

Freedom of Information

Review

ISSN 0817 3532

ISSUE No. 113

Contents

Articles

- Queensland Fol processing initiative
by Gerry Cottle 54
- Freedom of Information in Germany
by Thomas Hart 55
- Is there a role for comparative Freedom of Information analysis?: Part 1
by Rick Snell 57

Credits

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

Editorial Board

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

Editor:

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

Editorial Co-ordinator:

Elizabeth Boulton

Typesetting and Layout:

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

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

Correspondence to:

Legal Service Bulletin Co-op.,
C/- Faculty of Law, Monash University,
Clayton 3800
Tel. (03) 9544 0974
email: Liz.Boulton@law.monash.edu.au

Print Post approved PP:338685/00011

This issue may be cited as
(2004) 113 *Fol Review*

© LSB Co-operative Ltd 2004

Comment

This is the second last issue of the *Fol Review*. After 19 years the little green publication will cease to make its unique and varied contribution to the practice, understanding and reform of accessing government information. The LSB Co-operative, the publishers of the *Fol Review*, have decided to concentrate their resources and efforts on the *Alternative Law Journal*. The LSB Co-operative should be warmly thanked for supporting this unique publishing venture through thick and thin over almost two decades — an outstanding achievement and contribution to those interested in open government.

In particular the stalwart efforts of Liz Boulton should be acknowledged. She has been editorial co-ordinator (a nice name for the real editor) since issue 1. She has dealt with late copy with good grace and patience. Liz has managed to tolerate, over the last 10 years, my work habits and irregular contact by email. I have appreciated Liz's advice, editorial corrections and Herculean efforts to get the *Fol Review* out six times a year. So, on behalf of previous editors, writers, subscribers and readers, thank you very much Liz.

At the moment I am probably too close to assess the overall contribution of the *Fol Review*. Nevertheless even at a wild guess it would be substantial. There have been few articles, law reform submissions or parliamentary debates on Fol in Australia that have not owed at least a small debt to the *Fol Review* or their genesis to this small green newsletter.

There is a large dose of irony in the *Fol Review* slipping away to the archives just as Fol has become a worldwide phenomenon. When the first issue rolled off the presses in February 1986 I doubt if the then editors — Moira Paterson or Paul Villanti — or even Liz had an inkling that by December 2004 over 50 countries would have taken up the legislation and a score or more of other countries would be in the process of adopting it (such as Germany). Last month I was in Malaysia listening to a large number of civic society groups advocating the need for Fol.

Adding to the irony is the strong possibility — only an intriguing rumour at the moment — that the Australian Federal Government may have lost a further two cases in the Administrative Appeals Tribunal on conclusive certificates. Indeed the heavy hand of the *Re Howard* factors may have been somewhat loosened on the interpretation of Fol cases in Australia.

I have enjoyed my time as editor of the *Fol Review* and greatly regret seeing it fade away. However, thanks to Professor Al Roberts at Syracuse University, recent back issues of the *Fol Review* can be found and searched at <<http://review.foi.net>>.

Rick Snell

Queensland Fol processing initiative

Queensland Treasury has initiated and implemented an innovative advancement in freedom of information (Fol) processing that has revolutionised compliance with Fol legislation. The project involved a dramatic change in the way that Fol processing was conducted, moving away from the archaic, paper-based and labour intensive system to an improved, streamlined electronic system which provides a seamless approach to Fol processing.

Since the introduction of Fol legislation in Queensland in 1992, concern has often been expressed about the laborious and resource-intensive task of processing Fol applications. Treasury staff examined the possible use of electronic systems to improve processes and a business case was accepted comparing the software options for Treasury. Treasury sourced specific redaction software from the United States of America (where Fol legislation has existed for many years), which enables the removal of confidential or proprietary information selected from portable document format (PDF) documents.

This innovative software has made a significant contribution to Fol processing as it has assisted in overcoming the labour and resource concerns previously encountered in processing Fol applications. The implementation of such software means that material subject to Fol applications can be scanned into the computer system allowing the user to select individual words, paragraphs or parts of documents which are considered exempt material under Fol legislation. Once editing is completed and the material is ready for release, Fol staff are able to simply print the releasable material or save it to CD for release.

The initiative is considered 'best practice' in government agencies in Queensland. Agencies have drawn on Treasury's knowledge and engaged the Fol team to assist in implementing a similar Fol initiative.

By implementing this electronic system, Treasury has:

- eliminated the use of expensive consumables
- implemented time savings by eliminating the need to photocopy documents multiple times
- reduced 'wear and tear' on expensive equipment, including photocopiers and printers
- improved service delivery and client satisfaction by supplying Fol requests electronically
- reduced the need for storage capabilities for paper files
- reduced the processing time for Fol applications.

Brief description of project or initiative

The implementation of Treasury's Fol processing initiative has enabled better service delivery and resulted in significant cost savings for government achieved through harnessing existing information technology. The Fol initiative has increased the Queensland Government's ability to deliver seamless government services by involving non-government service providers (that is, the owners of the software), sharing new knowledge and assisting with the implementation of new Fol technologies.

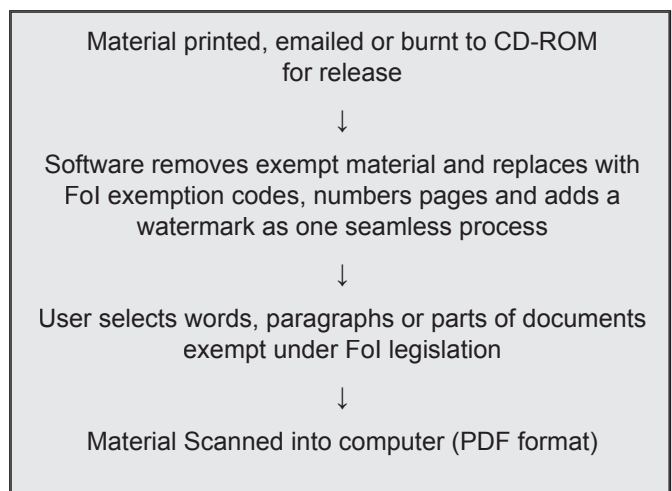
The Fol team working on this project has conducted extensive research into worldwide best practice for administering Fol legislation. This knowledge and the

determination to be at the cutting edge of Fol technology has driven this initiative and resulted in the team taking a leading role in Fol editing processes in Queensland and Australia. Government agencies in Queensland consider Treasury's initiative to be 'best practice' in Australia and have drawn on Treasury's knowledge by engaging the Treasury Fol team to assist them in implementing similar Fol initiatives.

Treasury's Fol team has applied their specialised knowledge and research to business process and technological innovations available around the world to develop this initiative, which has resulted in dramatic productivity improvements in what was a notoriously labour and resource-intensive process.

Previously, when the Fol team received a request for information, relevant documents pertaining to the request had to be photocopied a number of times. The sets of documents were then attached to a file and stored in the Records Management area. Large amounts of paper were used in the Fol process to fulfil requests as well as considerable space to store the documents.

For these reasons, and to reduce the amount of employee time used in fulfilling requests, the Fol team decided to investigate an electronic process to scan and process documents. The new initiative for Fol processing can best be communicated in the following diagram:



Aims and objectives

The Fol initiative aims to meet community expectations for electronic service delivery of Fol responses, to reduce the cost and time required to process Fol applications, and to share Fol knowledge and best practices within and beyond the state.

The Fol team realised the importance of quality service delivery to the community and it was because of this that the Fol processing initiative came about. After researching and gathering information about Fol processing best practice around the world, the team designed the Treasury thinking beyond the traditional boundaries of government and displaying its commitment to utilising the skills, resources and expertise that exist not only within other government agencies, but also within the private sector (the specialised

software was developed by a private company in the United States).

Queensland Treasury realised quality improvements were necessary in view of the previously cumbersome, labour intensive and resource-demanding systems for processing FoI applications. The FoI processing software was sourced and trialled with a view to improving the quality of government service delivery relevant to FoI applications. The software was developed further by the United States provider based on Queensland Treasury's requirements and design specifications.

The FoI initiative demonstrates a public sector that is committed to service improvements that uphold and improve the condition of the environment through the near elimination of consumption of millions of pieces of paper and large quantities of ink and toner annually which were necessary to respond to FoI applications.

Initially some agencies were reluctant to embrace this new technology. However, following exposure to the extensive demonstrations and education by Treasury these departments now wholeheartedly support the diversification that this software provides. Almost one half of government departments are now using the software on a daily basis.

The utilisation of Treasury's FoI processing initiative has brought savings to both applicants and the department. The savings across government are conservatively estimated at \$4.6 million annually. These savings are multiplied when the sharing of experiences and knowledge relating to the initiative with other states are considered. The savings are the result of improved performance in the processing of applications by, in many instances, reducing one-third of the time taken to process applications. Considerable savings also arise in the area of consumables, which were previously utilised during the manual processing of FoI requests and are now almost completely eliminated:

- paper, stationery and toners
- machinery 'wear and tear'
- labour (photocopying and stamping FoI documents).

Implementation of the FoI processing initiative has resulted in the following advantages not only to Treasury but also to other departments through active knowledge sharing:

- reduced costs in the processing of FoI applications
- reduced timeframes in the processing of applications
- reduced paper wastage
- improved service delivery
- improved client satisfaction
- ability to electronically incorporate additional information into documents with the added benefit of increased accuracy by eliminating the need to retype lengthy documents
- ability to turn an image into computer editable text, or to completely eliminate the image from the document.

Since the introduction of the FoI initiative, clients have enjoyed improved service. They no longer need to attend viewings of documents, which can be costly due to travel and time spent perusing the documents. The FoI initiative has enabled clients to obtain the releasable information via an email attachment or on CD-ROM.

The Office of the Information Commissioner has embraced this initiative and has already reviewed a number of cases where electronic processing has been used. Practitioners no longer need to send bundles of documents to the Information Commissioner as copies of originals, marked and released material are now supplied on CD-ROM.

GERRY COTTLE

Gerry Cottle is the Manager, Freedom of Information, The Treasury, Queensland.

Freedom of Information in Germany

One could say, with a touch of irony, that 1 May 2004 was a good day for freedom of information (FoI) in Germany. Before that date, Germany was rather isolated in the European Union (EU) 15 club, being the only EU (and OECD) member state apart from Luxembourg that did not have national FoI legislation. The new EU members, Malta and Cyprus, have joined the questionable club of countries that practise their very own avant-garde transparency: government secrecy as the rule rather than the exemption.

It is not out of sheer ignorance that Germany still lacks a national law. Rather, it is the result of a very long tradition of German administration that hates nothing more than loss of control. Transparency provides the tools for criticism, publicity being among the most important. So it is not surprising that in a country that knows so much about Max Weber's theories of bureaucracy and so little about Niskanen's, the 'secret state' is a concept that very few German academics would question in principle.

Without doubt, Germany is a latecomer on this issue, but starting in 1997, drafts for a national Freedom of Information Act (FoIA) have regularly been discussed. Parallel to the

national debate, some of the federal states (the 'Länder') have taken the initiative and passed their own legislation for their respective administrations (that would not be affected by a national law). Between 1998 and 2002, four state laws were passed: Brandenburg, Berlin, Schleswig-Holstein and North-Rhine Westfalia.

Some direction came and still does come from the EU level. Since 2001, there has been an EU regulation reaffirming the principle that the European Commission, Council and Parliament documents must be accessible to the public. There is, however, no general obligation for member states to pass an FoIA. But pressure comes from specialised areas. There is an EU directive on access to environmental information that forced Germany to pass the federal *Environmental Information Act* [*Umweltinformationsgesetz*, UIG] in 1994 and there is a joint declaration on the commercial use of public information (adopted as a directive in November 2003) that may lead to the creation of a uniform market for public-sector information in the EU in the medium term.

The beginnings

While the states gathered experience with the implementation of their laws, the national level remained hesitant. The general elections in 1998 brought about a fundamental change — in theory: the red-green coalition under Chancellor Schröder signed a coalition agreement that included the promise to pass a national FoI law.

The Ministry of the Interior took the lead in the decision-making process and developed a draft. After this had gone through the hands of all the stakeholders, little, however, remained of a 'transparency' law. As the 2002 general elections approached, the topic was discarded for the time being as not attractive enough for electoral campaigning. Even within the human rights activists' circles within Bündnis 90/Die Grünen there was little hope that an abstract topic such as 'freedom of information' could help win the very close election against such 'big topics' as unemployment or health insurance.

The law reappeared in the political process in early 2004, when the Ministry of the Interior remembered the promise made to the electorate (in the meantime, the second coalition agreement of the Schröder government had repeated the FoI promise). Without much enthusiasm, the old drafts were reanimated and the process of reaching consensus between the ministries started anew.

It may be sheer speculation, but it is not impossible, that the government's new attention to freedom of information had to do with an increasing pressure by some influential German non-governmental organisations. In mid-2002, the Bertelsmann Foundation (the largest German private foundation) had initiated a project that sought to identify the reasons for Germany's hesitation on the subject matter as well as examples for how to overcome these hurdles. In April of 2003, a conference in Berlin with an audience of Information Commissioners, academics and politicians from around the globe delivered the statement: 'The problems we are discussing in Germany have already been solved in so many other places that the government's hesitation is not credible anymore'.

Opposition from industry

As it turned out, the conference marked a turning point in a number of ways. Attention for the topic grew, as did opposition. Starting with a statement on one of the panels by a board member on that day, the Federation of the German Industry (BDI) opposed the law vehemently. This, indeed, is a novelty. No one in the international community appears ever to have heard of an industry player actively opposing FoI legislation. BDI did, with two lines of argument: (1) the risk to businesses as a result of the disclosure of confidential or incorrect information, and (2) possible negative repercussions for the national economy as a result of rising administrative costs and the feared increase in the public-sector share of the GDP.

FoI supporters did their best to deliver counter-arguments, yet the success was moderate. Of course, it was said, all FoI laws worldwide contain formulations that protect industry and business secrets from revelation if that would harm business interests. On the other hand, there is hardly any way of countering the argument that even if business secrets are protected by the law, they could still be revealed by bureaucrats handling the law erroneously.

Well, yes. A quick international survey by the Bertelsmann Foundation showed that there are no examples of anything serious happening in that respect, but of course that does not mean it *could* not happen.

The second argument (the economic consequences of over-regulation) had its background in another project the industry federation has been nurturing for years. The industry federation had argued that a regulatory impact analysis should be conducted before the passing of any law, showing the economic consequences of the new legislation. Without such an analysis showing that an FoI law was indeed not interfering with the economy's performance, BDI would oppose this (and any other) law. While no one questioned the benefits of such an analysis, it was clear that this would not happen — at least not in time for an FoIA to be passed.

The BDI's fundamental opposition could have been nothing more than one lobby voice among many, had it not been for the industry's most important ally. Probably without realising it, the German Chancellor had strengthened the industry players against his own government by giving out the order that no new legislation should be passed that was against industry's interest (in his struggle for success in fostering economic growth). Now the Ministry of the Interior had a 'Chancellor's Directive' on the one hand, an increasing pile of statements, letters and protest notes from the industry federation on the other. For a law that did not have any enthusiastic supporters within the government to begin with, that caused a stall in the push for FoI legislation. The parliamentary factions of the governing Socialist Party and the Green Party were unable to overcome this hurdle.

Public debate

On the other hand, public debate was opened. More and more journalists became more pronounced on the issue, quoted experiences from other countries and joined forces to repeatedly call for the law. The Bertelsmann Foundation continued to collect and publish material and examples on the formulation and implementation of FoIAs around the globe. A number of NGOs joined forces to write their own law. In April of 2004, Transparency International (an international organisation to fight corruption, based in Germany), Netzwerk Recherche (an association of investigative journalists) and other journalists and human rights associations presented a fully-fledged German FoI law to the President of the German Parliament. In various constellations, these organisations engaged in a number of other activities (such as a poster campaign in Berlin or an online collection of signatures that was conducted together with the most important German online news portal politik-digital.de) that all had the same aims: increase pressure on political decision-makers through raising awareness for the importance of the right of access to public-sector information. Even Parliament woke up to the call. Two members of the German Parliament's Subcommittee for New Media announced that they would recoup the initiative for the law from the Ministry of the Interior and meet for 'FoI Breakfasts' every Thursday at 8 am, until the law was passed. Shortly after this announcement, a representative of the ministry joined the breakfast club.

New draft legislation due

While there still is no official statement on part of the government when a new draft will be presented, individual statements suggest that it cannot take long. In August, a Green Party spokeswoman was quoted by the news service 'Spiegel Online' with a promise of a 'short, modern, understandable' law, the Chancellor apparently personally gave a 'go' as part of his quest for new, voter-friendly reform projects, and Minister of the Interior Otto Schily surprised those parts of the audience that knew what he was talking about at a Bertelsmann Foundation conference in September with the sober words: '... and we will pass a Freedom of Information Law'.

The 'short, modern, understandable' law deserves closer scrutiny, as it indicates that the new draft will be rather remote from the old one that was discarded in 2002 before the elections (another irony with respect to this law: the new draft is treated as a state secret). The previous draft had neither been short nor modern, to say the least. Complete ministries had demanded to be exempt from any transparency obligation, thereby leading to a law that was too soft for FoI advocates to be acceptable.

The Ministry of Economic Affairs had argued that all fiscal action should be exempt from access requirements. It demanded the consent of all affected parties for any supply of information concerning the business of economic enterprises. The protection of business secrets also took a strange form of administrative self-protection. Apart from protecting business, it allowed administrative entities to declare themselves 'third parties.' Thus, the very entities which the law obliges to be transparent can easily withdraw from their obligation by referring to a vague concept of trade secret. If an administrative unit declares its fiscal activities a secret, the very area where abuse and corruption is most likely to take place gets excluded from any transparency obligations. Other areas to be exempted were the Ministry of Defense and the intelligence services, working under the auspices of the Chancellor's Office.

Beyond that, the right to access information was restricted in the case of ongoing administrative proceedings. As citizens are particularly interested in those proceedings that they can still influence, this restriction would have undermined the idea of citizens' participation on which FoI is based in the first place.

Another shortcoming of the old draft was that it did not specify how much time the administration had to reply to an FoI request. After three months without obtaining information, applicants could have taken legal action through recourse to general administrative procedural law. They were not, however, granted any specific rights stemming from FoI legislation.

In addition, with administration fees of up to €500 (plus copies and other expenses), a massive deterrent to making use of the law would have been put into place. The Ministry of Finances demanded that fees should in principle cover all costs of assembling, editing, and supplying information — even beyond the limit of €500.

There is hope that these massive shortcomings will be corrected in the new draft. Enough information was available to the parliamentarians and bureaucrats in charge of the text. An extensive international comparison of formulation and implementation of access laws, designed and conducted by the Bertelsmann Foundation with the sole purpose of being useful for the public decision-makers, was presented in early 2004. An 'FoI checklist' indicated the critical points within any proposed FoI law and how they could be resolved for Germany.

Germany will probably have a national freedom of information law by the end of the next election period in 2006.

Note

Information on the Bertelsmann Foundation's Freedom of Information project is available (in German and English) at <www.informationsfreiheit.info>.

The international comparison has been published as: T. Hart, C. Welzel, H. Garstka (eds), Freedom of Information: The 'Transparent Administration' as a Civic Right? Verlag Bertelsmann Stiftung 2004, in parts available in English at <http://www.informationsfreiheit.info/en/general_information/own_reports_and_analysis/00069.php>

THOMAS HART

Dr Thomas Hart is project manager for the German-based Bertelsmann Foundation, responsible for Information Society projects in general, for e-government, e-democracy, freedom of information and public sector transparency in particular.

Is there a role for comparative Freedom of Information analysis?: Part 1

Law in general is human reason, insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied.

Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.

Montesquieu, *The Spirit of the Laws* 1748

Introduction

It had been my intention in 2005 to write a major piece for the *FoI Review* on undertaking comparative freedom of information studies. The article would look at my experiences in this area since 1996 — in terms of writing, teaching and talks in a variety of countries about the essential elements of FoI design, practice and compliance. The untimely demise of the *FoI Review* and the unexpected delay in a promised article has encouraged me to undertake an early work in progress ahead of the proposed schedule.

The core of this first version of the article comes from a public lecture I presented to the New Zealand Institute of Public Law in April 2002.¹ The talk was presented six years after my first significant foray into comparative freedom of information study and eight months before presenting my first undergraduate course on comparative freedom of information.

Readers of the *FoI Review* will be well aware of my calls for increased multi-disciplinary and comparative studies in FoI and information management. A number of contributors to the *FoI Review* such as Alasdair Roberts, Greg Terrill, Chris Berzins and Stephen Lambie have all made significant contributions in pursuit of this mission. In addition, the number of single country case studies published in the *FoI Review* had increased, providing strong foundations for more studies and for a variety of comparative studies in the future.

In this article I want to briefly touch on some of the key issues and areas of interest for comparative FoI study. In view of its hasty composition there will be many areas where my analysis will be incomplete or too sweeping in its generalisations. I beg the reader's indulgence and ask that you treat this more as an extended public talk than a carefully scripted academic contribution. It is my intention to complete Part 2 of the article for the last issue of the *FoI Review*. Part 2 will critically examine the existing — albeit small — pool of comparative FoI studies and analyse the direction(s) comparative study should follow over the next decade.

The beginnings

My experiences with comparative FoI began innocently in April 1996 with a visit to New Zealand. In the traditional way, of most unsuspecting and unsophisticated comparativists I had naively decided to learn a little more about the New Zealand *Official Information Act*. I had come to New Zealand at the invitation of Paul Walker, the first Director of the New Zealand Institute of Public Law, to be the inaugural visiting fellow of the newly formed Institute.

Prior to my arrival I had read the small amount of readily available material on FoI in New Zealand. I had plotted out an intensive round of documentary research in conjunction with a range of interviews with key figures. At that point and for most of my stay in New Zealand the focus had been to understand the *Official Information Act* on its own terms and within its own context.

Paul Walker, now a QC in London, suggested that I present two lectures to his undergraduate public law students on FoI in Australia and New Zealand. I was mortified but too beholden to Paul's generosity (in the invitation) and nascent friendship (which has now extended to our spouses and children) to refuse. Yet how to compact 13 years of Australian FoI experience and federal/state differences into a single 50 minute lecture? Even more confronting how to present a lecture on New Zealand FoI when my understanding was still so primitive and barely informed?

In the end I simply followed the advice I had so freely given to my students, namely, when undertaking comparisons, find criteria on or around which to organise your comparisons. The criteria I chose (the night before) for my first lecture were eventually used in a modified form in the article *Kiwi Paradox*.² At a later point Reitz in an instructive article about approaches to comparative law wrote:

Comparative law scholarship should be organized in a way that emphasizes explicit comparison.

Finally I come to the nitty-gritty detail of organization. I do not wish to dictate matters of form narrowly. Good writers find the organization that best fits their subject. However, I want to encourage the use of organization for comparative writing that emphasizes the comparative task being accomplished. There are all too many examples of comparative books and articles in which the comparative exploration of a subject (antitrust, for example) is organized in the following way: a detailed description of the antitrust law of country A, followed by a detailed description of the antitrust law of the country B, followed by a brief section that attempts to draw the chief comparisons. But this last section is inevitably too short and too lacking in detail to be effective comparison, not only because the writer has run out of steam at the end of the work, but also because, if he were to support his comparative analysis with all the rich detail, he would have to repeat much of the first two sections. It is as if the writer said to the reader 'Here is all the raw data about this subject in the two legal systems I am studying. Now you do the comparison according to these general guidelines I am giving you!'

Instead of the simplistic, ineffective, and inefficient three-part approach, I advocate trying as much as possible to make every section comparative. For example, if the subject is antitrust law, one section might compare and contrast the development of antitrust law in each country, another the two countries' treatment of horizontal restraints of trade, another the vertical restraints, another the enforcement mechanisms and remedies, etc. Try to break the subject down into the natural units that are important to the analysis and then describe each country's law with respect to that unit and compare and contrast them immediately. Let the contrasts documented in each section build toward your overall conclusion. Of course, for certain subjects it may be necessary to describe the law of one country in a block before comparing it. This seems especially likely, for example, when what is being compared is the historical development of a field or legal system. But the shorter these blocks, the more effective will be the comparison.³

After my first lecture and before the second I accepted an invitation from Judge Anand Satyanand, one of the New Zealand Ombudsmen to join him and a few staff members for morning tea. That seemingly innocent invitation changed my thinking, my life, the type of career I have lead as an academic and added new dimensions to discussions about FoI reform in several countries. The ideas and insights generated from that invitation have flowed onto talks, and policy discussions in Canada, South Africa, United Kingdom, Ireland, Bermuda, Indonesia, Philippines and Malaysia. Discussion about FoI reform in Australia since 1996 has been heavily influenced by the lessons and insights derived from the New Zealand experience.

I turned up at the New Zealand Ombudsmen's Office to have my cup of coffee and a few biscuits, intrigued by the large number of staff gathered and the semi-formal seating arrangements. I was horrified when, as I finished my coffee I was asked to give my comparison between the Australian *FoI Act* and the *Official Information Act* with the provocative request from Judge Satyanand 'and tell us which is the best and why'. I find it difficult to recall the detail of my impromptu, 15-minute talk but I have no problem with remembering the galling (for an Aussie) conclusion — New Zealand's *Official Information Act*.

Since that impromptu talk and the two undergraduate lectures I have been exploring the field of comparative FoI and trying to find the tools to exploit that exploration. In the words of Otto Kahn-Freund:

A comparative lawyer must make many decisions entirely for himself; decisions on the field he wishes to cultivate, and decisions on the tools and implements he wishes to use in cultivating it. More than that he must set out on a voyage of discovery to find the fields and on another voyage to find the tools.⁴

The rest of this article is an exploration of some of those potential fields and tools. Up to the moment of that New Zealand epiphany my intent had been to learn about the *Official Information Act* as a beast peculiar to New Zealand and at most write an article explaining the *Official Information Act* to an Australian audience.

Since that first hesitant effort of trying to create a comparative analysis from scratch, my primary mission has been to try and construct a comparative law research methodology in the general area of administrative law but, in particular, the areas of access to information and ombudsmen. My secondary mission has been to try and help in some minor way to shape, guide and inform reform attempts to existing FoI frameworks (Australia – both Commonwealth and State — and countries like Canada) or pending adoptions (South Africa, Bermuda, United Kingdom, Indonesia and the Northern Territory of Australia) heavily influenced by my understanding of the differences between FoI in Australia and New Zealand.

By the time of my return visit to the New Zealand Institute of Public Law, this time courtesy of Professor Matthew Palmer in April 2002, my thoughts and exposure to comparative FoI had developed more fully. Over the following 12 months I would give talks and/or teach courses in comparative FoI and administrative law in several countries. The rest of this article and Part 2 concentrate on the ideas, questions and problems raised by that post April 2002 experience.

Taking the comparative path

I want to explore whether comparative FoI analysis can add anything to the rapid law reform process which is underway around the globe in relation to open government. Do the lessons of FoI in countries like Sweden, the United States, Australia, Canada and New Zealand have any relevance to those countries seeking to build democratic and civic infrastructure? Is there a need and/or movement towards comparative administrative law in general?

The comparative study of administrative law offers an interesting and informative means of studying and shaping one of the most rapid developments in legal policy transfer — namely the rapid uptake of freedom of information or access to information schemes. That rapid uptake has created a demand for information about the design, development and implementation, and review of such access schemes, information that, to date, is limited. FoI has received only limited study as a marginal subject in a marginal field — administrative law. Indeed FoI is rarely covered in administrative law courses (or at best receives a fleeting mention amongst other topics like the role of an ombudsman that are given a few minutes at the end of a course for the sake of completeness), sometimes in media law units, increasingly in journalism courses and occasionally in information management courses.

To what extent can a comparative/multi-disciplinary approach to FoI be undertaken? What can we learn from it? How can we apply the material gathered from Canada,

Australia, United States, Sweden and New Zealand to the comparative study of FoI in countries like Ireland or in countries in transition? Comparative administrative law itself is a relatively unexplored field let alone comparative FoI which is a particularly rich area of study due to:

- the number of jurisdictions — 60+
- the similar legislative architecture in many of the jurisdictions
- the similar imperatives responsible for uptake — democratic, social and economic
- the similar outcomes/expectations (functions assigned/missions given).

Zweigert and Kotz argue that 'function is the start point and basis of all comparative law'.⁵ Therefore the potential for comparative study in the area of FoI is high. However, Harlow cautions that 'law is seen not merely as a toolkit of autonomous concepts readily transferable in time and space, but as a cultural artefact embedded in the society in which it functions'.⁶

The need

In a 2002 conference paper delivered in New Zealand, Grant Liddell attempted a quick overview of developments in FoI, personal access and data protection law.⁷ His paper highlighted the dramatic increase in the number of countries enacting data protection, privacy and FoI laws. In particular, using the work of David Banisar, from Privacy International, Liddell pointed out that 57 countries (as of March 2002) had enacted or proposed FoI laws and that 10 countries had enacted FoI laws since 2000.⁸ Since that date a further 10-15 countries have adopted some form of FoI legislation.⁹

This outbreak of adoption of open government statutes is a surprising phenomenon. In the early 1990s there was only a handful of countries with FoI laws on their statute books. Counting only national laws the figure stood at approximately 13 countries. Indeed some were willing to predict at the start of the 1990s that FoI had seen its heyday and that future adoption would be rare. In most countries there was a feeling as Liddell describes it that these laws were 'for past times'. FoI laws were considered dated, under strain from government restructuring and policy failures in achieving anything other than slow access to personal information.

Yet we are now witnessing a frenetic round of activity that sees proposals for FoI being floated from countries all over the world. Liddell argues that it is the new democracies of Eastern Europe and elsewhere that 'appear to be taking the greatest strides towards open government', whereas countries like the UK, Australia, Canada and the USA (especially since September 11) seem to be resiling from their already lukewarm flirtation with access laws.

On 22 April 2002, President Megawati of Indonesia opened an International Conference on FoI at the Presidential Palace. Her opening speech disappointed many Indonesians, especially those from non-government organisations (NGOs), due to its refrain of 'yes we need FoI but we need to proceed cautiously and protect other values'. What is remarkable is that the President opened the conference and that there are two proposals for FoI being considered by the Parliament (one government

bill and another presented by a number of parliamentary parties). In late September 2004 there was a gathering of NGOs and other civic society activists in Kuala Lumpur that passed a resolution requesting FoI laws for Malaysia.

This flurry of legislative activity and conferences, like that in Indonesia, reveal a major deficiency in the construction of democratic and civic infrastructure, namely, a dearth of comparative studies. At the conference in Jakarta the Indonesians, whether NGOs, government officials, activists or the media were keen to explore the experiences of other countries like Thailand, Japan, South Korea, Sweden and Australia. The discussion was limited by the fact that most of the material presented was single country case studies. In part this deficit in comparative studies is a consequence of the rapid spread of FoI (Thai and Japanese academics have barely had time to realise that FoI legislation is now operational), a general absence of comparative study in the area of administrative law, the general optimism of reformers that open government just needs the right switch (legislation) to be flicked, and that FoI is a readily transplantable law.

There is an urgent need for academics, postgraduates, government officials and NGOs to develop comparative studies in this area which include, but extend beyond, singular case studies or collections of case studies. These studies will not only inform the policy development processes of countries yet to adopt FoI legislation but will also feed back into reforms of veteran jurisdictions like Sweden, Canada, Australia, and the US.

Even the countries which appear to have the best track records on FoI — namely Sweden and New Zealand — have seen strong demands for reform in recent years and comparative experience may provide some guidance to re-energising those jurisdictions.¹⁰

The problem of rapid law reform

The 60+ countries that have adopted FoI regimes¹¹ have done so from a limited range of models:

- USA
- Australia – Canada
- New Zealand
- Article 19 Model Reforms¹²
- Sweden.¹³

Rarely is much time spent on understanding how these models work or do not work in their own legal and political environments before they are recast for a new set of operating conditions. Many of the models have a significant cadre of critics who have well-justified concerns about the efficacy of parts or the entire dynamics of particular FoI systems.

The reforms are implemented with little consideration given to the way that state secrecy operates and the multi-dimensional impact of FoI which can provoke unexpected levels of non-compliance from those charged with administering the reform. A comparative perspective may allow a better understanding of what design choices, legislative architecture, administrative reforms and other steps may be necessary to bed down a successful adoption of open government in the long term.

The US model, and more recently the Article 19 Model Reforms, have tended to be the dominant design models considered by countries when adopting FoI reforms. The US dominance came from a number of sources that have been carefully considered in a recent PhD thesis by Stephen Lamble.¹⁴ The Westminster model (Canada and Australia) has received little comparative treatment, and the New Zealand variant, until the mid 1990s, received little attention either within New Zealand or externally.

Part 2 of this article, to be published in the next issue, will explore the adequacy and types of comparative studies that have been undertaken up to now.

RICK SNELL

Rick Snell teaches law at the University of Tasmania.

References

1. R Snell, 'Why Australians and Canadians Can't Fathom the Official Information Act: Is there a Role for Comparative Freedom of Information Analysis?' presented to the New Zealand Institute of Public Law, 28 April, Wellington 2002.
2. 'The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand (2000) 28(3) *Federal Law Review* 575-616.
3. John C Reitz, 'How to do Comparative Law' (1998) *The American Journal of Comparative Law* 633-4.
4. O Kahn-Freund, 'Comparative Law as an Academic Subject,' (1996) 82 *Law Quarterly Review* 40-61, 41.
5. Zweigert and Kotz, *Introduction to Comparative Law*, 3rd ed, Clarendon Press, 42
6. Carol Harlow, 'Voices of Difference in a Plural Community,' Harvard Jean Monnet Working Paper 03/00, 3.
7. Grant Liddell, 'Origins, Background and Scope of Freedom of Information, Personal Access and Data Protection Law: Convergence, Divergence or Parallel Tracks?' presented at International Symposium on Freedom of Information and Privacy, Auckland, 28 March 2002.
8. <<http://www.privacyinternational.org/>> at 3 November 2004.
9. See <<http://freedominfo.org/survey.htm>> at 3 November 2004.
10. See papers of International Symposium on Freedom of Information and Privacy, Auckland, 28 March 2002 at <<http://www.privacy.org.nz/media/>>.
11. I have been unable to pin down a precise number.
12. Article 19 is an NGO based in London <www.article19.org/>.
13. Which despite its longevity and apparent effectiveness is rarely credited as a primary source of design inspiration for countries adopting FoI legislation.
14. Stephen Lamble, *Computer-Assisted Reporting and Freedom of Information*, PhD thesis, University of Queensland, November 2003.