

Freedom of Information

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Credits

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Comment

The publishing schedule for this year is one that is designed to encourage a more diverse range of topics and analysis of access to information issues and information policy. In this issue of the review we have two different types of articles: one a historical coverage of the antecedents of Fol; and the other a grand overview of the case/tribunal law that has emerged from the New South Wales Administrative Decisions Tribunal. In the following issues we will be publishing an update on developments in Queensland with the release of the Queensland Legal, Constitutional and Administrative Review Committee (LCARC) Report on Fol, an Information Studies analysis of the Official Information Act (NZ), a think piece on the relationship between parliament and Fol in a Westminster system and two studies on the relationship between Fol and whistleblowing (US and the UK).

My aim has been to try and encourage more multi-disciplinary (treating Fol officers as specialists in their own right) and cross-sector analysis of Fol and information policy in general. Stephen Lamble's piece on the history of Fol demonstrates what can happen when you combine disciplines (history and Computer Assisted Reporting — Journalism). His historical investigative piece brings to light new insights and reminds us of a key feature of Fol (the difference made by highly motivated individuals whose focus is on achieving an open and informed community). Peter Timmins' article is a great overview of the leading cases from a new review regime. The overview demonstrates how limiting the paucity of caselaw was for the health of the NSW Fol regime when external review was restricted to the NSW District Court.

Fol reform in Australia is once again on the cusp of promise and disappointment. The Queensland LCARC Report contains many promising ideas and reforms. However the Beattie government gazumped the reform process by arbitrarily implementing changes to fees. In the Northern Territory the period for public submissions on the proposed Information Bill has now closed. The commitment to open government appears to be sincere but a dependency on secrecy seems to have nested into the core of the design of the legislation. In South Australia Fol reform is one of the prices the ALP and Liberal parties seemed prepared to pay to gain support from independent members of parliament. Yet these two political parties turned their backs on the very same reforms towards the end of the last parliament.

There have been a number of unfortunate victims of Australia's 'Children Overboard' saga but from the perspective of information policy and open government the most damage has been done to the Westminster system and the integrity and trust our public institutions (and officials) engender. Australia has stumbled along for several months (including an election campaign with a government in caretaker mode, parliamentary committee hearings and belated, but now sustained, heavy media coverage) where it has not been possible for a clear, concise and accurate

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Freedom of Information, a Finnish clergyman's gift to democracy

Constitutional rights, guarantees of freedom of speech and freedom of the press tend to be thought of as analogous with republicanism and the Constitution of the United States. It is a matter of record that the First Amendment to the United States Constitution — a document guaranteeing freedoms of religion, speech, the press, assembly, and petition — has been seen as a model and a benchmark in other democratic nations. So too, have United States freedom of information laws and its Bill of Rights. In fact many of the nearly 40 nations around the world which have some form of freedom of information (Fol) statute today,¹ have at least partly based their own legislation on the United States model.²

In reality, however, the United States was far from the first nation to enshrine notions of constitutional rights, freedoms and Fol in legislation. To put things in perspective, it needs to be understood that although the United States Constitution is the oldest constitution in the world still currently in force, it was a document of the late-eighteenth century, having been adopted in 1789, the same year as the French National Assembly's Declaration of the Rights of Man and the start of the French revolution.³ The United States Bill of Rights — a collective term usually taken as encompassing the first 10 amendments to the United States constitution,⁴ all of which were designed to protect citizens against the excesses of government — was not ratified until 1791.⁵ The English Bill of Rights, which has been seen as a precursor to the United States legislation,⁶ had gained royal assent a century earlier, in 1689. But even the English legislation, which brought an end to the concept of the divine right of kings and was designed to protect citizens from the unrestrained rule of the monarch by subjugating royalty to the laws of parliament, is 'young' relative to the constitutional history of Sweden which dates from the mid-fourteenth century. Similarly, the concept of freedom of access to government-held information, which was enshrined in law in the United States in 1966, had become a constitutional reality in Sweden, a monarchical parliamentary democracy, two centuries earlier in 1766, a decade before the United States gained its independence from England.

But contrary to accounts published by many influential organisations including the United Kingdom and Scottish parliaments,⁷ the University of Missouri's Freedom of Information Centre,⁸ the Commonwealth Human Rights Initiative⁹ and Privacy International,¹⁰ the history of Fol dates back much further than 1766. The story of how the concepts underlying that ideal actually evolved in China more than 1200 years ago and were encapsulated in legislation from the first decade of the eighteenth century in Sweden is both fascinating and highly significant, not the least because one of the most important aspects of the Swedish legislation was that it linked notions of freedom of information, freedom of speech and transparency of government together with the principle of a free press.

Those links were forged by a truly remarkable Finnish clergyman, Anders Chydenius — a visionary who must be regarded as the true father of Fol as we understand it today. The story of how and why Chydenius created such an important legacy appears to have been largely overlooked in published accounts of the history of Fol. It was unravelled through the extensive use of investigative journalism techniques, particularly those of computer-assisted

reporting. Among the many facts which emerged was an initially surprising revelation that one strand of the evolution of Fol was deeply rooted in Seventh Century China. It was also discovered that the first legislative moves towards freedom of information in any Western nation, and probably the world, occurred in Sweden and Finland (which was part of the Swedish Realm at the time) in 1707. In that year a statute was adopted compelling the publishers of all printed literature to lodge 'legal deposit copies' of everything they produced with government approved libraries.¹¹ While not a freedom of information act in the broad sense of making all government-held documents available to all citizens, it was a very significant forerunner of later laws for three reasons. First, it ensured copies of documents were retained and indexed. Second, one clearly and specifically stated aim of the statute was to ensure that 'publications appearing within the realm would be accessible to the country's universities'.¹² Third, key provisions of the legislation were incorporated into later Swedish laws relating to Fol and press freedom. Ironically, in one sense yet understandably in another, a further object of the statute was to facilitate censorship and the control of printing.

Putting aside the latter point at this stage, the legal deposit legislation had been in force for more than 30 years by the time young Finnish student Anders Chydenius enrolled to study theology, physics, mathematics, natural sciences, Latin, philosophy and theology at Turku Academy in Finland. The son of a Lutheran clergyman, Chydenius had been born in 1729 and had grown up in poor, secluded parishes in the north of his homeland. He matriculated from Turku in 1745, aged 16, then moved to the oldest university in Scandinavia, the University of Uppsala in Sweden.¹³ It is not known if he accessed 'legal deposit copies' of information during his university education, but it is known that Chydenius graduated from Uppsala with a Master of Arts degree in 1753, aged 24. Later that year he married and became a curate in the Lutheran parish of Alaveteli. Among other things he also practised medicine, inoculating 'common people' against smallpox and performing 'demanding cataract operations'.¹⁴ In 1770 Chydenius was appointed minister in charge of his own parish. Around the same time he became deeply involved in economic politics and started publishing pamphlets on related subjects.

In 1765 he joined the Swedish (and Finnish) parliament, the Diet, in Stockholm as a representative of the clergy from his region. A classical liberal and a radical reformist proponent of free trade, he continued publishing. His most widely acclaimed work, the *Den nationella vinsten* (*The National Profit*), which supported absolute free trade in the domestic Swedish economy, was published in 1765. It is a document still regarded as so profound and of such lasting impact that Chydenius is now recognised as being not only far ahead of his time politically as 'a forerunner of modern democracy',¹⁵ but also socially and economically as 'a Finnish predecessor to Adam Smith'.¹⁶ In fact, Smith's acclaimed book *The Wealth of Nations* 'introduced' many of the same ideas Chydenius had advocated 11 years earlier in *Den nationella vinsten* — the difference appearing to be that Smith's work was widely read because it was published in English, while Chydenius's was written in Finnish and therefore had a very limited distribution.¹⁷ (Adam Smith

was a great Scottish economist whose 1776 book on the division of labour, *An Inquiry into the Nature and Causes of the Wealth of Nations (The Wealth of Nations)*, is regarded as one of the most important works ever written. Adam Smith 1723–1790: <<http://www.ebs.hw.ac.uk/EDC/edinburghers/adam-smith.html>>.)

Although Chydenius was virtually unrecognised outside Scandinavia in his lifetime, his philosophies had a huge impact within his own nation. In 1765, for example, he reportedly caused a sensation in the Swedish parliament when he first called for hitherto unheard-of democratic reforms. His main arguments were that deeply ingrained restrictions on trade and occupations should be abolished, censorship lifted, freedom of the press and freedom of information should be ‘rights’ and society should operate on the principles of personal freedom and responsibility for one’s own life.¹⁸ In a memorandum on the freedom of the press published the same year, Chydenius wrote:

No proof should be necessary that a modicum of freedom for writing and printing is one of the strongest pillars of support for free government, for in the absence of such, the Estates would not dispose of sufficient knowledge to make good laws, nor practitioners of law have control in their vocation, nor subjects knowledge of the requirements laid down in law, the limits of authority and their own duties. Learning and good manners would be suppressed, coarseness in thought, speech and customs would flourish, and a sinister gloom would within a few years darken our entire sky of freedom.¹⁹

Incongruous as it seems today in an era of strict government controls on the media in The People’s Republic of China, Chydenius based his campaign for press freedom and freedom of information on the way those freedoms were exercised in pre-nationalist and pre-communist China, a nation he described at the time as ‘the richest kingdom in the world in population and goods’²⁰ and ‘the model country of the freedom of press’.²¹ Yet, for all its wealth and freedoms, China at the time Chydenius was writing pamphlets about it, was a nation ruled by foreigners, the Manchu. Their Ch’ing (Qing) dynasty had gained power in 1644 and it was to persist until 1911. The earlier part of the dynasty, including the era when Chydenius introduced his Fol legislation in the Diet, was a time when the arts, drama and literature flourished in China. It was during the reign of the dynasty’s most successful king, Ch’ien-lung (Qianglong), and was a phase of great prosperity when China also made large territorial gains and its population doubled. Taxes were low, commerce and international trade grew. Encyclopaedias and dictionaries were published, Christian missionaries had been allowed into the country, the public service was educated and highly organised and the impact of the West was being felt for the first time.²²

In one pamphlet in particular, *Berättelse Om Chinesiska Skrif-Friheten, Öfversatt af Danskan (A Report on the Freedom of the Press in China)*, which was published in Stockholm in 1766, Chydenius described how his interest in individual freedoms in China dated back hundreds of years to the Tang Dynasty in the period from 618 to 907 and especially the reign of Emperor T’ai-tsung (Tai Zhong) from 627 to 649. During his 22 years in power T’ai-tsung had restructured the Chinese government. In the process he established an ‘Imperial Censorate’ — an elite group of highly educated ‘scholar officials’²³ who not only recorded official government decisions and correspondence but who were also expected to criticise the government, including the emperor. An institution founded in humanist Confucian philosophy, the

Censorate’s main roles were to scrutinise the government and its officials and to expose misgovernance, bureaucratic inefficiencies and official corruption. In the absence of modern media, it often acted in a public interest watchdog role and as an advocate for common people²⁴ — a tradition that continued until the close of the Ch’ing Dynasty in 1911.²⁵ Chydenius explained how citizens with a grievance against the government were encouraged to literally ‘beat the drum, to be heard’ in the emperor’s ‘castle’ during the Tang Dynasty and how they were ‘given the assurance that nothing would be taken the wrong way’.²⁶ He explained that emperors were expected to ‘admit their own imperfection as a proof for their love of the truth and in fear of ignorance and darkness’.²⁷

It is hardly surprising that Chydenius saw much to admire in the Tang dynasty. It was a high point in Chinese civilization. Among other things, block printing was invented in 868, making printed material widely available.²⁸ It was also a golden age of poetry, literature and art and a time when a public service system developed in which government employees were selected on merit after sitting civil service examinations²⁹ — another aspect of Chinese governance adopted hundreds or years later in Western nations. In another pamphlet, *Källan til rikets wan-magt (The Source of the Nation’s Weakness)*, Chydenius told readers that while China was the richest country in the world, it had no special trade privileges for towns, no differences between urban and rural industry, no fences, no customs taxes, and no navigation act — all things unheard of in Sweden in that era.³⁰

While one can only speculate about how and why Chydenius became interested in China and its checks and balances on government power — possibly during his own academic research — it is highly unusual and a measure of his stature intellectually and politically that he left direct written evidence linking the conceptual framework of his Fol legislation with Chinese prototypes. The rarity of discovering such good evidential primary source material³¹ was highlighted by United States academic and China researcher Edward Kracke (1990) who said that the full extent of Western indebtedness to China ‘must remain obscure’ because:

In most cases we can scarcely hope for evidence to show beyond a doubt whether or not the idea or its application was at some point inspired by Chinese precedent.³²

Fortunately, while Chydenius obviously could not draw on early Chinese society for an exact model of his Fol legislation, there is absolutely no doubt that he was inspired by the precedent of the Imperial Chinese Censorate and its relationship to human rights, individual freedoms and transparency of government. It is also remarkable that he perceived links between the Censorate, Fol and notions of a free press — or, in the latter case, of a total absence of press controls in the China he wrote about.³³ Coincidentally, perhaps, similar connections have been seen and explained in contemporary times by former Georgetown University professor and Asia Foundation Korean representative David Steinberg (1997) who wrote:

The Chinese, and the Koreans emulating the Chinese model, developed an institution that was critical to how power was executed, and institutionally provided some modest exposure to different views within the general Confucian ideological configuration. This was the Imperial Censorate. It was composed of officials who had access to the Emperor, and whose function was to tell the leader when things were right or wrong, when he was being led astray, and when plans or actions

were likely to have deleterious effects or be contrary to moral or established principles ...

[Today] the press has become, perhaps better has the potential for becoming, the equivalent of the Imperial Chinese Censorate which tells the emperor that he is wrong, and that his actions are unconscionable. If the press does not fulfil this function, the country is the poorer for it, and in greater danger. The press is to provide transparency to the processes of decision-making and to the decisions themselves, because bureaucracies generally abhor light, even when upright and responsible.

Without the press, the modern emperor — whether dictator or elected president - is insulated, encapsulated in a cocoon of many who are either sycophants or who are truly awed by those in power. They do not directly question the leader, sometimes because protocol inhibits it, sometimes because of social ostracism. Even in democracies, this may be difficult. The staff may believe they are protecting the leader, but it is a short term service and a long range disservice both to the individual and to the state. So if the Imperial Censorate is gone, and if the press is not free to perform this role, then the arrogance associated with power will grow, reinforced by a supportive wrapping that inflates egos and hides reality.³⁴

Paradoxically, that same 'arrogance associated with power' had bred a degree of laziness among those who opposed Chydenius's reforms. The actual process by which he managed to introduce Fol to Sweden and Finland therefore became something of an entertaining case study in political manipulation. It was described in an edited extract from *The Biography of Finland* as follows:

Chydenius and other radicals saw the necessity of improving the political competence of a broad cross-section of the population, consequently adopting the notion of freedom of the press with great zeal. Chydenius' memorandum on this matter in 1765 was signed by an elderly representative of the clergy. Furthermore, the radicals succeeded in making Chydenius a member of a parliamentary committee dealing with the freedom of press issue, and he became its most outspoken member in the winter session of 1765→66.

The conservatives had a majority in the committee, but since they were extremely lazy about participating in the meetings, the freedom of press supporters could handle the planning stage almost by themselves. Most of the work was done by Chydenius, with enormous industry and competence. The conservatives could not find tenable arguments against him in the big deputation revising the committee report. In its final recommendation in spring 1766 the freedom of press committee suggested abolishing censorship on other than religious articles, which would be subject to cathedral chapter control. The committee also suggested giving the public free access to all official documents as well as parliamentary committee reports and records. The conservatives did not succeed in voting these propositions down. In autumn 1766 the parliamentary majority ... approved the propositions ... Thus the Freedom-of-Press and the Right-of-Access to Public Records Act came into force at the end of the year, and Sweden had acquired the most progressive freedom-of-the-press law in the world.³⁵

Chydenius was later reported as saying he believed that the passing of the Freedom-of-Press and the Right-of-Access to Public Records Act was one of his greatest achievements.³⁶ The Act granted all citizens a right of access to all government-held documents. It required that official documents should 'upon request immediately be made available to anyone making a request' at no charge.³⁷ In the same year it ratified the Fol statute the Swedish parliament also passed legislation establishing the position and defining the role of the world's first Parliamentary Ombudsman.³⁸ That was 23 years before the United States Constitution was adopted and 25 years before ratification of the First Amendment to that constitution.³⁹ Unlike the Swedish legislation, however, neither the United States Constitution nor its first amendment provided for freedom of access to government-held documents or for an ombudsman.

Because Sweden was the first nation in the world to enact specific libertarian legislation based on concepts of press freedom, freedom of information and the role of an ombudsman, it is instructive to look beyond Chydenius and examine the Swedish experience in a wider context. According to the official Swedish Parliamentary Web site, 'The Riksdag in Swedish Society',⁴⁰ the nation entered what is now known in Swedish history as 'The Age of Liberty' after the death of King Carl XII in 1718. New constitutions which were broadly based on the concept of parliamentary rule and influenced to some extent by the philosophies of John Locke⁴¹ had been ratified in 1719/1720 when:

A new form of [parliamentary] government took shape, which became known, significantly, as Age of Liberty government, and captured the imagination of the great philosophers of the age like Voltaire, Rousseau and Mably.⁴²

Just as Chydenius' philosophies are still highly relevant today, the constitutional innovation and change which occurred in Sweden during the Age of Liberty is still reflected in the traditions and workings of its present Riksdag. In addition to new freedoms, the period saw the evolution of a two-party system of government and a system of parliamentary committees. There was also a separation of powers between the parliament and the monarchy. The way the Swedish system evolved also meant that its Constitution was unlike many other constitutions which were adopted later in other nations because the guiding principles of government reflected in the Swedish legislation were not contained in a single document but in four separate legislative elements, or 'fundamental laws' known collectively as the Instrument of Government. They became, and still are, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Of particular interest in the current context is the fact that Chydenius's Freedom-of-Press and the Right-of-Access to Public Records Act of 1766 specifically aimed to create an open society in which even documents such as letters from foreign heads of state to the Swedish prime minister were, and still are, open to public scrutiny.⁴³

In one sense, however, Chydenius was fortunate to have been in the right place at the right time because the Age of Liberty ended in 1772 after King Gustaff III, who had succeeded to the Swedish throne in 1771, became an autocratic ruler. Providentially, as it turned out, Gustaff's influence was little more than a blip in the democratic process and the country reverted to democratic rule in 1809 with the start of a new era which became known as the Age of Enlightenment. Subsequently a new Freedom of the Press (and Fol) Act was incorporated in the Instrument of Government in 1810. A further new Freedom of the Press Act was adopted in 1812. It was replaced again in 1949 and amended several times in the 1970s when the law was altered to encompass computerisation the electronic preparation and storage of documents.

Chapter One of the current Swedish Instrument of Government sets out the basic principles of Swedish democracy in everyday language. Section 4.2 is headed 'Fundamental Rights and Freedoms'. Under the sub-heading 'background' it says, in part:

The philosophers of the Age of Enlightenment put forward ideas concerning the need to protect citizens not just against their fellow-citizens but also against the state. They believed that public officials were the servants of the people, not their masters, and that it should be possible to hold them to account should they overstep the mark.

Ideas of this kind led to declarations of rights: in England in 1689, in France in 1789, in the constitutions of individual American states and in the [First Amendment to the] Constitution of the United States thereafter, in 1791. These sets of rules formed the model for the constitutions of many other countries. In Sweden, the ideas first took root in respect of printed matter. Sweden's first Freedom of the Press Act was drawn up in 1766. Censorship was banned (except in the case of theological writings), and the written material of public authorities became in principle accessible to the public. ... In this breakthrough for the ideas of the Age of Enlightenment, a significant influence was the political system of the Age of Liberty ...

After the more or less autocratic regimes of the Gustavian period, the ideas of the Age of Enlightenment enjoyed a renaissance in the 1809 Instrument of Government, primarily in the form of Article 86, which re-established the basic elements of the freedom of the press, namely freedom from censorship and other prior interventions, a requirement that interventions should have support in law and be subject to examination before a court of law, and the principle of the public nature of official documents.⁴⁴

The next nation after Sweden to adopt Fol legislation, the South American Republic of Colombia, has had a starkly contrasting record of political instability and a shocking record of human rights abuses for most of its history.⁴⁵ Its Fol statute, the Code of Political and Municipal Organisation of 1888 provided for access to government records. It was adopted after a reformist liberal Constitution was endorsed in 1886.⁴⁶ That Constitution was to go on and become the oldest surviving Constitution in Latin America and was not fully revised until 1999.⁴⁷ Access to documents under the 1888 code was available to individuals who could 'request documents held in government agencies and archives, unless it was specifically forbidden by another law'.⁴⁸ The current Colombian Constitution still contains a 'right' of access to government-held information. The wording of the relevant current law, which was approved in 1985, bears a remarkable similarity to the 1888 legislation with the Inter American Press Association reporting that the right to Fol in Colombia is currently regulated by an administrative code which says:

As a general principle, there shall be free access to official documents and these shall be considered as classified only if so provided by specific laws.⁴⁹

However the true impact of that law is far from clear — something not aided by Colombian president Andrés Pastrana Arango, who, while describing himself as a journalist and lawyer as well as 'a governing ruler', enigmatically told the World Association of Newspapers on World Press Freedom Day in May 2001, that:

As our Constitutional Court has said, freedom of information is a 'duty and a right, it is not an absolute right unless it has a special responsibility which conditions the achievement of that freedom'.⁵⁰

The third nation to introduce, or in a sense re-introduce, its own freedom of information laws appears to have been none other than Finland. It had been split from Sweden in 1809 as a result of the Napoleonic wars and became an autonomous Grand Duchy of Russia. However Finland declared itself independent in 1917. It was wracked by civil war in 1918⁵¹ but the war over, Finland elected its first president and officially became a republic in 1919. In doing so it passed a Constitution Act which was modelled to a large extent on Sweden's system of Fundamental Rights. The legislation included a Finish version of Sweden's Freedom of the Press Act, which also codified freedom of access to government-held information, and provided for the appointment of an ombudsman.⁵² The Finnish Fol legislation was revised in its Publicity of

Documents Act 1951, and again in 1999 in the Act on the Openness of Government Activities which states, in part:

The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.⁵³

Then came freedom of information in the United States. However, its first Fol legislation was not as is widely reported, the Freedom of Information Act of 1966. Neither was it Fol legislation in various states of the republic. In fact there was important precursor legislation in the United States just as there had been in Sweden and Finland. In the same way that the 1707 statute in Sweden and Finland had required records to be archived, the United States Congress passed the Administrative Procedure Act of 1946 which, for the first time, made it mandatory for all federal agencies in that nation 'to keep and maintain records which were to be open to inspection by the public'.⁵⁴

Around the same time, the idea of freedom of information was being heavily promoted by United States newspaper interests. In May 1946, the United States delegation to the United Nations persuaded the Commission on Human Rights to create a sub-commission on Fol. The United Nations General Assembly subsequently called an international conference on Fol in Geneva in 1947/48.⁵⁵ However a specific 1953 draft convention on Fol which came out of the Geneva meeting and which would have provided a benchmark and template for all nations, was later dumped. Ironically, some western journalists and editors had fought the proposal. They said they believed it would actually threaten press freedom. One of their leaders was an Australian, Sir Llyod Dumas. At the time he was managing director of Advertiser Newspapers Limited, the publisher of the *Adelaide Advertiser*.⁵⁶ A biographical note published by the Australian National Library says Dumas was concerned that if Australia signed the convention, too much power over the Australian press would pass to the federal government. He argued that the convention might have prohibited the publication of articles critical of foreign governments or it could have ensured that foreign governments were given an equal right of reply to any article which offended them. The note reported that:

As a consequence, Dumas became very active in opposition to the draft Convention. He liaised with members of the Commonwealth Press Union, the American Society of Editors and the International Press Institute and was ultimately instrumental in the abandonment of the Convention.⁵⁷

Another who spoke against the draft convention was a former president of the American Bar Association, Frank Holman. He argued that it conflicted with the United States Bill of Rights and was opening the way to dictatorship.⁵⁸ Meanwhile United States President Harry Truman had been recruited to the cause. He was reported to have pursued the ideal of 'the free flow of information in the world' in the immediate post World War II years.⁵⁹ In several speeches in 1947, Truman had specifically included freedom of information in explanations of his personal concept of human rights.⁶⁰ Presidential lobbying aside, the actual term 'Freedom of Information' is believed to have entered the vernacular in 1949 after it appeared as the title of a book published by journalist Herbert Brucker. A passionate believer in a free press whose distinguished

career included a stint as president of the American Society of Newspaper Editors and teaching in Columbia University's School of Journalism,⁶¹ Brucker (1973) recorded how lobbying by the press led to the first United States federal FOI law being introduced — not in 1966 as widely reported today, but in 1958. He recalled that:

The drive for freedom of information had its origin in World War II. In 1945, before the war ended, the American Society of Newspaper Editors sent a three-man committee around the world in an attempt to persuade the world's governments that, when peace came again, they should break down the barrier to the free flow of information across national borders. It was clear that these barriers had done much to bring on wars in the past.⁶²

In 1958 the first federal freedom-of-information law was signed by President Eisenhower. The late Harold L. Cross, a dedicated lawyer acting on behalf of the American Society of Newspaper Editors, had discovered that when bureaucrats were challenged as to what legal right they had to keep the public's business secret, they scurried the law books to come up with ... a statute dating back to 1789. It had simply ... authorised regulations covering 'the custody, use and preservation' of records and papers. Therefore the 1958 law's one-sentence text read simply, 'This section does not authorise withholding information from the public or limiting the availability of records to the public'.⁶³

It is highly significant from a journalist's perspective that as in Sweden/Finland, the drive to introduce FOI in the United States was inextricably linked to freedom of the press. But respected United States journalism historian Frank Luther Mott (1962) said that the simple 1958 law in the United States did not go nearly far enough and:

The question remained as to what might in given cases be proper to be kept secret 'in the public interest'.⁶⁴

He said the main problem was that a 'cult of secrecy' developed during the Cold War after World War II and that the culture of the public service fostered a:

... reluctance to give up the 'executive privilege' of withholding information of government activities on the grounds of 'public interest', and an inclination to regard all such questions from the point of view of how much it is possible to conceal rather than how little must necessarily be kept secret, were difficult forces to combat.⁶⁵

Despite the setback in the United Nations and a far from enthusiastic reception from public servants, notions of FOI spread like wildfire. Among other things a Freedom of Information Centre that still exists today was established at the University of Missouri in 1958. Mott reported that by 1960 in the United States 'some 30 states' had passed 'open meeting laws' which decreed that meetings of governmental boards, commissions, and councils must be open to the public. He said there were exceptions for bodies such as juries, parole boards, commerce commissions, 'and about half these laws also called for free access to records'.⁶⁶ Having allowed FOI a toe in the door in 1947 with the Administrative Procedure Act, then a foot in the door in 1958, pressure mounted on Congress to go further and open the door properly. The impact of the next and final steps in the process of introducing FOI in the United States was well summarised by journalism educator Margaret DeFleur (1994):

During the decade of the 1960s, pressures mounted for greater disclosure of the activities of all branches of government. In 1966 Congress passed a lengthy amendment to the Administrative Procedure Act, and called it the Freedom of Information Act. This amendment, commonly called FOIA, placed the burden of compliance squarely on the agencies and required that they prove they were justified when denying access to records. It also clarified the conditions under which agencies could legally withhold records by specifying nine exemptions to the Act. In order to protect against unwarranted invasions of personal privacy, the law allowed agencies to delete identifying details, but required that the agencies justify any decisions in writing.

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'.⁶⁷

After the United States Freedom of Information Act became law on 4 July 1966 — Independence Day — pressure intensified on governments around the world to allow their citizens similar rights. Research indicates that the next nation after the United States to adopt a form of specific FOI law was Denmark in 1970 followed by Norway in 1971 and France in 1978. (On a sub-national level the provincial government in Nova Scotia, Canada enacted legislation in 1977). The former British dominions of Australia, Canada and New Zealand all enacted their own national legislation in 1982, although Canada's statute did not actually pass into law until 1983. Then came laws in Austria and the Philippines which came into effect in 1987; Brazil 1988; Italy 1990; the Netherlands 1991; Hungary 1992, Portugal 1993; Belize (formerly British Honduras) 1994; Hong Kong and Russia 1995; Iceland, Lithuania and South Korea 1996; Thailand and the Ukraine 1997; Ireland, Israel and Latvia 1998 and the Czech Republic 1999. South Africa enacted legislation in 2000 but it did not pass into law until March 2001. In the United Kingdom, that nation's first 'proper' FOI legislation, its Freedom of Information Act 2000, received royal assent on 30 November 2000, but its provisions were to be phased in with a proviso that the law would not be fully operational until 2005.⁶⁸

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The NSW Administrative Decisions Tribunal: Leading Cases

The NSW Administrative Decisions Tribunal (ADT) was established in October 1998. Its jurisdiction is to undertake merits review of determinations made by decision makers on applications under the *Freedom of Information Act 1989* (NSW). It also has wide and growing jurisdiction to consider decisions made under other specified NSW acts.

Its first FoI decision was handed down in March 1999 (*Taylor v RSPCA* [1999] NSW ADT 23). The total is now around sixty decisions plus five decisions by the Appeal Panel which has jurisdiction to consider applications for review of Tribunal decisions on matters of law (s.113 *Administrative Decisions Tribunal Act 1997* (NSW)).

The purpose of this article is to highlight some of the important decisions by the Tribunal and to provide a point of reference for those in NSW and elsewhere who may be interested in exploring some of these decisions in detail.

Relevant provisions of the NSW *FoI Act* are not reproduced in full. The Act can be accessed at <www.austlii.edu.au>. References to clauses are to the exemption provisions which are contained in Schedule 1 of the Act.

The full texts of Tribunal Decisions are available on <www.lawlink.nsw.gov.au/adt> (General Division of the Tribunal and are listed by year). The website includes a 'view by category of decision' page, which lists some FoI decisions but is not a comprehensive index.

General approach to interpretation

The Tribunal attaches significance to the objects of the Act as set out in s.5. The objects (and the Second Reading speech) are frequently quoted in Tribunal decisions.

The Tribunal places the onus on the agency to justify any decision to withhold documents. There has been frequent reliance on the view expressed by the then President of the NSW Court of Appeal, Mr. Justice Kirby, in the *Perrin* case (*Commissioner of Police v District Court* NSW [1993] 31 NSWLR 606) that 'to withhold disclosure it is for the agency to make out the application for the exemption. Thus the question properly is not why the information should not be disclosed but why it should be exempted'. (See comments by Deputy President Hennessy in *Gilling v Hawkesbury City Council* [1999] NSW ADT 43).

However, this general approach to interpretation does not extend to a 'leaning position' in favour of disclosure when the Tribunal is required to interpret an exemption which includes a public interest test.

The Clause 9 exemption [internal working documents] is neutral on whether a document ... falling within the description ... does or does not deserve to be kept secret. [S]ecrecy is only justified if disclosure of something in a particular document would be contrary to the public interest. [This] test requires reflection on the objects of the exemption. This indicates the opinion of the

legislature that the public interest requires public openness accompanying or following decision making in some cases but that in other cases it requires secrecy. The neutrality of this position prevents approaching the exemption from any general assumption or presumption on the necessity of secrecy or openness of government deliberative documents.

Judicial Member Smith in *Tunchon v Commissioner of Police* [2000] NSW ADT 73.

In weighing up factors relevant to 'unreasonable' disclosure of information concerning a person's personal affairs the Tribunal must have regard to all the factors in the particular case. It should not adopt a 'leaning' position in favour of disclosure. At its core unreasonableness involves public interest considerations. A fundamental aspect of this will be whether withholding the document is 'reasonably' necessary for the proper administration of the government'. (Judicial Member Robinson in *Gliksman v Health Care Complaints Commission* [2001] NSWADT 47).

Scope to neither confirm nor deny the existence of documents

Section 28(3) does not require an agency to include in a notice of determination information which would render the notice an exempt document. This provision can be used particularly in cases that involve law enforcement and public safety documents (cl.4) to neither confirm nor deny the existence of documents if to do so would result in the notice itself being capable of a claim under this clause. (Deputy President Hennessy in *Ekeraw v Police* [2001] NSW ADT 27; Judicial Member Robinson in *Cerminara v Police* [2001] NSW ADT 95). (Deputy President Hennessy in *Murre (No.2) v NSW Police Service* [2001] NSWADT 175).

Law enforcement and public safety clause 4

The Tribunal has examined a number of the law enforcement and public safety exemptions closely, particularly cl.4(1)(b) (disclosure could reasonably be expected to enable the existence or identity of any confidential source of information in relation to the enforcement or administration of the law, to be ascertained).

In order to relate to the enforcement or administration of the law the information must be relevant to the 'policing of criminal laws or civil obligations'. The exemption is comparable to the police informer privilege but can be used not only by police agencies but by others who have similar powers and responsibilities. It is not relevant to information in relation to licensing functions of an agency where the ultimate penalty may involve the withdrawal of a license. (Mr Smith in *Watkins v RTA* [2000] NSWADT 11).

However it can apply to information that leads to investigation where an offence involving a penalty can be

imposed. Thus it can apply to documents that would reveal a confidential source of information regarding an unroadworthy motor vehicle. The complaint in this instance had led to an inspection and the issue of a defect notice and a failure to comply with conditions contained in such a notice was an offence subject to a fine. This was information related to the process of the enforcement of legal rights or duties. (Deputy President Hennessy in *Odisho v RTA* [2001] NSWADT 49).

When the applicant already knows the source of the information and can satisfy the Tribunal about this, disclosure would not reveal a confidential source (Deputy President Hennessy in *Latham v Community Services* [2000] NSWADT 58).

The name of a police officer obliged to provide information to another agency is not information which would reveal a confidential source. (President O'Connor in *X v Community Services* [1999] NSW ADT 141).

The fact that the information is false or incorrect is not a factor which prevents the exemption being claimed. There is no public interest test to be satisfied in this exemption. (President O'Connor in *Mauger v Wingecarribee Council* [1999] NSWADT 35).

The Tribunal has left open the possibility that malicious complaints should not be protected. (Appeal Panel in *X v Community Services* [2001] NSWADT AP 23).

In *Ingram v Sutherland Council* [2000] NSWADT 69 Judicial Member Fleming held that the identity of a neighbour who had written to a council regarding action and behaviours which might involve a breach of the law may attract this exemption. In this case the identity of the complainant was known to the FoI applicant. The decision is inconsistent with the approach taken in other cases. The information may have been exempt under cl.13(b) but this was not the Tribunal's decision.

Personal affairs cl.6, schedule 1

A person's name in isolation is not necessarily part of their personal affairs but their name linked with their address enables them to be contacted by people who have access to that information. This contact may be unwelcome and constitute an invasion of their privacy". (Deputy President Hennessy in *Gilling v Hawkesbury Council* [1999] NSWADT 43).

Names on a list of professionals maintained by a public agency as part of a peer review process in connection with the examination of complaints reveals nothing about the personal affairs of the persons concerned. (Deputy President Hennessy in *Dawson v Health Care Complaints Commission* [1999] NSWADT 57).

An application for access to the details (names and addresses) of holders of licenses issued by the National Parks and Wildlife Service to cull flying foxes in order to protect their commercial orchards did not involve the unreasonable disclosure of information concerning their personal affairs. An important consideration in weighing unreasonableness was the motive of the applicant who was planning to undertake research and observe the effects of such licences. In this case the motive went beyond mere curiosity and there was no evidence that the applicant intended to harass or otherwise interfere with the affairs of the license holders. (Judicial Member Robinson in *Humane Society v National Parks and Wildlife Services* [2000] NSWADT 133).

Internal working documents (cl.9)

In *Bennett v University of New England* [2000] NSW ADT 8, Deputy President Hennessy considered an application for review of a determination by the University to refuse access to a report prepared for consideration by the Council about the examination of the applicant's thesis for a Ph.D. Following consideration of the report the degree was conferred 14 years after it had been submitted. The report included information about the University's processes in dealing with the thesis. While parts of it had been made available to the applicant, other parts were denied on the basis of the internal working document exemption (and confidentiality — see below).

Deputy President Hennessy found that while the report satisfied the conditions of cl.9(1)(a) in that it contained advice and opinion prepared in the course of and for the purposes of the decision-making functions of the University, disclosure on balance was not contrary to the public interest.

The decision considers a wide range of factors put forward by the University that favoured non-disclosure in the public interest. It found that there was no evidence in this case to support a 'candour and frankness' argument that disclosure would inhibit future pre-decisional communications; that disclosure would not unfairly represent the reasons for a decision subsequently taken, or be unfair to a decision maker or prejudice the integrity of the decision-making process. Given the objects of the Act, the legitimate public interest in knowing whether the University had acted in accordance with the principles of sound administration and the unfavourable reflections on the University's processes, release of the remainder of the report was in the public interest in that it would enhance the openness, accountability and responsibility of the University.

Deputy President Hennessy in this decision attached importance to the fact that the decision-making process was complete and was not persuaded that scrutiny after the event would have any significant prejudicial impact on the University in future.

In *Tunchon v the NSW Police Service* [2000] NSW ADT 73 Judicial Member Smith considered an application for review of a decision by the Police Service to refuse access to a report prepared for the Commissioner by Morgan and Banks about a review of the Human Resources and Development Command and its functions.

In this case after canvassing the various public interest factors for and against disclosure the Tribunal decided that disclosure was on balance contrary to the public interest at this time. The report had not been fully considered or acted upon. It had only been seen by a select group of senior officers. The Tribunal concluded that there were real grounds for a concern that the Commissioner's continuing process of decision making could be seriously impaired by what would be premature release of the report.

In *Bennett v National Parks and Wildlife Service* [2000] NSW ADT 136 the applicant sought access to a document entitled 'Conditional Agreement to lease the Quarantine Station North Head' which had been executed by the Minister of the Environment and two other parties. In denying access the Department argued that the document was part of the preliminary development of a lease, that a series of other steps were required prior to finalisation including consultations with relevant government authorities, the community and other bodies and that

disclosure at this stage could have a detrimental effect on its financial interests if the proposal did not proceed.

The Tribunal concluded that as the deliberative process was not complete, disclosure at this stage would be premature and was on balance contrary to the public interest.

These three cases illustrate that while the Tribunal will protect documents associated with an agency's 'thinking' processes prior to a decision, it takes the view that after a decision has been made it will require evidence of special factors to justify non disclosure.

Where a document is dated and not part of current thinking process it will be hard to argue that disclosure is on balance contrary to the public interest. In *Simpson v Department of Education and Training* [2000] NSW ADT 134. Deputy President Hennessy considered an application for a draft report prepared by a working party on pay, conditions and entitlements of casual teachers. The draft had been prepared in 1994 and reflected matters considered by the working party during its meetings on eight or nine occasions. Agreement on the draft had not been reached by members of the working party and the options in it were never adopted as the official view of the Department or the NSW Teachers Federation.

Many of the issues referred to in the draft had been the subject of subsequent discussions between the Department and the Federation and the parties were still negotiating about pay and conditions for casual teachers.

Deputy President Hennessy commented that:

... it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing if there is evidence that the disclosure would adversely affect the decision-making process or that disclosure would for some other reason be contrary to the public interest. In either of those circumstances I consider that the public interest is served by non disclosure. I do not consider it is in the public interest for any agency to conduct its business with the public effectively 'looking over its shoulder' at all stages of its deliberations and speculating about what might be done and why. Generally I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all material available so that informed decisions may be made.

In this case the draft report completed in 1994 had long been superseded. It did not represent either a previous or current negotiating position and was not part of the Department's current thinking processes. The Internal Working Document Exemption was not satisfied in this case.

Legal professional privilege

Whether documents come within cl.10 should be determined by reference to the tests of client legal privilege found in the *Evidence Act*. (Mr M. Smith in *Mangoplah v Great Southern Energy* [1999] NSW ADT 93). (Appeal panel in *Charteris v Leichhardt Council* [2001] NSW ADTAP 12).

The law in Australia is now that legal professional privilege will attach to a confidential communication — oral or in writing — made for the dominant purpose of obtaining or giving legal advice or assistance or for use in proposed or anticipated legal proceedings. However, if privilege has been waived the exemption will not apply. Waiver can be express implied or imputed. Protection can be lost through intentionally disclosing protected materials. An implied waiver occurs when by reason of some conduct on the privilege holder's part it becomes unfair to maintain the privilege. (President O'Connor in *Walden and Toni v*

Leichhardt Council [2001] NSW ADT 81. (The Appeal Panel subsequently set aside the decision in this case to release documents as a result of an agreement between the parties. The Appeal Panel did not examine the decision itself [2001] NSW ADTAP 36).

Legal professional privilege extends to confidential communications between the government or agency and its employed legal advisers provided that in giving advice they were acting in their capacity as legal advisers. (Deputy President Hennessy in *Kay v Department of Corrective Services* [2000] NSW ADT 34).

Exemption on the grounds of legal professional privilege can be claimed by an agency even though the privilege was that of another agency. (President O'Connor in *CGEA Transport v Director General Department of Transport* [2000] NSW ADT 28).

Confidentiality

Clause 13(b) seeks to protect information obtained in confidence where disclosure could reasonably be expected to prejudice the future supply of such information, and is on balance contrary to the public interest.

The Tribunal's view in several cases is that information provided by public servants to other public servants will not usually meet the second of these criteria — that is, that disclosure would prejudice the future supply of information particularly where the employees have a legal duty to cooperate in providing information of the kind requested (Deputy President Hennessy in *Bennett v University of New England* [2000] NSW ADT 11; Judicial Member Robinson in *Mullett v Department of Education and Training* [2001] NSW ADT 119).

Costs

The power to award costs applies only if justified by special circumstances in the conduct of proceedings before the Tribunal. The usual rule is that costs are not to be awarded. This has at least two objectives — one to remove an impediment to an exercise of important rights that the Tribunal has been established to see protected where appropriate; two to discourage the use of lawyers. In these ways the goals of affordable accessible justice are seen as supported. (Appeal Panel in *Charteris v Leichhardt Municipal Council* [2001] NSW ADTAP 12).

Costs are costs incurred by a party for professional legal services. Costs of proceedings mean costs of proceedings before the Tribunal not any costs incurred prior to the proceedings. The costs power should not be used as a sanction to punish agencies for poor administration. (President O'Connor in *Raethel v Department of Education and Training* [2000] NSW ADT 56).

Tribunal powers to impose conditions regarding released documents

The Tribunal in exercising powers and discretions in ss.24 and 25 does not have power to impose conditions on the release of an agency's documents. While such a power exists in s.85 of the *ADT Act* such powers are subject to express or implied contrary provisions in the *FoI Act*. As there is no such power in the *FoI Act* the Tribunal in this case does not have powers under s.85 to impose conditions on the release of documents. (Judicial Member Robinson in *Humane Society v EPWS* [2001] NSW ADT 133).

Tribunal's override discretion

The Tribunal in conducting a review has the same powers under s.25(1) to exercise a discretion regarding the disclosure of an otherwise exempt document as the original decision maker. The Tribunal's function under s.63(1) of the *ADT Act* is to decide what the correct and preferable decision is having regard to the material then before it including ... any applicable law. This requires the Tribunal to address the merits of the decision made by the primary decision maker under s.25(1) by reference to the same legal parameters as applied to the original decision.

The override discretion should only be exercised where there is something about the information itself or the surrounding circumstances which bearing in mind the objects of the *Fol Act* and the rationale for any exemption which has been satisfied persuades the decision maker that the exemption should not be claimed. The touchstone is whether withholding the document is reasonably necessary for the proper administration of the government (s.5(2)(b)). The Tribunal is not constrained by s.124 of the *ADT Act* as in reviewing an *Fol* decision it is acting on powers conferred on it by the *Fol Act*. (Judicial Member Smith in *Mangoplah v Great Southern Energy* [1999] NSWADT 93); (Appeal Panel in *SAS Trustee v Daykin* [2001] NSW ADTAP 20).

Powers of review where no document exists

The Tribunal's jurisdiction to review a refusal extends to examining a decision that no documents of the kind requested have been found to exist. Such a determination under s.24 is reviewable by the Tribunal which can determine whether an agency is correctly asserting that it does not hold a document. (Judicial Member Smith in *Beesley v Commissioner of Police* [2000] NSW ADT 52)

Tribunal powers regarding restricted documents

Despite s.57(4) which appears to limit the review jurisdiction of the Tribunal to the consideration of whether there are reasonable grounds for a claimed exemption under Clauses 1, 2 and 4 (restricted documents), s.124 of the *ADT Act* empowers the Tribunal to satisfy itself not just that a reasonable person could reach such a conclusion but also that the Tribunal itself was satisfied that grounds existed for the exemption claim based on the material before it.

The Tribunal will only be limited in its consideration of matters under s.57 if there has been a separate invocation of s.57 by the applicant. (Deputy President Hennessy in *Kennedy v Commissioner of Police* [2001] NSW ADT 39)

In the normal course of reviewing a decision under the *Fol Act*, s.63 of the *ADT Act* empowers the Tribunal to review the decision of the agency to refuse access to an exempt document. (Judicial Member Smith in *Mangoplah v Great Southern Energy* [1999] NSW ADT 93).

The Tribunal has continued to take this position despite arguments by the Crown Solicitor that it has limited powers under s.57 in considering whether it can require the disclosure of a document it finds exempt under Clauses 1, 2 and 4. (restricted documents). (See also *Rittau v Police*, *Watkins v RTA*, and *Vranic v Department of Community Services* [2001] NSW ADT 129).

Status of individual tribunal decisions

The Tribunal is not bound by precedent in the strict sense in relation to being formally bound by earlier decisions of the Tribunal. However for a number of reasons I consider the

Tribunal should ordinarily follow decisions of the Appeal Panel and decisions of the Tribunal as constituted by the President or the Deputy Presidents. These decisions should be followed because they are authoritative and go some way to ensuring consistency in the Tribunal's decision making ... The Tribunal should only refuse to follow such decisions if it concludes the previous decision is clearly wrong.

Judicial Member Robinson in *Rittau v Commissioner of Police* [2000] NSW ADT 186

Extension of time for lodging applications to ADT

Section 54 of the *Fol Act* requires an application for review to be lodged with the ADT within 60 days. Although s.44 of the *ADT Act* allows the Tribunal to extend time for a late application, s.40 of that Act provides that such a provision only applies subject to any contrary provision in another enactment. As the *Fol Act* makes no provision for extension of time for lodgement of a late application, the ADT has no power to consider a late application. (Deputy President Hennessy in *Black v Bathurst City Council* [2001] NSW ADT 139)

ADT appeal panel jurisdiction to consider merits review

Section 113 of the *ADT Act* provides for an application for appeal of Tribunal decisions. However such an appeal must first be brought on a question of law. If an appeal is brought on a question of law the Appeal Panel has power under s.113(2)(b) to extend the appeal to a review of the merits if it grants leave to the applicant. In effect the Tribunal must find an error of law before it can review the merits of the decision. It would not be proper to embark on a consideration of the merits where no error of law have been established. (Appeal Panel in *Cerminara v NSW Police* [2001] NSW ADTAP 32).

Conclusion

The NSW District Court which conducted *Fol* merits review in the decade 1989-1999 did not make much of a contribution to *Fol* jurisprudence in Australia. The ADT, in a relatively short space of time is making a mark. President O'Connor and Deputy President Hennessy have delivered most of the decisions on *Fol* applications and have been well supported by Judicial Member Robinson. A relatively new member Judicial Member Britton has also made a number of well reasoned decisions. There has been the occasional decision which does not stand up to close scrutiny. Another article on the 'not so leading cases' will follow later in the year.

Peter Timmins

Peter Timmins of Timmins Consulting Australia is a legally trained management consultant who has been involved in Fol in NSW since the Act was introduced. For a free copy of his email newsletter 'Open and Shut' send an email to timminsp@ozemail.com.au

Overseas developments

US District Court rules that World War I German invisible ink formulas must still remain hidden from the public

Decision Reflects Judicial Difficulties In Addressing Secrecy vs Openness Disputes

WASHINGTON, DC

The Honorable Thomas Penfield Jackson of the U.S. District Court for The District of Columbia ruled today from the bench that the National Archives Records Administration (NARA), acting at the behest of the Central Intelligence Agency (CIA), can withhold the six oldest U.S. classified documents currently in NARA's custody. The documents, which date between 1917 and 1930, were sought by The James Madison Project (JMP) in a 1998 lawsuit under the *Freedom of Information Act* and contain formulas for creating and detecting invisible ink, particularly those used by the German government during the Great War. JMP plans to appeal the decision to the US Court of Appeals for the District of Columbia.

The lawsuit reflects the classic struggle in the battle between secrecy and openness. Judge Jackson noted that although he was sympathetic to the effort, as well as recalling that his childhood breakfast cereal contained the formula for invisible ink, he had no choice but to rule in favor of the CIA's position given that its stated sources and methods were at issue. Although the documents are nearly 100 years old, the CIA argued that the antiquated formulas and techniques were: '(1) currently viable for use by CIA agents; (2) building blocks for the CIA's more modern and sophisticated methods of using or detecting secret writing; (3) used to test current CIA secret writing systems for vulnerabilities; and (4) used to develop new formulas and techniques for secret writing.'

'We're obviously disappointed with the court's decision. The CIA's refusal to release such historical

information denigrates its credibility in withholding information that truly must remain secret. It may as well classify the periodic table,' said Mark S. Zaid, JMP's Executive Director. Zaid added that the documents were created by foreign governments no longer in existence or federal agencies, such as the US Postal Inspection Service, that have no classification authority and even previously published the same information.

The lawsuit was specifically brought to illustrate the absurdity of the classification system. The Commission on Protecting and Reducing Government Secrecy, a bi-partisan entity chaired by then-Senator Daniel Patrick Moynihan, concluded in 1997 that '[t]he best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.'

JMP is a Washington, DC-based non-profit organization with the primary purpose of reducing secrecy and promoting government accountability. It organizes educational events on issues relating to intelligence gathering and operations, secrecy policies, and national security. More information concerning JMP, as well as copies of some of the pleadings in this litigation, can be found at its website at <www.jamesmadisonproject.org>.

The case is *The James Madison Project v National Archives & Records Administration*, Civil Action No. 98-2737 (DDC)(TPJ).

Thank you to Mark Said, Executive Director of the James Madison Project for permission to reprint this case summary.

Comment continued from front page

version of events to be placed uncontested on the public record. When will governments, their spin doctors, their fully politicised mandarins and their hordes of camp followers learn that the moment of discomfort caused by accurate disclosure is a small prize for open and accountable government. Greg Sheridan in his article 'Demeaning defence a dangerous disgrace', (*Australian*, 28 February 2002) nailed the issue when he wrote:

Bryant's tone, and Defence's policy under Peter Reith, are the exact opposite of what is needed. We need more openness from Defence, not less. If Banks had been allowed to talk to reporters, this whole, dismal saga would have been over by October 11, at the latest. It would have caused an hour's embarrassment to the Government and would have had no bearing on the election result.

The excessive culture of secrecy and information control that pervades Australian national security organisations, and has been exaggerated under the Howard Government, makes this kind of debacle much more likely.

And it's all so unnecessary. The media, like the public, generally supports the ADF. Whatever momentary embarrassments might come from a policy and a culture of being as open as possible are as nothing compared with the dangers of excessive secrecy.

Rick Snell

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