consideration is given to these factors, all cabinet documents are classified automatically with the same stamp.

The New Zealand experience demonstrates that a Cabinet system of government and a Westminster civil service can tolerate, and benefit from, a significantly more open system of government. In terms of independent access to high quality and informative government information, Australian citizens run a distant second in comparison to their New Zealand counterparts. The contrast to the ‘sky will fall’ or the ‘foundations will rot’ tone of discussion about FOI in the Australian public service is clearly shown by these comments.

There are five immediate steps that need to be taken to ensure that FOI can make a positive and lasting contribution to better public administration in Australia. The first four steps include removal of conclusive certificates, the adoption of the Australian Law Reform and Administrative Review Council recommendations in regard to creation of a Federal Information Commissioner, improvement in the objectives clause of the legislation and a more stringent set of requirements that need to be satisfied before agencies withhold information on the grounds of public interest. Most of these have been addressed in the ALP’s Freedom of Information Amendment (Abolition of Conclusive Certificates) Bill 2006.

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The final step is the need to create an institutional champion for FOI external to the public service (Snell 2006). An institution that is a ‘credible, professional representative body to promote and advocate open government principles, and FOI laws that work to achieve those objectives’ (Timmins 2006). For those with long memories in Canberra this would be an organisation similar to the Rupert Public Interest Movement of the 1970s and early 1980s—many of whose members were public servants who went on to distinguished careers. Those behind Rupert made a fatal mistake when they packed up their bags after the passage of the Commonwealth FOI Act, believing that their job was done and that the information game could now be left in the hands of the public service and the government. The information game needs to include as many informed players as possible.

The irony for Treasury is that McKinnon, whilst a victory in the narrow sense of self-interest, severely undermines its own wellbeing mission. The first paragraph of the Wellbeing Framework policy states ‘Treasury’s mission is to improve the wellbeing of the Australian people by providing sound and timely advice to the Government, based on objective and thorough analysis of options, and by assisting Treasury Ministers in the administration of their responsibilities and the implementation of Government decisions’.

Which approach to ideas best contributes to the wellbeing of the Australian people? A secretive and proprietary control of knowledge, or transparent, modern and democratic principles of access to and exchange of ideas?
REFERENCES


