17. Information Commissioner (Canada), above, p.10.
18. See Handley, Robin, 'Complaining about Government Decisions', (1991) 16(2) *Legal Service Bulletin*, and also see the recommendation of the Administrative Review Council to establish a trial project along these lines, 'Access to Administrative Review by Members of Australia's Ethnic Communities', Report No.34, Chapter 9. While this proposal was specifically in regards to complaining about government decisions it could easily incorporate or be used solely for FoI.
19. See the details of the Advice and Awareness Sub-Program in WA Annual Report, above, pp.19-21.
20. See WA Annual Report, above, pp.15-17.
21. See Dally, Steven, 'Hospital Knew of Vent Faults,' *Saturday Examiner*, 22.10.94, p.1 and subsequent media coverage for the full details of this story.
22. Information Commissioner (Canada), *above*, pp.21-22.

FoI in NSW: wrong way go back!

The now departed New South Wales Ombudsman issued a swag of reports in his last couple of weeks in office.[1] One of these was boldly titled *FoI — The Way Ahead*.

The report was the last in a series of public statements about FoI made over the last 12 months. For a discussion of two earlier statements (a special Report in March 1994 and a speech at a Royal Institute of Public Administration Australia (RIPAA) Seminar in July 1994) see my article in (1994) 52 *FoI Review* 45.

Subsequently in November 1994, he issued an FoI Annual Report for 1993-94 incorporating his FoI Policies and Guidelines and in January 1995 he issued the special report titled *The Way Ahead*.

The real disappointment in all these is that after six years of dealing with the external review function under the *Freedom of Information Act 1988* (NSW) *(FoI Act)* we get nothing by way of an intellectually rigorous or empirically based analysis of the way NSW bureaucrats have applied the Act and the areas in which the Act should be reformed. We only get a call for a review, some suggested minor amendments and a call for creation both of an Information Commissioner's position and a special body to promote FoI.

It is not clear how far the Ombudsman is suggesting NSW copy the Queensland and WA legislation or whether it is just the idea of the statutory position and powers. At the time of writing this article I received copies of the first FoI Annual Reports from WA and Queensland so in the future I will examine their activities a little more closely.

Following are a few ideas about fundamental things in the *FoI Act* that should be subject to review and changed by amendment to the Act. Each point could be developed in more detail but indicates some of the issues the new NSW Ombudsman might turn her mind to by way of recommendations to whoever is in control of the NSW Parliament after the 25 March election.

FoI as a right

The *FoI Act* is not drafted in a way that demonstrates any positive commitment to access to government information in terms of 'the big picture' issues of citizen involvement in government. The provisions of any statute should reflect unequivocally a Parliamentary commitment to access as a right compatible with other basic human rights.

Section 5(1) states the objects of the Act are to extend 'as far as possible' a right to 'obtain access to information held by the government' and to ensure information in personal records is accurate. These two qualified objects are qualified even more in s.5(2): the right of access is 'subject to such restrictions as are reasonably necessary for the proper administration of government'.

The *FoI Act* was amended in 1992 by inserting a new s.59A to qualify the meaning of 'public interest' where it appears in the Act. The section excluded (as irrelevant to determining whether disclosure would be contrary to the public interest) the likelihood of embarrassment to or loss of confidence in the government or whether the applicant would misinterpret or misunderstand the document because of omissions.

It may be fine to say what is *not* the public interest, but the thrust of the *FoI Act* is to prevent disclosure if it is *in* the public interest not the reverse. This should be reversed. Changes were also made to the *FoI Act* in 1992 to the process for issuing and appealing against ministerial certificates. In essence, the policy objectives of the Act can be defeated by such certificates and perhaps the most frightening aspect of the amendments is that the new s.58A allows the Supreme Court to hear an appeal against the issue of a ministerial certificate, *in camera*, and in the absence of the appellant and in certain cases the appellant's representative.

The WA and Queensland FoI Acts, which create Information Commissioners, are slightly different in their wording if not in their effect. Under the heading 'Reasons for enactment of the Act', s.5(1) of the *Freedom of Information Act 1992* (Qld) states:

> Parliament recognises that, in a free and democratic society —
>
> (a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and . . .

The rest of the sub-section is worded in a similar way to s.5(2) of the *FoI Act* (NSW).

The Queensland Act in s.5(2) then goes on to detract from the promise of s.5(1) by stating:

> Parliament also recognises that there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on —
>
> (a) essential public interests; or
>
> (b) the private or business affairs of members of the community . . .

while s.5(3) states:

> the Act is intended to strike a balance between those competing interests by giving . . . a right of access to information . . . with limited exceptions for the purpose of preventing a prejudicial effect to the public interest.

In the *Freedom of Information Act* (WA), s.3(1) states the objects are to:

> (a) enable the public to participate more effectively in governing the State; and
>
> (b) make the persons and bodies that are responsible for State and local government more accountable to the public.

Differing objects provisions aside, the various Acts do not take FoI law beyond being more than mechanical access administration statutes, where the decision-making process is heavily qualified and covered by numerous exemptions.

We should turn to South Africa for a better indication of the way ahead as its new Constitution combines provisions on certain social and political rights with a right to information.

With the High Court reading certain rights into the Australian Constitution and the continued debate about a Bill of Rights for Australia, FoI laws need to be seen in a broader context. Chapter three of the new South African Constitution contains a list of fundamental rights and s.23 states:

> Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

While not perfect, a similar provision should be the starting point for a new FoI Act in NSW and it would imply certain rights also being recognised.[2]

Certainly the legislative recognition of an unqualified right is necessary if the narrowing of the US FOIA by the Supreme Court is any guide. There needs to be a resolution of the nexus between FoI and privacy legislation as well as the various confidentiality exemptions. As Andrussier suggests in relation to US decisions restricting public access on the grounds of confidentiality:

> In any event, the decisions ultimately restrict the public's access to certain information regardless of how important the information is to the particular requester or to the general public. In light of the congressional intent to maximise public access to agency records, the scale should tip in favour of the public.[3]

In NSW and at least WA and Queensland, the objects of the FoI Acts as well as other provisions would need to be rewritten to remove the excessive qualifications currently included.

The following comments should be considered as flowing from an enshrined right along the lines discussed above.

FoI Act and court records and law enforcement

Currently s.10 of the *FoI Act* (NSW) exempts from the operation of the Act holders of office and the staff of registries in courts and tribunals in relation to their judicial functions. Clause 4 of Schedule 1 exempts documents relating to law enforcement and public safety. The time has come perhaps to reconsider these exemptions. I will only touch on a few issues.

In New South Wales, as probably in other States, alternative dispute resolution has invaded the courts; compulsory mediation prior to a hearing is becoming a feature of court rules. The State is creating a system of unaccountable private 'justice'. What needs to be ensured, is open access to the records and results of such processes as well as any other similar mediations of disputes between public agencies and clients.

There is a common law right to access to information about court proceedings but much rests on the discretion of the court or tribunal, especially in the lower courts, where often no paper record is made. If confidence in the system is to exist, there should be open access to the records of proceedings without qualification. If more court matters are subject to resolution without a public hearing, it is difficult to see how confidence in the system will be maintained if access to such records as exist is denied.[4]

Government agencies with a law enforcement role similarly negotiate resolutions to major problems (for example, in relation to pollution, consumer protection, child welfare, and corporate regulation legislation) either with or without court action. Here also, all such FoI requests can be denied under existing exemptions as well as perhaps under the terms of the enabling legislation of the agencies in question.

By reversing the notion of the public interest currently implied in the *FoI Act* (that is, something in the interests of the government or its agencies) as well as seeing FoI in a rights context, would mean a far greater range of material would and should be made available.

Consider cases involving say a major pollution situation and a hazardous consumer product. In both situations action, either voluntary or enforced, will be taken by regulatory agencies. Information will exist on a wide range of matters clearly relevant to public and environmental health but it may be prohibited from release because it relates to law enforcement or allegedly confidential business affairs. No exemptions should be able to be claimed when a matter affects the public as in the two examples. The policy and legal issues related to these situations have been the subject of debate in the USA with clear support for the release of material in such circumstances.[5]

FoI and technology

The *FoI Act* has not really kept pace with technology and there is no legally enforceable right for a person to search an agency's electronic databases. At a RIPAA Seminar on Administrative law in November 1994, the former head of the Queensland Electoral and Administrative Review Commission said some 90% of that agency's documents were available online and all a person had to do was come to the office and searches could be made of its records at a terminal.

Currently ss.14 and 16 detail the two planks of the NSW *FoI Act's* scheme of access to information: s.14 requires an agency to publish a statement of affairs while s.16 provides a right of access to documents including those stored in other than written forms.

Sections 23 and 27 cater for electronic access but within certain limits. Section 23 entitles access if the agency could create a document from electronically stored information and if the experience in the USA with its FOIA is any guide, a NSW court (or even the Ombudsman) may not uphold a request for access to certain information on the basis it is not a document that could easily be created. Section 27 allows access in forms applicable to electronic storage. What needs to be put beyond doubt is the right of access to electronic data. An agency could also rely on s.22 to refuse access on the basis a request represents a substantial and unreasonable diversion of its resources.

One of the major problems in dealing with an agency claim that access to information would involve high costs (passed on to the applicant unless waived) or be covered by s.22 is a lack of knowledge of new technologies by lawyers, judges and applicants. As Grodsky noted in relation to a USA case where an agency made certain claims in relation to programming and the prohibitive cost:

> It may be difficult or impossible to know whether agencies are using technological explanations honestly or arbitrarily to circumvent information disclosure. Similarly, if requesters do not understand what types of operations are genuinely required to fulfil requests, they have little way of knowing whether assessed costs are accurate.[6]

A court would need to consider whether say the creation of a program to enable the extraction of information from a computer satisfied the provision in s.23(b) that an 'agency could create a written document'. USA experience suggests this could be a fertile field of litigation. The threshold issue of *FoI Act* applicability to electronic re-

cords, including such things as e-mail, needs to be addressed, as Grodsky writes of the USA:

> As electronic databases become more sophisticated, they resemble information 'pools' rather than discrete documents. Drawing analogies in the courts between paper documents and electronic information is often troublesome. When a 'paper statute' is applied in an era of electronic information, its original ideals can become difficult to carry out. Ironically, the powerful new systems designed to store, process and retrieve vast amounts of data may thwart public access to government information. [p.19]

Such matters have already arisen in NSW but the *FoI Act* does not have ready answers: see (1992) 52 *FoI Review* 47 about a matter involving the NSW Forestry Commission. Very simply an enforceable right to search through agency databases would turn computer abilities to search, segregate and consolidate information into a more meaningful way of enhancing public access. This is in addition to other means of making information available electronically.

FoI, an AAT and the ALP

An election promise announced by the ALP proposes the creation of an AAT for NSW. The Hon. Jeff Shaw, QC, Shadow Attorney-General promised the abolition of some 50 or so State appeals tribunals and their amalgamation into one central tribunal. A number of specialist tribunals, for example the Police Tribunal and Equal Opportunity Tribunal would remain.

A new administrative law regime for NSW was envisaged and appeals against FoI decisions would go to this new AAT as would a range of other decisions. The policy objectives underlying the creation of the single tribunal include the simplicity of procedures, the consistency of decisions across different areas of administration and the desire to '. . . contain costs and avoid a tendency towards excessive litigation and legalism'.

It was proposed the expertise of members of existing tribunals would not be lost but the scheme also plans that a NSW AAT would be linked to the District Court '. . . so it could use judges to preside in appropriate cases and be serviced by the court registry and resources'. Oh dear.

Perhaps it is time for a bold alternative. Yes an AAT is needed in NSW and yes integration with other court structures might reduce costs but one must look at the current state of administrative law and it would be better if a NSW AAT was integrated with the existing federal AAT. Of course the federal AAT is not perfect and is in great need of reform in terms of its cost and procedures but it would seem preferable to create a new administrative law regime using an existing body with the necessary structure and expertise rather than the NSW District Court which, though it might have a structure capable of adaptation, does not have the expertise.

Clearly the deficiencies of the federal AAT would need to be addressed but the objective would be an integrated federal/NSW administrative law system. As a starting point, one could consider the matter from one of two approaches as suggested some 12 years ago at a seminar to address such an issue: look at the perceived problems and see how to cope with them or plan an integrated system and ask if this solves the problems or is at least an improvement.[7]

Certainly issues of membership, appeals, cost sharing and sitting locations could be settled by agreement as would befit a federal/State enterprise but staff, facilities, procedure, fees and the other matters of administrivia so beloved of bureaucrats could be left as they are initially and reviewed later. Taking appeals, two models might be possible: an AAT (wearing its NSW hat) could decide matters of law and merits with appeals to the Court of Appeal or a scheme of internal and external appeal (such as to be found in Part 5, Division 2 of the *Land and Environment Court Act 1979* (NSW)), with appeals from there again to the Court of Appeal. The important thing would be getting a new regime up and running and this would be one way of doing it.

If the ALP is able to bring its promise off, in whatever form, it will supplant the suggestion of the former Ombudsman about creating an Information Commissioner.

Conclusions

The purpose of this article was to propose another way ahead for *FoI Act* (NSW) change. The ex-Ombudsman's other suggestions and his Policies and Guidelines will be addressed in a future issue.

The Ombudsman is one of the key people who should set the agenda for changes to the *FoI Act.* When FoI legislation was first mooted in NSW in 1978 bureaucrats and politicians were opposed and their views are just as typical now as they were then.

The then head of the Premier's Department, Gerry Gleeson's thoughts on FoI were:

> . . . because of its cost and the way it just bogs the bureaucracy down. It is used by the wrong people and finishes up being used by the media. I just don't think it achieves a lot. It inhibits government. And who is looking for it? the lawyers and the media.

The then Premier, Neville Wran's view was:

> I don't think cost is the determining factor . . . what I found wrong about the FoI system is that it provides a plundering instrument for political opponents. I know the principles of FoI, but so much of the expenditure is on the basis of some ratbag backbencher in the Opposition who gets some bee in his bonnet and then wastes tens of thousands of public dollars.[8]

The Ombudsman is one of the people who could change those views, perhaps even by becoming a bit of a ratbag.

BRUCE SMITH
Bruce Smith is a Sydney lawyer

References

1. Other reports released covered Police Conciliation of complaints, Police Internal Investigations, Race Relations and the Police, Raymond Denning — withdrawal from the Witness Protection Scheme and Good Conduct and Administrative Practice in Local Government.
2. Johannessen, L., 'Freedom of Expression and Information in the New South African Constitution and Its Compatibility with International Standards', (1994) 10 *South African Journal of Human Rights* 216-239.
3. Andrussier, S.E., 'The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the Public', (1991) *Duke Law Journal* 753-801
4. Bechamps, A.T., 'Sealed Out of Court Settlements: When Does the Public have the Right to Know?', (1990) 66 *Notre Dame Law Review* 117-157.
5. See Cummings, A.D., 'The Exxon Valdez Oil Spill and the Confidentiality of Natural resource Damage Assessment Data', (1992) 19 *Ecology Law Quarterly* 363-412; Vaughn, R.G., 'Consumer Access to Product Safety Information and the Future of the Freedom of Information Act' (1991) 5 *Administrative Law Journal* 673-711.
6. Grodsky, J.A., 'The Freedom of Information Act in the Electronic Age: the Statute is not User Friendly', (1990) 31 *Jurismetrics Journal* 17 at 27.
7. Australian Institute of Judicial Administration, 'An Integrated Court System for Australia', Melbourne, 1983.
8. Both quotes appear in Alaba, R.A., *Inside Bureaucratic Power: The Wilenski Review of NSW Government*, Hale & Ironmonger, Sydney, 1994, p.178.