

Freedom of Information

Review

ISSN 0817 3532

ISSUE No. 109

Contents

Articles

- Treatment of sensitive requests under British Columbia's freedom of information law
by *Alasdair Roberts** 2
- Media use of FoI surveyed: New Zealand puts Australia and Canada to shame
by *Stephen Lambie** 5
- Conclusive or ministerial certificates — an almost invisible blight in FoI practice
by *Rick Snell* 9
- A Selection of articles on freedom of information in the United States
by *Michael Ravnitzky* 12

*Articles in the *FoI Review* that are refereed are marked by an asterisk.

Credits

The *Freedom of Information Review* is published six times a year by the Legal Service Bulletin Co-operative Ltd.

International Editorial Board

Thomas B. Riley
Harry Hammitt
Maeve McDonagh
Ulf Öberg
Melissa Poole
Alasdair Roberts

Australian Editorial Board

Jason Pizer
Anne Cossins
Kim Rubenstein
Bill Lane
Peter Wilmshurst
Helen Townley
Chris Finn

Editor: Rick Snell
tel 03 62 26 2062 fax 03 62 26 7623
email: R.Snell@utas.edu.au
website:
<http://www.foi.law.utas.edu.au/>

Reporters

Peter Wilmshurst (NSW), Dannielle Evans (Vic.), Emma Sundborn (Cth)
Print Post approved PP:338685/00011

This issue may be cited as
(2004) 109 *FoI Review*

© LSB Co-operative Ltd 2004

Comment

In a long overdue announcement the Labor Party shadow Attorney General, Nicola Roxon, announced that her party would have a 'short and targeted' consultation process over the next two to three months and take a fully prepared FoI policy to the next election.

For Australian reformers this is welcome news after seven long years in which FoI reform has languished in the wilderness. During that period only the efforts of the Australian Democrats, especially the work of Senator Andrew Murray, kept any vitality in the proposals made by the Australian Law Reform Commission and the Administrative Review Council.

Ms Roxon is not clear about just who will be consulted in this 'short and targeted' consultation process but I would urge any readers who have ideas about reforms (or simply want to see a number of the ALRC/ARC reforms resurrected) to contact Ms Roxon at: The Office of Nicola Roxon MP, Shadow Attorney-General 204 Nicholson Street, Footscray VIC 3011, email: nicola@nicolaroxonmp.com.au

In a press release Ms Roxon stated that the review would look at:
all areas of the current FoI regime including (but not limited to):

- the breadth of the public interest test
- the growing use of the commercial-in-confidence exemption
- implications of new technology
- the use of conclusive certificates.

The fact that it has taken the entire period of the Howard Government for the Labor Party to see effective open government as a point of policy differentiation is a surprise. Somewhere in this short, sharp burst of consultation I hope that the ALP develops a far more deeply rooted affection for and commitment to the concept and rationale for FoI other than as a handy weapon against a highly secretive government.

This policy epiphany was, without a doubt, assisted (or even spawned) by the strong commitment that News Ltd in general, and *The Australian* in particular, have given to using FoI in the past 12 months.

The articles in this issue by Al Roberts and Stephen Lambie are strong examples of what is wrong with the access to information process in countries like Canada and Australia. More importantly, they are testimony to the contribution solid research and empirical work can make to this field of study and policy debate.

Whilst Stephen Lambie's finding that much of the media coverage in Australia about FoI is about the difficulties of using FoI is not a surprise, it is a major worry. We need to not only campaign for government reform but to encourage further epiphanies within the federal parliament and also in the fourth estate. Michael McKinnon of *The Australian* is to be congratulated for continuing to push the existing capacity and limited effectiveness of FoI to the limit. We also need researchers to demonstrate how, or if at all, FoI is a positive contribution to policy discussion, analysis and public discussion. The focus in Australia has been on how little flows from our statutorily entrenched access to government information. We need to start to explore what is the consequence or effect of this trickle of information into the information commons. Al Roberts's article demonstrates that developments like electronic records management can both improve and hinder access to information.

So get your submissions in for the ALP's policy review.

Rick Snell

Treatment of sensitive requests under British Columbia's freedom of information law

Although citizens may be unaware of it, governments are using new information technologies more extensively in the management of freedom of information (FoI) laws. Citizens must treat these new technologies warily. New IT systems can give governments unprecedented abilities to monitor and control the flow of information under FoI law. On the other hand, these systems also create new opportunities for non-governmental actors to monitor government itself.¹

The government of British Columbia, which adopted its *Freedom of Information and Protection of Privacy Act* (FoIPPA) in 1992, may now be in the vanguard of this technological transformation. Its Corporate Request Tracking System (CRTS), developed by EDS, is a government-wide database that provides all major ministries with a tool for managing their FoIPPA caseloads — and at the same time gives the centre of government much better oversight of the entire FoIPPA system.

The integration of caseload management and oversight functions into one database is an important innovation. In many governments, ministries rely on stand-alone case management databases, that are entirely separate from — and often incompatible with — those in other ministries. Canada's federal government has recently taken a step beyond this, by encouraging departments to adopt the same request management databases, and creating a new government-wide database into which data is regularly uploaded by departments.²

By contrast, British Columbia now operates a single government-wide database that can be used by each ministry to record its work on FoIPPA requests and monitor its overall performance in meeting FoIPPA requirements. Unlike the federal arrangement, British Columbia's system ensures that the government-wide database has a broader range of data about requests in all major ministries, updated on a real-time basis.

At the same time, the CRTS improves the British Columbia government's capacity to track politically sensitive requests. The database allows each ministry to give a 'sensitivity ranking' — High, Medium, or Low — to each new FoIPPA request.³ (A ministry may also choose not to assign a sensitivity ranking.) The Corporate Privacy and Information Access Branch (CPIAB), a component of British Columbia's Ministry of Management Services (MMS), may also give any request in the system a separate designation as 'CPIAB Sensitive'. CPIAB is the office that is responsible for cross-government policy and procedures on freedom of information.⁴

Each ministry can search the database for requests received by that organisation using a number of search criteria, including the type of requester and sensitivity of the request. CPIAB can undertake the same searches on a government-wide basis. For example, the CRTS could generate a list of requests received from media sources in a specified period, which meet a certain level of sensitivity or address a specified topic. This real-time search capacity could improve the capacity of political and

communications staff — either in ministries or central agencies — to identify potentially problematic FoIPPA requests.⁵

At the same time, new centralised databases also provide non-governmental actors with an unprecedented — and perhaps unanticipated — opportunity to obtain data that can be used to monitor the internal practices of government itself. The data used for this analysis was obtained by making a request under FoIPPA to CPIAB.⁶ CPIAB provided a range of data collected within the CRTS pertaining to 17,080 FoIPPA requests whose files were closed in the three-year period that began on 1 October 2000 and ended on 30 September 2003. Data relating to 10,598 personal information requests was deleted by the author. As a consequence, the analysis is based only on data for 6127 'general records' requests.⁷

Characteristics of sensitive requests

The data allows us to determine the characteristics of requests that are likely to be tagged as sensitive, either by the ministry that received the request or by CPIAB. *Table 1* classifies requests by subject, as identified by ministries. (Subject categories are not standardised across ministries, so there are several roughly similar categories. Fifty-eight per cent of requests were not categorised by subject at all.) The table shows the percentage of requests in each subject category that were tagged as 'CPIAB Sensitive' by CPIAB, and also the percentage that fell in each of the four sensitivity ratings (high, medium, low, or none) that can be applied by the ministry that received the request. The table is not exhaustive. For concision, some subject categories that contained only a small number of requests, or whose labels were unclear, were removed from the list.

Table 1: Sensitivity of requests, by subject

Subject of request	Number received	CPIAB sensitive	Ministry sensitive rating			
			High %	Med %	Low %	None %
Polls/focus groups	29	93	31	0	17	52 ¹
Minister's travel	22	91	23	14	27	36 ²
Briefing notes/books	32	78	59	6	0	34 ³
Budget information	68	69	100	0	0	0 ⁴
Policy issues	55	69	67	0	0	33 ⁵
Briefing books/materials	62	68	68	6	0	26 ⁶
Re-organisation	33	64	0	0	0	100 ⁷
Correspondence	127	58	37	16	9	38
Financial	30	47	7	10	7	77
Reports	38	45	18	26	3	53
Audit report	75	37	16	69	0	15

Subject of request	Number received	CPIAB sensitive	Ministry sensitive rating			
			High %	Med %	Low %	None %
Child protection	59	37	19	0	2	80
Contracts/ contrib. agreements	90	34	28	3	18	51
Administrative	104	32	18	2	6	74
Gaming	29	24	3	0	0	97
Lands and resources	253	23	10	3	4	83
Prosecutions	26	23	8	0	0	92
Administrative records	47	21	2	0	6	91
Investigations	34	21	9	0	0	91
Construction projects	20	20	15	0	55	30
Aboriginal	61	20	30	10	28	33
Enforcement	25	12	20	12	20	48
Revenue	25	12	12	24	28	36
Engineering	31	10	13	29	16	42
Inspection	24	8	0	0	0	100
Civil litigation	34	6	0	68	6	26
Tax records	20	5	15	55	20	10
Road maintenance	22	5	0	0	64	36
Coroner's report	29	3	0	0	0	100
Residential Tenancy	34	3	0	0	0	100
Licensing	69	1	0	0	0	100
Fire Reports	140	1	0	0	9	91
Subdivision	28	0	0	0	68	32
Road ownership	20	0	0	0	90	10
Inmate files	20	0	0	0	0	100

Two main findings can be drawn from *Table 1*. The first is a confirmation of what is generally known: that much of the most sensitive material relates to the core policymaking activity of government. The second finding relates to the disparity in rankings between CPIAB and ministries. It is noteworthy that the two items which top the CPIAB's list of sensitive topics — 'Polls/Focus Groups' and 'Minister's Travel' — would not top the ministries' list of 'highly sensitive' subjects. Furthermore, they are matters that have high political salience. This may allow the inference that the 'CPIAB Sensitive' ranking is important as a part of a centrally run, and politically attuned, communications program.

We are also able to determine which types of requester are most likely to submit requests that are regarded as sensitive by ministries or CPIAB. As *Table 2* shows, political parties and journalists are most likely to have their requests tagged as sensitive. In particular, it is highly probable that their requests will be tagged as 'CPIAB sensitive.' The probability that such requests will be tagged by ministries as highly sensitive is lower, but still substantial. (In fact, the CRTS Training Guide says that any request from a political party or the media should be

recorded as one of 'high sensitivity'. However, it is clear that this guideline is not always followed. The Training Guide says that special consideration should also be given to assigning a 'high' sensitivity rating to all requests from interest groups or law firms.)⁸

Table 2: Sensitivity of requests, by source of request

	CPIAB sensitive %	Ministry sensitivity rating			
		High %	Med %	Low %	None %
Political party	89	52	7	3	38
Media	72	41	21	2	35
Interest group	48	28	20	10	42
Other governments	30	14	16	19	51
Individual	19	20	10	12	58
Business	10	11	12	19	58
Other public body	7	5	18	7	70
Law firm	6	8	12	16	64
Researcher	4	2	10	17	71
All	31	23	13	11	53

Public servants often argue that government has a legitimate interest in monitoring the FoI system and anticipating the likely impact of disclosures. Furthermore they argue that this monitoring activity does not result in different treatment for sensitive requests. Data extracted from the CRTS allows us to examine whether this claim of equal treatment is plausible.

One basic question is whether sensitive requests are processed in a timely way. *Table 3*, which shows processing time for requests categorised by level of sensitivity, suggests that there are important variations.⁹ For example, requests that are tagged as 'highly sensitive' by ministries take an average of 81 days to process; by contrast, 'low sensitivity' requests take only 46 days. However, the interplay of ministerial and CPIAB ratings is not straightforward. In general, the 'CPIAB sensitive' tag did not increase processing time if a ministry had already classified the request as sensitive; on the other hand, it did increase processing time if a ministry had not already classified the request as sensitive.

Table 3: Processing time for requests, by sensitivity, in days

	All	Ministry sensitivity rating			
		High	Med	Low	None
CPIAB sensitive	73	73	78	46	74
Not CPIAB sensitive	61	99	91	46	53
All	65	81	87	46	57

It must be recognised that *Table 3* does not provide conclusive evidence of unfair treatment. There may be legitimate reasons for the differences observed in the Table. For example, sensitive requests might also be broader, or might require interdepartmental consultations.

At best, this table provides preliminary evidence that suggests a need for further study.

On the other hand, the data in *Table 4* is more problematic. It shows the percentage of requests that are not completed by deadlines stipulated in FoIPPA. (In general, the deadline is 30 days, but this can be extended in certain circumstances).¹⁰ A failure to respond by the statutory deadline is known under federal law as a 'deemed refusal,' and is regarded as a clear violation of statutory requirements. (In fact, the federal Information Commissioner uses this as a main measure of ministry performance.) There is a clear disparity in deemed refusal rates by level of sensitivity: only 36% for requests with low sensitivity, but 62% for requests with high sensitivity. Furthermore, the additional time taken *after* the expiration of the statutory deadline is longer for more sensitive requests.

Table 4: Deemed refusal rates by sensitivity

Sensitivity		Past deadline %	Average days past limit
High	CPIAB sensitive	61	53
	Not CPIAB sensitive	65	80
	Both	62	62
Medium	CPIAB sensitive	64	57
	Not CPIAB sensitive	70	61
	Both	68	60
Low	CPIAB sensitive	45	20
	Not CPIAB sensitive	35	35
	Both	36	33
None	CPIAB sensitive	53	73
	Not CPIAB sensitive	43	50
	Both	45	55

Another measure of treatment is the disposition of requests. These results are provided in *Table 5*. These results must be treated cautiously, as there may be legitimate reasons — such as differences in the kind or amount of information requested — that could explain some of the observed disparities.

Nonetheless, the data is intriguing. For example, it shows that the withdrawal rate is substantially higher for more sensitive requests — although the abandonment rate is lower. The meaning of this result needs to be clarified, but it might suggest that requesters are more likely to take the step of explicitly withdrawing requests that are being treated as sensitive, perhaps because of fee estimates or delays. (Data on fee estimates was not requested from MMS, so this point cannot be explored.) On the other hand, they seem less likely simply to walk away from the request. Sensitive requests are also less likely to result in full disclosure and much more likely to result in a response that records do not exist. Again, the reasons for these differences need to be explored more fully.

This is a short analysis based on a limited set of data extracted from the CRTS. The CRTS contains a much wider range of data that can be obtained by researchers and non-governmental organisations through FoIPPA. More data, combined with more sophisticated statistical analyses, could reveal more about the internal workings of the FoIPPA process and provide better evidence on the question on the treatment of sensitive requests.

Table 5: Disposition of requests by sensitivity

	All %	CPIAB sensitive		Ministry sensitivity rating			
		Yes %	No %	High %	Med %	Low %	None %
Abandoned	6.6	5.5	7.0	5.6	7.9	9.8	6.0
Withdrawn	12.1	18.0	9.5	18.7	18.0	8.5	8.7
Full disclosure	23.1	17.4	25.7	16.6	26.8	27.2	24.2
Partial release	32.6	27.7	34.8	27.7	27.1	34.3	35.6
Access denied	4.2	2.5	4.9	2.6	3.7	1.4	5.6
Records do not exist	15.4	24.6	11.3	25.9	11.7	10.2	12.9
Routinely releasable	4.5	3.2	5.0	1.9	3.6	6.9	5.3

Nonetheless this analysis does illustrate two basic points. Governments are adopting more sophisticated technologies for the administration of their freedom of information laws, and they are exploiting the potential for centralised monitoring that is created by these new technologies. At the same time, these technologies create new opportunities for non-governmental actors to increase transparency and accountability on matters relating to the operation of FoI laws.

ALASDAIR ROBERTS

Alasdair Roberts is Associate Professor of Public Administration in the Maxwell School of Syracuse University. He is also Director of the Campbell Public Affairs Institute.
asrobert@maxwell.syr.edu

The author wishes to thank the Corporate Privacy and Information Access Branch of the British Columbia Ministry of Management Services for its assistance in providing data for this research note. The database used for this analysis can be obtained from the author.

References

1. Better case management systems also advance citizens' interests by improving timeliness and consistency in processing requests.
2. Most major Canadian government departments use ATIPflow software, developed by PRIVASOFT. The government-wide database, the Coordination of Access to Information Request System, was developed by Government Telecommunications and Informatics Services (GTIS), a federal agency.
3. Information about the CRTS is drawn from the following document, obtained under the BC FoIPPA: *Corporate Request Tracking System User Guide* (Victoria, British Columbia: EDS, 2003).
4. Its website is <http://www.mser.gov.bc.ca/FoI_POP/>.
5. A study of the internal practices of the British Columbia government has not yet been undertaken. However, the journalist Ann Rees recently produced a series of news stories for the *Toronto Star* which described in detail how officials in the Ontario and federal governments attempted to manage the 'communications issues' raised by FoI requests. Her 'right to know' series is posted on the newspaper's website, <<http://www.thestar.ca>>.
6. CPIAB says that a FoIPPA request for CRTS data is not necessary, and that its policy is to release CRTS data on a routine basis in response to informal inquiries.
7. Data was also deleted for 36 general records requests whose disposition was undetermined, and 246 requests that were transferred to other institutions.
8. E-mail communication from CPIAB staff, 17 November 2003.
9. This table does not include requests that were abandoned, cancelled, or withdrawn. This leaves 4908 cases for analysis.
10. See s 10 of the FoIPPA.

Media use of Fol surveyed: New Zealand puts Australia and Canada to shame

A quantitative survey of thousands of news stories in four nations has revealed that few Australian journalists use Freedom of Information (Fol) requests as a news gathering tool. In contrast, however, their New Zealand counterparts are some of the heaviest Fol users in the English-speaking world. Among the survey's more unexpected outcomes was another discovery that in relative terms New Zealand journalists lodge many more Fol requests than their United States colleagues. In addition to presenting the raw data, this article examines probable reasons for the survey findings.

The survey methodology involved using a combination of journalistic techniques including advanced computer-assisted reporting statistical methods and content analysis. The results were based on detailed studies of on-line newspaper archives in Australia, Canada, New Zealand — all of which have Westminster systems of government — and in the United States, with its republican presidential system.

The Australian and New Zealand sections of the survey were conducted by the writer but it was not possible to gain direct access to all the relevant data in the United States and Canada. Results from the latter two nations were therefore based on data collected by credible others — in Canada's case a federal government task force and in the United States, the National Security Archive at George Washington University.¹ In each of those nations relevant data was extracted from computerised newspaper archives via Lexis-Nexis and Dow Jones.²

While it was possible to obtain figures relating to Fol requests lodged by journalists at all levels of government in Australia, New Zealand and the United States, it was only possible to obtain data on federal Fol requests by Canadian journalists. Time-lags in reporting some results meant there were also differences in the dates of the surveys, with the surveys of Australia and New Zealand media conducted over 12 months from 31 March 2001 to 31 March 2002, while the United States survey covered the 2000–2001 financial year and the Canadian survey period was the 2000 calendar year. None-the-less, the surveys were each conducted over a single 12-month period between January 2000 and 31 March 2002. Therefore, while not pretending to offer an absolutely definitive picture, the surveys were clearly indicative of national trends.

The United States

The National Security Archive is the largest non-profit user of the United States federal *Freedom of Information Act*, FOIA.³ The organisation conducted a detailed on-line survey of United States newspapers which showed that:

Documents released under federal, state and local *Freedom of Information Acts* [in the United States] sparked more than 3,000 news stories in 2000 and 2001 (according to the Archive's searches of on-line databases), exposing data of major public interest ...⁴

The director of the Archive's Freedom of Information Project, William Ferroggiaro, said the survey involved searching newspaper archives accessed via Lexis-Nexis and Dow Jones for the terms 'FOIA' or 'Freedom of Information Act' over a 12-month period.⁵ He said it was probable that the search captured wire service articles as well as individual newspaper articles — a factor which could mean that the tally of 3000 Fol-based articles could have been somewhat overstated as some syndicated wire service stories might have been counted more than once. In the context of the survey it is highly significant that a former chief staffer for the House of Representatives committee that had jurisdiction over FOIA, Robert Gellman, reported that relatively few United States journalists actually used Fol — often because they did not need to. In his 17 years with the committee Gellman worked on some of the major FOIA amendments in his nation. He said:

First, journalists are lazy. Many don't bother to make formal requests, but they threaten to sometimes. The threats can be effective because bureaucrats are lazy too and they will turn over/leak information rather than go through the FOIA paperwork. Reporters have told me for years that mentioning FOIA can be very useful. ... FOIA is a last resort. FOIA marks the borders of what can be withheld ...⁶

Gellman's observations were supported by the work of two Washington-based Heritage Foundation researchers into Fol use in 2001. They found that only 5% of 2285 FOIA requests submitted to four federal agencies during the first six months of 2001 were lodged by journalists.⁷ The analysis found that journalists were actually among the least frequent users of Fol in the United States and that 40% of requests were from corporations, 25% from lawyers and 16% from individuals who did not identify their employment.

Australia

The survey of Australian media found that Fol applications led to the publication of only 382 news stories in Australia in 2001–2002. It showed that only 23 Fol requests which resulted in publication of stories during the 12 months were lodged by media outlets under federal Fol legislation. A further 162 requests which sparked stories were for state and local government information. Over 100 of the latter requests were generated by just two publications — Queensland's *Courier-Mail* (87), and Victoria's *Herald Sun* (20). The remaining 197 requests which resulted in media reports were lodged, not by media outlets, but by opposition members of parliament — meaning that Australia's politicians were greater users of Fol than its journalists.

The survey also revealed that there were more articles criticising Australia's state and federal Fol laws (267) than there were stories resulting from Fol applications lodged by media outlets.

Canada

It was not possible for the writer to access enough Canadian media outlets via the Internet and World Wide Web to accurately survey of the use of Fol by Canadian media.

However, the Canadian Government's Access to Information Review Task Force,⁸ which was charged with reviewing that nation's federal FoI laws from 2000 to 2002, conducted a detailed survey of how Canadian journalists had used FoI in selected years from 1985 to 2000. The survey was not fully comparable with the other surveys discussed here because it focused solely on federal/national FoI requests whereas the other three surveys considered requests lodged with different levels of government. Despite that, there were enough close similarities in survey methods and results to be able to compare national trends.

The survey found that in 2000 there were 1911 newspaper articles published in Canada which referred to specific requests for information.⁹ A further 485 articles contained comments on Canada's *Access to Information Act*, with the majority being criticisms of the Act and/or its administration. Unfortunately the survey did not reveal how many FoI requests which sparked news stories were lodged by opposition politicians. However, separate research conducted by the Review Task Force revealed that:

... in 2000 — 2001, businesses made more use of the [*Access to Information Act*] than any other group (40.9 per cent), followed by the general public (31.5 per cent), organizations (16 per cent), the media (10.8 per cent) and academics (0.8 per cent). While usually included in the general public category, requests from parliamentarians are estimated to be 10 per cent of all requests.¹⁰

Those figures are comparable with figures from Australia and the United States. Among other things they indicate that, comparatively, less than 11% of FoI requests in either Australia, Canada or the United States were from journalists but that journalists in Australia and Canada apparently made greater use of formal FoI requests than journalists in the United States.¹¹

New Zealand

In New Zealand's case, it was possible to conduct a detailed survey of the nation's major newspapers; although it was not possible to survey broadcast media because there was insufficient access to archived transcripts of news and current affairs programs. But the survey of New Zealand newspapers was detailed and revealing.

One of the striking things about the New Zealand press is the high number of daily newspapers relative to population size.¹² The survey of newspaper articles in that nation was over the year from 31 March 2001 to 31 March 2002.¹³ It revealed that newspaper journalists lodged 466 FoI requests seeking information from the national government and/or local authorities which resulted in the publication of stories during the 12 months. A further 68 requests which resulted in newspaper articles were lodged by opposition members of parliament, making a total of 534 news stories. Of that number, 534 stories resulted from requests lodged with the National Government and 32 from applications made to local councils. Of 15 other articles or comment pieces which touched on either the *Official Information Act 1982* (New Zealand's FoI law pertaining to central government agencies) or its *Local Government Official Information and Meetings Act 1987* (for local and regional authorities) there was

negligible criticism of how the laws operated. In addition to the articles specifically stemming from FoI requests or commenting on the operation of the statutes, there were another 124 general references to FoI, many of which related to official inquiries and court cases and/or to individuals who had lodged their own FoI requests.

Interpreting the figures

Comparative results from the surveys in each nation are presented in the following four graphs. The data are collated and depicted in two ways, first as raw figures and, second, in terms of published news articles per 100,000 people.

Federal/National Government FoI requests which resulted in news stories over a 12-month period in 2000 or 2001/2002

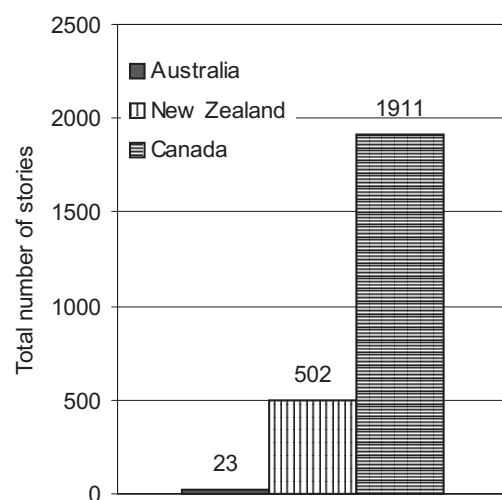


Figure 1: Raw results expressed as the total number of news stories involving national FoI requests

The graph in *Figure 1* plots the total number of FoI requests to national/federal government agencies that led to news stories in Australia, New Zealand and Canada over a year. The United States figures could not be included in this graph because it was not possible to separate United States federal figures from those for state and local governments; consequently they are dealt with later. The graph makes it clear that the sheer number of national (federal) government FoI-based news stories published in Canada in the survey period out-numbered the total of all national FoI-based stories in Australia and New Zealand.

But raw numbers can be misleading. More meaningful comparisons emerged by adjusting the survey findings to express the number of national government FoI-related articles published in each of the three Westminster nations in terms of articles per 100,000 people. The adjusted result is depicted in *Figure 2*. It is based on a population of Canada at the time of writing of about 30 million people, about 20 million in Australia and about 4 million in New Zealand.

In a dramatic reversal of the picture painted by the raw figures, *Figure 2* shows that per head of population, New Zealand newspaper journalists were proportionately much greater users of FoI at a national level than newspaper journalists in Australia or Canada. Further, in

comparative terms of stories per head of population, New Zealand journalists wrote nearly twice as many national FoI-based articles as Australian and Canadian journalists combined. Interestingly, *Figures 1 and 2* also indicate that Australian newspapers ranked a long last in both the raw use and adjusted figures.

Federal/National Government FoI requests for 100,000 people which resulted in news stories over a 12-month period in 2000/2001 or 2001/2002

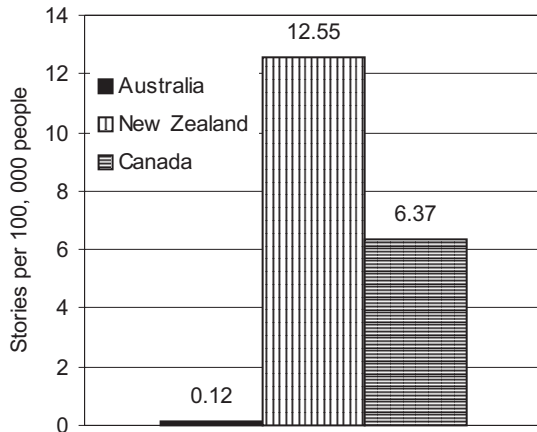


Figure 2: Number of national FoI-based articles adjusted for population and expressed as number of stories per 100,000 people

While it was not possible to obtain data on state/provincial and local government requests in Canada and the only figures which could be obtained for the United States were combined results for stories based on state, local and federal requests, it was possible to compare the number of stories resulting from requests lodged with all levels of government in Australia, New Zealand and the United States. Bearing in mind that New Zealand is a unitary state and not a federation and therefore only has national and local governments while Australia and the United States have federal, state and local government structures, *Figure 3* shows that in raw terms United States journalists lodged more FoI requests at all levels than their Australian or New Zealand counterparts.

News stories resulting from FoI requests lodged with all levels of government from national to local

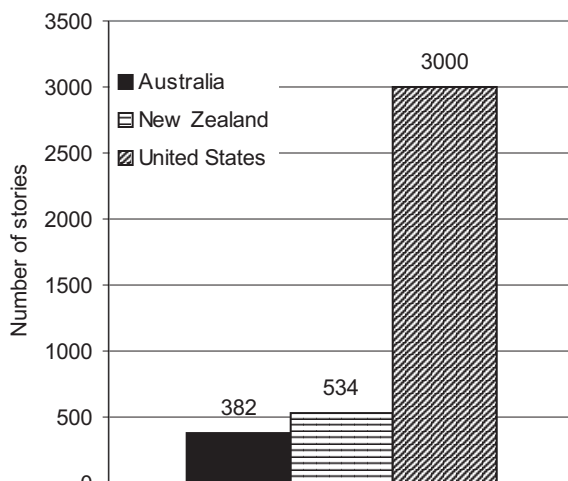


Figure 3: Total number of FoI-based stories sourced from all levels of government.

Superficially, *Figure 3* appears to confirm an expectation that FoI might be used to better effect by United States journalists. That expectation is consistent with the fact that the United States has the oldest FoI laws in the nations considered in the survey,¹⁴ that it has the most effective FoI laws, and that those laws are supported by other media-positive legislation such as the First Amendment to the Constitution with its guarantees of a free press and freedom of speech. However, the United States, with about 278 million people at the time of writing, had a population more than five times the total population of the three Westminster nations — which only had a combined total of about 54 million. So again the picture changed dramatically when the figures were adjusted for population and expressed in terms of stories per 100,000 people. The adjustment is reflected in *Figure 4*. It shows that per head of population, New Zealand newspapers published more than 12 times more FoI-based articles in the survey period than United States papers and that the New Zealand total was nearly seven times greater than Australia's. In population adjusted terms, however, even the Australian press published close to twice as many FoI-related articles as the United States press.

News stories resulting from FoI requests lodged with all levels of government in Australia, the United States and New Zealand per 100,000 people in 2001/2002

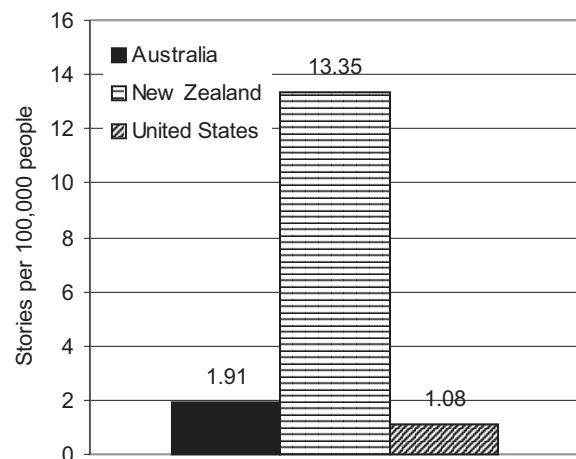


Figure 4: Total number of FoI-based articles from all levels of government in Australia, the United States and New Zealand adjusted for population and expressed as number of stories per 100,000 people.

Conclusions

The overwhelming conclusion to be drawn from the surveys was that United States and Australian journalists were not big users of their respective FoI laws but their New Zealand colleagues were comparatively much greater users. The result also infers that New Zealand had the most workable system of FoI of any of the Westminster nations considered in the surveys while Australia had the least workable. However, the survey result must be viewed in light of Gellman's point that journalists in the United States tend not to lodge formal FoI applications because they can often gain access to government information without resorting to formal legal process.¹⁵

It should also be remembered that there are very significant differences between FoI statutes and how they are administered in different jurisdictions.

As mentioned previously, there are also constitutionally protected rights of freedom of the press and freedom of speech in the United States which are either weaker, or do not exist at all, in the Westminster nations. In the United States, FoI operates in a political climate where there is a constitutionally enshrined 'Bill of Rights'.¹⁶ None of the Westminster nations discussed here has such unequivocal constitutional statements.¹⁷ It is therefore more difficult for public servants¹⁸ in the United States to tinker with legislative matters, including FoI statutes, without acquiescence from the legislature than it is in Westminster nations.

To that can be added the fact that of the four nations considered here, only the United States has all the elements of a full separation of powers. Only in the United States is there a clearly defined separation between the legislature and executive — or administration as it is referred to. In that system the executive (which is headed by the president as chief executive) is better insulated from meddling legislators than is the case in Westminster system nations. In the latter jurisdictions there is no real separation between the executive and the legislature. The heads of different branches of the executive are Cabinet ministers and Cabinets are composed of members of the legislature. Thus Westminster system cabinets are all-powerful and it is relatively much easier for politicians to interfere in the administration of legislation and to influence regulatory processes, including those relating to FoI requests by journalists.

Examples of that interference can be seen in Canada and Australia where it has become common in recent years for government media advisers to be informed by public servants when 'difficult' FoI requests that might embarrass ministers or governments are lodged. All too often those advisers and their ministers subsequently play a part in thwarting the release of information, or at least delay release until the newsworthiness associated with a particular request is devalued by the effluxion of time. That type of interference, while certainly not unknown, does not appear to happen to the same extent in the United States. In that nation the whole system of government tends to have been more effective in discouraging deliberate bureaucratic delays from developing into a virtual art-form, as has happened in Australia and Canada. Related to that point, costs and charges are generally clearly set out in United States FoI statutes, most of which effectively exempt the media from payment. In Australia and Canada, however, recalcitrant public servants and secretive governments have found that imposing outrageous charges, or even just preparing astronomically expensive quotes, is an effective disincentive that discourages media requests generally, and especially requests which are potentially embarrassing.

The survey results can also be seen to reflect differences in the way FoI legislation is actually framed in each nation. For example, FoI statutes in Australia and Canada have many more, and much less clearly defined, exemptions and exclusions than the well defined set of nine exemptions prescribed in United States federal laws. Another major legislative difference can be seen in the fact that Cabinet documents are exempt from scrutiny in Australia but not in New Zealand. Then there is the

point that both Canada and New Zealand have independent commissioners or ombudsmen specifically charged with administering FoI, while Australia does not.

And none of the Westminster bureaucracies have a requirement found in the United States FoI laws which obligate agencies to provide 'electronic' reading rooms giving Web access to FoI material that has been released previously or which would be likely to be released in future. That is an important difference which adds weight to Gellman's observation that United States journalists often do not need to lodge formal FoI requests to gain access to government-held information.

Within the Westminster nations, New Zealand stands out as having developed a system of FoI which can be reasonably well accessed by journalists. Its system, while far from perfect, stands head and shoulders above the politically manipulated sham that FoI has degenerated into for journalists and consumers of news in Australia and Canada. The main reason for that difference appears to be that the New Zealand statutes were passed at a time in that nation's history when its governments, public servants and citizens jointly recognised that there was a need to overhaul government and steer it away from secrecy and towards transparency. Further, unlike Australia and Canada, New Zealand did not slavishly adopt the United States model of FoI — a model that works relatively well in the United States republican presidential system but which is almost bound to fail in Westminster system nations because United States FoI laws do not superimpose well on governments and administrations in other nations which are less open and less accountable.¹⁹ That key difference at least partly explains why the operation of the New Zealand FoI system is not plagued to the same extent by the tactics of prevarication which dog FoI in Australia and Canada.²⁰

It is also noteworthy in light of Australia's abysmal standing in the survey that with a couple of significant exceptions stemming from the work of a couple of exceptional journalists, Australian media generally seems to have given up the fight in relation to FoI. That became evident in 2000 when the Australian Senate's all-party Legal and Constitutional Legislation Committee conducted public hearings into proposed amendments to federal FoI laws.²¹ The suggested changes would have increased transparency in the public service and introduced greater accountability in government.²² Astonishingly — and despite the survey finding reported herein that there were more articles published in Australian newspapers critical of the administration of FoI than there were stories resulting from FoI applications — not one of the 18 individuals who made submissions to those hearings was a journalist or represented a media outlet.²³

Similarly, in Canada, too, news outlets also seem to lack the will to confront their federal government about its abuse of FoI. As leading Canadian FoI advocate Professor Alasdair Roberts²⁴ lamented in the *Vancouver Sun* in September 2003:

Although journalists use the [Access to Information] Act regularly, publishers and broadcasters don't invest the resources needed to make the case for openness. Too often, editors let assaults on openness pass without comment.²⁵

Such media apathy does not bode well for the future of Fol or, indeed, for open and accountable democracy, in Australia or Canada.

STEPHEN LAMBLE

Dr Stephen Lamble is Co-ordinator of Journalism in the Faculty of Arts and Social Sciences at the University of the Sunshine Coast.
email: slamble@usc.edu.au

References

1. The Archive says it is the world's largest non-governmental library of declassified US government documents and the most prolific user of the FOIA, filing approximately 1000 FOIA requests each year (National Security Archive).
2. William Ferroggiaro, Director, Freedom of Information Project, The George Washington University, Washington DC, personal e-mail received 22 August 2002; Paul Attallah and Heather Pyman, 'How Journalists Use the Federal Access to Information Act' (2002) <<http://www.atirtf-geai.gc.ca/paper-journalist1-e.html#2>> at 6 February 2004.
3. National Security Archive: <http://www.gwu.edu/~nsarchiv/nsa/the_archive.html> at February 2004.
4. William Ferroggiaro, Sajit Gandhi and Thomas Blanton (eds), 'State of Freedom of Information report,' National Security Archive (2001) <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB51/>> at 25 January 2002.
5. Ferroggiaro, above n 2.
6. Robert Gellman, Privacy and Information Policy Consultant, Washington DC, personal e-mails, especially an e-mail of 18 June 2002.
7. Mark Tapscott and Nicole Taylor, 'Few Journalists Use the Federal Freedom of Information Act,' A study by the Centre for Media and Public Policy, The Heritage Foundation (2002) <<http://www.heritage.org/Press/MediaCenter/FOIA.cfm>> at 22 January 2004.
8. See 'Access To Information: Making It Work For Canadians': <http://www.atirtf-geai.gc.ca/report/key_points-e.html> at 4 October 2002.
9. Report of the Access to Information Review Task Force, 2002: <<http://www.atirtf-geai.gc.ca/report/report3-e.html>> at 12 July 2002.
10. Ibid.
11. At least in terms of the proportion of requests lodged.
12. Bill Rosenberg, News Media Ownership in New Zealand (2002) <<http://canterbury.cyberplace.org.nz/community/CAFCA/publications/Miscellaneous/mediaown.pdf>> (at 6 February 2004); Mass Media — Statistics New Zealand (2002) <<http://www.stats.govt.nz/domino/external/Web/nzstories.nsf/092edeb76ed5aa6bcc256afe0081d84e/5511b3d7bcc110aacc256b1f00006c42?OpenDocument>> at 4 June 2002;
13. The same period as the survey of Australian media.
14. With the first fully effective national Fol law having been introduced in the United States in 1966/67 compared with 1982/83 in Australia, Canada and New Zealand. The first nation to actually introduce Fol in the modern sense was Sweden/Finland in 1766. (See

- Stephen Lamble, 'Freedom of Information, a Finnish Clergyman's Gift to Democracy,' (2002) 97 *Freedom of Information Review* 2-8).
15. Gellman, above n 7.
 16. The United States 'Bill of Rights' is generally taken to be the first 10 Amendments to that nation's Constitution.
 17. Although the *New Zealand Bill of Rights Act 1990* does affirm and promote human rights and fundamental freedoms, while the *Canadian Charter of Rights and Freedoms*, a statute which has constitutional standing, 'guarantees' specific rights and freedoms including 'freedom' of the press.
 18. With the obvious exception of the president, but even then under strictly defined rules.
 19. See Stephen Lamble, 'United States Fol laws are a Poor Model for Statutes in Other Nations,' (2003) 106 *Freedom of Information Review* 51-5.
 20. Lamble, above n 19.
 21. Andrew Murray, 'Accountability,' Australian Democrats (2000) <http://www.democrats.org.au/parliament/index.htm?task=display&speech_id_display=568&name=Accountability&id=1> at 1 December 2000.
 22. Senate Legal and Constitutional Legislation Committee. Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000, the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.
 23. Senate Legal and Constitutional Legislation Committee. Appendices 1 and 2. Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000, the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.
 24. Professor Roberts is currently director of the Campbell Public Affairs Institute at Syracuse University in the United States.
 25. Alasdair Roberts, 'Government Secrecy is a Law unto Itself,' *Vancouver Sun*, (Vancouver) 23 September 2003, A13.

Other references not specifically cited in the text

- ABC Online, search: <<http://abc.net.au/search/>> at February 2004.
- Australian Provincial Newspapers News and Media: <<http://www.apn.com.au>>.
- Fairfax New Zealand Ltd: <<http://www.fairfaxnz.co.nz/>>.
- Fairfax f2 Network: <<http://www.f2.com.au>>.
- Independent Newspapers Limited: <<http://www.inl.co.nz/>>.
- Newspaper Publishers Association of New Zealand: <<http://times-age.co.nz/industry>>.
- NewsText: <<http://www.newstext.com.au>>.
- Network Seven: <<http://new.i7.com.au/>>.
- Ninemsn, news: <<http://news.ninemsn.com.au/>>.
- Rural Press: <<http://www.yourguide.com.au/yourguide.asp>>.
- Special Broadcasting Service (SBS): <http://www.sbs.com.au/sbs_front/index.htm>.
- Ten Network, Southern Cross Broadcasting: <<http://www.southerncrossbroadcasting.com.au/welcome/welcome.htm>>.
- The Otago Daily Times: <<http://www.odt.co.nz/>>.
- Wilson and Horton: <<http://www.wilsonandhorton.co.nz/>> (accessed various times 2002).

Conclusive or ministerial certificates — an almost invisible blight in Fol practice

The existence of such certificates leaves the Act exposed to changes in political will and bureaucratic commitment to the principles and objectives of the legislation ... The current restraint in the use of these certificates is not cause to allow the damaging potential of this mechanism to go unchecked.¹

Under the Commonwealth *Freedom of Information Act 1982*, a Minister may issue a certificate that establishes conclusively that a document is exempt. Ministerial certificates may only be issued in relation to certain categories of exempt documents. Where a conclusive certificate has been issued, the power of the Administrative Appeals Tribunal (AAT) to review is limited.

Nine years down the track and the damaging potential of conclusive certificates at the federal level in Australia remains a live issue. The problem is that there is no effective way to monitor the use of, and justifications for, conclusive certificates. Researchers within Australia and internationally have been frustrated by this lack of basic knowledge about how often and for what types of documents conclusive certificates have been used in Australia.² The fragility of Australian Fol practice and legislation at the federal level is being exposed and placed under pressure by a resurgence in the use and application of Fol by the Australian media, NGOs, researchers and the federal parliamentary opposition. This resurgence

appears to be provoking the federal government towards a greater reliance on conclusive certificates to prevent access to information that could inform public policy debates and enhance scrutiny of government performance in key program areas.

The introduction of conclusive certificates into Australian FoI legislation was at the insistence of paranoid antipodean Sir Humphrey Applebys and their ministerial masters. The concern was that the external review bodies (AAT, Federal Court or Commonwealth Ombudsman) would be unreliable in protecting sensitive information relating to Cabinet, Commonwealth/state relations, national security, defence, international relations and even deliberative process documents. The justification accepted by the Senate Standing Committee on Constitutional and Legal Affairs in 1979 was that the ultimate decision about access to such documents ought to be made by, and be the responsibility of, the highest levels of government. Yet it was a begrudging acceptance:

There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy.³

This paranoia and justification was always unsustainable or at best demonstrated a lack of (or maybe even a fear of) the genuine impartiality and integrity of those external review bodies. Furthermore unlike many other jurisdictions (examples being New Zealand and Ireland) no significant safeguards or limitations were built into the issuing of certificates and mechanisms to limit their duration to the minimum time necessary to protect the document in question.

Some jurisdictions, Tasmania being a prime example, have abolished conclusive certificates with no apparent outbreak of risky or unwarranted disclosure of sensitive information by the external review body. In its final report released in January 1996, the ALRC/ARC made three very conservative, and in my opinion weak, recommendations (which along with nearly every other one of the total 106 recommendations has failed to be implemented or seriously considered by the Howard Government). These recommendations were:

40A (ALRC): Regulations should be made under s 36A of the FoI Act prescribing two years as the maximum duration of conclusive certificates.

40B (ARC): Conclusive certificates issued under s 33 and s 34 should remain unlimited in duration. Certificates issued under s 36 (deliberative process) should be limited to a maximum of five years.

41 [ALRC/ARC] The FoI Commissioner [never implemented] should monitor the use of conclusive certificates and include in his or her annual FoI report details about their use and any failure of a Minister to revoke a certificate despite a finding by the AAT that there are no reasonable grounds for the exemption claim.

The ALRC and ARC were clearly divided on the necessity of conclusive certificates for s 36 (deliberative process) documents.⁴

53A (ALRC) Provision for a conclusive certificate in respect of s 36 of the FoI Act should be removed.

53B (ARC) The FoI Act should be amended to provide that when a Minister issues a conclusive certificate under s 36 he or she must:

- provide the applicant with detailed reasons for issuing the certificate
- specify the duration of the certificate, up to a maximum of five years, and give reasons for choosing that period
- advise the FoI Commissioner that the certificate has been issued.

In 1994 two junior officers of the Commonwealth Attorney-General's Department writing in a private capacity argued:

The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FoI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.

To some extent, the certificate provisions are a hangover from the days before FoI, when the feared impact of the legislation was clearly exaggerated. With reference to the FoI maturity gained by 1994, rather than the FoI terrors apprehended in 1982, we may conclude that the certificate provisions have outlived whatever usefulness they may once have had. The provisions should be removed from the Act, enabling the AAT to reach a determinative decision on the merits of the exempt status of documents.⁵

Conclusive certificates in action

There are no formal monitoring requirements or any publicly available information as to the frequency or pattern of usage of conclusive certificates. The ALRC/ARC reported that 'few agencies issue conclusive certificates [Dept of Prime Minister and Cabinet and Dept of Treasury] and only infrequently'. The ALRC/ARC noted that between 1986 and 1993 'the Dept of Prime Minister and Cabinet issued 21 conclusive certificates in respect of Cabinet submissions, seven in respect of internal working documents and five in respect of national security or international relations'.⁶

Yet monitoring of the use, frequency and pattern of conclusive certificates is almost impossible. The Annual FoI Reports by the Federal Attorney General have never separately mentioned the number or details of conclusive certificates issued in any single year. Prior to the cutback in support and staff devoted to FoI in the Attorney General's Department (after the election of the Howard Government in 1996) conclusive certificates were occasionally mentioned in case summaries but in recent years the Department has stopped even supplying case summaries, especially in the Annual Report.

The ALRC/ARC Report noted that 'it is not uncommon for agencies to issue a conclusive certificate after an applicant has lodged an appeal with the AAT'.⁷ It is this 'card up the sleeve' use of conclusive certificates which justifiably annoys applicants. Applicants lodge their requests, often wait an inordinate period of time for the agency to duly consider the request, respond to the agency's exemption claims on internal review, carefully respond to the grounds for exemptions in their AAT filing only to have the Agency play the conclusive certificate as a trump card. The ALRC/ARC stated: 'The Review considers the issue of conclusive certificates at that late stage to be an abuse of the system'.⁸ An abuse that there

is little check on or adverse consequences for allowing to occur.

In early November 2003 the following report appeared: 'The Weekend Australian has spent more than 10 months attempting to obtain, under FoI, publicly unavailable Treasury documents concerning the operation of the first homebuyers scheme, income tax bracket creep and baseline information used in the preparation of the intergenerational report on population ageing'.⁹ It was reported that the Treasury had requested the process to an AAT hearing be delayed because it wanted to consider the issuing of conclusive certificates on these matters. A decision made about such an action, in the lead up to an AAT hearing, on documents relating to issues of ongoing public debate is both a heavy handed use of an exemption that should rarely be used and a totally unjustified curtailment of informed public debate and policy scrutiny.

In December 2003, as a consequence of the campaign by Michael McKinnon and *The Australian*, the Federal Treasurer, Peter Costello revealed the following information:

- between 1982-1986 55 conclusive certificates were issued and 14 were contested in the AAT.
- since 1986 no record of certificates issued has been kept but 13 certificates have been challenged.¹⁰

The AAT 'can review the issue of a conclusive certificate and express a view on whether there are reasonable grounds for the exemption claim' under s 58.¹¹ However, if the AAT finds there are no reasonable grounds for the issue of the certificate it can only recommend that the Minister does so. If a Minister decides not to revoke the certificate he or she must table a notice and advise Parliament of their action. The ALRC/ARC reported that this tabling obligation 'imposes a considerable and sufficient discipline on Ministers'.¹²

A reading of the case summaries contained in the Annual FoI Reports of the Attorney General prior to 1996 reveals that the AAT had recommended the revocation of a number of conclusive certificates because the Minister had not met the minimal and low thresholds required for a conclusive certificate. It seems that the Ministers concerned found the discipline mentioned by the ALRC/ARC to be both unnecessary and a burden easily borne. However, the frequency of issue and subsequent revocation since 1996 is almost impossible to verify.

An alternative to complete abolition

The Irish FoI Act originally provided for the periodic review of conclusive certificates (ministerial certificates).¹³ The Taoiseach (Prime Minister) and other Ministers (but not the issuing Minister) had to on a regular basis (originally SIX months) review all certificates issued. The issuing Minister could make submissions in relation to the certificate but not participate in the review.

Second, the Taoiseach could at any time review the operations of the certificate mechanism as a whole or for any agency. If there was a decision that any certificate should be revoked, the issuing Minister had to revoke the certificate. Each Minister provided an annual report to the Irish Information Commissioner setting out the number of certificates issued and the basis for that decision. The Information Commissioner included this information in their Annual Report.

The *FoI (Amendment Act) 2003* imported into the Irish system the concept of applying conclusive certificates to deliberative process documents.¹⁴ One of the most worrisome aspects of the continued retention of conclusive certificates (especially in relation to deliberative process documents) in Australian federal FoI legislation is that it is used as a precedent by jurisdictions like Ireland to justify their restrictions on information access.

Further research needed

In researching this short note it was surprising to find the extent of the deficiencies in the monitoring and recording of the issue and revocation of conclusive certificates. There is simply no quick way of ascertaining the frequency (or changes in the pattern of usage) of conclusive certificates.

A quick scan of AAT decisions reveals an apparent high number of decisions by the AAT that there is no justification or grounds for the issuing of the certificate. This is surprising because the threshold to legitimate the issuing of a certificate is so low. The Tribunal only has to determine that reasonable grounds exist for the issuing of the certificate. There is no requirement for the Minister to show that the public interest in issuing the certificate outweighs the public interest in making the information available. Yet even with this low threshold and the minimum conditions tribunals have been prepared to accept a number of conclusive certificates have been seen to have no reasonable basis. In *Re Cleary and Department of the Treasury* (1993) 18 AAR 83 the Tribunal was prepared to accept that even if there was only a potential for public misunderstanding or misinterpretation this qualified for the Minister to have reasonable grounds upon which to issue a certificate.

Conclusion

The government needs to immediately issue details of all conclusive certificates issued since 1983 but especially since 1996. These details should include a listing of all cases where an AAT hearing has determined that the Minister had no reasonable grounds for issuing the certificate.

The government should also heed the advice of the 1996 ALRC/ARC report on the necessary safeguards, limitations, monitoring and review of conclusive certificates. Where the ALRC and ARC have split on their recommendations, a choice between the alternatives is far superior to the status quo.

There is unlimited potential for the abuse of the conclusive certificate process. Therefore, the government needs to demonstrate that potential is not being realised by intent, default or due to a lack of oversight. If the justification for conclusive certificates remains the desirability that the highest levels of government have final say over the release of sensitive information, then that responsibility must be transparent and able to be publicly demonstrated.

RICK SNELL

Rick Snell teaches law at the University of Tasmania.

References

1. Rick Snell, Submission 31 to Australian Law Reform Commission and Administrative Review Council, Issues Paper 12, 'Freedom of Information', September 1994 quoted in ALRC/ARC Discussion Paper 59, *Freedom of Information* (May 1995) 5.21.

2. See Barbara McIsaac, 'The Nature and Structure of Exempting Provisions and the Use of the Concept of a Public Interest Override,' Report 17 — Access to Information Review Task Force, (September 2001); The Campaign for Freedom of Information, 'The Ministerial Veto Overseas,' further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill (December 2001).
3. Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979), 15.19-15.20.
4. See ALRC/ARC, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77/ ARC Report No 40 (1995) 9.18-9.20.
5. The Campaign for Freedom of Information, 'The Ministerial Veto Overseas' 3-4.
6. ALRC/ARC Issues Paper 12, 'Freedom of Information' (September 1994) n 89.
7. ALRC/ARC Report 77, para 5.24.
8. ALRC/ARC Report 77, para 5.24.
9. Michael McKinnon (Fol Editor) and Jamie Walker, 'Costello thwarts bid for key files,' *The Australian*, 22 November 2003.
10. Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2003, 23830-31.
11. ALRC/ARC Report 77, para 5.24.
12. ALRC/ARC Report 77, para 5.23.
13. Information on the Irish Act is taken from Maeve McDonagh, *Freedom of Information Law in Ireland* (1998) 116-19.
14. For an extensive analysis of the changes and potential impact see Maeve McDonagh, 'The Honeymoon is Over: Ireland Rows Back on Fol,' (2003) 107 *Fol Review* 78-84.

A SELECTION OF RESOURCES ON FREEDOM OF INFORMATION IN THE UNITED STATES

by Michael Ravnitzky, mikerav@mindspring.com

This selection is concentrated on articles about or connected to freedom of information in the US. Unless otherwise noted all references to the *Freedom of Information Act* are to the United States legislation.

I have been collecting titles of some books and legal articles on the subject of Freedom of Information and secrecy issues. Sources included some legal bibliographic indexes. I have selected some of the most useful from that list. This list undoubtedly contains a few useful Freedom of Information Act related articles you may have missed. I have included only a couple of selected articles about state-level FOIA issues—most deal with the federal statute and its application.

Recent Books

- Birkinshaw, Peter. *Freedom of Information: the Law, the Practice and the Ideal*. Northwestern University Press, 3rd edition, 2004 (a focus on England).
- Davis, Charles N. and Sigmund L. Splichal (eds) *Access Denied: Freedom of Information in the Information Age*. Iowa State University Press, 2000.
- Foerstel, Herbert N. *Freedom of Information and the Right To Know: the Origins and Applications of the Freedom of Information Act*. Greenwood Publishing Group, 1999.
- Henry, Christopher N. *Freedom of Information Act*. Nova Science Publishers, April 2003. (Note: I don't know anything about this volume)
- Johnson, Chalmers. *The Sorrows of Empire: Militarism, Secrecy and the End of the Republic*. 1st edition. New York: Metropolitan Books, 2004.
- Koontz, Linda. *Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments*. Diane Publishing Co., December 2003.
- Rozell, Mark J. *Executive Privilege: Presidential Power, Secrecy, and Accountability*. 2nd edition. Lawrence, Kansas, University Press of Kansas, 2002.
- Terrill, Greg. *Secrecy and Openness: the Federal Government from Menzies to Whitlam and Beyond*. Carlton South, Victoria: Melbourne University Press, 2000.

Articles 2003

- Holding Back — There are Many Ways U.S. Government Agencies Thwart the Freedom of Information Act, by Jeffrey T. Richelson, *Bulletin of the Atomic Scientists*, vol. 59, no. 6, 2003, p. 26, 8 pp.
- Secret Settlements: Do We Need a Sunshine in Litigation Act? By Andrew J. Schwaba, *Wisconsin Lawyer*, vol. 76, no. 10, October 2003, p. 10-11, 50-1.

Rhode Island's Access to Public Records Act: An Application Gone Awry, by Michael W. Field, Roger Williams *University Law Review*, vol. 8, no. 2, Spring 2003, p. 293-352.

Articles 2002

- The Marriage of the False Claims Act and the Freedom of Information Act, Parasitic Potential or Positive Synergy?, by James Roy Moncus III, *Vanderbilt Law Review*, vol. 55, no. 5, 2002, p. 1549, 42 pp.
- Public Information Provision in the Digital Age: Implementation and Effects of the U.S. Freedom of Information Act, M. Botterman, et al., *Peace Research Abstracts* vol. 39, no. 4, 2002, pages 459-605.
- New Strategies for Enforcement of the Access to Information Act, by Alasdair Roberts. *Queen's Law Journal*, vol. 27, no. 2, spring 2002, p. 647-82.
- The Treatment of Contract Prices Under the Trade Secrets Act and the Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets? By Gregory H. McClure. *Public Contract Law Journal*, vol. 31, no. 2, Winter 2002, p. 185-235.
- Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*. By David Arkush. *Harvard Civil Rights-Civil Liberties Law Review*, vol. 37, no. 1, winter 2002, p. 131-57.
- Freedom of Information Act Access to Documents of Private Contractors Doing the Public's Business, by Greg Bass, Harry Hammitt, *Clearinghouse Review*, vol. 35, no. 9/10, Jan/Feb. 2002, p. 607-614.
- The Freedom of Information Act vs. The IRS Confidentiality Statute: the Battle Continues, by Kendis J. Doss and Craig J. Langstraat. *Oil, Gas & Energy Quarterly*, vol. 51, no. 1, September 2002, p. 45-59.
- FOIA Exemption Five: Will it Protect Government Scientists From Unfair Intrusion?, by Dianna G. Goldenson. *Boston College Environmental Affairs Law Review*, vol. 29, no. 2, 2002, p. 311-42.
- Document Destruction Violates the FOIA, by Arthur H. Siegal, *The Michigan Bar Journal*, vol. 81, No. 3, March 2002, p. 14-17.

Editorial Co-ordinator: Elizabeth Boulton

Typesetting and Layout: Last Word

Printing: Thajo Printing Pty Ltd, 4 Yeovil Court, Wheelers Hill 3150

Subscriptions: \$75 a year or \$55 to *Alt. LJ* subscribers (6 issues)

Correspondence to Legal Service Bulletin Co-op., C/- Faculty of Law, Monash University, Clayton 3800

Tel. (03) 9544 0974 email: Liz.Boulton@law.monash.edu.au