The Western Australian FoI Experience 1996–1998 — Any lessons for reform?

In the 1996–97 *Annual Report* of the Office of the Western Australian Information Commissioner (the Office), numerous recommendations for change to the *Freedom of Information Act 1992* (WA) (the Act) were discussed. As yet, these proposals have not been enacted into law — not an uncommon fate for positive FoI reform suggestions. This article provides a comparison and discussion of the 1996–1997 and 1997–98 *Annual Reports* of the Office. It highlights the increasing need for amendment to the legislation to enable adequate responses to change in the technological, political and economic environment.

Government outsourcing, e-mail communication, privatisation, are becoming more prevalent in the administration of society. Urgent change in both the legislative architecture and the administration of current freedom of information laws is required. Even without this type of cultural and political change, numerous deficiencies in the legislation are apparent. The reasons given by agencies are more often than not inadequate, the exemption provisions are wide and the legislation is being used predominantly to access personal information. If the FoI principles of openness and accountability were truly accepted by government, the recommendations of numerous bodies (see *Tables 1 and 2*) would be taken on board now.

Though the need for change is becoming increasingly obvious, the stance of the various governments seems to indicate that few radical changes are likely to be initiated in the near future. This inactivity has led the WA Information Commissioner to acknowledge that:

> ... any changes contemplated to the FoI Act are likely to be a mere tinkering with an access scheme that is more suited for a public sector of the 1970's than for a public administration in the 1990's and in the future.[1]

Statistics

There was a slight increase in the number of applications for access to documents made to State and Local government agencies in Western Australia over the two financial years: 4588 applications were lodged in 1997–98, compared to 4336 in 1996–97.

- Full access was provided to 74% of applications in 1996–97 and 73% in 1997–98. These high figures can be explained by the fact that the majority of applications for personal documents are approved.[2]

143 complaints including 46 informal or invalid complaints were lodged in 1996–97. This figure increased to 161 complaints in 1997–98 of which 31 were informal or invalid.

There were 213 applications for external review in 1996–97. This figure was down to 190 in 1997–98.

3 appeals to the Supreme Court from formal decisions of the Information Commissioner were filed in 1996–97 based on questions of law. No such appeals were lodged in 1997–1998.

Personal vs public information

Since the introduction of FoI legislation in Western Australia in 1992, the vast majority of applications for information have been requests for personal documents. The ratio of personal to non-personal applications lodged with State government agencies in the period 1996–98 was approximately 3:1.[3]

Of the requests for personal documents, 77% were directed to health-related agencies. In both 1996–97 and 1997–98, the Royal Perth Hospital and the Sir Charles Gairdner Hospital (QEII) ranked number one and two, respectively, as the agencies receiving the highest number of information applications.[4] This fact may be indicative that health records at these hospitals, even though under a governmental scheme, are difficult to access and thus individuals are required to resort to FoI to obtain their personal files. On the other hand, the figures may provide a general exemplification that FoI is being used predominantly for accessing personal affairs information. Either way, there is reason for concern — the aims of FoI of increasing openness and governmental accountability are not being met.

The number of requests made by journalists and the media under FoI in Western Australia are low. In 1996–97, 32 agencies reported a total of 84 FoI applications from the media (16 of which were directed to the police force). In 1997–98, 44 agencies reported a total of 81 FoI applications from the media (8 were directed to the Ministry of Premier and Cabinet).[5] These applications accounted for less than 2% of total applications under the *Freedom of Information Act 1992* (WA) in each financial year. Low utilisation of FoI by the media is apparent throughout Australia.

The Australian media could and should play a key role in FoI.[6] It is difficult to overstate the importance of the media in freedom of information — both in educating the public of the existence and importance of FoI[7] and in providing government information to the people. To play these roles the media must obtain accurate, unbiased information and ensure it reaches the public. Using FoI would facilitate this process. Unlike Australian journalists, those in New Zealand, Ireland and the United States play a more active role in the process of increasing governmental accountability by using and supporting FoI.[8] This under-utilisation by the media, lends further substantiation to the view that FoI legislation in Australia is not fulfilling the objective of government accountability to the people.

Giving of reasons

In Western Australia, the quality of notices giving reasons is low despite the efforts of the Office of the Information Commissioner: 43% of notices met the statutory requirements in 1997–98, compared to 36% in 1996–97. It is particularly worrying that the statistics for minimal compliance are so low — especially as the educative role of the Information Commissioner has led Western Australia to hold an exemplary position in many other FoI areas. The giving of reasons is at the heart of good administrative law — the current inadequacy of reasons, therefore, is a major point of concern for a number of commentators on FoI.

The low reversal rates on internal review may be a product, to some degree, of this inadequacy of reasons. If the reasons given for refusing a request are inadequate and do not equip the individual with greater knowledge of

the documents held by the agency and the reasons for refusing access, then internal review may become limited to a repeat of the initial request. Inadequate reasons and unavailing internal review prove frustrating and distressing to information applicants.[9] The performance of agencies in terms of giving adequate reasons is so poor that the Queensland Information Commissioner has recommended that he be given search and entry powers to use in extreme circumstances.[10] Obviously the current system is inadequate. Applicants must be persuaded that reasonable steps were taken to meet their request.[11] This can be achieved by an effective system of searching for documents and an adequate statement of reasons for non-disclosure.

Recommended amendments to the legislation

The 1996–97 *Annual Report* contained a variety of recommendations for legislative change. Similar types of suggestions were absent from the 1997–98 report. This fact is explained by the Commissioner's disappointment that, although there was some agreement by the government, the proposed amendments were not given a high legislative priority. The Commissioner expressed the view that nothing was to be gained from repeating the recommendations or the reasoning behind them.[12] The Queensland Information Commissioner has expressed similar discontent.[13]

The recommendations included the following:

- *Remove the requirement that internal review is a prerequisite to external review and give the Information Commissioner a wider discretion to accept complaints without internal review occurring.*

This recommendation came after the WA Commissioner recognised that a decreasing number of decisions are varied or reversed on internal review. Though this is generally a good result, reflecting correct application of the law in the first instance, some problems exist if the original decision is merely compounded. The Office was of the belief that individuals should not have to endure procedures that unnecessarily delay or frustrate their rights under the *FoI Act*. Another element that supports this recommendation is the fact that the Office had a success rate of 72% in conciliating complaints in 1996–97 and of 75% in 1997–98 (this figure is up from 59% in 1995-96).[14] The NSW Ombudsman recommended that internal review should not be a requirement to external review.[15] The Australian Law Reform Commission has given some support to this recommendation, but is of the general view that the *status quo* is to be preferred.

- *Give agencies the authority to refuse to deal with an access applicant if the agency consults the Information Commissioner and the Commissioner is of the view that the applicant is making unreasonable and unnecessary demands upon the agency.*

This recommendation was made to cover the situation where 'vexatious applicants' occupy excessive time and resources of particular agencies with requests for a large number of documents, or with repeated requests for the same information. This suggestion is important, as a major concern of agencies is the impact of FoI legislation on resources. The majority of applications are for personal information. As information about third parties cannot be released without approval, agencies spend many hours editing documents to delete information about third parties before disclosure. If implemented, this proposal would aid the reduction of the resource problem. In a 1997 review, the WA government concurred with this recommendation.[16]

Change is required to reduce the number of 'vexatious applicants' and the corresponding impact on agency resources. Whilst the level of guerilla paper warfare (where an applicant sets out with the intent to bog an agency's staff down in paper work) there does appear the need to allow a loop of never ending requests to be broken at some stage. The adequate giving of reasons for non-disclosure may assist to lessen the 'vexatious applicants' problem. If applicants are given some idea of the grounds for non-release and some qualitative breakdown of the documents uncovered in the search process in the first instance, they may be less inclined to make repeated requests for the same information. Repeated use of FoI is likely to be a last resort for some individuals. Legislative amendment should be enacted to impose an objective test on what constitutes 'vexatious' and to improve communication between agencies and the individual. Hopefully, such a mechanism would lead to the giving of more adequate reasons and less strain on agency resources.

Over time, as more agencies increase the amount of information available to the public outside the FoI means of access (45.8% of agencies had already increased the amount of information available to the public in 1996–97 compared to the previous year) cases of 'vexatious applicants' should also decline. The NSW Ombudsman recommends that agencies be given the power to refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being remade.[17]

- *Impose charges for access according to a scale of cost based on the number of documents to which access is allowed and impose charges for providing copies of documents containing personal information where the request exceeds a specified number.*

This recommendation was also made in response to the resource problem expressed by the majority of agencies. By imposing charges on personal documents above a certain number, individuals may be encouraged to narrow their requests to the documents actually required, rather than applying for more information than necessary. The contra argument is that access to your own personal information is a human right and therefore cannot be restricted merely on the basis of quantity. Indeed the individual who has 10,000 pages in government documents, relating to their personal affairs, may have a more pressing need to access than the individual who only has ten documents. The NSW Ombudsman suggested amendments to the fees imposed by the FoI legislation in that State — including that an upper limit be placed on the amount that can be charged for any one application.[18]

- *Limit the exemption clause 5(1)(b) — Law Enforcement, Public Safety and Property Security — to cases where disclosure could reasonably be expected to 'prejudice' an investigation. Disclose reports prepared in the course of routine law enforcement or investigation (except those relating to the criminal law) if disclosure, on the balance, would be in the public interest.*

A clause of the type 5(1)(b) is unique to the Western Australian legislation. This recommendation, if implemented, would bring the WA *FoI Act* into line with similar exemptions in other States. Presently, the application of the section is very wide, too wide. Its application is subject to the discretionary whims of agencies. It has been relied on to exempt documents from disclosure that relate to

breaches of the *Dog Act 1976*,[19] and to correspondence from a medical practitioner to the Medical Board in response to a complaint.[20] Obviously, such usage was not the intention behind the clause, or of the legislation generally. However, the WA government expressed concerns in the 1997 review that any amendments to clause 5(1)(b) would undermine law enforcement and investigations. As this review was not conducted by an impartial independent body, but by a government-appointed reviewer, the objectivity of the comments may be somewhat in doubt. The government did concede, however, that the issue might require further consideration.

Parliament should review that status of exempt agencies in Schedule 2 of the Act with a view to articulating clear public policy reasons for the inclusion of any agency in that schedule. Consider whether documents relating to the administrative functions of exempt agencies need to be protected from disclosure.

Amend the Act to grant the Information Commissioner power to decide that access should be granted to an exempt document (not Cabinet documents or those specified in clause 5(2) of Schedule 1) where the Commissioner is of the opinion that the public interest requires that this should be so.

These last two recommendations stem from the public interest test and are consistent with the general objectives behind FoI legislation. The aim of these suggestions is to expand the *FoI Act* to allow access to information unless there is a clear and unequivocal reason for non-disclosure. Such limitations to the exemption provisions have been widely recommended. The Western Australian Commission on Government concurred with the Commissioner's view to adopt a public interest test to all, except Cabinet, documents.[21] Despite these recommendations, the governmental review of the WA *FoI Act* determined that there is an insufficient case to include a public interest test on all clauses.

A report to the Canadian Information Commissioner[22] has in fact recommended that all exemptions under the Canadian *Access to Information Act* (except for those dealing with personal information, third parties and Cabinet confidences) should be discretionary in nature. A public interest override test was recommended for a number of other areas including solicitor-client privilege, safety of individuals, economic interests of government and information obtained in confidence from other governments.

Particular issues of interest

Awareness

Uniquely, the WA office of the Information Commissioner has advisory and educative functions as well as roles of dispute resolution and independent review. The Advice and Awareness sub-program assists applicants and agencies to exercise their respective rights and obligations under the FoI legislation. In 1996–97, a new 'Policy & Practice' manual was compiled and distributed to agencies, members of the public and public libraries free of charge. It contains guidelines to assist applicants and agencies in the interpretation of the Act and in exercising their rights under the Act. Advice on processes, procedures and external review is also included and reference is made to formal decisions of the Information Commissioner.

In May 1998, this assistance was extended with the publication of a practical guide for agencies seeking to achieve 'Best Practice' in the management *of FoI — FoI Standards and Performance Measures*. This guide was distributed to all public sector agencies. Any type of promotion of the Act is important to ensure that the legislation is implemented in the manner in which it was intended. The NSW Ombudsman has recommended a similar approach to that taken in Western Australia is adopted in that State.[23]

These guidelines, by increasing awareness of the legislation and the role of the agency, may decrease the practical difficulties experienced with FoI. If agencies are better informed about the legislation, problems such as the purely technical approach to exemptions taken by government agencies may be overcome. Agencies may use the discretion conferred on them in determining whether documents fall within one of the express exemptions, rather than taking a strict technical view as is the norm. This approach would coincide with the objectives of the Act and the stance taken by the WA Information Commissioner when it comes to conciliating disputes.

New exemptions

Some new exemptions were added to the Act in the year 1997–98. The Information Commissioner agreed with the four changes for reasons of certainty, although she was not entirely convinced that the existing exemptions were inadequate. The Queensland Commissioner has also expressed concern at the extension of exemption provisions.[24] Sensitive commercial information was protected by changes to clause 14 of Schedule 1 of the Act to cover information pertaining to the *Industry and Technology Development Bill 1997* and the *Gas Pipelines Access (Western Australia) Bill 1998*. The role of clause 14 is to preserve some of the secrecy provisions contained in other legislation.

The Anti-Corruption Commission sought to protect the confidentiality of information relating to investigations that may be carried out on its behalf by other agencies. Once again, such protection was also granted by an extension of clause 14. The final alteration to clause 14 was agreed on, in principle, to protect from disclosure information recorded on the Department of Family and Children's Services proposed Child Protection Services Register. Separately these exemptions can be justified on public interest grounds. However, as a whole they indicate that an increasing number of documents are unavailable under the Act.

Table 1: Proposed Amendments to the Legislation

Proposed amendment	Bodies in favour of the change
Internal review should not be a prerequisite to external review	• WA Information Commissioner • NSW Ombudsman • ALRC[25]
Make it clear that information created and collected by public officials is a national resource	• WA Information Commissioner • WA Government[26] • ARC • ALRC *continued*

Propos d am ndment	Bodi s in favour of the change
Change the costs involved in applications	WA Information Commissioner WA Commission on Government[27] • NSW Ombudsman • Australian Law Reform Commission
Review exemption provisions	• WA Information Commissioner • Queensland Information Commissioner • Canadian Information Commissioner
Alter the legislation to cover contracting out	• WA Information Commissioner[28] • Queensland Information Commissioner • ARC • ALRC • Senate Finance and Public Administration Reference Committee.

ARC: Administrative Review Council
ALRC: Australian Law Reform Commission

FoI legislation outdated?

> I am concerned that accountability, in its broadest sense, can end up as a casualty of the change process.[29]

Throughout Australia, numerous bodies are recommending to Parliament that amendments must be made to the existing FoI Acts. Alterations to FoI legislation do not, however, appear to be of high legislative priority to governments. In an ever-changing world, amendments to the legislation are becoming increasingly necessary to ensure that government is accountable to the people.

In the 1990s, more records and communications are conducted via e-mail and other electronic means. This trend will undoubtedly continue into the 21st century. The current FoI legislation was not designed to deal with the retrieval, authentication, and disclosure of electronic records. This is one of the reasons why the Information Commissioner considers that a wide-ranging and comprehensive review of FoI is needed to fully explore the implications for accountability; and particularly, for FoI, resulting from the changes that are occurring in government agencies. Also, the Commissioner has continually been of the view that data protection and privacy legislation is required in Western Australia. The Queensland Information Commissioner has also acknowledged the need for improvements in privacy legislation in that State.

The Canadian Commissioner recommended a new parliamentary committee be formed to deal with the challenges of the revolution in Information Technology and its impact on society. It was suggested that the committee set aside specific time each year to review annual reports and make recommendations for improving access to and dissemination of government information. A report to the Information Commissioner of Canada has also recommended that the *Access to Information Act* be amended to change the definition of record to 'information in records' to cover the concept of automated information. The NSW Ombudsman has likewise recommended the definition of document be amended to clarify that it includes data. A further recommendation of the Canadian Commissioner was the establishment of an automated locator and inventory system. A sensible way of charging for electronic information must also be devised.

The Administrative Review Council has conducted investigations into the role of FoI legislation in regard to the contracting out of government services.[30] The Western Australian and Queensland Commissioners have both suggested that the legislation be amended to cover the contracting out situation to avoid future problems. Changes are required to ensure that the government remains accountable to the people and that valuable shifts towards openness are not lost due to political changes.

The Senate Finance and Public Administration Reference Committee agreed with the third proposal of the Administrative Review Council. That is, FoI legislation should be amended to deem documents in the possession of the contractor that relate directly to the performance of contractual obligations to be in the possession of the government agency, and therefore accessible subject to the current exemptions. While it is acknowledged that this is not a perfect solution (as it depends on the contractor's adherence to record-keeping obligations) the change will go some way to ensuring that access to information is not lost or reduced by the contracting out of services.

The WA Information Commissioner suggests that legislative proposals contained in the White Paper for FoI in Britain may aid the Australian situation, but even those approaches are insufficient to serve the information needs of an increasingly informed and educated public.[31] Still, the proposals for the White Paper (though the final document may be weakened) are superior to the current position in Australia, and the New Zealand legislation also appears to be outperforming the Australian laws.

Conclusion

Electronic communications, contracting out, downsizing and privatisation have changed the design of the public sector, but as yet FoI has not altered to accommodate the changing environment. FoI legislation was debated and enacted in a period when government secrecy was the norm. It is understandable, therefore, that as time progresses and attitudes towards government accountability and the public's right to access information change, that legislation dealing directly with those issues needs also to be transformed. The challenge is to produce that transformation in the face of persistent non-compliance with existing legislation.

The WA Information Commissioner has argued that numerous amendments are required if the *Freedom of Information Act 1992* (WA) is to be effective in achieving its aims of increased government accountability and public awareness. As *Tables 1 and 2* highlight, numerous other bodies have proposed change within their respective jurisdictions. The majority of these recommendations have so far been to no avail, with governments either disagreeing with the suggestions or delaying action. With the current rate of technological advancement and economic change, the current legislation will render itself ineffective in a number of fundamental areas unless amendments are initiated. With the number of recommendations for change so high, the time for rethinking the legislation has come.

Table 2: FoI legislation Reviews — An Overview

Review body	Proposed changes
WA Information Commissioner	Abolish the requirement of internal review prior to external review. • Ensure documents created by and received by public officials are a national resource. • Change cost structures. • Review exemption provisions generally. • Review provisions to deal with contracting-out of government services. • Introduce measures to better protect data and personal privacy.
Queensland Information Commissioner	• Review exemption provisions generally and wind back overly broad provisions. • Review provisions to deal with contracting-out of government services. • Introduce measures to better protect personal privacy. • Give the Information Commissioner power to enter and search any premises occupied or used by an agency subject to the Act.
Canadian Information Commissioner	• Rename the Canadian *Access to Information Act* the *Freedom of Information Act* or, preferably, the *National Information Act* to make its purpose and intentions clear. • Amend the definition of record to read 'information in records' to deal with data. • Exemptions should be discretionary in nature and injury-based. • The term 'trade secret' should be defined in the Act. • Change to cost structures, including giving the Commissioner the power to make binding orders in regard to fee waiver decisions.
WA Commission on Government	• Change cost structures • Impose a public interest test to all exemption clauses, barring Cabinet documents. • Subject legislation that purports to override or restrict the application of the provisions of the *FoI Act* to public debate. • Fees must be waived if the applicant is impecunious or if it is in the public interest. • All government contracts should be available for public inspection. • A Code of Ethics within the public sector should include principles of data protection.
NSW Ombudsman	• Abolish the requirement of internal review prior to external review. • Change cost structures: including setting an upper limit for application costs and the advance deposit scheme. • Provide for the waiver of fees in full in situations of hardship or where applications are in the public interest. • Promote FoI in the State and monitor the implementation of FoI by government agencies.
ARC and the ALRC	• Ensure documents created by and received by public officials are a national resource. • Review provisions to deal with contracting-out of government services. • Agencies should review their current arrangements to ensure they have sufficient FoI officers. • A position of federal FoI Commissioner should be created. • Information in plain language about how to use FoI should be available at all government departments and agencies and at public libraries. • The definition of document should be changed to ensure it includes data. • Provide that an agency may refuse a request if the applicant has already been refused access, as long as there are no reasonable grounds for the request to be remade. • Internal review should not be a prerequisite to review by the AAT.

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References

1. Annual Report of the Office of the Western Australian Information Commissioner, 1997–98, p.5.
2. See *Office of the Information Commissioner Annual Reports*: 1993/94, p.30; 1994/95, p.27; 1995/96, p.26, 1997/98, p.8.
3. *Annual Report of the Office of the Western Australian Information Commissioner*, 1996–97, p.21; *Annual Report of the Office of the Western Australian Information Commissioner*, 1997–98, p.11.
4. 1996–97 *Western Australian Annual Report*, pp.20-21; 1997–98 *Western Australian Annual Report*, p.10
5. 1996–97 *Annual Report*, p.22; 1997–98 *Annual Report*, p.11.
6. Snell, R., *In Search of the Freedom of Information Constituency: Case 1 — The Media*, (1998) 78 *FoI Review* 82.
7. Chadwick, P., *Freedom of Information: How Queensland Could do Better ...*, in Prasser, Wear and Nethercote (eds), *Corruption and Reform — The Fitzgerald Vision*, University of Queensland Press, St Lucia, 1990, p.199.
8. Snell, R., above. See also the British Columbia Journalists' Committee for Freedom of Information at http:/www.direct.ca/bcjc/ or the US Reporters Committee for the Freedom of the Press at http://www.rcfp.org/
9. For examples of this frustration see generally Snell, R., *Obviously Four Unbelievers: Adequacy of Searches under FoI, An Act of Faith?*, (1994) 50 *FoI Review*.
10. Office of the Queensland Information Commissioner, *Annual Report*, 1997–98.
11. Office of the Queensland Information Commissioner, *Annual Report*, 1997–98, p.18.
12. 1997–98 *Western Australian Annual Report*, p.5.
13. *Queensland Information Commissioner Annual Report*, 6th Annual Report, 1997–98, p.17.
14. 1997–98 *Western Australian Annual Report*, pp.33 and 37.
15. NSW Ombudsman, *Implementing the FoI Act — A Snap-shot*, a special report to Parliament under s.31 of the Ombudsman Act, July 1997.
16. *Freedom of Information Act 1992* (WA), Attorney General's Report based on Statutory Review, 31st October 1997.
17. NSW Ombudsman, *Freedom of Information — The Way Ahead*, a special report to Parliament under s.31 of the Ombudsman Act, January 1995, p.33.
18. Ibid.
19. *Re Styles and City of Gosnells* (11/10/96, D05496).
20. *Re Bartlett-Walker & Medical Board of Western Australia* (18/11/96, D04970).
21. Western Australian Commission on Government, Report No. 1, August 1995, p.64.
22. Report prepared for the Office of the Information Commissioner of Canada by Sysnovators Ltd, *The Access to Information Act: A Critical Review*, Minister of Public Works and Government Services, 1994.

23. NSW Ombudsman, ref. 15 above, p.40.
24. *The Queensland Information Commissioner*, 6th Annual Report 1997–98, p.17.
25. Though the ALRC has given some support to this change, the Commission is of the opinion that generally the *status quo* is to be preferred.
26. The government acknowledged the recommendation of the WA Information Commissioner. In the Attorney General's Report based on Statutory Review, 31 October 1997, it is stated that the Government is committed to the principle and that it will be enshrined in the *Government Records Bill* to be introduced into Parliament. It is questionable whether this is not more appropriately an issue for FoI legislation.
27. Report No. 1, August 1995, p.79. The Commission recommended that a charge must be waived if the applicant is impecunious or if it is in the public interest.
28. The WA government considered this issue in the review. However, it did not reach a conclusion but left the State Supply Commission to examine the issue and, if necessary, will consider an amendment to the Act at a later date.
29. 1997–98 *Annual Report*, p.7.
30. Administrative Review Council, *The Contracting Out of Government Services — Access to Information*, Discussion Paper, December 1997.
31. 1997–98 *Western Australian Annual Report*, p.7.

FoI in Victoria: A right of access under siege

In the traditional slow news month of January, a story that involved a convicted murderer's use of FoI to obtain the names of hospital staff was sure to attract maximum coverage. 'A killer's list ... 51 live in fear' screamed a *Herald Sun* headline. The controversy intensified when Premier Jeff Kennett weighed in to defend the safety of public servants, lambasting the Victorian Civil and Administrative Tribunal (the Tribunal) and foreshadowing changes to FoI. The case serves as yet another illustration, if one were needed, of the ongoing vulnerability of FoI to government attack.

Background

Ashley Mervyn Coulston was convicted of the 1992 murders of three young people. He is seeking to have his case reopened in order to prove an alibi that on the night of the murders, he was visiting his partner in Frankston Hospital. Coulston made an FoI application to the hospital, seeking details of nursing and clerical staff rostered on that night. The hospital rejected the application on the grounds of the s.33 personal privacy exemption. Coulston sought review of the decision in the Tribunal. In November 1998, the Tribunal made an order for disclosure of the documents. The Hospital did not appeal against the decision and released the names of the 51 staff to Coulston in December 1998.

Premier Jeff Kennett had much to say about the case and about FoI: that the decision was outrageous and unacceptable; that the use and interpretation of FoI had 'gone beyond the pale of decency'; that he had had concerns about the Tribunal and FoI for some time; that ever since its introduction, FoI has been consistently expanded and at times misused; that there would be a review of FoI; and that he would not hesitate to scrap FoI if this was the best way to protect public servants.

Comment

A volatile mix of political agendas and point scoring, news values and public outrage distorted reactions to the *Coulston* case. The lessons to be learned should be confined to the particular circumstances, for it appears that the shortcomings lay with the handling of the case rather than with the Act itself. The hospital, apparently relying on legal advice that the documents would fall within the personal privacy exemption, was not legally represented at the Tribunal hearing. It appears that detailed submissions on the relevant law were not made. The hospital did not lodge an appeal or seek government assistance. The staff whose names were disclosed were not informed about the application or decision, which would have provided an opportunity for the case against disclosure to be contested more vigorously.

Unfortunately the case became the vehicle for an attack on the legitimacy of FoI and the role of independent decision makers, and the purported justification for possible further erosion of FoI in Victoria.

This is not the first time that Mr Kennett has criticised FoI or suggested contentious 'reforms'. In 1997, Mr Kennett argued that public servants' time was being wasted by frivolous FoI requests and mooted the removal of the right to appeal to a tribunal, which would be replaced with appeal to a government-appointed commissioner.

The track record of the Kennett government, aside from the 1993 extension of FoI to local government, is of legislative change that has reduced the scope of FoI and created disincentives to its use. In 1993, the cabinet documents exemption was widened, state owned enterprises were exempted from the Act, and application fees were introduced along with the removal of the threshold on fees. In 1998, legislative amendment created the possibility that unsuccessful appellants could be required to pay costs. The fee to lodge an appeal was also raised from $157 to $170.

These changes, actual or proposed, represent several of the 'deadly sins' of FoI identified by Justice Michael Kirby in a 1997 speech to the British section of the International Commission of Jurists: 'keep it secret' through numerous and overly broad exemptions; 'grant exemptions' so that certain bodies are not subject to FoI; 'up costs and fees', putting FoI beyond the reach of ordinary citizens; and 'weaken independent decision-makers' who can stand up to government and require that sensitive information be provided.

The reporting of the *Coulston* decision and the ensuing public debate may have given members of the public the impression that the right of access created by FoI is so expansive and liable to misuse as to be dangerous. However, readers of this publication will be familiar with a different story altogether — a right of access curtailed at the outset by exemptions, subject to further diminution by defensive administration and narrow interpretation, and that may be time consuming and expensive for the user. Yet for all this, FoI has served Victorians well in recent times, providing them with information about the Intergraph contract, the privatisation of the Cranbourne ambulance service, the government's Grand Prix entertainment expenses, and the use of government credit cards. Could it be that the *Coulston* case, removed from the rough and tumble of politics, provided a seemingly altruistic justification for an attack on the source of these discomforting disclosures?