Back to the drawing board

Preliminary musings on redesigning Australian Freedom of Information

Introduction

This article attempts to return to basic principles and primary design choices about access to official information in Australia. Other articles have either attempted to weave together the key points of specific law reform suggestions over the past decade and/or have looked at compliance and administration reforms. Yet we seem to be bound to the narrow vision of our original designers who opted for a basic US adversarial/litigant model with a series of patchwork connections. These connections were to incorporate the essential dynamics of a hybrid Westminster system that had evolved during the slow development of Australian government since 1788.

There are a number of 'standard' features, which are essential to an effective freedom of information (FoI) legislative scheme. The components of an ideal FoI model are best adopted as an integrated 'package' to maximise the utility of the legislation and to encourage greater public participation. A balance needs to be struck between the notions that power and secrecy are relative rather than absolute concepts and that government power will not be drastically diluted merely because there is improved citizen access to information.

Any attempt to formulate basic design principles for FoI must begin with a statement of objectives to structure and guide the accompanying policy and process. The objectives of the legislation must be to enhance public access to information and improve overall government accountability. A statement of objectives must be expressed in clear and uncompromising words, which mandate that access is the paramount objective. The very title of the legislation can assist in emphasising these objects — a legislative title of 'Access to Information' would symbolically imply greater openness than does the title 'Freedom of Information'.

An FoI legislative scheme cannot be effective without a commitment from government and its servants to openness and accountability. This commitment must be genuine; it must be long term; and it must be evident not only among FoI officers assigned to process requests, but also among senior bureaucrats, policy advisers and at the ministerial level. To this end, a simple starting point is to avoid direct references to any exemptions to the legislation in the statement of objects. Thus rather than a statement such as 'This Act seeks to ... subject to ...' it would be more appropriate if the statement read: 'This Act will ...'. Minor changes in wording can be of symbolic significance.

Australian FoI legislation has so far failed to achieve an outcome where access to information in the custody of government is the norm, and non-disclosure is a contestable and limited exception. A viable democracy needs and demands an informed citizenry, yet Australian politicians seem prepared to offer us the sad, faded and crumbling relic of our first attempt (the Commonwealth *FoI Act)* or a hasty back to what it was before version (the Bracks formula in Victoria).

The contemporary relevance of basic design principles

The experiment of Australian FoI legislation has not realised its ambitious objectives. The main problem is resistance to the regime from the government itself. The more restrictive the legislation, the greater the level of government commitment. The fate of FoI legislation can be largely influenced by whether there is a 'political patron' within government — such as a Minister with a genuine commitment to FoI principles — to champion the cause. Australia has produced few ministerial champions.

Contemporary design principles should not be based on notions that the government generally maintains an unfettered discretion over content, distribution and restrictions on the dissemination of information. The design of FoI should first and foremost be to locate access to information as a foundational democratic right. This democratic foundation should be treated as an absolute prerequisite for an effective Australian democracy. It matters not whether the foundation is legitimated by a belated recognition by the High Court that there is a complex and necessary interrelationship between representative democracy, freedom of speech, freedom of expression and freedom of information, or whether its origin is a more fundamental source.

While 'democracy' may have been incorporated in prior FoI designs, it tended to be subordinated to the necessity to protect a large array of government information depicted as sensitive. Indeed the passage of Australian legislation, at both State and Commonwealth levels resembled a game of cards where secrecy, confidentiality and exemptions were regularly played trump cards. Rather than fostering greater openness in government, FoI was often depicted as an alien concept that paradoxically would interfere with attempts to enhance accountability.

We should approach FoI from a new angle, starting with a pro-disclosure emphasis and then carving out more limited exceptions, rather than beginning with blanket exemptions from disclosure and allowing piecemeal disclosures largely at the unfettered discretion of government. FoI has been vulnerable to political maneuvering and the temptation to resist disclosure has been too readily embraced by reliance on widely drafted exemption clauses. We need to reverse the ethos of government secrecy and plan a regime based on a presumption of openness.

A pro-disclosure regime would have a number of different features from the current model. There would be no room for any kind of a ministerial veto power to declare material exempt. The test for non-disclosure would have a high and difficult threshold, for example 'substantial harm', whereby considerations of inconvenience and a default disposition towards non-disclosure would no longer be tolerated. Arguments over non-disclosure would shift from the current preoccupation with categories to actual consideration of the content of documents and whether the release or non-release of that information would contribute to or lessen the public wealth at the moment.

Basic design principles

Application to a wide scope of bodies, including private organisations carrying out public functions

There must be a broad definition of 'public authorities' to which the legislation is to apply. FoI must be consistently applied to the public sector as a whole, at national and local levels. The Australian Law Reform Commission, Administrative Review Council and the Commonwealth Ombudsman have adopted the view that governments ought not be excused from accountability by contracting services to the private sector.

More importantly the current reconfiguration of the state should not be assumed to be the final definitive version. Therefore, any access regime should be designed to ensure citizens will have continued access to information in the democratic spectrum regardless of the type of entity or its location (private, public or other sector) which has immediate control over and responsibility for the information. This design principle may necessitate the involvement of other schemes (privacy, data access, etc) but the concept of maintaining actual access, as opposed to theoretical, should be fundamental to any legislative scheme.

Timely access to information

When a citizen (journalist, student, MP or day care group) decides they would like to know more or to be more fully informed, the release or non-release of that information should occur within the shortest feasible timeframe. Legislative, administrative and compliance regimes should be designed to ensure that the decision, and outcomes from that decision, treat time as of the essence.

Existing schemes in Australia permit unnecessary delay. These schemes have incorporated excessive maximum processing times which are theoretically only in place to accommodate the small and exceptional range of difficult and problematic requests. Access regimes should be designed to allow for the earliest identification and separate processing of problematic requests. The timely processing of FoI requests is currently only an accidental and uncontrolled by-product of an uncertain and often variable commodity, namely, the good will, ethics and resources of individual FoI officers.

Narrowly defined and regularly contested exemptions

Theoretically, exemption clauses in Australian legislation were designed to exclude a minor, albeit significant in terms of content and importance, amount of information. Yet the operation of various exemption schemes has produced the opposite outcome especially when the quality of information released or withheld is factored into the equation.

The problem lies in the fact that once requested information is deemed 'exempt', the refusal to release that information is very rarely challenged. Agencies appear to treat the claim for exemption as a one-off irrevocable 'hard edged' classification of information. Future approaches to access the information, regardless of a change in circumstances and passage of time and events since its original creation and/or classification, are treated by agencies as inappropriate and vexatious use of FoI. Rather than reducing the volume of inaccessible government information the FoI process often seems to remove the possibility of further release.

Exemptions should be designed to serve as a tool of last resort, difficult to justify as the lifespan of the information increases, and subject to reassessment. The information covered by exemptions should be regularly and vigorously contested. This would mean that agencies claiming exemptions need to re-assess the categorisation of information over time, either by a further request for information or preferably by a mandated reclassification process. In any such access regime the possibility of an agency saying 'we have reconsidered your request of two years ago and now consider that there is no justification to claim the exemption' should be the rule rather than a daydream.

The decision to release or more importantly not to release should revolve around an assessment of the consequences of release in light of the surrounding circumstances at the time of each request or mandatory reclassification program. This necessitates a scheme that allows information to be re-classified subsequent to its initial creation so that documents previously and justifiably exempt can later be released. Whether exempt documents would be eligible for release at a later date would depend on the nature of the information involved and the relative risks of its release.

Moreover, the re-assessment of the classification of documents ought to occur as a matter of routine administration. Typically, assessments of the nature of information have taken place within the charged context of an FoI request, and have been conditioned by subjective considerations of political risk and (often emotive) views on the particular applicant and the use to which the information is to be put. A scheme, which provides an incentive to release information — or at least deters non-disclosure by reliance on blanket exemptions — better serves the objectives of FoI than the current exemption process.

Redesigning FoI legislation to incorporate a 'substantial harm' test

Determining the threshold extent of harm against which the disclosure or withholding of information should be judged has practical implications for the operation of freedom of information legislation. In most jurisdictions, information can only be withheld where disclosure would cause 'damage' or 'harm' or 'injury,' with most provisions lacking the requirement that such detriment must be 'substantial' to justify non-disclosure. If the threshold test instead demonstrates a stronger presumption in favour of openness, then access to information is less likely to be obstructed.

The threshold test therefore needs to be framed in more specific and demanding terms. The UK White Paper of 1997 noted that a more stringent test of harm would have the practical effect of reducing the volume of material withheld. This is because an agency cannot point to the general nature of the document and argue that it attracts exemption merely because it falls into a pre-defined category. Information ought not be withheld just because it 'relates' to a matter considered exempt or because it was given to a party 'in confidence'.

Instead, the focus ought to be on the type and extent of harm involved in disclosure of the document. This is aligned with the consequential — as opposed to categorical — approach to disclosure adopted in New Zealand's *Official Information Act*. Rather than raising a bare assertion that the information sought is exempt, the obligation is on agencies to justify not only their initial claim for non-disclosure but to demonstrate a serious threat to the public interest arising from the actual release.

The higher threshold test is necessary to avoid agencies being over-defensive in the release of information, which undermines the spirit and policy underlying freedom of information principles. It would assist in avoiding the tendency towards reflex refusals to release material not previously disclosed, and would encourage authorities to discount inconvenience and speculative risks in determining whether to disclose information. It further means that responses cannot be poorly argued, helping to avoid the time-consuming task of considering or constructing defences to prevent disclosure which may entirely lack foundation or merit.

Several issues need to be resolved when determining the operation of the substantial harm test. For example, would the substantial harm test apply to all disclosures? Can 'substantial harm' result from the cumulative effect of numerous disclosures of similar material over a period of time as well as from a single disclosure?

The interaction between the substantial harm test and the public interest also requires consideration. There is the risk that the results of the substantial harm test may not necessarily be consistent with the public interest, whether the outcome is to disclose or withhold information. This implies a need for an overriding public interest test to determine whether the preliminary decision on whether or not to disclose based on the 'substantial harm' test is itself not perverse.

The nexus between fees and the level and type of access

The charging policy adopted by the government will affect the volume of access requests handled, especially given that even a modest charging regime has proven to be a significant disincentive. More often it is the selective potential to use fees as a deterrent that is the major problem. The average fee collected at the Commonwealth level has been approximately $10 a request. However, particular users, especially journalists, can show estimated fees and charges which agencies are prepared to calculate at a potential charge of several thousand dollars. Therefore, the type of charging regime and its underlying principles will be critical. The simplest model is universal free access based on the concept that citizens have a democratic right of access and that information handling is a fixed cost of governance in a Westminster system. This removes the potential for agencies to use fee estimates as a device for non-disclosure.

The basic Australian model of an application fee and then a possible processing fee (with or without discounts or complete waivers) inserts a number of potential deficiencies into FoI legislation. Since the mid-1980s the concept of user pays or an attempt at partial cost recovery has found its way into legislation and/or design considerations. A number of the submissions from Queensland agencies, to the Queensland Legal, Constitutional and Administrative Review Committee, have proposed using fees precisely in order to deter the number of vexatious applicants and what are labelled as fishing expeditions.

The two-tiered charging system as proposed in the UK has several advantages in that it structures charges according to the nature of the request. The concept is that commercial and other heavy users subsidise those who use the legislation for public or public interest purposes. The two-tiered system has also been used in the United States and has been suggested in South Africa and India. The United States' *FoI Act* adopts a differential fee structure. The US approach requires applicants who make requests for commercial purposes to pay for the cost of copies, searching, and review time, while universities and scientific research organisations are charged for the costs of copies only and all other requestors are charged for copies and search time but not review costs. This type of system privileges 'ordinary' end users over commercial users.

However, it can be difficult in practice to distinguish between requests that are made in the 'public' and 'private' interest respectively, particularly where the request for information is made by incorporated non-government, media or charity-based organisations.

A compromise scheme is that proposed by the Australian Law Reform Commission that would see fees calculated on the amount of information released. The theory is that applicants would self-regulate their requests in order to reduce charges. More skeptical Canberra insiders have advanced the concern that some agencies would attempt to drown troublesome requestors, journalists and opposition parliamentarians, in charges by liberally interpreting requests to include as much documentation as possible.

An independent information commissioner

Experience with FoI legislation in Australia at both Commonwealth and State levels, as well as in overseas jurisdictions such as New Zealand and Canada, strongly indicates that an external review body is a crucial design feature.

The Western Australian model exemplifies a successful external review system, in that the Commissioner's office is adequately staffed and resourced and performs multiple functions, including having powers to oversee the conciliation and mediation of complaints. This approach, particularly the preference for conciliation and mediation in the resolution of disputes, embodies a fundamental transformation in the application of FoI legislation, namely, the objective to facilitate greater and effective access to information rather than channelling a disputed request towards an adversarial contest whose outcomes are uncertain and often costly.

Whereas current design principles have largely adversarial overtones and structures, a more visionary design would incorporate the benefits of an adversarial model — such as the ability to contest agency determinations and challenge exemptions — while also promoting a proactive role for the review body in improving agency performance. This would involve the incorporation of broad performance criteria into the legislation as constant, benchmark indicators of compliance with the legislation and fulfillment of its objectives.

The experience of the Western Australian Information Commissioner demonstrates the benefits where such a review body additionally adopts a 'hands on' role in the preparation of a 'report card' by which to monitor agency performance and compliance with the legislation, according to a set of performance criteria. The Commissioner can also offer advice and assistance to agencies to improve efficiency and effectiveness of internal administrative procedures. The 'report cards' feature an appraisal of each agency's performance in terms of the average time taken to deal with requests, the fees charged by the agency in processing the requests, the manner in which the agency manages its records, the rate of refusal to release information, the degree of openness and responsiveness within the agency and the effectiveness of its overall administrative framework.

FoI and the Westminster system

Australia was the first country with a Westminster system to introduce FoI legislation, which represents a shift — albeit small — in the balance of power between the citizen and the state and has philosophical and cultural implications. The problem perceived by Australian governments is that secrecy goes to the heart of power, which is in turn linked to information. Thus, to reduce levels of secrecy via the disclosure of information is to reduce power or at the very least face avoidable and informed criticism or scrutiny. The justifications by the Kennett government in the Victorian Parliament during the passage of the *Freedom of Information Amendment Act 1999,* are an excellent example of the argument that an FoI regime is unnecessary or merely an optional extra in a Westminster system.

A constant theme that emerges when governments or their public servants consider FoI is that FoI sits uneasily with existing Westminster practices and core values. Indeed the argument is advanced that FoI is a potentially hostile and damaging threat to that system of government. Accountability and transparency are seen to be more than adequately catered for with ministerial responsibility, Cabinet collectivity and a vigilant parliamentary process. The Tasmanian government, in justifying its amendment Bill in 1994, did so by detailing the damage, both direct and indirect, that FoI inflicts on a Westminster process. This occurs by exposing the conduct of policy formulation and exchanges between policy advisers and Ministers to potential scrutiny. The Tasmanian government argued that the Westminster system demanded a core area — not just Cabinet but also the policy processes leading to the final Cabinet decision — for governments to think and develop ideas and policies in private.

Current design principles accommodate Westminster principles, even giving them a permanent and lasting predominance, without qualifying their operation. Therefore, Australian FoI legislation has been constructed on the premise that there will always be several classes of government information, determined by their category rather than their content, which will be permanently excluded from release or excluded for significant periods of time.

The preferable approach is that adopted in New Zealand by the Danks Committee. The Committee argued that key principles of the Westminster system ought to continue to apply, and due recognition ought to be given to principles of Cabinet responsibility. However, the application of these principles needed to be modified, and continually modified thereafter, in light of an unavoidable and absolute necessity to practise open government. The proposals of the Danks Committee reflect an evolutionary approach to FoI design, being founded on the idea that citizen-based ownership of information entitles access to it, thereby demanding the modification of other ideas about government which rely on secrecy or processes that necessitate permanent confidentiality.

This is in accord with the notion that the Westminster system is itself evolutionary and need not be depicted as a stagnant set of principles which, though in theory are intended to promote open government, are in practice used by governments as a shield from scrutiny. Shifting the onus of proof from the applicant to the holding agency or Minister as well as narrowing the exemptions to application of the legislation would better reflect the notion that access to information is an entrenched democratic right rather than one dependent on the political climate or on a reliance on 'tradition' to deter disclosure. Instead, as the Senate Committee concluded, further modifications to the Westminster traditions via FoI will be for the better:

> Freedom of information legislation does not relate to any specific system of government, be it a Westminster, presidential or any other system. It is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving.[2]

In Australia, we seem to have missed the concept that legislation like FoI will from time to time require a transformation in the practice and operation of the Westminster system. It is not simply a case of sacred and immutable traditions being protected against an exotic concept. The introduction of FoI legislation is a watershed from which the Westminster system becomes transformed into a more democratic, participatory and open form of government.

The Westminster system is not an end in itself, but merely a means to the end of greater accountability and democratic government. It is in the interests of Ministers to expose advice provided to them to greater public scrutiny so that the quality of that advice can be improved. The Senate Standing Committee on Constitutional and Legal Affairs noted in 1979:

> It is not that freedom of information will change our governmental system; it is rather that our changing governmental system is contributing to pressures for freedom of information legislation.[3]

This comment needs to be situated within the context of a debate over whether FoI legislation is necessary at all. At the end of this century of Australian government the issue is how to achieve better implementation and design of access to information legislation, and this requires countering arguments that FoI still does not fit within 'the system'. Such arguments misread the practical operation of the Westminster system and ignore the way in which FoI can enhance those features and make for good government. The challenge will lie in ensuring that FoI enhances the positive features of the Westminster system and that nothing of value is diminished.

Conclusion

Australia seems not to have embraced the concept that the introduction of FoI in conjunction with the Westminster system, itself a constantly evolving system, was meant to, and needed to, form a symbiotic relationship. The design concepts touched on in this article are meant to encourage reformers to return to first principles and to flesh out both the detail and parameters of the relationship between a Westminster system and FoI legislation.

Debate and discussion about Australian FoI has been dominated by the concept that our only real choice was how to make the American model fit Australian conditions. Rarely have we stopped to contemplate starting from first principles and then constructing a legislative framework, which would accommodate those principles. Of equal importance in the debate, especially from the public service quarter, has been the treatment of the Westminster system as being at the foundation of our government. The Tasmanian Government argued:

> the Government adopts the view that the foundation of Australian democratic institutions and their unique expression in Tasmania can continue to be found in the rich tradition, conventions and cultural underpinnings of Westminster style government. This is not a rigid or weak foundation but rather one which is able to accommodate change and diversity, a strength which arises in part from the federal elements of our democracy and in part from its long and hard fought for traditions. This understanding of the cultural foundations of our system of

Government is critical to placing Freedom of Information legislation in context.[4]

In this worldview, the context of FoI is external, and of greater inferiority, to the lasting, albeit flexible, traditions of Westminster. We need to reject that viewpoint. The relationship and configuration of concepts like FoI and Westminster are compatible to the extent that each contributes to the ultimate goal of producing an informed citizenry of a democratic system. If aspects of either concept fail to contribute, or contain elements that are counterproductive to achieving that objective then the concepts need to be adjusted or modified.

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3. 'Freedom of Information', above, p.26.
4. Tasmanian Government Submission to the Legislative Council Select Committee on Freedom of Information, 1995, p.5.

You Don't Know what you've Got until it's Gone

The French Media's Use of FoI

I have just returned from eight months in France, conducting research on the French FoI law.[1] Each week I would buy at least four newspapers and carefully look through them for discussions on the FoI law or for articles beginning with: 'According to documents provided under FoI...' During my time in France, I discovered only two articles which referred to the French FoI law. This struck me as a stark contrast to the experience of reading daily papers in Australia. While I do not claim to have conducted a thorough survey of French journalists' use of FoI, the almost complete absence of references to FoI prompted me to reflect on the role of the media in promoting FoI. I returned to Australia to find the same debate taking place in the pages of the *FoI Review*. The French experience offers a case study of what can happen when the media does not use the available FoI laws.

The legislation

The French FoI law was passed in 1978 and is similar to the Australian FoI laws. It sets up a broad right of access, which is then subject to a number of exceptions.[2] There are exceptions for secrets relating to the deliberative processes of government, defence, external affairs, national currency, state security, legal proceedings, the conduct of investigations, commercial secrets as well as for personal information. France also has a very long history of bureaucratic secrecy, which the French FoI law has struggled to break through.[3] So the structure of the law, the length of time it has been in operation and the culture in which it operates are all broadly comparable to the Australian situation.

Media usage

French commentators and the French FoI Commission (the Commission d'Accès aux Documents Administratifs or CADA) support my informal conclusions that the media is an irregular user of the FoI law.[4] There are no clear statistics on media use in France, although 6 years after the law was introduced, CADA had received only ten appeals from journalists.[5] The poor use made of the French FoI law contrasts with the results of Nigel Waters' survey which revealed that journalists from the *Sydney Morning Herald* made about 35 requests for information over an 18-month period and used FoI requests made by politicians a further 13 times. In all, FoI was mentioned in the paper on over 100 occasions during this period and resulted in a number of significant stories being run.[6] A similar analysis of the use of FoI by reporters from the *Age* and the *Australian Financial Review* over six months showed a reduced level of FoI use, but a total of 89 references to FoI in the *Age* and 16 in the *Australian Financial Review*.[7]

It seems that the French press has very strong contacts within the administration and relies on informal avenues and leaks as a more efficient and effective means of obtaining their information.[8] One recent example involved a fairly controversial report prepared for the Attorney-General on family law reform. On the morning of 14 September 1999 it was leaked to the Christian paper *La Croix*, when the Attorney-General herself was not due to receive a copy until midday that day. Public release had been scheduled for 17 September 1999.[9]

The two articles that I noticed where the French media had used the FoI law reflect both the difficulties and the benefits of the law. The first article appeared in the national paper *Libération*.[10] It concerned a public funded company,[11] run by members of the regional government.[12] A regional auditor's report[13] noted that during a three year period the company had spent a total of $61,952 (FF 241,614) on food and wine. Two meals in particular stood out as costing $254 and $464 per head. Two members of the opposition sought access to a copy of the bills for these meals and, after considerable difficulty and CADA's intervention, were successful. They discovered that the meals were held at a restaurant owned by another member of the local government. The restaurant owner would later be voting on the construction of a car factory by the company in that region. The story was not front page news,[14] and the journalist writing it did not seem too shocked by the story he told. Nonetheless, he hoped that people would be angry enough to react because he argued that there was a need to break the silence and tacit acceptance of this sort of improper use of public funds.