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Comment

This issue deals with a mixed bag of issues and topics. The first article is by Al Roberts, who has recently moved from Queen's University in Canada to head up the Campbell Public Affairs Institute at Syracuse University, New York — an interdisciplinary research organisation. His article looks at the operation of information rights involving multilateral institutions. Roberts concludes that access rules will be a limited but useful tool for promoting democratisation within the European Union. The level of utility will be less for individual citizens, but potentially increased for non-governmental organisations and media not already privileged with access to information within the European Union.

The second article is by Shane Sody tracing the similarities and differences between two proposals for reform in South Australia. The majority parties have rejected the more radical and innovative of the reforms and even the fate of the less ambitious reforms is uncertain. The Opposition Labor Party in South Australia, most likely with a high expectation of soon occupying ministerial offices, has shown little inclination to improve Fol in that State.

In the 'Recent Developments' section are two reminders of how access to information is always a series of a few faltering steps intermingled with massive backsliding. The UK government has delayed the introduction of Fol for the maximum time possible. The Blair government is set to create a multitude of new records in the perpetuation of secrecy stakes. There was once upon a time when words and commitments uttered in Opposition were seen to be sacred pledges to be honoured in government. Meanwhile the Beattie Labor government in Queensland decides to mothball an excellent discussion paper on Fol and cut straight to the chase by instituting exactly the type of fee regime designed to restrict the use of the legislation.

Last December my Christmas wish was for one of our media moguls to take their fourth estate role seriously enough to think about donating some funds for some serious Fol research and advocacy. I will put that particular Christmas sock back out again this year. Yes Virginia, there is a Father Christmas.

Rick Snell

Multilateral institutions and the right to information

Experience in the European union

The proposition that citizens should have a right to information held by public authorities is now generally recognised within established liberal democracies. Governments in these nations have adopted statutes that enforce a right to information, while courts have become more willing to acknowledge the fundamental character of such a right. Many emerging democracies have entrenched such a right in their fundamental laws. The right to information has become, in the phrase of Sol Picciotto, a 'constitutive principle' for the design of institutions that yield public power.¹ The popular expectation of transparency is now so firmly entrenched that a charge of secretiveness made against a public authority is treated, without further elaboration, as a challenge to the legitimacy of that institution.

In practice, the promotion of transparency has been hindered by recent and dramatic changes in the structure of governmental authority. One problematic trend has been the transfer of governmental functions to intergovernmental forums or new supranational institutions. This problem has two facets. One is the degree of deference that polities have traditionally given to executives in the conduct of intergovernmental affairs. Communications between governments, or internal deliberations about strategy in dealing with other governments, have always been privileged with a high degree of protection under right-to-information laws. The presumption of confidentiality is integral to the ethos of national diplomatic services and engrained in the practices of interstate relations. A second facet of the problem is secretiveness of new supranational institutions. These institutions remain beyond the reach of national right-to-information laws and are often imbued with the habits of secrecy typical of the intergovernmental processes through which they were created.

Anti-globalisation activists have succeeded in exploiting the discordance between growing expectations of transparency and the secretiveness of intergovernmental and supranational institutions. The 'crises of legitimacy' that have afflicted many such arrangements — the World Trade Organisation, the World Bank and International Monetary Fund, the OECD (in its failed attempt to negotiate a multilateral agreement on investment), and negotiating processes for NAFTA and the FTAA — are fuelled by the perception of shadowy dealing behind closed doors. As a consequence, remedies for reform give prominence to the need for openness. 'Increased transparency is essential,' says Joseph Nye Jr, in the project of 'restoring the perceived legitimacy of international governance'.²

How easily will old norms and practices be overcome? The experience of reform within the European Union might seem to give cause for optimism. The institutions of the European Union experienced their own crisis of legitimacy a decade ago, becoming the object of complaints about excessive secrecy comparable to those now made against other supranational and intergovernmental institutions. The EU has responded by adopting treaty provisions and rules to define a right to information held by EU institutions. The right to information was also included in the Charter of Fundamental Rights agreed to by leaders of the EU's member states in December 2000. The steps taken by the EU now seem extraordinary,³ but do they

mark a path soon to be taken by other global institutions — 'the beginning of the end of secrecy as the prevailing norm of international law and international relations'?⁴

Probably not, for two reasons. The accomplishments achieved in the EU are significant but nonetheless limited. In important respects, the diplomatic ethos still trumps demands for access to information. Furthermore this qualified success was attained in circumstances that were — compared to the circumstances surrounding other intergovernmental mechanisms — highly favorable to transparency. There was already substantial convergence in national policies on access to information. Decision rules governing policy formulation within the EU eased the adoption of the new transparency rules. The process of functional differentiation within the EU was relatively advanced, reducing the perceived risks of transparency in some quarters, and creating an influential lobby for transparency within the EU architecture. The explicit acknowledgement in EU treaties of European citizenship also strengthened the case for stronger access rules.

Convergence in national policies

The task of establishing a right-to-information policy for EU institutions was made easier by the commonalities in policies among the EU's member states. This may seem a peculiar assertion, because emphasis is typically given to the divergences in policy within the EU. The divergences are significant; nonetheless, there is a consistency in policy — and in broader political culture — that is sometimes absent in other intergovernmental arrangements.

It is common for commentators to dwell on the 'radical difference' in approaches to official secrecy between EU states.⁵ Broadly a demarcation is drawn between the 'protestant North' — Nordic countries with strong traditions of governmental openness — and the 'Catholic south' — nations with *étatist* political cultures in which political executives and bureaucrats are accustomed to greater power and secrecy.

The differences in national policies on official secrecy are significant, and are evident in the response of member states to requests for information from EU institutions. The lobby group Statewatch tracked the behaviour of member states in Council votes about access to documents and found a clear split, with one bloc (including Sweden, Denmark and Finland) usually voting for access, and another (including France, Germany, Italy and Spain) usually voting against.⁶ The same blocs often joined as parties to litigation before the European Court of Justice on access disputes. In the *Hautala* case, for example, Finland and Sweden called for broader access, while France argued against. The Dutch government also initiated two prominent cases against EU institutions on its access to information policy.

The EU's access rules were crafted to accommodate more secretive governments — which created a conflict with the standards of more open governments that could be exposed by activists. In 1995 a Dutch court ruled that EU documents held by the Dutch Finance Ministry were not accessible under national law, and could only be obtained by making a request to the EU Council itself under its more rigorous rules. Another case, *Svenska*

Journalistförbundet, began when Swedish journalists requested the same set of 20 documents from Swedish authorities and the EU Council. The case seemed to confirm fears about the conflict in standards: while the Swedish authorities released 18 documents, the EU Council released only two.

However, the significance of national attitudes toward openness can be exaggerated. There were also strong commonalities in national policies that were not evident in other international forums. At the time of adoption of the Amsterdam Treaty, 10 of 15 member states had laws acknowledging a right of access to information. An eleventh state, Ireland, would have a law come into force in 1998, while the new Labour government of the United Kingdom had promised to adopt a new freedom of information law as part of its program of constitutional reform. Germany had no national right-to-information law, but there were active movements to adopt comparable laws within its *Bundesländern*. Germany and the remaining two states — Austria and Luxembourg — also acknowledged a narrower right of access to records for individuals who were the subject of administrative decisions. Furthermore all of the EU member states would shortly become signatories of the UNECE Convention on Access to Information, which obliged governments to adopt legislation assuring a right of access to environmental information held by public authorities.

There is, as an Advocate General of the European Court of Justice has observed, a strong convergence in national laws, which made agreement on a comparable policy for EU institutions more probable. In other venues — such as the World Trade Organisation — agreement must be reached with nations that have no similar domestic policy. Indeed, they may lack even the more basic foundations of administrative law, or the political preconditions (such as mass enfranchisement and a strong non-governmental sector) for the adoption of a similar policy. In these circumstances the adoption of a transparency policy to govern intergovernmental arrangements would be substantially more difficult.

Favorable decision rules

In other venues, progress in adopting access to information policies has been stymied by unfavourable decision rules. Within the World Trade Organisation, for example, comparable policy requires consensus among member states. This gives an effective veto to states that are hostile to greater transparency. In the EU, however, the availability of well-established procedures for delegated rule-making have permitted progress on transparency notwithstanding the ambivalence of some member states.

This was evident during the negotiation of the Treaty on European Union (TEU). Member states could not achieve unanimity on the Dutch proposal to entrench a right of access to information within the TEU. However, alternative processes — designed to allow the adoption of internal rules of procedure by EU institutions — allowed progress nonetheless. Procedural rules for the Council could be adopted by a simple majority of member states, while rules for the Commission required only a majority of Commissioners. The procedure was imperfect: it gave heavy influence to the General Secretariats of the Council and Commission, and no role to the European Parliament, which was more sympathetic to access. The Dutch government launched an unsuccessful court challenge to the process after its own more substantial

proposals were shunted aside. The deficiencies of the process were revealed again in August 2000 when the Council adopted the Solana decision by majority vote. Nevertheless, it remained true that the Council and Commission had made greater progress than would have been possible if unanimity had been required on new access rules.

Member states employed a similar strategy in dealing with disagreements over transparency during negotiation of the Amsterdam Treaty. They eschewed the detailed language in the treaty regarding the right of access to documents that had been proposed by Sweden, again preferring to delegate the responsibility for developing details of the policy. But in 1997 the process of delegation varied significantly, invoking 'co-decision' rules that required the assent of the European Parliament to a new access policy. The empowerment of the Parliament in this way ensured that the regressive proposals put forward by the Commission in January 2000 were not included in the regulation finally adopted in May 2001.

Functional differentiation

The adoption of access rules has also been aided by the fact that the process of functional differentiation within the EU is relatively advanced when compared to other inter-governmental mechanisms. This process of differentiation is not so advanced as it is within national or subnational levels of government, where the discrete functions of governance — legislative, executive, adjudicative and advocative — are typically assigned to discrete institutions. Nevertheless, it is more advanced than in many other multilateral institutions. This fact makes it easier to adopt access rules for some less sensitive functions, and incidentally creates centres of advocacy for stronger access rules.

The position of the EU can be better understood by contrasting it with another mechanism for transnational governance, the World Trade Organisation. Within the WTO, the functions of governance are still largely conflated. One body — the General Council — makes policy; oversees the implementation of policy; and adjudicates disputes over policy. The WTO secretariat is weak. Responsibility for policy formulation and enforcement actions still rests with member states. In such circumstances, transparency is hard to attain. Every decision becomes an opportunity for interstate negotiations in which the range of potential outcomes is not clearly bounded and the stakes are consequently substantial. Under these circumstances states would be more ambivalent about abandoning traditions of confidentiality.

In the process of segmenting and delegating functional responsibilities, EU member states have constrained their own capacity to reshape decision points into venues for renegotiation of rules. They have also narrowed the range of potential outcomes from decisions. The work of institutions holding specific functional responsibilities becomes routine, and the risks of transparency are consequently reduced. By contrast, when functions are not fully separated — as in the case of comitology committees, where the business of rulemaking and rule enforcement is still conflated — the stakes for member states are substantially higher, and the willingness to tolerate transparency ebbs.

Functional differentiation also produces an institutionalised lobby for transparency within the EU architecture. The European Parliament is an important component of

this lobby. The authority of the Parliament has grown substantially after the adoption of the TEU and Amsterdam Treaty. The emergence of an institutional culture that emphasises Parliament's role as a counterweight to the Council and Commission has been as important as the growth in formal powers. This emphasis on the 'watchdog role' of Parliament leads naturally to an emphasis on access to information about the internal operations of the other institutions. The controversy leading to the resignation of the Santer Commission in March 1999, which included disputes about the right of parliamentary investigators to review internal documents, reflected and reinforced the watchdog culture. Distaste with the 'secretive and authoritarian culture' of the Commission encouraged parliamentarians to press the Prodi Commission for stronger rules on access to documents.⁷

Another prominent advocate of openness within the EU architecture has been the European Ombudsman, a role created by the TEU. The position is distinctive within the EU because it is filled entirely at the discretion of the European Parliament. The ombudsman role is a Nordic innovation and its first incumbent, Jacob Söderman, had previously served as Finland's Ombudsman. After his appointment in 1995, Söderman 'attacked secrecy in the EU with missionary zeal'.⁸ The Ombudsman's function is to investigate complaints of maladministration. Söderman defined access to information as a principle of good administration and on that foundation produced several reports criticising secretive practices within EU institutions. Söderman also developed close relations with parliamentarians and helped to articulate concern about the weaknesses of EU policy on access to documents. His office lobbied for the inclusion of a commitment to transparency in the Charter of Fundamental Rights adopted by member states in December 2000.

In addition, the European Court of Justice has played an important role as a force for openness. Its most obvious function has been to ensure the enforcement of rules adopted by the Council and Commission. However, the Court's judgments have also aided in entrenching the right to information in popular consciousness. It has consistently applied a presumption of openness in disputes about the interpretation of EU policies on access to documents. In the 1996 case *Netherlands v Council*, the Court noted the 'progressive affirmation' of the right to information among member states, and in a series of subsequent cases came closer to identifying the right to information as a basic democratic right. Deirdre Curtin has called this 'creeping constitutionalisation' of the right to information.⁹

The role of the European Court of Justice in entrenching the right to information was enhanced by the distinctive structure of the court itself. Unlike the judiciaries of many member states, judges of the European Court are aided by special officers — Advocates General — whose function is to provide independent submissions on matters before the court.¹⁰ Advocates General have pushed the Court to take more aggressive stands on the right to information. Three years before adoption of the Amsterdam Treaty, Advocate General Giuseppe Tesaurò argued that the Court should acknowledge that the right to information was implied in the terms of the TEU. The opinion was widely cited by advocates of transparency. A more recent opinion by Advocate General Phillipe Léger has also pushed for stronger protection for the right to information.

European citizenship

Finally, the cause of reform was aided by the entrenchment of the concept of European citizenship. In other circumstances, calls for increased transparency have been rebuffed with arguments that member states alone have the standing to claim a right to information. Individuals or non-governmental organisations, it is argued, may have an interest in the work of supranational bodies, but no formal relationship from which rights or obligations might be inferred.

The capacity of EU member states to resist calls for transparency in this way is restricted by their acknowledgement that citizens of member states may be 'citizens of the Union' as well. This recognition (in the TEU) forestalls challenges to the standing of individuals or non-governmental organisations. Furthermore, it leads naturally to an effort to elaborate on the concept of citizenship, by defining the rights and obligations that are implied when citizenship is acknowledged. The new Charter of Fundamental Rights, which includes a right to information, represents a recent and explicit attempt to elaborate upon the implications of European citizenship. Even before the adoption of the Charter, however, advocates of transparency had used earlier commitments on European citizenship to justify demands for access to documents.

Does it matter?

In sum, right-to-information advocates within the EU have achieved only partial success, and this under circumstances much more favorable than those confronting advocates interested in other intergovernmental or supranational institutions. The EU architecture is relatively sophisticated, providing many points of influence for advocates of transparency. Furthermore there is an emerging mode of discourse that favours access rights. Nevertheless, the diplomatic ethos — and norms about the confidentiality of interstate communications — continue to exert a heavy influence on rules about access to documents.

These new access rules have been promoted as a tool for improving public trust in EU institutions. However, there is good reason to doubt whether new access rules could have such an effect on public opinion. It is true that the adoption of this new policy brings core EU institutions closer to conformity with the 'constitutive principles' that (according to conventional wisdom) should regulate the structure of governing institutions. On the other hand, critics can point to the substantial limitations in the policy, and also use new access rules to obtain fuel for broader public debate about the conduct of EU institutions in addressing contentious issues. This broadening of policy debate could easily lead to an erosion of respect for EU institutions.

There is a second reason why access rules may play only a limited role in restoring trust. Current policy does not apply at all to the processes by which the most basic decisions about the structure of the Union — what Hoskyns calls 'constitutive decisions',¹¹ embedded in the text of EU treaties — are made. Complaints persist about the closed and secretive character of EU treaty negotiations. Secrecy of this sort — rather than secrecy in lesser legislative and administrative tasks — may be most corrosive of public trust. On the other hand, it is precisely in this context that states may be most ambivalent about transparency and reluctant to abandon conventional diplomatic practices. Negotiations may be too loosely

structured, and the risk of adverse outcomes too great, for states to be tolerant of greater openness.

In short, the relationship between transparency and institutional legitimacy is complex, and the supposed correlation between the two phenomena largely unsubstantiated. This does not mean that a case for increased transparency cannot be made. Access rules can still be justified as a tool for promoting democratisation within the EU. They are likely to do this, not by empowering individual citizens, but by empowering non-governmental organisations and media not already privileged with access to information as a result of their proximity to decision makers in Brussels or Strasbourg. By levelling the barriers to entry that surround the policy process, access rules could produce a healthier — if not happier — Union.

ALASDAIR ROBERTS

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This is a short excerpt from a longer paper that will be published in *European Public Law* in 2002. For concision, endnotes and some citations have been removed from this excerpt. Professor Roberts' web address is <<http://www.aroberts.ca>>.

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South Australia: A Tale of Two Fol Bills

Long-awaited reform of South Australia's Fol legislation is finally on the horizon. After several years of inquiry, two separate Bills, reflecting two different reform packages, were before the State parliament at the same time in 2001. One of the two Bills represented a radical departure from the existing norms of Fol legislation in Australia. However, an imminent election may delay or thwart any reform in the short to medium term.

The political and parliamentary context

Introduction of two Bills

In February 1997, the South Australian parliament's Joint Standing Legislative Review Committee (the LRC) was asked to report on the operation of South Australia's *Freedom of Information Act 1991* (the *Fol Act*). More than three and a half years later, on 4 October 2000, the LRC's report was finally tabled in parliament.¹ The six members of the LRC, drawn from three political parties, (Liberal, Labor and Democrat) unanimously recommended a new Act, modelled on New Zealand's *Official Information Act 1982*.

Because the LRC's report had been anticipated for so long, the reaction on the floor of State parliament was swift. One week after the report had been tabled, on 11 October 2000, one of the members of the LRC, (Australian Democrats MLC Ian Gilfillan) introduced a private member's Bill. Mr Gilfillan's *Freedom of Information Bill 2000* (the LRC Bill) adopted in its entirety the draft Bill recommended in the LRC report.² On the same day, an independent (who was not a member of the LRC) Nick Xenophon MLC, also moved a Bill, identical in every respect to the LRC Bill moved by Mr Gilfillan. Mr Xenophon later gave his support to the Bill moved by Mr Gilfillan.

On 25 October 2000, the Liberal member for Colton, Steve Condous spoke in the House of Assembly in support of the LRC's recommendations, and on the same day the Committee's chair, Liberal Angus Redford did

likewise in the Legislative Council, while formally moving to note the LRC's report.

However, despite the tripartisan nature of the LRC's recommendations, and the speeches in parliament of its own backbenchers, the South Australian government found itself unable to support many of the Committee's recommendations, or the LRC Bill. On 15 May 2001, Administrative Services Minister, Robert Lawson, MLC, wrote to Mr Redford, formally responding to the LRC's report, and rejecting the LRC's recommendation for a new Act.³

Mr Lawson followed up on 25 July 2001, by introducing a rival Bill, the *Freedom of Information (Miscellaneous) Amendment Bill 2001* (the government Bill) which would, if enacted, address some of the concerns raised by the LRC, by amending the *Fol Act*.

The next day, on 26 July 2001, Mr Lawson spoke to the LRC Bill, formally opposing it, but suggesting that both the LRC Bill and the government Bill ought to lie on the table over the parliamentary recess in August and September, for consultation. The LRC Bill that day (26 July) passed its second reading stage. However, after the resumption of parliament in September, the LRC Bill was defeated, without further debate, on 3 October 2001.

This left only the government Bill remaining on the parliamentary notice paper. Mr Gilfillan indicated in late October 2001 that he intended to move amendments to the government Bill, in an attempt to resurrect some of the features of the defeated LRC Bill.

Political turmoil

Thus, at the time of writing, the final shape of any amendments to the *Fol Act* remained unclear. The prospect of reform was further clouded by the turmoil in the governing Liberal Party, and the proximity of a State election. Within a period of 15 days in October 2001, the Premier, a Minister, and the Cabinet secretary all resigned. One of those who quit on 4 October was the former Tourism Minister Joan Hall, who had been criticised by the Auditor General

for her handling of the controversial Hindmarsh Soccer Stadium for the 2000 Olympics. Some months earlier, an FoI application for documents concerning the soccer stadium was refused. A Ministerial certificate (the only one issued in 1999/2000) had declared that the relevant documents were restricted and exempt under s.46 of the *FoI Act*.

South Australia's four-year State election cycle concluded on 11 October 2001. An election must be called no later than 20 April 2002.

FoI applications up

There is an increasing interest in FoI in South Australia. The latest annual FoI report reveals a 17% increase in the number of FoI applications (up to 7958) an increase (from 13% to 17%) in the number of applications which were wholly or partially refused, and an increase in the number of exemptions claimed by agencies (up from 747 to 1246).

Although most of the increase in applications, and the increased rate of exemptions claimed are attributable to requests for documents affecting personal affairs, there is also growing interest in high-level government decision making. In 1999/2000, for instance, the number of exemptions claimed for Cabinet documents rose from 3 to 24.

Reforms common to both Bills

The government Bill was introduced to the Legislative Council more than nine months after the LRC Bill's introduction. The government and the Parliamentary Counsel therefore have taken the opportunity to adopt, in some clauses, the same or similar wording that was used in the LRC Bill.

Local government

At present, councils are not 'agencies' for purposes of the *FoI Act*. Local government has a separate, though similar, scheme of FoI operating under Part VA of the *Local Government Act 1934*. Both the LRC Bill and the government Bill sought to bring local government under the umbrella of the one FoI statute, by fitting councils under the definition of an 'agency'.

Shortening of time limits

Both Bills sought to reduce the time limits in which agencies must respond to FoI applications. At present, the limit is 45 days. The LRC Bill proposed⁴ 'not later than 20 working days'. The government Bill proposed⁵ 'within 30 days'.

Extension of time limits

Both Bills would have permitted the proposed new shorter time limits to be extended 'for a reasonable period of time having regard to the circumstances'. That is, if a request is made for a 'large quantity of official information'. This option was to have been invoked by a 'principal officer' (under the government Bill) or a 'Chief Executive' (under the LRC Bill) sending a notice to an applicant, setting out the period of the extension, the reasons for the extension, and specifying rights of appeal against the extension of the time limit.

The Law Society of South Australia has warned that under these proposed arrangements 'there is a danger that the issue of such notices will become routine'.⁶ Official

figures indicate only 51% of FoI applications are processed within 30 days, and 19% are not processed within 45 days.⁷

The differences

There are major differences between the Bills, reflecting Minister Robert Lawson's view that 'since it came into operation on 1 January 1992, the *FoI Act* has been successful'.⁸

Objects of the Bill

FoI legislation is said to be based on two conflicting principles: access to information, and restriction of official information.⁹ In the Objects of the *FoI Act* (at s.3) access to official documents held by the government is 'subject only to such restrictions as are reasonably necessary for the proper administration of the Government'.¹⁰

The only amendment which was proposed by the government Bill to s.3 was a minor provision, consequential upon the inclusion of local government in the scheme of the Act.

The LRC Bill, in contrast, provided, as the third of its three Objects, 'to protect official information to the extent consistent with the public interest and the preservation of personal privacy'. The different wording begs the question of what ought to be paramount in FoI legislation. Should it be 'the public interest' or should it be 'the proper administration of the Government'?

It is not difficult to imagine an FoI application for official documents, the release of which would be 'in the public interest', notwithstanding that such a release may interrupt 'the proper administration of the Government'. If the processing of such a request involved a consideration of the Objects of the legislation, then it is likely that such a request would be denied under the *FoI Act*. Under the LRC Bill, the opposite result would have been likely.

Exempt agencies

Both Bills would have maintained a list of 'exempt agencies', which are immune from the respective FoI statute. The LRC Bill sought to reduce the number of exempt agencies by two. It would have omitted from the list in the *FoI Act*, 'the Parole Board', and the Police 'Operations Planning and Intelligence Unit' which is now defunct.¹¹

In contrast the government Bill sought to *increase* the number of exempt agencies by two, by including the Motor Accident Commission, and 'a Minister of the Crown in respect of the administration of the former South Australian Development Fund or the Industry Investment Attraction Fund (or a fund substituted for the Industry Investment Attraction Fund)'.¹²

Universities

Both Bills would have perpetuated the present anomaly under which all three Universities in South Australia are exempt from FoI legislation. The LRC Bill would have adopted the same definition of 'agency' used in s.4 of the *FoI Act*, under which universities do not fit because they do not include on their governing bodies 'a Minister of the Crown or a person or body appointed by the Governor or a Minister of the Crown'. The government Bill sought to amend this definition of an 'agency', but nevertheless specifically named all three Universities in its list of 'exempt agencies'.

Restriction of information

The two Bills had different conceptual approaches to the method of determining whether information ought to be released, or withheld.

Under the government Bill

The government Bill did not seek to alter the present approach of the *FoI Act*. That is, it proposed relatively minor amendments to Schedule 1 of the Act. Schedule 1 of the Act contains a long and complex list (comprising 21 clauses spread over seven pages of the Act) of categories of documents which are exempt, by virtue of the fact that they 'contain matter the disclosure of which' would cause or 'could reasonably be expected to cause' various kinds of unwelcome consequences. These consequences include 'damage to relations between [governments]';¹³ 'prejudice [to] the competitiveness of the agency in carrying on ... commercial activities'¹⁴ or 'an adverse effect on the agency ... on whose behalf ... research is being ... carried out'.¹⁵

Apart from amendments merely consequential upon the inclusion of local government, the government Bill sought to make four amendments of substance to Schedule 1:

- Rewriting the exemptions affecting 'law enforcement and public safety'. The proposed new wording of cl.4 of Schedule 1 would have removed the presently existing public interest balancing test concerning documents which might 'endanger the life or physical safety of any person', prejudice a fair trial, or 'facilitate an escape from lawful custody'.
- Inserting a new 'personal affairs' exemption to 'protect' the 'welfare' of persons 'presently under the age of 18', or persons 'suffering from mental illness, impairment or infirmity'.¹⁶
- Inserting a public interest balancing test into the present exemption for documents affecting business affairs.¹⁷ The absence of such a test in South Australia's *FoI Act* is unique in Australian jurisdictions and has been previously criticised as anomalous, permitting exemptions to be claimed whenever any effect on business affairs (even a 'slight' effect) may be discerned.¹⁸
- Inserting a public interest balancing test into the present exemption for documents affecting the conduct of research.¹⁹

Under the LRC Bill

In contrast, the LRC Bill had only four clauses (covering only three pages of the Bill), which were relevant to a decision about whether information 'is to be made available'. Three clauses stated relevant general principles, and a later fourth clause listed a series of exceptions under which a request for information 'may be refused'.

The scheme started at cl.8 with a concept (novel in Australian jurisdictions) of 'good reason for withholding':

Principle of availability

8. The question whether any official information is to be made available, where that question arises under this Act, must be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information must be made available unless there is good reason for withholding it.

This clause was followed with the two key operational clauses, 9 and 10, which provided respectively '**conclusive** reasons for withholding official information' and

'**other** reasons for withholding information' (my emphasis).

Conclusive reasons for withholding official information

9. Good reason for withholding official information exists, for the purposes of Section 8, if the making available of that information would be likely —

(a) to prejudice the entrusting of information to the Government of South Australia on a basis of confidence by —

(i) the Government of the Commonwealth or of a State or Territory of (ii) the Commonwealth; or

(iii) the government of another country or an agency of such a government; or

an international governmental organisation; or

(b) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(c) to endanger the safety of a person; or

(d) to damage seriously the economy of the state by disclosing, prematurely, decisions to change or continue Government economic or financial policies relating to —

(i) taxation; or

(ii) the borrowing of money by the Government of South Australia; or

(iii) the stability, control or adjustment of prices of goods, services or rents, or other costs, or rates of wages, salaries or other incomes.

This Clause was followed by cl.10, which listed 'other reasons for withholding official information'. In contrast to the 'conclusive reasons' of cl.9, the list of 'other reasons' in cl.10 were to be subject to a public interest balancing test, expressed in these terms:

Other reasons for withholding official information.

10. (1) Where this section applies, good reason for withholding official information exists, for the purposes of Section 8, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that informational available.

There followed, in sub-clause(2), provisions relevant to protecting:

- 'the privacy of natural persons';
- trade secrets, or the commercial position of a person;
- 'obligations of confidence', where relevant to the future supply of information in the public interest;
- measures for public health and safety;
- the 'substantial economic interests of the State';
- 'measures that prevent or mitigate material loss to members of the public';
- the maintenance of 'constitutional conventions' such as individual and collective Cabinet responsibility;
- 'the effective conduct of public affairs';
- legal professional privilege;
- agencies' commercial activities and commercial negotiations;
- the use of official information for improper gain or improper advantage.

Apart from these three clauses, cl.21 would have additionally permitted 'refusal of requests' in circumstances where, for example 'the making available of the information' would be 'contrary to the provisions of a specific enactment' or 'but for any immunity of the Crown, constitute contempt of court ... or infringe the privilege of Parliament'. Clause 21 also would have allowed 'refusal of requests' where (to preserve the intentions of cl.9 and 10) an agency may 'refuse to confirm or deny the existence or non-existence of the information requested' or where information 'will soon be publicly available'; or

where it 'cannot be made available without substantial collation or research' or where 'the request is frivolous or vexatious or ... the information requested is trivial'.

On balance, the scheme envisaged by the LRC Bill encompassed fewer grounds for withholding information. Of the various 'good reasons' listed for withholding information, many (most notably Cabinet documents) were to be subject to a 'public interest' balancing test which is not relevant to decisions made under Schedule 1 of the *FoI Act*. However, neither Bill sought to adopt the proposal of a 'general public interest over-ride' test, which is part of equivalent legislation in New South Wales²⁰ and Victoria,²¹ and which has been previously recommended by the Ombudsman.²²

Ministerial certificates

The *FoI Act* (at s.46) provides for Ministerial certificates, the issue of which is to be taken as 'conclusive evidence' that a document is 'restricted' under Schedule 1. Part VA of the *Local Government Act 1934* provides for the same type of certificates to be issued by the Mayor, or chair of a council.

The 'propriety' of such a certificate is not to be questioned in external review by the Ombudsman or Police Complaints Authority.²³

The government Bill proposed to widen this concept, and make the option of issuing a certificate available also to 'an agency which is not a State Government agency'.²⁴

The LRC Bill did not utilise the concept of 'certificates' other than during external review by the Ombudsman. At that point, the LRC Bill would have permitted only the Attorney-General to 'certify' that the 'making available of any information would be likely to prejudice the prevention, investigation or detection of any offences'. Such certification would then prevent the Ombudsman recommending that the information be made available by the agency.²⁵

Training and accreditation

Both the LRC Bill and the government Bill accepted the need for officers handling *FoI* applications to be trained for the purpose. Both Bills would have required the Minister to develop 'appropriate training programs to assist agencies in complying with this Act'.²⁶

However the government Bill went further in this regard. In a proposed amendment to s.4 of the Act, it introduced the concept of an 'accredited *FoI* officer' who was proposed to be either 'the principal officer of the agency' or a person in an 'executive position' who 'has completed training of a type approved by the Minister for an accredited *FoI* officer'.

Under the government Bill's proposed amendments to s.14 of the Act, *FoI* applications were to 'be dealt with on behalf of an agency by an accredited *FoI* officer of the agency'.

Internal Review

The LRC Bill proposed to entirely abolish internal review of an *FoI* determination. The intention of this reform presumably was to ensure that decisions at first instance were taken by a relatively senior officer, with a view to the risks of an external review, and to speed the process of reaching a final determination in disputed cases.²⁷

The government Bill proposed no change to the current system of internal review, under s.38 of the Act. Minister Robert Lawson argued:

Internal review processes are a positive component of the current *FoI Act* and they should be retained. Statistics from the last reporting year show that just over half of the applications for internal review actually resulted in the initial application being varied in some way. The internal review process is a cost-effective method of review, which reduces reliance on external review mechanisms.²⁸

External review

The *FoI Act* presently provides for two forms of external (merits) review. An aggrieved applicant may choose to take an application to either the Ombudsman/Police Complaints Authority (whichever is relevant) under Section 39, or to the District Court under s.40. An applicant may also choose to pursue both forms of merits review in succession. However, a District Court appeal is not an option available to an agency. There is no time limit in the Act for instituting a s.39 review. External review by the Ombudsman or PCA can end with a 'directed determination' to an agency, which is always observed, although neither the Ombudsman nor PCA has any legislative power to require compliance with such a determination. These external review provisions in the *FoI Act* have been criticised by the Ombudsman as promoting 'confusion and uncertainty'.²⁹

The government Bill did not propose to remove this double jeopardy for an agency. It did, however, propose to insert a 30-day time limit for an applicant to institute a s.39 review, and proposed a new sub-section 39(3b) requiring the parties to co-operate in reaching a negotiated settlement. In addition, the government Bill proposed a new s.39A which would permit an agency to appeal to the District Court against a 'directed determination' arising from a s.39 review, but only on 'a question of law'. In such circumstances, the Court must 'order that the agency pay the respondent's reasonable costs'.

The LRC Bill sought to remove the jurisdiction of the District Court to hear merits reviews. It also sought to remove the jurisdiction of the Police Complaints Authority, thereby assigning all external reviews (even over applications for police information) to the Ombudsman. Although the PCA made no submission to the LRC's review of the *FoI Act*, there is no argument supporting this proposed reform in the LRC's report. Omitting the PCA from the LRC Bill may have been an oversight.

Like the present *FoI Act*, the LRC Bill would also have prevented any appeal by an agency against the Ombudsman's recommendation. Rather it imposed a strict public duty on an agency or a Minister to comply with a recommendation of an Ombudsman within 21 working days 'unless, before that day, the Governor, by regulation, otherwise directs'.³⁰

Thus, under the LRC Bill, the only method open to the government, to seek to overturn a review recommendation of the Ombudsman, would have been for the Governor to make a regulation. That regulation (unless overturned by either House of parliament under the *Subordinate Legislation Act 1978*) could have been challenged by an aggrieved applicant in the District Court, solely on the grounds that 'the regulation was beyond the powers conferred by section 36 or was otherwise wrong in law'.³¹

Outsourced government functions

The *FoI Act* does not apply to any private sector agencies, carrying out functions which have been contracted to them by government. In recent years, many functions previously carried out by the South Australian State

government have been contracted out, or are managed by privately owned companies. Water, sewerage, and electricity supply are the most prominent examples.

The LRC Bill therefore provided:

Information held by an independent contractor engaged by an agency in the contractor's capacity as such contractor, will, for the purposes of this Act, be taken to be held by the agency.³²

The government Bill did not address this issue at all. Minister Robert Lawson suggested that this provision might not have been consistent with National Privacy principles, and might have conflicted with the LRC's broad support for 'the confidentiality of private financial information'.³³

Reasons for refusal

The *Fol Act* obliges an agency refusing an FoI request to give the reasons for such a refusal, and 'the findings on any material questions of fact underlying the reasons for the refusal'.³⁴

The LRC Bill (at cl.22) was not so generous with the provision of reasons to unsuccessful applicants. It would generally have required an applicant to be given the reasons for a refusal, but not in circumstances in which the agency was entitled under cl.11 to neither confirm nor deny the existence or non-existence of the information sought.

The provisions of the government Bill extended an applicant's rights in this regard. The government Bill would have required an agency to give not only the reasons for a refusal, but also (where applicable) the reasons why release of the document would be 'contrary to the public interest'.³⁵

Protection for staff and agencies

The *Fol Act* offers protection for staff and agencies making a determination to release a document, and authors of documents. Section 50 provides that 'no action lies' against them for breach of confidence or defamation.

The government Bill would have extended this protection by providing (at cl.14, amending s.19) that nothing prevents an agency from making a determination to release a document, after the statutory time limits for decision have elapsed, and that 'any such determination is to be taken to have been made under this Act'.

The LRC Bill went further in this regard. It did not limit protection merely to breach of confidence or defamation actions. The LRC Bill provided, at cl.46, that no proceedings of any type, civil or criminal, lie against any person in connection with 'official information made available in good faith pursuant to this Act'.

Deemed refusal v deemed consent

The *Fol Act* provides at s.19, that an agency, which fails to determine an application within the time required by the Act, is to be taken to have refused access.

The government Bill made clear, with a proposed amendment to s.19, that such a deemed refusal is for purposes of internal review, and external review.

The LRC Bill, on the other hand, adopted exactly the opposite approach. For purposes of external review by the Ombudsman, if an agency failed to determine an application within the time limit 'the agency will be taken to have granted the request'.³⁶ However an applicant who was placed in this position by an agency's failure to respond would still have faced the practical difficulty of

getting the material from the agency. An applicant would have needed to 'make a complaint to the Ombudsman' if the agency still did not 'make the official information available... within a reasonable time'. The Ombudsman, in assessing such a complaint, would have been required, by cl.31(4)(b) of the LRC Bill, to 'review ... whether the request should have been granted and, if it appears to the Ombudsman that the request should not have been granted, must recommend that the agency not make the information available'.

Thus there would have been little if any difference in practice, under the LRC Bill, between a deemed consent, and an explicit refusal. Unless an agency chose to voluntarily comply with a 'deemed consent', both outcomes would have required a merits review by the Ombudsman.

Summary

The LRC Bill

The LRC Bill proposed as its centrepiece, a concept which was much simpler to understand than the existing *Fol Act*, and which would have been unique in Australian jurisdictions. In cl.8, it set out a short statement of principle, that there needs to be a 'good reason for withholding'. This was followed in cl.9 with a short list of exemptions, and in cl.10 with a longer, though still concise list of categories of information which could be released, if such release was consistent with the public interest. The LRC Bill's reliance on this central concept meant that there was no room in the Bill for the *Fol Act's* device of a 'Ministerial (or Mayoral) certificate' which is presently used to stop some FoI applications proceeding.

The LRC Bill's other major proposed reforms of FoI legislation would have been the extension of the legislation to private companies contracting with government agencies; and the reduction from three possible merits review opportunities (internal review, the Ombudsman or Police Complaints Authority, and the District Court) to just one — the Ombudsman.

The LRC Bill's proposed abolition of the present role of the Police Complaints Authority in external review was put forward without any explanation or rationalisation. The LRC Bill also could be said to be flawed because it failed to include universities in its definition of 'agencies'; and because of its endorsement of what would be, in practice, the token concept of 'deemed consent'.

The government Bill

The government Bill adopted some of the recommendations of the LRC's 2000 report, and the LRC Bill. However it discarded other suggestions, and sought to extend (potentially, at least by regulation) to more agencies, one of the most controversial measures by which a document may be prevented from being released, that is, by issue of the s.46 'conclusive evidence' certificate.

Although the government Bill proposed new 'public interest' balancing tests for two clauses of the Act's Schedule 1, it did not attempt to reduce the complexity or the overall wide scope of the Schedule 1 exemptions.

It would have permitted the present three-layer system of merits review: (internal review, Ombudsman/PCA and District Court) to continue, adding to the complexity of the appeal process by permitting agencies to appeal (though only on points of law) to the District Court.

On the other hand, the government Bill's proposal to have Fol applications administered only by 'accredited officers' within agencies may have led to better understanding within agencies, of the duties and responsibilities of each agency under the Act.

Conclusion

Although the LRC Bill was flawed in some respects, and needed amendment, the cause of open and accountable government in South Australia would have been advanced if the LRC Bill had received more support in the State parliament. If it had succeeded, even with significant amendments, it could have become a model for new Fol legislation in other Australian jurisdictions.

However the LRC Bill was rejected. At the time of writing it was not clear what, if any amendments to the existing *Fol Act* might emerge from the South Australian parliament. In late 2001, minor parties and independent MPs held the balance of power in both chambers of the South Australian parliament, with an election imminent. Political events, and/or amendment of the government Bill, might have overtaken this article by the time it reaches print.

Nevertheless, this discussion may be useful as a comparison of two different Bills, as they were introduced to the South Australian parliament in 2000/2001.

SHANE SODY

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References

1. South Australian Parliament: Legislative Review Committee, 'Report Concerning the Fol Act', 15 September 2000.
2. There were minor, immaterial differences between the draft Bill recommended by the LRC in its report, and the LRC Bill which was moved by Ian Gilfillan MLC on 11 October 2000. The differences, suggested by Parliamentary Counsel, mostly clarified technical points, or transferred paragraphs from the Schedule of the Draft Bill, to clauses within the Bill itself.
3. 'Response of the Minister for Administrative and Information Services' to the Legislative Review Committee, 14 May 2001.
4. At cl. 17.
5. At cl.10, amending s.14 of the *Fol Act*.
6. Letter from Law Society president, Martin Keith, to Attorney-General Trevor Griffin, 11 September 2001.
7. Freedom of Information Act Annual Report for the year ended 30 June 2000, pp.14, 15.
8. 'Response of the Minister for Administrative and Information Services' to the Legislative Review Committee, 14 May 2001, p.2.
9. Clark, D. Freedom of Information: A Seminar at the Law Society of South Australia, 16 June 2001, p.3.
10. Section 3(2)(b).
11. The LRC Bill also would have removed the parliament and its officers from the list of exempt agencies, but would have maintained the same effect by providing at cl.5 that 'This Act does not apply to the parliament, an officer of the parliament, or a parliamentary committee'.
12. Clause 35(d), amending Schedule 2 of the *Fol Act*.
13. Freedom of Information Act 1991, Schedule 1, cl.5(1)(a)(i).
14. Schedule 1 cl.16(2)(b).
15. Schedule 1 cl.8(1)(b).
16. Clause 34(g) of the government Bill, amending Schedule 1, cl.6 of the Act.
17. Clause 34 (i) and (j) of the government Bill, amending Schedule 1, cl.7 of the Act.
18. Sody, S., 'A Charter to Withhold Information', (2000) 88 *Fol Review* 53 at 56; and Finn, C. 'Getting the Good Oil: Freedom of Information and Contracting Out', (1998) 5 *AJ Admin L* 113.
19. Clause 34 (k) of the government Bill, amending Schedule 1, cl.8 of the Act.
20. *Fol Act* (NSW) s.52(6).
21. *Fol Act* (Vic) s.50(4).
22. SA Ombudsman *Annual Report* 1998/99, pp.75-8.
23. Section 39(4).
24. Clause 4 of the government Bill (amending s.4 of the *Fol Act*) would have applied this definition to councils and to 'a person or body declared by the regulations to be an agency'.
25. LRC Bill at cl.35.
26. Clause 33 of the government Bill, inserting new s.54A, and cl.41 of the LRC Bill.
27. See Legislative Review Committee 'Report Concerning the Fol Act', p.14.
28. 'Response of the Minister for Administrative and Information Services' to the Legislative Review Committee, 14 May 2001, p.6.
29. South Australian Ombudsman *Annual Report* 1999/2000, p.60.
30. LRC Bill, cl.36(2).
31. LRC Bill, cl.38(2).
32. LRC Bill cl.3(6).
33. 'Response of the Minister for Administrative and Information Services' to the Legislative Review Committee, 14 May 2001, p.8.
34. Section 23(2)(f).
35. Clause 17 of the government Bill, amending s.23 of the *Fol Act*.
36. Clause 31(3) of the LRC Bill.

Recent Developments

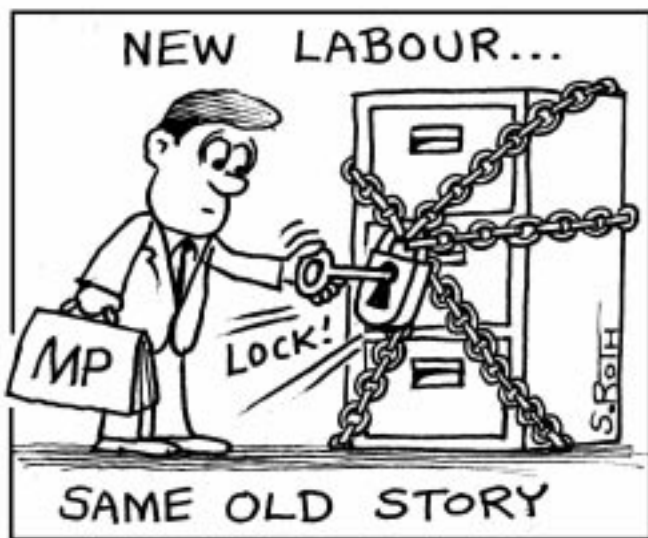
Double blow to freedom of information in the United Kingdom: the view of the UK Campaign for Freedom of Information

On 14 November 2001 the government delivered a double blow to freedom of information in the United Kingdom. The four-year delay in implementing the Freedom of Information Act, which the Lord Chancellor announced, was condemned as 'totally unjustifiable' by the Campaign for Freedom of Information. The Campaign was also deeply critical of ministers' decision to refuse to comply with an open government ruling by the Parliamentary Ombudsman, also announced today — the first time this has ever happened since the code's introduction in 1994.

The Campaign's director Maurice Frankel said: 'Labour has spent 25 years promising freedom of

information — but are now showing how little those promises meant. They are obstructing the Act's implementation — while flouting the existing openness code. Ministers promised that the public would have the right to know, but what they are giving us is their own right to say no.'

The government had intended to phase-in the Freedom of Information Act, starting with central government departments in summer 2002, with other authorities following at intervals. The Information Commissioner, Elizabeth France, who will enforce the Act, has said she believes it would be 'realistic' for central government to comply with the right of access from October 2002, with other authorities following at six-monthly intervals. But the Lord Chancellor has now announced that the right of access will come into force for all public authorities at once, in January 2005 — an enormous delay of more than four years from the Act's passage in November 2000.



The Campaign pointed out that Canada's FoI law was implemented 12 months after it was passed, as was Ireland's. Australia's law came into effect after nine months and New Zealand's after seven months. More than 30 countries have introduced and implemented FoI laws, none of them taking as long as the UK. There is no possible justification for a four-year delay. Even former Soviet bloc countries like Hungary, Poland, Bulgaria, the Czech Republic and Bosnia and Herzegovina have now overtaken the UK by bringing their FoI laws into force.

The Parliamentary Ombudsman revealed that the former Home Secretary, Jack Straw, had refused to comply with one of his rulings under the open government code, introduced by John Major in 1994. The then Home Secretary had been asked by a Conservative MP how many times ministers in his department had declared a private interest which might affect their public functions. The Home Secretary refused citing exemptions in the code which protect the frankness of internal discussions and personal privacy. The Ombudsman found that neither exemption applied, since what had been requested was purely statistical information and would not identify any individual minister or incident. But Ministers overruled him and have refused to disclose the information (see the UK Parliamentary Ombudsman's press release 58/01 of 13/11/01). Mr Frankel said 'no Conservative minister ever refused to comply with an Ombudsman's ruling, and until now no Labour minister has either. For the government to start now shows how determined ministers are to insist on their right to keep secrets.'

In his announcement the Lord Chancellor, Lord Irvine, told peers that the provisions of the FoI Act dealing with publication schemes would be phased in starting in November 2002. Under the Act every authority must produce a publication scheme describing the information which it publishes or intends to publish, and these must be approved by the Information Commissioner. This is a relatively minor aspect of the Act, and is separate from the individual right of access, which will not come into force until January 2005.

For further information see:
<<http://www.cfoi.org.uk/index.html>>.

[Editor's note: The rapidly fading promise of the UK White Paper and the subsequent handling of FoI by the Blair government would have made a perfect script for *Yes Prime Minister*.]

[R.S.]

Chasing the appearance, not the reality of open government in Queensland

The Queensland government has recently introduced processing fees for freedom of information requests arguing that there had been a several million-dollar blow-out in the costs of processing FoI requests over the last several years. At the same time the retiring Information Commissioner took the government to task for using the Cabinet Exemption as a means of avoiding FoI requests.

This article originally appeared as an opinion piece in *The Brisbane Line*, the on-line magazine of the Brisbane Institute. There are a number of articles about FoI and government secrecy in the November 2001 Issue at <<http://www.brisinst.org.au/>>.

The power and potency of FoI is best demonstrated when governments use fees and administrative practices to defeat the objects of the legislation. The Beattie government, despite having a compliant parliament at its beck and call, still feels the necessity to rig the access game and enforce house rules.

Cost recovery of FoI administration is one of the more blatant devices used by governments to deter potential users. The insertion of a \$20 an hour processing fee for FoI requests will put an average FoI request out of the reach of most citizens and community groups. Experience, from other jurisdictions, suggests that applications for non-personal affairs information will decrease by 20-30% overnight. The concession by the *Courier-Mail* that cost recovery is a valid justification for the government's actions misses the central point.

FoI legislation never intended full cost recovery. The intention was to provide to citizens access to information they have already paid for in terms of taxes, fees, charges and other revenue. As the retiring Information Commissioner Fred Albiez noted, it is ironic that the Queensland government is keen to make users pay for FoI but expects its spin doctors, public relations units and fact finding missions to be fully subsidised. While it is prepared to bury the \$9 million dollar plus cost overrun of the Goodwill Bridge (no hint of attempting to recover the full costs of this infrastructure from users), it regards the democratic infrastructure of FoI as an unreasonable impost.

The Beattie government, like previous governments, is happy to reap the democratic dividends that flow from having FoI legislation on the statute books. The *FoI Act* allows the government to maintain that its information practices and treatment of citizens is fundamentally different from the days of the Fitzgerald Royal Commission. Yet when the crunch comes, and there is a need to hide information, the government sees no problem in sending public servants scurrying to collect every last piece of paper to bury the concept of accountability deep in the never never of Cabinet secrecy.

It is a testimony to the democratic and accountability power of FoI that a government is prepared to ignore its own best practice guidelines (its Cabinet Handbook) and flood a Cabinet meeting with the full minutiae of the paperwork associated with a major construction project. The Premier and his Cabinet Budget Review Committee are entitled to use any documentation necessary to try and understand why a major project went so far over budget. Yet to then use this exercise as a means of avoiding

releasing information requested under Fol by the Leader of the Opposition is to make a mockery of the *Fol Act*. Heavy-handed exploitation of exemptions like Cabinet documents has the capacity to cripple the legislation.

Since its inception various Queensland governments have amended and administered Fol legislation as if it was an unnecessary burden on good government. The new fee regime and the continued exploitation of the Cabinet exemption ignores the findings and advice of the Queensland Legal Constitutional and Administrative Review Committee (LCARC) Discussion Paper on Fol released in 2000. The LCARC discussion paper made a number of important suggestions to improve the legislation and Fol administration in Queensland. Those reforms and suggestions now appear to be gathering dust while the government pounces on cost recovery as a means to deter journalists and others from using the legislation.

There has been more than a touch of *Yes Minister* in the way Queensland Ministers and senior public servants have reacted to Fol. When I read the submissions of government agencies to the LCARC review I was struck by a powerful impression. Most departments considered Fol as something they had to tolerate but did not need to fully embrace. The attitude was one that suggested Fol was more a mistake than a necessary foundation for democratic and open government. The reforms these agencies wanted were higher fees, longer processing times (already the longest in Australia), wider exemptions and

the capacity to refuse requests. In other words Fol was like influenza, no cure, but certainly steps could be taken to minimise the risk and discomfort. In terms of fees, the Beattie government has delivered one item on the wish list of agencies. In his final report the retiring Information Commissioner noted:

some of my more profound regrets have been my experiences of antipathy demonstrated towards the Fol Act, and open government principles generally, by some segments of the Queensland public sector (including local government), and the dearth of any sustained leadership from our political or public service leaders supporting the embrace by the Queensland public sector of open government principles.

While the ALP is prepared to pay lip service to the concept of a republic it seems Premier Beattie prefers the government practices of a colonial autocrat. The time has come in 2001 to reconsider whether the occupation of ministerial portfolios is for the interest of the Executive or for the benefit of the people. A limited degree of secrecy is necessary to preserve the fundamental operations of Cabinet. Yet to extend that protection to construction documents devalues the best aspects of our Westminster system. While Joh Bjelke-Petersen would never have tolerated Fol legislation, he would have had few tips to pass onto the Beattie government on how to minimise its impact.

[R.S.]

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Note: We apologise for an error that resulted in issues 93 and 94 having the same page numbers. There should be minimal confusion as long as the issue number is cited along with the page numbers.

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