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Comment

This issue presents three very different and interesting articles. The first article is an attempt to use the economic analysis work of Nobel Prize winning economist Joseph Stiglitz, in conjunction with recent work by Al Roberts and Greg Terrill, to address the framework necessary for considering how FoI laws should treat government and quasi government corporations. Judge Satyanand's paper is an insider's account of how one jurisdiction (New Zealand) — possibly to a greater extent than many comparable countries especially those with Westminster systems — has adjusted to having a relatively effective *FoI Act*. The third article whilst based on Canadian experience reminds us all of John Ralston Saul's argument in *Voltaire's Bastards*, in his chapter 'Art of the Secret', that 'there are endless simple methods for any government to get around access-to-information legislation'.

Paul Hubbard's essay brings a fresh and interesting combination of analyses to look at the perennial tough issue of how to regulate the access of information controlled or held by government business enterprises or other hybrid combinations of state and private organisations. In particular, the author attempts to incorporate the efforts of Joseph Stiglitz, to apply an economic perspective on information asymmetry to public policy decision making, with arguments and analysis that have focused on the issues of culture and compliance in FoI design and practice. There is much in this article that can be contested but it also has the potential to enliven future analysis. It has already provoked some interesting discussion between those who referred it for publication.

Judge Satyanand provides us with an insightful account of some of the ways in which FoI seems to work effectively in New Zealand. More importantly, this article provides some guides for other jurisdictions in making better choices about policy, legislative design and implementation of FoI in their own countries. New Zealand is too often overlooked when law reform bodies or parliaments are considering examples of FoI practice. The lesson to be learned is simply to avoid a slavish cut and paste adoption of the New Zealand *Official Information Act*. The New Zealand lesson stresses the necessity for policy choices based on a commitment to openness and an evolutionary system that transforms the operating precepts of the key information influencing elements in that system.

In the final article, Ann Rees makes the argument, based on a 12-month investigation in Canada, that there is a 'highly sophisticated, government-wide access to an information surveillance system designed and controlled by communications spin doctors bent on protecting the political interests of their bosses from the public's right to know'. Ann Rees was able to undertake this study supported by a media fellowship. Australian journalism could do with similar types of schemes and benefactors.

Finally, as this goes to print, News Ltd is taking the Federal Government on in the AAT over two major FoI issues — conclusive certificates and the infamous Howard factors that are far too often used to deny supply of relevant information to support public debate, commentary and critiques.

Rick Snell

Accountability in the grey area:

Employing Stiglitz to tackle compliance in a world of structural pluralism, a comparative study

In the grey area between the government department and the private corporation, lurk numerous government business enterprises, public-private partnerships, joint ventures and the like. These new forms of quasi-government enterprises do not fit neatly within existing freedom of information laws. The new pluralism challenges existing public and private notions of accountability. However, a new coherent justification for accountability can be established, based on arguments of efficiency and the need to smother corruption.

This paper attempts a comparative study of how these bodies are covered by existing freedom of information legislation. It is multi-disciplinary, drawing heavily on Alasdair Roberts' writings from a public policy perspective, and utilising the economic insight of Joseph Stiglitz. It responds to the challenge put forth by Aronson¹ and Snell² to address today's dominant paradigm — economics — on its own terms. In doing so, it draws on Finn's arguments based on competition policy, to provide a justification for a freedom of information regime in the murky world between public and private.

Notes on sources and methodology

The concept of 'structural pluralism'⁴ recognises the gap between 'government controlled' and 'market controlled' enterprise. Roberts identifies 'structural pluralism' as a particular challenge to freedom of information.⁵ While 'government ministries' in the traditional sense are the classic subjects of FoI literature, this research investigates the relationship of other organisations to freedom of information.

The recognition of 'structural pluralism' that Roberts brings to the study of freedom of information⁶ is used here. It offers a way to marshal bodies and enterprises that do not fit into traditional categories. In refusing to recognise the public/private dichotomy, it also calls into question underlying rationales for freedom of information. This is a question that must be answered if sensible information policy can be implemented in the grey area.

This paper incorporates a comparative study of five jurisdictions' freedom of information legislation. This is a useful guide as all are Westminster style democracies with similar legislative regimes, which are directly comparable. The Acts were also enacted over a twenty year period, which allows 'trends' in legislation to be detected. The response of other legislatures to these issues may be useful in determining future directions. This comparative statutory analysis is helpful to separate problems due to legislative drafting, from compliance issues.

This comparative study is not limited to legislation. It also draws from literature, particularly from the United States, Canada and Australia. To date, the discussion of

compliance has centred on the public service.⁷ By employing Stiglitz' economic perspective, the problem can be considered outside the cultural heartland of government.

PART 1 STRUCTURAL PLURALISM — WELCOME TO THE TWILIGHT ZONE⁸

There has been a trend in the last two decades toward privatisation and corporatisation. Many business enterprises of government are therefore trapped between the 'private' and 'public' spheres. However, freedom of information regimes were largely designed before this reinvention of government. Aronson has urged that administrative law deal with this by recasting the public-private dichotomy as a 'trichotomy', incorporating the new quasi-government enterprises. However, Roberts points out that the world has shifted towards pluralism in its institutions. New crossbreeds and mongrels have emerged that defy characterisation. The challenge to those seeking accountability is how to bring these institutions to heel.

The use of state-owned enterprises is not new. The accountability mechanisms that should be imposed have never been clearly identifiable. In Sweden in the 1950s, the application of the 'publicity rule' to different forms of state enterprise was not consistent.⁹ The same decade in India, the Auditor General declared that the 'practice of constituting State-owned enterprises as private companies' was 'a fraud on the *Companies Act* and on the Constitution'.¹⁰ However, since the early 1980s there has been a proliferation of these enterprises.¹¹ This new push goes beyond mere state-owned enterprises. It includes the 'contracting out' of government services and the 'the proliferation of quasi-independent organizations that are established by government but which refuse to be described as governmental'.¹² Should a quasi-independent organisation be subject to public law accountability?

There has been some consideration of this area. The Administrative Review Council (ARC) looked at the issue in the mid-1990s:

[M]uch of this debate centres on the degree to which private sector or public sector forms of accountability should apply to these hybrid bodies, and where to draw the line if a blend of both should apply.¹³

The ARC recognised that Government Business Enterprises (GBEs) 'are in a "grey zone", somewhere between what was traditionally considered to be the public sector and what was traditionally considered to be the private sector'.¹⁴ However, it justified its conclusion based on the paradigm dichotomy of public and private law: the justification for applying FoI is government control or

majority shareholding.¹⁵ However, where there is 'real' competition, the market (i.e. private), accountability mechanisms may be sufficient.¹⁶

The ARC did take the first step in recognising the hybrid nature of GBEs. However, the recommendations still cling to the 'frailty of the public law/private law distinction'.¹⁷ Aronson's statement is supported by Snell and Langston, who argue that the public/private conception has reached its use-by-date in this area.¹⁸ It is necessary to recognise the reinvention of the state.¹⁹ Aronson does this by adopting a concept of mixed administration.²⁰ This notion of mixed private/public enterprise creates a 'trichotomy', when added to the existing public-private dichotomy.²¹

Simply adding a new category is insufficient. As Roberts argues, 'heterogeneity is the order of the day'.²² Not all GBEs, joint ventures or privately contracted services were created equal. Roberts brings the notion of structural pluralism²³ to the issue. Roberts notes that 'the ambit of [freedom of information] law has shrunk'.²⁴ However, if the notion of structural pluralism is accepted, this is not the same as Terrill's statement that 'government has withdrawn from many areas where it has previously been'.²⁵ While Terrill sees grey-area enterprises as a boundary issue,²⁶ Roberts, having recognised pluralism, sees the 'fraying edges of government'.²⁷ This is a very useful way to approach hybrid bodies, as it allows us to see them as they truly are, not as we would like to categorise them.

Unfortunately, accepting pluralism creates a major problem for freedom of information. Commentators avoid this dilemma by tacitly assuming a public/private dichotomy, even when they know it is wrong. If clear delineations of public and private law do not fit the reinvented government, then the old justification for freedom of information in business enterprises (based on 'public' ownership and control), also loses potency. Roberts has attempted to address this by finding alternative justifications for freedom of information. He suggests a kind of harm principle²⁸ or a basis in civil and political rights.²⁹ While these are laudable ideas, they are hardly going 'to win credibility with the free marketeers'.³⁰ Part four of this paper uses Stiglitz' economic approach to suggest how this might be done.

PART 2 CAN CURRENT LEGISLATION BE EFFECTIVE IN THE GREY ZONE?

Before calling for a freedom of information revolution, it is worth examining legislation that is already in place. A comparative study provides a marketplace of ideas in how Government Business Enterprises have been covered by freedom of information. One approach is simply to list bodies covered, while the another is to legislate certain criteria to determine which quasi-government enterprises will be covered. The central criteria is government ownership or control (see part one). The Irish approach, a hybrid model, offers the best response to structural pluralism.

Even if a body seems to be covered, it may however escape real disclosure through reliance on exemptions relating to commercial information. The ability to shift information from the public to the commercial domain comes from restructuring. Unless the existing exemptions are tightened substantially, the ambit of freedom of information in a pluralist world is narrow indeed. Finn suggests that these exemptions are anti-competitive. This leads to Terrill and Roberts' suggestions that freedom of information has been deliberately eroded to simplify the policy process.

The extent to which GBEs are covered by existing legislation

To determine trends in freedom of information legislation, this paper compared legislation from five jurisdictions: Tasmania, Trinidad and Tobago, New Zealand, Jamaica and Ireland. The geography of these jurisdictions is somewhat similar, as all are island jurisdictions. All jurisdictions are based on Westminster systems of government with some sort of legislated access to information scheme. Although Tasmania is not a country, it has the apparatus of Westminster system. The jurisdictions are all of comparable size (400,000–3.9 million people). The legislation dates from 1982 (New Zealand) to 2002 (Jamaica).

The comparison reveals two approaches to determining whether a company/agency is or is not subject to Freedom of Information type legislation. The older approach used in New Zealand (1982) and Tasmania (1991) lists the bodies and authorities that are covered. The newer approach instead adopts a government ownership test, along the lines of that proposed by the ARC³¹ (Trinidad and Tobago (1999), Jamaica (2002)). Ireland (1997) adopts a hybrid combination of the two approaches. The fact that the new pieces of legislation have changed the way government business enterprises have been included suggests that there has been some legislative response by governments to the problem.

The ownership and control tests do not require active declaration or listing in order to be covered. This should stop any new bodies from slipping below the radar. For example, a Government Business Enterprise could not 'spin off' a business enterprise of its own, simply to avoid freedom of information. However, a definitive 'list' reduces arguments over whether or not a body is in fact covered. While a government ownership test may 'catch' most GBEs in the FoI net, Roberts expresses doubts as to whether one piece of legislation 'could be drafted to fit the diverse range of entities that have replaced big government'.³² For example, would an unincorporated joint venture be able to escape freedom of information laws?

For this reason, the hybrid Irish legislation may provide the best approach. Most quasi-government bodies should fall into the broad category of government ownership. That is not to say that government ownership is the most solid foundation for freedom of information.

However, it is a good category with which to identify bodies related to government. Enterprises that do not fit within this criteria could be still be included on a case-by-case basis. This provides a slightly more flexible administrative scheme.³³ This hybrid approach is well suited to dealing with a pluralist government structure functions.

Commercial exemptions to Fol: The sieve-like qualities of Fol

Simply being satisfied that a body falls within the realm of legislation is not enough. Freedom of information legislation has sieve-like qualities. The broad right to information held by the body runs away through exemptions in the legislation. In the context of quasi-government business enterprises, the key provisions relate to the protection of commercial information.

The legislation of all the jurisdictions studied protects trade secrets of both agencies and third parties. Other information exempted is information of commercial value (Ireland, Jamaica), information of which the release would prejudice commercial interests (New Zealand, Ireland, Jamaica) or information that would expose the enterprise to a competitive disadvantage (Tasmania, Trinidad and Tobago). All jurisdictions have similar exemptions for both government agencies, and third parties. It is through this third party mechanism that information relating to outside contractors may be protected. In three jurisdictions (Trinidad and Tobago, Tasmania, and Ireland), the interests of third parties may be outweighed by public interest considerations. Only in Ireland are public interest arguments able to outweigh these exemptions for government agencies. The scope of these exemptions has been criticised.

Finn provides an excellent analysis of them in the light of competition policy. He concluded that 'commercial information may well be significantly overprotected from disclosure under contemporary Fol legislation'.³⁴ He argues that exemptions, necessary to protect the competitive process, are justified. Exemptions that purely protect the commercial interests of one party are not.³⁵ Aronson supports this call to narrow the commercial exemptions.³⁶ This will be considered further in part four.

Regardless of whether the exemptions are too wide, the sheer quantity of information that can be excluded through exemptions grows following restructuring. As discussed in part one, the reinvention of government has involved immense restructuring. Government services that used to be provided by departments have had their form altered.³⁷ They are repackaged into commercial operations, making much of their information exempt. Roberts argues that this trend is neither temporary nor inadvertent.³⁸ Governments, argue Terrill, began to see freedom of information as an intrusion into the policy-making process.³⁹ To say that the government underwent massive restructuring to merely avoid complying with freedom of information would be going too far. There

are far easier ways to avoid compliance (see part three). However, Roberts' and Terrill's views suggest that little positive effort was taken to reconnect newly created bodies with effective accountability mechanisms.

This becomes truly worrying if Finn's analysis is correct. If the exemptions are in fact anti-competitive⁴⁰ then tightening exemptions should increase competition and effectiveness. The coherence of the 'economic paradigm',⁴¹ which underpins two decades of restructuring, is shaken if a desire to suppress participatory democracy has in fact undermined economic efficiency. It is hoped that this is a mere oversight that will be rectified by legislation. However, even the ability of central government to legislate may have little impact at the frontier of government.⁴²

PART 3 CULTURE AND COMPLIANCE

To be effective, legislation must not only be well drafted, but also followed. Part two has dealt with the letter of the law. Part three deals with the spirit of the law. The corporate culture of an organisation is essential for compliance with freedom of information legislation. However, the farther one gets from the 'core' functions of government, the less likely a culture supportive of Fol will be found. Existing legislation is geared towards the core of government. Similarly, Roberts' theory of compliance is under-equipped to deal with the fraying edges of government.

Non-compliance with freedom of information is a major issue even within government departments.⁴³ Culture is a crucial part of compliance. According to Hammitt, 'freedom of information laws work best when agencies subject to them believe in maximum public disclosure'.⁴⁴ This 'Cultural Lens' was of great importance to the recent Canadian Access to Information Task Force.⁴⁵ The importance of culture cannot be understated. Berzins, presenting the perspective from the public service itself states that where 'there is outright hostility to the principle of access throughout the institution, the access process certainly cannot function'.⁴⁶

Few commentators have yet applied the cultural analysis to the grey zone. The suggestion of the Canadian Task Force was that to stress the connection between access to information and cornerstone public service values,⁴⁷ seems somewhat futile if management of a quasi-government enterprise do not see themselves as public servants. Added to this is the uncertainty about the role of these new bodies. It is difficult to determine the core values for an enterprise 'trapped in a kind of twilight zone, searching for that elusive balance between freedom from government constraints and accountability'.⁴⁸ Although Roberts does identify this 'displacement of the "public service" ethos'⁴⁹ as one of the challenges to freedom of information in a pluralistic world, it is not clear that trying to re-infuse those values in the fraying edges of government is possible. The farther one gets from the government department the less one is likely to recognise and commit

to public service values. An appeal to culture is unlikely to work.

The existing legislation provides no help in aligning cultural values, and therefore encouraging compliance in the grey zone. This can be supported by a quick study of purpose clauses in FoI legislation.⁵⁰ Executive accountability is a stated purpose of FoI in New Zealand, Tasmania, Ireland and Jamaica. Participation in government is a purpose in New Zealand, Tasmania and Jamaica, and transparency in Ireland, Trinidad and Tobago, and Jamaica. However, it is difficult to see how purposes rooted in government transparency, executive accountability or democratic participation will hold much purchase in organisations that 'refuse to be described as governmental'.⁵¹

Roberts has pioneered a more sophisticated model of compliance, which has been adopted by Snell.⁵² Drawing on the work of Terrill, Snell notes many ways in which compliance is hindered. Although he is primarily addressing the civil service, one particular comment applies to grey-area corporations to an even greater extent. In the public service, FoI officers 'find themselves torn between their clear legislative requirements and the more pressing and immediate perceived requirements of their bureaucratic and political leadership'.⁵³ In the grey zone, the real requirements of profit, and the fracturing of employment from ideas of public service, increase the incentive to please the boss.⁵⁴ This could be addressed by strengthening the presumption of disclosure. Rather than merely relying on sections of an Act, it has been suggested that an articulated outline of foreseeable harm⁵⁵ must also be made before disclosure. A disadvantage of this suggestion is that it may move FoI even more into the legalistic, adversarial process, which does not really fit the culture of open and accountable government.⁵⁶ However, given that this culture may already have broken down at the 'frayed edge' of government, this should be considered.

As useful as Roberts' model is within government, it lacks critical factors to illuminate the twilight zone of accountability. Culture is such an important part of compliance, but it appears to erode the further one gets from government. Roberts' model is therefore incomplete without it. However, the bugbear of structural pluralism reappears. Adding a categories for 'Department', 'GBE' and 'Joint Venture' under a heading of 'Type of body requested' fails to deal with the hybrid nature of pluralist institutions. Some sort of continuum would be preferable, but it is unclear how this could be graded objectively. Similarly, Aronson suggests that compliance is degraded the more 'commercial' government operations become.⁵⁷ While this may be more neatly categorised into Roberts' model, it does not solve the problem. The Roberts Compliance Model loses its elegance and usefulness once too many grey-area variables are introduced.

The paper has so far revealed the crisis that freedom of information faces when dealing with structural pluralism:

the public law nature of traditional FoI justifications been shaken. The scope of legislative exemptions seem to undermine accountability. Now we see that existing analyses of culture and compliance are ill-equipped to deal with the grey zone of government. The final part of this paper will use the economic perspective provided by Stiglitz to resolve this conundrum.

PART 4 STIGLITZ: AN ECONOMIC PERSPECTIVE

The work of Nobel Prize winning economist Stiglitz is crucial to addressing this problem. Like most commentators, he agrees that the problems of freedom of information are rooted more in culture than legislation.⁵⁸ However, he brings a strong economic perspective to the issue of information access. There are both costs and benefits involved with withholding or disclosing information. Compliance follows when the cost of withholding is high, and the benefit of withholding is low.

As information becomes a commodity, attempting to control that information provides certain advantages. However, information asymmetries⁵⁹ are also detrimental to the integrity of the market. At the low end of the scale, the rent charged on information creates inefficiency and poor service provision. It protects under-performing management and enterprises, contrary to the goals of the very restructuring that created it.⁶⁰ Even more dangerously, the lack of transparency that an information asymmetry forms is the basis for systematic corruption.

The value of information

Stiglitz' basic contention is that non-compliance will occur where there is sufficient incentive for secrecy.⁶¹ Compliance is reduced when the benefits in withholding information are too great. These benefits are significant. Information is the 'central commodity' of the 'new information economy'.⁶² Governments will naturally want to assert rights over it, Roberts argues.⁶³ Stiglitz backs this in economic terms:

Lack of information, like any form of artificially created scarcity, gives rise to rents.⁶⁴

From a purely theoretical perspective, controlling information is valuable in itself. The rent for this control of information is collected in a number of different ways in the grey area.

The benefit to the enterprise of withholding information

The first reason why grey-zone enterprises may be withholding information is straightforward — self preservation. As Stiglitz points out, secrecy provides a shield against being accused of making a mistake.⁶⁵ Either the mistake will never be found, or if it is, blame can be avoided. There is a reason why this benefit may have greater value to a government business enterprise than an ordinary department. In the department, the conventions of Westminster require a Minister to take responsibility. Even though they are unlikely to resign, they will still bear the political responsibility for their department

(although there is much discourse in this field). However, with independence from government being a key feature of a GBE⁶⁶ or other grey-area denizen, it is unlikely that a Minister could or would take any responsibility. Blame is likely to fall on the management of the enterprise. It could even effect the viability of the enterprise as a whole. There is therefore both a personal and systematic reason in attributing value to withholding information.

Withholding information also allows enterprises to maintain competitive advantages against competition. This was pointed out by Finn (see part two). This is commonplace behaviour in the private sector:

one thing that appears clear in real world markets, as opposed to ideal types of those markets, is that firms constantly engage in a wide variety of strategic behaviours, designed to protect their individual market position, precisely by preventing the market forces from having their full operation⁶⁷

Even in a monopoly situation in which a quasi-government enterprise is likely to operate,⁶⁸ there is a huge benefit to be gained in preventing a market from being established. Uninformed proposals and ideas are unlikely to be effective.⁶⁹ A commercial position is therefore protected not by being more efficient, but simply by denying outsiders the opportunity to compete.⁷⁰ More rent is thereby collected.

Another perceived benefit is the simplification of decision making.⁷¹ The transfer of information is not an end in itself — it may lead to an expectation of participation in governance.⁷² While such popular participation may well enhance the quality of the decision made,⁷³ serious consultation may be long and costly. Deadlines may be missed. Although this may be tolerated in a public service culture with some commitment to participatory democracy, a slim and supposedly competitive GBE may see it as more of an irritation.

Finally, the ever present issue of under-resourcing of Fol⁷⁴ is directly applicable to an economic analysis. Good Fol staff need not only be paid, but trained.⁷⁵ A GBE struggling to meet breakeven or profit requirements is unlikely to give a high priority to the administration of Fol. This is especially the case if Fol is seen as a troublesome cause of disruption and roadblocks.⁷⁶

The cost to the enterprise of withholding information

The cost to the business enterprise of withholding information is fairly low. This is partly due to what Terrill has identified as the systematic advantage of government over the individual.⁷⁷ Without a large and informed freedom of information constituency, prepared to appeal dubious refusals and attract attention, then a quasi-commercial enterprise could probably deal with most requests quite cheaply by relying on the broad commercial exemptions (see part two). Even if appeals find against the enterprise, there is no penalty to be paid.

The benefit to the enterprise of disclosing information

It is possible that products and services would be improved if enterprises are prepared to listen to their consumers. This is appropriate in this discussion, as the drive to private sector forms is meant to make the consumer sovereign.⁷⁸ Aronson argues that the impact consumers (or citizens) can make is proportional to the information they are given.⁷⁹ Stiglitz agrees that access to quality information is essential if outside suggestions will be well suited to a particular problem.⁸⁰ For enterprises that value listening to their customers, there would be some value in disclosing information. Unfortunately, most of these business enterprises have arisen where government is the sole provider of a service.⁸¹ When such a service is essential (such as electricity), then consumers have no choice but to accept the service. In the absence of a competitive market, the body is under no market pressure to improve products or decrease costs.

The enterprise perspective

Having brought some of the ideas of Finn, Roberts, Terrill and Snell into Stiglitz' economic thesis, it can be seen that the benefits of withholding information by and large outweigh the costs for the organisation. It is not a complete analysis, but it goes some way to explain why we might expect compliance to be fairly abysmal in the grey area. The notion of service to the public and the benefit to the public service of disclosing information is foreign to the business enterprise. While there may be some brownie points to be gained from being 'good corporate citizens', there is too much value in maintaining an information asymmetry.

The cost to the economy, government and society of withholding information

Underlying all this is a massive cross-subsidy. Although it may be in the interests of government business enterprises to avoid accountability, the cost of secrecy is actually transferred to the economy at large. These costs fall into two categories — lost efficiency and corruption.

Efficiency

The purpose of the restructuring that created the grey area was economic efficiency and better service outcomes.⁸² This depends on a good flow of information.⁸³ Finn points out that the continuous and reliable provision of information is fundamental to an effective market.⁸⁴ Economically rational people depend on information,⁸⁵ which is why stock markets require continuous disclosure of information.⁸⁶

Allowing artificial asymmetries of information to exist is anathema to this.⁸⁷ As shown above, the enterprise derives great benefits from secrecy, in terms of protection from competition. In addition, in areas without an 'exit strategy' for consumers, there is nothing to improve the quality of the service offered. The voice of the consumer is the only tool to improve the product.⁸⁸ It may be the only

way to facilitate fair, impartial and rational decision making,⁸⁹ where there is no serious competition.

Those reluctant to apply serious information disclosure in the grey area often argue on the basis of the public/private dichotomy (see part one). The argument is that a level playing field⁹⁰ between GBEs and private companies is required for proper competition. Therefore 'public law' remedies should not apply in 'private law' fields of activity. Others have already drawn attention to deficiencies in this argument — notably that government owned enterprises are not subject to stock market pressures,⁹¹ which gives incumbent management of a government business enterprise an almost unassailable position behind a wall of secrecy.⁹² While this may be good for stability, it allows under-performing management to continue, seriously damaging the economic efficiency argument upon which the whole structure was founded.

Corruption

Corrupt behaviour, like secrecy distorts the market and hampers efficiency.⁹³ If allowed to take root, it also inhibits development and growth, but undermines social cohesion and the rule of law.⁹⁴ Stiglitz argues that lack of transparency is at the root of corruption.⁹⁵ According to Aronson, secrecy is a major risk factor in corrupt behaviour.⁹⁶ For this reason, improvements in information flow are able to reduce the scope for such abuses.⁹⁷ A discussion of corruption in quasi-government bodies is especially important, as much corruption 'occurs at the interface between the public and the private sector'.⁹⁸

Applying the economic calculus, a regime like freedom of information may be better at preventing corruption from taking root, rather than weeding it out. This is because once information becomes incriminating, the value in withholding it would skyrocket. A request for this information would most likely result in malicious non-compliance.⁹⁹ However, even if freedom of information is unable to tackle corruption head on, a systematic monitoring of compliance may provide a hint that all is not well.

The problem of corruption, and the potential role of comprehensive disclosure mechanisms should not be undermined. An information asymmetry, such as a lack of transparency, allows corruption. This in turn distorts the marketplace.¹⁰⁰ In addition 'it erodes respect for the law; and teaches people that honest work is not where the rewards are to be found. Corruption demoralizes people and destroys social cohesion.'¹⁰¹ Respect for the rule of law is surely essential for a level playing field. The demoralisation of people and destruction of social cohesion is clearly not a policy objective of any democratic government.

A way forward?

The problem of information asymmetries is not new. They exist in the private sector in the relationship between the owners and managers of a private corporation.¹⁰² Some

mandatory disclosure is required by corporations legislation, however the capital markets, voluntarily opted into by corporations, also have an effect.¹⁰³ The Listing Rules of the Australian Stock Exchange (ASX) devote an entire chapter to Continuous Disclosure, which requires the publication of 'events and developments as they occur'.¹⁰⁴ Obviously, the advantages of finance available through the market¹⁰⁵ outweigh the value of withholding information. While it may be unlikely that we see a 'GBESX' any time soon, economics may have a very real role to play in encouraging information flows.

Freedom of information, in its present form, may not be able to do this. Terrill has explained that due to the individualised nature of requests, freedom of information does not function as a mechanism for the systematic redistribution of information.¹⁰⁶ In this way, it is radically different from forms of corporate accountability, where there is no disclosure to individual, atomised shareholders.¹⁰⁷ It may be that the publication of the results of non-personal requests should be made openly. However, the broader approach to information policy sought by Terrill¹⁰⁸ is needed to systematically and coherently address the issue.

Conclusion

Freedom of information is a tool for encouraging information flow between government and citizen. It faces significant challenges outside the heartland of government. Existing freedom of information regimes were not designed with structural pluralism in mind. Similarly, existing commentary on compliance and culture does not apply directly to the problem of transparency in the grey area. Nevertheless, by adopting Stiglitz' economic model, it is possible to draw the arguments of compliance and culture into a coherent discussion about information flows. The Stiglitz analysis provides an explanation as to why any sort of disclosure mechanism will face stiff compliance issues. However, it also provides a strong economic justification for applying disclosure mechanisms. Armed with a justification that goes beyond the 'public/private' divide, we may at last be able to address the problems of accountability in the grey area.

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References

1. M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in M Taggart (ed) *The Province of Administrative Law* (1997) 63.
2. Snell R and Langston E, 'Who needs FOI when market mechanisms will deliver accountability on demand? A critical evaluation of the relationship between freedom of information and government business enterprises' [1999] 3 FJLR 215 at 224.
3. M Coper, from 'Discussion Paper, Administrative Review of Government Business Enterprises' (1993) Administrative Review Council, 38.
4. A Giddens, *The Third Way and its Critics* (2000) 55.
5. A Roberts, 'Structural pluralism and the right to information' *University of Toronto Law Journal*, 51.3 (July 2001), 243–271.
6. *Ibid.*

7. See Snell, 'Administrative Compliance — evaluating the effectiveness of Freedom of Information' 93 *Freedom of Information Review* 26.
8. Coper, above n 3.
9. DV Verney, *Public Enterprise in Sweden*, (1959) 82.
10. *Ibid.*, 4, quoting *Some Problems in the Organisation and Administration of Public Enterprises in the Industrial Field* (1954) 13.
11. Aronson, above n 1, page 41.
12. A Roberts, 'The Informational Commons At Risk' in Daniel Drache (ed), *The Market or the Public Domain: Global Governance and the Asymmetry of Power* (2001) 175–201, accessed from <<http://faculty.maxwell.syr.edu/asroberts/documents/chapters/commons.pdf>> at 30 June 2004, 10.
13. Administrative Review Council 'Discussion Paper, Administrative Review of Government Business Enterprises' (1993) 1.
14. *Ibid.*, 44–45.
15. *Ibid.*, 45.
16. Administrative Review Council, Report No. 38, 1995, summary accessible at <<http://www.law.gov.au/www/arcHome.nsf/Web+Pages/EA6F31DCE53969C6CA256B3C001E2EB6?OpenDocument>> at 30 June 2004.
17. Aronson, above n 1, 55.
18. Snell and Langston, above n 2, 232.
19. Snell and Langston, above n 2, 245.
20. Aronson, above n 1, 52.
21. Aronson, above n 1, 63.
22. Roberts, above n 12, 28.
23. Giddens, above n 4, 55.
24. Roberts, above n 5, 244.
25. G Terrill, 'The Rise and Decline of Freedom of Information in Australia' in McDonald and Terril (eds) *Open Government, Freedom of Information and Privacy* (1998) 110.
26. *Ibid.*, 108.
27. Roberts, above n 12, 8.
28. Roberts, above n 5, 256.
29. *Ibid.*, 259.
30. Snell and Langston, above n 2, 238.
31. Above n 13, 45.
32. Roberts, above n 12, 28.
33. See Snell and Langston, above n 2, 242.
34. Finn, 'Rethinking commercial confidentiality in the decade of competition policy' 106 *Freedom of Information Review* 60 at 66.
35. *Ibid.* 67.
36. Aronson, above n 1, 63.
37. *Ibid.*, 41.
38. Roberts, above n 12, 8.
39. G Terrill, 'Individualism and freedom of information legislation' 87 *Freedom of Information Review* 30 at 30.
40. Finn, above n 34 at 66.
41. Aronson above n 1, 44.
42. Roberts, above n 12, 6.
43. For an overview see Snell, 'Administrative Compliance — evaluating the effectiveness of Freedom of Information' 93 *Freedom of Information Review* 26 at 28–29.
44. H Hammit, 'The better part of discretion — US Style' 77 *Freedom of Information Review* 67 at 67.
45. Access to Information Review Task Force 'Access to Information: Making it work for Canadians', 2002, 157.
46. Berzins, 'Ontario Freedom of Information Process' [2002] 26 *Advocates' Quarterly* 7.
47. Access to Information Review Task Force, above n 45, 159.
48. Coper, above n 3, 38.
49. Roberts, above n 5, 244.
50. The *Irish Freedom of Information Act* (1997) contains no purpose clause. Information on purpose was taken from Information Commissioner's 2002 report, ch 1.
51. Roberts, above n 12, 10.
52. Snell above n 43.
53. *Ibid.* at 29.
54. This issue of discretion is also raised in Hammit, above n 44.
55. *Ibid.* at 67–68.
56. Gillis, 'Freedom of Information and Open Government in Canada' from McDonald, Terril *Open Government, Freedom of Information and Privacy*, (1998) 151.
57. Aronson, above n 1, 61.
58. Stiglitz, 'Transparency in Government' from *The Right to tell: The role of mass media in economic development*, World Bank (2002) 42.
59. *Ibid.*, 27.
60. Snell and Langston, above n 2, 236.
61. Stiglitz, above n 58, 42.
62. Roberts, above n 12, 2.
63. *Ibid.*
64. Stiglitz, above n 58, 35.
65. *Ibid.*, 34.
66. Above n 13, vii.
67. Finn, above n 34, 61.
68. Above n 13, 46.
69. Stiglitz, above n 58, 32.
70. Finn, above n 34 at 61.
71. Roberts, above n 12, 8.
72. 'Observations on the Protection and Promotion of Freedom of Expression in Ethiopia: Submission Presented to the government of the Federal Democratic Republic of Ethiopia by Article 19, The Global Campaign for Free Expression' 22 November 2000.
73. Above n 13, 38.
74. Snell, above n 43, 29.
75. Access to Information Review Task Force, above n 45, 160.
76. Snell, above 43, 28.
77. Terrill, above n 39, 30.
78. Aronson, above n 1, 60.
79. *Ibid.*
80. Stiglitz, above n 58, 32.
81. Above n 13, 46.
82. Snell and Langston, above n 2, 236.
83. Aronson, above n 1, 69–70.
84. Finn, above n 34, 60.
85. Aronson, above n 1, 59.
86. See Australian Stock Exchange (ASX) Listing Rules, chapter 3, 301 <<http://www.asx.com.au/ListingRules/chapters/ch03.pdf>> at 30 June 2004.
87. Stiglitz, above n 58, 27.
88. Stiglitz, above n 58, 32.
89. Above n 13, 38.
90. *Ibid.*, 8.
91. *Ibid.*, 13.
92. Finn, above n 34, 61.
93. M Bonham and D Heradstveit, 'The Psychology of Corruption in Azerbaijan and Iran' in D Heradstveit and H Hveem (eds), *The Challenge of Democracy and Development in the Gulf* (forthcoming), p 16 of chapter.
94. *Ibid.*, p 1 of chapter.
95. *Ibid.*, p 9 of chapter.
96. Aronson, above n 1, 61.
97. Stiglitz, above n 58, 28.
98. Africa Governance Forum (AGFII) 'Accountability and Transparency in Africa A Concept Paper', <<http://www.uneca.org/unsia/cluster/govern/forum2.htm>> at 30 June 2004.
99. See Snell, above n 43.
100. Bonham and Heradstveit, above n 93, p 16 of chapter.
101. *Ibid.*, p 1 of chapter.
102. Stiglitz, above n 58, 27.
103. *Ibid.*, 28.
104. Above n 86, 301.
105. HA Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (11th Edition, 1993) 759.
106. Terrill, above n 39, 31.
107. Snell and Langston, above n 2, 244.
108. Terrill, above n 39, 31.

The benefits of Fol: The New Zealand experience

Information is the currency of democracy.

Thomas Jefferson, 3rd President of the United States 1801–1809 (Attribution)

I believe that information is the coinage of democracy.

Hon Richard Prebble MP during first reading of the Official Information Bill in the New Zealand House of Representatives, Wellington, on 23 July 1981.¹

The right to information has become one of the fundamental rights of the 20th century citizen ...

Lionel Jospin, Prime Minister of France, in an opening address to the International Statistical Institute Conference, Paris, 1989.

Some Freedom of Information releases will bring with them disobliging headlines for the government. But each and every release will contribute day by day towards [our long term vision of] a more transparent government in which people feel greater confidence.

Rt Hon Lord Falconer of Thoroton, Lord Chancellor, Speech to the Campaign for Freedom of Information, St Bride Institute, London on 1 March 2004.²

The above four quotations, from widely different sources, have a resonance for the matter of securing, where that is lawful and possible, access to information that might be held by a government.

The context of Freedom of Information (Fol)

In many countries relevant to the discussion, the executive of the party commanding a voting majority in the legislature produces its policy through legislation to parliament, and having succeeded in its passage, then implements those policies through the actions of government ministries, departments and organisations. The exercise of such power is subject, in appropriate cases, to questions raised in the legislature or before select committees, to check by the courts, and on occasions of executive maladministration by reference to ombudsmen. Lastly, in those countries where there is freedom of information legislation in force, there arises a need for the executive to demonstrate accountability by making known, on request, what has been done, and again on request, the basis and the reasons for that.

New Zealand is one such country. It has a population of four million, a legislature of 120, a mixed member proportional system of voting to a unicameral parliament, that is, with some members elected from electorates and others elected according to national party lists. In the present era, that is, for most of the last decade, the country has had experience of governments that need to form coalitions, or agreements for support, with at least one more party to secure necessary votes in the House in order to pass legislation. The nature of government thus often requires negotiation over forthcoming legislation and as a result there is a need on the part of opposition parties for information to map out the nature and extent of opposition to — or support for — government legislation. Similarly, the actions of government undergo scrutiny, not only from citizens but groups connected with opposition and as a

result of which there is a need for information. Many New Zealanders would describe the foregoing changed environment as the achievement of an era of 'open government', where there is an expectation of having access to official information.

The Fol policy options

Information in the possession of the government can be said to belong in a legal sense to it, or, as used to be said '[The information is] the property of the Queen and her advisers' and therefore not readily available. On the other hand, the same information can be said to belong to the people, in whose name the affairs of government are conducted. In this second mode, a case can be made out for availability on request, perhaps with the presence of withholding grounds by which can be preserved matters to do with security of the state, maintenance of the law, personal privacy or commercial sensitivity — to take four examples.

These kinds of arguments were assessed by a New Zealand committee of senior civil servants undertaking a review of official information in the late 1970s.³ Their conclusions can be expressed in the following sequence:

- The assumptions implicit in the *Official Secrets Act* were not in keeping with contemporary attitudes and in practice not strictly enforced.
- The assumption on which both the government and interested groups were tending to work was that official information should be made available to the public unless there were good reasons to withhold it in the interests of the community at large.
- The government should reaffirm its responsibility to keep the public informed of its activities and to make official information available unless there was good reason to withhold it.
- The changes [proposed] were of such constitutional importance that they deserve to be given the force of law.
- The essential purpose of the new system was to improve communication between the government and the people.
- The effectiveness of the reforms would depend largely on the attitudes of those directly concerned — not only of ministers and officials but also individuals, interest groups and the public media.
- Balance is a goal that could seldom be fully achieved but if it were not actively sought after, the credibility of those involved might suffer.
- Greater freedom of information could not be expected to end all differences of opinion within the community or to resolve major political issues. If applied systematically, however, and with due regard for the balance between divergent interests [the changes] should help to narrow differences of opinion, increase the effectiveness of policies adopted and strengthen public confidence in the system.⁴

The policy

The foregoing report was adopted by the government of the day and became New Zealand's official information legislation. The *Official Information Act 1982* is based on access to information as opposed to supply of documents, along with a presumption of availability, except where good reason for withholding exists under the Act. It is possible for the information holder to impose reasonable charges for supply of information. There are no exceptions on the basis of class or category of information, so that items such as cabinet papers and security documents are covered by the Act and may be dealt with under its terms. If dissatisfied with the information holder's decision on the application for access, a requester can ask an ombudsman to investigate and review whether the application should have been refused or whether the decision by the information holder on the application may be otherwise unreasonable or wrong. All ministers and most ministries, departments and other government organisations are subject to review in this way. There is companion legislation for local government to which freedom of information was extended in 1987.

The legislation

The philosophy of the legislation is contained in capsule form in early sections that say that the purpose of the Act is to:

Increase progressively the availability of information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies and to promote the accountability of Ministers ... and officials ... and thereby to promote ... good government.⁵

Another early section goes on to say that there is a principle of availability unless there is good reason for withholding information.⁶

Requests for information fall to be considered under two headings — administrative and substantive. Administrative concerns, such as a request not being framed in a sufficiently particular fashion, the time and cost of collation, the material already being publicly available elsewhere, the information requested being trivial or the request being frivolous or vexatious, are addressed by mechanisms in the Act. Once administrative or procedural concerns have been addressed, substantive grounds for refusal may then be canvassed by the information holding body. In essence, this requires the information holder to consider two questions — first, whether disclosure would be likely to result in any detrimental effect, and secondly, whether such detrimental effect is in fact covered by one of the specific reasons for withholding information under the Act.

There are two sets of withholding grounds — conclusive and defeasible. The conclusive grounds include where the making available of information would be likely to prejudice the security or defence of New Zealand or the international relations of the government, or to prejudice the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial.

Other conclusive grounds relate to safety of persons and damage to the economy. If these [conclusive] withholding grounds are invoked against a requester, an Ombudsman may be called on to consider the information to determine that the categorisation invoked is appropriate and, if so, to confirm the appropriateness of declinature. This is done without taking into account any wider public interest considerations to which reference is made presently.

There are some 12 defeasible grounds, the most commonly invoked being protection of individual privacy, protection of commercially sensitive information, protection of information that may be the subject of an obligation of confidence, protection of the confidentiality of advice tendered by ministers of the Crown and officials, and protection of free and frank expression of opinion by, between or to ministers and departmental employees. Protection also exists for legal professional privilege and disclosure for improper gain or advantage. When these grounds are cited to refuse a request, the case is also brought to an ombudsman who, in the first place, determines whether the withholding ground has been properly invoked. In terms of the legislation and arguments presented by the requester, the ombudsman then makes a determination as to whether the withholding is

outweighed by other considerations which render it desirable in the public interest to make that information available.⁷

In other words, the defeasible withholding grounds are subject to a public interest test. Over a 20-year period, the number of *Official Information Act* requests brought to the ombudsmen has grown markedly. Users of the legislation now include, in significant numbers, members of parliament, the opposition parliamentary research units, the press, legal advisers and corporate associations as well as individual requesters. In the most recently reported year the ombudsmen reported to Parliament on some 1500 cases that they had determined under the *Official Information Act* in a workload numbering approximately 6000 cases. There are more detailed statistics contained in the annual report made by the ombudsmen to the New Zealand Parliament each year.

After a recommendation made by an ombudsman that certain information should be made available, a 20-working day period of time runs, during which the withholding body has the option of releasing the information, in accordance with the recommendation. There is retained a right of what in shorthand may be called 'veto by cabinet' because an order in council can prevent the ombudsman's recommendation from taking effect. Following the twentieth day a public duty arises for the information holding body to comply with. A significant feature is therefore that responsibility for the actual release is retained by the information holding body, not by the ombudsmen. In the event that a public duty arises the matter is referred by the ombudsman to the Attorney General who brings action in the High Court to enforce

this. It may be noted that the veto power referred to has not been utilised during the past fifteen years. The fact that it has not been used represents an interesting aspect of the relationship between the ombudsmen and the Executive with the Executive knowing it might be criticised for using the veto, this acting as a deterrent, whilst the ombudsmen would rather that any precedent for use of the veto not be set, this acting as an incentive towards understanding of the view furnished by the information holder. There is an interest all round in seeing the balance preserved. It will be noted that there are a number of differences from the United Kingdom Freedom of Information legislation with the latter's different kinds of exemptions and tests.

The experience

Each case must be considered by an ombudsman on its own merits but very often, with experience of many cases of a similar kind, it becomes possible to predict the way in which the Act may be complied with. The ombudsmen publish Practice Guidelines that are made available to users of the Act. Very often there is a balancing exercise required between competing interests to determine what level of disclosure may be required in the public interest in a particular case. On a number of occasions the ombudsmen and their specialist staff are called on to act as facilitators or catalysts to ensure the production of suitably anonymised synopses and summaries of information. These, whilst preserving the precise items sought to be withheld, also enable the appropriate amount of accountability envisaged by the legislation. The ombudsmen also publish case notes and maintain information on a website <<http://www.ombudsmen.govt.nz>>.

Twenty years of operation have seen two principal kinds of information being responsible for most argument. The first relates to information that may be held by a minister or department in relation to policy being developed when that information may also be of interest to opposition politicians or lobby groups or the press. In such (pre-decisional) circumstances a line comes to be drawn along the continuum between formulation of an idea and presentation of the policy at the beginning of which it is desirable for the information to be withheld whilst the policy is discussed with officials and perhaps other ministers. Somewhere along this line comes a point at which it may be desirable for release to be sought and obtained. This is so that submissions may be made either in support of or in opposition to that proposed. Information comes to be made available under the heading of better participation in the making and administration of laws. The second relates to information that may be held by a minister, but more often by a regulatory agency, after an event has occurred and where the actions of government officials may be in question as to fairness or appropriateness. In those [post-decisional] circumstances also there may be a need to demonstrate how fairly an organisation

has conducted itself and therefore a proper case may arise for disclosure.

The New Zealand legislation can be said to have five unique features:

- (i) a right to information, not documents, which enables compliance with requests using paraphrasing, summarising and oral briefing in addition to supply of copies;
- (ii) the term 'information' is not itself defined thereby encompassing oral and electronically retained information;⁸
- (iii) no exemptions from coverage that underpins a need for well drafted and durable withholding grounds;
- (iv) referral to ombudsmen for disposition of complaints and reviews leading to recommendations for conclusion that can become legally binding; and
- (v) a section that provides a right for a requester to receive reasons for a decision having been made, thereby helping promote accountability using information in the possession of a government agency.

Twenty years of operation have seen this become a low key practical method of investigation and review in which information holders routinely supply ombudsmen with the information upon request by letter without there being need for resort to ombudsman powers of summons, and requirement to produce and to answer questions under oath. In unusual circumstances an own motion investigation by ombudsmen has sought and obtained answers as to why incorrect or incomplete information may have been provided. In a recent case the government official who had withheld information from an ombudsman inquiry was dismissed by his ministry when this became known. The ministry in question has reviewed its procedures and has issued a new policy.⁹ There does, however, remain a need for ongoing training about freedom of information processes. There are limits to the extent to which this may be undertaken by the ombudsmen's offices and there is still a challenge for training to maintain priority in the public sector generally. The general tenor of compliance with the Official Information legislation by the public sector can be said to maintain standards of accountability.

In the course of 20 years, there have been a small number of cases that have proceeded to the High Court and the Court of Appeal, judgments in the Law Reports delineating the constitutional nature of the legislation and confirming the nature and extent of the tests that should be applied by either information holding bodies when considering requests, or by an ombudsman on review.¹⁰

Conclusion

Freedom of information appears to have suited the New Zealand context where the population is small and the political chemistry one of direct relationships, due to the legislature being unicameral and subject to election every three years. It has been necessary to have the ongoing

commitment of the civil service to make the legislation work.

The day-to-day work of the ombudsmen under the *Official Information Act* is by way of assessment that a withholding ground has been properly invoked, and in determining whether, in the circumstances, there may sometimes be a ground whereby release of the information is nonetheless proper, having regard to the public interest. Ombudsmen are also involved because of a methodology that has been employed under the ombudsmen legislation for nearly 40 years in persuading both citizens and government organisations towards a satisfactory outcome. This can be, in the context of the *Official Information Act*, by way of encouraging the release of summaries, excerpts or other solutions brought about by eventual agreement.

The *Official Information Act*, when drafted, envisaged the availability of information to the ordinary everyday citizen. It may not have been predicted that, within a 20-year period, the right to information would come to be exercised in a much wider fashion involving requests from lawyers, from members of the press and the media generally, and from members of parliament exercising rights to information in addition to, or aside from, those obtained under the standing orders of the House by parliamentary question.

As a result, therefore, ministers of the Crown (for example, as well as ministries, departments and State Owned Enterprises) have come to receive many more requests for information than may have been forecast by the authors of the Danks Report and the framers of the *Official Information Act*. It is now an everyday occurrence to read in the newspapers of information that has been obtained under the *Official Information Act* from a minister (or department) or that information has come to light after an investigation undertaken by the country's ombudsmen. Ministers need to have, in most cases, specialised and trained staff equipped to deal with multiple requests for information. Ministers need to be able to argue the need to withhold information in appropriate circumstances, and to withstand what are effectively appeals to the jurisdiction of the ombudsmen when cases are taken by way of the review mechanisms provided by the *Official Information Act*.

Behind the *Official Information Act* stands the *Ombudsmen Act 1975* and its predecessor the *Parliamentary Commissioner (Ombudsman) Act 1962*. For nearly 40 years New Zealanders have been able to have direct access to an officer of parliament to investigate instances of unfairness or mistake.

In a system where there has been a pervading practice of freedom of information for so long, it is recognised that much information will be made available upon request. As the erstwhile Secretary to the New Zealand Cabinet, Marie Shroff, wrote in a 1997 contribution to a conference on the *Official Information Act*:

Governments [too] have adapted to the new regime. Indeed, virtually all written work in the government these days is prepared on the assumption that it will be made public in due course. The idea of maintaining secrecy over ordinary official information, especially after decisions have been made, already seems old-fashioned and a little quaint. Instead, the focus in the current open style of government is on managing the dissemination of official information.

This present paper commenced with a quotation attributed to United States President Thomas Jefferson, and it may be apposite to end with another:

Whenever the people are well-informed, they can be trusted with their own government. Whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights.

Thomas Jefferson, 3rd President of the United States 1801–1809.

JUDGE ANAND SATYANAND

Judge Anand Satyanand is an Ombudsman in New Zealand who has held office since 1995, and was previously a legal practitioner admitted to the Bar in 1970, and a District Court Judge appointed in 1982.

This paper was first delivered to the joint CAPITA and University College London Constitution Unit Access to Information 2004 Conference, 12 May 2004, London. Republished with the permission of Judge Satyanand.

References

1. Hansard Volume 439 Page 1915 23 July 1981.
2. Full speech available online from <<http://www.cfoi.org.uk/Sfalconerspeech.html>> at 25 June 2004.
3. Towards Open Government Committee on Official Information General Report December 1980 — 'The Danks Report'.
4. *Ibid.* p 5 et seq.
5. Section 4 *Official Information Act* (NZ)
6. *Ibid.* Section 5.
7. *Ibid.* Section 9.
8. *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC), and [1988] 1 NZLR 385 (CA). In the High Court, Jeffries J, having noted that information held by the Police was within the definition of official information, observed at p 586:
I turn to the words of the definition. Perhaps the most outstanding feature of the definition is that the word 'information' is used which dramatically broadens the scope of the whole Act. The stuff of what is held by Departments, Ministers, or organisations is not confined to the written word but embraces any knowledge however gained or held by the named bodies in their official capacities. The omission, undoubtedly deliberate, to define the word 'information' serves to emphasise the intention of the legislature to place few limits on relevant knowledge. Some statutory limits are contained in section 18(f), (g) and (h) of the *Official Information Act*.
The Court of Appeal did not disagree with this view and the judgement of McMullin J expressly endorsed these sentiments. He stated at p 402:
Information is not defined in the Act. From this it may be inferred that the draftsman was prepared to adopt the ordinary dictionary meaning of that word. Information, in its ordinary dictionary meaning is that which informs, instructs, tells or makes aware.
9. New Zealand Press Association Press Release 26 April 2004.
10. Examples include *Police v Ombudsman* [1988] 1 NZLR, 385, *Wyatt Co Ltd v Queenstown Lakes District Council* [1991] 2 NZLR, 180 *Television New Zealand v Ombudsman* [1992] 1 NZLR, 106.

Red File alert: Public access at risk

The Canadian experience

EDITOR'S NOTE

The following article is the result of an investigation into the handling of FOI requests in Canada. The investigation was undertaken by the award-winning Vancouver journalist Ann Rees who was the 2002 recipient of the Atkinson Fellowship in Public Policy. This article is reprinted with the kind permission of the Atkinson Fellowship in Public Policy.

About the investigation

The public's right to receive government information is being subverted, delayed and denied by a communications system designed to protect the government's image, even at the cost of the public's right to know. A year long Atkinson Fellowship in Public Policy investigation has uncovered interference in freedom of information requests for records the government fears will lead to bad press and embarrassing questions from the opposition.

Federal surveillance system flags files — Ministries, Privy Council delay requests

- The Prime Minister's Office calls them 'Red Files'.
- Justice Canada prefers purple folders.
- Some ministries use the designation 'Amber Light'.
- Others deny it even has a name.

But there is no denying the existence of a highly sophisticated, government-wide access to an information surveillance system designed and controlled by communications spin doctors bent on protecting the political interests of their bosses from the public's right to know. A *Toronto Star* investigation in 2003 has found that every federal Canadian Access to Information and Privacy request is under watch to determine whether it should be sent for closer scrutiny by both communications offices and ministers' political staff.

All federal ministries are involved in the procedure, including the departments of national Defence and Foreign Affairs, Citizenship and Immigration Canada, Health Canada, Transport Canada, Justice Canada and the Treasury Board, the investigation conducted on behalf of the Atkinson Fellowship in Public Policy has shown.

The Prime Minister's Privy Council Office sits at the top of the communications operation, monitoring both its own contentious requests and those in other ministries. The Office of the Prime Minister has refused to comment on this investigation.

But Privy Council spokesperson François Jubinville admits his secretariat plays a central role in the coordination of all government communications, including monitoring of contentious access requests filed to his office and to various ministries.

'That speaks to our fundamental role here in the secretariat which is to ... act as a coordinator of communications activities throughout the government,' says Jubinville.

'It is our role to make sure that ... the department releasing the information is prepared to essentially handle any fallout.'

Requests from media and opposition are automatically added to the watch list in most ministries. The scale of requests in the communications operation is massive, with up to 75% of requests in some ministries coded for review.

'My understanding and the public's understanding, is that this is not how it is supposed to work,' says Canadian Alliance leader Stephen Harper.

'This entire super-process ... blurs the line between the statutory public service functions of the civil service, and political reporting. That to me is really wrong in principle and there is no doubt that this is not in the spirit of the act.'

Canada's leading expert on access to information issues, Alasdair Roberts, says the system results in unequal treatment for suspect requesters. Media queries are sidelined while others move through unimpeded. Roberts' studies show journalists' requests take longer on average than other types of requests.

'Everyone is entitled to equal protection and treatment under the law,' he says.

'There is no provision in the law that says that journalists and politicians get second-class treatment.'

The ministries' surveillance systems are aided by a shared electronic government database in which each federal ministry and department enters all new access to information requests. Although 50 other countries worldwide have right to access laws similar to Canada's, none have a comparable electronic database to monitor requests, says Roberts, a former Queen's University professor.

'No other nation maintains a government-wide database like CAIRS, he says, using the acronym for the Coordination of Access to Information Request System.

'CAIRS is the product of a political system in which centralized control is an obsession.'

The system, which has been around in a less sophisticated form for a decade, was upgraded by the Liberal government in 2001 to allow 'officials across government to review the inflow of requests to all major federal departments,' says Roberts, who now teaches at Syracuse University's Maxwell School of Citizenship.

Under the database, the new requests are classified according to the type of requester. This enables

communications officials to easily find requests from media and opposition MPs and track them for the Amber Light or Red File processes.

The database also includes a description of the request, allowing potentially contentious issues to be flagged for similar review.

A further refinement allows the user to enter Amber Light and Red File designations into a database called ATIPflow, an electronic log kept by ministries and the Privy Council Office of actions taken on the request.

Other departments, like National Defence, deny they enter any special code. They simply note on the ATIPflow log that 'the minister's office wishes to see the file.' Whatever the code, bureaucrats working in access offices know the drill: sound the alarm and proceed with caution. Judith Mooney, access director for the Department of National Defence, wears two hats. She not only gives final approval on which records should be released, but she says she also advises the minister on 'tactics' to mitigate or avoid any embarrassment which might result.

Her department received about 1,300 requests last year, with 65% coded for review by communications, which then flags requests to be sent to the minister's office for review.

'The minister's office sees about 25% to one-third,' says Mooney.

She says she does not see a conflict in her job as an access director and as an adviser.

'It is a blend of the two.

'My role here is to ensure that requesters get the service that the law guarantees that they shall have. And we do that,' says Mooney, who recently won an award from the Treasury Board of Canada for decreasing processing times for requests.

She also helps prepare the minister for questions which are expected to arise when records are made public.

'I believe that it is responsible management to ensure that the communications needs of the institution are met,' Mooney says.

'We can be better prepared in terms of structuring what information is out there,' she adds.

'As a public servant, I have a responsibility to the institution to make sure that I do what I can to further the institution's goals.'

But the communications role is not always a comfortable fit for many access officials. Emails, obtained under access laws, from Citizenship and Immigration Canada show several senior Access to Information and Privacy (ATIP) officials balked at the suggestion they should help communications advisers write media lines for requests they had received. Others questioned delaying the release of requested records until the communications staff had finished preparing media lines for the minister.

'It is not (the access to information office) function to coordinate media lines, or to determine whether they are required,' wrote Don McColl, a senior officer in the department's public rights administration, in an email on 3 December 2001.

The Department of Foreign Affairs and International Trade estimates 'between 50% and 75% of our requests

go through the process,' according to an email, obtained under access law, which was part of an exchange between the department and Citizenship and Immigration Canada (CIC). The CIC was seeking advice on revamping its Amber Light procedure.

'Much about your systems has great appeal here,' reads an email from Diane Burrows who heads the access office at CIC.

In a later interview, Burrows said that just 38 of her department's requests were reviewed by the minister's office last year. CIC had received just 78 media requests.

Even so, internal emails between citizenship department access staff reveal that many are not happy working with spin doctors — both inside their ministry and at the Privy

Council Office (PCO), which is ultimately in charge of the entire surveillance system. Most offensive to staff are delays resulting from unwelcome oversight.

At the top of the process is the PCO communications and consultations branch which can, and does, demand to see any request it chooses, delaying release until the Prime Minister's communications advisers are satisfied.

In one of many examples of delays, an access officer responsible for processing requests at Citizenship and Immigration Canada protested when he was ordered to send a late file to the PCO. Release of the records had already been delayed within his department. But the access officer was overruled.

Red Files

Several offices need to be aware of information being released as a result of an access request even though they are not involved in the decision-making process. These offices are provided with red files containing information to be released in response to the request. This red file notification procedure is carried out concurrently with the sign-off process. It provides awareness but does not hold up the processing of the request. The red file procedures for the specific offices are described below.

Above, an excerpt from the Privy Council Office's access to information procedures manual explains the Red File designation.

Below, an excerpt from this internal Citizenship and Immigration Canada email illustrates a request delayed by the Amber Light procedure.

These Operational Performance reports are now ready for release, with the exception of the Amber Light process. The documents are in my office, and the heads-up memo to the MO must be amended to reflect the new MO staffers' names. That will be done today.

'When Privy Council Office says they want to see a release package, I am not at liberty to do anything but what they ask,' wrote Christopher Deeble, a speechwriter acting as a temporary liaison between the department's access and communications offices, in an email.

The PCO also communicates with other departments that might be affected to ensure that they are prepared for media questions.

'We want to make sure that angle is covered,' says PCO spokesperson Jubinville.

It is also his secretariat's job to notify the Prime Minister's Office of any potential problems which might arise through access requests.

'As we are the department of the Prime Minister ... sometimes there is a need to notify the Prime Minister's Office.

'And what I mean by the Prime Minister's Office is primarily ... the communication team in the PMO, generally called the press office. We want to make sure that they are up to speed on the documents that are being released.'

Liberal MP John Bryden, a long-time critic of his government's handling of access issues, says the process is designed to hide mistakes rather than to increase transparency and openness.

'What you are encouraging is an attitude that we want to cover up our legitimate mistakes,' he says.

'The difficulty with screening in order to prevent embarrassment is that you are actually destroying the advantage of having transparency in the first place,' says Bryden, who has established an unsanctioned all-party committee which made recommendations for amendments to the 20-year-old Access to Information and Privacy Act.

Former Supreme Court Justice Gerard LaForest summarised the purpose of the Act in a landmark 1997 appeal.

'The overarching purpose of access to information legislation ... is to facilitate democracy,' LaForest wrote.

'It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.'

The most contentious or politically dangerous flagged files are tagged for closer review, using designations such as 'sensitive' or 'interesting'. In addition to the electronic database, a list of new requests filed, usually on a weekly basis, to the various ministers' offices and to the Privy Council Office's communications branch, where it is also reviewed for political sensitivities.

The Red File designation on a PCO request means it must be reviewed by the Prime Minister's Office prior to release, according to the secretariat's access procedures manual.

'Several offices need to be aware of information being released as a result of an access request even though

they are not involved in the (access) decision-making process,' reads the document, obtained under access law.

'These offices are provided with red files containing information to be released in response to the request.' PCO spokesperson Jubinville says he was unaware of either the Amber Light or Red File system.

'The Amber Light system is not something that we know about, or the Red Files system is not something we know about,' he says.

It seems hard to miss. 'Red File' is the term used in the PCO's access procedures manual. Every Tuesday, Department of National Defence access director Mooney and an assistant deputy minister in charge of corporate affairs meet with the communications officer and with staff from the minister's office and from parliamentary affairs, which reports to the PCO.

'We look at the text only of the requests that have been received in the previous week,' says Mooney. 'It is in that forum that they tell us what they would like to see.'

'The requests are discussed and reviewed throughout the retrieval process. Media lines are prepared for the most contentious requests and complete packages are sent to the minister's office for review prior to releasing the records to the applicant.'

Mooney says the minister's office returns the package for release within 48 hours to prevent delays. However, records from several ministries and the PCO obtained under access law show delays are a common source of frustration for access officials who must answer to the information commissioner when requesters complain.

The Access to Information and Privacy Act requires a request be completed within 30 days. Extensions can be granted if the request is complex or if it requires consultations outside of government. Information Commissioner John Reid says extensions are on the increase.

'What we are seeing,' he says, 'is a greater use of the time delay factors that are built into the act: 'We can't do it in 30 days, we need 90 days.'

'I have now instigated a study to find out whether there is anything going on at all.'

Delays are the order of the day for Red File requests to the Privy Council Office, which handles requests for information involving the Prime Minister and his staff. Records of all PCO requests completed last year show one out of every four media requests — 14 of 58 requests — were tagged for further review. The average time to process these requests was eight months.

'That's pretty phenomenal,' says Reid, of the finding.

Only two media requests were released within 30 days.

PCO communications staff also reviewed eight requests from members of the public, with an average processing time of 5.6 months. Nine of 51 business requests were also flagged. The average processing time was about 4.2 months. One source of delays seems to be

a 'communications form' which must be filed out on all Red Files.

The form asks: 'Are there communications implications related to the disclosure of information in this file?' A 'yes' means the officer must immediately notify 'the communications analyst for this file (either PCO Communications or Intergovernmental Affairs Communications, or both),' according to a copy of the forms obtained under access law.

Jubenville denies this causes delays, as it happens at the end of the process. He says communications begin its review when the documents 'have already been released.

'There is absolutely no reason why this particular part of the approval process should hold up.'

But a *Star* review of the tagged communications forms showed an average of about eight weeks lapsed between the time the form was marked for media lines and the time the records were finally released to the requester. In most cases, the requests were already late by the time the form was ticked for media lines.

Jubenville took three weeks to release a file he was handling following notification on the communications form that media lines might be required.

The request was already long overdue for release and took seven months in total to process. Of the 27 communications forms that were properly dated, only one was released on the same day it was recommended for communications review.

The Privy Council Office's ATIPflow electronic log shows how files flagged as sensitive are delayed. One file was a June, 2002 request to the PCO for information about 'improprieties' in the awarding of government contracts and 'lobbying by ministers for federal contracts.'

Media and opposition parties had accused Prime Minister Jean Chrétien and members of his cabinet of cronyism and corruption in the awarding of several public works contracts. Chrétien denied any wrongdoing.

The Treasury Board of Canada's communications records, obtained under access law, show the government was deeply concerned about the impact of negative media coverage on public opinion. They were particularly concerned about access requests on the issue.

'Media coverage concerning the federal sponsorships should be tracked for references by MPs to ATI (Access to Information),' reads one memo.

The search for records in the PCO was led by four assistant secretaries to the cabinet, including Mario Lague, head of communications and consultation. The file, which was received on June 6, 2002, would take six months to process. Privy Council Office communications would sign off on 2 October.

The file was finally turned over to the office's access coordinator Cluineas Boyle on 28 October, to decide which records would be sent to the applicant. On

19 November, an access officer issued his final 'record of decision.' A copy of the Red File was sent to the Prime Minister's Office that same day.

Two weeks later, on 4 December, a communications branch analyst was officially notified that media lines and questions and answers would be required in preparation for release of the records to the requester, according to the Red Files communication form obtained under access law. Another copy of the file was transmitted electronically to the Prime Minister's Office.

PCO communications finished its review on 19 December, with the notation on the activity log reading: "'Red" file w/copy of severed records forwarded to Frances McRae of PCO Communications.' Copies of the records were finally mailed to the media requester that same day.

Though no ATIP officials have spoken out in public, access coordinators raised the issue of communications interference when they met with members of the Prime Minister's access to information task force in October, 2000. They complained about the stress of dealing with 'sensitive' files, the designation used by most ministries for files flagged for communications review.

But their concerns were never made public and are conspicuous by their absence in the final report of the Prime Minister's task force.

ATKINSON FELLOWSHIP WINNERS

The Atkinson Fellowship in Public Policy was established in 1988 to further the tradition of liberal journalism in Canada that was fostered by Joseph E. Atkinson, the founder of the *Toronto Star*. The winners pursue a year-long research project on a subject of topical interest and their articles are published by the newspaper.

ANN REES

Ann Rees is the 2002 recipient of the Atkinson Fellowship in Public Policy. Her year-long project explores the effectiveness of Canadian freedom of information laws. Rees, 51, a veteran reporter with the Vancouver Province, has left the paper to become co-ordinator of the journalism program at Kwantlen University College in Richmond, BC.

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