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Comment

The articles in this issue focus on a major weakness of FoI in many countries, and particularly in Australia of a lack of the timely release of information. A central rationale, if not the primary objective, of FoI is to maximise the accessibility of timely and accurate information to citizens and government. Theoretically this 'enriched informational commons' (using Alasdair Robert's terminology) enhances public deliberative democracy and ensures informed public policy making and debate. The speech by the Federal Shadow Attorney-General, Nicola Roxon, included in this issue, and the subsequent release of the Australian Labor Party's new FoI policy, are welcome steps forward. However, it is a commitment that whilst well intentioned in Opposition — on the eve of an election campaign — is rarely delivered in the wake of an election victory.

The article by postgraduate journalism student Taylor Bildstein describes a situation that is neither unique nor, unfortunately, exceptional. In her narrative Bildstein shows how a handful of young citizens and new recruits to the fourth estate, with good grace and tolerance, discover how FoI appears to have the informational efficacy of using tin cans with a very long piece of string: an interesting but ultimately pointless exercise. The matters that Bildstein and her fellow students were attempting to understand, interpret and report on were not of minor import. Some, such as Intelligent Island, have national ramifications and involve the expenditure of $40 million arising out of the sale of Telstra. Others, such as economic development and the exploitation of national parks, have significant import for management practices and public debate in several states. Her vignettes starkly demonstrate that you don't need malicious and active non-compliance to bastardise FoI, simply a lack of interest and commitment in giving maximum and timely access to quality information. In none of the scenarios outlined in Bildstein's article (possibly to the deep regret of several aspiring investigative journalists) would governments have fallen, resignations been demanded or projects been unnecessarily delayed by public debate. In most of the scenarios there were no malicious or subversive FoI officers, simply civil servants who had more pressing matters than enriching the information commons or ensuring that open government was the norm.

The third article is from Michael McKinnon who, as FoI Editor for *The Australian*, is rapidly joining the likes of Jack Waterford and Paul Chadwick in making FoI a part of mainstream Australian journalism. In his article McKinnon echoes the frustrations and experiences of the second article. However, both he and *The Australian* are in a position to challenge indifference and information stonewalling with a campaign of action. As McKinnon notes, in an information age, an era of computers, email and Google, there is simply no justification for any reasonable request not to be determined within statutory time limits, especially time limits that were designed for an information system only recently removed from reliance on the quill and ink. Many within the public service may view the Deemed Refusal Campaign as unnecessarily hostile. However, it is a feeling not shared by many users, like me, who are generally sympathetic to the challenges of administering FoI.

Rick Snell

Alice in FoI land

Student experiences with the Tasmanian FoI Act

Postgraduate journalism was offered at the University of Tasmania for the first time in 2003. With the cessation of the cadetship program at the Australian Broadcasting Corporation and the ever-tightening budgets of all media organisations in Tasmania, the opportunities for journalists to be trained on-the-job are becoming more and more limited.

While both time and other resources are tight for investigative journalism, the rise of the spin doctor has allowed governments, NGOs, businesses and other organisations to push their messages more effectively. In this environment, where spin doctors embrace the opportunity to spoon feed journalists their versions of stories, journalism would be severely challenged in its ability to act in its role as the fourth estate without external training in research techniques.

One solution to training journalists in investigative techniques is to send them back to university. Postgraduate studies in journalism at the University of Tasmania have focused on such media research techniques, including freedom of information (FoI).

The object of the Tasmanian *Freedom of Information Act 1991* 'is to improve the democratic process in Tasmania by increasing the accountability of the executive to the people of Tasmania and by increasing the ability of the people of Tasmania to participate in their governance'.[1] However, as most people of Tasmania are busy with their own responsibilities, they often do not have the time or motivation to investigate the workings of government and that role is left up to the journalist.

I was excited to learn about a new tool so I could pursue my work as an investigative journalist, to dig deeper, understand more and report on those aspects of government activities that are not included in their tight, neat and frequent press releases. I was ready to embrace my role as a member of the fourth estate, and help to balance the power that government has as the generator and keeper of so much of the information that is of relevance to Tasmanians, to pursue government information in the public interest.

Students use of FoI

The practical experience of postgraduate journalism students using FoI has been quite a different story to that which I expected. Postgraduates such as myself have become players in a game of patience and negotiation, as we have had to wait for up to five months, and then often appeal, in order to pursue the information we sought. Of the postgraduate journalism students in 2003 none received useful information for their stories from FoI. And even when we have appealed decisions, it has not guaranteed a positive response. In order to take the process that far, we have needed to study the Act and the stated causes for exemptions with an unflinching fidelity to the principles that underlie the Act. With those principles in mind, some students have been surprised to observe the conflicting messages that the results of FoI requests have provided — and not provided — and some of the justifications that have been given in an attempt to legitimise the withholding of information that appears to be, without doubt, in the public interest. We've had to find our orientation in a confusing and illogical climate, a little like *Alice's Adventures Underground.*[2]

> *Alice had not a moment to think about stopping herself before she found herself falling down what seemed a deep well. Either the well was very deep, or she fell very slowly, for she had plenty of time as she went down to look about her, and wonder what would happen next.*
>
> *First, she tried to look down and make out what she was coming to, but it was too dark to see anything: then she looked at the sides of the well, and noticed that they were filled with cupboards and bookshelves; here and there were maps and pictures hung on pegs.*
>
> *Down, down, down. Would the fall never come to an end? 'I wonder how many miles I've fallen by this time?' she said aloud, 'I must be getting somewhere near the centre of the earth'.*

Above ground things appear normal and events can be easily explained away with a well-crafted media statement or neatly packaged press release. Like chickens in a media farmyard, we could wait for these little packages of government-friendly information to be fed to us and, without a great deal of work, have ourselves a story. But who would want to take our stories? As students, most of us don't have the ear of a local editor, and there aren't many opportunities for freelancing — unless we produce a really top story. If our story came from a press release, all the other media organisations received that story at the same time, or perhaps even earlier than we did. Our story is a dud; it's not news when it comes from us. Considering the following position, it's arguable whether it's news at all:

> News is what someone somewhere does not want printed and all the rest is advertising.[3]

Or we could take the initiative and pursue members of the government to provide answers to questions that we may devise based on research into other above-ground sources, like government annual reports, or other news reports that touch on an aspect to a potential story but don't pursue it. Again, we would be dealing with above-ground sources because public servants are not allowed to speak to the media and will always defer their answers to the Minister's media officer:

> No public statement is to be made or question from the media answered by anyone in government, without approval of the statement or of the spokesperson by the relevant Minister OR Head of Agency or his/her nominee.[4]

So two days later, or that afternoon if we're lucky, we'll receive an email with answers to our questions, neatly typed, neatly punctuated and neatly approved by senior members of the government department. While a face-to-face interview with an appropriate member of staff may have yielded more information, a broader understanding of the issue and provided the opportunity for cross-examination of the answers provided to our questions, the email reply provides no such interaction.

There are many above-ground ways to get information as a journalist and I won't go into them all here, but I'm sure that you are beginning to understand why I was excited at the prospect of going underground and using FoI. What would I discover underground?

While I hoped to uncover amazing secrets and write great stories that opened up the mysterious ways of the

Tasmanian State Government, and make my contribution to democracy, what I did discover was in its own way almost as interesting as that scenario, that I had envisaged.

The way my first FoI request was dealt with in 2003 was a process that piqued my interest in FoI legislation as something more than a journalistic tool: that experience suggested that FoI legislation in Tasmania was an issue in itself.

> *A large rose tree stood near the entrance of the garden: the roses on it were white, but there were three gardeners at it, painting them red. This Alice thought a very curious thing, and she went near to watch them, and just as she came up she heard one of them say 'look out Five! Don't go splashing paint over me like that!'*
>
> *'I couldn't help it,' said Five in a sulky tone, 'Seven jogged my elbow.'…*
>
> *On which Seven lifted up his head and said 'that's right, Five! Always lay the blame on others!'*
>
> *'You'd better not talk!' said Five, 'I heard the Queen say only yesterday she thought of having you beheaded!'*
>
> *'What for?' said the one who had spoken first.*
>
> *'That's not your business, Two!' said Seven.*
>
> *'Yes it is his business!' said Five …*
>
> *Seven flung his brush down, and had just begun 'well! Of all the unjust things — ' when his eye fell upon Alice and he stopped suddenly …*
>
> *'Would you tell me please,' said Alice timidly, 'why you are painting those roses?'*
>
> *Five and Seven looked at Two, but said nothing.*

On 2 May 2003 I submitted my first ever FoI request. It was to the Tasmanian State Government Department of Primary Industries, Water and Environment and the request was for a copy of a feasibility study reporting on the development of new tourism facilities at the Maria Island National Park on Tasmania's east coast.

FoI request re Maria Island National Park development

Maria is a very special island, with a rich and unusual history. It has one of Tasmania's few marine protected areas and the seas around are a strange mixture of warm northern currents that travel all the way from the Coral Sea in Australia's north-eastern tropics, and cold southerly currents that bring a feast of nutrients from the Antarctic. Where these two currents meet, at Maria Island, there is an explosion of unique underwater biodiversity. As the National Park Management Plan 1998 states: '[t]he park is substantially free of pollution of air, land and water'.[5]

The island itself is very dry, like much of Tasmania's east coast and it is a small island. You could walk the length of it in a day. It has long and pristine beaches, stunning fossil cliffs that flow in sandstone waves along the sheltered western side of the island, and wide windy spaces of former grazing lands that farmers cleared in the north for sheep from the late 1800s.

On Maria's coast you can find Aboriginal shell middens, from thousands of years of Aboriginal occupation, when the Tasmanian *Tyreddeme* Aborigines rowed their canoes to the island, made from rushes, to hunt for shellfish, build huts and bury their dead.[6]

You can also find the remains of a convict settlement, cement works, whaling activities, a vineyard, a health resort built by an eccentric in the 1890s, features of great scientific interest remnant from many geological ages, and the unique characteristics of island wildlife and plants.

The only modern development on the island is a campsite and some nearby toilet facilities. Otherwise there is no infrastructure, apart from sandstone and brick ruins.

Most of this interesting mixture of history, failed commercial and community ventures, and natural wonder is concentrated around Darlington and Point Lesueur in the north. This just happens to be the same area where a developer proposed building a five-star resort during a period of exclusivity negotiated in secret with the Tasmanian State Government over the period 2001 to 2003.

When local businessman Denis Bignold heard on the ever-active Tasmanian grapevine that representatives of the Tasmanian State Government were coming to Maria Island National Park to consider what types of tourism facilities are appropriate to be developed within the guidelines set out in the management plan of the park, he approached the government with the suggestion that he get first dibs at putting a proposal together and seeking investors.

He got what he asked for: six months to scope out the potential for development and commission a pre-feasibility study, and subject to a favourable outcome with the pre-feasibility study, another six months to provide a detailed development proposal. During this time the State Government told the media and the public nothing about the plans.

The secret exclusivity agreement became public knowledge when the Tasmanian Greens received the results of an FoI request on the topic in early 2003. The issue hit the media and many Tasmanians who love Maria Island for its undeveloped charm were angry that such plans, especially plans as grand as Bignold's, were progressing without open consultation with the community.

My FoI request built upon that original FoI request that had exposed the issue. I asked for a copy of the feasibility study and, after consultation with an FoI Officer, any information that details the Government's expectations in relation to the study, the process for preparation of the study (including timeframes) and the Government's response to the study.

While I saw this as a National Parks issue, the Tasmanian State Government must have viewed it as a state development issue, because five days after I lodged the request it was transferred to the Department of Economic Development.

While the Tasmanian FoI Act states that FoI applicants shall be notified of a decision on a request not later than 30 days after the request has been received by or on behalf of the agency or Minister (s 16b), I was notified of a decision 94 days after the request was received.

A search of agency records had identified 34 documents relevant to my request, of which 18 documents were released in full. The rest were partially or fully exempted because they:[7]

- expressed individual officers' opinions and 'were not purely factual in nature'. The FoI Officer explained, 'The information consists of an observation or comment that is not directly supported by evidence … If it had been anticipated that the documents would be made public, the officers may have restricted their information to publicly available facts and avoided including opinion.'
- would subject the developer's company to commercial disadvantage. The FoI Officer wrote, 'I have been advised by solicitors acting for … [the company] that the information is not generally available to competitors of the

company and that disclosure of the requested information would expose the company to competitive disadvantage'. The company's lawyers advised the FoI Officer that the release of the information could cause harm 'to the competitive position of the company because it relates to incomplete commercial and financial negotiations or because it may result in the company's intellectual property being imitated by competitors'.

- relate to the government agency's 'competitive position as a development agency'. The FoI Officer explained, 'The agency's competitors are development agencies in other states, which are also seeking to attract business to their states'.
- 'contain information that was provided to this agency on the understanding that the information was to be treated as confidential and not provided to a third party'.

There were only four new documents contained in the new schedule and all of these were exempt. I received nothing new and useful from my request.

I appealed to the Secretary of the Department and received an unexpectedly swift reply 14 days later advising that my internal appeal was unsuccessful.

> *'You!' said the caterpillar contemptuously, 'who are you?'*
>
> *Which bought them back again to the beginning of the conversation: Alice felt a little irritated at the caterpillar making such very short remarks … and the caterpillar seemed to be in a very bad temper, she turned round and walked away.*
>
> *'Come back!' the caterpillar called after her, 'I've something important to say!'*
>
> *This sounded promising: Alice turned and came back again …*
>
> *Alice thought she might as well wait, as she had nothing else to do, and perhaps after all the caterpillar might tell her something worth hearing.*

I requested an external appeal with the Ombudsman on 9 October, promising to forward grounds for the request shortly, which I did on 3 November. I had never written to the Ombudsman before.

> *It sounded an excellent plan, no doubt, and very neatly and simply arranged: the only difficulty was, that she had not the smallest idea how to set about it.*

After consultation with my peers, I wrote a letter to the Ombudsman that focused on the special attributes of Maria Island detailed in the Maria Island National Park Management Plan 1998. This national park is one of the fortunate ones in Tasmania to have a management plan, and the document was a very useful reference.

The many special attributes of the island, I argued, strengthen the public interest case for overriding exemptions like commercial in confidence, the department's claim that it engages in competition as a development agency, records of non-factual observations and comments, or any other justifications for confidentiality.

Those special attributes are the reason why Maria Island was chosen to be a national park, and that is why any proposed developments on the island should be approached with the highest possible amount of community awareness about the proposals and the process underway.

The Government was already off to a bad start in the eyes of the community. It had not announced that development plans were being considered — although the possibility for development is addressed in the management plan. It had dealt with a developer in secret without calling for expressions of interest, and the developer told the media when the story was exposed that he wanted to put an ambitious five-star resort on the tiny island, which currently has no facilities — not even a shop to buy milk or a newspaper.

The developer had then lost interest in the proposal (claiming that negative media exposure had stopped investors from coming forward). Here was the Government's opportunity to come clean and allow the community to fully understand the process that Maria Island National Park had just been subject to.

The documents I requested under FoI are now up to six years old. Because of the developer's loss of interest in the project, the documents are not working documents anymore. They are historical and redundant. The way people do business changes over time and it is quite likely that the commercial sensitivity of the information will have been eroded or even disappeared. So this strengthens the public interest argument to release them.

Let's not forget as well that the development of Maria Island is a project of major significance for Tasmania, and for this reason it is important that the people of Tasmania understand the processes that are governing the development of state assets, especially national parks, which have unique characteristics. There are a number of unique characteristics attached to the development proposal in question, including:

- exclusivity clauses
- that the proposal deals with a tourism icon and a significant tourism asset
- that the potential size of the development project is large
- that the proposal is likely to have included control or partial control of the ferry service to Maria Island, details of a proposed new operator and conditions of operation, potentially restricting public access to the national park.

All of these factors further contribute to the public interest in the process of Maria Island's development.

So what can we learn from this process? If the deed of agreement between the developer and the Tasmanian Government, or the feasibility study prepared by the developer and presented to the Tasmanian Government, is released, the community will be given the opportunity to assess the project objectively and from the distance provided by time. Was the deed effective in protecting or advancing the interests of the Tasmanian Government and national parks, and what considerations did the Deed offer? Until we see it, we cannot form a judgment.

And while some information may be covered by exemption categories, the whole draft deed would not be. So at least substantial parts of the draft deeds should be released.

Regarding opinion and comment, I attempted to interpret the types of documents that had been exempted under this section of the legislation. This was interesting because I had to think about the types of information that someone is likely to include in a particular document, like an email compared to a report or a briefing paper, and also how these documents are likely to be structured.

> *'Who are these?' said the Queen, pointing to the three gardeners lying around the rose tree, for, as they were lying on their faces, and the pattern on their backs was the same as the rest of the pack, she could not tell whether they were gardeners, or soldiers, or courtiers, or three of her own children.*

Take, for example, a draft letter between a representative of the National Parks and Wildlife Service and the developer. We can assume that the content of the document related to national park considerations and was not likely to relate to matters of commercial confidentiality. The management of our national parks is certainly of interest to the public.

We can also assume that the deliberative stage of the subject contained within the letter had passed by the time a letter was drafted and opinions were well formed by the time they reached the page, even in draft form. So the release of a draft letter should not impact on frankness and candour between members of the public service and with the Minister.

Another document with parts withheld was sent to two main recipients representing Infrastructure Development at the Department of State Development, and the Parks and Wildlife Service. As well, the email was sent to two secondary recipients representing the Parks and Wildlife Service and Tourism Tasmania — a widely circulated interdepartmental email. It would be very unusual that such a widely distributed inter-agency email would contain a fully frank and candid exchange. Instead, we would expect the email to be carefully considered, the content perhaps also to be discussed between colleagues, before such wide circulation. If portions of this email were confidential, then normally the sender would send the original candid email to the two main recipients and then a less candid version to the two secondary recipients, marked FYI, for example. But clearly the frankness of the email was not an issue for the sender because she distributed the original unedited email simultaneously to all three government agencies.

We would also normally expect that material of a sensitive nature would not be found in the middle of an email. Normally, sensitive material would be labelled as such within the email, or the sensitive information would be sent in a separate email labelled as such. But the structure of the information in the email reveals no clear arrangement of material based on information sensitivity.

And because the email stood alone and made sense with the sections missing, we can assume that the email would have been sent regardless of whether those sections were included. By studying the nature of the document we could see that policy processes would have continued unhindered and will continue unhindered into the future with the release of the email in its entirety.

The Maria Island National Park Management Plan 1998 plan contains guidelines about the types of developments that are appropriate on Maria, and where such developments may occur. But I realised that this management plan was up for review in 2003 and as the developer's consultation with Government had already progressed in a clandestine manner, I considered the possibility that the management plan review may result in significant and accommodating changes to the guidelines for development. If this were to occur, it would be especially important that the community understand the events that led to those changes, although this is a possible scenario that I did not share with the Ombudsman.

One of the most interesting exemptions was the commercial argument applied by the FoI Officer that seemed to imply that one of the government agencies itself was the entity whose trade and commercial operations needed protection. I argued that the role of development agencies, such as the Tasmanian Government Department of State Development, is to facilitate trade and commerce. They themselves are not engaged in commercial trade or operating as a commercial entity. Let's make it very clear — in society we have government, which regulates the business environment, and then we have businesses which operate in that environment. Or at least that is the way it used to be.

When it came to addressing this exemption I found an article on Margo Kingston's (*Sydney Morning Herald*) webdiary[8] useful in articulating the problem. In a June 2003 article by Alistair Mant, the messy situation of trying to distinguish between guardians (government) and traders (business) was articulated:

> There is indeed a case to be made that the water has been muddied somewhere between the realms of the public and the private and that the central problem is the confusion of value sets. The businessman who aggrandises public responsibility to himself is likely to offend the ordinary person eventually, as will the public servant who wishes to play businessman. Perhaps the core problem is that all the developments described above have been driven by self-serving top dogs — those who have ascended to the commanding heights of both the public and the private sectors and who may now enjoy an unconsciously collusive relationship. In the end, it is always the ordinary person, and that includes the taxpayer, who foots the bill — and smells a rat.[9]

I addressed the claim that the Tasmanian Government agency information should be exempt by pointing out that the particular commercial exemption in the FoI Act (s 32(a)ii) applies to government agencies engaged in trade and commerce — like TASMAP, the government printing authority, or the government bookshop and other such agencies — but not those agencies seeking to facilitate trade and commerce. Whatever incentives the Department of State Development may offer to encourage trade and commerce in Tasmania it does remain a government department that is not itself involved in commercial activities.

> *Alice was very nearly getting up and saying, 'thank you, sir, for your interesting story,' but she could not help thinking there must be more to come, so she sat still and said nothing.*

In a letter dated 10 November 2003, the senior investigation officer with the Ombudsman's office wrote me a letter advising: 'I cannot advise you of a time frame for carrying out the review'.

On 5 January 2004 the Ombudsman's office manager wrote to advise that the senior investigation officer was on leave until late January. I am now coming to the one-year anniversary of the date of my original request.

Reflecting on the start of this process one year ago, I embarked on the use of FoI in order to gather information for an assignment that was due at the end of June 2003. I figured I had enough time to put in an FoI request: two months, when the Act tells me that I will receive a response within one month. I would never have guessed that a year later I would still be pursuing the information.

Other student FoI requests

Some of my fellow postgraduate journalism students are also appealing the long lists of exemptions they have received. As our deadlines have come and gone, I has been difficult to stay focused on the pursuit of the information we sought.

Suzie Price, for example, was trying to find out what correspondence had occurred between the Tasmanian Department of Health and Human Services and the Australian Hotels Association (AHA) between September 2001 and

October 2003. Price received her reply within a reasonable amount of time but she said the information she did receive was not very useful:

> I was surprised by how little correspondence information I received, and how many reports were given to me that I had already sourced without FoI, including reports from the department itself.[10]

Price's study deadline had passed by this stage and her appeal took two months to process. No reasons were given for the delay.

Price thinks the FoI process would be an excellent tool for journalists if they could be sure that they were being given complete information. She said, 'we still can't be sure of that, even if we put in appeals'. And further, 'if we do have the time and resources to put in an FoI in the first place, we can be sure we will be given some information, and some information is always better than none … I think the officers probably haven't been taught to make FoI requests their top priority — maybe they've even been told to ignore them for as long as they can, I'm not sure.'

As for myself, although I did not receive the information I thought I wanted from my Maria Island FoI request, the schedules themselves did inform me about the people and dates moving the story I was pursuing; and the documents that were released — although largely innocuous — did broaden my understanding of how these processes work. Applying for information under the FoI Act, appealing internally and then researching and assembling my arguments to the Ombudsman, has given me a very good understanding and appreciation of the objectives of the Tasmanian FoI Act and positioned me well to make the most of FoI's capabilities in future. I know what reasonably to expect I'm going to get in return for my efforts under the current FoI system. The experience has also made clear how badly the FoI process needs reform if it is going to come close to its stated objective to 'improve democratic government in Tasmania by increasing the accountability of the executive to the people of Tasmania and by increasing the ability of the people of Tasmania to participate in their governance'.

> *'That's very curious!' Alice thought, 'but everything's curious today …now, I'll manage better this time,' she said to herself, and began taking the little golden key, and unlocking the door that led into the garden.*

I was curious: why did my Maria Island FoI request take three months to process, especially when I received very little in addition to the information that had previously been released as a result of someone else's FoI request?

I made a second request to the Department of Economic Development, building on my own previous request and asked for information in relation to developments in national parks, specifically development of Maria Island. I also asked for information about the handling of FoI requests from political and NGO bodies that I was aware had submitted requests about Maria Island that were similar to mine, as well as information about the handling of my own request.

After clarifying my request with the FoI Officer, I received a reply within the legislated 30 days.

Nothing much had happened in relation to the developer's intentions or his relationship with the Tasmanian Government since my first request, according to the five documents I received. A letter to the developer from the Assistant General Manager for Development Projects in August 2003 asked him to confirm in writing what he had said verbally:

> given the level of adverse publicity and negativity about the proposal to enhance the tourism infrastructure on Maria Island, you would not be lodging a development proposal under the provisions of the Agreement by yourself and the Minister. To enable me to close Economic Development's files on the project, I would appreciate your written confirmation that the agreement is at an end.

A minute to the Minister said that the Department of Economic Development understood that the Department of Tourism, Parks, Heritage and the Arts was soon to seek Expressions of Interest (EoI) for the ferry services and limited use of the assets on Maria Island.

If only the seeking of EoI had been the approach to begin with. The developer would not have felt that his time and money had been wasted when his secret agreement with the government was exposed, and the community would enjoy a greater level of trust of the government.

Regarding information about the handling of FoI requests from myself, and the political and NGO bodies, I received all 28 documents located, all released in full.

> *'Would you like to see a little of it?' said the Mock Turtle.*
>
> *'Very much indeed,' said Alice.*

I discovered that the Tasmanian Greens' FoI request took two months to process and noted that the request was processed over the Christmas and summer holiday period, when government staffing resources were likely to be at the lowest point of the year due to increased numbers of staff taking vacations. Once finalised by the FoI Officer, the response was checked by the Acting Secretary of the Department and the Head of the Office within five days. The Deputy Premier did not sign approval of the response, even though his name was one of three listed on the approval form. This was the request that fuelled the consequential debate over development of Maria Island in 2003.

My request, which sought similar information, also took two months for the FoI Officer to process. But as you will recall, I did not receive a reply until three months after it was lodged. The response was held up waiting for a series of senior members of the department to sign off on it. It took four days for the Manager Secretariat — the same person who later rejected my internal appeal request — to sign. It took a further ten days for a second supervisor to sign off. It was another seven days before the Acting Secretary signed off on my request and another four days for the signature of the Head of Office to be added to the list. As with the Greens' request, the Deputy Premier did not sign approval of the response to my request. All in all, my request was held up for four weeks as it was approved by a succession of four staff more senior than the FoI Officer who made the decision.

The difference between the approval processes for the Greens' request and my request suggests that exposure of this issue in the media changed the way FoI requests on the issue were handled. Following that exposure, my request was approved by one more senior officer in the Department than the Greens' request was, bringing the total to four and the time taken to approve the response was increased by a factor of five (from five days to 25 days).

The FoI Act (s 21) states that 'a decision in respect of a request for information made to an agency shall be made by —

> (a) the responsible Minister; or

(b) the principal officer of the agency; or

(c) subject to the regulations – an officer of the agency acting within the scope of authority exercisable by the officer in accordance with arrangements approved by the responsible Minister or the principal officer of the agency, and published in the *Gazette*.

Section 5 defines a principal officer as:

(a) in relation to an Agency, within the meaning of the State Services Act 2000 – the Head of Agency; and

(b) in any other case —

(i) if the regulations declare an office to be the principal office in relation to the agency — the person holding or performing the duties of that office; or

(ii) in any other case — the person who constitutes that agency or, if the agency is constituted by two or more people, the person who is entitled to preside at a meeting of the agency at which the person is present.

So — correct me if I'm wrong (email: Bildstein@bigpond.com) only one or two people are supposed to be involved in the FoI processing process, right?

'In that case,' said the Dodo solemnly, rising to his feet, 'I move that the meeting adjourn, for the immediate adoption of more energetic remedies — '

'Speak English!' said the Duck, 'I don't know the meaning of half those long words, and what's more, I don't believe you do either!' And the Duck quacked a comfortable laugh to itself. Some of the other birds tittered audibly.

Regardless of what is stated in the details of the Act, it is obvious that when four senior staff are involved in the FoI approval process (five including the FoI Officer) there is more than ample opportunity for interference in the decision-making process. If something is political, or a hot topic in the media or is otherwise sensitive for some reason, the balancing of public interest arguments for and against release of information could become distorted as the interests of each of those extra four senior staff members consider their positions as they sign off on the FoI response. Anecdotal accounts from working journalists have also shown that government media advisers are also involved in the process, although I have not found this to be the case 'on the record' through FoI. Their role may be more informal and advisory, than official.

My last two requests in 2003 were to the Department of Tourism, Parks, Heritage and the Arts, and the Department of Premier and Cabinet.

The process was becoming easier and as I said, I knew better what to expect — that is, not too much. I was also less afraid to talk to the FoI Officers. FoI Officers at both departments invited me to visit and discuss the applications. It was good to put faces to the names of the FoI Officers, but the best thing about visiting the FoI Officer in person was that discussing my request did a lot to help me to clarify the issue in my own mind. I knew they would ask me exactly what information, or what kind of information I wanted, and in order to be able to discuss this with them, I needed to think it through thoroughly before the visit. Compared with my first two FoI requests, the last two were far more focused.

I am thankful that I wasn't charged fees for any of my four FoI requests to the Tasmanian Government in 2003.

The other postgraduate journalism student who really embraced FoI, as I have, was Mark Thomson. He was trying to find out what happened to the $40 million Intelligent Island money that the Tasmanian Government received when independent Senator Brian Harradine agreed to the partial sale of Telstra. Thomson requested documents relating to various aspects of the Intelligent Island Program, specifically minutes of board meetings, documents related to the proposed 'centre of excellence', and material relating to how funds from the program had been disbursed.

'You ought to be ashamed of yourself for asking such a simple question,' added the Gryphon, and then they both sat silent and looked at poor Alice, who felt ready to sink into the earth.

Thomson's request took five months to process and in the end he didn't get the key information he was looking for. Many of the documents relating to the centre of excellence were exempted from release and many sections of the Intelligent Island board minutes were deleted. Thomson said he was surprised at the reasons given for exempting documents. For example, he was told:

> The documents contain information that is not purely factual, expresses individual opinions and raises hypothetical concerns and issues. Disclosure of the documents would be contrary to the public interest as the information contained within them would misrepresent the considered opinion of the Department and Government and may cause unnecessary debate.[11]

Misrepresent the considered opinion of the Government? Unnecessary debate? Thomson said, 'I was just gob smacked when I saw that …That seems to go right against the intention of the FoI Act'.

Thomson had been quoted $250 for the request but appealed and ended up paying $45. This is still more than most people are required to pay for a first request. The standard amount is $30.

Thirty days after Thomson's request, he had spoken to the FoI Officer to inquire about progress and was told that the information was due to him in about one week. But one week later he had received nothing, so he called again.

He was told that the file received from the Intelligent Island Board was 'a bit thin' and that they hadn't provided all the documentation requested. The explanation was that Intelligent Island didn't understand that *all* documents relating to the centre of excellence should be included. Thomson said, 'It was amazing that they didn't understand what was required of FoI requests. That really seemed poor' … 'It seemed a bit extraordinary to me, but I gave them the benefit of the doubt at that stage.' [12]

He called the FoI Officer on Monday 2 February to ask after the information and was told it was in the mail. When he received the letter on Thursday it was dated Tuesday, 3 February.

The information eventually received was not very useful. All documents relating to the centre of excellence — including meeting minutes — were fully exempt or partially exempt. Most recent meeting minutes of the board were completely exempt.

Thomson has appealed the decision. He wrote in his letter of appeal: 'Good-quality participation and public debate require extensive access to a wide range of information rather than pre-packaged, sanitised material delivered by the executive'.[13]

He argued that public interest would best be served with the release of the information he had requested because of the significant size of the funds in question ($40 million); the connection with the Telstra sale, one of the biggest public issues in the country in recent years; and current public calls by Tasmanian politicians for a review of the entire program. Therefore, he said, public interest considerations should

overwhelm confidentiality arguments. He went on to say, '"unnecessary debate" is a peculiar term in the context of a liberal democracy' and:

> In my view, a major strategic development involving the spending of $40 million of public funding is worthy of debate and wide-ranging discussion, not just of the worthiness of the final proposal, but of all models, submissions, no matter how speculative, leading up to that final decision.

In reply, he was told:

> an identifiable benefit that favours the public release of this information must be shown to be significant enough to override the application of the exemption.[14]

But the Act puts it another way (in s 7):

> A person has a legally enforceable right to be provided, in accordance with this Act, with information contained in records in the possession of an agency or a Minister unless the information is exempt information.

While the wording of the Government's reply to Thomson's application for internal review indicates that the decision not to release documents of significance was made by the FoI Officer, other experiences (such as my own, already described) suggest otherwise.

> *There was generally a ridge or a furrow in her way… Alice soon came to the conclusion that it was a very difficult game indeed.*

Regardless of the delays, unsatisfactory result and expense, Thomson says he is planning to use FoI again — but this time he plans to pursue the FoI Officer more diligently and regularly, and to be less trusting. He said 'There is a lot of secrecy about Intelligent Island but I don't know whether that's peculiar to this program or whether that's normal — whether the [FoI] process is normally this frustrating'.

For Thomson, the failure of FoI to deliver useful information about Intelligent Island has been especially frustrating because none of the board members will comment on the record. Consequently, Tasmanians still don't know what happened to that $40 million.

Thomson, Price and I agree that the delays and unsatisfactory results when using FoI as an investigative tool for journalism in Tasmania does not appear to be the fault of the FoI Officers who process our requests. Suzie Price said. 'it's not so much that I don't trust the FoI Officers but it's more that I don't trust the system as a whole'.[15]

One FoI Officer in particular has processed both of my requests to the Department of Economic Development as well as Thomson's, and she has been nothing but helpful. She has explained what is happening and the reasons, but the ultimate decision appears to be out of her hands.

TAYLOR BILDSTEIN

Taylor Bildstein is a freelance journalist and Masters in Journalism and Media Studies student at the University of Tasmania. She is currently conducting interview-based research with Tasmanian journalists for a thesis that addresses the question 'is FoI an effective investigative tool for journalists in Tasmania?'

Thank you to the postgraduate journalism students who spoke openly and honestly about their experiences using FoI

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Does Australia have the democratic tools required to maintain a healthy democracy?

A speech by Nicola Roxon MP, Labor's Federal Shadow Attorney-General to the Conference honouring Justice Gaudron's contribution to the law Melbourne, 5 March 2004.

Introduction

It is a privilege to be speaking at a conference to honour the work of Justice Mary Gaudron.

I am particularly delighted not only because she has been a towering figure in Australian legal circles for the past three decades (and continues to be on the international stage past her retirement from the High Court), but also because I worked as her associate from late 1992–1994.

For me, like for so many other women in the law, she has been an inspiration from a distance, but also more personally she was a rigorous and demanding taskmaster, preparing me well for the arguments that I now face in my new job as Labor's Federal Shadow Attorney- General.

I was at the Court during a very interesting period — after *Mabo* but before *Wik* — so at a time when there was enormous public debate about the role of the High Court in our democracy. The debate, you will recall focused on the interaction between the parliament and the courts, who should be making

laws and whether the High Court was being too creative, or not creative enough, and/or interventionist in its decisions.

Of course these debates remain a constant, although in varying forms, but it gave me an insight, a unique window, into the limits and frustrations of the Court as an institution unable to participate in the public and media discussion on their decisions, no matter how accurate or inaccurate the debate.

Now that I am a member of parliament I feel especially privileged to have had this bird's eye view of the judiciary. Not many of us get the chance for such a close look at another arm of government. Having worked in courts, and now the parliament, I do confess to a healthy interest in having a better look at the third arm of government — the Executive. I may be accused of having a particular interest that goes beyond my academic interest in the doctrine of the separation of powers, but I will have the leave that judgment up to you!

Theme

I want to consider a number of Justice Gaudron's contributions that focus on the interaction between arms of government, and also between the public, the courts and the parliament. My thesis is that to maintain a healthy, representative democracy we need a range of tools. The 'democratic tools' I intend to explore today are:

1. the issue of standing to bring action against governments
2. the constitutional implied freedom of political communication
3. legislative tools like the *Freedom of Information Act 1982* (Cth).

Any one of these tools alone might not be sufficient to deliver, protect or encourage a strong democracy, but together, and used properly, they can help maintain and strengthen our democratic structures. If we want to renovate or modernise our democracy, we may need tools beyond this as well.

Justice Gaudron's period at the Court gave her the opportunity to identify, develop and use these democratic tools.

Her judgments reveal that she took to this task a strong sense of the need for courts to ensure that executive government was responsive and accountable to the public. She also took an equally strong sense that for people to participate effectively in the good government of the nation, some basic rights and opportunities have to be provided, or at least not be stifled.

I want to use her judgments and comments to invite you to look at government decision-making in a broad context. While it necessarily involves administrative law in a narrow sense as it affects an individual, I invite you to also take a step beyond and to look at broader government decision-making and the level of information provided about it to the public at large.

My personal perspective is that we are entitled to know how government decisions are made — not just whether we can review or appeal them as an individual, but whether access is provided to information that will truly allow a full assessment of decisions. Without information how can we ensure accountability and informed public debate?

1. The doctrine of **separation** *of powers and standing to bring actions against government*

Justice Gaudron was a vigorous defender of the doctrine of separation of powers. This was reflected in both her administrative and constitutional law judgments.

In administrative law, she emphasised the importance of allowing individuals to hold the executive to account through the judiciary. In particular she has stated that the rule of law requires the courts to preserve whatever remedies it can to ensure that citizens can require the executive to govern according to law.

Let me read you a quote from her judgment in *Corporation of the City of Enfield v Development Assessment Commission* where she deals with the issue of accountability:

> '… [A]ccountability' can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers.
>
> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers.
>
> It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise.
>
> The rule of law requires no less.[1]

It is in this context, and with this flavour to her approach, that Justice Gaudron liberalised the test of standing in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund.*[2] The decision stated that the 'special interest test' should 'be construed as an enabling, not a restrictive, procedural stipulation'.

The effect of her judgment in that case was to extend to many more individuals the right to seek equitable remedies against the executive for acting beyond its power.

Although the facts of the case were unusual, and somewhat complicated the point was made clearly that there was a public interest in preventing ultra vires executive action

> There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction.[3]

hey note in the decision that, in contrast to the UK, in Australia the Attorney-General has a political role. He or she is in charge of a large department, normally a member of Cabinet and not necessarily a lawyer. Given this they state:

> At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.[4]

Her strong and generous approach acknowledging the right of more people to seek judicial review reveals an underlying sense of what is needed to ensure balance & accountability in our system of government — and shows how the Court can help provide that balance by giving citizens the right to take actions against the Executive.

In this way, the courts assist citizens to hold the executive directly accountable for its actions. It also emphasises that there is a public interest, as well as the plaintiff's private interest, to prevent misuse of public authority and money. Standing requirements should not be used as a gate to prevent

courts examining ultra vires action — they should be construed in an 'enabling' not a 'restrictive' manner.

But even with Justice Gaudron's support for a broad interpretation of standing, this assists only in the limited circumstances of a particular case.

A broad interpretation of standing is certainly a handy democratic tool, but one that can only be used for certain jobs. It can only be used to pursue particular action, in particular matters, so it cannot be used in a wide range of areas to enforce accountability.

2. Constitutional implied freedoms

Another tool in the democratic tool kit is the constitutional implied freedom of political communication.

Calling it a tool in this context might be a bit misleading, as it suggests an active role or right. Perhaps the implied freedom should more properly be seen as a protective shield, a negative right which limits parliamentary action that would offend its basic principle.

As the landmark case on 'implied freedoms', *Australian Capital Television v The Commonwealth (ACTV)*, has already been dealt with in some detail by others today, I will focus not on the decision as a whole, but rather Justice Gaudron's carefully and persuasively argued separate judgment in which she supported the majority.

Quoting from her judgment you will notice again, her strong support of our democratic structure. She said that the provisions of the Constitution directing elections for the Houses of Parliament:

> predicate, and in turn, are predicated upon a free society governed in accordance with the principles of representative parliamentary democracy.'[5]
>
> [Accordingly] Representative democracy is a fundamental part of the Constitution — as fundamental as federalism and as fundamental as the vesting of judicial power in an independent federal judiciary.[6]

Importantly, Justice Gaudron's judgment foreshadowed that while a free and representatively democratic society necessarily entailed freedom of political discourse it may also entail 'freedom of movement, freedom of association and, perhaps, freedom of speech generally'.[7]

We see in this acknowledgment, the repeated theme that certain rights and freedoms must be part of our system of government and ensuring our democratic structures work well.

This has been read by many as indicating a preparedness, at least on Justice Gaudron's part, to expand on the scope and content of implied constitutional freedoms in future cases.

Later in *Kruger v Commonwealth* she developed this further:

> It is also settled constitutional doctrine that the system of democratic government for which the Constitution provides depends for its maintenance on freedom of communication and discussion of political matters …
>
> Those cases do not hold that the freedom is confined to political communications and discussions. Rather, the position is that the Constitution mandates whatever is necessary for the maintenance of the democratic processes for which it provides.
>
> …
>
> Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement.
>
> …
>
> As already mentioned, the Commonwealth's power to legislate with respect to the matters specified in s 51 of the Constitution is limited by and subject to the implied freedom of political communication necessary for the maintenance of the system of government for which the Constitution provides. And because freedom of movement and freedom of association are, at least in the respects mentioned, aspects of freedom of political communication, they, too, are implicit in the Constitution and constrain the power conferred by s 51.

These freedoms mentioned by Justice Gaudron are part of what she clearly recognises as the developing tools that might be needed to continue to protect and maintain our democratic structures.

3. Freedom of Information

This brings me to the last democratic tool I want to look at today, the *Freedom of Information Act 1982* (FoI Act).

Of the three tools I have discussed today, this is the one where Justice Gaudron has had the least direct involvement, but it is the one that is now most within my realm to change and where the rationale of the other decisions inevitably leads us to propose reform in this area.

It is intriguing that the High Court decision in the *Australian Capital Television* case was not much more than 10 years ago. Just over 10 years ago, the High Court read into our 100-year-old constitution an implied freedom of political discourse — and found it to be a necessary part of political debate in our representative democracy.

Yet our current use and practice of a 20-year-old FoI Act has effectively allowed governments to obscure and block access to the very information which might make that political discourse of real value.

What value is freedom found to be guaranteed by our constitution if the debate can only be had around facts that the government chooses to selectively release?

Isn't the philosophy of the High Court's decision based on the rights and needs of people to be able to choose their representatives with the fullest information they can? In fact, Justice Gaudron's decision in *Kruger* on the nature of the relationship between political communication and access to information makes reference to this:

> [Of freedom of political communication] It also entails the right to communicate with elected representatives who 'have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to *inform the people* so that they may make informed judgements on relevant matters'. (Quoting Mason CJ from *ACTV*) [8] [Emphasis added]

Of course, it has been made clear by the Court that they do not regard the implied freedom as giving any individual a particular right; rather it is a limitation on governments, and the parliament, which prevents legislative action that would restrict such debate.

So it is clear that we must look to the active rights given under the FoI Act to see if it is the multi-purpose spanner that we need in our democratic tool-kit.

Is it a strong enough and handy enough tool to ensure accountability in a broad range of areas?

In a joint judgment with Justices Gummow and Hayne, Justice Gaudron, *Egan v Willis*[9] referred to modern FoI legislation as a 'supplement' to the operation of responsible government in Australia. Although this was only a passing

comment, it shows that Justice Gaudron considers FoI to play an important role in our democratic system of government.

In my view this 'supplement' is not working. Even a cursory glance at how FoI is currently operating will highlight how the Howard Government has used exemptions in the Act to refuse to provide basic statistical information about the First Home Owners Grant Scheme, the impact of bracket creep and the provisions of significant contracts with privatised immigration detention centre managers, just to name a few.

It will be no surprise to anyone that my job involves following closely, and with great concern, these decisions of the Federal Government. I am acutely aware of the information, or lack of information, that is available to us, as the Opposition, or to the media and the public at large.

In recent times we have been almost embarrassed by the plethora of opportunities for the Opposition to ask — is the Government telling us all they know? Do they have to?

Just consider a few examples:

- children overboard
- weapons of mass destruction
- the details of the US Free trade agreement

So where is this all leading?

It leads me to the question of whether our Executive Government has become obsessed with controlling and restricting information — perhaps to a point where it runs directly counter to the type of free democracy we pride ourselves on having, and that the Court acknowledges as fundamental to our system of democracy.

It is clear that the FOI Act is not the robust, versatile tool our democracy needs. It is more like something you get given at Christmas and don't exactly know how to work. The instructions are not in English and you are not fully confident all the pieces are in the box any way! And it needs to be fixed.

One of my first acts as Shadow Attorney-General was to commit Labor to a review of the FoI Act, starting with a period of consultation of all key stakeholders. We need to ensure the public interest is being put first, not last. Governments rule for public benefit, and should not be able to withhold material as if their reason for being is a private one.

Conclusion

Will the existing tools in our democratic tool kit be able to maintain a solid operating structure for a healthy democracy? As I have outlined, Justice Gaudron took several opportunities to strengthen a range of democratic tools. In fact, she didn't just sharpen the odd democratic implement; she even traded a few for power tools instead!

But there is much to be done from here — and parliament must grasp the need to open up our processes for more public scrutiny. We cannot leave the courts to find all the answers in this area. It is our democracy we will strengthen, and it is our obligation to make sure we do so.

NICOLA ROXON MP

Nicola Roxon is the Federal Shadow Attorney-General.

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FoI delays and the use of the deemed refusal

While Freedom of Information (FoI) laws are one of the most powerful tools in the armoury of investigative journalists, sadly Australia's 1982 Act is a blunt and often useless weapon. Widely and wrongly applied exemptions and high costs all contribute to the media's general contempt for the usefulness of FoI but the main issue underpinning endemic disillusionment is extensive delays.

More than for any other FoI users, timely release of information is critical to journalists, and governments understand and manipulate this factor to deter media scrutiny. *The Australian* has embarked on a process that could dramatically lower the delays faced by journalists and has already yielded positive results.

An axiom hammered into almost all journalists is 'you are only as good as your last story'. Journalists are trained to produce daily with relatively few chances for any strategic planning because of the insatiable nature of deadlines.

Each day across newsrooms in Australia, chiefs of staffs and producers are obliged to prepare and present newslists capable of filling the newspaper or broadcast slot with enough copy. While senior journalists understand and appreciate the potential results of long-term investigations, the relentless grind often means potential areas of investigation are put aside to be 'worried about tomorrow', with journalists instead asked what they have for today's newslist.

Every news organisation understands that today's story becomes less relevant day by day — when an FoI application can take years to yield results this makes the process a long-odds punt at best. Take for example the case of *The Australian's* long-standing investigations into levels of bulk billing in Australia. An FoI request lodged last year took the Department of Health and Ageing six months to provide a decision. Typically, the agency was able to find little public interest in the release of information — despite the importance of bulk billing to the health of Australians — ultimately leading to a recently lodged appeal to the Administrative Appeals Tribunal (AAT).

Another case illustrating the lengthy delays in FoI involves *The Australian* newspaper's investigations into oil spills on the Great Barrier Reef. The request lodged in late November 2002, faced interminable delays through the decision making and internal review processes. *The Australian* is still awaiting a decision on access from the AAT following an appeal. Not surprisingly, bureaucrats have decided that release of information about the protection of our most priceless environmental asset from pollution was not in the public interest.

These delays are not isolated cases. Quite simply, the FoI process is so slow, expensive and difficult that few newsrooms can justify allocating limited resources to such a marginal proposition. More than anything, the lengthy delays are the greatest disincentive.

Nevertheless, the potential value of FoI to journalism has been recognised by *The Australian* with Editor in Chief Chris Mitchell appointing Australia's first FoI Editor in late 2002. The plan was for a dedicated specialist, who (theoretically!) understood the complexities of FoI law and could not only carry out investigations himself but also on behalf of other journalists on the paper.

While the success of this strategy is not for the author to judge, the use of FoI across News Ltd's publications around Australia is gaining momentum in a move endorsed by company chief executive Mr John Hartigan. The *Daily Telegraph* has appointed an FoI editor and other News Ltd publications are understood to be considering similar appointments.

Campaign to reduce delay

With the latitude provided by the specialised role, *The Australian* has embarked on a campaign to reduce the delays that so hamper FoI. First, the newspaper has argued and campaigned for new and improved FoI laws addressing, among other issues, the lengthy delays.

This author recently wrote News Ltd's submission to the Australian Labor Party on FoI reform with the ALP promising substantial changes if elected to government. Federal Attorney General Philip Ruddock has also told *The Australian* that the government is considering reforms in the commercial-in-confidence exemption that often thwarts attempts to improve the accountability of the private sector using public money to deliver government programs.

The submission noted that not only were agencies refusing to give documents in the majority of cases, but there were lengthy delays. Agencies like the Australian Taxation Office only granted 17.7% of applications in full in 2002–2003 according to the *Freedom of Information Act 2002–2003 Annual Report*. The same report notes the Department of Treasury only granted 13.6% of applications in full; the Department of Prime Minister and Cabinet granted 18.8% of requests in full and the Department of Education, Science and Training granted just 8.3% of requests in full.

Similarly, while the Act requires a determination within 30 days, in the case of the Department of Prime Minister and Cabinet, 36% of requests took longer than 90 days to receive a response. In 2002–2003, about 25% of FoI requests received by the Commonwealth Government took longer than the 30 days required for a determination, despite the massive increase in efficiency provided by information technology since the FoI Act's introduction more than 20 years ago.

The extent of delays can also be shown in the case of three AAT appeals over bracket creep, the First Home Buyers Scheme and the intergenerational report, where the Federal Treasurer has issued two conclusive certificates. The appeal, to be heard in July, will be over documents that have already been, on average, under request for 17 months, with the government blocking access because of apparent public interest concerns.

News Ltd has suggested to the ALP that employees and managers must be assessed on FoI performance as part of any employment review with a new Information Commissioner empowered to investigate and act on lengthy delays.

Appealing to the AAT

While improvements to the Act through legislative reform would be helpful, *The Australian* is now using the deemed refusal provision of the Act to improve agency compliance. Where an agency fails to provide a determination within 30 days, an applicant can appeal directly to the AAT on the basis that access to documents has been deemed to be refused.

Rather than awaiting a late decision, then undergoing an internal review which rarely alters a decision, an applicant can go straight to the AAT. This appears to annoy the government immensely. For example, the Health Department appeared relatively bored with complaints from the author about delays in relation to a request for documents about out-of-pocket medical expenses. An AAT appeal was lodged in the morning and, amazingly, the decision was provided by the afternoon to the newspaper.

While *The Australian* cannot afford the time or money to challenge every delayed decision in this way, there is both the will and resources to randomly select late applications for appeal. The key criterion, of course, is whether the public interest in the subject matter provides reasonable scope for success in the AAT.

More importantly, public servants have to carefully consider opting for endless delays when processing *The Australian* newspaper's FoI requests because they may have to explain their actions under cross-examination in the AAT, with the dangers of perjury leaving little place to hide. Naturally, those proceedings may well warrant publication.

The Australian invites the media, and other users of FoI, to follow the same strategy. It will force improvements in processing times and the $574 deposit fee to the AAT is refundable if even one page of government records is released.

MICHAEL McKINNON

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