FREEDOM OF INFORMATION

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Thinking about today's address and freedom of information ('FOI') bought home to me some curious contradictions in my personal career.

I was the Secretary of the Public Service Board for a time in the late 1970's when the FOI legislation was being prepared in the Attorney-General's Department. The three members who made up the Public Service Board at the time, and to whom I reported, were very conservative people. Like most of their peers then at the top of the Public Service they were not great supporters of FOI, which they saw as being championed by radical young academics and activists.

Many senior public servants at the time hated the thought of FOI legislation. It promised to cramp their style as it was common practice for senior staff to write the most vituperative and often slanderous marginal comments on files. As a consequence historians will find many of the pre-FOI files much more juicy to read than those created more recently.

The Public Service Board's interest was essentially associated with the anticipated impact of the legislation on the administrative process. It was particularly concerned that the candour and frankness of the relationship between senior public servants and Ministers was not weakened by the opening up of government records to public scrutiny. It was also concerned about the costs to government of meeting the anticipated demand for access to records.

As Secretary to the Board, I participated in an Interdepartmental Committee chaired by Lindsay Curtis which advised the Attorney-General, and my brief was to keep injecting these types of considerations into the debate in an attempt to try to head off some of the more extravagant measures which some proponents of the scheme were pushing for. In retrospect, it is fortunate that I was singularly unsuccessful in my endeavours.

Later I spent 10 years as a member of the Advisory Council of the Australian Archives, and while the Archives Act and the FOI Act are complementary, in a sense their purposes seem at odds with each other. FOI is about openness and disclosure of the workings of government. The Archives Act is very much about creating a logical and sustainable regime to guide the destruction of the great bulk of records created over time by governments, ensuring, of course, that those records which are of lasting value are preserved.

Now an Ombudsman, I am the holder of an important office which is one of the lynch pins of the Commonwealth system of administrative law created in the 1970's. I share with the FOI Act and other important pieces of legislation, the principles and values of openness and accountability, fairness and equity, which are now embedded features of the Australian approach to democratic government. So I've come a long way since those early discussions around the table with Lindsay Curtis.

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However, we live in changing times. While many fundamentals are taken for granted, we do need to be constantly alert to the fact that ultimately it is up to our nation's leaders and the community itself, what sort of society we want in the future and what should be the nature of the continuing relationship between the electors and the elected.

Freedom of information is, in my view, one of the fundamentals which should continue to be regarded as a given. It is hard to overstate its importance and its continuing relevance as the statutory embodiment of the principle of openness in government. While one might question some of the technical details of the legislation, the philosophical thrust of the legislation is as relevant today as it was in the 1970's when it was being debated.

Former Prime Minister, the Right Honourable Malcolm Fraser, captured the essence of the freedom of information legislation in an address to mark the 50th anniversary of the *Canberra Times* on 22 September 1976. He said:

> If the Australian electorate is to be able to make valid judgments on government policy it should have the greatest access to information possible.
>
> How can any community progress without continuing and informed and intelligent debate?
>
> How can there be debate without information?

The FOI Act was passed by Federal Parliament in 1982. The essential purpose of the Act was to make government more open and accountable by providing to citizens a right of access to information in the possession of the government. These rights now form an important part of our democratic tradition.

Seventeen years later, at a time when governments are more concerned with the cost of government and balancing budgets, it is worth reflecting on whether the ideals espoused by Malcolm Fraser, and later reflected in the FOI legislation, have in fact been fully realised.

As Commonwealth Ombudsman, my Office receives complaints from citizens about the way government agencies handle FOI requests. My Office also has a wider role in monitoring administration within government agencies, including administration of FOI. As a result, my Office is well placed to make some judgments about how well FOI is being administered.

We receive a steady stream of FOI related complaints each year, generally associated with delay, with use of the exemption provisions or with the level of charges being sought.

Last year, because of increasing evidence that the aims of the FOI Act were not being fully met, my Office conducted an 'own motion' review of FOI administration across a selection of government agencies.

In June 1999, I released a report of our review, entitled 'Needs to Know'. A mixture of good and bad outcomes emerged. On the positive side, we found that most agencies appeared to be approaching FOI in a reasonably responsive manner and it had become an accepted part of public administration. The staff who had the role of being agency FOI coordinators, in particular, seemed to be advocates of 'open government' and were reasonably well informed about access requirements within their organisations.

We also found that there had been a gradual but sustained upward trend in the disclosure of information over the years although this growth was largely achieved by those agencies which dealt predominantly with requests for personal information.

On the negative side, however, we identified a number of areas of concern. Few agencies had mechanisms in place which encouraged or promoted the disclosure of information without recourse to the FOI Act. There were also signs in some agencies that some FOI decision makers continue to experience difficulty with the aim of the Act and have at times

adopted a minimalist approach to disclosure.

We found widespread problems with the recording of FOI decisions and the probable misuse of exemptions in some cases. This was more evident in agencies which receive FOI requests relating to government policy than in those which typically deal with requests for personal information. In one agency we found that a senior officer had applied an exemption on a departmental document on the basis of 'commercial interest'. The officer did not provide any reasons for the decision and internal review was sought. The document was subsequently released after review. However, what was not disclosed to the applicant was that the document had been listed all along in the Department's s.9 notice as one which was publicly available for inspection or purchase, without recourse to FOI.

In a considerable number of other cases, we observed exemptions had been claimed without any reasons being recorded or advised to applicants. There appeared to be a widespread misunderstanding of the decision recording requirements of s.26 of the Act.

There were also signs that some agencies had been advising FOI applicants of unreasonably high charges to process an FOI request as a means of deterring the applicant from proceeding with the request.

These shortcomings suggest that some of the principles of the legislation have been forgotten, or are not fully understood or embraced by some of the current managers on Commonwealth Government agencies.

Other bodies, such as the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) also share concern over the declining importance accorded to FOI by government agencies.

In 1995, the ALRC and ARC issued a joint report 'Open government: a review of the federal *Freedom of Information Act 1982*'. This review identified a number of deficiencies, the most important being:

- there is no person or organisation responsible for overseeing the administration of the Act;
- the culture of some agencies is not as supportive of the philosophy of open government and FOI as it was felt it should be;
- the conflict between the old 'secrecy regime' and the new culture of openness represented by the FOI Act has not been resolved;
- the cost of using the Act can be prohibitive for some applicants; and
- the exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.

Significantly, four years later, similar deficiencies were identified during my Office's review of FOI administration.

The ALRC/ARC report to the government made a number of recommendations for legislative amendment, one of the most significant being the appointment of an FOI Commissioner to monitor and promote the FOI Act. I agree there is a need for such a body or authority to have oversight of administration of the Act. It was envisaged that the FOI Commissioner would conduct regular audits, and monitor agencies' compliance with, and administration of, the Act.

Importantly, the FOI Commissioner would also be responsible for the issuing of FOI guidelines to assist agencies in interpreting and applying the Act.

The Attorney-General's Department had a monitoring and educative role, but since 1995 it has progressively withdrawn from the publication of FOI guidelines, the conduct of FOI practitioner training and the issue of FOI Memoranda and Decision

Summaries. This has led to a growing void in the availability of current FOI information to help agencies in their administration of the legislation. This is clearly an undesirable situation given the complexity which can be associated with the application of the FOI legislation.

The need for applicants to resort to the formal processes available under the FOI legislation is lessened if government agencies simply make as much information as possible publicly available. Parliament saw a need to promote this important principle of open government by its inclusion as one of the aims of the FOI legislation. Unfortunately, available material suggests that this aim of the Act has not been widely reflected in agency practices. Members of the community appear often to be forced to resort to exercising their statutory right to information rather than being able to rely on Parliament's intention for government agencies to make most of the information they hold freely available without relying on formal access provisions.

Our investigation showed some signs of a culture of passive resistance to the disclosure of information emerging in parts of the bureaucracy. If this culture is allowed to flourish, then the aims of the FOI Act will continue to recede, to the detriment of open government and society.

The Archives Act complements FOI in important ways. It regulates public access to documents created prior to the commencement of the FOI Act, and establishes regimes governing their destruction and retention of government records on a continuing basis. The Australian Archives organisation unfortunately does not currently have the legislative 'teeth' to enforce minimum standards of record keeping and, as a consequence, information management practices across government leave considerable room for improvement. The challenge of management of electronic records also needs to be resolved.

Significant issues for accountability are associated with poor record keeping practices. The Auditor-General, the Law Reform Commission and my Office have all recently drawn attention to deficiencies in this area. Obviously an FOI Act is of little value if poor record keeping practices result in lost records, or an inability of agencies to find them when required.

We have heard a lot about accountability in recent years, but it has generally been about redefining and strengthening the accountability obligations of public officials and institutions, in a changing public administration environment. Recent public sector reforms have sought to improve the focus on outcomes and the measurement of performance against pre-determined targets or objectives. Improving efficiency by striving for more value for money has been an all pervasive goal.

Most modern day public servants, I suspect, if asked to speak of accountability, would do so by reference to these resource management and service delivery issues. However, accountability is as much about transparency and openness. Holding officials responsible for their actions and maintaining, and disclosing when required, a reliable record of the workings of government promote these aspects of accountability and are fundamental to good governance in a modern open society.

The significant extent of contracting out, which has occurred in government within a relatively short period of time, has raised issues about the community's continued access to information related to the delivery of government services. The Government has introduced a bill to amend the *Privacy Act 1988*,[1] and has proposed amendments to the FOI Act.

The effect of these amendments, if enacted, would be to ensure that the rights of those dealing with government contractors will, for most purposes, be the same as the rights of people dealing directly with government agencies. One exception, which the Government has not yet addressed, is the need for the FOI Act

to be amended to make the Ombudsman's jurisdiction in relation to the actions of government contractors clear, consistent and certain.

The commercial-in-confidence exemption will continue to be available in relation to documents concerning government dealings with contractors. In my view, that exemption has been overclaimed in the past - it is not unknown for officials to refuse disclosure of documents because of the possible adverse effect on a commercial body, when the commercial body itself has no great fear of disclosure. The commercial-in-confidence exemption has also been claimed at times to avoid disclosure of the nature of government dealings with business. The growing reliance on this exemption in relation to a wide range of documents, seems to disregard the terms of s.43 of the FOI Act - which I recall requires that there be 'a reasonable expectation of damage', rather than a mere possibility.

In the early days of contracting out, sitting in Estimates Committees, I was amazed at how Senators allowed refusals by public servants to answer a wide range of questions on the grounds of commercial-in-confidence, without any kind of probing or questioning. However, the parliamentary committees have adopted a more robust approach recently. For example, the Senate in 1998 resolved that 'there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise'. The Senate Finance and Public Administration References Committee - dealing with contracting out - referred to a need to explain the reason for any claims, to the limits on reasonable claims and to their limited lifespan. With that said, Committees can agree to accept sensitive information in camera, an option that is clearly not available under FOI.

While by international standards we have a healthy democracy in Australia, the quality of our democratic processes would be improved if there was a more complete embrace of the cultural change the FOI legislation was designed to achieve. This is especially so of the bureaucratic level of Government which does not get exposed, to the same degree as Ministers, to the pressures for disclosure emanating from the Parliament and from an inquisitive media.

Cultural values need to be constantly reinforced if they are to be maintained. Governments and agency heads, through their actions, have an important continuing responsibility to reaffirm their commitment to openness, accountability and compliance with the spirit and practice of FOI legislation.

I hope that the Government gives early consideration to the matters contained in the reports by the ALRC and my Office and, in particular, the recommendation that a body or authority be given legislative responsibility for effective oversight of administration of the FOI Act.

Resolution of these matters would be a positive step in reinforcing the continued commitment to, and relevance of, the important objectives of the FOI legislation.

Endnote

1 The Privacy Amendment (Private Sector) Bill 2000 was introduced by the Attorney-General into the House of Representatives on 12 April 2000.