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# The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited

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*The way any legislation is interpreted can have a fundamental impact on its efficacy. The impact on legislation designed to be a key component of a system of open government such as freedom of information legislation is even more significant. This article examines why the first decade of interpretation of FOI in Australia has failed to give full operation to the objects and purposes of the legislation. The spread of FOI to all Australian States has been accompanied by the adoption of a "leaning" in favour of disclosure approach to interpretation by State review bodies including Ombudsmen, Information Commissioners and State Supreme Courts.*

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## INTRODUCTION

The interpretation and application of any legislation has the potential to frustrate its purpose. In the area of freedom of information the approach adopted towards interpretation is even more crucial. For those favouring a transition from a state that indorses and encourages secrecy to a society that operates on the principles of open government, it is vital that a "leaning" approach is taken towards freedom of information (FOI) legislation. This approach emphasises that FOI legislation should be interpreted with a bias towards disclosure and that public access ought not be frustrated by the courts, or other review bodies, except upon the clearest grounds. Therefore any doubt ought to be resolved in favour of disclosure. If the "leaning" approach is adopted then the burden of persuasion must rest upon the governmental party resisting disclosure. The rationale for this approach to interpretation stems from the fact that administration of FOI legislation by necessity lends itself too easily to be, in the words of Sir Harry Gibbs, "administered in a tardy and grudging way".<sup>1</sup>

This "leaning" or "tilting" approach should not be seen as a mechanism to release sensitive information but as a safety check which would ensure that claims for exemptions are justified and can be proven as being so on reasonable grounds. The New South Wales Ombudsman commented:

"the long-term answer is, in my opinion, to create an organisation or body charged with promoting FOI which has sufficient political influence to counterbalance the natural tendency of government and bureaucrats to lean towards the avoidance of public scrutiny."<sup>2</sup>

An Australian bureaucrat, steeped in the traditions of Westminster, who is given the choice between disclosure and avoiding public scrutiny

<sup>1</sup> Sir Harry Gibbs, Foreword to *Keeping Them Honest: Democratic Reform in Queensland* (University of Queensland Press, 1992), p xvi.

<sup>2</sup> NSW Ombudsman, "Freedom of Information — Way Ahead". Special Report, Jan 1995.