THE FOI ACT 1982 AND THE FOI ACT 2000 (UK): ARE THERE LESSONS WE CAN LEARN FROM EACH OTHER?

Philip Coppel*

Introduction

In inviting me to give this seminar, Professor Creyke has been particularly generous. Not only has she permitted me to address you, but she has given this session as vague a title as one could hope for. I believe in accepting generosity. I have taken the vague title as a licence to range over the subject area as I see fit. I shall concentrate on those aspects that are of more universal and enduring interest: the object of freedom of information; its inter-relationship with other aspects of public law; and the public interest that it serves to secure.

It is almost a quarter of a century since the Commonwealth's *Freedom of Information Act 1982* was enacted. At about the same time, similar legislation was passed in New Zealand (the *Official Information Act 1982)* and in Canada (the *Access to Information Act 1985*). More than a decade earlier the US had passed its *Freedom of Information Act 1966*. The United Kingdom was thus decidedly the last of these comparable democracies to enact freedom of information legislation. Its *Freedom of Information Act*, passed in 2000, only came fully into force on 1 January 2005.

This difference of maturity provides an opportunity to measure the effect of such legislation on public administration. It provides an opportunity to examine whether the ethos reflected in the legislation has been embraced by public administrators.

The McKinnon case

Next month, the High Court of Australia is to hear what is arguably, the most important appeal on the 1982 Act to have come before it. *McKinnon v Secretary, Department of Treasury*[1] concerns two fairly prosaic requests for documents made by the FOI editor of the Australian newspaper. First, Mr McKinnon applied for reports on the first home buyers scheme. In particular, he sought documents summarising its fraudulent use and its use by high-wealth individuals. Secondly, he applied for the disclosure of documents relating to tax 'bracket creep'. In particular, he sought reports on the extent of bracket creep, its impact on revenue collection and the impact on taxpayers. Many documents were released, but some 50-odd were not.

The Treasurer issued two conclusive certificates under s 36(3), in identical terms, spelling out why their disclosure would be contrary to the public interest. Mr McKinnon appealed to the Administrative Appeals Tribunal. The appeal was dismissed. In August last year, a majority of the Full Court of the Federal Court dismissed an appeal from that decision.

---

* *Phillip Coppel is a former Australian practitioner who has been at the English bar since 1994, where he has a varied government law practice. He is the author of Information Rights (Thomson & Sweet & Maxwell, 2004, a text on access to government information in the United Kingdom. He gave this paper at an AIAL seminar held in Canberra on 12 April 2006.*

Underneath the appeal lies an ideological difference. Its importance cannot be properly appreciated without some reflection on the purpose of freedom of information legislation. We do not know, of course, exactly what is contained in the documents. But we do know that the only exemption invoked requires that each of the documents be an internal working document and that its disclosure be contrary to the public interest. The President of the Tribunal said that the withheld documents described options, that they were provisional in nature. He found that the documents contained jargon and acronyms which would be meaningless to the average reader; the average reader would have difficulty in understanding the conclusions and even greater difficulty in understanding the reasoning and methodology.

I do no more than summarise why it was said by the Treasury that the release of such material would be contrary to the public interest. These grounds reveal an ideological fault line. These grounds are universal in their application. Any internal, deliberative document, however anodyne, however prosaic, however routine, can have these grounds pinned to them. Thus it was said that disclosure would impede free communication between public servants and their Minister. It was said that:

> '...officers should be able freely to do in written form what they could otherwise do orally, in circumstances where any oral communication would remain confidential'.

It was said that the public would not be able to appreciate that the documents were tentative in nature and that public confusion and misunderstanding would result.

Misunderstanding is, of course, a possible consequence whenever one puts pen to paper or whenever one opens one's mouth. Responsibility tempers our outpourings. Once beyond our infancy, there is no such thing as an absolute freedom of expression. One cannot decouple what one says or writes from all and any consequences.

The public interest grounds in *McKinnon* go to the heart of the concept of freedom of information. It is a small step from invoking these grounds to contending that freedom of information is contrary to the public interest. The Treasury's first public interest ground was that:

> Officers of the Government should be able to communicate directly, freely and confidentially with a responsible Minister and members of the Minister's office on issues which are considered to have ongoing sensitivity and are controversial and which affect the Minster's portfolio.

It is difficult to quarrel with such a bland statement of principle. Indeed, we can take the statement further without adding controversy. Officers of the Government should be able to communicate directly, freely and confidentially with each other. They should be able to do so on any issues with which they are dealing. Yet, if that be right, it must follow that there is a public interest in keeping all that they write out of the public gaze.

The Treasury's third and fourth public interest grounds were that the documents, if released, might mislead or be misunderstood. Similarly bland, it has universal application. Any document can mislead. Any document can be misunderstood. A policy, even if adopted, can be abandoned or changed. This can cause confusion. This can be misleading.

The *McKinnon* appeal raises the question whether the s 58(5) certificated appeal process involves a balancing exercise. But in answering that question, it provides a useful opportunity to remind ourselves why it is that this legislation exists. To do that, we need to go back to basics.

Freedom of information legislation

It is frequently suggested that Sweden was the first country to pass freedom of information legislation and that it did so in the late 18th century. It did indeed pass legislation bearing that phrase, or, to be more precise, something like it in Swedish. But it meant something different from what you or I understand by the phrase. It was concerned with guaranteeing the freedom to impart information. It was the 1966 US Act that commandeered the phrase to describe a right to elicit official information. Thus, when in the late 1940s the fledgling United Nations asked each member state to report on its guarantees of freedom of expression and on statutory constraints on freedom of expression, it did so under the rubric of 'freedom of information'. One can still find echoes of that use in certain international instruments: for example, Article 19 of the United Nations Universal Declaration of Human Rights (1948) and Article 10 of the European Convention on Human Rights (1950).

It was, as I have said, the United States' *Freedom of Information Act 1966* that first used the phrase to describe the right as we now know it. Whichever jurisdiction one is in, its unifying attributes remain much the same. It is a right given to every person. It is a right that requires no demonstrable interest in order to be invoked. It is a right to see all recorded information held by a public authority, regardless of subject matter and regardless of provenance. But the right is invariable shaped by a series of exemptions that describe a protected interest: national security, law enforcement, the law of confidentiality, legal professional privilege and so forth.

The onus of demonstrating the applicability of any exemption lies on the public authority. Exemptions do not apply in a blanket form to all information captured by a request: the public authority must instead consider the bits of information to see whether any can be released. These, then, are the essential attributes of freedom of information legislation. Whilst there is variation in the exact description of exemptions, there is a remarkable cross-jurisdictional similarity in terms of the interests that are protected by the exemptions.

The timing of the US Act and the background to it serve as important reminders of the underlying objective of such legislation. A right of access had, in fact, been included two years earlier in the *Administrative Procedure Act 1964*. The 1966 Act was little more than a revision of a part of that Act. It is telling that the original right of access was included within a statute intended to codify an individual's right to challenge decisions of the federal administration. It followed a decade's consideration and debate on the issue. It came at a time when in that country, as elsewhere, the basic and now familiar, principles of administrative law were being established.

It came, moreover, at a time when many of the most important, the most seminal international instruments defining the relationship between individual and state were being drawn. In the soul-searching period immediately after 1945 there was an imperative to define in abstract terms those aspects of that relationship which had been so offended in the preceding decade. The ballot box alone had not provided the individual with the necessary protection. The unqualified subordination of the interests of the individual to those of the State had shown itself to be corrosive. Once sufficiently corroded, it eased the way to a normative free-fall. Then, perhaps more so than now, it was recognised that certain universal principles had to be cast in enduring form. They had to be articulated to provide a yardstick against which to identify deviation. The United States was, at that time, one of the nations ready to identify those principles. And so it was that it took the plunge. It conferred an innovative right of universal access to government information, restricted only by reference to recognised, protected interests. It provided the conceptual model upon which all such legislation has since been based.

The UK experience

What then of the United Kingdom? If freedom of information is an integral part of the mature relationship between citizen and State, why did the self-styled mother of parliaments drag its heels for almost 40 years? The answer is both complex and illuminating. It is complex because there is a patchwork of reasons. It is illuminating, because within that patchwork we find the fundamental principles for and against such legislation pulling in opposite directions.

Whatever might have been the case elsewhere, the United Kingdom's *Freedom of Information Act 2000* was more evolutionary rather than it was revolutionary. The first step in the evolutionary process came 40 years earlier. It came in the form of an Act introduced as a Private Members Bill by the member for Finchley in London, a Mrs Margaret Thatcher[2]. In her maiden speech to Parliament, she introduced what was to become the *Public Bodies (Admission to Meetings) Act 1960.* In a single provision it gave members of the Press, for the first time, the right to see the reports and documents supplied to members of local authorities in connection with meetings open to the public. Local authorities play a very important role in the government of the United Kingdom. Local authorities are charged with performing many of the functions of government that most immediately concern members of the public: education, planning, local taxes, public housing and so forth.

In her second reading speech, the Member for Finchley said:

> The public has the right...to know what its elected representatives are doing.....Unless the Press, which is to report to the public has some idea from the documents before it what is to be discussed, the business of allowing the Press in becomes wholly abortive.....The Press must have some idea from the documents what is the true subject to be discussed at a meeting to which its representatives are entitled to be admitted....I hope that Hon. Members will think fit to give this Bill a Second Reading, and to consider that the paramount function of this distinguished House is to safeguard civil liberties rather than to think that administrative convenience should take first place in law.

It will be noticed that the documents contemplated for release by the Member for Finchley were deliberative documents. The Press were to be entitled to see official documents that discussed options for members to consider. These are the very sorts of documents that lie at the heart of the *McKinnon* appeal. These were to be provided to the very sorts of body that made the request that led to the *McKinnon* appeal. Mrs Thatcher's reasoning was that there was little point in inviting the Press to attend the business of local authorities, if all that they could report on was that which had been decided.

The Bill was passed. Local authorities continued to transact business. The Act remains on the statute book. I have yet to see it suggested that any section of the public have been consequentially engulfed in confusion and misunderstanding. I have yet to see it suggested that local government officers have consequentially compromised their professionalism.

Indeed, the history of information rights in the United Kingdom might suggest the opposite. In the forty years after 1960 numerous statutory provisions were passed each giving individuals a limited right of access to information. The right was invariably limited by subject matter. The right was often limited by the person who could invoke it. Most of these rights imposed an obligation on local authorities, rather than on Central Government. Thus, for example, in the United Kingdom the public has long had a right to see files held by local authorities relating to applications for planning permission. So, too, the *Local Government Act 1972* has long given members of the public a wide-ranging power to see documents held by local authorities.

Central Government in the United Kingdom, while busily imposing these obligations on local authorities, showed itself less keen on like obligations being imposed on itself. Those obligations to which it became subject were invariably the result of European Directives.

Thus, the Data Protection Acts of 1984 and of 1998 gave effect to European Directives that, amongst other things, give natural persons a right of access to information relating to themselves. The Environmental Information Regulations give everyone a right to environmental information held by public authorities, subject to the usual exceptions.

Nevertheless, the pressure mounted for comprehensive freedom of information legislation. The response in 1994 was to introduce a Code of Practice on Access to Government Information. The Code provided a comprehensive scheme for access to information held by Central Government. It resembled freedom of information in all respects other than that it did not confer an enforceable right of access. Its grounds for exemption were the familiar ones. Unsuccessful applicants could appeal to the Parliamentary Ombudsman who could report and recommend, but who could not compel.

The efficacy of this voluntary Code was betrayed by the official statements extolling the virtues of the Freedom of Information Bill. The Act, it was said, would represent a 'radical advance in open and accountable government'. It would '...begin to change for good the secretive culture of the public service'[3]. In fact, the most significant difference between the Code and the Act is that the former did not confer an enforceable right, whereas the latter does. Disclosure recommendations of the Parliamentary Ombudsman had been routinely ignored. Cultural change, if it comes at all, does not come from exhortation. It comes from legal compulsion.

The United Kingdom's *Freedom of Information Act 2000* is in conventional form. It gives a right of access to every person, natural or corporate. It is given regardless of age, residency or nationality. It is a right given in respect of all recorded information, in whatever form, held by a public authority. Public authorities subject to the Act include all Government Departments, all local authorities, the police, the NHS, schools, universities and thousands of quangos. The Act is unlimited by subject matter, and the right is given regardless of the provenance of the information. It is a right that requires no demonstrable interest in order to be invoked. The only limitations on the right derive from the recipient public authority's entitlement to show that an exemption applies to the requested information or that compliance would exceed cost limits spelled out in regulations.

The burden of FOI

As with all such legislation, the burden on each public authority can be immense. At one level, it seems counter-instinctive that someone holding information should be compelled to disclose it to anyone who might care to ask. We can understand why someone having a recognisable interest in particular information should be able to see it. But, by convention, freedom of information legislation has no such limitation. It seems unduly invasive to gratify a requester who has no demonstrable interest in the information; or where the only object of the request is to satisfy an idle curiosity; or where the motive is nothing purer than a general desire to embarrass. Why should public authorities be given the run-around merely in order to indulge such sentiments?

The first year of the full-scale operation of the Act in the United Kingdom saw many public authorities asking themselves these questions. The answer is elusive when confronted by an apparently pointless request; or by a disruptive request; or by a potentially damaging request. The answer can only satisfactorily be found by returning to the origins of the right.

Freedom of information marks an important component in the evolution of the modern relationship between the executive and the individual. The equilibrium of that relationship is in large part maintained by four components:

First, a coherent body of principles governing the supervision of the lawfulness of the decision-making process — what we call 'judicial review'. Towards the end of his distinguished judicial career, Lord Diplock described this '.... as having been the greatest achievement of the English courts in [his] judicial lifetime'[4].

Secondly, the appointment of permanent office holders to investigate maladministration — what we call 'ombudsmen'. It is a concept, and a word, derived from Sweden. They have had one since 1809. The focus here is investigative, rather than coercive.

Thirdly, the spread of independent bodies whose remit is to come up with the right decision — 'the tribunal system'.

And *fourthly*, a universal right of access to official information, not confined by subject matter; not confined by the persons who may exercise the right, and not confined by some recognised need to know — what we call 'freedom of information'.

The real importance of 'open government' does not lie in feeding Press curiosity or facilitating the embarrassment of government officials. Its greater importance is at once both more mundane and more diffuse. Freedom of information provides the means for ensuring transparent decision-making; it provides the means for greater individual involvement in and understanding of the workings of officialdom as it affects the individual.

It is difficult to over-state the significance of this greater individual involvement and understanding. We have seen in the last 60 years a growth in State activity and regulation that has exceeded what many feared. The information held on each of us could not rationally have been predicted 60 years ago. No-one could have imagined our current ability to analyse and process that information.

Yet, for most of us, most of the time, the Orwellian dystopia has not come to pass. The novel *1984* remains a great work of fiction, not of premonition. It is not through mere acclimatisation that most of us have become reconciled to this fact. Hand-in-hand with greater state involvement, there has been a transformation of the processes by which those same public bodies are held accountable for what they do. That greater accountability has been secured by the fundamental changes in the legal relationship between those governing and those whom they govern. The relationship is a more responsible and responsive one. And rights of access to official information form an important part in this changed relationship.

So viewed, the burden on public authorities is more easily borne. So viewed, we see that it enables public authorities to increase their involvement in all manner of activity, without necessarily generating widespread antagonism. It is the very counter-intuitiveness of the right that serves to dispel the misapprehensions.

McKinnon, again

And so I return to the battle lines in the *McKinnon* appeal. Public authorities in the United Kingdom have not been slow to profess the Act's 'chilling effect'. Whether by design or by coincidence, claims for exemption bear an uncanny cross-jurisdictional resemblance.

I mentioned earlier that at a primal level there is something counter-intuitive about being compelled to disclose one's own information to anyone that cares to ask. This is particularly so where the information constitutes a record of one's own thought processes. We view that as a private space. Freedom of information, however, requires a public authority to take itself beyond the prehensile urge to hold onto everything. It is quite true that we are more careful in what we commit to writing if there is a risk that it will be seen by others. Indeed, most of us

exercise at least a little thought before we speak or commit to paper what is in our minds. By speaking and by writing, we convey to others something definite. By doing so, we are more apt to influence others.

It is only right, therefore, that officials should be cautious in committing their thoughts to writing. It is a virtue, not a vice, that thoughts that do not bear examination stay off a file. I have long practised chilling the written extravagances of my pupils by insisting that they ask how their drafts will sound when read aloud in court. I remember the same chill being sent down my spine when, as a solicitor, I was told that one should always assume that every phone call made or received was being recorded. Yet, neither the advice I gave nor the advice I received was bad advice. The advice made for greater care. Thoughts committed to writing take on a life of their own, informing and shaping the views of others who pick up the file and who may be charged with making decisions.

It is, of course, the responsibility of many public officials to express their views frankly. The suggestion that any such official would be prepared to abdicate or compromise that responsibility because those views might see the light of day is somewhat surprising. What is yet more surprising is that those who assert most vigorously that administrative anaemia will ensue, are those who are best qualified, best placed and best experienced to take and defend points of view. Such dialectic is part and parcel of the upper echelons of any public authority. Why should those skills crumble simply because the audience has changed?

Like the Australian Act, the UK 2000 Act has an exemption for internal working documents. Although the UK provision is worded differently from the Australian provision, the thrust (and, for that matter, the section number) is the same. The UK Government's Departmental 'guidance' on s 36 begins:

> Section 36 is central, along with section 35, to protecting the delivery of effective central government. Whilst there is an important public interest in disclosure of information about, for example, the advisory and deliberative processes of central government, there is also a powerful public interest in ensuring that there is a space within which Ministers and officials are able to discuss policy options and delivery, freely and frankly.

Typically, where a public authority receives a request it wishes to refuse, the wardrobe of exemptions is examined. One by one, each is examined to see whether it can be made to fit. The lycra in the wardrobe is s 36. It has special qualities. It has an elasticity like no other. Section 36 of the UK Act provides for an exemption where 'in the reasonable opinion of a qualified person' the disclosure of the information would or would be likely inter alia to inhibit 'the free and frank provision of advice' or 'the free and frank exchange of views' or would otherwise be likely 'to prejudice the effective conduct of public affairs'.

The section departs from every other exemption in the Act by lowering the threshold for exemption from an objective assessment of harm or prejudice or attributes, to one of reasonable opinion. It is self-evident that that reasonable opinion will be informed by the views that that individual holds as to the overall merits of the concept of 'freedom of information'.

Who then is the qualified person whose opinion is to be determinative? In relation to a government department, it means any Minister of the Crown. In relation to most other public authorities, it is usually the head of the organisation: the chief executive and the monitoring officer of a local authority and so forth.

What of the appeal structure? The first tier (internal reconsideration) does not apply where s 36 is relied upon. Because the 'qualified person' is generally the head of the public authority, an internal review is not practicable. The second tier of appeal is to the Information Commissioner. In relation to s 36 the Information Commissioner has said that he:

> ....considers a reasonable opinion to be one which lies within the bounds of reasonableness or range of reasonable opinions and can be verified by evidence. Any opinion which is not outrageous, or manifestly absurd or made with no evidence, or made on the basis of irrelevant factors or without consideration of all relevant factors, will satisfy such a test. The Commissioner may well take a different view of what would have been the best decision in the circumstances but this is immaterial where the qualified person's opinion lies within the bounds of reasonableness.[5]

Thus, the Information Commissioner considers himself to have only a supervisory role. The third tier of review, the Information Tribunal, is concerned only with reviewing the decision of the Information Commissioner.

In short, the most powerful exemption in the Act has the crudest form of review. While 'safeguarding national security', while 'prejudice to the defence of the British Islands', while 'prejudice to law enforcement' and so forth must all stand the test of external merit review, the '...powerful public interest in ensuring that there is a space within which Ministers and officials are able to discuss policy options ...[6]' is protected from such intrusions.

All of us, then, wait with some interest to see what the High Court makes of ss 36 and 58 of the 1982 Act in the *McKinnon* appeal. That appeal is defined by the peculiar appeal right given in a certificated claim under s 58. But it is fanciful to think that the competition between the alternative readings of that section can be decided without reference to s 36; or without reference to the public interest that is served by the Act; or without reference to the very purpose of freedom of information legislation. Thus, the short answer to the question posed by this seminar is 'yes'.

Endnotes

1 [2005] FCAFC 142 (2 Aug 05)
2 Without wishing to suggest any pattern, it is to be noted that one of the Congressional sponsors of the USA's *Freedom of Information Act 1966* was Donald Rumsfeld.
3 http://www.dca.gov.uk/foi/guidance/exguide/sec36/chap01.htm
4 R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 1617 at 641.
5 http://www.ico.gov.uk. Awareness Guidance no. 25.
6 http://www.dca.gov.uk/foi/guidance/exguide/sec36/chap01.htm.