Freedom of Information

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Comment

The following observations were made about the debates surrounding FoI by Philip Doty after sitting through a two-day conference in Mexico in November 2000. He observed that there seemed to be four tensions or riddles that characterised freedom of information:

what he loosely termed 'federalism'. Namely the policy issue network and tensions thrown up by FoI including the need for a centralised policy instrument (usually a statute) requiring freedom of information — the necessity for local control over records, the role of the media, public interest groups, citizens and the need for effective remedies for those denied access.

the nature of the relationship among the key actors. Doty argued that these 'relationships demand mutual co-operation *and* mutual scepticism. These relationships are *both* adversarial and collegial.

how we translate information into political action. What is the relationship between the citizen and the state?

how we manage the unrealistic expectations we have of freedom of information. Doty argued that 'we must constantly strive for improvement, not perfection. The challenge of freedom of information in this regard is how to achieve two goals simultaneously: (1) aiming high for transparency of government without excuse while (2) understanding how to achieve and accept partial, limited victories that help build such transparency step-by-step rather than expecting it at one stroke.'

Doty's paper was entitled 'Freedom of Information in the United States: Historical Foundations and Current Trends' — his email address is: pdoty@gslis.utexas.edu

Throughout this year, with different groups, I have been contemplating these riddles or tensions. In January it was with a class of highly motivated Canadian, Hong Kong and French law students looking at FoI from a comparative basis. In February it was with a bunch of very dedicated and

Continued on p.68

The *FoI Review* gratefully acknowledges Justice Ted Matlow and Canada Law Book for granting permission to reprint 'Ontario's freedom of information access process: "a view from the inside"' by Christopher Berzins in April 2003 (104 *FoI Review* 18). The article was first published in *The Advocates' Quarterly* (2002, 26 *Adv.Q.* 1).

As editor I was eager to reprint Chris Berzins's excellent article in a journal that reached a more specialised FoI readership. A number of FoI officers have wanted articles that better reflect their day-to-day engagement with FoI in practice. As editor I felt that Chris's article was ideal. I have used it now to introduce three different classes of law students (in Canada and Australia) to a more balanced perspective on FoI issues.

I apologise to Chris Berzins and Justice Matlow for neglecting to include this acknowledgement when we reprinted the article. Chris had given his permission to reprint subject to the inclusion of the acknowledgement.

Rick Snell

Australia's 'great surprise' for the US: negotiating the 2002 Security of Information Agreement

In June 2002 Australia's Foreign Affairs Minister, Alexander Downer, announced that he had signed a new agreement on the exchange of classified information with the United States. In a public statement, Downer implied that the agreement was needed to account for 'advances in information technology' since the signing of an earlier US–Australian pact in 1962.[1] However, internal documents released by the US Department of Defense show that the new agreement was prompted by very different concerns.

The US–Australia pact is one of over 50 bilateral security of information (SOI) agreements that have been negotiated by the US Department of Defense over the last half-century. Under an SOI agreement, governments agree to take a variety of measures to control the handling of sensitive information received from the United States. The US practice of negotiating SOI agreements was formalised in National Security Decision Memorandum 119 (NSDM 119), issued by the Nixon administration in June 1971, which prohibits the sharing of classified military information with a foreign government that has not signed a legally binding SOI agreement.

These SOI agreements can have important implications for citizens. For example, security clearance procedures that are needed to comply with the requirements of an SOI agreement could affect the ability of Australian citizens to hold government employment. (In the 1950s and 1960s, NATO SOI rules effectively barred homosexuals from key government positions.)

SOI agreements can also collide with national right-to-information policies. The US–Australia agreement absolutely bars the disclosure of shared classified information to non-governmental actors without the consent of the originating government — a flat prohibition on disclosure that clashes with the harm-based approach to disclosure upon which right-to-information laws are often based. The agreement also states that disagreements about the disclosure of shared information 'shall not be referred to a national court, to an international tribunal, or to any other person or entity for settlement'.[2] This could conflict with appeal provisions in Part VI of Australia's *Freedom of Information Act.*

Few Australians would have known about the 1962 SOI agreement, which was itself a classified document. This was standard practice at the time. The US–UK SOI agreement, signed in April 1961, was only declassified and publicly acknowledged in March 2001. Canada denied the existence of its agreement with the United States until it was declassified in response to a request from the US government in November 2002.

In Australia, the classified status of its SOI agreement with the United States created distinctive problems. In August 1999 — almost 40 years after its signing — the Australian Defence Department told the US Department of Defense (US DOD) that it did not view the 1962 agreement as legally binding under international law. According to documents released by the US DOD, the Australian government said that it had never undertaken the internal procedures necessary to make the agreement legally binding, and regarded the agreements as 'morally and politically binding only'.[3] Australian officials told the US DOD that the classified status of the 1962 pact had complicated the process of making it legally binding — perhaps because some officials lacked the clearance needed to approve the document.

This caused serious concern within the US DOD. In November 1999, a US DOD official told US Deputy Secretary of Defense John Hamre that the Australian message:

> … came as a great surprise to us, since all U.S. international agreements concerning security of information have always been done on a legally binding basis. It is also of great concern to us, since these agreements establish the fundamental commitment to protect classified information of the other government. DoD shares a great deal of highly classified information with Australia.

Australia was the only country whose SOI agreement with the US was not legally binding. 'It is imperative', the official said, that a legally binding agreement be established as soon as possible.

Deputy Secretary Hamre was advised to use an upcoming visit with Australian officials to 'urge [them] to negotiate and conclude the replacement agreement quickly'. In the meantime, US DOD staff planned to evaluate 'disclosures of classified information to Australia program by program' to ensure that stopgap measures were in place to provide legally binding assurances before disclosures were made.

The US DOD also had other bureaucratic difficulties. The 1962 agreement covered the exchange of *all* classified information, but NSDM 119 only required a legally binding agreement for the exchange of classified *military* information. The State Department has insisted since the mid-1980s that new SOI agreements be limited to the military sphere alone, and in November 1999 it was expected to resist the US DOD's request to negotiate a new agreement equal in scope to the 1962 agreement. In the end, however, the State Department did not block US DOD's plan. As a result, the new US–Australia agreement is actually broader than required by NSDM 119.

However, there may have been other complications in talks about a replacement agreement. A July 2000 memorandum from US DOD said that formal negotiations for the new agreement would 'take place in Canberra during the week of 17 July 2000'.[4] This proved to be a highly optimistic forecast. In fact, negotiations went on for nearly two years until the new agreement was signed in June 2002. US DOD memoranda do not provide an explanation for the protracted discussions.

That the new SOI agreement is publicly accessible — unlike its 1962 predecessor — is a small step forward. Nonetheless, greater transparency about the negotiation of such agreements is clearly required. As defence and intelligence services collaborate more closely, these

agreements will grow in number, and the constraints which they impose on national right-to-information policies may become tighter. This is an area that has been wholly neglected by academics and activists interested in governmental openness. One first step might be an inquiry through Australia's *Freedom of Information Act* about the Australian view of negotiations over the 2002 SOI agreement. There are other opportunities for study as well. Since 1996, Australia has negotiated at least four other SOI agreements — with South Africa, Canada, Singapore and Denmark.

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United States FoI laws are a poor model for statutes in other nations

Governments around the globe have drawn on two basic models when drafting their own freedom of information legislation. They are the Swedish and United States (US) FoI laws. But while the US legislation was originally based on Swedish statutes,[1] the most commonly adopted versions of FoI have been based on the US example. It has been adapted and modified by many of the more than 40 nations which have introduced their own FoI laws since the mid-1960s. But while the US legislation works relatively well within its own jurisdiction and the US has heavily promoted its laws internationally,[2] its statues do not provide the most appropriate template in many other nations and they generally do not work well in other political systems.

Constitutional and other differences

One of the major differences between the Swedish and US laws stems from how the respective statutes evolved and where they slotted into their national political frameworks. The first truly effective Swedish FoI law, and the first effective law of its type anywhere, was the *Freedom-of-Press and the Right-of-Access to Public Records Act* of 1766. It became one of Sweden's 'fundamental laws' — an important part of its constitution. The statute, which was inspired by the approach to individual freedoms by successive Chinese emperors during the Tang Dynasty in the period from 618 to 907,[3] specifically aimed to create an open society in which even documents such as letters from foreign heads of state to the Swedish prime minister were, and still are, open to public scrutiny.[4] The first effective US legislation, however, was not enacted until 1966, 200 years later than Sweden's laws. It was generally weaker than the Swedish law, was not directly constitutionally based and was not part of the structure underpinning the political system. It was, however, framed in a system which has significant constitutional guarantees of rights and freedoms. The implications of those distinctions are important and will be considered in more detail later.

Constitutional issues aside, some other differences between how the two models function can be partly explained in terms of attitudinal factors. For example, because FoI has a much longer history in Sweden, it is arguably much better accepted by governments, officials and citizens, than the US laws. Another difference is the fact that FoI has evolved in a unitary state in Sweden but in a federation of states in the US. Then there is the point that the Swedish model is directly and inextricably linked with notions of a free and responsible press, while, although there is an implied connection, there is no absolute linkage in the US. Finally, there is a close, if informal, relationship between the effectiveness of FoI in the US and that nation's system of the separation of powers, an association that is lacking in Sweden today[5] and in most nations which have adopted the US FoI model.

Facilitators v gatekeepers

Writing in *FoI Review* in 2001, respected Swedish journalist and then Murdoch University Master of Arts researcher Johan Lidberg brought several of those points together when he compared FoI as a journalistic tool in Sweden and in Western Australia.[6] The study is of interest in the current context because FoI in Western Australia, as well as in other Australian states and territories and in Australian federal legislation, is based on the US model, thus providing an insight into contrasts between the original Swedish model and a system of FoI based on the US example. Lidberg said that one of the most significant differences was to be found in the mindset of public servants, with Swedish officials thinking of themselves as FoI 'facilitators rather than gatekeepers' who work in 'a culture of openness rather than secrecy'.[7] As Lidberg put it:

> Imagine a world where a journalist, and indeed any citizen, can walk into any government agency, and get access to most documents in a few minutes; or a place where a journalist has the right to read the professional correspondence of any politician. Such a place exists, but it is not in Australia … it is Sweden.[8]

And:

> I found it contradictory that two countries that seem to share common values about democracy, scrutiny of elected representatives and government agencies, and the role of the media have come to opposite conclusions about the flow of, and access to, government information.[9]

Similarities and differences in Swedish and United States models

Delving behind Lidberg's comparison, it is relevant to directly summarise the similarities and differences in the Swedish and US models. They are itemised in the table (p.53) which was compiled from a wide variety of sources:

The table makes it clear that nations which adopted and/or adapted the US model rather than the Swedish paradigm would have been starting at a disadvantage in terms of transparency. That is for several reasons. One of the most important is the fact that the Swedish model is actually a constitutional document and it would be extremely difficult if not impossible for a government to water it down or ignore it without reference to the electorate. As Lidberg said:

> This makes changing FoI legislation in Sweden a complex and lengthy process and as such it works as a safeguard against the government of the day finding FoI too extensive and wanting to change it.[10]

On the other hand, the US model is an Act of Congress and it can be changed by politicians without direct reference to the people. Its effect can also be controlled to a large extent by administrative regulation and direction, particularly by decrees emanating from the President and Attorney General.

Inherent systemic limitations

But that basic distinction between the presence or absence of direct constitutional linkages and an acknowledgment of the impact of attitudinal factors are only part of the story. To fully understand why the US model has not generally worked well in many European nations[11] or in former British dominions such as Australia and Canada and why it is unlikely to be a success in the United Kingdom when that nation's legislation comes into full effect in 2005, it is necessary to digress a little and consider several issues. First, it helps to remember that the system of government in the US evolved from the British system into a distinctive and democratic republic that is very different in function and ethos from the Westminster system. Then there was the fact that after ratification of the Treaty of Paris in 1783, in which England recognised American independence, ideals of equality became a driving force underlying the framing of the US Constitution and its early Bill of Rights amendments.[12] Those amendments, and particularly the First Amendment, complement and/or constrain nearly all US legislation — including its FoI Acts.

Thus, while the US model of FoI is not directly incorporated into the constitution and it is open to political tampering, it was still framed in a system where there are at least some complementary constitutional provisions relating to freedom of speech and of the press. Those provisions are either totally absent or, at best, poorly imitated in most of the nations, and particularly Westminster system nations, which have modelled their FoI Acts on the US laws.

That point does not appear to have been understood in many of the jurisdictions which have modelled their own statutes on US laws. They have either overlooked or not cared about the fact that the impact of a US statute will be likely to differ significantly if it is applied in a different setting where it is not buttressed by the same set of constitutional guarantees of rights and freedoms. As a result, nations which do not have the same constitutional foundation and political structures as the US but which have mimicked or adapted US FoI laws have found themselves with legislation which is inherently crippled by the absence of complementary legislative and political conditions and by different cultural values and expectations. For that reason alone, it would have been much better if nations which adopted their own FoI laws had based their legislation on the Swedish model with its direct constitutional standing.

The distinction is particularly significant in nations such as the United Kingdom which have a parliamentary system based on a structure of common law precedent and legal interpretation rather than a written constitution. But even in nations where there are written constitutions there can still be massive problems when FoI has been modelled on the US laws. In Australia, for example, the almost total absence of constitutional guarantees of personal and press rights and freedoms has seen that nation's US-based model of FoI so heavily politically manipulated and administratively mangled that, as Lidberg found, there is little evidence of the original Swedish ideal of administrative transparency.

Similarly, in Canada, although there is a 'Bill of Rights' of sorts in the *Canadian Charter of Rights and Freedoms*, its *Access to Information Act* (ATIA) is weak. Although Canada's Information Commissioner, John Reid, has said the legislation had attained 'quasi-constitutional status' and it was designed to operate 'notwithstanding any other Act of Parliament' he has also said there was a 'desperate need to resuscitate the terminally ill information management structure' of the Canadian Government.[13] Reid listed the worst problems with FoI as delays in processing requests, excessive secrecy and administrative 'improprieties' including using excessive fees and time extensions as barriers to access, inadequate searches for records and political interference.[14] In a comment which could apply equally to the Australian situation, wherein governments have deliberately classified information as cabinet documents purely to avoid their release, Reid said the 'cabinet confidence exclusion' in the Canadian federal statute was 'ripe' for abuse.[15] Saying that the exclusion was the ATIA's 'greatest weakness', he reported that:

> Over the 18 years since the Access to Information Act came into force, numerous instances have arisen where the government has certified information to be a cabinet confidence when the information clearly does not so qualify.[16]

A former Liberal cabinet minister himself, Reid said requests lodged by journalists and opposition members of parliament tended to get slower service, closer scrutiny, and more conservative treatment from public servants than requests from other categories of requestors.[17]

Model	Sweden	United States
Influences	7th to 18th century Chinese culture, Lutheran church, academe, liberal libertarian ideals of individual freedoms and a free press, emerging democratic concepts	Press interests, the United Nations, post World War II democratic ideals, presidential desire to help stop public service becoming a fourth arm of government
Relevant legislation first enacted	1707 and 1766	1947, 1958 and 1966
FoI a constitutional requirement	Yes	No
Links to press freedom	Direct, constitutional and very specifically and clearly stated in legislation	No direct links but implied support in the First Amendment to the Constitution
Perceptions and attitudes of legislators and officials	A cultural tradition of administrative openness. Strong expectations of transparency as a natural right	Ranging from enthusiasm to obstruction. A deep and long-standing pre-FoI Act tradition of administrative secrecy which was reinforced by the Cold War
'Ownership' of information	Expectations of public ownership and control	A mixed perception of government ownership and control and public ownership
Cost	Free, no access or processing fees	Often expensive, nearly always a processing fee and photocopying charges. However, reduced charges or no charge for the press and educational users if disclosure 'in the public interest'
Processing time for requests	Short, often within hours	Generally drawn out, usually at least a month and can take much longer
Specific rules facilitating FoI access by journalists	No specific rules in relation to FoI as all citizens, including journalists and editors, have equally free access	Yes, but journalists are still not as free as in the Swedish model
Relationships between journalists and public servants who administer FoI	Generally open and professional	Often suspicious and distrustful
Public and media awareness of FoI rights	Generally very high	Generally poor to mediocre, although high among some journalists, media and rights' groups
Possibilities for appeal against refusal to release information	Broad, either through an ombudsman or direct to a court. The vast majority of such appeals have been won by appellants	Often a matter of official discretion or administrative appeal at first but can then go to court in many cases although outcomes are unpredictable
Other nations which have adapted or adopted the model	Only a handful including Finland, Norway, Denmark and the US	About 35 including Australia, Canada, South Africa, Japan, Thailand, Ireland and the United Kingdom
Separation of powers	Original FoI laws framed at a time when there was emphasis on a separation of powers but the concept was abandoned in 1974 when the Instrument of Government was revised.	A clear three-way separation between the judiciary, legislature and administration/executive.

A different path and a better outcome

One rare example of a Westminster nation which broke from the pack and did not slavishly follow the US model was New Zealand. Interestingly, although that nation's *Official Information Act* has been labelled 'quaint and quixotic',[18] it has developed into one of the most successful systems of FoI outside Sweden and the US. In fact Snell concluded that New Zealand's laws work much better than FoI in Australia and Canada. In a direct comparison between systems, he said:

> … the *Official Information Act* has achieved a significantly higher level of openness in government than Australian FoI legislation. Hence the paradox. How did the two access regimes travel so far from their original receptions (sic)? The superior performance of the *Official Information Act* can be traced back to the original design principles associated with each legislative scheme. Buchanan notes that, whilst the New Zealand *Official Information Act* shares the same general objectives as its Australian and Canadian counterparts, it differs to a considerable extent in its design principles.[19]

Snell's assessment is similar to a conclusion by Eagles et al who made some direct comparisons between the way FoI functioned in New Zealand, Australia, Canada and the US.[20] They concluded that New Zealand's statute was broad and open to interpretation

because it had been deliberately designed that way in 'an evolutionary and gradualist approach' requiring 'indigenous solutions which were difficult to align with overseas proposals'.[21] In fact Eagles et al concluded that:

> The New Zealand Act (unlike the Australian FOIA) was never intended to be a rendering of American precedent into statutory form.[22]

And:

> … decisions under the American FOIA are made in a very different constitutional and administrative setting. The separation of powers and the patronage system combine to produce a [United States] civil service which is neither directly accountable to the legislature nor avowedly apolitical (at least in the upper levels). Accountability in the American system is secured through a combination of oversight by powerful Congressional committees and strict financial control.[23]

The separation of powers

Constitutional differences aside, a second major reason why the US model of FoI does not work well in many other nations is related to the function and concept of the separation of powers. There is a significant difference between the way the separation of powers operates in the US federal system and in many other nations — again, particularly those with Westminster systems. The distinction was highlighted by Australia's Chief Justice Sir Gerard Brennan in 1998 when he explained that in a Westminster system the repositories of legislative and executive power are brought together in the Parliament in order to make the executive arm of government — which is effectively controlled by the Cabinet — theoretically responsible to the Parliament under a structure known as 'representative democracy'.

In the US system, however, the constitution makes it clear that the president is the repository of executive power, separate from the Congress, which is the repository of legislative power. Thus, in the US system, the president, as head of the public service, acquires authority to exercise executive power, not from the Congress, but from direct election by the people.[24] The distinction is highly significant. It means that in the US the executive, legislature and judiciary are actually separated.[25] In a Westminster nation while the judiciary is separate, there is no real separation between the executive and legislature. That is largely because Cabinet members, who are bound by rules of Cabinet confidentiality, are the heads of different public service departments and also members of the legislature.[26] There is therefore greater potential for legislators and public servants to work together in secrecy in a Westminster system and to interfere in the administration of FoI than there is in the US system.

FoI as a restraint on public servants

Ironically in a sense, one of the motivations for the introduction of FoI in the US was to counteract political interference by public servants and to keep them in their place. That motivation was reflected in a scheme promoted by President Franklin D Roosevelt which culminated in assent being given to the *Administrative Procedure Act* of 1946.[27] The Act was a ground-breaking precursor to FoI legislation which stemmed from recommendations contained in a 1937 report of an influential committee established by President Roosevelt known as the President's Committee on Administrative Management, or the Brownlow Committee. The recommendations of that committee resulted in a far-reaching overhaul of the executive arm of government. The impact of those changes was subsequently considered in the US Court of Appeals which ruled that the *Administrative Procedure Act* was at least partly designed to:

> … stem the abuses of power by agencies seemingly unchecked by requirements for procedural rigour. For example, the original presidential [1937] committee investigating the need for congressional control over these agencies reported: '[Agencies] are in reality miniature independent governments … They constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers …[28]

Among other things, the Court had recognised that FoI had been promoted by the presidency because of its potential as a 'watchdog' which would help restrain the bureaucracy from developing into a de facto fourth arm of government. The Brownlow Committee hoped that the presence of a system of FoI would help control the public service by encouraging a cultural belief among public servants and in the wider community that the public had a right to know and the public service had a duty to be transparent and accountable, not only to politicians but also directly to the public. That mindset is the direct opposite of the belief system in many other government administrations and specifically in the cultural expectations found in the executive arms of most Westminster governments. As Rowat explained, nearly all former British dominions have tended to inherit a system of 'discretionary secrecy' under which decisions to release or withhold administrative information are made at the discretion of the executive.[29] Describing discretionary secrecy as a tradition 'incompatible with the people's right to know how they are being governed', Rowat[30] said:

> It also means that the public have no right to see or use the vast store of documents and data which have been paid for with their taxes, and that they do not have complete information upon which to base their judgments on public issues or their control over the government.[31]

Former editor of the Melbourne newspaper *The Age*, Creighton Burns, saw the obvious distinction underlying the two systems. He observed:

> The public's 'right to know' is embedded even more deeply, both constitutionally and culturally, in the governance of the United States [than Westminster nations].[32]

The problems associated with imposing a model developed in one political system on a totally different system have also been exacerbated by a change in the power-base underlying Westminster nations as a result of control gradually being hijacked by Cabinets in the latter part of the 20th century. As Ellis-Jones noted in 1997:

> In recent years, there has been a shift of real power [in Westminster nations] from the legislature to the executive (whose various tasks are increasingly undertaken by government and other authorities), largely due to the:
>
> emergence of the 'cabinet system' of government;
>
> erosion of the doctrine of ministerial responsibility; and
>
> conferment of broad discretionary powers upon members of the executive and public servants.[33]

And:

> As a result, there is the ability of one organ of government to control, or at least interfere with, the exercise of the functions of

another organ of government and even to exercise those functions.[34]

That interference is particularly evident in the administration of FoI in nations where the relevant laws are not constitutionally supported and/or where there is no real separation of powers between the legislature and executive.

Conclusions

In conclusion then, the US model of FoI does not work well when applied or adapted in other nations. That is for a variety of reasons but primarily because:

1. The US model of FoI was inspired by and adapted from the original Swedish model but it is weaker. But just as the US FoI laws are weaker than the Swedish model, most laws which have been based on the US template are weaker again.
2. The Swedish law is still the strongest, best accepted and most transparent FoI legislation in the world. It is a constitutional document which cannot be altered without 'laborious formalities'.[35] However, the US FoI Act is not a direct constitutional document and it can therefore be amended by politicians. Its effect and impact can also be influenced and subverted by administrative interpretation.
3. Despite the forgoing points, the US FoI Act evolved and operates in a system with strong constitutional guarantees of rights and freedoms that are not found in most other nations.
4. Despite some superficial similarities in government structure there are massive structural differences between the US political and governance systems and the systems in most other nations. Therefore it is at best difficult, and at worst totally impractical, to attempt to adapt legislation which evolved in the US and was designed to work in that democratic system to totally different circumstances in other, often less democratic, nations.
5. There is a clearly defined separation of powers between the legislature and executive/administration in the US system which tends to inhibit politicians from interfering in the operation of FoI. There is no real separation between the legislature and executive in many other nations, including Westminster nations, so there is less restriction on political interference in the administration of FoI.
6. One of the underlying motivations for the introduction of FoI in the US was to help control the public service and make it transparent and accountable so that it did not develop into a fourth arm of government. That motivation is irrelevant in systems which do not have a full and clearly defined separation of powers. Such jurisdictions would be much better served if they had drawn on the Swedish precedent and developed a system of FoI that was constitutionally supported and safeguarded.

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25. Even to the extent that an administration controlled by a president who is a member of one political party may have to work with a legislature controlled by an opposing party.
26. Therefore the administration in a Westminster nation can only ever be 'ruled' by members of the governing political party/parties of the day.
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Government transparency: Japan's Information Disclosure Law of 2001

On 13 December 2001, a three-judge panel of Nagoya District Court rendered the first court decision applying Japan's new information disclosure law.[1] The plaintiffs were self-appointed citizen auditors seeking data related to an international exposition planned for 2005 at a site near Nagoya. The defendant was the Economics and Trade Bureau of the Chubu District office of the Ministry of Economics, Trade and Industry. The government lost. The court ordered disclosure of much of the information at issue, including a list of banks under consideration to finance the event and other plan details.

Over the past decade, Japan has adopted a number of laws and regulatory measures intended to make government administration more transparent and to provide greater opportunity for public participation in policy-making. These measures include an Administrative Procedure Law adopted in 1993,[2] regulations establishing a no-action letter system,[3] a government-wide policy review system[4] and a 'notice and comment' procedure to allow public comment on proposed regulations.[5] One of the most significant measures is the Information Disclosure Law (Law concerning the Disclosure of Information in the Possession of Administrative Agencies, Law No. 42 of 1999). Roughly patterned on the US *Freedom of Information Act*, this law for the first time provides a legally enforceable right to request information in the possession of Japan's national government.

Article 1 of the Information Disclosure Law describes its purpose in terms that call forth the core principles of democracy:

> In accordance with the principle that sovereignty resides in the people … the purpose of the law is to strive for greater disclosure of information held by administrative agencies thereby ensuring that government fulfills its duty to explain its various operations to the people and contributing to the promotion of a fair and democratic administration subject to the proper understanding and criticism of the people.[6]

It is too early too judge whether the law will truly fulfill this mission. The purpose of this article is to provide a brief overview of the operation of the statute and report some of the more noteworthy developments that have taken place in its first year of operation.

Overview of year one

The law came into effect on 1 April 2001 and attracted much attention during its first year of operation — and tens of thousands of information requests. According to the General Affairs Ministry, from 1 April 2001 through 31 March 2002, 48,650 document requests were filed and 45,071 decisions were made by national government agencies subject to the law. Of these decisions, 39,995 or nearly 89% resulted in either full or partial disclosure, and 5076 or about 11% resulted in complete denials.[7] The 'partial disclosure' category cannot be meaningfully evaluated because it covers a range from cases where only minor details were withheld to cases where virtually all information of interested was blacked out.

At the top of the list in number of requests received was the National Tax Agency. The cause of the NTA's popularity is undoubtedly its standard practice of publishing lists of people with highest reported incomes.[8] Many merchants are eager to obtain this information and the new law has provided a handy tool. Other agencies receiving more than 2000 requests included the Ministry of Land and Transportation, the Ministry of Health and Labor, the Financial Services Agency and the Ministry of Foreign Affairs.

During the first year of operation 1342 appeals were filed with administrative agencies subject to the law and 14 lawsuits were filed in court. The Nagoya decision mentioned above was the first to proceed to judgment. (Rather than accept the court judgment, the government appealed. The case is pending before the Nagoya High Court at the time of writing.)[9]

This article examines these and other significant developments later in the article. First, it will give a brief overview of the operation of the statute.

Basic request procedures and documents subject to request

The statute establishes a simple procedure that enables anyone, Japanese or non-Japanese, to request to examine or copy documents in the possession of administrative agencies. The request must provide 'titles of administrative documents or other particulars sufficient to identify' the relevant documents.[10] Article 5 requires that, except for items that come within one or more of six categories of exempt information, 'the head of the administrative agency … shall disclose the relevant administrative documents to the requester'.

All national administrative agencies, including 'organs within the Cabinet or established under the jurisdiction of the Cabinet' are subject to disclosure requests.[11] Requests are not limited to paper documents. The rules allow inspection and copying of 'documents, drawings, and electromagnetic records', as long as they were 'prepared or obtained by an employee of an administrative agency in the course of his or her duties' and 'held in the possession of the administrative agency for the use of its employees'.[12]

The Act creates six categories of exempt information and incorporates others by reference. Language creating each of these exemptions is broad and appears to grant officials much discretion in determining information exempt from disclosure. Provided that a government agency actually holds documents responsive to a request, the decision to disclose or not turns on interpretation of the scope of these exemptions.

The six categories of exempt information are 'individual information,' confidential business information, national security and foreign policy matters, criminal investigation and prosecution, policy deliberations internal to administrative agencies and a list of activities

conducted by administrative agencies including research, personnel management and other matters.[13]

Customer service, time limits and fees

Requests can be made in person or by mail. All ministries and major agencies have established information windows with staff assigned to assist requesters in filling out request forms and identifying documents of interest. In addition, all national government agencies have established virtual windows on their websites. They explain the basic process and enable visitors to conduct key word searches of document titles online. A fixed fee of 300 yen must be paid with each request. There is an additional fee of 100 yen to view every 100 pages of a requested document and there can also be a charge of 20 yen per page for photocopying. There is a provision to waive some fees in some circumstances but this is not as broadly available as it is in the USA. Visitors can also download request forms and submit them by mail if they choose — provided they attach a 300 yen revenue stamp.

Article 10 of the Act requires that agencies respond within 30 days. This can be extended for an additional 30 days due to difficulty in handling the disposition or some other reason. Article 11 allows for further extensions where a 'very large volume' of documents is involved.

Significant disclosures in the first year

Among information requesters active in the first year, reporters for national newspapers have attracted the most attention. They have used the new law to find newsworthy documents and many of their discoveries have found their way into print. Perhaps the most prominent example was the release of minutes of the proceedings of the Financial Rehabilitation Commission (FRC) held between December 1998 and January 2001.[14] The FRC was charged with overseeing the examination of Japan's commercial banks and making recommendations for remedial action. FRC decisions led to the nationalisation of two especially weak institutions and the injection of more than seven trillion yen of public money into 15 others in early 1999.[15] Major newspapers filed requests for minutes of FRC meetings immediately after launch of the disclosure system. Although numerous details were blacked out, a the volume of documents released by the Financial Services Agency was large, leading to front-page stories. According to one newspaper account: '[i]n about 1000 pages of copies of FRC minutes, the names of companies and individuals involved in the public fund injection to the financial institutions were blacked out. FRC officials said publication of such names would unreasonably jeopardise the interests, rights and competitive status of those concerned.'[16] Agencies commonly cite the 'individual information' exemption in withholding the names of individuals and other identifying information. This has been a major source of complaint from requesters and will be discussed later under the heading 'Criticisms'.

Other noteworthy disclosures included the details of '*amakudari*' placements of retiring central government officials in senior positions in government-controlled 'special corporations' (*tokushu hojin*) including compensation levels;[17] total expenditures by the Ministry of Foreign Affairs related to the Okinawa Summit held in July 2000 (14.8 billion yen; this amount was additional to sums expended by other ministries);[18] administrative punishments applied to doctors employed at national hospitals who improperly received gifts from drug providers;[19] and others.

One case that received special attention was a disclosure by the Ministry of Justice that in January 2001, only three months prior to implementation of the new law, it destroyed all records of executions carried out between 1949 and 1989.[20] The action was taken pursuant to a newly adopted Ministry policy requiring that such records be maintained for only ten years. Apparently there is no longer any official record of executions carried out prior to the most recent ten-year period.

Appeals

Dissatisfied requesters are provided two avenues of appeal. First, they can file a request for administrative review of non-disclosure decisions. Article 18 of the Information Disclosure Law requires agencies to refer such appeals to the Information Disclosure Review Board (*joho kokai shinsakai*) established by the law.[21] Alternatively, they can file suit for nullification of the non-disclosure decision directly with courts in eight districts. There is no requirement that requesters first appeal to the Review Board before filing suit in court.

Creation of the Information Disclosure Review Board is perhaps the most innovative and potentially influential aspect of the Information Disclosure Law. The Board ordinarily considers appeals in three member panels. These panels have the power to demand that the agency submit the document(s) in question and can consider written and oral presentations by requesters and their representatives. Hearings are closed to the public, thus allowing for *in camera* examination of confidential matters.

Once the Review Board panel has come to a conclusion, it issues a written opinion that is sent to the agency head and published on the Internet. The agency then must decide whether to follow the opinion of the Review Board or stand by its original disposition. All Board members are appointed by the Prime Minister for three-year terms and must be approved by both houses of the Diet. The original nine members included three law professors, three retired public officials, two attorneys and a former commentator on NHK.[22]

Of 1342 appeals filed with administrative agencies, 571 cases were referred to the Information Disclosure Review Board in the year ending 31 March 2002. The Board had formally received 384 cases for review and delivered formal recommendations in 178.[23]

The potential for the Board to play a leading role in policy development was illustrated in a series of recommendations issued on 9 January 2002.[24] Requesters had sought to examine official reports concerning accidents that occurred in public hospitals and health care facilities during 2000. The Ministry of Health and Labor made a 'partial disclosure' under Article 6 of the Information Disclosure Law, releasing a list of 83 incidents, but redacting

critical information, citing the exemption for individual information. The details released were so meager that, according to the Board, requesters could learn nothing more than the fact that reports were actually filed with the Ministry concerning these accidents.

The Ministry cited the exemption for 'Individual Information' to support its decision to withhold details. The Ministry reasoned that, by disclosing any details about the incidents, people with some relationship to the patient would be able to identify the patient. In its recommendation, the Board disagreed with this narrow approach, writing that the Individual Information exemption should apply only when information released would enable people with no special relationship to the patient (*ippanjin*) to make the identification.

Applying this logic, the Board went through a detailed list of types of information in the reports, deciding which information was properly withheld and which should be disclosed. Details the Board recommended for disclosure included the names of the chief and associate heads of the hospital, the chief physician in charge of departments involved in the incident, the date of the initial examination, dates and details of examinations and treatments, reports by hospital accident review panels and other details. Press accounts hailed the recommendations as 'the first specific standards for malpractice disclosure'.[25]

Criticisms

Requesters have made numerous complaints about current implementation of the Information Disclosure Law. Causes of complaint include delays in receiving responses and costs for handling requests and making copies. Some observers point out that there are no mechanisms to ensure compliance by government officials. There are no penalties for recalcitrant officials and no awards of attorneys' fees for requesters who may incur heavy costs in pursuing a just claim. One perceptive observer, Ms Yukiko Miki, Executive Director of the Information Clearinghouse Japan, has said that government officials readily disclose documents in unambiguous cases where the law clearly mandates disclosure; on the other hand, in cases that require more sophisticated judgment, officials reject requests, leaving the requester the burden of filing an appeal with the national Information Disclosure Review Board.[26] Thus, the Board may play a critical role in setting policy. As an accumulation of Board Recommendations builds, officials will have precedents to rely on and may have an easier time disposing of challenging cases. In its first year of operation, one of the major complaints against the system was the backlog created by the great number of appeals filed. The statute itself does not set any time limit to govern appeals.[27]

An obvious and fundamental weakness in the system is embedded in the broad statutory language employed to create exempt categories of information. This issue has been confronted by courts which have considered cases filed under local information disclosure ordinances.

Problems with government handling of information about requesters

Application of the disclosure law took an unexpected turn on 28 May 2002 when the Mainichi Shinbun newspaper revealed that officers of the Self-Defense Agency compiled a list of people who had submitted information requests, had conducted background investigations of those people and then distributed this information to officers in the Agency.[28] Subsequent revelations showed that similar lists had been compiled by each of the three branches of the Self-Defence Forces and that these databases were made available throughout the Agency and the branches by posting them on local area networks. Representatives of the Agency themselves admitted that certain of these actions violated a 1988 Privacy Protection Law.[29] This law, however, provides no penalties for violation. The ensuing uproar was so loud that the Koizumi Administration abandoned similarly toothless privacy-related bills it had already proposed to the Diet along with other defense-related legislation.[30] Diet members from all opposition political parties boycotted all Diet sessions for several days pending clarifications and apologies from government representatives.[31]

This incident raised serious questions about the absence of protection for individual privacy in Japan, the failure of the government to train personnel regarding the purpose of the new disclosure law and the ambiguous position of the Koizumi Administration concerning such issues.

Local government document disclosure

Local governments adopted disclosure ordinances long before the national government took action. By 1985 major population centers, including Tokyo, Osaka, Kanagawa and Saitama, had all adopted information disclosure ordinances and attorneys, citizen activists and local residents had begun to file requests.[32] The information disclosure movement received a major boost when a loose network of activists who called themselves 'Citizen Ombudsmen' began a national campaign to uncover misuse of public funds. When they discovered that local government officials across the country were spending many millions of dollars to entertain national public officials and on related abuses, the story made front pages of Japan's national newspapers. Due to these efforts and the embarrassing disclosures, such entertainment was curtailed and numerous officials were disciplined for improper behaviour. Perhaps of greatest significance, public revulsion at the details of misbehavior amongst old style officials has led to the election of progressive governors and city mayors around the country who are committed to transparency in government.[33]

The first lawsuit was filed under the Saitama ordinance in 1983.[34] By the time the national Information Disclosure Law was enacted in 1999, a significant body of administrative experience and judicial precedent had developed. Although the wording of local ordinances differs in many respects from the national law and the range of documents available is quite different, nonetheless knowledge gained under the local rules by attorneys, judges, information requesters and others is applicable to the operation and interpretation of the national law.

In the 1983 Saitama suit, a court confronted for the first time the opaque language typically employed to describe categories of exempt information in these ordinances. In this case, as in subsequent cases where courts have reversed government decisions to withhold, advocates persuaded the court that the ordinance creates a general rule of disclosure and, as exceptions to this general rule, exemptions should be interpreted narrowly. In its decision in 1984, the Saitama court imposed a heavy burden of proof to justify non-disclosure, requiring that the government present 'clear and objective' evidence to support its claim of exemption. When the government failed to meet this burden, court-mandated disclosure was the result.

In other cases, courts have been more willing to accept government assertions of exempt status at face value. The split is well illustrated by a set of decisions issued by different panels of the Supreme Court in 1994. On January 27, 1994 the First Petty Bench issued two judgments upholding decisions by the governors of Osaka and Tochigi to deny requests for documents detailing their entertainment expenditures.[35] Less than three weeks later, the Third Petty Bench of the Supreme Court ordered disclosure of similar information related to entertainment by the Osaka Water Department.[36] The First Petty Bench accepted government arguments that disclosure would disrupt relations with official guests. The Third Petty Bench, on the other hand, declared that the government bears a burden of proof to uphold information denials and in order to successfully carry this burden, must 'assert and prove concrete facts' justifying application of the exemption. Needless to say, advocates for information requesters routinely cite the latter case in court pleadings while government representatives cite the contrary judgments of the First Petty Bench.[37]

Dissatisfied requesters are provided two avenues of appeal. They can file a request for review of the non-disclosure decision by the 'Information Disclosure Review Board' (Review Board) established by the law (described below), or they can file a suit for nullification of the non-disclosure decision directly with one of eight district courts. There is no requirement that requesters first appeal to the Review Board before filing suit in court.

Articles 21-26 establish the Review Board, a nine-member panel attached directly to the Office of the Prime Minister, with panel members appointed by the Prime Minister subject to Diet approval. Appeals to the Review Board are governed by the Administrative Complaint Inquiries Law. Under this law, the Review Board does not actually have the power to force an agency to disclose documents; the ARC commentary indicates that the council is intended to act as a 'third party,' providing guidance to the administrative agency that must make the disclosure decision. Thus, an appeal to the Review Board is actually made to the agency that made the original disposition, and the agency head then refers the appeal to the Review Board for examination.

The future

In the final days of Diet negotiations over the proposed information disclosure law in early 1999, Opposition party members were able to gain some significant amendments to the Government Bill. One requires that four years after its launch the statute should be subject to a complete review and modified to remedy defects. Pro-disclosure activists are already making their wish lists of proposals for reform, including shorter time limits on appeals, tighter wording for exemptions, reduced fees and other items.

The Defense Agency incident suddenly threw a spotlight on the threat of government invasion of individual privacy and its relationship to a disclosure system. Proponents of information disclosure also support protection of individuals against improper surveillance by government and against the dissemination of private information among officials without an appropriate need to know. The incident clearly revealed that there is little protection against such abuses in Japan today.

As suggested at the outset of this article, a freedom of information law is only one element in a system that successfully promotes citizen understanding and participation in government policymaking. Another critical element is the existence of active and sophisticated citizen organisations able to identify important information, obtain relevant items from government agencies and then utilise them in the course of developing proposals for public policies. Even the most progressive disclosure system will have little impact if there are few organisations with the capability to effectively represent public interest by developing policy proposals, lobbying for their adoption and monitoring government performance. Many observers point out that there has been much interest in the role of non-governmental organisations in Japan since the occurrence of the Kobe earthquake in 1995. However, this has yet to result in the development of an influential community of civil society organisations anywhere near the scale of what we see in the United States. The lack of any real tax incentives for financial contributions, the absence of a tradition of civic participation in policymaking, and other factors have inhibited the growth of such organisations.

Nonetheless, implementation of the Information Disclosure Law itself is a major accomplishment in the effort to develop a more democratic society in Japan. Its future growth will depend on the energy of the Japanese people in putting it to work and the posture of future governments in responding to citizen requests and in adopting further improvements.

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Rethinking commercial confidentiality in the decade of competition policy

Introduction

The always fuzzy line between 'public' and 'private' has been reconstructed since freedom of information (FoI) legislation first appeared in Australia in the early 1980s. Both the wave of privatisation and outsourcing since that time and the mid-1990s commitment to the values of national competition policy have radically altered the landscape across which the FoI Acts operate. In particular, the commercial relations between government, business and the broader community have been fundamentally reshaped. It follows that business affairs exemptions, trading on notions of 'commercial confidentiality', must also be reconstructed. This article offers some opening thoughts and provocations.

Markets, competition and information: three propositions

We can begin with three propositions:

- both competitive markets and political democracies require free information flows in order to function effectively;
- the individual interest in competitive success is not identical to, and may in fact operate against the public interest in fostering vigorous competition;
- unilateral control of information may create a situation of market power, or even monopoly, with anti-competitive consequences.

The first proposition suggests some broad similarities between democracies and markets. The centrality of access to information to a flourishing democracy is well recognised by public lawyers. It is the key rationale underpinning the FoI Acts. It is the same rationale which lies at the heart of the 'freedom of political speech' cases. As Brennan J remarked in *Nationwide News*:

> … it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgment.[1]

Economists make a parallel observation in relation to markets. These are also informational systems, which depend on information exchange as their key decision-making mechanism. In the context of competition law, the point was well made in an early and much approved decision of the Trade Practices Tribunal:

> We think of competition as a mechanism for the discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply.[2]

The 'ideal type' of a market, wherein perfect competition takes place, is therefore a marketplace characterised amongst other things by perfect information. In that ideal market every player knows everything there is to know about every other player, and all their transactional potentials, and thus makes the informed production and consumption decisions from which the allocative efficiency of the market, Adam Smith's 'invisible hand', is said to flow. Access to information is one of the pre-conditions for effective competition, which leads in turn to economic efficiency and hence to the broader public interest.

Of course the ideal world of perfect competition is a myth.[3] No economist pretends otherwise. But where market transactions are not characterised by openness and transparency this is seen as a deficit, just as it is in a society which aspires to functioning democracy. Lack of information is seen as a market imperfection which frustrates the competitive process and inhibits the attainment of economic efficiency. Thus, defenders of the market faith object to government 'interference' in the market process on the grounds that it 'distorts' the price signals on which allocative efficiency depends. The 'messages' of supply and demand do not get through clearly to the producers and consumers who need to receive them if the market is to achieve such efficiencies. In just the same way, FoI legislation hampered by extensive exemption provisions is incapable of delivering to citizens the information on which rational electoral choices depend. As a result, the democratic allocation of those electoral choices is frustrated.

An analogy between markets and democracies pitched at this level of generality will not be persuasive without more. But it raises a basic question for discussion in relation to commercial confidentiality. If it is indeed the case, as argued below, that the rationale for protecting commercial interests is in truth the protection of the competitive process, then how can it be that the *denial* of access to information actually achieves this goal?

The second proposition above distinguishes between private interests in competitive success and the public interest in vigorous competition. This distinction is central to this article, and foreshadows the claim that FoI exemptions for commercial material confuse the two. It is one thing to preserve or enhance the competitive position of an individual player in the marketplace. It is quite another to enhance and encourage vigorous competition itself. Indeed, one of the consequences of vigorous competition is the elimination from the market altogether of the inefficient. Competition law makes this distinction very clearly. For example, it has never been unlawful to injure ones competitors by taking business away from them. Rather, that is what competition is all about. In this context, the High Court has commented that

> Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort.[4]

Competition law regulates business practices which restrict or hamper fierce and vigorous competition. It is not, and has never been, about the protection of individual players in the market place. The recent Dawson Review of the Competition Provisions of the Trade Practices Act noted:

> Both anti-competitive and pro-competitive conduct may result in changes in the structure of markets, notably by the exit of individual businesses. Part IV seeks to prevent conduct that may lessen competition, *not to protect less competitive businesses.* The distinction is an important one.[5]

It follows that if the rationale for the 'business affairs' exemptions is one of competition and economic efficiency, then we should be careful to ensure that claims of commercial confidentiality do not simply have the effect of protecting corporations from full exposure to the rigors of competition, perhaps preserving an unfairly anti-competitive market position. One thing that appears clear in real world markets, as opposed to the ideal types of those markets, is that firms constantly engage in a wide variety of strategic behaviours, designed to protect their individual market position, precisely by preventing market forces from having their full operation. But the public interest in flourishing competition is surely not an interest in the preservation of particular individual firms. Rather, it is an interest in the competitive process itself, and in the allocative, technical and dynamic efficiencies which are said to result from the operation of market forces. Competition lawyers have had to learn to distinguish between attempts to preserve individual competitive advantage and measures necessary to preserve the competitive process itself. I would argue that a similar distinction must be made when considering claims for the exemption from disclosure of commercial material.

The third proposition above is that unilateral control of information may create a situation of market power, or even monopoly, with anti-competitive consequences.

This is not a controversial proposition. It is recognised in competition law that market power, the ability to act unilaterally with a significant degree of insulation from market responses, may derive from the possession of legitimately acquired property rights. Indeed it may derive from the possession of a statutory monopoly. This principle is equally applicable to the case of exclusive intellectual property rights, whether these derive from trade secrets, copyright or patent. Exclusive use rights of such property in information may generate market power and have the effect of preventing what might otherwise be effective competition.[6]

Significant market power may also be derived from lesser forms of information rights. Recent experience has shown that long-term governmental outsourcing arrangements may result in a government effectively depriving itself of the capacity to directly perform the outsourced functions itself, since it no longer possesses the necessary staff, and the associated skills base, nor the required technical equipment and infrastructure. In short, the government is at the mercy of the incumbent contractor.

The critical time will usually be the time of contractual renewal, where the loss of its own skills base may prevent the contracting agency from credibly threatening to return the function in-house. Its bargaining position will be greatly strengthened if it is bargaining with a number of viable alternative contractors and not just the incumbent. The more likely scenario, however, is that the latter will possess a major competitive advantage due to its 'inside knowledge' of the operation. Other potential tenderers will simply lack the detailed knowledge on which to accurately base competitive yet profitable bids.

In such a scenario, the incumbent gains a competitive advantage which is not a reward for greater efficiency, but simply the result of its privileged access to relevant market information. From the viewpoint of the contracting agency, and the information-poor competing tenderers, the key rationale for competitive tendering is undercut. The incumbent enjoys a position where it is relatively insulated from competitive pressures, that is, from the

very forces which were supposed to produce efficiencies in the delivery of the tendered service delivery. In short, the risk is that a public monopoly, allegedly inefficient, will have been converted to a private monopoly. Any potential for efficiencies flowing from competitive pressures will be lost.

Such a result is not unavoidable. Well thought out contracts will take care to specify the information rights that will apply at the time of contractual renewal and will strive to incorporate contractual mechanisms designed to ensure an informational 'level playing field' between the incumbent and potential contractual substitutes. The point to be emphasised for current purposes is that the solution lies in unlocking the commercial information of the incumbent and making it available to competitors, rather than according it the status of private property.

It is instructive to consider what happens when a major government contract is initially let. Under the due diligence process, each potential tenderer is supplied with detailed information as to the current operation of the government agency whose functions are to be outsourced. Indeed, it is only on the basis of quite detailed and exhaustive consideration of the current operation, the plant and equipment employed, the labour force, the capital requirements, and so on, that a sensible and appropriate tender can be prepared. This, of course, is equally true when a contract falls due for renewal. The implication is that the commercial confidentiality of the incumbent must be overridden in order for a genuinely competitive tendering process to occur. The situation is a clear instance of conflict between public interest in a strongly competitive tendering process and the private commercial advantage of the incumbent. To privilege the commercial interest of the incumbent in such a situation is to entrench a newly created private monopoly over the service in question.

What sorts of commercial information do we protect?

Commercially sensitive material comes into the possession of government in a variety of ways. At the time when the FoI Acts were first appearing in Australian jurisdictions, the typical way in which government acquired such information was in the course of its regulatory and licensing functions. Regulatory bodies such as the Therapeutic Goods Administrator did, and still do, require access to a good deal of commercially valuable information in order to carry out their statutorily assigned tasks.

In the re-configured landscape of public administration in which the Acts now operate, government obtains commercial information in other ways as well. First, as government itself becomes a commercial player in a competitive environment it develops its own body of such information. Telstra provides an obvious example. Second, as government outsources and privatises, it acquires a good deal of commercial information throughout the life cycle of contract tendering, award, subsequent performance and eventual renewal, termination or re-tender. One observation to be made is that as these are very different types of commercially sensitive material, the rationales for their protection may well be of quite different strengths. Current FoI legislation shows little awareness of this.

Not only does government acquire commercially valuable information in a range of ways, but that information falls into different types and is valuable in different ways. The strongest cases involve information relating to innovation of various sorts.

Some information is sensitive because it discloses technical innovation. This might include information relating to production processes, formulae and industrial designs, as well as information concerning other technological inventions. The best examples come from cases in the traditional licensing or regulatory context.[7] However, opportunities for technical innovation may also arise in more dynamic technological fields such as the outsourcing of data processing services by government.

Innovation may also occur at the management level. Sensitive commercial information may relate to innovation of this sort as well, detailing unique and innovative management strategies and organisational techniques. It is questionable, however, whether the same scope for innovation exists in this field as in the area of technological advance.

In the field of outsourced service delivery, much of the 'innovation' appears to consist of greatly reduced staff numbers, accompanied by re-organisation of rosters and duty schedules. If the same levels of service delivery are to be achieved, then this will presumably require innovations in the deployment of those staff, perhaps new rostering systems, and perhaps in the mix between human resources and infrastructure. Striking the right balance here is what gives a particular tenderer their 'competitive edge' and is therefore of commercial value in a practical sense. However, these changes do not appear to be as strikingly innovative as those in the technical field.

An interesting example, arguably falling within this category, is provided by tender evaluation methodology (TEM) exempted from disclosure in *Thwaites v Metropolitan Ambulance Service*.[8] In that decision, Galvin DP accepted the evidence of Hendersons Consultants that they had prepared the TEM on the basis of the experience and expertise the firm had accumulated in conducting tenders for other clients. He accepted that to disclose the TEM would result in commercial disadvantage to the Hendersons, as it would enable their competitors to see not only how the firm designed such methodologies but also the style, format and presentation of the document as a whole. This was sufficient to exempt the TEM from disclosure.

In the same case, the various tenderers themselves argued that their operational methods were of commercial value and hence exempt from disclosure. The procedure manuals of the four tendering companies contained details of their approaches and the guidelines given to their staff relating to various aspects of their operations. The guidelines related to maintenance and stocking of vehicles, uniforms and general presentation of ambulance drivers and attendants, procedures for handling deceased and psychiatric patients, crewing, communications, patient care

record-keeping and other documentation including comment and running sheets.

It was argued that the information was commercially sensitive. Access to it by competitors would disadvantage the company and prejudice it in future negotiations with Metropolitan Ambulance Service (MAS) about shift allocations, lease charges, hourly rates and staffing requirements under either the current contract or any future contracts. It would disadvantage the company were it to pursue contracts with hospitals in that its competitors for hospital work would be able to undercut Transcare on rates. Galvin DP held that the documents contained information of a sensitive kind relating to the manner in which the companies proposed to conduct the service tendered for and also general, commercial, descriptive, supportive and operational information. Galvin DP held that 'much of the information' would impinge on the manner in which the companies conducted their business. The documents were therefore exempt. The facts may be interestingly compared with those of the more recent Federal Court decision in the *Staff Development and Training Centre* case.[9] In both instances, the emphasis appears to be placed on *individual* disadvantage, rather than on the effect of disclosure on the competitive process itself.

A third type of competitively sensitive information is that which relates to a firm's plans for the future, particularly its competitive strategies and techniques. Examples of this type of information include marketing and capital budgeting plans, decisions to build new plants, or to change the amount of a bid on a contract. This type of information may well become public knowledge within a few months, and firms tend to keep their competitive strategies secret for the relatively short amount of time it takes for the secrecy to give them a competitive edge.

Finally, competitively sensitive information may be comprised of numerical and other descriptive data. Examples of this type of information are production-cost figures, pricing lists, assets, workforce statistics, detailed sales figures, customer lists, and the names and addresses of the company's suppliers.

Consultancy fees and charges under a contract may fall within this category. In *Thwaites v Department of Health and Community Services,*[10] exemption was claimed for details of consultancy fees paid by the Dept of Health and Community Services to Pacstone Pty Ltd. It was held that they were exempt from disclosure. Macnamara DP held that the information was of a sensitive nature and related to the conduct of Pacstone Pty Ltd's operations. This was sufficient for its exemption under s.34(1)(a) of the Victorian *FoI Act,* even though Pacstone was unable to demonstrate that it would suffer commercial disadvantage from disclosure.

Pacstone had argued that disclosing the information would 'render that commercial undertaking vulnerable to undercutting and the like in future competitive tenders'. Macnamara DP noted first that there was no evidence from officers of Pacstone to support the claim that Pacstone would suffer a disadvantage by reason of potential undercutting. Second, there was no evidence Pacstone would continue to seek consultancy work of this type. Third, the Annual Report of the Department sets out a register of consultancies, from which, even in the absence of direct hourly charge-out rates, an astute competitor could infer the charging practices from the given as to total fees and their knowledge of the scope of the tasks involved in the consultancy. It would thus be difficult to credit claims of disadvantage under s.34(1)(b).

What is remarkable, given the efficiency driven rationale for competitive tendering, is that undercutting should be seen as a problem at all. Indeed, this is precisely the kind of economic efficiency which a competitive tendering process is designed to generate, and which is used to justify the outsourcing exercise in the first instance. What is equally remarkable, however, is that the demonstration of such an individual competitive disadvantage is sufficient to result in exemption from disclosure under most existing FoI legislation.

In *Cuthbertson v Dept Natural Resources and the Environment,*[11] information on the input details of sawmilling operations, including details of sawlogs and other material purchased, and output details of sawmilling operations, was required to be submitted to obtain sawmilling licences. Evidence was accepted that these input and output details would enable a competitor to ascertain the companies' production secrets and methods. Annexures to the licences would enable a competitor to know financial and commercial information, that would otherwise be secret, as to the companies' future plans for production.

> Such information would disclose to competitors of [the companies] trade secrets and give such competitors an 'armchair ride' into finding out such trade secrets such as intended production and markets. Further, such information would allow competitors to find out trade secrets, business and commercial information of [the companies] that would otherwise not be available.[12]

In refusing to release the information, the Tribunal commented that it was 'of the utmost importance' that people having dealings with the government should have confidence in the system, and that when they are told information they supply will be confidential, it should remain confidential. It followed that releasing such documents would break confidence in the system and expose the secrets of the companies to 'the jungle of competition'. Heaven forbid!

It can be seen that quite a range of information can be regarded as commercially sensitive. Equally, it can be seen that the reasons for this protection may vary considerably, albeit under the broad rubric of commercial disadvantage. Intellectual property regimes, and in particular the law of trade secrets, have allowed businesses to protect a wide range of business information, of both technological and non-technological varieties. It is interesting, however, that discussions of the rationales for protecting commercial information generally do not distinguish between the types of information. It is equally interesting to note the sweeping nature of the protection accorded for commercial information in FoI legislation.

Why do we protect commercial information from disclosure?

Why then do we protect commercial information? One suggestion can be quickly disposed of. We are not concerned to protect commercial confidences out of some sort of privacy concerns. Corporations are not the bearers of human rights.

The key and indeed almost the only plausible rationale for the protection of commercial information is that such protection contributes to economic efficiency, in particular, dynamic efficiency. The common law trade secret doctrines and statutory protection regimes for copyright and patent laws provide incentives to create. This is the essential rationale for the existence of intellectual property regimes in a competitive market economy. It is a *public* interest rationale.

Few would doubt the extreme importance of technological innovation in today's world. In the Australian context, many argue that the key to national economic growth is through an export-led economy. Viewed in this way, technological innovation is a 'matter of public interest and national policy'.[13] However, at the macroeconomic level, there are two conflicting 'national interest' objectives. The first is to maximise the production of technological information through incentives to create and innovate; the second is to maximise the use of this information, that is, to 'maximise the dissemination of such information among potential users thus promoting further research, and, by competition, achieving high levels of productivity'.[14] It is at this level, that the potential conflict is evident. Whereas the individual creating new technology may have an incentive to maximise their competitive advantage by keeping the innovation to themselves, the broader public interest in competitiveness generally requires that the new technology become widely available. Among other things, giving the creator a monopoly over their creation leads to higher prices and the associated deadweight loss to society, and reduces the dissemination of information necessary for further creation.[15]

The Report of the Intellectual Property and Competition Review Committee recognised the underlying tensions. An Issues Paper released as part of the review process commented in the following terms:

> The major concerns of competition policy in regard to IP rights are the market power that may result from the granting of such rights and the detrimental effects caused by the anti- competitive exercise of such rights. At its simplest, market power can harm consumers through the setting of prices which are higher than those needed to secure production. Moreover, the harm caused by market power may extend beyond this when the protection granted firms allows them in one way or another to slow or distort innovation. Under these circumstances, market power will limit the growth of productivity over time, and hence reduce the scope for durably raising living standards.[16]

The Final Report noted:

> Balancing between providing incentives to invest in innovation on the one hand, and for efficient diffusion of innovation on the other, is a central, and perhaps the crucial, element in the design of intellectual property laws.[17]

The Review Committee expressed the view that the existing intellectual property exemptions under s.51(3) of the *Trade Practices Act 1974* (TPA) were 'seriously flawed, as the extent and breadth of the exemptions are unclear and may well be too broad'.[18] The Review recommended that a competition test be applied to the use of IP rights, such that a breach of Part IV of the TPA (the Restrictive Trade Practices provisions) might be made out where (but only where) a substantial lessening of competition could be shown to result.[19]

Protection of commercial information in FoI legislation

What is striking about the exemptions for 'business affairs' in the light of the foregoing discussion is their breadth. IP statutes generally take a balanced approach recognising that there are competitive arguments for and against information disclosure.[20] Ironically however, the protection granted to commercial information under FoI Acts is frequently much greater. Virtually any kind of commercial information is potentially exempt. In many instances the exemption is absolute. In others, it is sufficient to show an individual competitive disadvantage flowing from disclosure, regardless of whether or not the disclosure is potentially pro-competitive from a broader perspective. Where 'public interest' considerations are given weight, they appear to focus on the (admirable) public interest in transparency and openness and not to take account of the public interest in vigorous competition.

Under s.43 of the Commonwealth Act 'trade secrets', which can include a wide range of 'innovative' materials, enjoy absolute exemption from disclosure. Any other information having a commercial value is also absolutely immune from disclosure, so long as that commercial value might reasonably be expected to be destroyed or diminished by disclosure. Indeed, information not having any commercial value is also exempt from disclosure where that disclosure would have an 'unreasonable' effect. No reference appears in these provisions to the broader public interest in encouraging competition. The focus is entirely on the prevention of any form of individual disadvantage.

Other jurisdictions show a broadly similar pattern. In Victoria, a document acquired from a business, commercial or financial undertaking is exempt from disclosure under s.34 if '(a) the information relates to trade secrets or other matters of a business, commercial or financial nature; *or* (b) the disclosure of the information under this Act would be likely to expose the undertaking to disadvantage.[21] While is it true that the Victorian Act does allow the Victorian Civil and Administrative Tribunal (VCAT) to apply a 'public interest over-ride'[22] on review of an exemption granted under s.34, the public interest envisaged here appears to be the broader democratic interest in access to information. The importance of that interest is obvious, but it should be clearly distinguished from the public interest in effective competition. The latter should limit the prima facie scope of an exemption to be granted on grounds of commercial confidence, rather than operating to override any such exemption.

In the *Victorian Prisons Case*[23] the principal public interest arguments turned on the public right to know. The VCAT decision stressed public transparency and understanding as well as the need to 'clear the air', placing

some emphasis on the nature of the contracts at issue, being for the management of private prisons. Some consideration *was* given to the likely effect on future tender processes; however, it is evident that the major weight was placed on the public interest in informed democratic debate. The public interest in being better informed was also the key element in the VCAT decision to apply s.50(4) and allow public interest release of prima facie exempt commercial material in the Victorian Casino Case.[24]

Section 57 of the Northern Territory *Information Act 2002* provides that commercial information *may* be exempt. However, the focus remains on 'unreasonable' individual disadvantage to an undertaking with a relevant consideration under s.57(2)(c) being 'whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking'. Section 57(2)(d) provides an example of factors which may override such disadvantage and justify release of the commercial information in question. The example provided is 'the public interest in evaluating aspects of government regulation of corporate practices or environmental controls'. Again, this reflects the traditional focus of public interest concerns with openness and transparency.

Section 31 of the Tasmanian *Freedom of Information Act 1991* also provides that 'public interest' is to be taken into account when considering whether commercial material should be exempt. The nature of that public interest is not specified. As with the NT Act, the public interest concerns are considered at the point of determining whether access to the information in question would 'unreasonably' expose an undertaking to disadvantage. Tasmania also has a specific exemption for the trade secrets of an agency (s.32) perhaps recognising the newly commercial nature of many governmental agencies.

The NSW *Freedom of Information Act 1989* deals with business affairs under Clause 7 of Schedule 1. Trade secrets receive absolute protection, as does matter which has a commercial value that could reasonably be expected to be diminished by disclosure, or indeed matter the disclosure of which could reasonably be expected to have an unreasonable adverse effect on business, professional, commercial or financial affairs. As with the Commonwealth Act this appears potentially very broad and is focused on individual disadvantage with little consideration of the public interest in vigorous competition.

Section 45 of the Queensland *Freedom of Information Act 1992* follows a similar pattern to the NSW Act in some respects but is subject to a public interest balancing test at least in relation to s.45(1)(c). The nature of that public interest is not elaborated. The Western Australian *Freedom of Information* Act *1992* is similar in effect.[25] The South Australian *Freedom of Information 1991* Act again follows the NSW pattern but now provides for public interest balancing in relation to commercial matter other than trade secrets.[26] Again, the nature of that public interest is not indicated.

Limitations to the 'innovation' rationale

Given the weight accorded to commercial confidentiality in the FoI exemption provisions, one might expect to find that respect supported very a strong economic rationale. In fact, the incentive and innovation rationale is open to a number of criticisms:

- it lacks empirical support,
- it may be more limited in scope than thought,
- the rationale for protection may be quite limited in time, and
- there may be too many forms of protection.

Lack of empirical support

Interestingly, and despite its apparent intuitive plausibility, the incentive argument has its empirical critics. Commentators have noted that 'There is a serious shortage of objective, empirical information concerning the value of industrial property regimes to economic prosperity'.[27] It is not agreed among economists that industrial property regimes actually do encourage economic development, or that incentives to create in fact provide a net beneficial effect to society.[28] For example, incentives to create may actually lead to too many resources being devoted to research and development.[29] Even those who argue in favour of intellectual property rights as a means of enhancing innovation accept that competition in the production of intellectual property should only be restricted for the time required to reach an 'optimal' level of innovation.[30]

Technological innovation only?

Second, the rationale for trade secret protection applies most clearly and intuitively to technological ideas, that is, to trade secrets in the narrow sense of new inventions, formulae, processes etc. It is far less clear that non-technological business information requires secrecy to encourage its production. There is no empirical or theoretical evidence at all that secrecy is required to encourage the production of non-technological business information that is not directly related to either innovative activities or future plans. That is, there is no evidence that secrecy provides an incentive to create a socially-optimal level of production of business information that would otherwise be underproduced, in particular as regards information that is 'routine' or a 'by product of activities that a firm would carry on anyway'.[31] Information such as customer lists, merchandising information, and, in particular, financial information such as cost and price lists must be compiled in any event if a firm is to compete effectively. The anticipated profit is in itself sufficient to create this type of information. Indeed, a firm simply has to create these types of information in order to compete. A firm might invest more in this type of information if it knew it could protect the results through secrecy laws, but 'it is not evident that the additional investment would enhance competition or product quality enough to justify the social costs'.[32] In fact, Stevenson suggests that the enforced disclosure of this 'routine' business information would 'not only spur competition but would save society the cost of the duplicative efforts and industrial espionage (as well as the countermeasures taken to prevent it) that would at least sometimes be undertaken'.[33]

Unlike 'routine' business information, the corporation may create information that is intrinsically valuable for its own sake, for example, market surveys. This type of information may also include information that is generally available but has been accumulated and put together in a specific way by the firm, such as directory information, racing results, and stock exchange information.[34] A firm may need to keep such information secret to recoup the costs of production in the same way that an inventor may need a period of protection to recoup the costs of the research and development. In other words, the 'innovation rationale' may apply to this type of information. However, as with inventions under patent law, it is arguable that there should be a time limit on the length of secrecy.

Given the dearth of empirical information in this area, it is difficult to generalise on the economic impact of granting commercial confidentiality to these more general types of business information, as opposed to technological or innovative information. There has been little or no economic analysis of the net benefits or costs of access or disclosure of non-technological business information to society, although we would expect that in the case of routine information, disclosure would increase competition and produce a net benefit to society.

Time limits to protection?

The innovation rationale is a public interest argument; as discussed above, it attempts to balance the public interest in the creation of new ideas and technology with the equally significant public interest in the dissemination of that information. Once this is accepted, it is apparent that it cannot be in the public interest to indefinitely preserve commercial confidentiality if the effect is to allow one player to dominate the market. Strictly speaking, one should allow enough incentive to encourage innovation and no more. Once this point is reached, and there is sufficient incentive to encourage innovation, the incentive structure should change, so that dissemination of the information as widely as possible is encouraged. There is no rationale for allowing excess profits, that is, over and above a 'fair market return'. The public interest is ultimately in the dissemination of information so that efficiency can rise generally.

Most importantly, it may be that excessive protection for intellectual property will actually discourage further innovation. Where a firm finds itself with a significant, non-transient market advantage due to innovation, it may become effectively insulated from competitive pressures. Such a firm may be able to 'rest on its laurels', and escape pressure to engage in further innovation. This is the uneconomic consequence of market power and monopoly, however achieved. Indeed, there may be instances where it is only *after* dissemination of the innovation that there will be a renewed incentive for the next level of innovation, the second and third order innovations, to occur. Proponents of IP rights to reward and enhance innovation accept that protection should be time limited.[35]

Are there too many forms of protection?

There is disagreement as to whether, given the existence of patents law and other statutory regimes, the common law trade secret doctrine can be justified economically.[36] To see the significance of this debate in relation to potential FoI disclosures of commercial information, it is necessary to carefully distinguish between 'trade secrets' and the approach taken by statutory regimes such as patent. The latter does not provide absolute protection for commercial information. Rather, it provides a mechanism for the controlled release of that information into the community as a whole, over a period of time, and with a system for the recompense of the innovator, for the benefit of that community as a whole. In short, patent law attempts to balance the need to provide individual incentives for innovation with the wider community need to access and employ that innovation to enhance productivity on all sides. By contrast, the common law trade secrets doctrine attempts no such balancing but provides near absolute protection to the holder of the information, to their advantage but potentially to the disadvantage of the wider community. No attempt is made to consider the broader public interest in disseminating new and innovative techniques. Economists are now beginning to question whether such absolute protection is necessary or desirable; intuitively, one might argue that as long as there is enough protection for innovation that the incentive to innovate remains, and that no additional protection is needed. But, as noted above, the current protection afforded by FoI exemptions for commercial information is near absolute, rather than emulating the kind of balance struck by patents law. For the same reasons, it is questionable whether this is desirable or necessary.

Conclusion: a new approach to commercial information in FoI cases?

The conclusion to be drawn is that commercial information may well be significantly over-protected from disclosure under contemporary FoI legislation. This is at least ironic. The over-protection is evident quite apart from democratic arguments that the public 'right to know' may over-ride established commercial interests. Viewed solely in terms of enhanced economic efficiency and competitiveness, the existing levels of protection for business information appear difficult to justify. FoI legislation should be redrawn so that business information is only protected where its release will cause demonstrable harm to the competitive process itself. It should not be sufficient to justify exemption, as is usually the case, either that material is of a commercial nature, or that its release will cause some 'competitive disadvantage' to an individual enterprise. This is particularly the case where the disadvantage in question flows directly from the further exposure of the enterprise in question to the competitive process. The underlying rationale for the protection of commercially sensitive information is to encourage innovation. This justifies a level of protection, but only where the innovation would not occur without that protection, and only for a limited period of time. The broader public interest at a macro economic level lies in strengthening all dimensions of the competitive process. This requires the dissemination of information, rather than its monopolisation as a device to insulate a firm from effective competition.

The appropriate test is therefore a competition test, rather than one of individual disadvantage. There will remain situations where disclosure of information will tend to inhibit competition rather than fuel it. For example, it may be argued that in some competitive tendering situations, information as to competing tenders may lead to collusive tendering practices such as 'bid rigging'. Where this is so, it would constitute a valid economic reason for considering the application of a business affairs exemption. Nonetheless, such suggestions need to be approached with caution. A strong empirical foundation for such claims should be required. Prima facie, it is equally plausible to assert that knowledge of competitors' cost structures may enable their rivals to undercut their bids. It is far from apparent that this is against the public interest. Indeed, competitive tendering for the delivery of services on behalf of government is intended to generate just such efficiencies. Moreover, suggestions that collusive tendering will occur must take into account the fact that such practices are clearly prohibited by s.45 of the *Trade Practices Act 1974*. Perhaps the more appropriate solution is to ensure that instances of coordinated bidding strategies by tenderers are better detected and more rigorously prosecuted.

Other instances where the proper functioning of an effective competitive process actually requires at least some level of temporary secrecy can and will no doubt be discovered. But there seems little warrant for the current extended scope of 'business affairs' exemptions. As one commentator has remarked:

> In a free market economy that is by definition dependent on the liberal flow of information, the question is not whether the disclosure of 'commercial secrets' will be disadvantageous to a particular firm but what effect a change in the law governing the protection of those secrets will have, over the long run, on the economic incentives of a corporation to engage in socially productive activity.[37]

It is the public interest in an effective competitive process which should be protected within the business affairs exemptions, not the private interests of individual firms.

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2. *Re Qld Co-Op Milling Association* 8 ALR 481 at 515.
3. Nor is it necessarily desirable. Both democracies and markets recognise the need for at least some exceptions to the free flow of information for instrumental reasons. These are discussed below.
4. *Queensland Wire Industries v BHP* (1989) 167 CLR 177 at 191. See also the joint judgment of Gleeson CJ, Gummow, Hayne & Callinan J in *Melway Publishing v Robert Hicks* 205 CLR 1 at 13, who commented in the context of s.46 (misuse of market power) that 'Section 46 aims to promote competition, not the private interests of particular persons or corporations' (para 17).
5. Dawson, D., Segal, J. & Rendall, C., *Review of the Competition Provisions of the Trade Practices Act,* January 2003 at 29. (Emphasis added.) Available from the Commonwealth Treasury website.
6. It is notable that although s.51(3) of the Commonwealth *Trade Practices Act* exempts a range of license conditions or assignments of IP rights from the scope of the Act, that exemption does not extend to misuse market power, under s.46. The National Competition Council recommended further limits on this exemption in its Legislative Review of the provision, released in March 1999, and available from the NCC website at <http://www.ncc.gov.au>.
7. For an example, see *Searle v Public Interest Advocacy Centre* (1992) 108 ALR 163.
8. Victorian AAT, No 04289 of 1995.
9. *Secretary, Dept of Workplace Relations & Small Business v Staff Development & Training Centre P/L* [2001] 114 FCR 301.
10. Victorian AAT, No 25696 of 1995.
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15. Stevenson R., *Corporations and Information: Secrecy, Access and Disclosure;* The John Hopkins University Press, Baltimore and London, 1980, p.22.
16. Intellectual Property & Competition Review Committee; Issues Paper, September 1999 at pp. 4-5. Available at <http://ipcr.gov.au/ipcr/issues/issues.html>.
17. *Final Report of the Intellectual Property and Competition Review Committee* (September 2000).
18. Ibid at 11.
19. Ibid at 19.
20. See the Commonwealth *Copyright Act 1968*, *Patents Act 1990* and *TradeMarks Act 1995*.
21. It is now well established that the 'or' in s.34 means what it says: *Gill v Department of Industry, Technology and Resources* [1987] VR 681 stands for the proposition that paras (a) and (b) of s.34(1) should be read disjunctively. This means that under s.34(1)(a), it is not necessary to establish that disclosure of information relating to trade secrets or other matters of a business, commercial or financial nature would be likely to expose the undertaking to disadvantage. It also means that under s.34(1)(b), information acquired by an agency or a Minister from a business, commercial or financial undertaking that would be likely to expose the undertaking to disadvantage does not have to relate to trade secrets or other matters of a business, commercial or financial nature.
22. See s.50(4) of the Victorian *Freedom of Information Act 1982*.
23. *Coburg & Brunswick Community Legal & Financial Counselling Centre v Department of Justice* VCAT (1999) Nos 96/49366 & 97/57494.
24. *Re Hulls and Department of Treasury and Finance* VCAT (1 December 1998).
25. See Clause 4 of Schedule One and cl 4(7) in particular.
26. See Clause 7, Schedule 1, *Freedom of Information Act 1991* (SA).
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28. For discussion of this issue, see Lunn, 'The Roles of Property Rights and Market power in Appropriating Innovative Output' (1985) 14 *JLS* 423; Braun, 'The Economic Role of Industrial Property' [1979] *EIPR* 265; Ordover, 'Economic Foundations and Considerations in Protecting industrial and Intellectual Property' (1984) 53 *Anti-Trust LJ* 503.
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36. For an article arguing the positive effects to society of trade secrets law on invention, see Friedman, D., Landes, W. and Posner, R., 'Some Economics of Trade Secret Law' (1991) 5(1) *Journal of Economic Perspectives* 61. For a critique of the incentive argument as applied to trade secrets law see Bone, R., above, ref 32.
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‘Catha edulis Forsk’ and freedom of information: a short note on an early FoI pioneer

Pronounced chat, qat (variously chat, kat, khat, jaad, mirra, miaraa, marongi or miurungi) is a herbal remedy and/or an intoxicant. It is a plant, grown at high altitudes, traditionally in Hararge province of Ethiopia, the Taizz area of The Yemen and various parts of Kenya.[1]

The perennial shrub, Catha edulis Forsk, is named after the naturalist and botanist Peter Forsskål[2] who identified it in North Yemen in the mid-18th century during an expedition organised by King Frederick V of Denmark. ‘The only survivor of the five members of the expedition, the Hanoverian geographer, Karsten Niebuhr, published the botanical papers in 1775, and in memory of his friend called Catha edulis — Catha edulis Forsk.’[3]

So far, so interesting — but, what does this all have to do with FoI? The story begins in 1992.

In that year, I presented a paper titled ‘Historical Basis of the Right to Freedom of Information in Europe’, at a conference in Budapest (Hungary had just enacted its FoI Act). As is customary, due obeisance was paid to the Swedish *Freedom of the Press Act 1766*, as the world’s first FoI Act (though, apparently, it is better translated as Freedom of Printing Act, according to Erik Gothe, *The Swedish Tradition of Freedom of Press* <http://www.fecl.org/circular/1507.htm>).

Being ignorant at the time of the concept, no mention was made of the 15th century principle underlying the law, the so-called Offentlighetsprincip.[4] Less customarily, however, the rhetorical question was thrown out during the course of the presentation: how is it that this revolutionary legal event occurred in Sweden in the mid-18th century? Few commentators on FoI seem to be interested in the context and background to the passage of the Act.[5]

Usually, such questions are never picked up. However, not so on this occasion. A Czech lawyer attending the conference came up to me (before the lunch break!) and essayed that part of the answer might be found by following up the life and work of one Peter Forsskål.

This tip led to an ongoing research project into the life and work of a fascinating, Renaissance man, Peter Forsskål.

As well as posthumously publishing two volumes on the flora and fauna of aegyptiaco-arabica, Forsskål also authored *Tankar om borgerliga friheten* (1795), *Thoughts on Civic Liberty* (or Thoughts about Civil Freedom) which was published by Lars Salvius in Stockholm.

The pamphlet is an ‘important plea for freedom of the press. Forsskål argues for complete freedom of expression and against preventive censorship and restraint. The pamphlet was in fact approved by Sweden’s last censor librorum Niclas von Oelreich but was nonetheless condemned and copies confiscated. The pamphlet made Forsskål most objectionable to the government.’[6]

While clearly being more in the mould of conflating freedom of information with freedom of the press, the claim of this Note is that this pamphlet contains an important seed of the idea of freedom of information and that Peter Forsskål deserves to be known as one of its true progenitors.

Furthermore, so far as is known, this important plea has never been translated into English. Now, through the efforts of Theresa McGrane-Langvik and Maria Lindstedt, a draft translation has been prepared, and will be published in due course.

Qat or Catha edulis Forks is a herbal intoxicant. Peter Forsskål, whose name it bears, may have to be, henceforth, considered as one of the primary sources which has intoxicated the freedom of information idea.

David Goldberg

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keen civil servants in the Lord Chancellor’s Division in Whitehall thinking about how to implement FoI in the heartland of modern spin and governmental paternalism. In March it was with a dazzling array of activists, NGOS, parliamentarians, military officials, journalists and experts from several countries in Jakarta and Manila. In April and May it was with a group of senior Tasmanian law students where we examined Doty’s riddles from a comparative perspective. In the last seven weeks it has been watching how 140 law students, after being introduced to the purity of the concept of open government, have struggled with their unrealistic expectations when they critically assess the delivery and performance of Australian FoI over the last 20 years.

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