FREEDOM OF INFORMATION

*Stephen Brown**

Edited text of an address to an AIAL seminar entitled "Freedom of Information - A Current Perspective" held in Canberra on 21 February 2000

My perspective today is that of someone who for more than 10 years had management oversight of the freedom of information ("FOI") function in a major Commonwealth agency, the Department of Defence. In these comments, I will mention particular features of FOI management in Defence, refer to a few problems encountered over the years, and comment on some challenges for FOI in the future.

FOI has become widely accepted in democratic societies. Even the United Kingdom, one of the bastions of secrecy, now has legislation in hand, though it does seem that Sir Arnold (if not Sir Humphrey) may have played a part in its development. The UK did, of course, have an administrative scheme for 'Open Government', announced in March 1994. To implement this policy, the UK Ministry of Defence on 8 April 1994 issued a Defence Council Instruction entitled 'Open Government'. This bore the standard caveat: 'Not to be communicated to anyone outside HM Service without authority'.

I can't claim that the Australian Defence Organisation ever managed anything quite so incongruous. While FOI was accepted with varying degrees of enthusiasm, it was accepted and its administration commenced.

As in most agencies, substantial resources were provided in Defence for the FOI function on the commencement of the Act. Defence received an initial staffing allocation of 32 positions - to cover, of course, the set-up requirements of developing an administrative structure and writing instructions, as well as the ongoing management of requests. It was soon evident that nothing like the predicted volume of requests would occur, though individual requests could be much more complex than had been thought. The staffing cover for FOI reduced fairly rapidly, aided by general pressures on administrative expenditure through the 1980s and 1990s. Indeed, at one point the existence of two simultaneous staffing reviews briefly reduced the FOI staff allocation to the figure of minus one. The FOI section now has 6 staff, and is located in the Defence Legal Office. In 1998/99, Defence had 185 formal requests (and 11 document amendment requests) plus 456 purported requests which were handled outside the Act.

In Defence, the FOI section provides central management of FOI requests, including formal communications and advice to applicants, decisions on fees and charges, and the provision of advice on FOI matters to decision-makers. However, the responsibility for decisions on requests rests with the relevant functional area. Authority to release documents under the FOI Act was initially given to Class 11 public servants and Defence Force equivalents, while authority to deny was given to Senior Executive Service Level 1 officers or Defence Force 1-star officers. These levels now have been lowered so that SOG-B or Colonel-equivalent can both release and refuse.

* *Stephen Brown is formerly Assistant Secretary, Legal Services Branch, Department of Defence*

The FOI section provides active support to decision-makers, including advice on the scope of exemptions, relevant interpretations of the Act and help in the assessment of documents. The section can also assist decision-makers in bringing their occasionally nebulous reasons into a form compliant with the Act and suitable for advice to applicants.

As I have said, responsibility for actual decisions on requests rests with the relevant functional area. In this respect, I disagree with the recommendation in the Ombudsman's 1999 Report that decision-making be centralised in agencies. For an organisation the size and complexity of Defence, it would be impossible for a central decision-maker to even understand all requests, let alone be familiar with the considerations relevant to release.

Consistently with the arrangements for decision-making, Defence has also devolved responsibility for internal review. Authorisation was initially given to Deputy Secretaries and Service Deputy Chiefs, but now extends to all Senior Executive Service and Defence Force star rank officers. An internal review is normally undertaken by an officer in the chain of command or management above the initial decision-maker. Here, also, specialist advice is available from the FOI section.

One practice adopted by Defence has proved useful. When a potentially sensitive FOI request is received, a brief advice is circulated to relevant higher executives, the Public Information Branch and, usually, the Minister's Offices. This practice minimises nasty surprises - eg, when released documents appear in the press.

None of these features of FOI administration is particularly novel, but they have enabled effective management of FOI in a very large and diverse organisation. The crucial element has been the existence of a central, experienced and highly competent FOI section.

I now turn to discuss a few problems encountered in Defence in managing FOI.

While I do not think that there is now any general cultural problem in Defence with the idea of FOI, there can be particular instances where a decision-maker is unwilling to agree to the release of documents in response to a request which has been clearly made out. Sometimes this may reflect lack of familiarity with FOI - eg, because the decision-maker is newly posted to Canberra. Other times the requester may be seen as hostile, eliciting a response of 'Why should we give ammunition to our enemies?'. Dialogue with the FOI staff usually resolves these situations. A hint that the decision-maker may have to justify a refusal before the Administrative Appeals Tribunal can also be helpful.

Compliance with deadlines has always been a problem, and Defence does not have a particularly good record in meeting the statutory time limits. This is due largely to the complexity of individual requests and the difficulties in locating documents in a very large and diverse organisation. The 1995 Report of a review of the FOI Act by the Australian Law Reform Commission and the Administrative Review Council recommended a reduction from 30 to 14 days in the statutory time limit for responding to FOI requests. In my view, this is an entirely unreal suggestion. Apart from the factors I have mentioned, what the Ombudsman's Report delicately describes as 'a work environment of often conflicting priorities' will nearly always be a major, indeed nearly insuperable, barrier to meeting shorter time limits.

I have already mentioned that immediately following the enactment of the FOI Act, the number of FOI requests was lower than had been expected, but that individual requests often turned out to be far more complex than anyone would have thought. Naturally, it is always open to an agency to refuse a request on workload grounds, but even making that judgment can require a substantial exercise of locating and assessing the scope of the records involved.

The reality of this issue should not be dismissed. While probably not alone in this, Defence has had experience of requests which occupied hundreds of staff hours in locating, reviewing and assessing documents. There can be further large demands on staff time when appeals are made against refusals to release documents - and the workload ground, of course, has no application here.

Perhaps the most extreme example of a large and complex request was one which related to a commercial dispute. The estimated cost of meeting this request was $27 million - quite apart from the fact that the relevant area of the Department would have largely ceased normal business while processing it. The request was refused on workload grounds. However, when litigation ensued, a discovery order was sought in virtually the same terms as the request. Although the Commonwealth demonstrated the cost and burden of compliance, the order was granted, with the judge merely commenting: "The Commonwealth has deep pockets". Happily for the taxpayer's pockets, the litigation went into suspension and was eventually discontinued.

Such applicants often fall in the broader category of the vexatious requester - the person who pursues an obsessive quest over a period of years, sometimes decades, and for whom satisfaction is never reached. Most agencies have experiences of such people. I dare say many of them also contact the Ombudsman's Office. But when the public service is urged to benchmark itself against private sector best practice, it is salutary to consider that the private sector is not subject to such processes as FOI. A private sector manager with profit targets would not contemplate for a moment the diversion of resources which is involved in dealing with the vexatious requesters handled as a matter of course by public service agencies. This perhaps, is one of the downsides of public sector accountability and responsiveness.

And so to some challenges for the future.

These are not necessarily FOI-specific, but it seems to me that they will have considerable impact on its effectiveness.

The first challenge relates to records management. In making these comments, I do so in strong support of the observations in the Ombudsman's Report.

By records management, I mean three things (and these apply to records in physical or electronic form):

- actually recording policy and administrative processes, actions and decisions;
- maintaining such records and related correspondence in a coherent and identifiable form;
- being able to locate and access all relevant records as required and with minimal effort.

Satisfactory achievement in each of these areas is essential if the FOI system is to be capable of operating and thereby to serve its objectives of openness and accountability. Self-evidently, too, satisfactory achievement in these areas is necessary if an agency is to manage its business and be able for its own purposes to identify and retrieve the knowledge it holds.

The Ombudsman's Report suggests, and it is certainly my belief, that there are shortcomings in these areas in a number of agencies - and I certainly would not exclude Defence from this assessment. There is a classic case study of the problems in Professor Pearce's report on the pay television matter. The Canberra Hospital demolition is another example. Significant elements of that undertaking were not properly recorded, and some of the records which were made then proved difficult to find when needed.

It is a core responsibility of agencies to conduct records management at a high level of efficiency. If this is done, FOI

performance will run at an equally high level.

There is a collection of challenges emerging from outsourcing and from contracting generally. One example is the issue of access to information held by contracted service providers. Legislative amendments are proposed to deal with FOI and privacy issues, though these amendments do seem to be taking an awfully long time to put in place. There are, I know, some practical problems in extending these legislative regimes to contractors, but I doubt that there is any real issue of principle in doing so.

However, another aspect of Commonwealth contracting presents more difficulty in the FOI context. This is the concept of 'commercial in confidence'. There appears to be a belief in some quarters that this is a complete and automatic barrier to the disclosure of documents which are so described. Plainly this is not correct.

Parties cannot, for example, contract out of FOI simply by agreeing that their contractual documents will not be released. If an FOI request is made, it must be addressed against the statutory criteria and if non-disclosure is proposed then the case has to be made - eg, because disclosure would damage the financial interests of the Commonwealth, or would harm the commercial interests of the contractor. Many documents claimed to be commercial-in-confidence could not possibly meet these tests, and continued vigilance will be needed to ensure that disclosure entitlements are not undermined.

There is a particular challenge to ensure that the FOI system itself is administered consistently and competently across the entire range of Commonwealth agencies, large and small. The Ombudsman's Report identified wide variations among agencies in FOI training, administration and guidance. It is therefore particularly regrettable that the Attorney-General's Department - the Department which has responsibility for the FOI Act under the Administrative Arrangements Order - ceased to distribute FOI Memoranda and Decision Summaries. No other mechanism has been created for keeping FOI practitioners abreast of developments affecting the Act, for providing policy guidelines on its operation or for ensuring consistency in administration across the spectrum of agencies.

I would have thought that these were inescapable responsibilities of the Department which administers the Act. If the Attorney-General's Department cannot meet them, the Act should be assigned to a Department which can.

The FOI Commissioner recommended by the ALRC/ARC Report might perhaps have assumed these functions, but it appears unlikely that the Government will agree to establish that office. If that proves to be the case, perhaps we may hope that the Government will alternatively allocate some modest resources to this activity, consistent with its commitments to open government, enhanced accountability and best practice administration.

In conclusion, it will probably have been evident from these remarks that I am a believer in openness of government, and in FOI as a means for achieving that end.

Bureaucrats have tended to be rather negative about openness, fearing that its most likely outcome will be to allow the gathering of material for purposes of criticism, often in a glare of unwelcome publicity. I think that this is unnecessarily defensive. Openness can also be used to demonstrate competence, professionalism and achievement. No doubt these are attributes which are less likely to feature on 4 Corners, but demonstrating them is part of the obligation of accountability. Openness can also help to convince the community of the undoubted fact that government administration does exist to serve them. After all, that is something they have a right to know.