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Comment

As this editorial is being written the Senate Legal and Constitutional References Committee is due to hold its one and only public hearing on the Australian Democrats *Freedom of Information (Open Government) Amendment Bill 2000* on 5 March 2001. This Bill is designed to implement the majority of the reforms proposed by the ALRC/ARC Report *Open Government* which was released in early 1996. The only witnesses scheduled are the Commonwealth Ombudsman, Attorney-General's Department, Australian Law Reform Commission, and myself.

As the committee consists of three government senators, one Australian Democrat and two Australian Labor Party (ALP) senators, the possibility of seeing the Bill favourably endorsed appears slight. However, it is pleasing to see at least one political party embracing these reforms. Readers might be able to better enlighten me but as of this date I have little idea what the ALP's official, or even unofficial, policy position is on Freedom of Information. I would urge those readers who are members of the ALP and/or have some input into its policy formulation to try and bring the ALP into supporting these reforms and a long-term rejuvenation of the concept of open government.

It will be interesting to see what the new ALP governments in Western Australia and Queensland do about FoI. Newspaper reports from South Australia suggest that the State Liberal government is looking to make 'some changes to the law, but they would not be sweeping changes'. Unfortunately the newspaper reports suggest that the government might be keen to embrace some of the less positive changes made by the Blair government in the UK last year. It will be a pity if the comprehensive and radical proposals from the SA Legislative Council Committee report released in September 2000 result only in minor tinkering.

I have recently read Alasdair Roberts 'The Informational Commons at Risk', School of Policy Studies, Working Paper 8, September 2000 accessible at <http://qsilver.queensu.ca/~roberta/research.html>. Roberts argues that our informational commons, namely that intangible 'pool of information about community [and political affairs] which must be publicly accessible for citizens to engage intelligently in the act of self-government', is at risk. That while once a single comprehensive regulatory tool — FoI law — could be highly effective in preserving or accessing that informational commons, this is no longer the case. One of the greatest difficulties according to Roberts is building an 'alliance of citizens, businesses and non-governmental organisations' with enough of a common interest to mount effective campaigns for openness. During my involvement in various parliamentary and law reform inquiries around Australia in the last six years, dealing with FoI, I have been struck by the absence of any such coalition. The consequences of this absence were well noted by Greg Terrill in (2000) 87 *FoI Review*.

Rick Snell

Computer-Assisted Reporting and FoI — a PhD research project

A greatly enhanced new genera of public service (public interest) journalism has blossomed in the United States since the late 1980s as a direct result of new methods of exploiting that nation's Freedom of Information laws. As a result of that development there is now an urgent need for research into whether journalists and the communities they serve in other major English speaking countries can reap similar benefits.

The research, which is being undertaken through the University of Queensland's Department of Journalism, aims to compare the current flow of public information under the United States system of government with its flow in Westminster style systems. It is also examining a relatively new journalistic methodology known as computer-assisted reporting, and the relationship between that practice and FoI data access. One important aim is to discover how journalists working in nations outside the United States could apply or adapt the new methods so as to better inform their own communities.

Another question which begs particular attention is whether there is, as the writer believes likely, a different collective philosophy about the 'ownership' of government information in a congressional/presidential style government, such as that in the United States, and systems with a Westminster heritage, such as those in the United Kingdom and its former dominions of Australia, Canada, New Zealand and South Africa? There are, after all, strong common ties between the latter nations and their governance, not just in terms of heritage and tradition, but also directly through the 1931 Statute of Westminster which granted the former dominions independence from British rule. Those links arguably underpin a common reliance on what might be termed a 'paternalistic' Westminster psyche which seems to promote a belief that public information is actually 'owned' by government rather than the public and that it should generally be treated as if it was secret. That ideology is in stark contrast with the United States system where, as evidenced by the introduction of comprehensive FoI legislation in the 1960s,[1] the philosophy would appear to be that public information is just that — 'owned' by the public.

The Internet and americanisation

The sense of urgency underlying the research stems from the fact that there are very strong, direct and continuously evolving links between computer-assisted reporting, information technology, concepts of globalisation and the Internet — all of which are in constant states of growth and flux. The Internet, for example, is tending to homogenise and globalise (Americanise?) notions of government, politics and culture around the world more rapidly and efficiently than any other communication technology — including the telephone, radio, film or television — has done before. That is largely because the ubiquitous, some might suggest insidious, ethnocentric United States culture which nurtured development of the Internet and has largely driven the information technology revolution is having a highly visible and sometimes dramatic impact on more conservative, traditional, notions of society, politics and government in other nations. Much of that impact has been (and continues to be) delivered via the Internet, a communications system that had forever changed the world by the time many people even realised it existed. Since the early 1990s, for example, there have been highly significant impacts on basic conservative traditions through changes such as the Americanisation of localised spellings, grammar and pronunciations, many of which arrived with the use of United States developed computer software — particularly word processing, spell checking, Web browsing and desktop publishing packages. But the changes, as well as the confusions, uncertainties and challenges which are accompanying them, go much deeper than language. In all but the most primitive and/or poverty stricken nations they are placing hitherto unheard of, again strongly Americanised, pressures on concepts of government, law, civil rights, the judiciary and the role of the media as the 'fourth estate'.

As United Kingdom academic Mark Wheeler noted in his book *Politics and the Mass Media*:

> Freedom of speech is the citizen's fundamental right in a modern democratic society. In traditional liberal thought the press has been advanced as a 'public watchdog' over the state. It occupies a fourth estate which is separate from the Crown, Parliament and the Judiciary. Therefore, it may reveal the authorities' abuses and maintain a mature democracy. This underlying principle has dictated the press's organisational structure. It should be lightly regulated, subject only to libel and obscenity laws and the tenets of taste and decency.[2]
>
> The changes within mass communications and the burgeoning development of the multi-media are complex and still on-going. As a consequence, there will be a constant need for research to determine how these developments are being realised.[3]

And:

> Effectively, several decades of new technology have been unleashed in the last fifteen years. The changes comprise: a computer revolution hastened by cryptology, the modem, domestic personal computers and more sophisticated software to be down-loaded; microwave technology, drawn from radar and rockets, for launching satellites; high-definition television reception; terrestrial broadcast reforms such as digital compression; the domestic video recorder; and telecommunications advances including the long-running (now reaching fruition) introduction of narrow-band fibre-optic cable.
>
> These advancements have complicated the communications industries' economic and social relationships.[4]

A need for re-education

How best to come to terms with those new information technologies is something which is occupying the minds of more and more people around the world. Australian High Court judge Justice Michael Kirby, for instance, has warned that many judges do not know enough about new technology to make effective rulings on cases involving the Internet.[5] He said most judges had not grown up in the digital age and they needed to be educated about the complex technology and jargon of electronic commerce, Internet copyright, hacking and on-line fraud. The situation is similar within the media where many owners and senior managers are products of generations which grew up uneducated in the ways of computers and the communications revolution.

Quinn[6] said the problem also extended into journalism and journalism training:

> Many journalism academics, like practising journalists, do not see the value in new research tools such as the Internet, databases and spreadsheets — mostly because they haven't taken the time to learn them.

Leading United States journalism educator, Miami University Professor of Journalism, Bruce Garrison noted that:

> As with any new technology, it will take time, perhaps an entire generation, before these changes have worked their way into all levels of journalism. After all, journalists are, for the most part, wordsmiths, not computer 'nerds' … but they still need to learn a little about PCMCIA cards, motherboards, RAM, or active color matrix notebook displays.[7]

So, while there is undoubtedly some negative fallout from the information technology revolution and globalisation — much of which could be overcome through in-service education — there are also clearly great benefits and reasons to be optimistic. At a basic level many people around the globe already experience at least some of the advantages through dramatically easier access to information, the use of better computers, the convenience of e-mail and the way the Internet can bring the world to their desktops. But there are also likely be other more subtle long-term advantages as flow-ons from the promulgation of United States cultural/political expectations. They could conceivably include better FoI access, a stronger fourth estate and, consequently, more accountable government in many countries.

What is CAR?

Before proceeding it is important to take time to understand the term 'computer-assisted reporting', or CAR, and how it relates to freedom of information. CAR as it is employed today in the United States, has steadily evolved since the late 1980s when those journalists who discovered it or who were taught how to use it effectively, started regularly accessing computer databases with the aim of improving their reporting on stories of public interest. Much of the information they relied on to achieve that aim has been accessed under United States freedom of information laws.

The concept of CAR is generally acknowledged[8] to have grown from the work of University of North Carolina journalism professor Philip Meyer and a book he wrote in 1973 titled *Precision Journalism*. In many ways its development has paralleled the evolution of desktop computers and the Internet. In fact the Assistant Dean of the College of Journalism at the University of Maryland, Christopher Callahan believes CAR and the Internet are providing 'journalists with the most important reporting tool since the telephone'. Today, Callahan reminds us, the Internet stands as the single largest source of information available anywhere in the world.[10]

An acknowledged United States and world expert on CAR, Garrison broadly defines CAR as: '[the] application of computers to gather information for a news presentation'.[11] He refers to CAR in terms of the use of computers to search for information and retrieve it from other computers and databases and the use of computers to analyse original and other databases for information for news stories. Garrison says:

> Databases available through telephone connections can reveal much about the communities and individuals that reporters cover. … Major investigative news stories are being produced with computers. So are ordinary, day-to-day stories … In recent years, computer-assisted projects have won Pulitzer Prizes and other [United States] national recognition for excellence in journalism.[12]

The only Australian author of a book on CAR, Deakin University senior lecturer in journalism Dr Stephen Quinn, says it can be applied at different levels and mean different things to different journalists.[13] At its most basic level, Quinn says, CAR refers to techniques such as using e-mail to arrange interviews or locate experts. At its deepest level it requires journalists to 'dig' for stories by using computers as tools to analyse complex databases. A concept with highly practical applications, higher level CAR has been likened to a gold mine for reporters and editors.[14] It is also important to understand that CAR is about online news gathering or 'input'. It is not about online publishing or 'output'.[15] According to Quinn and Granato:

> Computer-assisted journalism refers to the tools and techniques that help you [a journalist] think up story ideas, research investigative stories and identify, locate and interview sources. The tools include e-mail; Internet browsers, search engines and subject directories; spread sheets and databases. The techniques are how you use the tools to improve the breadth, depth and quality of your reporting.[16]

But although computer-assisted reporting has been dubbed an 'electronic revolution' in terms of reporting in the United States[17] and while CAR generated articles won Pulitzer Prizes for eight consecutive years from 1990 to 1998, it is yet to have anything like the same level of impact on journalists and media in other English speaking countries outside the United States. In some ways that apparent lack of acceptance in the wider arena seems surprising, particularly in a country such as Australia where the population has generally been quick to adopt innovative new communications technologies[18] and Australians have embraced the Internet with even more enthusiasm per head of population than their United States counterparts.[19]

CAR and FoI

Quinn and Granato[20] believe one major limiting factor inhibiting development of CAR in Australia has been the fact that it developed in the United States — a country where freedom of government information is much more open than in Westminster system nations such as Australia and a country where defamation laws are less restrictive than the 'stringent' laws which 'intimidate investigative reporting' in Australia.

In Canada that country's leading CAR educator, Robin Rowland from the Ryerson Polytechnic University School of Journalism in Toronto, told his students early in 1999 that:

> … in 1995, most reporters in Canada believed that we would follow the U.S. model of slowly gaining access to government databases. This is not happening in Canada and may not happen for some time.[21]

Another Australian journalism educator, Suellen Tapsall,[22] says 'the current knowledge-base of the application of CAR within and Australian context is poor', 'CAR is *not* likely to be totally acceptable to Australian newsgathering', and:

> Australia's media functions in a similar manner to that of the United States, albeit within the context of a British [style] political and legal system, yet computer-assisted reporting is not currently an identified, utilised factor within most Australian newsrooms. Individual reporters are attempting to incorporate some aspects of the CAR technique, but such efforts are ad hoc and infrequent and would most often entail low level CAR techniques and applications. However, the rapid adoption of the Internet and similar technologies has increased the speed and availability of communication between people in various locations and social or cultural settings.

And Tapsall also notes:

> CAR has developed in the United States; a country with a culture that promises disclosure and freedom of access to information, even information that individuals and governments would at times prefer to keep suppressed. In Australia, privacy issues are more emphasized.[23]

United States CAR advocate and Boston University academic Professor Margaret DeFleur traces the evolution of her country's current attitude to freedom of access to government held information to the period immediately following the end of World War II when Congress passed the *Administrative Procedure Act of 1946*.

'For the first time it became mandatory for all federal agencies to keep and maintain records which were to be open to inspection by the public (with some exceptions)', DeFleur said.[24] Later, during the decade of the 1960s, pressure mounted for greater disclosure of the activities of all branches of government, with the result that:

> In 1966 Congress passed a lengthy amendment to the *Administrative Procedure Act*, and called it the *Freedom of Information Act*. This amendment, commonly called FoI, placed the burden of compliance squarely on the agencies and required that they prove they were justified when denying access to records.
>
> … The FoIA amendment was written with some very real teeth to enforce its provisions. If records were not released, citizens could register a complaint in court about the agency. That could then enjoin that agency and order the production of any records improperly withheld. More forcefully, that statute stated that 'in the event of non compliance with the court's order, the district court may punish the responsible officers for contempt.' Finally, a provision was included requiring that such court cases 'take precedence on the docket over all other cases and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.[25]

Interestingly in the context of comparing the United States political system with Westminster style systems (where public servants have led the fight against FoI) the United States' federal *Freedom of Information Act* (which has been mirrored to greater or lesser degrees in its states) was signed into law by the chief executive of that country's public service, President Lyndon B Johnson. It is also relevant that a 1986 amendment to the federal legislation, *The FoI Reform Act*, established categories of requesters for the assessment of charges and granted preferred status to the press, educational and non-commercial scientific users.[26]

> Those with preferred status could receive records without charge or reduced charge if disclosure was 'in the public interest and contributes significantly to public understanding of the operations or activities of government'.[27]

Little wonder then that Quinn contends that:

> CAR evolved in the United States **because** of that country's long tradition and culture of freedom of information. The 1966 *Freedom of Information Act* required government agencies to provide information to the public, based on the 'people's right to know'.[28]

FoI and cultural expectations

Similarly, in comparison to their counterparts in nations such as Australia which do not have a 'Bill of Rights', United States journalists also benefit enormously from the direct protection of their nation's media which is found in the First Amendment to their federal constitution. Quinn believes that as well as the legal shelter that the First Amendment offers, it has also engendered a mind-set whereby:

> American journalists have grown up under the aegis of the First Amendment to the United States Constitution and they **expect** access to information as a constitutional right.[29]

That expectation is reflected by another United States CAR expert Brant Houston. The author of *Computer-Assisted Reporting A Practical Guide*, Houston sees a stark contrast between the days before and after the marriage of FoI and CAR in the United States and he advised journalists accordingly:

> A free and democratic society is based on openness, not bureaucracy. In seeking electronic information, remember that the keeper of public information should have to give you a good reason not to release the information. You should not have to give the agency head a good reason to release it. Taxpayers have already supplied the money to enter the data, store the data, and retrieve the data. In short, you need to think: 'You have it. I want it. Give it to me.'[30]

And:

> For years, [US] journalists had been like animals in a zoo, waiting to be fed pellets of information by keepers who were happy to have the journalists stay in their Luddite cages. But now journalists need to learn the basic tools of computer-assisted reporting because it is the best way to get the information. After all, most governmental and commercial records are now stored electronically, and a huge number of records and databases are available through the World Wide Web. Without the ability to deal with electronic data, a journalist is choosing to catch a ride rather than drive on the information superhighway. The old fashioned journalist will never get to the destination on time — or worse, will be brutally run over by the competing media. Furthermore, a good journalist wants to see original documents or exact copies of those documents. Every time a journalist lets someone else select or sort those documents, he or she risks letting someone else add a spin or bias that can't be detected.[31]

While Houston's views are no doubt highly relevant in the United States experience, they also highlight the fact that to a large extent journalists in other major English speaking countries are still struggling to bend the bars on their Luddite cages. That is despite the fact that Canada's first freedom of information law (the first in a Westminster democracy) was adopted by the provincial government of Nova Scotia in 1977 and that Australia was the first Westminster system nation to introduce federal FoI legislation (in 1982). In both jurisdictions the nature of their FoI laws, their respective defamation laws and cultural expectations have made it impossible for journalists to work in the same ways as their United States counterparts.

FoI and Westminster tradition

Addressing a freedom of information seminar in Oxford, England in February 2000 Canada's Information Commissioner John M. Reid, PC summarised the situation at that time in nations with a Westminster tradition as follows:

> New Zealand and Australia adopted freedom of information legislation … as did Canada.
>
> Great Britain just can't seem to get out of the starting blocks. It has been examining freedom of information proposals and bills since 1911 and only in the year 2000 does it look somewhat likely that it will take the plunge.
>
> In one sense, it is understandable why Great Britain, the 'mother' of parliamentary democracies has resisted adopting a right of access for so long. This right is more at home in a political culture like that of the United States, which is strongly influenced by John Lock's principles of popular sovereignty. In a system where 'the people' are invested with sovereign power — which they delegate to government — administrative secrecy is quite simply, a denial of responsibility by those in power.
>
> In the British (and Canadian) systems, however, sovereign authority resides in Parliament and accountability flows from the

administration to the people through the principle of ministerial accountability to Parliament. Even today, it is feared that broad access rights could dilute the system of ministerial accountability, although I personally have never been able to understand that argument.[32]

Reid's thoughts seem to reflect those of one of the prime movers behind the introduction of FoI in Australia, former senator Alan Missen. In a lecture to the Campaign for Freedom of Information delivered in the House of Commons, Westminster, back in July 1984 Senator Missen castigated the Establishment:

> It is my belief that the development of the 'right to know' is something that needs to come to all democratic societies. It is necessary for an informed public to have the right of access to government documents. I regret that this country [the United Kingdom], which has been such a leader in democratic developments for hundreds of years, is proceeding so slowly in this area.[33]

The senator warned that the most vehement opposition to the introduction of FoI legislation was likely to come from public servants suffering the 'delusion' that it would weaken traditions such as that of ministerial responsibility.

> I want also to speak, at an early stage, about the Westminster system, and to tackle head on (and I do this in the home of the Westminster system) the arguments that are consistently raised against freedom of information. They are misleading arguments and outdated arguments, but nonetheless are firmly held by senior public servants or 'mandarins' as they are sometimes known. Some hold a fixed vision of an unchanging political system, firmly believing that, if changed, would lead to a weakening of the Westminster principles of government.[34]

FoI and the media — the ideal versus the reality

Interestingly in the present context, Senator Missen also noted that two years after Australia's federal FoI legislation was passed:

> The media, to an extent, has not yet used the Act as much as it might … To an extent they fit the description given by the late Nye Bean. When talking about the media and control of it, he said 'You can't muzzle a sheep'. I think unfortunately that is rather true in our country in that they have been rather sheep-like so far in the use of it. Investigatory journalism has a long way to go.[35]

Fourteen years later Australia's Chief Justice Sir Gerard Brennan also spoke of the links between FoI in a Westminster democracy and the media. In a 1998 address to law students at Bond University he seemed to have an each way bet when he expressed his views as follows:

> An important check on possible misuse of executive power — indeed, on the exercise of any power — is publicity. Misuse of power flourishes in the dark; it cannot survive the glare of publicity.
>
> The *Freedom of Information Act 1982* provided a mechanism for prizing open the files of Government and thus exposing the dealings of Government to publicity. Of course, there had to be some limits imposed. The great affairs of State cannot be transacted in a gold fish bowl and too free an access to those transactions could have a chilling effect on communications on subjects of national interest.
>
> The FoI Act has arguably been a useful tool in political debate and has been availed of by the media. The glare of publicity focused by independent and careful media on the transactions of government in all of its branches is one of the most significant protections of a modern Westminster democracy. The safeguarding of the independence of the media must be one of the primary objects of any Government committed to democracy. That is not to say that engagement in media activities is beyond legal control. To the contrary. Control may be needed to safeguard independence from influences which might tend to corrupt the fair and accurate reporting of newsworthy events and situations and which might produce unfairness in emphasis or comment. These journalistic desiderata are themselves encouraged by the laws of defamation.[36]

Were Mr Justice Brennan and Senator Missen expecting too much of 'the media' because they were failing to see how it was collectively hamstrung by the very (Westminster) democratic system it was supposed to protect?

A culture of secrecy

And maybe his honour was not aware that a review of Australia's federal *Freedom of Information Act* by the Australian Law Reform Commission and the Administrative Review Council in 1996 had concluded that the Act was deficient and its intent was being thwarted by a culture of secrecy. The Review pointed out that the Australian legislation lacked the absolutely fundamental underpinning of the United States laws because:

> There is currently no general obligation on federal public servants to create adequate records. Nor is there a general requirement to document decisions.[37]

The Review recommended that what it said was a 'culture of secrecy' pervading aspects of Australia's public sector administration must be dismantled. It also said that Australia's State-by-State FoI laws were fragmented, confusing and varied from the federal legislation:

> While there are many similarities between the exemption provisions in the state and federal FoI Acts, they are not uniform. From the point of view of applicants, it would be preferable if the exemptions in all FoI Acts throughout Australia were consistent. They would then not have to understand two sets of exemptions when they seek access to documents in the possession of State and Commonwealth agencies. Achieving uniform exemptions would require intensive consultation between state and federal governments. The Review considers this would be a worthwhile enhancement of FoI in Australia and suggests that the Standing Committee of Attorneys-General should pursue this matter.[38]

The Review was also heavily critical[39] of the almost unfettered ability of federal ministers to hide documents and other information through the issue of a 'conclusive certificate', something which makes a document that is the subject of the certificate exempt from FoI for as long as the certificate remains in force. It also said the Act needed to make it clear that potential or actual embarrassment to government or public servants (perhaps through subsequent media interest) should not be a valid criterion against which to balance the public interest in disclosure of information:

> The FoI Act should be amended to provide that, for the purpose of determining whether release of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to the government.[40]

And that:

> It can be argued that highly sensitive information, release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the sort of material to which the FoI Act is designed to give access because it involves responsibility at the very highest levels of government.[41]

However, The Review's recommendations — which it said were designed to give effect to the Australian people's 'right of access to government-held information' — languished. In September 2000 Australian Democrats senator, Andrew Murray, attempted to revive them when he introduced a Private Member's Bill in the Senate. He said Australia had embraced freedom of information much less vigorously than other democracies, and:

> The maladministration of Australia's FoI laws has a serious negative impact on the quality of Australian democracy. It improperly excludes from public scrutiny and debate information to which the people, the sovereign rulers of our democratic nation, are entitled.[42]

Stark contrasts between systems

The future of Senator Murray's Bill, was unclear at the time of writing. However, even if it was to pass into law, it still would not place Australian journalists and their potential to exploit CAR methods in the public interest on a level footing with their United States counterparts. A measure of the contrast between the United States and Westminster system nations becomes apparent when looking at computer database records accessible to United States journalists. They include information such as individual criminal records, police records, health department files, state financial transactions, speeding ticket records, driving licence information including the private addresses and dates of birth of drivers, the names and addresses of all registered gun owners and a listing of the types of guns they own, individual prison records, information about political party memberships and donations as well as state school reports — all information which is strictly off limits to journalists in countries such as Australia, New Zealand, the United Kingdom and Canada.

An example of that difference in practical terms can be found in the work of United States based journalism educators Alfred Lorenz and John Vivian who presented a case study showing how two US reporters used CAR as the starting point for a story which revealed that one in six bridges in New Jersey was unsafe.[43] The story was based on information drawn directly from open government databases. The writer has tried to access similar information in Australia but has found that it either does not exist or is simply not available. Differences in the two systems are particularly apparent to former United States journalist and current University of Queensland journalism lecturer David Conley. In *The Daily Miracle: An Introduction To Journalism*, a book he wrote specifically for first year Australian journalism students, he told them:

> Governments are happy to provide reporters with anything they want under freedom of information (FoI) Acts, unless it happens to be newsworthy. At least that is the way it seems for reporters who find themselves playing hide and seek with bureaucrats.[44]

And:

> The premise underlying [Australian] federal and state FoI legislation is that public documents should be available for public scrutiny. However, the many exemptions to this legislation keep the material to which journalists would most like to have access out of the public's gaze.[45]

Then there is the fact that a huge majority of the many texts referring to CAR were written by United States academics and reporters. Most of those books and articles rest to varying degrees on the point that much United States based CAR and the stories which have flowed from it were sourced from freely available government information and databases — again, information of a type that is simply not accessible or does not exist in Westminster system nations.

Defamation and contempt

As already discussed, the United States media, too, has an inherent constitutional right through the First Amendment to the constitution, to freedom of the press. That amendment offers stronger protection than any legislation in any Westminster system nation including Canada — possibly the most advanced of the Westminster group, with its 1982 Charter of Rights and Freedoms. It is also partly why defamation laws and even privacy laws in the United States are generally much less restrictive and certainly less 'chilling' in relation to journalism, deep CAR and publishing than those in the Westminster system nations. It is impossible in an article such as this to canvass all the legal and cultural differences between the systems of governance and their impact on journalists' adoption of CAR techniques but as United States privacy advocate and accomplished legal scholar Professor Arthur Miller wrote nearly 30 years ago in his then landmark book *The Assault on Privacy: Computers, Data Banks, and Dossiers*:

> To assure an open and well-informed society, the free-speech guarantee in the First Amendment to the United States Constitution gives the news media a right to publish matters that are of interest to the general public. In order to be effective, this constitutional principle may have to be applied on occasion to prevent an individual who is injured by a publication that is false or reveals intimate facts about him from obtaining legal redress.[46]

And:

> A newspaper editor might hesitate to publish many 'newsworthy' stories that cross his desk, were it not for the First Amendment privilege; without the protection accorded the paper by the Constitution, it would be necessary to determine in advance of publication whether the stories contained inaccuracies that could lead to defamation suits. The result would be delays and occasional decisions to refrain from publishing.[47]

The points Miller made are highly relevant to the use of CAR as they highlight a major broad difference in defamation law between the United States and Westminster nations. That is that in the latter countries the major legal defences to defamation lean more towards valuing personal reputation than free speech, while the emphasis is reversed in the United States. In the Westminster nations, defences other than those relating to privilege centre on the umbrella concepts that a publisher (defendant) must be able to prove that something that was said or written was true and/or in the public interest and/or that it was a fair and reasonable comment on a matter of public concern. In the United States on the other hand, a plaintiff (and public figures in particular) must prove[48] that what was said or written was false, that the publisher was at fault at the level of 'actual malice' and that the plaintiff had suffered harm. Actual malice must be proved with 'convincing clarity'. The fundamental differences between the two systems and the shelter offered to the media by the First Amendment were summarised by the Supreme Court of Canada as follows:

> Unlike their American colleagues, our judges have weighed more heavily the value of personal reputation over those of free speech and free press. Thus there occurs in many of their decisions a careful reminder that these freedoms are ones 'governed by law' and that there is no 'freedom to make untrue defamatory statements'. Canadian courts have stated emphatically that the press enjoys no privilege of free speech greater than enjoyed by a private individual and that the liberty of the press is no greater than the liberty of every subject.[49]

Contrast that approach with a summary by Reddick and King of the attitude towards defamation in the United States:

> In the 1964 landmark *New York Times* v. *Sullivan* ruling, the US Supreme Court ruled that the news media could not be punished for libel for reporting false information about public officials unless plaintiffs demonstrated that the journalists had acted with 'actual malice.' The court defined actual malice as a reckless disregard for the truth. The court reasoned that American democracy depended in part on a vigorous press, but a vigorous press was bound to make mistakes from time to time. Therefore, the press needed 'breathing room' in which it could make mistakes without being punished.[50]
>
> … in 1977, the Second Circuit Court of Appeals decided in *Edwards* v. *Audubon Society* that reporters and publications could not be punished for libel if they published attributed

> information from sources which they believed were reliable and credible, even if that information ultimately proved to be false and harmful.[51]

Contempt laws also vary markedly between the two systems. Take, for example, the furore which erupted in Melbourne in May 2000 when the Supreme Court of Victoria felt the time-honoured Westminster sub judice contempt principle, which is generally respected by the media in British-style systems, had been so compromised by information posted on a Western Australian-based Internet site known as 'CrimeNet', that a murder trial was aborted. What is particularly interesting in the current context is that publication of information on the private CrimeNet database, which contained details drawn from previously published reports about the alleged criminal background of a person on trial, would have been legally safe and totally acceptable in the United States because publication would have been protected by the First Amendment. In all probability it would also have been regarded as an acceptable publication if the information had been printed in a newspaper or even broadcast on radio and television in Western Australia because publication within that specific jurisdiction would hardly have been considered likely to prejudice jurors sitting in a trial in Melbourne, several thousand kilometres to the east. However, and although no claims were made that any juror had actually accessed the CrimeNet site, publication on the Internet was considered a serious breach by the court because it was publication to the whole world.

Traditions challenged on-line

From the points considered thus far it can be argued quite forcefully that the mere existence of the Internet, and the constitutionally enshrined United States belief in a right to free speech which is embedded in it, is seriously challenging (for good or bad) other legal and government systems, traditions and philosophies around the world. Dealing with that challenge is proving a perplexing task in many nations — and certainly not just those with Westminster style systems. In China, for example, the government appears to be fighting something of a losing battle as it repeatedly attempts to crush dissent in Internet chat rooms and to stop that country's estimated 16.9 million Internet users[52] from accessing news content which has not been officially approved by the State Council — China's cabinet. And even in Sweden, a country noted for freedom of thought, there has been a running controversy since 1998 about privacy and the publication of people's names on the Internet. Press and information officer of the Swedish union of journalists Christoph Andersson[53] claims that while Sweden has had its own FoI law, the *Public Access Act*, since 1766, there is a modern conflict resulting from the way Sweden interpreted and implemented the European Union's 'data directive' in 1998. That law, the *Personal Data Act*, administered by the Data Inspection Board, makes it illegal for a Swede to publish on the Internet information, including names, which can be applied for and supplied (even to anonymous applicants) by government departments in written documents. As a result, not even the Swedish telephone directory can be openly published on the Internet.

Stockholm University information technology professor Jacob Palme says:

> This law formally makes it illegal to mention information about any identifiable individual on the Internet, without prior permission from that person. For example, the law makes it illegal to criticise a public official unless that official permits you to publish the criticism. Because of widespread complaints, the law was modified in 1998. The modification says that 'minor violations' of the law will not be prosecuted.[54]

But:

> There is an obvious conflict between the *Freedom of Information Act* and the *Personal Data Act*. This has caused conflicts, some local governments have wanted to publish minutes of meetings of various committees, and the Data Inspection Board has said no.[55]

It therefore seems logical that, if the Internet is having serious impacts on traditional ideas about government, the law, judiciary, defamation, freedom of speech and privacy in countries outside the United States, it will also be impacting at least as heavily on the fourth estate in those same countries — even if their news producers are yet to fully wake-up to the fact!

Could CAR and FoI link by default?

Specifically from a journalism educator's perspective and from the perspective of journalists and media organisations they work for in countries other than the United States, there is a choice of either being left behind, unwitting victims of the new technology and its social, political and cultural implications, or of being pro-active, keeping up and being prepared to meet the inevitable, sometimes rapid, changes and challenges that unprecedented advances in information technology are bringing. Therefore, as an aid for those who want to (or need to) keep up, the research discussed here aims — among other things — to establish a base-line by examining and documenting what appears to be the close links between a journalist's use of CAR methods in different nations and the legal, political, social and cultural systems within those countries.

As mentioned at the outset, there are other factors at work, too, in relation to CAR and FoI which need to be examined. As Tapsall suggested, there could also be economic considerations at play in addition to the legal and cultural:

> As Australian state and federal governments 'own' the data they collect, they charge accordingly. Cost constraints are expected to emerge both at the level of obtaining the raw data (paying for the actual database or information) and when journalists have to resort to FoI. Historically, cost has been a concern for CAR practitioners in the United States and it seems likely to be as much an issue in Australia, where concerns have been expressed over the past decade about the rising cost of FoI applications.[56]

However, economic factors can and do work both ways, with some government departments in the former British dominions seemingly starting to discover the fact (but not doing much about it as yet) that their United States counterparts have found it is much, much cheaper and easier to make information available on the Internet than to provide it using more traditional, paper based, methods. In fact in 1995 the United States Congress passed an updated *Paperwork Reduction Act*, which requires federal government departments in that country to save paper by storing information on computer databases and putting it on-line. Two generally stated aims of the legislation were to:

> Improve the quality and use of Federal information to strengthen decision making, accountability, and openness in Government and society; [and] minimize the cost to the Federal Government of the creation, collection, maintenance, use, dissemination, and disposition of information.[57]

The Act could be seen as a further sign of an inherent commitment to the public ownership of information in the United States — and yet another factor making it easier to employ CAR techniques in that jurisdiction than in the Westminster nations. Furthermore, the *Paperwork Reduction Act* goes hand-in-hand with the fact that the United States Congress generally excludes its administration from the ownership of copyright. While not something of great consequence to Australian journalists because news reporting and research is exempted from the terms of Australia's federal *Copyright Act 1968*,[58] the United States situation is never-the-less in stark contrast at a cultural level with attitudes in the Westminster nations where the laws and concept of Crown copyright still purvey a strong sense that governments believe that they own public information and must be asked for permission to reproduce it.

That said, there are signs of creeping, if economically driven, cultural change in the government administrations of the Westminster group. Over the past two years, for example, the Australian Transport Safety Bureau[59] has consistently improved the amount and depth of data relating to air safety and air safety investigations on its Internet site. Other federal, State and local government agencies in Australia have made similar discoveries about the cost effectiveness of putting information on the Internet, while many other non-government or semi-government organisations (including many courts) have done the same. The result is that some sites, such as the partly government owned Telstra White Pages Internet site, which is updated daily, provide information that would not have been available only a couple of years ago and others now provide information that is not available in any other way. The situation is somewhat similar in the United Kingdom, where the government maintains very comprehensive Web sites, in Canada and, to a conspicuously lesser extent, New Zealand. So maybe, by default and without really realizing what they are doing, at least some Westminster government agencies are moving in a direction predicted by futurists:

> Futurists contend that a digital revolution may reform monolithic state edifices, corporations, political parties, schools, workplaces, orthodox economies and popular entertainment. The Internet will increase interactive citizen participation by circumventing the centralised, conglomerate and outmoded media structures … the technological revolution will enhance freedom of belief, conscience, speech, movement, association and enfranchisement. Governments regulators and owners will be impotent as millions adopt the interconnecting technology and engage in political discourse. In particular, the Internet offers instant global communication, in which all citizens can access the same information and cultural resources. There will be a globalisation of citizenship, the decline of nationalism and the reform of archaic political structures.[60]

It would therefore be ironic indeed if development of the Internet eventually saw improved computer-assisted news reporting, freedom of speech and press freedom becoming facts of life in countries outside the United States through a creeping, almost accidental, relaxation in relation to FoI. If that were in fact to happen, it seems it would not stem from any altruistic new government philosophy in relation to freedom of information, a fresh new democratic imperative of a free press nor even because the Internet had totally Americanised the world. It could simply happen for pragmatic economic reasons feeding from a growing cultural expectation promulgated via the Internet that, as in the United States, FoI and open government, freedom of speech and freedom of the media are rights, not privileges.

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VICTORIAN FoI DECISION

VCAT

McINTOSH and THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT
No. 2000/59619

Decided: 13 December 2000.

Section 29 (matter communicated by another State) — Section 30(1) (internal working documents) — section 50(4) (public interest override).

Factual background

Governmental regulation of environmental flows down the Snowy River has a complicated and contentious political history. In the 1950s the Commonwealth, Victorian and New South Wales governments made an Agreement (the Agreement) to implement legislation enabling the Snowy Mountains Scheme (the Scheme). The Scheme governed the provision of hydro-electric power and water for irrigation in the Murray and Murrumbidgee Rivers.

In 1994 the Commonwealth government announced that it wished to corporatise the Scheme. Extensive negotiation between the three governments party to the Agreement resulted in a Water Inquiry into management of environmental flows. In 1997 the three governments enacted legislation facilitating corporatisation. However the Acts were only to be proclaimed upon consensual resolution of issues surrounding environmental flows down the Snowy River. The issue gained some importance during the 1999 Victorian election and was a negotiating point between the incumbent Labor government in gaining support of the newly elected Independent Member for Gippsland East, Craig Ingram.

In late 1999 Andrew McIntosh, a Liberal Opposition Member of Parliament, lodged an application under the *Freedom of Information Act 1982* (Vic.) with the Department of Natural Resources and Environment (DNRE). McIntosh requested access to all documents created since July 1999 concerning the flow down the Snowy River; and/or capital work relating to improved environmental flows down the Snowy River; and/ or undertakings in relation to these issues. The DNRE released many documents but considered some documents to be exempt.

The exempt documents consisted of briefing notes, internal memoranda and advice to the Minister and Secretary of the Department from very senior officers of the DNRE concerning policy implementation matters during the government's policy development on flows down the Snowy River and negotiations with the NSW government.

On 6 October 2000, the Victorian and New South Wales governments announced an agreement to increase flows to the Snowy River to 21% over the next 10 years and up to 28% in the long term. Fully documenting and implementing the agreement required further processes of review by the Murray Darling Basin Commission, endorsement by the Commonwealth government, and tabling before both houses of the NSW Parliament for proclamation. This agreement postdated McIntosh's request.

Procedural history

In July 2000 McIntosh applied to the VCAT for review of the DNRE's original decision to deny access to the documents rather than the decision on internal review. At the directions hearing the DNRE raised the preliminary issue concerning the Tribunal's jurisdiction to review the decision. The DNRE argued that the Tribunal

did not have jurisdiction because McIntosh had incorrectly identified the DNRE's original decision for VACT review, rather than the DNRE's decision upon internal review. On this occasion the VCAT found that it had jurisdiction to review the original decision. Accordingly orders were made setting a date for the VCAT to review the decision.

At the December 2000 hearing the DNRE identified four documents that attracted exemptions under ss.29, 30(1) and 50(4). The DNRE released more material before and during the hearing, leaving parts of three documents in dispute.

Decision

The Tribunal upheld the DNRE's submissions and found the documents to be exempt under s.30(1)(a) and (b) of the Act. The Tribunal was further satisfied that the public interest override in s.50(4) of the Act did not apply so as to require release of the document. The Tribunal saw no need to consider the application of s.29 of the Act as all the documents were deemed exempt under s.30 of the Act.

Reasons for the decision

Section 30(1)(a)

The VCAT held that the documents were prepared at a preliminary stage of negotiations, involved sensitive issues and that much of the information they contained had been superseded. The VCAT accepted the DNRE's evidence characterising the documents as containing either opinion or advice by members of the Department in the course of the deliberative processes related to the functions of the Department. Consequently the first limb of the test was satisfied. The evidence was that the documents contained proposals communicated in confidence by the governments of States other than Victoria to the Victorian government; tentative opinions about the possible effects or impacts which may occur if the Victorian government adopted certain proposals in order to enhance policy positions; and opinions and deliberations at an early stage within the Department regarding sensitive issues surrounding the flows. McIntosh did not contest this first limb of the test.

Section 30(1)(b)

The DNRE submitted that release of the documents would be contrary to the public interest on a number of grounds including:

- full release is likely to have an adverse impact upon negotiation processes and dealings between the States and the Commonwealth and unnecessarily complicating those dealings at a time when no agreement has been reached and certain material has been overridden by events;
- disclosure would lead to a reluctance in senior officers to committing opinions to paper leading to a greater reliance upon oral communications. This would undermine efficiency and be detrimental to the deliberative and decision-making process;
- the documents form part of a complex web of high level deliberations between the Department, the government and other governments; and
- on its own disclosing such high level communications and tentative opinions would be misleading as they do not accurately reflect the reasons for certain decisions being taken. Disclosure would only result in confusion and unnecessary debate.

McIntosh argued that the issue of the re-establishment of environmental flows down the Snowy River received extensive media coverage and was a critical issue in delivering government to the Victorian Labor Party in 1999. McIntosh's witness, another Liberal Opposition Member, gave supporting evidence suggesting that the restoration of environmental flows down the Snowy River, was and still remains the single biggest deciding factor enabling the Victorian Labor Party to form government at the last election.

McIntosh submitted that the public interest is served by transparency of executive decision making and this could only be achieved by full disclosure of the documents. He insisted that in relation to the exempt documents, the October 2000 announcement represented a 'done deal' and there was no longer any reason for not disclosing the documents.

The VCAT agreed with the majority of the DNRE's submissions on s.30(1)(b). Deputy President Coghlan held that the documents involved communications at a very high level about sensitive issues and were prepared at the early stages of the government's policy development by a Department which played a small role in overall negotiations. She found that releasing such tentative opinions would be misleading as they did not accurately reflect the reasons for certain decisions and might result in confusion and ill-informed debate. Consequently disclosure would be contrary to the public interest. Section 30(1)(b) was also satisfied.

Section 50(4)

The VCAT decided that there was nothing convincing in the McIntosh's submissions that the public interest required release of the documents. Deputy President Coghlan maintained that there was no evidence of any illegality, impropriety, sharp practice or wrongdoing which would require the clearing of the air. The Deputy President agreed with many of the Department's contentions and was not satisfied that s.50(4) should apply.

The DNRE referred the Tribunal to principles relating to the public interest override outlined in Secretary to the *Department of Premier and Cabinet v Hulls* (1999) 15 VAR 360. McIntosh raised the same public interest ground for s.50(4) of the Act that it put forward in relation to s.30(1)(b) of the Act.

Comment

The Tribunal applied the test set out in s.30(1)(a) and (b) of the Act with relevant concern for the ongoing tentative agreements made between the States and the Commonwealth on flows down the Snowy River. In this circumstance it seems reasonable that it is contrary to the public interest to have such extensive and protracted negotiations jeopardised by the release of preliminary internal working documents, indeed draft letters and superseded information prepared by small players in the overall scheme of negotiations.

Transparency of executive decision making may be served in releasing certain documents after decisions have clearly been made, negotiations are finalised and the agreements fully implemented; however clearly this was not the situation.

Though the documents were all found to be exempt under s.30 with no allowances to the public interest override in s.50(4), it would have been interesting to gauge the Tribunal's approach to the rarely invoked exemption of s.29.

[D.E.]

Personal encounters of the FoI kind

A TALE OF TWO FOI APPLICATIONS

It was the best of determinations, it was the not so best of determinations, it was a case of generosity, it was a case of meanness, it showed the spirit of the law, it showed rejection of the spirit of the law, it was the season of compliance with the law, it was the season of non-compliance with the law, it gave an indication of hope, it gave cause for despair — in short the story of the determinations was so little different to ones in earlier times, as to require only argument about the superlatives to be used.*

This story concerns two applications: one lodged on the NSW Roads and Traffic Authority (RTA) and one lodged on Lane Cove Council (LCC), a council on Sydney's North shore. The applications were made under the *Freedom of Information Act 1989* (NSW). All subsequent references are to that Act.

Why the FoI applications?

What is a citizen to do when a press report about conduct by a public authority outrages him or her? Well one thing to do is to find out the facts, given media reports may not always tell the all of the story. As Mao once said 'No investigation, no right to speak'. The *FoI Act* provides one means for a citizen to carry out such an investigation.

Well on 9 November 2000 in the *Sydney Morning Herald* a report appeared on a matter that on any other occasion would be so innocuous as to be un-newsworthy. The council on Sydney's North shore used its powers to partially close a road, containing residential dwellings, but which runs onto the busy Pacific Highway. On the Highway there were numerous businesses and also in the vicinity was radio station 2UE. Prior to the road closure vehicles could use the road to get onto the Pacific Highway to take them into Sydney. This option was now closed and a lengthier route was now required to access the Highway to go south.

Apparently the closure caused inconvenience to some, and was opposed by some residents and the operators and customers of the nearby businesses, as well as by two prominent radio announcers on 2UE. These announcers made a number of public broadcasts about the closure, including making appeals to the relevant NSW Minister to intervene. One of the announcers had written a letter to the Minister (*Sydney Morning Herald*, 14 November 2000).

The *Herald* story reported how the RTA had given LCC a deadline by which to reverse the effect of the road closure or have the RTA carry out the work itself. Followers of the story were curious to know why the RTA had changed its stance from regarding the matter as one for the Council to one where it considered it had to intervene.

LCC obtained an interim injunction, the matter was heard in January 2001, the injunction was lifted and the NSW Supreme Court held that the RTA had the power to carry out the work it had proposed, if the Council did not. The issue of the RTA's authority was the only matter decided by the Court.

As the exercise of power, and the decision-making processes that lead up to it, is of great interest to this citizen, as it should be to others, he decided to lodge the FoI requests to properly inform himself, as far as records alone can do so, about what had happened. An equally important issue concerns the processes of local government in making decisions about their local communities, with input from those communities, and then finding that others, who are not part of the community, can seek to act in a way to overrule the decisions made.

The chronology

The two applications were sent on 21 November 2000. The response by LCC was simply to invite me to inspect all of its files and copy those documents I wanted access to. The response by the RTA was somewhat different. The following events therefore only cover my dealings with the RTA.

22 November 2000: FoI application received by RTA. Due date for determination is 13 December.

13 December 2000: e-mail received from RTA, sometime after 4 pm and read at 5.40 pm. RTA advised it was consulting third parties and asked if I represented any such parties. No reasons were given but it was clear the RTA considered some of the material I sought concerned the personal or business affairs of third parties.

18 December 2000: e-mail to RTA claiming due date was 12 December (I miscounted on this point) and pointing out no reasons had been given justifying the view my request related to personal or business affairs.

18 December 2000: e-mail from RTA pointing out due date was 13 December. RTA also pointed out it considered personal and business affairs exemption still considered to apply (still no reasons given). RTA also said I should have responded earlier to e-mail of 13 December so formal advice of need to consult could have been given. Period to deal with my application is extended by 14 days.

22 December 2000: e-mail to RTA advising I would await the expiry of the extended period. Due date now 27 December 2000. Letter from RTA dated 18 December received confirming e-mail of 18 December.

29 December 2000: application for Internal Review lodged as no advice received of any determination.

4 January 2001: date of RTA letter advising a determination had been made on 22 December to give me access to some 300 documents and asking if I wished to go ahead with Internal Review.

12 January 2001: I advised RTA I would 'suspend' Internal Review and await documents.

16 January 2001: date of RTA letter acknowledging my suspension and providing documents.

30 & 31 January 2001: Hearing of injunction matter in Supreme Court.

12 February 2001: Decision by Supreme Court about LCC's injunction. [2001] NSWSC 30.

19 February 2001: letter to RTA reinstating my Internal Review application on the basis the documents supplied showed a number of other documents in existence which either should have been supplied or, if I was to be denied access, the reasons for the determination.

The handling of the applications

The contrast between the RTA and LCC could not have been more stark. The cynical might suggest LCC was more open and accommodating because it was objecting to the actions of the RTA and so was happy to enlist any support. As an applicant I certainly was in no position to

assist LCC in resisting the RTA. In addition the LCC files I was given access to showed numerous documents unfavourable to the Council's position, these mainly being letters from various parties hostile to the Council's decision to put in the partial road closure.

The RTA seemed to approach the application with blissful disregard of the provisions of the Act. It appears a decision was made within the RTA that my application concerned the personal and business affairs of individuals and organisations, including LCC.

The time for dealing with an application is 21 days but s.59B(2) of the Act provides:

> If the person dealing with an application determines in writing that the special circumstances of the case make it necessary to extend any such period of 21 days:
>
> (a) the period is taken to be extended by a further 14 days; and
>
> (b) the person must, as soon as practicable, inform the applicant that the period has been so extended.

One of the special circumstances allowed under s.59B(3) for the purpose of section 59B(2) is the need to consult a person under either s.31 or 32, where the documents sought concern personal or business affairs.

Leaving aside any challenge to the issue of whether the views of any person, organisation or agency regarding a road closure do concern personal or business affairs it is clear from the RTA's e-mail to me on 13 December that a determination had been made to that effect. This e-mail merely advised me third parties were being consulted and did not advise me of the extension of the period for dealing with my application.

Section 28(1) requires written notice of an agency's determination to be given to an applicant. As a determination is made under s.59B(2) and it is to be in writing it seems I should have been advised of the 'special circumstances' leading to the extension, not only by force of s.59B but also by s.28. As I am required to be told of the extended period for dealing with the matter it seems consistent with s.28 that I be told of the reasons.

The RTA's letter of 18 December 2000 states definitively:

> As the documents contain matter concerning the personal affairs of individuals and organizations comments must be sought before I can determine if access will be given.

It is of interest that one of the parties consulted was the Council. By way of a telephone call from the RTA to LCC on 18 December 2000 (and a subsequent letter) the Council was asked if it objected to the release of certain records relating to its dealing with the RTA. The RTA was advised LCC had no objection to the release of the records. At the very least those documents held by the RTA about LCC could and should have been released in the week of the 18 December.

If the determination about 'special circumstances' was made before the due date of 13 December, then the consultation process should have commenced before then. It is not unreasonable to expect that I should have been notified of the determination and the extension before the expiry on 13 December.

Turning to the actual determination, apparently made on 22 December 2000, to actually release the 300 or so documents, I was not advised of this until after I had lodged my application for Internal Review. Even allowing for the time of year should I not have been advised, if only by e-mail, of the intention to release the documents and the additional fee I was asked to pay? (I had sent $100 with my original request and paid an additional $107.50 processing charge.)

Based on my examination of the documents supplied as well as my observation of the Supreme Court hearing it appears there are other documents covered by my request that have not been supplied. Thus I reinstated my Internal Review request.

Of minor interest is that in my original request I also sought a copy of a Policy Document listed in the RTA's Summary of Affairs. This was only supplied, along with all the other documents, in January 2001. It should have been supplied earlier.

It might be thought the court case involving the RTA and the Council provides sufficient excuse for the RTA's handling of the matter but LCC had no trouble determining the matter within the original deadline of 13 December and arranging access and copying for me in the following week. Perhaps it reflects a difference in attitude to the Act.

To be fair to the RTA it receives the sixth highest number of FoI applications (286 in 1998/1999) and is not listed in the Ombudsman's Annual Report for 1999/2000 as among the top 19 agencies with the highest percentage of full or part refusals. On the other hand the RTA did generate the fourth largest number of complaints to the Ombudsman in 1999/2000 (13 out of 139 received).

What next?

What does this experience tell us? Is there a 'smoking gun' to be found within the paperwork? That remains to be seen. Once my Internal Review application is dealt with it may be possible to take this matter elsewhere? The Supreme Court action could only deal with a narrowly defined set of issues, ie whether the RTA had the power to take action against the Council's road closure. Other agencies may be better equipped to fathom why the RTA made the decisions it did.

Now in NSW the RTA is part of the cognoscenti of FoI practitioners so one must wonder about the fate of applications dealt with by other agencies, not so familiar with the Act's requirements. I wonder if the Ombudsman would be interested in my experience?

If there is one message for the citizen it is that persisting with FoI applications is a hard slog.

[P.W.]

**Apologies to Charles Dickens for the opening paragraph*

RECORDS AND FoI

In a recent matter involving a University in Sydney, a consultant was brought in to examine in detail the operations of a Department of the University. After months of enquiry by the consultant a number of people within and without the University wanted access to the consultant's report. They were told there was no written report. His conclusions had apparently been passed on at a series of meetings with members of the University executive. When the executive was pressed as to the reasons there was no written report the enquirers were told that if the report was not in writing the NSW Ombudsman would not be able to obtain a copy of it.

[P.W.]

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