Freedom of Information Review

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Comment

In the last weeks of 2004 the last issue of the *FoI Review* moves towards completion. After 19 years of cataloguing the reception, administration and stumbles of FoI in Australia the 'little green magazine' will be no more. It started life in a far different world. Only two Australian jurisdictions had FoI Acts on their statute books and less than a dozen countries had embraced the concept of allowing, as a legal right, access to government information.

Only a few weeks ago I received the first annual report of the Northern Territory Information Commissioner (the last jurisdiction in Australia to implement a statutory scheme of access) and an email reminder about the pending commencement of FoI in the heartland of Westminster. The *FoI Review* is departing at a fascinating period of FoI development.

The articles in this last issue depict the complexity and diversity of issues now confronting those charged with administering or developing access regimes and the monitoring and scrutiny difficulties faced by those who support greater access. Jack Herman and Inez Ryan's article is a powerful case for further FoI reform in Australia. More than any other article it highlights the poorly timed exit of the *FoI Review*. The article by Chris Berzins brings into focus a major policy issue that either is left in the too hard policy basket or more often simply ignored — namely the access-privacy nexus or interface. The Timmins article is a succinct yet penetrating analysis of the gap between the promise of FoI and its delivery in New South Wales despite 16 years of operation. The Bildstein and Robertson articles on Forestry and Dole Cruisers are stories about the impediments that still face users of FoI a decade (or even two) after the legislation has come into operation. A salutary reminder (probably unneeded) for the UK Campaign for Freedom of Information that 2005 is just one more milestone in a very difficult journey. The article on Mexico and FoI mirrors the challenges and decisions now being made in an ever expanding array of countries on FoI.

Fortunately there is some good news for those looking for an outlet for their writings on FoI or those interested in reading FoI articles. Steve Wood, Senior Lecturer at the School of Business Information, Liverpool John Moores University intends to start publishing an on-line journal on FoI in early 2005. The proposed title of the journal is *Open Government: A Journal On Freedom of Information*. The Journal has formal approval and funding from Liverpool John Moores University and will be professionally hosted by Scholarly Exchange <http://www.scholarlyexchange.org/> and will be an open access journal with an ISSN and creative commons licence. Further details can be sought from Steve Wood at <S.Wood@livjm.ac.uk>.

Finally, many thanks to all those who have contributed, subscribed and used this wonderful little publication.

RICK SNELL

The urgent need for reform of Freedom of Information in Australia

Among the main objectives of the *Freedom of Information Act*, in addition to its focus on providing access to personal information (and thus ensuring that it is accurate), is the facilitation of public scrutiny of government actions and subsequently an increase in government accountability. Consequently the information made available should lead to greater public input into policy-making. These laudable ideas predate the High Court's finding of an implication in the *Constitution* of a freedom of communication in political matters. That implication, and the Court's reasoning for its existence, that such a freedom is necessary in a representative democracy, because the voting public needs to be informed on political matters in order to make a reasoned choice at elections, lends more weight to the idea that, through freedom of information (FoI) processes, there should be available detailed analyses of government actions in a wide range of areas.

One of the main avenues through which such scrutiny and analysis will be conducted is the press. Among its primary aims is keeping their readers informed on matters of public interest and concern. Thus, the press has in the past tried to, and, on occasions, continues to, use FoI processes to discover matters of public interest related to the performance of government and on the development of public policy. In other words, its use of FoI relates to maintenance of the accountability of governments.

In the absence of government disclosure of material related to the development of public policy, the public is dependent on FoI processes to discover the background. Otherwise we become increasingly reliant on 'news management', on leaks, public relations and spin-doctoring. To some extent we are already used to that in politics but its insidious influence is spreading in the use of news management techniques by the police, the military, industry and, even, universities. Without access to the source material, journalists, and their readers, are subject to the spin-doctors who tell only their side of the story.

At the same time as they are more likely to provide background briefings and off-the-record leaks, governments and the public service have become more sophisticated in their ability to frustrate attempts by the press to use FoI. Methods used include a large number of blanket exemptions to the process (Cabinet documents, commercial-in-confidence, privacy, security etc), time delays built in, the charging of excessive fees for the service and, in some cases, unrealistic requirements for identification of documents required. We've seen federal ministers use 'conclusive certificates' to block access to documents sought by *The Australian* in a number of areas which would appear to be quintessentially matters of public interest and concern, including Treasury documents on the effect of bracket creep on incomes and taxes and the possible misuse of the first home-owners' scheme.

Those of you who read *The Australian* will have been following the developments of that paper's FoI editor, Michael McKinnon, to gain access to the treasury documents. McKinnon is one of the few Australian journalists who makes regular and systematic use of FoI laws to gain access to information on which to base his investigations and who has been achieving some success in his efforts. But McKinnon's limited success in the field of FoI is in contrast with the majority of Australian journalists who make very limited use of FoI in their work.

Although statistics are published by the various government agencies which are responsible for overseeing FoI, most of those agencies don't distinguish between journalists and other applicants for the purposes of analysis. Consequently it is very difficult to make an accurate estimate of how many FoI applications are made by journalists. There is one notable exception: the Queensland Information Commissioner publishes a profile of those applicants who seek external review. In its 2003 annual report the Commissioner reported that 275 applicants sought such review. The vast majority of those applicants were individuals. Only two were journalists. There are three possible explanations: few FoI applications from journalists are refused (which seems improbable); very few journalists whose applications are refused seek review; or relatively few journalists make FoI applications. Evidence, including a study done for the Council by an honours student at UTS in 2002, suggests that the majority of journalists make very little use of FoI.

Here is a paradox, one of the primary reasons for introducing legislation was to increase government accountability by facilitating scrutiny of government action, yet journalists rarely use FoI. Which raises the question: why is it that journalists make so little use of FoI?

Raise the subject of FoI with most journalists or editors and they'll usually tell you that it's not worth their time to make an FoI application; that it's more trouble than it's worth; or that an FoI application requires a lot of work and yields very little reward. Probe a little deeper and their complaints usually boil down to three problems: they are refused access to the information they seek; they are advised that they will only be given access to the information that they want if they pay an exorbitant amount of money; or it takes so long to process the application that the information is outdated and irrelevant by the time they receive it. It remains easier (and quicker) for journalists to acquire information via unofficial leaks and off-the-record briefings than it is to gain access through formal FoI procedures. This makes journalists more vulnerable to being manipulated and misled and makes it much easier for governments and officials to manage news.

Government politicians (although interestingly, not those politicians who are in opposition), when responding to criticisms of excessive use of exemptions to block FoI applications, have a tendency to cite the large volume of successful FoI applications as evidence that the legislation is operating satisfactorily. According to the Commonwealth statistics for the year 2002–2003, of 38,370 requests determined only 2246 (5.58%) were refused, with more than 70% being granted in full. However, it is clear that the applications which are successful are overwhelmingly from individuals for personal information. If you look at applications for non-personal information, such as policy documents — *the very documents sought by journalists for the purposes of scrutinising government action* — a very different picture

emerges. Of a total of 41,481 FoI requests received by Commonwealth agencies between 2002 and 2003, 38,120 of them (almost 92%) were for personal information, most of these being directed at Veterans Affairs, Centrelink or the Department of Immigration. Only 8% of FoI applications were for non-personal information. So how does the success rate of these non-personal applications compare with the overall success rate? About 46% of applications for non-personal information were granted in full, with about 15% being refused. But even that adjusted figure is misleading, since it does not take account of the high proportion of FoI applications which are withdrawn because of the exorbitant charges demanded for their processing.

Costs

When explaining their reasons for not utilising FoI, journalists often cite the fees charged. In his Address to the Press Council in 2003, News Limited CEO, John Hartigan, referred to one example where the government quoted $605,284.72 for a single application. After negotiation this was reduced to $284. But is this typical?

According to Labor's Robert McClelland in 2002, analysis from the ALP reveals that charges notified by the Howard Government in response to FoI requests leapt from $308,689 in 1998–99, to $552,038 in 1999–2000, $1,099,380 in 2000–01 and $825,779 in 2001–02.

'Few of these extra charges were actually collected', he added, 'raising serious concerns that they were only ever notified to deter requests for information'.

The Council's analysis of published statistics suggests that certain agencies do demand extremely high payments for FoI applications which seek non-personal information. In 2002–03 the Remuneration Tribunal issued only one quote for non-personal information — the figure quoted was $10,471. In the same year the Department of Finance and Administration issued 15 quotes for charges in respect of FoI applications for non-personal information, which totalled $138,299, averaging $9219.93 per application. But the winner of the award for the most outrageous charges quoted for an FoI application is the Department of Industry, Tourism and Resources, which issued $186,128 worth of quotes in respect of just 13 applications for non-personal information — that's an average of $14,317.54. There appears to be a correlation between the size of the amounts quoted and the proportion of applications withdrawn: those agencies which quoted higher amounts tended to have high numbers of applications being withdrawn (52% of applications to the Department of Finance were withdrawn; 45.4% of those to the Department of Industry).

A total of 3333 applications were withdrawn in 2002–03, but no distinction is made between those withdrawals where personal information was being sought and those withdrawals where non-personal information was being sought. If the figures are adjusted again to include the total number of withdrawals, the rate of success for FoI looks very poor indeed, with approximately 22% of applications for non-personal information being granted in full and an estimated 50% apparently being withdrawn due to the high cost of proceeding. With only a one in five chance of an FoI application succeeding, should it really surprise anyone that FoI is perceived by most journalists as being a waste of time?

But what if you do fight on, against the odds, and persuade your employer to cough up the cash the government is demanding as ransom and ultimately succeed in your efforts to gain access to the information? Well, its probable that by the time you receive the documents they will no longer be useful to you.

Time

'The real problem is that, quite frankly, you go through this kind of automatic process of refusal through the federal government department', says Ross Coulthart, a journalist with Nine's *Sunday*. 'They know that when it gets to the Administrative Appeals Tribunal [the final step] that 99 times out of a hundred we drop off because we can't afford it.'

Other journalists say the time taken to process FoI requests is one of the biggest deterrents. Many believe some government agencies use those delays to discourage applications. 'The lengthy delay in processing can mean the significance of the story is lost', says a reporter with *The Australian*, Jennifer Sexton.

The Commonwealth legislation states that applications must be processed within 30 days, unless consultation with a third party is necessary (in which case they must be processed within 60 days). A further delay of 30 days is incurred where review is sought. Statistics indicate that 34.68% of FoI applications for non-personal information took more than 30 days to process and 17% took more than 60 days to process. But even the remaining 65% of applications which are processed within 30 days usually take too long to be of assistance to journalists, who usually work within relatively brief timeframes, where an issue being researched may only remain of interest to readers and audiences for a few weeks and where editors may require articles to be researched, written and published within a few days. In general, journalists need to get access to information quickly. For the purposes of investigative journalism, the value of information reduces in proportion with the time it takes to acquire it.

Time and money anecdote: Yet another recent FoI debacle involves a request for information about the approval of drugs and medical treatments. The department quoted $3855 for the information, including 141 hours of 'decision-making' at $20 an hour.

Exemptions

So how is it that legislation which was intended to have the effect of making information accessible has, in its practical operation, resulted in information being blocked? The problem lies partly with the legislation itself and partly with the culture of the public service. Changes to the operation of government, such as the increasing use of private contractors, are also important elements discouraging the free flow of information. Issues of training and resources are also factors which have a bearing on the success of FoI applications. Of course, government ministers must also take some responsibility.

The Press Council's view is that information should be available and that there should be no blanket classes of exemptions. Currently, there are a number of exemptions which are typically relied on when refusing FoI applications by the media. These include Cabinet-in-confidence,

commercial-in-confidence, 'internal working documents', and 'unreasonable diversion of resources'.

It's interesting to note that just because a document falls within one of the exemptions it does not necessarily follow that the information must be withheld — the government has a discretion as to whether or not to disclose exempt information. But rather than exercising that discretion in favour of greater openness, governments tend to withhold information beyond what is legitimately within the scope of the exemptions.

Cabinet

The Commonwealth Act exempts from access any document which was brought into existence for the purpose of consideration by Cabinet. The blanket exemption of all Cabinet documents is perhaps the most disturbing of all the exemptions, because it so completely antithetical to the spirit of FoI. As far as journalists are concerned, the Cabinet-in-confidence exemption has the effect of placing beyond their reach the very documents that would be of the greatest utility in scrutinising governments and keeping them accountable to the voting public. Although many of the documents which are submitted for Cabinet consideration are no doubt routine and dull, these are nonetheless the documents which record the process by which politicians decide how to spend taxpayers' money and there can be no doubt that there is a public interest in having them available for scrutiny. Although it is difficult to measure, I would expect that this exemption acts as a major disincentive discouraging journalists from attempting to employ FoI in their research. And it appears to breach the implied freedom of political communication.

But why should Cabinet documents, regardless of their subject matter, be automatically exempt from FoI? Two years ago, the Welsh Parliament commenced the publication of its Cabinet minutes on the Internet. If the publication of Cabinet documents would jeopardise Australia's security or public, they are exempt under s 33 or s 37; if the documents would adversely affect personal privacy they are exempt under s 41. There are a number of other exemptions which could be relied on to withhold Cabinet documents from the scope of FoI without resorting to a universal exemption. The Cabinet-in-confidence exemption is unnecessary and should be removed.

Commercial

It has been widely acknowledged that the use of the 'commercial-in-confidence' exemption has been steadily increasing for several years. This trend has been so pronounced that it has prompted at least two state auditors-general to make public their concerns that it is threatening government accountability. While the extensive use of the exemption is in itself worrying, more disturbing is the suggestion (from state Auditors-General, Ombudsmans and public accounts committees) that the inclusion of confidentiality clauses in government contracts is made, not at the request of contractors, but at the insistence of governments so that they can use the clauses as an excuse to invoke FoI.

Ironically, given government's assertions that they want to be more like business, this increasing use of the commercial exemption to limit information comes at a time when private enterprise is being, or is being forced to be, in the wake of several prominent company collapses, more forthcoming with information on financial matters, including the salary levels of their executives.

There have been recently suggestions for change to the commercial-in-confidence exemption. In November 2002 the Queensland Public Accounts Committee's recommendations included the advice that information should be made public unless there is a justifiable reason for not doing so; that the party requesting the confidentiality should be required to demonstrate how its commercial interests would be harmed by disclosure; and that confidentiality clauses should not be routinely included in contracts between government and private sector organisations.

A positive step would be to incorporate guidelines for the appropriate use of commercial-in-confidence into FoI legislation, and legislate to place an onus on ministers and public servants to adhere to such guidelines. Where a confidentiality clause is inserted into a government contract unnecessarily or for an inappropriate purpose the public interest in accountability should prevail to override that clause.

But perhaps we should go further, and consider whether there should be any commercial exemption at all. When contractors tender for government contracts they should understand that public accountability is part of the deal. The public is a party to such contracts and, as such, could be regarded as having a right to know all the terms. The inclusion of a confidentiality clause is not sufficient in itself to justify the removal of public accountability.

Internal working docos

One of the more peculiar aspects of the FoI legislation is that which exempts 'internal working documents' from disclosure if they would disclose matter relating to opinion, advice or recommendations obtained in the course of deliberative processes involved in the functions of a government agency. In other words, documents which reveal the advice on which government decisions are based are exempt. But surely, if an aim of FoI is to facilitate scrutiny of government, these are the very documents which ought to be accessible? If it would be contrary to the public interest to disclose the information, it is exempted. Why then is there a need to make specific reference to internal working documents? Merely because a document has been created or obtained for the purpose of assisting the government in its decision-making is not sufficient justification to be exempt from disclosure and this exemption should be repealed.

Conclusive certificates

A significant clause which is to be found in several places is the provision for conclusive certificates. This clause gives ministers the power to certify that the disclosure of a document would be contrary to the public interest. Such a certificate makes the document exempt from disclosure. The Howard Government, in particular, has a fondness for the employment of conclusive certificates as a means of maximising the scope of the exemptions to keep information out of the public arena, as exemplified by recent matters which led to Michael McKinnon's appeal to the AAT. Alexander Downer blocked access to the Government's legal advice on the incarceration of Australian citizens

in Guantanamo Bay because release of the advice might damage the security of Australia and international relations, and reveal information communicated in confidence by a foreign government. And Peter Costello stymied attempts to glean information on the first home-owners' scheme and on the impact of rising incomes on the 2003 tax cuts, and other material related to the effects of 'bracket creep' on taxpayers.

(In the most delicious irony of the McKinnon case, the precedent on which the Treasury relied to keep the certificates in place arose from an earlier attempt by an Opposition politician to use FoI law to pry loose information from an earlier Treasurer. The politician seeking to use FoI processes, and seeking a ruling that the Treasurer's use of conclusive certificates was wrong, was John Winston Howard. The Treasurer at the time was Paul Keating. In the period since 1985, Mr Howard has obviously changed his view on the use of FoI to frustrate attempts to shine a light on government practices and to increase government accountability.)

Once a conclusive certificate has been issued, the only way to gain access to the relevant material is to seek review via the AAT or the Federal Court. Obviously, few applicants have the resources to pursue this course of action, which may take years to be resolved. But even if you succeed in your application for review and the issue of the certificate is found to be inappropriate, there is no way to force the Minister to disclose the 'exempt' material.

To mitigate the excessive and inappropriate use of conclusive certificates, a provision should be inserted into FoI legislation which makes it an offence for ministers or senior public servants to issue conclusive certificates for improper purposes, such as the concealing of incompetence, inefficiency, dishonesty or corruption, or to avoid embarrassment to the government.

Other reasons

Although there is ample scope for an extensive range of information to be legitimately withheld under the various exemptions, many FoI applications are refused for spurious reasons which have only the most tenuous connection with those exemptions. Even where the refusal is within the letter of the law it is often contrary to the spirit of the legislation. Excuses given for refusal of access have included the need to avoid embarrassment to the government, a fear that disclosure would confuse the public, or that disclosure would lead to uninformed debate.

In many instances refusal of access is due to an erroneous understanding of the exemption provisions. The inability of many public servants to comprehend their obligations under the legislation also results in many applicants not being provided with adequate reasons for refusal of access, thus making the task of reviewing those decisions difficult.

Administrator's anecdote: Several weeks after making an FoI request, a journalist was told there would be an unavoidable delay past the statutory period for replies because of backlogs, short-staffing etc.

When the reply arrived, the journalist was told by the FoI officer that only six documents were considered to fit within the 'terms of your request'. Of these 'access is granted in full to three documents'' and 'access is denied in full to three documents''. The three documents the journalist was allowed to see were all correspondence to ... him, relating to his FoI request.

But an inability adequately to understand the legislation and consequent shortcomings in processing applications is not confined to public servants. It has been suggested that the media would have a higher rate of success if they improved their skills in preparing FoI applications. This is largely due to the inclusion in FoI legislation of provisions which permit the refusal of voluminous requests which would take up an excessive amount of administrative time and resources. Those journalists who have had some success in lodging FoI applications have indicated that in order to have a chance of succeeding, journalists must invest time into the process of refining applications down to very specific requests. In order to do this, journalists must have a thorough knowledge of public service procedures.

Reform

There is a broad range of problems with the legislation. What steps can be taken to address them?

First, governments need to make more information on the process of policy development automatically available to the public. This should include material that informs the decision-making processes of the Executive. Then it needs to reform FoI so that information is actually available on matters of public interest and concern.

I have already indicated that the exemptions in the FoI legislation are in need of review. Most of the exemptions should be abolished, while others need to be redrafted so that they only apply in the event of exceptional circumstances. All FoI legislation should include a clause which makes it an offence to withhold information improperly or for an inappropriate purpose. (For example, President Clinton's *Executive Order 13292*, in respect of National Security, prohibits the classification of information in order to (a) conceal breaches of the law, inefficiency, or administrative error; (b) prevent embarrassment to a person, organisation, or agency; (c) restrain competition; or (d) prevent or delay the release of information that does not require protection in the interest of national security.) The legislation should be redrafted so that any exemptions are over-ridden by the fundamental principle that information should be freely accessible unless it is clearly in the public interest to withhold it. Conclusive certificates should be abolished.

The appointment of independent Information Commissioners should improve FoI but any body given the task of monitoring FoI must be given adequate legislative powers to be able to review decisions and to intervene, where appropriate. It is also essential that any watchdog body be able to collect detailed statistics on FoI applications. Applications need to be broken down by the type of applicant, the nature of the information sought, the purpose for which the information is being sought, the reasons given for refusal, the reasons for applications being withdrawn and so on.

In addition to legislative reform, governments need to improve the training of staff in dealing with FoI applications, so that they make decisions which are consistent with both the letter and the spirit of the legislation. Such training goes beyond merely understanding the legislation. There is a need to encourage the development of an ethos within the

public service and government which is consistent with the notion that the public has a right to be informed.

Governments also need to ensure that adequate resources are invested in employing sufficient numbers of staff who have responsibility for processing FoI applications. By ensuring that FoI is adequately resourced, governments would increase the probability that applications are processed in a timely way.

Similarly, journalists need to be given training in how to prepare an FoI application so that it has the greatest chance of success. Media organisations need to invest resources into pursuing reviews and appeals against unreasonable refusal of FoI applications. The appointment of dedicated FoI editors would also be a positive step.

The task of reforming FoI is a challenging one. It requires vigilance on the part of those who seek to have government information freely available. It also requires courage on the part of politicians, who will undoubtedly face resistance from their colleagues and from senior bureaucrats. Freedom of information laws around Australia need to be reformed to make the suppression of material of public interest and concern much harder. Material should be available, unless it fits narrow and specific categories of exclusion and such exclusions should not be for classes of documents. And those who administer FoI need to justify their exclusions, rather than the current situation where the onus seems to be on those seeking to have suppressed material released.

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This paper was delivered at the Public Right to Know Conference, University of Technology, Sydney, 21 August 2004.

Some thoughts on administering access and privacy rights: one statute or two?

Although the right of access to government information and the right to privacy often seem to conflict, they are also inextricably linked. From a freedom of information (FoI) perspective, the right of access is always a qualified one, subject as it is to the application of necessary exemptions of which the protection of personal privacy is but one. With respect to informational privacy, the two are more intertwined given that access rights are an integral component of the fair information principles which now comprise the framework of most statutory privacy regimes; the right of access to one's own information, important in its own right, also underpins the right to correct that information or to file a statement of disagreement.[1]

Given the tensions and the linkages between informational access and privacy rights, it is surprising that so little consideration has been paid to the issue of whether access and privacy rights are best dealt with under a single statute or administered separately. However, this becomes an increasingly important question with the access and privacy landscape changing so rapidly, driven in part by breathtaking changes in technology, the transition to electronic record keeping with the emergence of trans-national data flows, and the blurring of the boundaries between the public and private sectors.

What follows is a very tentative and preliminary assessment of the issue. Although it is unquestionably impressionistic, it is informed by considerable practical experience administering access and privacy rights within a single statute.[2] It also draws on my critical commentary about a variety of issues pertaining to the administration of access and privacy rights in a Canadian context.[3] The examples cited are exclusively Canadian and, as much as I am a strong proponent of comparative studies, there is a real danger making assessments of other jurisdictions when the terrain is not sufficiently familiar.[4] The conclusions reached are cautious because it is clear that a variety of considerations come into play. Effective enforcement of access and privacy rights depends not only on sound institutional design but on other factors such as adequate resources, careful legislative drafting, and the particular attributes the individual charged with oversight brings to the position. That being said, it is hoped that some of the conclusions may be of value in terms of provoking more extensive consideration of the factors that contribute to effective access to information and privacy regimes.

In Canada, access and privacy rights first received comprehensive[5] statutory protection at the federal level in the early 1980s. The creation of separate access and privacy statutes followed the approach in the United States although the assignment of oversight and enforcement responsibilities to ombudsman-like commissioners marked a departure from the American model which heavily emphasised self-enforcement. Given the initial reliance on the two-statute model, it makes senses to begin with a consideration of its strengths and weaknesses.

The two-statute model: advantages

A number of the arguments in favour of administering access and privacy under separate statutes are closely related and linked by the sense that however much the two may intersect, they do involve very different processes and may demand very different sets of skills to administer. For example, the access to information process is very much driven by requesters even if access commissioners have encouraged institutions to make more information routinely available. On the other hand, even though some privacy commissioners may devote considerable attention to complaint resolution, many privacy advocates downplay the value of complaints as a means of promoting privacy protection.[6] Therefore, from an enforcement process perspective it may make good sense to treat access and privacy separately.

It is possible that separate treatment also allows for the core issues to be pursued with more vigor. To the extent that one sees the oversight body playing an important advocacy role, this may be facilitated by a two-statute model. For

example, David Flaherty has referred to the danger that privacy commissioners may succumb to the temptation to engage in 'balancing' when what is called for is advocacy.[7] This tendency may be exacerbated when the privacy agenda also has to be balanced against the issues and concerns arising in an access context. Therefore, the two-statute model would seem to permit greater room for the oversight body to play the role of privacy or access advocate.

Arguably the two-statute model may also allow for better allocation of resources. As suggested, the most effective methods of conducting oversight and achieving compliance in the access and privacy arenas may differ. Therefore, the two-statute model may provide each oversight body with more flexibility to target resources. In addition, in the single statute model, the oversight body may be tempted to maximise its resources by focusing on processes that can be employed in both the access and privacy contexts.

This may lead to an emphasis on complaint resolution which makes sense from an access perspective but is questionable in terms of privacy.

The separate statute approach also offers some distinct advantages in terms of selecting an individual responsible for oversight. What makes for a good access commissioner may be very different from what is required of a good privacy commissioner.[8] This is not just a question of substantive expertise but also the skills that the position demands.

With respect to question of expertise, there are clearly individuals who, on appointment, had strong credentials as privacy experts;[9] the same cannot be said on the access side. In fact, it is difficult to define expertise in an access context, as distinct from the experience that comes from interpreting the legislation on a day to day basis.[10] However the ability to interpret legislation and to write effective decisions that will withstand judicial scrutiny may be far more important on the access side than on the privacy side.[11] Much of course depends on the oversight model that is in place; where there is order making authority, soundly reasoned decisions are critically important. Where an ombudsman is used, the ability to persuade and to use the powers of publicity become far more important. In fact, as both Flaherty and Colin Bennett have argued, effective commissioners play numerous roles which demand a variety of skills. In short, given the range of skills that may be necessary to enforce access and privacy rights, the narrower focus of the two-statute model may provide greater opportunity to select an individual whose skills more closely meet the demands of the position.

Finally, it has been suggested by Flaherty that in a country as large as Canada, effective enforcement of access and privacy's 'competing interests'[12] can only occur at the federal level under separate statutes. There may be merit to this but one might also question whether that assessment might change if access and privacy at the federal level had the benefit of stronger oversight and enforcement mechanisms.

The two-statute model: disadvantages

With respect to the disadvantages of the two-statute model, one that immediately springs to mind is the room for public disagreement between the two oversight bodies. A classic example of this occurred several years ago when the federal Privacy Commissioner and the federal Information Commissioner clashed publicly over the issue of access to the Prime Minister's agendas, the Privacy Commissioner publicly challenging the Information Commissioner's right to even view the records to determine whether they were subject to the Access to Information Act.[13] Even though the dispute was largely attributable to the confrontational style of the former Privacy Commissioner, it brought home clearly a basic weakness in the two-statute approach.

Less dramatic than public disagreement between the oversight bodies is the potential for conflicting approaches to similar issues. For example, there is the chance that definitional terms or procedural requirements that are common to both access and privacy statutes may receive inconsistent treatment which would produce uncertainty until definitively resolved by the courts or by the legislature.

Associated with the previous concern is the possibility that the two-statute approach may aggravate the tensions between access and privacy and, in doing so, will discredit the claims of each. It was suggested earlier that a strength of the two-statute model is the opportunity for advocacy; taken to excess, it is also one of its weaknesses.

Single statute model: advantages

With respect to the case for the single statute model for administering access and privacy rights, one of the more compelling arguments is precisely that it invites a 'balanced' approach. If both access and privacy are given their due by the body charged with oversight, a more sensitive resolution is likely to occur when the two collide. This in turn may reduce the impression many seem to have that access can only be had at a cost to privacy or vice versa.

Related to the foregoing is the opportunity the single statute model provides to ensure consistency in treatment of interpretive and policy questions that occur on both the access and the privacy side. The first occasion arises when the legislation is drafted but equally important is the ongoing interpretation given to that language by the oversight body. Whether these possibilities are realised is another matter. However, administering access and privacy under the same statute increases the chance that statutory interpretation will be attuned to what is a rapidly changing access and privacy landscape.

Another advantage of the single statute model is the potential it has to generate a broader expertise that can be brought to bear on all issues confronting the oversight body. For example, as I have argued elsewhere, the use of rulemaking procedures by administrative agencies can foster expertise that, properly employed, can inform all aspects of the agency's activities.[14] We have seen some excellent examples of this in recent work of British Columbia's Information and Privacy Commissioner, David Loukidelis[15] but, unfortunately, not all oversight agencies make full use of these opportunities. As a result, processes that might be fruitful are not employed and information that might be usefully shared within the oversight agency is not.[16]

The single statute approach to administration of access and privacy rights also provides an excellent opportunity to address some of the very significant policy challenges that straddle the access/privacy divide. Of particular note are issues concerning access to information in electronic format and regulation of personal information contained in

public registers, particularly as that information becomes available electronically. That being said, those opportunities have not always been realised.

Single statute model: disadvantages

Although the single statute model has some potential advantages, it is not without problems. First, the opportunity to address access and privacy issues in a careful and considered way may be squandered, *Ontario's Freedom of Information and Protection of Privacy Act* being an excellent case in point. While the access provisions are drafted in considerable detail, the privacy provisions are strikingly deficient. As a simple example, there is no explicit complaint provision with the result that the Act is silent about the Commissioner's powers with respect to complaint resolution on the privacy side.[17] Nor does the Act deal in any meaningful way with the public register problem. These shortcomings, not surprisingly, have created very real administrative problems for the Information and Privacy Commissioner's office.[18]

There is also the danger that in a single statute model amendments designed to deal with a particular access or privacy problem may produce unintended consequences on the other side. Ontario's legislation provides another unfortunate example; an attempt to address policy concerns on the access side through the exclusion of broad categories of labour relations and employment-related records effectively ousted the privacy rules as they apply to government employees.[19] In short, the single statute model provides a real opportunity to get matters right but it may also magnify the costs of failing to do so.

Another concern with the single statute model is the danger that either access or privacy could decline in profile depending on the orientation of the head of the oversight body. It should not be surprising that an individual who brings specialised expertise to that position will be particularly drawn to those issues that engage that expertise. Given that it appears more likely that individuals will arrive with privacy credentials, it seems more likely that it would be access rights that could be jeopardised in the single statute model.

The profile of access issues in the single statute model may also be threatened by the heightened attention that is being given to privacy issues of late. In Canada, this is reflected by the move to regulate the use of personal information in the private sector and to introduce special rules to address health privacy issues. Responsibility for oversight in these areas is being given in part to provincial commissioners who are already responsible for access and privacy rights in the public sector. Despite the best of intentions, one has to wonder whether or not access rights are at risk of being swamped by the new privacy agenda. With no organised access constituency to speak of, the most important champion of access rights is likely to be the oversight agency. If this body is inevitably distracted by the considerable demands of overseeing one or perhaps more[20] new privacy regimes, access rights can't help but suffer.

Conclusion

The effective enforcement of access and privacy rights will depend on a number of factors. Whether or not the interests of each are best advanced with a single statute or separately remains an open question. The particular appeal of the single statute approach is the opportunity it provides to deal effectively with the critical points where access and privacy intersect. However, much still depends on careful drafting and well-reasoned interpretation by the oversight body. The two-statute model may have more resonance with those who see access and privacy enforcement as largely dissimilar enterprises requiring much different approaches. Regardless of the model one prefers, much will still depend on the powers the oversight agency is given, the tools it is provided with, and level of resources that are allocated to it. What is needed is more critical thinking about how all of these factors interrelate and how they may contribute to or detract from effective access and privacy regimes.

CHRISTOPHER BERZINS

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REFERENCES

1. However, David Flaherty has expressed 'scepticism … about the importance of access and correction rights'. See 'Controlling Surveillance: Can Privacy Protection be Made Effective?' in P. Agre and M. Rotenberg, eds, *Technology and Privacy: The New Landscape* (Cambridge: MIT Press, 1997) at 186-7. My own experience in administering Ontario's Freedom of Information and Protection of Privacy Act lends support to Flaherty's conclusion. Although there certainly have been many requests for personal information, most of these arise in the context of specific proceedings such as an investigation of an employment standards claim. There have been very few general requests to view personal information that may be on file with the institution and there has never been a formal request to correct information. And on the latter point, the Information and Privacy Commissioner's annual report for 2003 showed that there were only 15 correction requests in total for Ontario's entire provincial and municipal sectors.
2. I have managed the Ministry of Labour's Freedom of Information and Privacy Office since 1988 and in that period I have handled close to 12,000 access requests and have made all submissions to the Information and Privacy Commissioner with respect to access appeals and privacy complaints.
3. See 'Deference in Name Only: Judicial Review of Ontario's Information and Privacy Commissioner' (1998) 20 *Ad. Q.*304; 'Protecting Personal Information in Canada's Private Sector: The Price of Consensus Building', (2002) 27 *Queen's L. J.* 609; 'Ontario's Freedom of Information Access Process: A View From the *Inside'*, (2002) 26 *Ad. Q.* 1; 'Judicial Deference and Ontario's Information and Privacy Commissioner: In Search of "Reasonableness"', (2004) 28 *Ad. Q.* 1; and 'Three Years Under the PIPEDA: A Disappointing Beginning', forthcoming, *Can. Journal of Law &Tech*.
4. In order to have a good understanding of how access and privacy are administered in any particular jurisdiction, one not only needs to have a good appreciation of the statutory provisions but also the decisions and reports issued by the oversight body and judicial consideration of those results. Beyond that, it is helpful to have some sense of how things actually operate in terms of day to day administration, a point I have discussed at some length in a previous article. See 'Ontario's Freedom of Information Process' … above, n3.
5. A number of provincial privacy statutes existed prior to the introduction of the federal *Privacy Act* but all of these were limited to statutory recognition of privacy-related causes of action; none involved oversight and enforcement by an independent agency.
6. Colin Bennett and David Flaherty have repeatedly downplayed the importance of privacy complaints in terms of achieving privacy compliance.
7. Above, n1, at 173,179.
8. Flaherty has written extensively about the qualifications of privacy commissioners. See, in particular, Protecting Privacy in Surveillance Societies, (Chapel Hill: UNC Press, 1989). He revisited many of the conlusions from that study in 'Controlling

Surveillance …', above, n1. Bennett has also devoted considerable attention to the topic. See, in particular, *The Governance of Privacy* (with Charles Raab), (Aldershot: Ashgate Press, 2003) and 'The Privacy Commissoiner of Canada: Multiple Roles , Diverse Expectations and Structural Dilemmas' (2003) 46 *Can. Pub. Adm.* 218.

9. David Flaherty is probably the best example. On his appointment as British Columbia's Information and Privacy Commissioner in 1993, he was not only Canada's leading privacy authority but an internationally recognised expert as well.
10. I have discussed at some length the problems Ontario's courts have had in explaining the basis for deference to the IPC on access issues. The courts repeatedly refer to an expertise in balancing access and privacy rights when in fact this seldom comes into play. See ' Judicial Deference and Ontario's Information and Privacy Commissioner…', above , n3, at 3-11.
11. I have argued that the IPC's failure in this regard has contributed significantly to an excessive level of intervention by the courts. See 'Deference in Name Only …', and 'Judicial Deference and Ontario's Information and Privacy Commissioner …', above, n3.
12. Above, n1 at 168.
13. The Privacy Commissioner went to the extraordinary length of making a scathing attack on the Information Commissioner in a letter that was publicly disseminated.
14. See 'Policy Making by Labour Relations Boards in Canada: Is There a Case for Rulemaking?' (2000) 25 *Queen's L.J.* 479, at 545.
15. Not only has Commissioner Loukidelis used notice and comment-like processes very effectively to involve the community on a number of occasions (eg draft workplace privacy guidelines) but his superb report on the implications of the US *Patriot Act* relied greatly on extensive input received as a result of a high profile public submission process.
16. A classic example is the USNational Labour Relations Board which I have discussed at length in a previous article (supra, n14). Canada's federal Privacy Commissioner has also been heavily criticised for the failure to use all of the tools that are available to it, a point I discuss at length in a forthcoming article (above, n3). However, there are refreshing signs that that is changing with the appointment late last year of Jennifer Stoddart as new commissioner.
17. As a result of the failure to set out a privacy complaint process, the Act is silent with respect to the Commissioner's powers to investigate. It also means that the Commissioner is limited to making recommendations, unlike the access side where the Commissioner can issue binding orders subject only to judicial review.
18. On 26 April 2000 the Commissioner tabled a special report with the Legislature concerning her investigation into complaints about the disclosure of information held by the Province of Ontario Savings Office. As a result of difficulties encountered in gaining cooperation with respect to her investigation, she recommended amendments to the legislation that would allow her to conduct 'proper and complete investigations'
19. I have discussed this issue in a recent article. See 'Judicial Deference and Ontario's Information and Privacy Commissioner: In Search of "Reasonableness"', above, n3, at 15–17.
20. For example, Ontario's Information Privacy Commissioner has just been given oversight responsibilities with respect to the new *Personal Health Information Protection Act*. And should Ontario bring in privacy legislation governing the private sector, as British Columbia and Alberta have done, it is most likely that the IPC would be assigned oversight responsibilities here as well. Regardless of whether additional resources were provided, these new obligations would impose a huge burden on the IPC which would have to have some impact on the access side.

Freedom of information In New South Wales: 15 years on

The *Freedom of Information Act 1989* (NSW) was introduced by the Liberal Government headed by Nick Greiner following a commitment made during the election campaign of the previous year. NSW followed the Commonwealth and Victoria both in introducing legislation and enacting a similar regime for access to documents held by a minister or government agency.

It was generally accepted, perhaps by all except some senior long term public servants, that reform of rights of access to government information was long overdue in NSW. The late Dr Peter Wilenski in a report on public administration a few years earlier, had described the NSW public sector as 'a bastion of secrecy'.

At the time the Government presented the case for freedom of information (FoI) in the context of a broad commitment to public sector reform. One element of this approach, was that responsibility for the Act was assigned to the Premier and the Premier's Department, not to the Attorney General. The thinking at the time was that while FoI was an administrative law initiative, its primary rationale was about improvements in accountability and access information, issues best addressed by experienced public officials who also had knowledge and understanding of the requirements of the *FoI Act.* In other jurisdictions in Australia, the administrative law focus appears to have given a much more prominent role to lawyers in the day-to-day administration of the Act.

In NSW responsibility for FoI in government agencies was usually located in a part of the organisation other than legal services and encouragement was given to greater openness without use of FoI. The Premier's Department at the time and the NSW Ombudsman both emphasised that FoI should be seen as a last resort to access government information.

Agencies were asked to examine broader issues associated with disclosure of information, especially in the case of routine, non complex requests. Applications under the *FoI Act* should only be necessary where there was a need for the agency to weigh and balance potential harm to other public interests, including the operations of government, personal privacy or sensitive commercial information. Where the Act was utilised, the applicant would have a right to the documents sought unless there were particular reasons why a relevant exemption should apply. Notices of determination should be drafted in plain English and would not require long or complex legal essays on the meaning of exemption provisions relied upon.

Over the past 15 years the NSW Ombudsman estimates that there have been something of the order of 120,000 FoI applications. Reports over the years indicate that the majority of applicants use FoI to seek access to documents concerning their own affairs or their own dealings with a government agency. All indications are that the vast majority of this type of application result in the applicant being given access to all relevant documents held by the agency.

This personal request emphasis is illustrated by the list of agencies that receive most requests. In every year since the Act commenced the NSW Police Service has topped the list, sometimes accounting for close to half the total number of applications received by all agencies. In

the last 12 months the Police Service received over 5000 applications. The number of applications received by that agency has increased by around 40% in each of the last three years. Other agencies consistently at the top of the list include the Roads and Traffic Authority (1200 applications last year), Workcover (700) and the Government Superannuation Administration Corporation, Pillar (500). Area Health Services which administer public hospitals in NSW have at various times also been high in the pecking order, although most have now dropped down the list as access to health records is usually available without resort to FoI in accordance with NSW privacy legislation (since 1 September 2004 the *Health Records and Information Privacy Act* and previously from 1 July 2000 the *Privacy and Personal Information Protection Act)*.

There are no independent measures or assessments that enable a judgment to be made about whether FoI in NSW has achieved its objectives of open government more effectively than what has occurred in the Commonwealth, or other state and territory jurisdictions in Australia.

The general story seems to be much the same as elsewhere: FoI has been to a degree a challenge to the traditional culture of secrecy in some agencies and at some levels of government; FoI (and other developments including the wonders of modern IT) has focused attention in some agencies on records management issues; and thousands of citizens have succeeded in gaining access to information about their own affairs which they regarded as important enough to warrant pursuing.

No one should be surprised that the *FoI Act* has been utilised relatively successfully by applicants seeking access to personal information. It is perhaps surprising that this turns out to have been the main use of the Act.

The true touchstone of FoI success is whether it has opened up access to other categories of information that throw light on government operations and decision making, and improve participation in policy development.

In these areas performance information is thin. What happens in response to any particular application is usually only known to the applicant and the agency, unless subsequently revealed as a result of a complaint to the Ombudsman which then features in a publicly available report, or in a decision of the Administrative Decisions Tribunal (ADT). Any such cases are probably the tip of an iceberg — relatively few applicants will have the time, energy or resources to pursue such matters to conclusion.

The anecdotal evidence suggests that FoI has failed to deliver the degree of openness and transparency that its advocates and sponsors anticipated. There is a high degree of caution and conservatism in considering the release of documents other than those containing information about the personal affairs of the applicant. 'Candour and frankness' and similar concerns continue to feature prominently in reasons put forward to support a claim that disclosure of a particular document would be contrary to the public interest.

There are a number of weaknesses apparent in the NSW Act and its implementation.

In his Annual Report 2003–2004 (available at <www.ombo.nsw.gov.au>) the NSW Ombudsman again calls for a review of the Act, continuing a process first commenced by one of his predecessors in a special report to Parliament ten years ago.

The Ombudsman points out that since the early 1990s most legislation passed in NSW requires a review by the responsible minister after a maximum of five years. The Ombudsman refers to the significant changes in public administration and the community at large since the Act was first introduced and to the piecemeal changes over the years that result 'in a fragmented Act that does not provide consistency or proper guidance for those trying to implement it, and is not effective in keeping agencies accountable to the public'.

The Ombudsman also suggests another compelling reason for review is that there are now several separate and largely inconsistent schemes in NSW under which members of the public can access information held by public sector agencies — an FoI Act, two Privacy Acts that include access rights, the *Local Government Act* that provides access to local council documents, and the *State Records Act.*

FoI has also suffered in NSW as a result of a lack of profile and ongoing leadership within government. It is difficult to recall a positive public statement about FoI from the current Premier, who continues to be the Minister responsible for the Act. In terms of public service support, the guidance and assistance initially provided by an FoI unit in the Premier's Department is a distant memory since its abolition in 1991 on the claimed grounds that the successful implementation of the Act at that stage made its work redundant.

One of the indicators of the Act's 'orphan' status is that the Procedures Manual, issued by the Premier's Department as a guide to agency implementation, has not been updated since 1994. As a result it does not refer to any of the reported FoI decisions of the ADT regarding the interpretation of exemption provisions.

The Carr Government did make good a 1995 election commitment to establish the ADT. That initiative has produced to date over 150 FoI merits review decisions since the Tribunal began operations in late 1998. The Tribunal, however, has had only limited impact on the day-to-day decision making on FoI applications. While its decisions are publicly available (<www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/adt> which has a limited search capability), the Tribunal has done little otherwise to 'promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales', one of its objectives specified in s 3 of the *Administrative Decisions Tribunal Act 1997*.

The ADT faces the same problem as any busy (court or) tribunal — consistency in decision making among its members. As a result practitioners find it difficult to sort the wheat from the chaff in published decisions, and to develop general principles from what arguably might be the leading cases and to apply them in dealing with applications. The Tribunal's annual reports cite few FoI cases which it regards as deserving of such status. The Tribunal has also to date not commented on or sought to draw lessons for public administrators from the hundreds of FoI cases settled or withdrawn before they have been the subject of a decision.

The *Administrative Decisions Tribunal Act* is one of those that provide for statutory review five years after commencement. The NSW Attorney General called for public submissions to the review in December 2002. The report is yet to be tabled in the NSW Parliament.

One error (or more cynically a key part of the plan) associated with the introduction of an FoI law is the failure by government to appreciate the degree to which cultural change requires consistent and persistent reiteration and support. Openness, accountability and responsibility give rise to constant tensions within the government system. Values such as these need constant nurturing, a point noted in a 1997 address to the British Section of the International Commission of Jurists by Justice Michael Kirby of the High Court of Australia. His list of FoI's seven deadly sins included the idea that the passage of FoI legislation is enough of itself to work the necessary revolution in the culture and attitudes of public administration.

In NSW a comprehensive analysis has yet to be undertaken but it is clear that there are still many dark corners of public administration, which the FoI torchlight has failed to illuminate.

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DOLE CRUISERS

A story about an FoI application to confirm a news release

This freedom of information (FoI) application began as part of an analysis of the way Australian newspapers told a story about an allegedly large number of dole bludgers targeted for action by the Federal Government. The application was intended to help cast light on earlier versions of that story, as told by the researchers to Department of Employment and Workplace Relations (DEWR) and by DEWR to its Minister. Aspects of these various linked stories — including their truth and validity — should be of interest to the Australian community.

The bureaucratic response: a pattern emerges

An FoI application for the release of ministerial briefing notes on the attitudes of unemployed Australians was only partially successful. Government officials ultimately withheld advice to their Minister on the implications of what was said to be groundbreaking research on unemployment, as well as recommendations for action. During the course of two related FoI applications and two internal reviews, a pattern of bureaucratic response emerged. In each case, an initial refusal to release documents was followed by a reversal of that decision coupled with a partial release of some information. This pattern of refusing then relenting had the effect of exhausting internal appeal rights and of prolonging the FoI process. The bureaucrats' principal defence against disclosure relied on s 36 (Internal Working Documents) and s 41 (Personal Information) of the federal *FoI Act*. Release of the documents sought, argued the bureaucrats, would inhibit their capacity to provide candid advice to the government. They also claimed that release in some cases would involve the unreasonable disclosure of personal information. If the government had implemented the longstanding proposals to change the s 41 privacy provision, set out in the Australian Law Reform Commission and Administrative Review Committee Report No. 77 *Open Government* in 1996, it is possible the application might have ended more fruitfully.

> Robert, more joy — Can we discuss tomorrow pls. Susan pls arrange

Robert and Susan were the recipients of this internal DEWR e-mail[1] late in 2003. The e-mail's author was a senior official and the irony in his reference to 'more joy' would no doubt have been apparent to his two colleagues. Attached to the e-mail was another sent to the senior officer by a DEWR lawyer. This lawyer was handling an internal review of a decision to refuse to release ministerial briefings I'd applied for under the *Freedom of Information Act 1982* (Cth). The lawyer wanted to know if there were any 'sensitivities with disclosing' the exempted information. This would be the subject for discussion between Robert and his superior.

At stake were ministerial briefings on research into the attitudes of the unemployed. The briefings included recommendations for dealing with a group of jobless Australians who the researchers had defined as 'dole cruisers'. These were people who were said to enjoy being on the dole and who might exist in large numbers. Releasing these briefings, I claimed, would serve the public interest as we would know the extent and more accurate details about this research and this group of 'Dole Cruisers'.

My FoI dialogue with the Department of Employment and Workplace Relations ran from August 2002 until June 2004 (see *Table 1).* I was analysing the way Australian newspapers reported a particular story about unemployment in May 2002. There was a single, initial source for the story about 'dole crusiers.' — a statement from the then Minister, Mal Brough.[2] The statement started:

> Brough To Target 'Cruising' Dole Recipients
>
> The Howard Government is set to disrupt the lifestyle of 'cruising' dole recipients, who enjoy being unemployed and have no intention of genuinely seeking work.
>
> Employment Services Minister, Mal Brough, said research commissioned by [his] Department … indicated that as many as one in six 'job seekers' were not really seeking jobs at all.

Mr Brough's office gave the news release on an exclusive basis to two newspapers, The *Daily Telegraph* in Sydney and Brisbane's *Courier Mail*. The two papers published their reports on 20 May 2002. The story was picked up that day (a Monday) by broadcast media and Australian Associated Press. Other newspapers around the country followed with their own versions of the story the following day.

For a representative sample of much of the coverage, here are the headline and first two paragraphs of the *Daily*

Table A: A chronology of events

20 May 2002	Minister for Employment Services announces crackdown on ‘cruising’ unemployed
8 August 2002	FoI application for material relating to Minister’s media release and separate Work for the Dole material (cost — $30)
13 November 2002	DEWR advises charge of $278.10
December to March 2003	Exchanges of letters about exemption from charge
31 July 2003	Charge paid
1 September 2003	DEWR releases WFD documents but fully exempts dole cruiser material
17 November 2003	Late application for internal review ($40)
11 February 2004	Decision — censored documents released
23 March 2004	FoI application for DEWR documentation of previous application ($30)
23 April 2004	Documents to be released at charge of $76.60
12 May 2004	Documents released
15 June 2004	Application for internal review ($40)
29 June 2004	Decision — release of documents, some deletions restored

Telegraph’s report,[3] under the byline of its chief political correspondent:

> I’d rather sit on the beach than work — Exposed: Australia’s true dole bludgers
>
> One in six of those on the dole, about 100,000 people, have no intention of genuinely looking for work.
>
> These ‘cruisers’ have been identified by the first significant research into who takes unemployment benefits and why.

My analysis of this reporting necessarily involved scrutiny of the source material — not only the Minister’s news release but also the material used in its preparation. What were the Minister’s sources and how did he use them? I sent the Department an FoI application, seeking copies of material in its possession relating to the press release by the Minister, Mal Brough.

The original FoI application was deemed by the Department to have started on 8 October 2002. Letters were exchanged between us until 11 months later on 1 September 2003, when the Department’s principal government lawyer wrote outlining his reasons for releasing some documents but exempting others.

Here is part of the letter.[4]

> In respect of File WR02/15426 titled ‘Labour Market Development — Research — Job Seeker Attitudinal Segmentation — Reporting’ which contains 55 folios that fall within the scope of your request I have decided:
>
> - to exempt in full 30 folios numbered 54-56 and 58-84 under the provisions of sections 36 (1) of the Act. However whilst this includes a draft departmental quantitative research report titled 'Job Seeker Attitudinal Segmentation — Analysis of the Segments’ I have identified that the report is now in a final format. Consequently I have decided to release the document to you in its final format; and
> - to release in full to you the report ‘Job Seeker Attitudinal Segmentation — an Australian Model’.

What the Department’s lawyer was proposing to give me were two reports that were already on the department’s website and publicly available. I had obtained copies of these documents months earlier.

What the lawyer would not give me were two departmental briefings to the Minister.

Elsewhere in the letter[5] he gave his reasons for keeping the briefings secret. The reasoning relied on a definition of the documents under s 36 (Internal Working Documents) of the FoI Act, along with an interpretation of public interest. The documents were described as including opinions or recommendations, as well as material which might mislead or misinform a reader because it was in a nascent and not final form. There were, the lawyer acknowledged, public interest factors in favour of disclosure, including a general public interest in people having access to documents that concern them. Disclosure could also ‘allow closer scrutiny of governmental decisions affecting members of the public’.[6]

In the case of the dole cruisers, the government had indeed made decisions affecting members of the public. In order to give effect to Minister Brough’s promise to ‘disrupt the lifestyle’ of cruising dole recipients, the government had extended the reach of its mutual obligation requirements. From 1 July 2002, the Work for the Dole program had been extended to cover people aged up to 49. Despite the changes, Mr Brough’s officials thought that releasing the briefings would be contrary to the public interest. Why? Because the briefings contained views that had been expressed on the basis of continuing confidentiality between DEWR officials and their Minister:

> Release of such material would involve a breach of the necessary confidential relationships between Ministers and departmental officers and may in future hamper the provision of candid expressions of views and opinions.[7]

The lawyer also wrote that he believed that matters of public interest were better served by allowing what he called the free flow of information, advice and opinion between the Department and Ministers. Furthermore ‘the disclosure of recommendations, advice, views and opinions of an interim nature, could confuse readers as to the actual decisions made and the reasons for those decisions’.[8]

The Department’s briefing notes to Minister Brough, then, were denied me under s 36(1)(a) of the *FoI Act.*

I asked DEWR to reconsider its decision under s 54 of the Act. This entitles applicants to ask an agency to internally review a decision to withhold material.

Another senior government lawyer conducted the review. He overturned some of the arguments of his colleague, finding that parts of the documents sent to the Minister could be released. Where s 36 once applied, it now did not. But in other cases, this lawyer wrote,[9] parts of the briefings to the Minister were still exempt under section 36 or under another section relating to personal privacy. Section 41(1) makes a document exempt if releasing it involves the unreasonable disclosure of personal information about any person, living or dead. Thus the second lawyer found a new reason to withhold information.

However, he also found a way to release all the exempted pages. The method was the censor's pen. A total of six pages could be released with appropriate deletions so that they would no longer be exempt documents.

The documents[10] arrived in my letterbox, with blank white sections like snow over footprints. Whole sentences and paragraphs had been removed, along with at least one dot point under the heading 'Recommendation'. On another page, again written for the Minister's eyes, somebody had deleted part of a section under the heading 'Implications'. One of three paragraphs defined as 'Issues' was gone. So was the name of a member of the Minister's staff, referred to via 'Dot points requested by ——— in your Office, as background for a possible 'op ed' article or speech material (see Attachment A)'. Attachment A was also deleted from my copy of the documents.

But what was written for the Minister's eyes must also have contained notes written in the Minister's hand, or the hand of someone in his office. Some of the pages given to me clearly had no deletions of the original text. Given that the privacy provisions of the FoI Act had been invoked to delete some material, it can be assumed that what was censored on these pages were handwritten notes or comments. It can further be assumed that DEWR'S lawyers believed that a reader would be able to infer the identity of the author of these additions.

Section 41: personal privacy provisions

The Australian Law Reform Commission and the Administrative Review Council have recommended changes to s 41 of the Act. In a review, the two bodies argued that there should be no presumption that personal information is exempt. They noted that a public interest test was implicit in the notion of unreasonable disclosure of personal information as defined in the Act. Sometimes, they said, the public interest in disclosure could outweigh an individual's interest in privacy. Thus, 'To reflect this, an agency should be required to consider whether disclosure would be in the public interest'.[11]

I can only speculate about what aspects of the personal privacy of the Minister were being protected by his Department. If DEWR had been required to apply a public interest test against its own interpretation of its Minister's personal privacy, would the outcome have been different? At the least, I believe, a new s 41 in line with the Australian Law Reform Commission's recommendations would have increased my chances of receiving some uncensored documents. The review remains under consideration by the Federal Government, some eight-and-a-half years after the report was tabled in Federal Parliament.

Where to next?

Having received my censored documents, I had two options under the FoI legislation if I wanted to continue my pursuit of them in their complete form. I could ask the Administrative Appeals Tribunal to review the case or I could go to the Commonwealth Ombudsman.

I chose another course. I sent a new FoI application to the Department, seeking copies of all internal departmental correspondence generated by my previous application. This time, a third government lawyer handled the matter.[12]

This time, copies of all the relevant documents were released but again, they came with deletions. As before, parts of the documents were deemed to be exempt from release under ss 36 and 41. Two other sections were now invoked for the first time. Section 42 involved documents covered by legal professional privilege; s 43 involved business and commercial affairs.

A total of 11 folios (pages) were sent to me with a variety of deletions. The documents included an exchange of e-mails[13] between a DEWR official and a lawyer. The latter was the legal officer who reviewed the Department's original rejection of my application for copies of the 'dole cruiser' documents. He wrote to the official:

> Can you identify any particular sensitivities involved in disclosing folios 54–56 in file WR02/5343 and Folios 58–84 on (the same) file. If so, please tell me what they are and the reasons for them.

The official e-mailed a response which said in part:

> Folios 58–84 on file WR02/5343 contains opinions and advice of a sensitive nature about the attitudes of job seekers and how this might be used ——— While 54–56 in the same file is related, the brief relates to areas of research that appear on the Department's internet sight [sic] and so may be considered suitable for release.

In the copy of the e-mail that I obtained, a blank space had opened between the words 'used' and 'While'. Here, the government did not want outsiders — the public — to know anything, even in barest form, about the potential application of DEWR'S ideas about the problematic unemployed.

Also included in the 11 censored pages was one with apparent references to proposed courses of action by the government. Folio 22, for example, contains five handwritten words on the top line of a page from a ruled A4 pad: 'decrease satisfaction with current lifestyle'. The rest of the page is blank. Whatever was written there had been deleted under ss 36(1) and 42. These are respectively the provisions relating to advice from the officials to their Minister, and legal professional privilege.

Another ruled page, released without any deletion, contains more handwritten notes indicating attempts to anticipate future developments in the course of my pursuit of the original documents: 'said AAT hearing is a hearing de novo so if goes to AAT then client area will be likely called to give evidence'.

A hearing de novo is a fresh look at all the issues. It's possible to infer that these handwritten notes were made during a meeting between DEWR officials and lawyers to discuss strategy should I take a challenge to the Administrative Appeals Tribunal.

I opted for another internal review in the hope that this time, I could see unedited, uncensored documents.

The results of that review were similar to those of its predecessor. (And here, the line of DEWR lawyers curved into a circle and closed — the lawyer who decided on my original application was now the one who handled the new internal review.)

Again, the status of some documents was changed on review. Five pages that had been released with deletions the first time round were now available in full. Again, one lawyer overruled his colleague's previous decisions. This time, the reviewer restored what had been deleted under ss 41(1) — affecting personal privacy — and 43(1)c — relating to business affairs.

The business affairs were those of the Department itself, because some of the documents now given to me in full were simply copies of internal receipts for FoI charges I had paid. What I was allowed to see the second time round were a couple of numbers from the Department's internal accounting system. The internal review also restored the names of DEWR officials that had been deleted from other pages. Neither the names nor numbers ever had any relevance to my research. In essence, the results of the review were insignificant. All the exemptions and deletions that concealed the Department's thinking on the unemployed remained in force.

In summary

I have no doubt that the Department was scrupulous in meeting its obligations under the Act. In fact, when I was tardy in seeking the first of the two internal reviews, I was granted extra time beyond the statutory limit of 30 days. Such generosity, however, did not extend to official interpretations of the FoI laws. The pattern of behaviour evident in the responses to my applications indicated a stance based on what appears to me to be an initial reflexive blanket refusal, followed by concessions in response to applications for internal review. This delayed matters and added to my costs.

The pattern of DEWR's responses also showed a capacity to find more reasons under the Act to maintain secrecy. The lawyers started with s 36, only adding s 41 at the internal review stage of the first application. It is notable, too, that some DEWR lawyers saw a capacity to release documents (albeit in censored form) that was twice not apparent to others.

So an FoI application that began as part of an analysis of the way Australian newspapers told a story about an allegedly large number of dole bludgers living the life of 'dole cruisers' played out over almost two years, two FoI applications and two internal reviews. In the end, I secured two censored ministerial briefings — better than nothing but far short of what might have been released to contribute to a fuller understanding of government policy and plans that directly affect many thousands of people.

During the course of my application, I discussed freedom of information with several public servants. Let the last word go to one of them.

> 'We're very careful now', this official told me, 'about what we're putting in briefs and e-mails'.

GARETH ROBINSON

Gareth Robinson has worked as a journalist at the ABC, SBS, AAP and the Sydney Morning Herald. This article is based on his experiences while undertaking a Masters in Journalism at the University of Wollongong.

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Transparency and access to public information in Mexico

The 1980s was a decade characterised by the political transition from authoritarian regimes to systems that over time were to become democratic; the 1990s stands out as the period of 'the advent of transparency and access to information'. Despite the fact that the very first legislation in terms of access to information came into being in 1776 — when Sweden passed the Freedom of Press Law — it has only been in the past ten years that these two topics, intrinsically linked, have been incorporated into the political agenda of a sizeable number of countries. At present, over 40 countries have established legislation that promotes access to information in the hands of government, and another 30 are undergoing the process of designing, discussing or adopting said regulations. Transparency and access to public information are two qualities inherent to a representative government. In fact, a democratic system should promote institutional channels for access to information that will enable society to be informed of and evaluate (on a periodic basis, not merely through electoral processes but through alternative ways of expressing preference) government management and the performance of civil servants. This is, obviously, in addition to guaranteeing clear and reliable rules to govern electoral competition and the rise to power.

Transparency and access to information are two mechanisms that foster accountability; both have a direct effect on the perfecting of the democratic system in that they allow for a multitude of stakeholders — including non-governmental organisations, civil society, academia, and state powers themselves — to bring down costs linked to the monitoring and supervision of those in power. Transparency and access to public governmental information both favor the creation of communication channels between state institutions and society. This enables society to scrutinise government administration in a critical, well-informed and periodic manner.

Federal law for transparency and for access to governmental public information

The promulgation of the Federal Law for Transparency and for Access to Governmental Public Information for Mexico (LFTAIPG is the acronym for the name in Spanish) on 12 June 2002 has at its core the objective of mending the shortcomings and legal voids stemming from the absence of specific regulations on access to public information. With the issuance of this Federal Law, LFTAIPG, Mexico has embarked on a process of change in the relationship between the government and those governed, and has forged ahead toward a new way to manage the public service, 'with open doors and facing society'. The right to access information, guaranteed by this legislation, will enable Mexico to move towards the consolidation of a more democratic government, one in which each and every one of its civil servants and public representatives will be held accountable to the citizens.

The LFTAIPG established access for all individuals to information in the hands of the state branches, autonomous constitutional bodies, federal administrative tribunals, and other federal bodies. Some of the primary objectives of the LFTAIPG are to: 'render public administration transparent'; 'foster accountability to citizens' — so they may evaluate the performance of government entities; and 'contribute to the democratization of Mexican society and the full application of the Rule of Law' (LFTAIPG, Article 4). The attainment of these goals will contribute to increasing citizen trust in governmental institutions and will also lead to increasingly responsible political role-players involved in the process of designing and implementing public policy.

The LFTAIPG is a valuable piece of legislation, well conceived, well articulated, and unequivocal in its definitions and objectives, designed to ensure the rights of individuals to obtain information that is in the hands of government. It establishes that all government information is inherently of a public nature (Article 2), and instructs all government offices and entities to favor the 'principle of publicity' (Article 6) over that of secrecy.[1] It grants citizens the right to seek the disclosure of information not already public through a straightforward request process (Article 40). In addition, the LFTAIPG grants any individual the right to appeal an entity's decision to deny information (Article 49), and the right to take the case to court should said appeal be denied.

Going beyond establishing the public nature of practically all information either generated by or in the hands of the government, the Law provides a list of 'transparency obligations' that each government office and entity must observe. Article 7 of the Law mandates the entities to publish — in a routine and accessible manner — all information relevant to everyday functions, budget, operations, personnel directory, wages, internal reports, and the signing of contracts and concessions. In addition to the LFTAIPG, the Regulations of the Law impose the specific mandate to update information relevant to the 'obligations of transparency' for each and every one of the government offices and entities under the Federal Public Administration over a timeframe ranging from three months to one year.

The existence alone of legislation on access to public governmental information does not in and of itself guarantee the effective practice of a citizen's right to access to information. In some countries, legislation does not provide mechanisms that strengthen access to information; governments can create obstacles or take advantage of legal voids to refuse the dissemination of the information they hold. Given these reasons, and in order to forge ahead successfully in the implementation of the right to access to information, some jurisdictions foresee the need for creation of autonomous institutions responsible for monitoring the application of legislation on access to government information.

Federal Institute for Access to Public Information and the Protection of the Right to Acess Information in Mexico

In Article 33, the LFTAIPG provides for the creation of the Federal Institute for Access to Public Information (IFAI is the acronym for the name in Spanish), which officially began operating in June of 2003. The IFAI is responsible for enforcing and ensuring application of the LFTAIPG in the Federal Executive Branch, and is the body responsible for promoting and disseminating the right to access to information and for settling refusals from the authorities to respond to petitions for access to information. At the same time, the IFAI is mandated to safeguard the confidentiality of personal information in the hands of government offices and entities. To ensure compliance of this mandate, the IFAI is empowered to carry out functions entailing settlement and regulation, monitoring and coordination, and the operation and management of promotion and dissemination activities.

Since the creation of the IFAI, any Mexican citizen interested in requesting information that is in the hands of the federal government has three options to do so, by:

- visiting the IFAI Service Center, where qualified personnel and computer equipment is available to assist and guide petitioners
- going directly to the Secretary of State of Government Office where one wishes to obtain information. The individual must then go to the special office called 'Liaison Office'. Every government office, per LFTAIPG mandate, must operate one of these offices to provide guidance for requesting information
- accessing <http://informacionpublica.gob.mx> through the Internet from any point in the country or abroad, and clicking on 'System for Information Petitions' (SISI).

We would underscore that the last mechanism mentioned for accessing government information, known as the SISI in Spanish, is an innovation at the international level, given that very few countries offer such a user-friendly means for

citizens to request public governmental information via the Internet.

The IFAI has provided consultancy service to government officials from Canada, Germany, Great Britain, the Czech Republic and Peru, just to mention some countries, interested in setting up systems to access information similar to the SISI. The electronic revolution has had an effect on access to information, turning the government into a disseminator of information, thus recovering the values that now support the provisions of an open government. The IFAI is wholly immersed in this facilitating access to government information by citizens via remote communication means, as is the case with the SISI.

In only 18 months of operation — June 2003 through November 2004 — over 57,000 petitions for information have been submitted; of these, 92% have been submitted through the SISI:

Requests	Total
Electronic requests	52,978
Written requests	4,405
Total number of requests	57,383
Electronic answers	47,748
Written answers	3,438
Total number of answers	51,186
Appeals	1,900

The SISI is a universal system that manages petitions for information and personal data in accordance with the provisions of the LFTAIPG, its Regulation and the guidelines issued by IFAI. Petitioners, government parties responsible and the IFAI can all use the SISI, which provides statistical information to the Institute itself, and can be used as support for the Annual Report that the IFAI authorities must submit to the Legislative Branch.

The SISI has emerged as the most efficient means of communication, linking society, government offices and entities and the IFAI through registering all petitions for access to information in documents that remain in the hands of entities of federal public administration, regardless of the mechanism employed by the petitioner; that is to say, either through the Internet, through the postal service, or physically visiting the appropriate Liaison Office.

The SISI operates based on six stages that comprise the process for access to information from the time the individual submits their petition, through the internal process for handling said petition, through the delivery of information and possible appeal before the IFAI:

Phase 1: Petition

The individual must submit their petition to the SISI or draft it in print and send via postal service, or hand deliver at the Liaison Office for it to be typed and processed within the system. In all cases, the SISI will assign a folio number for follow up purposes.

Phase 2: Reception and investigation

The government office or entity receives the petition and turns it over to the corresponding administrative unit. The unit investigates if the requested information is available and determines its nature, which can be public, reserved or confidential. The government office or entity in question receives the petition, and turns it over to the corresponding administrative unit for investigation concerning the existence of the information requested and its nature, which can be public, reserved or confidential. When the information requested exists and is public, this administrative unit sends said information to the Liaison Office and indicates, where applicable, the cost entailed according to delivery mode.

Phase 3: Response, delivery options and delivery

The government office or entity notifies the petitioner of the response to the petition. If it is negative, the petitioner will be advised of the option of an appeal before the IFAI. In the case of an affirmative response, the SISI will notify the petitioner of the means available for copying the information and the cost of copying the information, as well as of different means of delivery and their respective costs. The system issues a slip with a bank identification code through which payment can be made.

Phase 4: Notification of payment

Once payment has been made, the bank automatically notifies the SISI of the payment; the government office or entity can know at all times which petitioners have covered the cost of copying and delivering the information in question, so that the requested information can then be copied and issued.

Phase 5: Delivery or sending

When the government office or entity has copied and sent the information requested, the SISI will inform the petitioner of the date on which the information was sent and, when applicable, the tracking number. In any case, information delivered via electronic means will at all times be free of charge.

Phase 6: Appeal

If the petitioner decides to submit an appeal when information is denied, the SISI facilitates this process through electronic means. The petitioner can also submit in print and send in or personally call at the IFAI. In the latter two cases, the IFAI will incorporate the information on the individual requesting an appeal through the SISI. IFAI will study the case and notify said individual within the period established.

The process for consultation or changes to personal information through the SISI requires authentication of the petitioner's identity.

Federal Institute for Access to Public Information and the Protection of Personal Information

Article 12 of the Universal Declaration on Human Rights states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Democracy is developed and justified within the framework of the respect of the privacy of the individuals that are a part of it. A genuinely free society can only take shape based on the recognition of the privacy and autonomy that is due to all citizens.

The protection of personal information is founded on controlling said information to guarantee the protection of the individual who is risking transmitting said personal information, and not on the protection per se of the intimacy of private life. Subparagraph II of Article 3 of the LFTAIPG defines personal information as:

> … the information relevant to an individual, identified or identifiable from another, information pertaining to ethnic or racial origin, or information pertaining to physical, moral or emotional traits, his or her family and sentimental life, address, telephone number, patrimony, ideology and political opinions, religious or philosophical beliefs or conviction, state of physical or mental health, sexual preference and other similar issues related to his or her privacy.

Access to information pertaining to personal information contained in public archives is dealt with by the LFTAIPG in Article 24, a provision stipulating that only the interested party and their representatives can request a Liaison Office for access to personal information contained in governmental databases. Said information will be submitted to the interested party within ten working days to be counted from the date the request was received by the LFTAIPG, in clearly understandable format, or the interested party will be notified in writing that the personal information system does not contain information pertaining to the petitioner. If delivery or correction of personal information is refused, an appeal can be submitted to the IFAI. The same applies in the case of lack of compliance with the timeframes established by law.

In keeping with Article 37 of the LFTAIPG, the IFAI is empowered, among other things, to establish and review the criteria for classification and de-classification, and is responsible for the custody of reserved and confidential information (Subparagraph III) and to establish the guidelines and general policies for the management, security and protection of personal information that is in the hands of government offices and entities (Paragraph IX). In this regard, the IFAI is the institution responsible for safeguarding the protection of personal information and for avoiding the dissemination, distribution and/or marketing of the personal information contained in the information systems of the government parties responsible.

Access to state and municipal information

The IFAI seeks to promote and establish collaboration and support at the state and municipal levels with the objective of exchanging experiences and fostering the development of standards and institutions in matters of transparency, access to information and the protection of personal information. Twenty states of the federation already have laws to ensure access to information, namely: Aguascalientes, Coahuila, Colima, the Federal District, Durango, Guanajuato, Jalisco, Michoacan, Morelos, Nayarit, Nuevo Leon, Queretaro, Puebla, Quintana Roo, San Luis Potosi Sinaloa, Tlaxcala, Veracruz, Yucatán and Zacatecas. Several other states (Chiapas, Hidalgo, among others) are undergoing the process to adopt legislation on the matter.

The state of Colima stands out, given that in addition to legislating access to information, it seeks to enforce a law for the protection of personal information — the first such legislation in the country. As regards the local sphere, the municipalities of Guadalajara, Monterrey, Queretaro and Torreon, Leon, Colima, Culiacan, Mazatlan, Tlalnepantla de Baz, among others, already have regulations on transparency and access to information in place.

Conclusions

The IFAI is creating mechanisms geared to fostering transparency and accountability in Mexico: the obligations concerning transparency imposed by the LFTAIPG and verified by the IFAI contribute to clarifying the scope of this matter, placing Mexico among the countries with the highest standards at the international level. The section in the legislation on classification provides for the creation of a registry of all documents produced by the government, which will in future simplify access to public information. On the other hand, it states that the period for reserving information is counted from the time information is generated and not from the time of the classification of the document. Lastly, the establishment of access fees is an attempt to prevent the cost of copying and sending information from becoming a deterrent to transparency.

The LFTAIPG and the IFAI exert positive effects for Mexico in the economic and political arenas. Doubtless, a more transparent state will consequently be a more efficient one. This improved state efficiency will not only be reflected in the long term through strengthening the public treasury — the heritage of all Mexicans — but also the economy as a whole. This can be explained when we witness the cost of corruption in our economy rising to several percentile points of GDP. On reducing corruption, these resources can be channelled to productive and social activities.

In the political sphere, and within the framework of the democratisation process, the IFAI guarantees the right to access information and thus fosters a process of democratic consolidation through which each and every one of the country's civil servants is to be held accountable to the citizens. Accessing information is one of the most important tasks on the national democratic agenda, in the understanding that democracy seen as government participation depends on the capacity of the citizens to take part in public life. Hence, the IFAI is taking part in the construction and strengthening of accountability, has a positive effect on administrative efficiency and fosters appropriate conditions for citizens to supervise governmental spheres.

LÍA LIMÓN

Lía Limón is Directora de Asuntos Internacionales,Instituto Federal de Acceso a la Información, Mexico.

REFERENCE

1. According to Article 13 of the FoIA, the information that the government posses can be considered 'reserved', (temporarily subject to exemptions of access) only if its dissemination can:

   I) Affect national or public security or national defense;

   II) Affect the conduction of the negotiations or international affairs, including 7he confidential information that other states or international organizations give to Mexico with that character;

   III) Damage the financial, economic or monetary stability of the country;

   IV) Put under risk life, security or health of any person, or

   V) Cause a serious damage to activities related to the verification of the fulfilment of the laws, prevention or persecution of crimes, the collecting of the contributions, the operations of migratory control, the procedural strategies in judicial or administrative processes while there is not a final resolution.

Recent Developments

CHANGES TO FoI IN TASMANIA

One of Australia's most contentious areas of freedom of information is under reform, with the announcement on 30 August 2004 that Forestry Tasmania will no longer be excluded from the Tasmanian *FoI Act.*

Since 1994 a special exemption provision has allowed the government business enterprise to opt into the Act, while otherwise remaining exempt.

The announcement is part of wider changes to the Tasmanian forest practices system that Resources Minister Bryan Green said would improve transparency. 'This shows we have nothing to hide in the forest industry', he said.

The Tasmanian Liberal Opposition welcomed the move. 'There are many lurid allegations about Forestry Tasmania out there. Most of them are complete rubbish, but the very fact that it's existed under special protection from freedom of information suggested that it had something to hide', said Opposition leader Rene Hidding.

'It should have exactly the same commercial protection as all other government business enterprises have, but no special exemptions'; Mr Hidding said.

The Editor of *FoI Review*, Rick Snell, said the move is a good first step towards improving government accountability in Tasmania, but pointed out that when Labor was in opposition they made a commitment to change the Act to include Forestry Tasmania. It has taken them more than six years to do so once in power. 'There was no need for the delay', said Mr Snell.

'Removing Forestry Tasmania's special exemption provision goes only part way towards accessing government business enterprise information covered by commercial in confidence exemptions', Mr Snell said.

He said those exemptions in the Tasmanian *FoI Act* can be expected to be applied frequently to any requests to Forestry Tasmania.

After the application of exemptions on the grounds of privacy and legal considerations, exemptions on the grounds that information was obtained in confidence was the third most frequent exemption applied in Tasmania in 2003.

However, according to Mr Snell the changes do make Forestry Tasmania more accountable. The previous system deterred people from using FoI to get information from Forestry Tasmania. Any appeals to the Ombudsman would always be decided in favour of non-release of information because the special provision exempting Forestry Tasmania was clear. 'I think it makes it even more paramount that the Ombudsman sets benchmark performance standards for agencies, including Forestry Tasmania, and they need to be able to do more than just assert the claim for exemption — the onus must be on them to demonstrate with logic, reasoning and evidence that the exemption claim is justifiable within the parameters of the Act', said Mr Snell.

A recent appeal to the Ombudsman, about the decision of a different Tasmanian government department, brought into question the quality of the Ombudsman's decision-making and the timeliness of her responses. The FoI request related to development in a national park on the east coast of Tasmania, submitted to the Department of Economic Development in May 2003.

While the Tasmanian *FoI Act* requires notification of a decision within 30 days, it took the department three months. A further FoI request revealed that a third of that time was spent while four senior bureaucrats signed off on the decision. Much of the information requested was excluded from release.

An internal review, which was conducted by one of the senior officers who signed off on the original decision, decided in favour of the Department.

An application for external review was made to the Ombudsman, Jan O'Grady, in November 2003. The Ombudsman is also required to decide upon the review request within 30 days, but in this case it took eight months.

Ms O'Grady agreed with all of the Department's justifications for non-release. She cited the same 20-year-old case law that Federal Treasurer Peter Costello used to try to avoid releasing information about bracket-creep to *The Australian* newspaper's Michael McKinnon: *Re Howard and the Treasurer*. That case was argued by the present Prime Minister, John Howard, in 1985 and lost. At that time Tasmania didn't even have an *FoI Act*. '*Re Howard* is a blessing for any agency that wants to deny access to information. It is one of the worst cases in Australian FoI history', said Mr Snell.

The Queensland Information Commissioner enacted a scathing attack on the five broad factors listed in *Re Howard* in 1993 when he commented that *Re Howard* was an ill-advised determination that was decided at a time when the Commonwealth AAT had only two years experience in determining appeals under the Commonwealth *FoI Act*.

'It would have been more appropriate to refer to recent precedents set in other Australian states than to refer to *Re Howard'*, said Mr Snell. He went on to point out the fact that the Ombudsman chose dated federal case law over modern state case law, and agreed with the Department of Economic Development without any apparent independent investigation, indicates the decision wasn't adequately considered.

Rene Hidding disagrees that the quality of the Ombudsman's decisions are questionable. 'I've got no concerns about the decisions that the Ombudsman makes. The Ombudsman is a fine person who exercises judgment having regard to all the circumstances', said Mr Hidding.

Mr Snell attributes the Tasmanian Ombudsman's lapse on the Department of Economic Development decision to her large workload. The Ombudsman's office holds the health complaints commissioner role, the electricity Ombudsman role, handles public interest disclosures, and will also probably soon be assigned some type of privacy function. At the same time, successive governments have

refused to give the Ombudsman's office the resources necessary to carry out its functions.

Mr Hidding agrees more resources are needed. 'It's a question of how it looks. I don't think for a minute that the current Ombudsman would be influenced by the government of the day. However it isn't a good look for this statutory position to be closely aligned to the government and come under the agency of the Attorney General. She should be a fully independent officer of the Parliament of Tasmania'.

Stephen Lamble, University of the Sunshine Coast journalism coordinator, questions the independence of the role of the Ombudsman in Tasmania and other states: 'How can an 'external review officer' be independent of the legislature and Executive when the Premier is the head of both and his department has responsibility for that same officer?'

In Tasmania, the Attorney General (Judy Jackson) heads the Ombudsman portfolio, not the Premier, but it still remains that the Ombudsman reports to a Minister, not directly to Parliament.

'Public servants are only custodians of government information on behalf of the people. Politicians really should have no part in the process', Dr Lamble said.

Following the debate over the Ombudsman's review decision, more resources were allocated and an extra staff member was appointed to the Ombudsman's office. 'Their staffing capacity has gone up, and we'll just have to wait and see if they are actually able to perform', said Mr Snell.

Rene Hidding says that if Forestry Tasmania takes a pro-release attitude then there's little need for the Ombudsman to get involved. 'Forestry Tasmania ought to be generous with information on the basis that more openness equals more accountability, which is what people want. If it does result in more appeals to the Ombudsman then the Ombudsman should be given more resources to deal with it.'

Now that Forestry Tasmania's special exemption has been removed, only one contentious government business enterprise remains exempt under special provisions of the Tasmanian *FoI Act*: TT Line, which operates the Bass Strait ferries.

Rick Snell points out that one of the major recommendations of the Legislative Council Select Inquiry into FoI in 1996 was that both Forestry Tasmania and TT Line should be subject to the *FoI Act*.

'There's no reason why TT Line should still be excluded', said Mr Snell.

TAYLOR BILDSTEIN

Taylor Bildstein is a freelance journalist and postgraduate student at the University of Tasmania supervised by Rick Snell.

Getting sued in the interests of FoI

The October 2003 *FoI Review* contained an article by Craig Burgess: 'Court split over FoI defamation threat to whistleblowers' ((2003) 107 *FoI Review* 70). It dealt with the position where an FoI applicant obtains a document from an agency and then sues the author of the document obtained for defamation.

It could be a letter from a 'whistleblower' to an agency, or a letter from a person seeking help from an agency in say a consumer dispute with a trader or even an MP writing on behalf of a constituent to an agency about a third party. All such documents might be released as a result of an FoI application.

As Burgess pointed out the author would assume the FoI legislation provided protection but as things stand it depends on which state one lives in. He reported on a NSW Court of Appeal decision holding there was no such protection. (See *Ainsworth v Burden* (2003) NSWCA 90.)

Now the High Court has refused leave to appeal against the decision so it remains to be seen if the NSW Parliament will amend s 64 of the *Freedom of Information Act 1989*.

The High Court judges (Callinan and Heydon JJ) made the distinction between the provision of the document under FoI (which is protected from proceedings) and the actual publication by the original author of the document supplied (which is not protected). See *Burden v Ainsworth* (2004) HCA Trans 144. The substantive defamation issue has yet to be heard even though the document in question was written in 1993.

The two court decisions narrowly construct the wording of s 64 and help defeat one point of FoI legislation: the trade off between freer access to agency data and protection for authors or suppliers of the data.

The NSW Ombudsman's latest Annual Report supports amendment of the Act to put the protection of authors beyond doubt. He wrote to the NSW Premier and it is understood the Cabinet Office sought advice from the Attorney General's Department. The advice apparently suggested the Ombudsman be asked to substantiate the need for an amendment. *Res ipsa loquitur* one would have thought.

Perhaps the prospect of MPs being sued will be enough to generate amendment of the Act (and retrospective quashing of any litigation) but a letter-writing campaign to MPs is needed to get the topic on the agenda.

PETER WILMSHURST

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Last issue of the Freedom of Information Review

This first issue of the *Freedom of Information Review* was published in February 1986. Regrettably, this issue, December 2004, will be the final issue. Unfortunately the decline in subscription levels over the past years has made it impossible for us to continue publication.

The founding editors of the *Freedom of Information Review* were Moira Paterson and Paul Villanti who remained editors for three years until June 1989. At that point Peter Bayne teamed up with Paul Villanti in the editorship. In August 1992 Rick Snell replaced Peter Bayne and co-edited with Paul Villanti until Paul retired at the end of 1994. For the last ten years Rick Snell has been the sole editor.

The Legal Service Bulletin Cooperative Ltd extends its congratulations and expresses deep appreciation for the efforts of all these *volunteer* editors who have been responsible for 19 years of the FoIR. Particularly, we thank the incumbent editor, Rick Snell, whose passion and dedication to the field of FoI is legendary. Rick is a senior lecturer in law at the University of Tasmania whose focus is administrative law and FoI in particular.

Beyond the editors there have been many volunteer contributors who have done the painstaking work of summarising the AAT and Federal Court decisions and writing articles to keep readers up to date with developments in FoI worldwide. The Cooperative extends its deep appreciation to all of them.

Thank you also to the members of the Editorial Board who have advised the Editor and acted as referees.

We thank too the current production team, Last Word Publishing and Thajo Printing both of whom have been involved for more than ten years.

And finally the Cooperative would like to thank the subscribers who have made it all possible. Some of you have subscribed for the full 19 years.

The *Alternative Law Journal* will continue to publish articles covering the operation of law in society and will keep freedom of information issues within its purview.

See the Comment in this edition which tells of a new e-publishing venture in the area of FoI.

Liz Boulton
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