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Comment

I have just spent the month of January teaching comparative Freedom of Information Law at the Law School, University of Western Ontario. In between the layers of snow, learning how to shop for groceries in temperatures of below zero plus minus 8 for wind chill and quaint Canadian sayings like 'Is it warm enough for snow yet?' I have had the joy of teaching fifteen Canadian, one Chinese and four French students. After mastering my heavy accent, and learning to exchange a's for e's in my speech we spent the time as a group trying to apply the lessons, insights, literature and law reform suggestions across and between various jurisdictions. The ideas and insights generated by the students will contribute much to the nascent discipline of comparative study in FoI.

The attempt to construct and foster comparative and multi-disciplinary approaches is important. Over the last decade there has been a rapid uptake of freedom of information type schemes around the world from a beginning base of about 13 jurisdictions to a tally that now exceeds over 50 jurisdictions. During my time in Canada I received updates on the beginning of FoI officer training in Jamaica, the news of the Indian Act being signed into law and the beginnings of consultations for FoI in Ethiopia. Yet that rapid uptake is building on a paucity of critical research within and between jurisdictions as to what should be learnt from and what should be avoided from existing schemes. The onus on scholars, reformers and implementers is to do more than quick cut and pastes and launch these schemes on wishful thinking and new year's resolutions to avoid some of the mistakes made by other jurisdictions. Last week I gave a talk at the Lord Chancellor's Division (since June 2002 responsible for the implementation of the new UK Act) in London and was struck by the strong commitment of those charged with the task but concerned by the uncertainty caused by the lack of commitment from the political, and Whitehall, leadership in the United Kingdom. Yet the World Bank is putting in place the incentives that see a vast array of jurisdictions that lack the civil service infrastructure, resource base and long standing commitment to the rule of law and due process, scrambling to put FoI Acts into operation.

I have also been pleased during my discussions in Canada, UK and Ireland about the feedback I have received in relation to the *FoI Review*. Furthermore the articles I have on hand, and the ones promised for later issues, will continue to inform, lead and outline debate and discussion in the area of FoI and information policy in general. In recent issues I have been trying to balance the task of providing access to already published, but not widely available, information with commissioning and hunting down new analysis and insights. I hope that the Review continues to be at the forefront of FoI research and analysis.

Rick Snell

The need for FoI renewal — digging in, not giving up

Introduction

This article draws together a number of changes to FoI proposed by commentators and government bodies and argues that there is an urgent need to improve the administration of the *FoI Act* by a number of means including amendment of the objects clause and appointment of an FoI Commissioner as recommended in the Australian Law Reform Commission and the Administrative Review Council review of the *FoI Act* (ALRC/ARC report).[1] There was political support from all parties for these two changes in a Senate Committee's inquiry into the Democrats' Freedom of Information (Open Government) Bill 2000, but there was no response from government. The Bill was reinstated in 2002 after the election. In addition, it is important to establish a process to examine the 'design principles' of the Act, as proposed by Rick Snell and Nicole Tyson, a task not carried out in the ALRC/ARC report. As a contribution to that process, the article summarises some general principles for exemption provisions drawn from the literature and submissions to parliamentary bodies. Finally, those who support the concept of FoI as a means of providing both government accountability and greater citizen participation in government need to work towards collective means for greater public utilisation of the Act. In a political climate in which there are strong pressures towards secrecy, there are nonetheless countervailing forces that could favour a renewal of the ideal of greater access to government information as one of the means to allow debate and challenge in relation to government actions and policy.

The current situation — neglect, inaction and defects

In its 20-year history, the *Freedom of Information Act 1982* has only been substantially amended three times, the last time in 1991. None of the major amendments involved a completely systematic rethinking of the best ways to achieve the aims of FoI, the 1983 changes coming closest to that. The central proposals of the latest (1996) ALRC/ARC review have not been implemented, and government has not given us any meaningful explanation why not.[2]

The criticisms are well known, and I will take many of them for granted here.[3] Major difficulties are developing both in terms of the practical administration of the Act and in terms of its structure and the basic assumptions underlying it.[4] No real attempt has been made to update the Act to cope with the massive transformation of the state in the late 1980s and 1990s.[5] If these difficulties are not addressed, the gap between the pretence and the reality of FoI will widen ever further.

Even minor measures needed to remove redundant provisions of the Act have not yet been implemented, though I understand that some work has been done in this area. More significantly, the government has failed to introduce amendments to the Act to provide for its application to documents in the possession of contractors under outsourcing arrangements, despite the fact that this was promised on 3 February 1998 by the Attorney-General in a press release dealing with both privacy and FoI, and was reiterated by his Department in 2001.[6] Amendments were made to the *Privacy Act 1988* to cover outsourced personal information,[7] but there appears to have been stalemate in the bureaucracy about the means of amending the FoI Act, leaving a significant issue unaddressed.[8] Related issues concerning 'commercial in confidence' claims have also been ignored (see below).

The failure to take action on these measures is a recipe for freezing the FoI Act in time and, of more immediate importance, allows a continued decline in the standards of FoI knowledge and administration by agencies.

The problem is that changes to the FoI Act, and even to its administration, have had no political priority even in the case of purely machinery matters. Such neglect in areas like income tax, corporations, trade practices or migration is simply impossible to imagine, with any shortcomings or loopholes in these laws being promptly amended.

It is not as though we do not have significant and detailed proposals for change, both legislative and administrative, in the work of commentators like Rick Snell, Greg Terrill, Spencer Zifcak, Moira Paterson, Peter Bayne, Anne Cossins and others.[9] I have time to deal only with a few of these matters, and have regrettably not been able to look at the best form of external review.

Renewing and supporting the foundations of FoI

Initiative for legislative change — the Freedom of Information (Open Government) Bill 2000 and 2002[10]

An initiative for reviving the process of reform was provided by the FoI (Open Government) Bill first introduced into the Senate in 2000 by Democrat Senator Andrew Murray and reinstated in February 2002. The Bill seeks to implement most of the recommendations of the ALRC/ARC report.[11] Significantly, it has been examined by the Senate Legal and Constitutional Legislation Committee, and despite the negative approach of the submissions and evidence of the Attorney–General's Department (presumably with government approval), there was cross-party support for the most significant of the ALRC/ARC report's recommendations proposing creation of an FoI Commissioner and recasting the objects clause. (Importantly, the Committee also accepted the need for changes to the fees and charges structure, but I do not have time to deal with that here.)[12] This was in accordance with the views of most of the submissions.

Cross-party support for these two measures is of great significance because their implementation could be expected to have a major effect on the practical administration of FoI by agencies. It could provide some basis for continued approaches to government parties stressing the need for these two measures if FoI is to be administered properly in the future. At the same time the opposition Labor Party and the minor parties should be supported in their generally more sympathetic approach to FoI. John McMillan is right that there is a need to build 'a non-aligned culture of support for FoI within the legislature'.[13]

I believe that academic lawyers, political scientists and others could play a more active role, for example by seeking the establishment within an appropriate academic centre or national institute of a standing Forum on Open Government (FOG!) to promote dialogue between academics of all persuasions, politicians, public servants, media representatives, lawyers and citizen groups and individuals who use FoI. It would be good to see concern

with FoI and open government extended beyond lawyers to other groups who can offer valuable insights into governance and citizen participation issues. Such a forum could be within a single university or could span a number of institutions in a partially virtual format. It could seek partnerships and financial support from media organisations, law foundations, the Australian Research Council and so on.

Recasting the objects clause[14]

The replacement objects clause proposed by the ALRC/ARC and accepted by the Senate Committee contains a far more explicitly democratic objective for the FoI Act than the existing clause. It speaks of giving effect to the principles of representative government and of:

- enabling people to participate in the policy, accountability and decision-making processes of government;
- opening the government's activities to scrutiny, discussion, comment and review; and
- increasing the accountability of the executive branch of government.

As proposed by the ALRC/ARC report, it would also be desirable to include an acknowledgement 'that the information collected and created by public officers is a national resource'.[15] This is foundational to an open attitude to government-held information, and would be helpful in not restricting the FoI Act to an accountability role. This point can be important in interpretation, for example in relation to the scope of the personal privacy exemption in s.41.[16]

The revised objects clause provides a symbolic statement that should influence administration and interpretation of the Act. Arguably Victoria and New South Wales have adopted an interpretation of the Act that favours disclosure, but that has not been the case in the Commonwealth jurisdiction. [17] As Matthew Smith pointed out recently,[18] the High Court avoided this issue in its recent decision in *Shergold v Tanner*,[19] and it is uncertain what view it would take if it did address it. The clause accepted by the Senate Committee overcomes the court-created flaw in the present provision depriving it of any interpretative power.

Rick Snell told the Senate Committee that, although largely symbolic (though I think it would be more than that), the proposed change would be likely to produce a 'fundamental transformation in the way that the FoI game is played in Australia … it would have a dramatic impact on the way that agencies approach the interpretation of the exemption provisions and the application of the Act …'[20] Given the importance of the active acceptance of the aims of the Act in changing administrative culture, taking such a step is vital to a renewal of the practice of the Act.[21] But it is not enough on its own.

A mechanism to improve and underwrite compliance — an FoI Commissioner[22]

Most commentators agree that there is a need for a body with the functions of monitoring, auditing and promoting the consistent and efficient administration of the *FoI Act.* FoI is not an area in which government agencies can be left entirely to their own resources. This is because of the complexity of the legislation, the self-interest of agencies in non-compliance with the full rigour of the legislative requirements, and the difficulties of keeping FoI knowledge current without central assistance. In this respect the *FoI Act* has more similarities to the *Privacy Act* than to the *Administrative Appeals Tribunal Act 1975* (Cth) and *Administrative Decisions (Judicial Review) Act 1977* (Cth).

By facilitating consistency and best practice an FoI Commissioner would contribute significantly to a more open administrative culture, which virtually everyone agrees is the major need if FoI is to succeed.[23] Such an authority could be expected to work in partnership with agencies in achieving routine and well-informed compliance with the often complex and frustrating provisions of the present Act, and help to identify ways in which it could be simplified. Training in FoI could become a requirement for officers administering FoI or making FoI decisions.[24] An FoI Commissioner would provide what we now lack, a continuing player committed to the legal policy of the *FoI Act*.

The cost of establishing such an office need not be great, perhaps somewhere in the vicinity of $1–2 million. These costs could be minimised by co-location with the Ombudsman (as suggested by the ALRC/ARC report),[25] or by conferring the FoI Commissioner role on the Ombudsman, and creating a special unit as recommended in the recent Senate Committee report.[26]

It could be argued that the other jurisdictions in Australia do not have such a mechanism, but where there is external review by an Information Commissioner or the Ombudsman there is a tendency for those bodies to act to some extent as the central standard setting bodies for FoI.[27]

Renewal of government commitment to presumption of disclosure

It is 17 years since a Labor Cabinet directed that 'agencies should not refuse access to non-contentious material only because there are technical grounds of exemption under the (FoI) Act'.[28] This position was reinforced by Labor Minister for Justice Duncan Kerr in a letter to his fellow Ministers in October 1994.[29] A similar direction from the present Attorney-General, who is politically responsible for administration of the *FoI Act,* circulated to all agencies and publicised at FoI Practitioners' Forums and in other ways, would provide leadership in regenerating administration of the *FoI Act* and improving compliance by agencies with the legal policy of the Act of favouring disclosure wherever possible.[30]

Reforming the structure of exemptions (or 'withholding provisions')

> Exemptions should be designed to serve as a tool of last resort, difficult to justify as the lifespan of information increases, and subject to reassessment.[31]

Despite, or even perhaps — terrible thought! — because of, submissions to them concerning the need for a reconsideration of the general structure of the exemption provisions,[32] the Senate Committee last year left questions of the exemptions structure *and* specific amendments to exemption provisions until another day.[33] It is important to pressure federal politicians to establish a *process* to (a) address the individual exemptions that urgently need amendment, and (b) examine proposals for recasting the exemption regime in a way more consistent with the Act's broad objects. The two can only be kept apart with difficulty, which is probably one reason the Committee shelved the issue, but it is totally unsatisfactory to be left with no hint of an ongoing process. What that process should be is hard to say, but I believe the

Senate Committee should be pressed to ponder that question and not simply wash its hands of the matter.

Probably the most pressing need concerning existing exemptions relates to the so-called 'commercial in confidence' exemptions and their relation to government agencies and to contractors. As the ARC and the ALRC/ARC reports and others have recognised, this area urgently needs both legislative and administrative attention, but will inevitably raise major issues of design. It would be preferable to have information concerning the commercial activities of all agencies dealt with under s.43, which has a public interest component in one of its exemptions, rather than have some protected by a blanket protection in Schedule 2 while uncertainty remains as to the application of s.43 to other agencies and their activities. In addition, issues raised by the application of the business affairs and breach of confidence exemptions (ss.43 and 45) in the context of outsourcing need urgent attention, including the question of adding a public interest test to s 45 and to the other components of s.43(1) in addition to the present unreasonableness test in s.43(1)(c)(i).[34] These interconnected issues are too important to be ignored just because their solution is difficult and will arouse opposition from some quarters.

The most significant *structural* problems with the present exemptions system (or as Rick Snell calls them, 'withholding provisions', which conveys a less rigid impression to decision makers) come down to:

- the complexity and lack of coherence of the system;
- the categorical manner in which many of them are expressed that encourages knee-jerk identification of documents as exempt rather than careful consideration in each case of the degree of expected harm and the balance of the public interest; and
- the general failure of the public interest test to yield much in the way of disclosure. [35]

It seems to me that the essential requirement of a fair dinkum withholding structure is that in virtually all cases it allows the balancing of all factors of the public interest relevant to disclosure of specific information, starting from a genuine principle (in the words of the New Zealand Act) 'that the information shall be made available unless there is good reason for withholding it'.[36] Introduction of the following elements of a withholding regime would, in my view, make a significant difference:

1. A general provision to the effect that *information is to be made available unless disclosure would cause substantial harm* (i.e. writing into the legislation an equivalent to the approach mandated by Cabinet in 1985). This would be combined with the discretion referred to in point 5 below.
2. A *specific substantial harm test* for as many withholding provisions as possible, although not all provisions can be dealt with in the same way. The word 'substantial' needs to be defined in terms of gravity of effect rather than as something that is 'real or of substance and not that which is insubstantial or nominal'.[37] Similar but separate exemptions with public interest tests seem to me to be needed for deliberative process information (s.36) and personal privacy (s.41). In addition, I believe it is important to follow the New Zealand lead here and to substitute for the class exemption for Cabinet documents a harm-based test. (I am under no illusions about the difficulty of doing this. Apart from the threat to monopoly of information, it would take public servants out of the comfort zone where certain kinds of information don't need to be considered for disclosure on the merits, and it would involve some compliance costs.)
3. *Reshaping the present public interest tests so that they become integral components of the withholding provisions* and take explicit account of the *impact of a decision to withhold information on achievement of the objects of the Act* (as Anne Cossins has long suggested ought to be the case in relation to all exemptions, but certainly those with a public interest component).[38]

   If the test for withholding information where there is a public interest component is put in terms of a requirement to weigh (i) a reasonably expected substantial prejudice to a listed interest against (ii) aspects of the public interest favouring disclosure, including (iii) the gravity of the impact of refusal of the information on fulfilment of the objects of the Act, this would provide decision makers with guidance as well as making clear to them, the AAT and the courts that the specific democratic deficit of non-disclosure has to be considered in each case.
4. Wherever possible, introducing a *public interest component* into provisions which don't currently have one, so that the actual harm of disclosure and non-disclosure can always be weighed against each other. This is important in relation to the 'commercial in confidence' exemptions, including both breach of confidence (s.45) and business affairs (s.43), to which I would add legal professional privilege (s.42) and (if it is not repealed as recommended by the ALRC/ARC report) the secrecy provision in s.38. I intend to discuss these proposals in another place.
5. Introducing *a genuine discretion under the FoI Act* (not just 'outside' it) to disclose information that could be withheld, and extending the protections in ss.91 and 92 to a bona fide exercise of that discretion, subject to proper consideration of the interests of third parties. (It is doubtful whether s.18(2) would be held by the AAT or the Federal Court to provide a discretion, and the matter should be put beyond doubt.)[39] This would provide flexibility to agency decision makers to disclose information that is technically exempt but which would cause no substantial harm to any legitimate government or third party interests; in the case of third party interests there should be provision for consultations.
6. *Allowing the Administrative Appeals Tribunal (AAT) to review refusals to exercise the discretion to disclose information,* which, in the (hopefully rare) cases where there is no specific public interest component in a withholding provision, would allow consideration of an overriding public interest in disclosure.
7. *Removal of conclusive certificate provisions* from the deliberative process and Commonwealth–State provisions because they unfairly upset the public interest balancing process; they are not used in this context in State legislation (except now in the Northern Territory). In practice they also play little real role in relation to security, defence and international relations and Cabinet and Executive Council documents, given that in any case AAT composition and procedures for hearing such matters would take account of the information's sensitivity. I agree with the ALRC/ARC report that Executive Council documents

do not need special protection as other provisions will suffice.[40]

8. In addition, Peter Bayne has persistently raised the question of *adding a provision along the lines of s.6 of the Queensland FoI Act to require a decision maker to take account of the identity (and perhaps the particular interest) of the applicant in determining the consequences of disclosure and the balance of public interest*.[41] The ALRC/ARC report endorsed a version of this, and it or a broader version should be implemented.[42]

These changes would, I believe, create a much fairer balance between the interests of citizens and government without in any way imperilling genuinely sensitive information, and would give far greater effect to the open government ideals of the *FoI Act* than is occurring under the current structure. In light of the present provisions of the Commonwealth *FoI Act* they may seem radical, but not when viewed in the light of experience elsewhere (especially New Zealand and Sweden). The important first point is to get consideration of improvements back on the agenda, and to employ something like the above as a basis for discussion.

Disclosure mechanisms

Every avenue should be exploited that will lead to the greater routine availability of government-held information.[43] This was a major thrust of the ALRC's review of the *Archives Act 1983,*[44] and is a major theme of the Canadian Task Force Report of 2002.[45] Such an approach is a vital element of an administrative culture favourable to release, reserving the really contentious documents for disputation under FoI rules. The major danger here could be if agencies take to using their information resources to raise revenue by adopting sale prices that unduly limit citizen access to such information.[46] Of course, the Swedish example is the light on the hill: the vast bulk of all government documents are made readily and routinely available either immediately or rapidly after oral request.[47]

A suggestion of Greg Terrill's for overcoming the excessive individualism of the *FoI Act* would be very valuable in shifting FoI from a one-off release mechanism to one where the disclosure of information to an applicant is followed fairly quickly by publication of a meaningful description of the documents released, e.g. on the agency's website.[48] This would mean that others interested in the material could also obtain access to the information, unless only that applicant is entitled to access it, but the first applicant would normally have some prior advantage, important to news media. If it is impossible at first to obtain legislative change to this effect, it might still be feasible for the Senate to require agencies to table such statements regularly in a way similar to the 'Harradine List' of policy files — the inconvenience of that for agencies could lead to voluntary performance of this task!

Renewing FoI from outside

Compliance measures

In order to get the best out of the present FoI system, it is necessary to investigate the mechanisms by which governments and agencies are able to evade compliance with the requirements of the *FoI Act*. The pioneer of this work is Associate Professor Alasdair Roberts,[49] and his ideas have been further developed by Rick Snell in an Australian context in several important articles.[50] Snell constructs a continuum that includes: administrative activism, administrative compliance, administrative non-compliance, adversarialism and malicious non-compliance, all of which I can remember encountering in days gone by. The development and application of concepts of compliance would allow FoI users and supporters to identify the kinds and levels of agency compliance, work with particular agencies to improve their performance, and to publicise persistent poor performers. Undergraduate and graduate projects of the kind run by Rick Snell at the Universities of Tasmania and Wollongong as part of their administrative law courses can provide a lot of useful information in this area.[51]

Until a specialist monitoring authority is achieved, such work would also benefit from the involvement of the Ombudsman, and perhaps from work by the Administrative Review Council.

Renewing FoI usage — building a constituency

Among the major flaws of FoI legislation identified by Greg Terrill is that it relies on isolated individuals asking for information by a mechanism which inevitably advantages government because of its role as repeat player.[52] These criticisms serve to indicate the inherent limitations of such legislation, although adoption of the above suggestions could go some way to redressing the imbalance.

At the same time, FoI is not necessarily limited to use by largely isolated individuals. Many of the early proponents of FoI were strongly influenced by Ralph Nader,[53] and Nader's view in 1970 was that:

> there need to be institutions, be they universities, law reviews, public interest law firms, citizen groups, newspapers, magazines or the electronic media who systematically follow through to the courts on denials of agency information.[54]

The expectation was that, as in the United States, access to government-held information would expose important instances of abuse of power in areas of consumer law, environmental issues, local government and so on. [55] The actual experience has fallen short of the expectations at Commonwealth level, and perhaps to a slightly lesser extent at State level. We have not so far seen much in the way of well-funded organisations with a specifically FoI orientation like the Nader inspired FoI Clearing House, the FoI Coalition, the Reporters' Committee for the Freedom of the Press and many others in the United States.

Among those who are potential members of an FoI constituency are journalists and other media workers, lawyers, politicians, academic students of government, historians, business (one of the largest users of FoI in the United States and Canada), and lobby and community groups.[56] Some of these groups, of course, will have contradictory interests in relation to FoI, and many remain to be convinced that FoI is of more than marginal utility to them.[57]

There has been a good beginning in the study of the use and promotion of FoI by print journalists, and interesting projects are in progress.[58] The preliminary results show a largely spasmodic use of FoI by journalists in Australia, and some work in bringing the existence of the Act to public attention, while there are some solid examples of FoI contributing significantly to major stories.[59] However, journalists are among those most frustrated by the unnecessary width and abuse of discretions.[60] We need studies at the Commonwealth and State levels that look at their needs and those of users such as historians,

political scientists, environmental and community groups and so on.[61] Parliamentarians are another group who need consideration as potential members of an FoI constituency.[62] Such studies may help us to understand how we can involve these various groups in active advocacy for new and more effective FoI laws and administration.

What I want to suggest is that, even if government remains resistant to FoI change, there are still steps that could be taken by a wide range of interested people to achieve greater use of FoI and greater pressure for FoI reform. Even without the private and corporate resources of the United States, surely we could learn enough from the example of organisations like the National FoI Coalition to set up a wide-ranging body to advocate for open government measures and against unnecessary restrictions on access.

I have no idea whether we can find the depth of interest to make it possible to achieve this end, but I fear that if we do not do so, FoI will continue to degenerate as a useful mechanism to make supposedly liberal democracy more open, responsive and participatory.

Conclusions

To summarise in a very general way, I believe that advocates of open government need to keep up the pressure on federal government to make changes to the objects clause and establish an office of FoI Commissioner that will provide an institutional guarantee of greater integrity in the FoI system than exists at present, and to institute a process for exploring ways of renewing and redesigning the Act and its administration — from exemptions, to fees and charges, to proactive disclosure measures, to review processes and so on. No government body is currently looking at the need to keep the *FoI Act* abreast of the major changes happening in the structure of the state, and how to shape it and other mechanisms to serve the ends of open government in new circumstances. In Alasdair Roberts' words: 'Old FoI laws no longer seem to cover the most important loci of social power'.[63] The price will be growing irrelevance.

Secondly, however, we should seek to build up the intellectual and practical strength of the open government position in the community and the academy, rather than putting all our eggs in the problematic basket of government action. At the same time, there are ways of assessing the compliance of individual agencies with FoI requirements. These can be utilised to help improve performance even under the present Act.

The threats and realities of war and terrorism can be expected to reinforce other contemporary trends that favour demands for secrecy and the construction of a 'national security state'. At the same time, growth of secrecy can generate countervailing demands for transparency. This happened in the United States and Australia following governmental deceptions in the Vietnam War and the abuse of power in Watergate and its cover- up.[64] Roberts gives a number of recent similar examples,[65] and our experience with government claims of children being thrown overboard and attempts to withhold information about the sinking of SIEV-X may point in the same direction.[66] Such demands could favour a renewal of the ideal of greater access to government information as one of the means to allow participation, debate and challenge in relation to government actions and policy.

Whatever the social, economic and political pressures fostering secrecy, it remains true in Roberts' words that the 'right to self-government — which is itself a basic human right — means little if citizens lack the information needed to make intelligent decisions'.[67] Those opposed or indifferent to FoI have not won the intellectual argument. We need to see they do not win the practical argument either.

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A longer version of this paper was presented to the ANU Law Faculty's Public Law Weekend on 1–2 November 2002, and is to be published in a forthcoming issue of *AIAL Forum*.

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2. See Fraser, Ron, 'Freedom of Information: Commonwealth Developments' (2001) 9 *A J Admin L* 34 at 35–36; Rick Snell has referred to the tragedy 'that an increasingly dilapidated, antiquated and flawed *Freedom of Information Act 1982* (Cth) continues to diminish [the informational] commons' — see 'Administrative Compliance — Evaluating the Effectiveness of Freedom of Information' (2001) 93 *FoI Rev* 26 at 30.
3. See in particular ALRC/ARC report, note 1 above, especially para.2.12 and references and chap 4; and Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies*, June 1999, *passim*. For a comparative critique, see Snell, Rick, 'The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *FL Rev* 575.
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5. On the transformation and its implications for FoI see eg Snell note 4 and Arthurs, H.W., 'Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy' (1997) 42 *McG LJ* 29; see also discussion in Juillet, Luc and Paquet, Gilles, 'Information Policy and Governance', Report 1 — Access to Information Review Task Force (Canada), available from website: <http://www. atirtf-geai. gc.ca>.
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7. *Privacy Amendment (Private Sector) Act 2000* (Cth).
8. On the general issue see *The Contracting Out of Government Services*, Administrative Review Council Report No 42, August 1998. See also McLeod, Ron, Commonwealth Ombudsman, 'Commentary' (2001) 29 *FL Rev* 359 at 361–362, and Paterson, Moira, 'Commercial in Confidence Claims, Freedom of Information and Public Accountability — A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing', in Robin Creyke and John McMillan (eds), *Administrative Justice — the Core and the Fringe*, Papers presented at the 1999 National Administrative Law Forum, 2000, 243.
9. See references throughout this paper. Peter Bayne's work has been more technical than that of some of the others and is less referred to here, but has been vital to the development of ideas concerning the design of legislation.
10. Some of what is said here is based on my submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the FoI Amendment (Open Government) Bill 2000, Submission No 16,

or on Fraser, note 2 above. See also Report of the Committee dated April 2001.

11. See Second Reading Speech by Senator Murray, 5 September 2000, *Hansard*, Senate, 17318 ff; and Explanatory Memorandum circulated by Senator Murray, available through searching on the Senate *Hansard* site.
12. See Committee's report, note 10 at 53–57.
13. McMillan, John, 'Twenty Years of Open Government — What Have We Learnt?', Inaugural Professorial Address, 20 March 2002, at 9, available through ANU Faculty of Law Website.
14. For more detail see Fraser note 2 above at 36–37.
15. Para.4.9 and recommendation 4, since published in a revised form by the ANU Centre for International and Public Law and the Federation Press as Law and Policy Paper 21, 2002 (see 26).
16. For some other minor suggested changes, see my submission to the Senate Committee, note 10 above, at 13–15. On s.41, see *ibid*, at 24.
17. *Commissioner of Police v District Court of NSW* (*Perrin's Case*) (1993) 31 NSWLR 606 (CA); *Victorian Public Service Commission v Wright* (1986) 160 CLR 145 (HCA) as interpreted by Victorian courts and tribunals. See *News Corp Ltd v NCSC* (1984) 1 FCR 64 and *Searle Australia Pty Ltd v PIAC* (1992) 108 ALR 163 for decisions of the Full Federal Court that there is no 'leaning position' in the Commonwealth FoI Act. Discussed in Cossins, Anne, 'Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy under Public Interest Immunity and Freedom of Information Law' (1995) 23 *FL Rev* 226 at 268 ff.
18. Smith, Matthew, 'Recent Developments in Freedom of Information Law', paper delivered at ANU Law Faculty Public Law Weekend, 1–2 November 2002.
19. *Shergold v Tanner* (2002) 188 ALR 302.
20. See *Committee Hansard*, Senate, Legal and Constitutional Committee, 5 March 2001 at 2 (evidence of R. Snell).
21. Some further changes to the clause in the Bill are suggested in my submission to the Senate Committee, note 10 above.
22. I have again drawn on my submission to the Senate Committee, note 10 above. See also Fraser note 2 above at 37–39.
23. See *Access to Information: Making it Work for Canadians: Report of the Access to Information Task Force*, Government of Canada, June 2002, chap.11, as well as ALRC/ARC report, note 1 above especially at paras 4.12–4.13.
24. See Report of the Legislative Review Committee (South Australia), September 2000 at para. 6.4. See also the call for a Commissioner in association with outsourcing: 'If no monitoring body is appointed, the value of applying the access provisions of the FoI Act would be lost.' Creyke, Robin, 'The Contracting Out of Government Services — Final Report: A Salutation' at 4, address at the launch of the ARC's Report No 42, note 8 above.
25. Note 1 above, para. 6.30.
26. Note 10 above, recommendation 1(d) and para. 3.114.
27. See eg the Western Australian Information Commissioner's role in 'ensuring that agencies are aware of their responsibilities under the FoI Act' and periodic report cards on their performance. The Queensland Information Commissioner is also developing activities of this kind.
28. See *FoI Memo No 77: Government directions on administration of FoI Act,* June 1985, para. 6, and *New FoI Memo No 19: Preliminary and Procedural Points*, December 1993, para. 2.6.
29. *Freedom of Information Act 1982: Annual Report 1994–95* at Appendix R. Unfortunately for the impact of this letter in later years, it was buried at the back of the report rather than being placed in a prominent position at the front. The change of government in March 1996 would also have deprived it of continuing impact.
30. Unfortunately, the United States Attorney-General John Ashcroft has repudiated the Janet Reno direction, which was to release information unless it is 'reasonably foreseeable that disclosure would be harmful', in order to achieve 'a maximum responsible disclosure of information'. The new direction stresses the nondisclosure of information when there is a 'sound legal basis to do so' and the Department of Justice undertakes to defend agencies which make a decision to refuse information in such cases. Some Democrat Senators have expressed concern with this development. See: *USA Today*, 17 January 2002, available through: <http://www.usa.today.com>.
31. Snell, Rick and Tyson, Nicole, 'Back to the Drawing Board: Preliminary Musings on Redesigning Australian Freedom of Information' (2000) 85 *FoI Rev* 2 at 3.
32. In particular from Fraser, note 10 above and Snell, note 20 above. A basic structure similar to that summarised here was developed in my submission. It is drawn essentially from Snell & Tyson, note 31 above, Snell note 3 above, Cossins note 17 above, and the New Zealand *Official Information Act 1982*. However, the precise form of the proposals may not appeal to those commentators.
33. This issue is discussed in Fraser, note 2 above at 39–40.
34. For the arguments, see the view of a minority of four members of the ARC in *The Contracting Out of Government Services*, ARC Report No.42, at 73–75, and Paterson, Moira, note 8 above; Finn, Chris, 'Getting the Good Oil' (1998) 5 *A J Admin L* 113; on s.43 and government agencies, see Fraser, 'Freedom of Information: Testing the Limits of FoI Access – Some recent decisions' (2002) 9.*A J Admin L* 207 at 213–5.
35. Despite the comments in *Searle Australian Pty Ltd v PIAC* (1992) 108 ALR 163 at 169 that fulfilment of the first part of an exemption with a balancing public interest test does not cast an onus on the applicant, that is the way they are normally applied; and note Wilcox J in *Arnold v Queensland* (1987) 13 ALD 195 at 209 who referred to a prima facie exemption if information falls within the first part of an exemption with a balancing public interest test.
36. *Official Information Act 1982* (NZ), s.5.
37. This is the view taken in one line of cases in the AAT based on the view of Muirhead J in *Ascic v Australian Federal Police* (1986) 11 ALN N184 at 185; see eg Forgie DP in *Re Electronic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449 at [83]. For a different view represented in many AAT cases, see eg Beaumont J in *Harris v Australian Broadcasting Corporation* (1984) 50 ALR 551 at 564, and Hall DP in *Re James and ANU* (1984) 6 ALD 687 at 699.
38. See Cossins, Anne, *Annotated Freedom of Information Act New South Wales* (1997) at paras.1.13.11–1.13.12.
39. ALRC/ARC report, note 1 at para.8.3.
40. See note 1 above, para.9.14 & recommendation 50.
41. See eg Bayne, P., submission to the ACT Legislative Assembly's Standing Committee on Justice and Community Safety, point 5, and 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 *F L Rev* 287 at 305 and 320–1.
42. ALRC/ARC report, note 1 above, para.4.11 and recommendation 6; see also clause 11A in Schedule 1 of the FoI (Open Government) Bill 2002.
43. See ALRC/ARC report, note 1 above, para.4.17.
44. *Australia's federal record: A review of Archives Act 1983*, ALRC Report No 85, 1998 at chap 18, especially paras.18.8–18.24.
45. See Canadian ATI Task Force Report, note 23 above, chap.8.
46. See ALRC/ARC report, note 1 above, para.6.26.
47. Lidberg, J., 'Freedom of Information as a Journalistic Tool — a Comparative Study between Western Australia and Sweden' (2001) 95 *FoI Rev* 42.
48. Terrill, Greg, 'Individualism and Freedom of Information Legislation' (2000) 87 *FoI Rev* 30 at 31. A database of Canadian ATI requests (not complete) is available on the following website set up by Alasdair Roberts: <http://track.foilaw.net>. Note that the Canadian Task Force (note 23 above) recommended that 'information on completed requests across government be made available to the public on a government Web site' (Recommendation 7.3). Under the US Electronic FoI Act there is 'a requirement to post documents or links to information for which there have been multiple access requests' (Canadian Task Force Report at 119).
49. Previously of Queen's University, Ontario and now Director of the Campbell Public Affairs Institute at the Maxwell School of Syracuse University. See his paper on 'Limited access: Assessing the health of Canada's freedom of information laws', April 1998, and many other papers and articles available at <http://faculty.maxwell.syr.edu/asroberts/research.html>.
50. See Snell, notes 2 and 4.
51. See <http://www.foi.law.utas.edu.au/> research link.
52. Terrill, Greg, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond*, 2000, eg at 115, and article referred to in note 48 above; Hazell, R., 'Freedom of Information in Australia, Canada and New Zealand' (1989) 67 *Public Administration* quoted R Snell, 'In search of the Freedom of Information constituency: Case 1 — The Media' (1998) 78 *FoI Rev* 81 at 82: 'Yet Hazell notes that this direct empowerment in the absence of informational go-betweens was overly optimistic: "with the wisdom of hindsight it was naive to suppose that individual citizens ever would be the major users of the legislation. The public are seldom direct

consumers of government information: they rely on others (the media, interest groups, political parties) to process the information for them and to select items which will appeal to their own particular range of interests and prejudices."'

53. For example Terrill, note 52 above at 17 and 91–92; see also Fraser, R., 'FoI and Citizen Participation in Public Policy and Decision Making', Grad Dip in Pub Law essay, 1986 at 5–6 and Appendix 1 (in author's possession).
54. Quoted Snell, note 4 above at 105.
55. John McMillan, 'Freedom of Information in Australia: Issue closed' (1977) 8 *F L Rev* 379 at 389–391. And note for use of the US FoIA up to the early 1980s, Relyea, Harold C. and Cavanagh, Suzanne, 'Press Notices on Disclosures made Pursuant to the Federal Freedom of Information Act, 1972–1980' (1982) 3 *Journal of Media Law and Practice* 144.
56. See Snell, note 4 above at 105–6.
57. See Roberts, A., 'The Informational Commons at Risk', August 2000 at 28, available at website note 58, and published in Dranche, David (ed.), *The Market or the Public Domain: Global Governance or the Asymmetry of Power,* 2001, 175 (book not sighted), on the difficulty today of constructing 'coalitions that are powerful enough to push for adoption of policies that promote openness'.
58. For other recent writing on the media and FoI see eg Waters, Nigel, *Print Media Use of Freedom of Information Laws in Australia*, Australian Centre for Independent Journalism, University of Technology, Sydney, January 1999, and 'Freedom of Information Works for the Media in New Zealand' (1998) 77 *FoI Rev* 66; Snell, note 52 above; Coulthart, Ross, 'Why the FoI Act is a Joke or "Don't Shoot the Media, We're Doing our Best"' (1999) 81 *FoI Rev* 43; Lidberg, note 47 above; Johnson, Anina, 'You Don't Know What you've Got until it's Gone: The French Media's Use of FoI' (2000) 85 *FoI Rev* 6; Atallah, Paul and Pyman, Heather, 'How Journalists Use the Federal Access to Information Act', *Report 8 — Access to Information Review Task Force,* January 2002; note also a just published work with chapter on FoI by Rick Snell and Matthew Ricketson: Stephen Tanner (ed), *Journalism: Investigation and Research*, Pearson, 2002.
59. Waters, 1999 note 58 above, especially at 15–25; Evans, Bryony, 'The Use by Journalists of the Australian Freedom of Information Regime', (2003) *FoI Rev* 8 (this issue).
60. See e.g. Coulthart note 58 above.
61. Note that Terrill, note 52 above, is an example of an historical study where an attempt to use the provisions of the Archives and FoI Acts for research purposes was accompanied by a considerable amount of frustration — see eg 85 and 121–2.
62. On parliamentarians, see Snell, Rick and Upcher, James, 'Freedom of Information and Parliament: A Limited Accountability Tool for a Key Constituency?' (2002) 100 *FoI Rev* 35.
63. Note 57 above at 28.
64. See Terrill, note 52 above at 45–49.
65. Roberts, note 57 above at 12–15.
66. See <http://www.aph.gov.au/senate/committee/maritime_incident_cttee/index.htm>; Weller, Patrick, *Don't Tell the Prime Minister,* 2002; and resources at: <http://www.sievx.com/>.
67. Note 57 at 29.

The use by journalists of the Australian freedom of information regime

Introduction

The principles of open government underlying the *Freedom of Information Act 1982* (Cth) presuppose a significant role for the media in scrutinising government policy and decisions, and providing information to the public about these processes. As the instrument through which the public makes sense of this information, the media links the transparency provided by the freedom of information (FoI) regime with the participation of citizens in the political process. The argument made is that the use of FoI by journalists to access government documents as part of the investigative process is essential to ensuring the public receive as much accurate information about government as possible.

Despite this expectation, FoI does not play a large role in the information gathering processes of journalists. Interviews conducted for this report show that journalists and editors are generally cynical about how far FoI can be used to access documents revealing government processes, particularly those documents dealing with high-level or politically sensitive government deliberations or decisions.

The common obstacles identified by journalists to accessing information through the FoI process were:

- procedural obstacles
  - prohibitive costs of processing FoI requests and pursuing review of decisions made on requests, and
  - time delays in the processing of requests and release of documents;
- the scope and operation of the exemptions in the Act that prevent disclosure of certain documents and material; and
- the application and interpretation of the Act by administrators to inhibit disclosure.

The report first sets out how the Commonwealth FoI process operates. This is followed by an analysis of the experience of the media in using the process based on interviews with journalists and editors, and a section summarising the results of an interview conducted with the FoI Coordinator of the Department of Prime Minister and Cabinet. Finally, the conclusion puts forward some suggestions made in the interviews for future development of the FoI regime to promote access to government-held information.

Methodology

This report is drawn from research conducted for a more detailed and legalistic honours paper on the media's use of the Commonwealth FoI regime completed as part of the final year of the writer's Bachelor of Communication (Journalism)/Bachelor of Law degree.

The original research on which the following conclusions are based comprised a series of interviews with journalists and editors from a number of the major news organisations and metropolitan newspapers. These were Fairfax publications, the *Sydney Morning Herald,* the *Australian Financial Review*, and the *Age;* News Limited publications, the *Daily Telegraph* and the *Australian*; Channel Nine 's *Sunday* program; and the ABC, including *Four Corners*, the *7:30 Report*, and *Radio National* programs. Those interviewed for this report were chosen on the basis of availability and their level of experience with the Commonwealth FoI regime, though some interviewed did have greater experience with state regimes.[1] A number of interviews were also conducted with academics in the area and some administrators within Commonwealth departments. The number of interviews and the depth of the interviews was restricted by time and resource constraints so that the focus of the information is primarily on the Commonwealth regime.

It is important to recognise that although the state and territory regimes operate differently from each other and the Commonwealth regime, those interviewed from the media industry identified common obstacles that had the effect of restricting their access to certain government documents through the FoI process. To this extent the obstacles highlighted in this report can be applied generally to the use of FoI by all journalists, regardless of the jurisdiction they deal with most regularly in their day-to-day practice.

FoI legislation in Australia

The focus of this report is the experience of Australian journalists with the Commonwealth FoI regime governed by the *Freedom of Information Act 1982 (Cth)*. Legislation has been enacted in the other states and territories based on the Commonwealth legislation, though the regimes in these jurisdictions are different in some respects. The relevant state and territory legislation is as follows:
Freedom of Information Act 1992 (Qld)
Freedom of Information Act 1989 (NSW)
Freedom of Information Act 1982 (Vic)
Freedom of Information Act 1991 (SA)
Freedom of Information Act 1992 (WA)
Freedom of Information Act 1989 (ACT)
Freedom of Information Act 1991 (Tas)

THE MEDIA'S USE OF THE COMMONWEALTH FREEDOM OF INFORMATION ACT

Exercising the right of access under the Commonwealth FoI regime

The most significant element of the Commonwealth FoI regime for journalists is the operation of 'a legally enforceable right' of access to the documents of a Commonwealth agency or Minister pursuant to s.11 of the Act. Read in correlation with the objects of the Act, which has as its preamble the extension of the right of access of the Australian community to government information,[2] this right delivers a powerful investigative tool into the hands of the journalism profession. The process for requesting documents required by the Act determines the operation of this right.

The process for lodging a valid FoI request

Under the Act, a request for information must contain the particulars set out by s.15(1) and can only be made for 'documents' in the possession of an 'agency'. These terms are defined broadly in the Act, essentially covering recorded information in the possession of any major government authority or department, so that they are not significant hurdles for an applicant to jump when lodging a request.[3]

The right of access is subject to procedural prerequisites being that: the request is in the required form[4]; the processing fees have been paid,[5] and, pursuant to s.24, the processing of the request does not 'substantially or unreasonably' divert the resources of the agency.[6] The exemption provisions limit the disclosure of documents of a particular type or documents the disclosure of which would have a particular effect.[7]

Where a valid request is made to an agency, the agency is required to notify the applicant of the decision on the request within 30 days of the day after the day the request is received by the agency.[8] The administrator can also extend this processing time period where consultation with a third party on the request is required or where the applicant agrees to the extension.[9]

Refusal to process an FoI request on resource grounds

A number of the journalists interviewed, whose fields of specialisation range from health and education to political analysis, said they commonly had requests refused on s.24 grounds, where the agency or Minister is satisfied that the processing of a request would 'substantially or unreasonably' divert resources.

In deciding whether there would be a 'substantial or unreasonable' diversion the administrator is to consider the resources that would have been used in processing, but is barred from considering the motives of the applicant.[10] The application of s.24 is based on the scope of the request and the level of specificity with which the documents are identified. Broad ranging requests for documents from a department are likely to be refused. Mark Robinson, health writer with the *Sydney Morning Herald* and former state political reporter, says that this effectively cuts out using the Act to conduct 'fishing expeditions', where 'you don't always know what you are looking for' and the request is used as a way to actually find a story.[11]

A common observation by those interviewed was that, in order to avoid s.24 being applied to refuse processing of requests, journalists need to spend time framing their request to make it as specific as possible. For example, if it is not possible to state the details of the actual documents being sought, journalists should refine the request down as much as possible to a definition of the documents that they are seeking. Marian Wilkinson, a senior journalist at the *Sydney Morning Herald*, suggests journalists should use strategies to make requests very specific from the beginning of the process, such as consulting with former bureaucrats to understand how particular departments organise information and where specific documents will be located.[12] In order to avoid s.24, Michael McKinnon, senior journalist and FoI Coordinator with the *Courier Mail*, has negotiated with the Queensland Premier's Department for an index to be provided to the paper that lists all the file titles held by the department. By reference to the titles of actual documents, journalists are able to identify and request specific documents rather than embarking on fishing expeditions for information without certain outcomes.[13]

The other advantage of refining the request from the outset is that time delays involved with consultation with FoI administrators to refine requests can be reduced, as well as the costs of processing the request. However Laura Tingle, senior political correspondent with the *Sydney Morning Herald*, argues the time involved with refining and pursuing a request for documents often undermines the value of FoI as a journalistic tool:

> To put in a viable FoI request first up requires a good couple of days of work, so you've really got to be determined you're going to find something to do it, and then you've got to be exceptionally aggressive and assertive in pursing the issue. In most cases where I've been doing something I probably haven't been as aggressive and assertive as I should have been purely on the basis that the time frames are such a problem.[14]

Determinations on an FoI request

Differing levels of access to a requested document can be given in response to a request. These can range from

inspection, to giving the document to the applicant, to outright refusal, for example where the document is excluded by an exemption.[15] Where access to a document is refused on the grounds of an exemption, the administrator may still be obliged to disclose a copy of the document where deletions could be made excluding the copy from the exemption and where it is reasonably practicable for the agency to do so.[16] Where it is not possible to make deletions from the exempt material, the administrator must give the applicant a statement of reasons setting out the grounds for refusal.[17]

Upon refusal of a request for access, the applicant is able to pursue internal review of decision upon which an additional 30-day time period comes into effect and an additional $40 is payable to the agency.[18] External review can also be sought through the Administrative Appeals Tribunal (AAT), but only after there has been internal review of the decision.[19]

FoI in the newsroom: How journalists use FoI to access government held documents

Overview

> For journalists, using FoI is all too often a signal of defeat. It's putting the government on notice of what they want and it can only be used as a last resort. Most of the time FoI is a complete waste of time in terms of its practical application.
>
> Ross Coulthart, Journalist *Sunday* program[20]

A common criticism among the journalists interviewed is that, while the existence of the FoI regime is important, the obstacles they face in using the Act to access documents means its practical value as an investigative tool is minimal if existent at all. Contrary to the rationale of access to information behind FoI it is suggested that the resources, both in costs and time, to make a viable request are often not justified by the expected results, particularly where other sources of information are available, such as 'leaking' of documents or government contacts. As Marian Wilkinson, of the *Sydney Morning Herald* commented:

> I really think it's a mixed bag. Often there is very little in the end, that I've seen that's come out of FoI that has substantially altered your understanding of a situation… [21]

However all of the journalists interviewed recognised that, as part of the broader democratic and accountability role forseen for journalists, FoI, in principle at least, is ultimately beneficial for journalists. Further, there has been a level of successful FoI requests that have been used to support stories or research despite the operation of these obstacles.[22]

The areas of journalism in which FoI is commonly used

The use of FoI is concentrated and more viable in certain 'rounds' of journalism than others, whether as a result of the focus of the rounds or the time limitations placed on the production of stories in that area.

Out of the 30 journalists contacted only 11 said they had made regular use of FoI. Journalists attributed their lack of regular use of FoI to time constraints, the nature of their work, or simply lack of interest. For example, David Marr, a senior journalist with the *Sydney Morning Herald*, said that the pattern of his work, focusing on documents already available to the public and legal decisions, meant that until recently he had not used FoI as a research tool.[23]

Journalists who specialise in areas such as in-depth political reporting, defence, immigration and health use FoI regularly. Marian Wilkinson, who specialises in political analysis, recently lodged a request with the Department of Defence and the Australian Search and Rescue Authority for documents, such as ships' logs, memorandums and government files, relating to the Tampa rescue operation late last year. Laura Tingle, previously a senior political correspondent in the Canberra bureau of the *Sydney Morning Herald* and now a senior writer for the *Australian Financial Review*, has used FoI to pursue documents from government departments including Treasury, Health and Aged Care, and Employment and Workplace Relations.[24]

The nature of the story to be written also tends to determine when FoI is used as part of the researching process. Particularly where a story requires documents relating to high-level government policy or deliberations, the exemptions in the Act are seen as effectively leading to automatic refusal of such requests. As commented by Ross Coulthart, investigative journalist with the *Sunday* program:

> The real problem is that, quite frankly, you go through this kind of automatic process of refusal through the federal government departments. They know that when it gets to the AAT that 99 times out of 100 we drop off because we can't afford it.[25]

Longer stories are also more compatible with use of FoI as a research tool.[26] For example, Jack Waterford, Editor-in-Chief of the *Canberra Times*, said he would direct a journalist to use FoI to write a feature with a one to two month research period, whereas FoI would not be practical for a story for the next day or week.[27] Similarly, Jonathan Holmes, Executive Producer (TV) of the *7:30 Report*, said the journalists at the program rarely made use of FoI because they did not do investigative reports that extended over a long period of time.[28]

Obstacles to accessing government held documents through the FoI process

Procedural obstacles

The cost of seeking documents

A majority of the journalists interviewed cited the high cost of pursuing an FoI request as a deterrent to using the process.

Under the Commonwealth FoI regime, a typical FoI request is subject initially to an application fee of $30 as a prerequisite to the request being accepted for processing.[29] FoI administrators also have the discretion to decide that an applicant is liable to pay additional charges to cover the processing of the request, such as the cost of photocopying.[30] It is significant to note that such fees and charges are restricted in the case of requests for personal information. Additional costs apply where review of a decision by an agency on a request is pursued in the AAT or Federal Court, including legal representation and filing fees.

A common experience relayed by journalists is of receiving a bill from an agency to which an FoI request has been made, estimating the cost of processing a request for, in some cases, thousands of dollars. For example, a request made by Mark Robinson, journalist with the *Sydney Morning Herald,* for documents relating to the Peter Reith telecard affair was met with a quote for processing costs of $68,000.

The view of Marian Wilkinson, who is also a former editor of the *Sydney Morning Herald*, is that the FoI process is 'increasingly expensive and, in the stringent times the newspapers are going through, it's very hard to persuade newspaper editors … to pick up a bill … for what may or may not be, in the end, much information'.[31] At the time she was interviewed for this report, Wilkinson was waiting for a response to her request for documents from the Department of Defence about Operation Relex and the Tampa rescue operation, and she had received an estimate of $7000 in processing charges. Her request was in relation to a specific document and included the file number to identify it, but while this meant there was a minimal searching fee, the $7000 was quoted for the decision-making time of the department.

Patrick Walters of the *Australian* made the point that while application and processing fees do not represent as much of a hurdle for larger news organisations, for smaller organisations or those with lower budgets, as well as freelance reporters, the costs would be a significant obstacle. This view was supported by comments from ABC reporters that the expense of FoI, in addition to time constraints, has resulted in low use of FoI as part of the research for their programs.[32]

The high costs involved in seeking external review of a decision of an agency or minister to refuse documents have also been cited as a deterrent to journalists, or their news organisations, pursuing requests and achieving access to documents sought.[33]

It is noted that the fee regimes differ between the state and Commonwealth FoI regimes, so that the extent to which fees are a deterrent to using FoI may depend on the jurisdiction in which a request is to be made.

Time delay working against FoI as an effective investigative tool

Every journalist interviewed cited the time taken to process FoI requests as one of the main deterrents to using FoI in day-to-day news practice where stories are often being researched for the next day or soon after.

Under the Commonwealth regime, administrators are required to notify the applicant of the decision on a valid FoI request within 30 days of the day after the day the request is received by the agency.[34] The 30-day time limit for processing may be extended by an additional 30 days where consultation with a third party is required before material can be released and where the applicant is informed of the extension.[35] The agency will also have an additional 30 days where the applicant makes a request for internal review of a decision on a request.

The statutory time periods for processing and the means of extending response times can mean that the response to an application is not received for at least 30 days, assuming the agency complies with the required time periods.[36] Where journalists are writing to tight deadlines in which stories are dependent on the currency of the issues, time delays reduce the effectiveness of FoI as a way of gathering information. Patrick Walters, the Editor-in-chief of the *Australian's* Canberra bureau, argues that the efficacy of FoI as an investigative tool for journalists is determined by how quickly information can be accessed.[37]

According to a number of the journalists interviewed, government agencies often fail to respond within the time periods whether as a result of resource constraints or deliberate delaying tactics. A perception among some of the journalists was that some agencies use time delays to discourage use of the FoI process, for example by responding to requests at the end of the prescribed 30-day time limit or extending time periods unnecessarily.

The effect of procedural obstacles on the way journalists use the FoI process

These procedural obstacles in combination with daily work pressures appear to have resulted in a fragmented approach to the FoI process by journalists.

Indeed where there are other less cumbersome avenues for accessing government information, for example through 'leaks' or government public relations units, it appears journalists tend to overlook FoI as an investigative tool, or at least as a first port of call for gathering official information. Significantly, where these alternatives for getting government information are not available, time and cost constraints may mean that journalists are not able to pursue certain issues as rigorously as they otherwise could. As Walters commented regarding the use of FoI by the *Australian's* Canberra Bureau:

> We're not using it [FoI] as often as we could or even as we should be using it because it's now a very costly exercise, it's time-consuming in the sense that it's never time-critical … you quite often find that by the time you actually get your FoI back and you actually get the information, you may well have got it from another source or indeed that issue which you were pursing at the time is no longer in the public mind.[38]

From the interviews with journalists and editors conducted, there is little evidence of systematic use of the FoI process by news organisations or individual journalists. There are some exceptions, for example, Michael McKinnon, senior journalist and FoI Coordinator at the *Courier Mail*, has developed a systematic approach to lodging FoI requests through continuing negotiation with government agencies, particularly the Queensland Premier's Department.[39]

According to Jack Waterford, Editor-in-chief of the *Canberra Times*, such a fragmented approach has the potential to undermine the efficacy of the FoI process even where journalists and news organisations do use it. He argues that it is important to ensure that any requests made to agencies by journalists are carefully formed and not arbitrary 'stabs' at getting access to information of no real value. This requires journalists to have a working knowledge of government departments and how they operate, particularly their system of record management.[40]

Along these lines Anne Davies, Urban Affairs writer with the *Sydney Morning Herald*, suggests that use of FoI could be promoted by agencies providing a process that would allow journalists to identify the documents that are available from a department before a request is formed.[41]

The scope and operation of the exemption provisions

The operation of the exemptions restricts how far journalists are able to access government-held documents through the FoI process. The refusal of requests for disclosure through the application of the exemption provisions has fed a perception among journalists that requests, particularly in relation to government policy or deliberations relating to high level government decisions, will be effectively open to automatic refusal.

The exemptions commonly cited by journalists as obstacles to accessing government-held documents included those applying to:

- Cabinet documents;
- documents involved in the decision-making processes of government ('deliberative process documents' or 'internal working documents');
- documents deemed 'commercial-in-confidence';
- access to documents resulting in disclosure of certain personal information (privacy grounds); and
- national security and defence documents.

Significantly, the exemptions for Cabinet documents[42] and for internal working documents[43] determine the right of access to documents explaining the reasons behind government decision and policy-making and processes. According to journalists the broad scope of documents caught by these exemptions means it is unlikely that a request for more sensitive government documents would be granted, at least not without deletion of material or pursuing the request through the review process. Jack Waterford of the *Canberra Times* said a distinction can be drawn between three levels of government documents commonly sought through FoI. Personal information is readily available, and routine information aboout government decisions of a low to medium sensitivity will usually be accessible. However, where documents concerning high level, politically sensitive decisions have been sought Waterford notes that 'most of the journalists who have tried have been pretty dissatisfied with both the time taken to process the request and what they've got out of it in the end'.[44]

Further the strict approach of agencies to the release of such documents, particularly Cabinet documents, can result in a situation for journalists where, contrary to their belief that certain information should be available in the public interest, access to such information is refused. The *Australian's* Patrick Walters gave the example of a request made by the paper to the Commonwealth Remuneration Tribunal for the salaries of secretaries in government departments that was refused on the grounds of Cabinet confidentiality:

> That was, I thought, a rather surprising dead end in terms of the way you might have felt the system might respond. I can understand you mightn't get access to certain classes of defence documents relating to business of the National Security Committee of Cabinet. That is entirely comprehensible. But when it comes to the provision of salary levels for senior public servants you would have thought that something in the Act would allow you to pursue it successfully.[45]

A number of journalists also expressed concern about the growing use of the commercial-in-confidence exemption as a ground for refusing access to documents, and that a liberal use of the exemption by agencies opened it to abuse.[46]

Application and interpretation of the Act by administrators

A common perception among the journalists interviewed was that the application and interpretation of the legislation by administrators in the processing of FoI requests determines how far the regime will work either for or against journalistS when they are seeking government documents.

Concern was expressed by journalists in relation to the perceived level of control held by FoI officers over, not only whether requested documents ate disclosed, but also over whether the documents would be filed or located in the first place. As the *Sydney Morning Herald's* Marian Wilkinson commented:

> The other thing which I'm never really confident of is that they have total say as to whether this document fitted in to your FoI request or not … you're never quite sure whether you're getting all the material or just the material they believe is relevant to your request.[47]

This contributes to a perception among journalists that, as applicants, they are at a significant disadvantage in the 'FoI game', persistently blocked from obtaining any useful information through the process by frustration tactics employed by administrators, such as delays in responding to requests. The following quotes from journalists reflect the perception of the barriers erected by those who administer the FoI process:

> There is a culture of secrecy where there should be openness that prevents journalists from doing their jobs properly and from providing public accountability.[48]

> … [FoI] is not a first port of call for information gathering because there's a real, a kind of web that's been woven around the FoI framework as it applies to public service which just makes it difficult to access in a hurry.[49]

In some cases, such arguments extended to alleging deliberate misapplication or manipulation of the FoI provisions to prevent disclosure and deter use of the process by journalists.[50]

The politicisation of the FoI process is also seen as creating uncertainty for journalists about how valuable the results of FoI requests will be. Many journalists presume that, contrary to the spirit of the Act, decisions by administrators about disclosure of requested documents are aimed at maintaining government secrecy rather than promoting openness and transparency. Only a few journalists referred to particular instances of administrators obstructing their requests for documents, though it was unclear whether the obstruction was deliberate or a result of the process itself.[51] For example, a common experience cited by journalists was of administrators waiting until the end of the statutory time period to inform them that they needed to refine the scope of their request, requiring the journalist to reframe the request and resubmit, extending the processing time. Another tactic cited by journalists interviewed was where government agencies release information requested by a news organisation publicly or to a rival news organisation as well as the applicant for the purpose of taking the momentum out of a sensitive political issue.

However, it should also be emphasised that the experience of journalists with FoI administrators is not entirely negative.[52] Indeed, Snell argues that a presumption of distrust of government by applicants, including journalists, ignores ways the regime can be used to improve government accountability and the fact that some applicants do get assistance from FoI officers with forming and refining requests.[53]

THE ADMINISTRATION OF FOI: A CASE STUDY IN THE USE OF FOI BY THE MEDIA

Overview

Due to time and resource constraints, it was not possible to conduct detailed interviews with a range of government agencies that administer the Commonwealth FoI process.

The interview with the Department of Prime Minister and Cabinet (DPMC) was conducted with the FoI coordinator, Philip Weeks, and a senior legal officer of the Legal and Culture branch of the Department, Brendan MacDowell.

It is emphasised that it is not possible to draw any general observations from the interview conducted with the DPMC as each department has a different system for handling FoI requests and the different functions of agencies will determine the sorts of request they receive. Further, the amount of detailed information from the interview is limited by the fact that both the FoI Coordinator and the senior officer had only been in their positions in the DPMC since May 2002.

Department of the Prime Minister and Cabinet

The FoI process within the Department

The 2000–01 Attorney General's Department Annual FoI Report indicates that the majority of requests received by DPMC is for non-personal information, for example policy documents and correspondence.[54] The DPMC receives a low number of FoI requests annually in comparison to other Commonwealth departments — its requests represent only 0.07% of total requests made in that period.

A FoI Coordinator in the Legal and Culture branch of the DPMC oversees the FoI process. The FoI Coordinator is the point of contact with the applicant and makes the initial assessment of the request. The request is then delegated to an Assistant Secretary within the relevant branch of the DPMC who makes the searches for the requested documents and decides whether the request will be granted, in full or in part, or refused. The FoI Coordinator advises the applicant of the Assistant Secretary's decision and the applicant can decide whether to proceed with the request or pursue internal review. Where internal review is sought, the next senior Assistant Secretary above the initial decision maker deals with the request. The FoI Coordinator can also seek advice from senior officers in the Legal and Culture branch in relation to issues of interpretation of the request or the FoI legislation throughout the process.

Requests by the media to the Department

Frequency of requests by journalists

Time period (calender year)	Number of requests by members of the media	Total number of requests
1997	14	25
1998	9	23
1999	7	27
2000	25	33
2001	7	16
1 Jan 2002 to 3 July 2002	7	14

Where applicants identify themselves as working for a news organisation when making an FoI request from the DPMC, the FoI Coordinator notes this next to their name on the FoI request records.[55] The preceding statistics regarding the number of requests made by journalists to the DPMC from 1 January 1997 to 3 July 2002 are based on these notations.[56]

Information sought in requests by journalists

According to an assessment of the requests made since 1997, journalists commonly seek two general types of information from the DPMC:

- specific documents or categories of documents which are thought to exist, commonly relating to a particular issue within the media at the time;
- broadly framed requests for a range of documents relating to a particular topic, from which it is not clear that a specific document is being sought (ie, more in the nature of 'fishing expeditions' for possible stories). These sort of requests would usually require some refinement or negotiation with the FoI Coordinator before they could be accepted as sufficiently specific to be processed.

According to the DPMC, it was not possible from the statistics and records kept to accurately assess which sort of request was more frequently made by journalists. However, on an assessment of the initial request statements by journalists, it was estimated that only 8 out of the 68 requests received from journalists from 1 January 1997 to 3 July 2002 could be classified as being of the broad-ranging, non-specific type identified above. According to the DPMC the other requests appeared to be for specific documents and were usually connected to an issue that was prominent within the media within the relevant period.[57]

Compliance with requirements for processing

It was also not possible on the statistics available for the DPMC to indicate the extent to which the requests made by journalists complied with the requirements under the Act for the acceptance of requests for processing.

Further, it was not possible to generalise as to the common exemptions that would have been applied to requests by journalists as it would depend on the nature of each specific request and the circumstances of the request. However it was stated that, due to the nature of the information dealt with by the DPMC, primarily being advice to the Prime Minister and to Cabinet, the refusal of access to documents requested through FoI, either partially or wholly, on the grounds of Cabinet confidentially is common.

Conclusions

The interviews conducted for this report indicate that journalists and editors remain hesitant to make regular use of FoI as part of the process of day-to-day reporting, and in some cases, as part of longer term investigations. The obstacles that are perceived to stand between the media and official government-held information in the FoI process act as deterrents to utilising the regime in a systematic or sustained way. However, the development of approaches to making FoI requests within some newsrooms and by some individual journalists may indicate that journalists are becoming more aware of how to make the process work for them as a research tool.

A number of suggestions came out of the interviews with journalists and editors about the way the regime could be changed to work more effectively for the media as an information-gathering tool.[58] In general terms, these suggested changes included:

- The development of a process within government agencies and departments to assist members of the media to identify specific documents held by the department in relation to an issue.[59]
- A higher level of routine disclosure of government information. Ross Coulthart of the *Sunday* program contrasts the high level of publicly available information in the US to the situation in Australia where he perceives a greater reliance on processes like FoI for the public to access official information. Marian Wilkinson of the *Sydney Morning Herald* also argues that this reliance on formal processes for accessing information has stifled any routine disclosure of government information:

  … with the FoI legislation in place, so many bureaucrats refuse information. They say you can apply for it under FoI and I feel that a lot of this information, which is in many cases not that sensitive, should be routinely made available through the public relations officers of the department, but they're not, so you're forced to go through a cumbersome and costly FoI process instead. In that way, I think that FoI material has become a negative.[60]

  She suggests that there should be a penalty imposed on government departments for not supplying information initially where it is found that the information should have been publicly released.[61]
- Jack Waterford, Editor-in-Chief of the *Canberra Times*, suggests clearer guidelines are required to explain how the public interest test in the FoI legislation operates to allow disclosure of information. Currently the AAT and Federal Court decisions on the interpretation of the public interest indicate some uncertainty in the circumstances in which disclosure will be deemed to be in the 'public interest' and how the 'public interest' is to be determined.[62]
- The creation of more defined guidelines for when the exemptions within the legislation operate to prevent access to certain government documents, including clearly limiting the scope of a number of the exemptions that are perceived to be used broadly and might be open to abuse. As indicated above, the exemptions for Cabinet documents and internal working documents significantly restrict access to high-level government material. Concern was also expressed in relation to the common use of the commercial in confidence and national security exemptions to prevent access to information.
- The adoption of an approach within newsrooms that encourages journalists to report on failed FoI attempts or perceived government secrecy in a matter of public interest Matthew Moore of the *Sydney Morning Herald* argues that 'journalists should be prepared to make a noise about what government won't tell you'.
- A more proactive approach should be taken by journalists and the media industry in general to reform the existing FoI regime to promote greater access to information, and to promote of the use of the process by the public and other organisations. Rick Snell, an academic and FoI expert from the University of Tasmania, argues that the main difference between the Canadian FoI system, in which a number of progressive reforms have taken place in recent years, and the Australian system is the different attitudes of the media in Canada and Australia to development and use of FoI.[63]

Despite the fragmented use and cynicism towards use of FoI, all of the journalists interviewed recognised that, as part of the broader democratic role of journalists, FoI, in principle at least, is ultimately beneficial for journalists and the general public.

BRYONY EVANS
For the Australian Press Council

Bryony Evans completed this study for the Australian Press Council in 2002 while she was an undergraduate student in journalism and law at the University of Technology Sydney. The Australian Press Council has given permission for this slightly edited and amended version of the report to be republished.

References

1. A list of the journalists interviewed is included at the end of this report.
2. s.3(1).
3. s.4(1). 'Document' is defined as any written material or recorded information, though some documents are expressly excluded including Cabinet notebooks and library materials. A broad scope is given to the definition of 'agency' and its components under s.4(1), including all major government authorities and departments. As the document must be 'in the possession of an agency … whether created in the agency or received in the agency', a request can also be made for documents produced by a third party and given to an agency in some circumstances.
4. s.15.
5. ss.29–31. The FoI (Fees and Charges) Regulations set out the fee structure applicable to requests made under the Act. For further detail on the amount of fees and charges, see the discussion below.
6. s.24.
7. Pt IV of the Act. The right of access is expressly made subject to the exemptions pursuant to s.11(1) and s.3(1)(b). Further, s.32 provides that the exemption provisions are not limited in their operation by any other exemption or provision in the Act or by reason of the application of another exemption to the same document.
8. s.15(5)(b) of the Act
9. For further details on the applicable time periods under the Commonwealth legislation, see the discussion below.
10. s.24(2)–(3). There are a number of other prerequisites administrators must satisfy before s.24 can be applied, including the giving of reasonable notice to the applicant of their intention to refuse the request and that the applicant is given reasonable opportunity to consult in an attempt to narrow the request.
11. Mark Robinson, Personal Interview, 25 March 2002.
12. Marian Wilkinson, Personal Interview, 15 April 2002.
13. Michael McKinnon, Personal Interview, 17 April 2002.
14. Laura Tingle, Personal Interview, 17 April 2002.
15. s.20.
16. s.22. Where material is deleted, a statement of reasons must be issued by the agency containing the grounds on which the deletions were made; s.22(2)(a).
17. s.26. The statement of reasons must also set out the material on which the findings were based.
18. s.54(1).
19. s.55.
20 Ross Coulthart, Personal Interview, 22 Apri12002.
21. Wilkinson, Personal Interview, 15 April 2002.
22. Patrick Walters, Personal Interview, 19 April 2002.
23. David Marr, Personal Communication (email), 21 March 2002.
24. Tingle, Personal Interview, 17 April 2002. For example, she made a request for documents regarding the successful tenders for contracts in the Commonwealth Job Network scheme in 2000.
25. Coulthart, Personal Interview, 22 April 2002.
26. Further detail on this point see the discussion of time delays below.
27. Waterford, Personal Interview, 22 April 2002.
28. Jonathan Holmes, Personal Communication (email), 5 April 2002.
29. s.15(2)(e) of the Act, cl.5 *Freedom of Information (Fees and Charges) Regulations 1982* (Cth). There is a separate fee of $40 for internal review of a decision regarding an FoI request: s.54(1).

30. s.29 of the Act For example, the charge for locating documents is $15 per hour and the charge for consultation and processing time is $20 per hour, as well as charges for provision of access such as photocopying. The applicant must be notified of the charges and an estimate of the charges for a request given. See the Attorney-General's Department Memorandum on Fees and Charges No 29: <http://www.ag.gov.au/foi/memos/memo29:html>.
31. Wilkinson, Personal Interview, 15 April 2002.
32. Liz Jackson, Senior Journalist *Four Corners*, Personal Communication (email), 5 April 2002; Cathy Van Extel National Political Reporter *Radio National* Breakfast, Phone Conversation, 5 April 2002; Kirsten Garrett journalist *Radio National* Background Briefing, Personal Communication (email), 4 April 2002.
33. Coulthart, Personal Interview, 22 April 2002; Gary Hughes, *Age*, Personal Communication (email), 19 April 2002. See also Waters, N. *Print Media Use of Freedom of Information Laws in Australia*, January 1999, Australian Centre of Independent Journalism at 22.
34. s.15(5)(b) of the Act.
35. s.15(6) of the Act pursuant to the consultation requirements under ss.26A, 27 or 27A. The applicant can also agree with the relevant agency that the time limit be extended to a period that exceeds 30 days.
36. It should be noted that administrators are therefore not required to take the full 30 days to respond to the request.
37. Patrick Walters, Personal Interview, 19 April 2002.
38. Walters, Personal Interview, 19 April 2002.
39. See footnote 13.
40. Jack Waterford, Personal Interview, 22 April 2002. See also Kearney, S. 'The Media and FoI — Working the Sources', (2000) 87 *FoI Review* 32-33 at 33. As discussed earlier, greater specificity in requests also reduces the possibility of a request being refused on diversion of resources grounds, under s.24.
41. Anne Davies, Personal Interview, 25 March 2002.
42. s.34 Freedom of Information Act 1982 (Cth) There are equivalent provisions in all of the state FoI Acts.
43 s.36 Freedom of Information Act 1982 (Cth) Equivalent provisions exist in all state FoI Acts.
44. Waterford, Personal Interview, 24 April 2002.
45. Walters, Personal Interview, 19 April 2002.
46. Ross Coulthart, Personal Interview, 22 April 2002, Matthew Moore *Sydney Morning Herald*, Personal Interview, 10 April 2002. See also Moore, M., 'Olympics: the secret deals', *Sydney Morning Herald*, 21 November 1998 at 1, Moore, M., 'The Secret Games', *Sydney Morning Herald,* 21 November 1998, p.5.
47. Wilkinson, Personal Interview, 15 Apri12002.
48. Coulthart, Personal Interview, 22 April 2002.
49. Walters, Personal Interview, 19 April 2002.
50. For example, Coulthart, R., (1999) 81 *FoI Review* 43.
51. For example, a common experience cited by journalists was of administrators waiting until the end of the statutory time period to inform them that they needed to refine the scope of their request, requiring the journalist to reframe the request and resubmit, extending the time period for the processing of the revised request. There is not room, and it is not the purpose of this paper, to deal with these allegations in detail. A recent report by the Commonwealth Ombudsman examines administrative compliance by Commonwealth agencies with the Act: *Needs to Know: Own Motion Investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies*, June 1999.
52. For example, the negotiation undertaken by Michael McKinnon and the *Courier Mail* with the Queensland Premier's Department for access to file titles for all department documents. See footnote 13.
53. Snell, R., Freedom of Information and the Delivery of Diminishing Returns or How the Spin Doctors and Journalists have Mistreated a Volatile Reform, paper given at the Public Right to Know Conference 2001, Australian Centre for Independent Journalism <http://acij.uts.edu.au/Dr2k/2001/sne1l.html>.
54 In 2000–01, the DPMC received 24 requests, 22 of which were for non-personal information: AGD Annual Report.
55. This is not restricted to journalists, as where any person identifies himself or herself as being from a particular organisation it is noted on the request records of the DPMC.
56. Therefore the figures are rough guides to the frequency of FoI requests by journalists as the applicant can only be identified as a member of the media where they have notified the DPMC at the time of making the request.
57. These figures are based only on an assessment of the request titles as they appear in the electronic database of the DPMC and do not indicate whether the requests required later refinement or negotiation for processing. Time and resource constraints prevented the DPMC from undertaking the more detailed examination that would be required to get accurate figures of when this negotiation was required.
58. See also the recommendations made by Nigel Waters in the conclusions to his paper Print Media Use of Freedom of Information Laws January 1999, above, pp.30-3.
59 Note that some developments have been made in the direction of providing this sort of information. In 1995, Senator Brian Harradine introduced a Standing Order through the Senate that requires all new file titles for every federal government department and agency to be tabled on disk in the Parliamentary Bills and Papers office every month. Further, Senate Continuing Order No.5 requires that each federal department provide a list of departmental files on their official website. See for example, the website of the DPMC <http://www.dpmc.gov .au>. For comment on compliance with this order by departments, see Coulthart, R., 'Why the FoI Act is a Joke or "Don't Shoot the Media, We're Doing our Best"' (1999) 81 *FoI Review* 43-6 at 44-5.
60. Wilkinson, Personal Interview, 15 April 2002.
61. Wilkinson suggested an appropriate penalty might be a requirement that the department waive the costs of the applicant's FoI application for that information.
62. Particularly in relation to the public interest test that qualifies the internal working documents exemption in the Commonwealth Act: s.36.
63. Snell, R., 'Learning from the Canadians — Encounters with a Task Force, an Academic and an Information Commissioner', Open Government forum, 10 December 2001, hosted by the Hon. Arthur Chesterfield Evans. See also Snell, R., 'In Search of the Freedom of Information Constituency: Case 1 — The Media' (1998) 78 *FoI Review* 81-4 and Snell, R., 'Freedom of Information and the Delivery of Diminishing Returns or How the Spin Doctors and Journalists have Mistreated a Volatile Reform, Public Right to Know Conference, 2001 above, ref. 53.

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Moore, Matthew (2002), Senior Journalist *Sydney Morning Herald*, 10 April, Personal Interview.

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Hughes, Gary (2002), Journalist the *Age*, 19 April, Email Correspondence.

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RECENT DEVELOPMENTS

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March 30: *National security and open government in Central and Eastern Europe: The Bulgarian experience* by Alexander Kashamov, Coordinator of Legal Projects, Access to Information Programme Foundation.

April 7: *National security and transparency in the European Union,* by Professor Deirdre Curtin, Head of the Department of the Law of International Organizations, Utrecht University.

April 15: *Privacy and Security: Issues and Analysis,* Bruce Berkowitz, Senior Policy Analyst, Rand Corporation, and Research Fellow, Hoover Institution.

This symposium being organised by Professor Alasdair Roberts, Director, Campbell Public Affairs Institute, Maxwell School, Syracuse University.
Contact email: asrobert@maxwell.syr.edu

Proposed amendments to the Irish FoI Act

The *Irish Times* (13 Feb 2003) reports that a secret review by a group of top civil servants had reported to the Taoiseach (Prime Minister) that the Irish FoI Act ought to be amended. A primary driver in the review was the approaching deadline of 21 April 2003 when the first Cabinet papers from five years previously are accessible under the legislation. Furthermore recent release of information under the legislation has severely embarrassed the government. One of the opposition leaders succinctly captured the government's concerns when they wrote 'On a rolling basis over the next five years, we will be able to see the background papers and advice which went to the Government and underpinned all major decisions taken by this Government'.

Training begins in Jamaica

In mid January training commenced for several hundred public servants in Jamaica. The training will extend until mid July. The Act was passed in June 2002 and becomes operational later in 2003. A key part of the training is to expose the civil service to the expectations of civil society organisations and members of the public.

Malaysia starts to think about FoI

In December 2002 planning started for a Malaysian national conference on Access to Information, held under the United Nations Development Project but being organised by Strategic Analysia Malaysia, an on-line think-tank. Consultations were conducted with alternative media groups and civil society groups, while the national conference includes these two sectors, along with academics, government officers, mainstream media and media owners.

The conference was due to be conducted in January but was postponed to a later date.

Press for access to information reform in Canada

At a hearing of the ad hoc 'MPs on Access Committee' on 24 February 2003, headed by Liberal MP John Bryden, the Open Government Canada (OGC) coalition criticised flaws in the federal government's Access to Information Review Task Force report and called for much stronger reforms to the federal *Access to Information Act* (ATI Act) and access system to be implemented as soon as possible.

The Canadian Association of Journalists is a founding member of OGC. OGC submitted its position paper on the access law and system to the Committee. 'The current federal access to information system actually encourages secretive and unaccountable behaviour by Cabinet ministers and public officials', said Duff Conacher, a member of the OGC Steering Committee, and Coordinator of Democracy Watch, who testified on behalf of OGC at the hearing. 'The federal government should stop delaying changing the law in ways needed to end the culture of secrecy that threatens our democracy.' See Open Government Canada <http://www.opengovernmentcanada. org>; Canadian Association of Journalists <http://www.caj.ca>.

Debate continues in Indonesia

Debate still continues in the Indonesian parliament as to whether the National Security Bill and Freedom of Information Bill should be considered together or individually. Opposition members of parliament and non-government organisations are keen to debate the two Bills separately. Article 19 proposes to hold forums on freedom of information in Jakarta on the 14-15 March 2003 and a workshop in Manila, Philippines on the 17 March 2003.

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