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Reform FoI

In a recent speech to a Public Right to Know Conference, Council Executive Secretary JACK R HERMAN looked at the urgent need to reform freedom of information law and practice.

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 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 upon 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.

Statistics

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 its 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 2,246 (5.58 per cent) were refused, with more than 70 per cent 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 per cent) were for personal information, most of these being directed at Veterans Affairs, Centrelink or the Department of Immigration. Only 8 per cent 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 per cent of applications for non-personal information were granted in full, with about 15 per cent 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 2002-2003 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 fifteen quotes for charges in respect of FoI applications for non-personal information, which totalled $138,299, averaging $9,219.93 per application. But the winner of the award for the most outrageous charges quoted for an FoI applications is the Department of Industry, Tourism and Resources, which issued $186,128 worth of quotes in respect of just thirteen 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 per cent of applications to the Department of Finance were withdrawn; 45.4 per cent of those to the Department of Industry).

A total of 3,333 applications were withdrawn in 2002-2003, but no distinction is made between those withdrawals

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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 per cent of applications for non-personal information being granted in full and an estimated fifty per cent apparently being withdrawn due to the high cost of proceeding. With an only 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 per cent of FoI applications for non-personal information took more than thirty days to process and 17 per cent took more than sixty days to process. But even the remaining 65 percent of applications which are processed within thirty 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 $3,855 for the information, including 141 hours of "decision-making" at $20/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 upon 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 is 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 upon 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 the 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 organizations.

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 over-ride 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 documents

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 upon 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 affects of 'bracket creep' on taxpayers.

(In the most delicious irony of the McKinnon case, the precedent upon 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 ... 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, organization, 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 organizations 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.

Jack R Herman

[**Note**: Much of the research for this paper was done by the Council's Policy Officer, Inez Ryan, who also wrote an early draft of the paper.]