VALUE RENEWABLE – A CASE FOR FOI AND PRIVACY LAWS

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The invitation

To whom did John McMillan, our Commonwealth Ombudsman, extend the invitation to give this talk?

Was it the young man who took to the new FOI laws in the 1980s with some ferocity, probing their possibilities for better journalistic scrutiny of Executive Government and encouraging others to do the same?

Was it the public interest advocate from the non-profit Communications Law Centre who played occasional bit parts as FOI statutes appeared throughout the States and Territories in the late 1980s and 90s?

Or was it the man who, with others, revised the journalists' code of ethics in the 1990s and was privileged to be given an opportunity to think through fundamental questions about the purposes and limits of disclosure and discretion in a free society?

Perhaps it was the middle-aged man who, as first Victorian Privacy Commissioner, found that events far away on 11 September 2001, ten days after the law he was appointed to administer came into effect, caused a recalibration of liberty and security, with effects on privacy and FOI, of which he could have had no inkling when he accepted the five-year term.

Surely the invitation was not extended to the man who recently accepted a new role at the national broadcaster, with responsibilities involving its adherence to its editorial policies, containing as they do commitments – to be found in all standard media codes - to uphold fundamental values, including participatory democracy through the provision of information and respect for persons through, among other things, respect for privacy.

The invitation was issued to all these men, for they all comprise me and my experiences with freedom of information and privacy law and policy.

But who among them will speak first, who clearest, in these next 18 minutes or so?

Like you, perhaps, I will be listening carefully for the answer.

The reflections that follow amount to a case for freedom of information law and privacy law as they apply to Executive Government. I will steer away from the texts of the statutes. Of course they may need to be renovated over time, and we must always be open to evidence,

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review and debate about change. Denis O'Brien makes worthwhile points in his contribution today about necessary amendments to the *Freedom of Information Act*. The Australian Law Reform Commission is currently reviewing privacy law. I lack both the current knowledge (especially in today's company) and, if I understood the invitation correctly, the mandate to give a paper about technical reform. Instead, I plan to draw on my mixed experience with these laws, in effect, to restate their value. Scarred as I am by them both, I still contend that FOI and privacy laws, and the principles that underlie them, remain important to the structures we use to try to run a democratic community tolerably well.

The paper[1] goes like this: I begin by drawing some distinctions, then set out what I regard as values of enduring relevance. I restate them because my observation is that unless refreshed they get smothered by detail, a wood lost in trees. Next, where some may see mismatch, I suggest unusual compatibility. Finally I suggest that, more than the mere existence of these laws or their operation in particular cases, I find now that their greatest contribution is in their plodding and mostly unglamorous processes.

The distinctions

FOI and privacy statutes, as they evolved in Australia, share some common origins but it helps to distinguish them and some of the concepts they employ.

Privacy is not the same as secrecy. The philosopher Sissela Bok put it like this:

> …privacy need not hide; and secrecy hides far more than what is private. A private garden need not be a secret garden; a private life is rarely a secret life. Conversely, secret diplomacy rarely conceals what is private, any more than do arrangements for a surprise party or for choosing prize winners.[2]

Only natural persons have privacy rights, not governments or corporations.

FOI compels openness; its exemptions are comparatively rough-hewn. Privacy law is fine-grained about discretion. Under FOI, anyone can seek access. Under privacy laws, only the subject of the personal information can seek access.

FOI is basically about disclosure and, less often, correction. Information privacy is more sophisticated, and deals also with collection, use, quality, security, transfer and matching of personal information.

I think these distinctions matter because privacy law is sometimes wrongly cited as the reason that disclosure of information is denied. Or privacy is 'blamed' when it is some other law – perhaps an exemption under FOI, properly applied, or an older statutory confidentiality provision – that is the legal reason that access to information is not granted. FOI exemptions, properly applied, are usually upholding a value most people would acknowledge as valid – say, effective law enforcement or privacy for medical data.

Over time, misuse and misconception can eat away at support for laws which we might think would have universal support and, properly explained, usually do. As a journalist and later as a privacy commissioner I often encountered this phenomenon.

Enduring value, unusual compatibility

It is not necessary to restate the enduring value of the principles underpinning freedom of information laws: informed electorate, accountable government, participatory democracy etc. Instead, I draw attention to a new, scholarly treatment of transparency and public policy by three academics from Harvard's Kennedy School of Government. They elaborate and review what they call 'targeted transparency' measures. More stringent financial disclosure

laws are an example. Their term 'targeted transparency' distinguishes such measures from generic laws such as the *FOI Act*. Of the United States, the authors say –

> We find that three factors have helped to propel this new generation of transparency into mainstream policy. First, the maturing of an early generation of right-to-know transparency measures helped to prepare the way for targeted transparency policies. Second, crises that called for urgent responses to suddenly revealed risks or performance problems helped to overcome political forces that favored secrecy and that limited innovation. Finally, a generation of research by economists and cognitive psychologists helped to provide a rationale for government action.[3]

I speculate that Australia might hold a similar story. Many of you will have spent significant time in FOI law and policy. Am I too optimistic in suggesting that implicit in what the authors have distilled is an indication that values that gave birth to FOI here in the 1970s are renewable? I mean, in particular, the value that holds: seek and spread information in order better to understand and address problems, notwithstanding opposition.

Forgive me if I spend a little more time on the enduring value of privacy than I have on FOI. It is a deliberate response to the times through which we are passing, marked by fear of terrorism and increasingly enabled with technologies of surveillance. In such times a relatively 'shy' human right like privacy can be easily neglected or too readily discounted.

Basically, privacy serves three purposes –

1 Privacy is essential to our sense of self. We have a conversation with ourselves in our heads, then we speak and act among others. By being allowed privacy, we can create and restore our individual self.

2 Privacy enables intimacy between individuals. We create intimacy partly by giving away some of our privacy freely to those whom we regard as close to us. They might be a partner in a relationship, a family member or a friend. The closeness of the relationship determines how much we say to them of our inner worries and hopes, how much we relax and just 'be ourselves' in their company. In this role, privacy calibrates social relationships. In the security of a trusting relationship we may 'think aloud', putting on hold our sense of reserve. In relationships privacy becomes shared. It is no longer associated only with solitude or the nurturing of selfhood. But common to privacy in both of these settings is the notion of control. We reveal of ourselves as *we* choose. The essence of feelings of indignity and humiliation resulting from breach of privacy is very often, at core, a feeling of loss of control. I saw examples of these reactions often enough as a privacy commissioner. I hope I did not cause them unjustifiably as a journalist.

3 Privacy serves liberty. Here, the value of privacy goes wider than individuals alone or in intimate relationships. Privacy is an instrumental freedom. Unless privacy is respected, particularly by governments, it can be difficult to exercise the various freedoms that have come to comprise liberty in our times. This is partly why a right to privacy is to be found in all the leading international human rights instruments (and in the human rights statutes of the ACT and Victoria). Think of it in practical terms: freedom of belief or of conscience means little without privacy. Freedom of association, at an organisational level, requires respect for privacy. Odd as it may sound, privacy is a pre-condition to freedom of expression too. Authors consult, compose, draft, rethink, revise – all *before* they publish. We can all think of historical episodes – some in the not-very-distant past – in which the interplay of privacy and the practical enjoyment of other freedoms have been made clear by the denial of privacy. One acronym, Stasi, evokes what I mean. Legal phrases familiar to us all – 'unreasonable search and seizure', for instance – sprang from experience of the harms that disdain for privacy breeds.

Yes, in particular cases the value privacy may be in tension with the value freedom of expression. Choices must be made. But at the level of principle I regard them as compatible and often interdependent. The cultivation and protection of sources by journalists is an illustration.

And, of course, privacy in society cannot be absolute. Other values, including security, compete with liberty and its component parts. Compromises are made. The legitimacy of the compromises depends partly on the transparency of the process through which the compromises are reached, and partly on the accountability of those who will exercise new powers. Here too FOI and privacy laws have parts to play. It is to processes, plain and unexciting, that I now turn.

Processes can be their own reward

In times of fear or crisis, FOI law and privacy law need to be refreshed, not overlooked, still less downgraded. They are among the necessary checks and balances that ought to be in good working order when democratic societies confront serious problems.

Regardless of the issue, debate about what and how much to change to tackle the issue depends at least in part on access to information about what is already being done or not done, about the proportionality of safeguards in relation to anticipated risks, and about the adequacy of oversight. Of course, there will be unavoidable limits on disclosure for certain proper purposes, but it remains the case that information is necessary to ensure that the *process* of making changes (whatever the result may be) is perceived to have been legitimate.[4]

For simplicity's sake, let me use the term 'access laws' from now on to mean FOI or privacy laws in the sense that privacy laws give an individual enforceable rights to seek access to his or her personal information and to test its quality.

History shows that the access laws of some jurisdictions have been enacted or strengthened following periods of excess by the Executive. Constriction of information flows has been found to have worsened the problems by blocking the system's safety valve - that is, its capacity to consider evidence, to have second thoughts, to alert relevant decision-makers to the need for correction or change, and to pressure them if they are reluctant or tardy. To illustrate: the US *Freedom of Information Act 1966* was strengthened by Congress in 1974 after it had learned of the excesses of the Nixon Administration. In Australia, the FOI laws of two of the States, Queensland and Western Australia, were direct results of the recommendations of Royal Commissions into serious corruption at senior levels of the Executive.

Access laws do not lubricate democracies only by causing the Executive to disgorge information in a more detailed or more timely way than it might prefer. Access laws are essential to society's health in a more subtle way. Access laws reinforce for everyone the salutary principle of dispersal of power, of checks and balances. And they do so in relation to that most powerful commodity, information.

When legislatures create or amend access laws, they tend to set out the basic rules with a general presumption of openness. Then they create specialist regulators such as information commissioners, privacy commissioners or ombudsmen and give them a relatively small chunk of power to administer individual cases that arise between individuals and the Executive. To the extent the statutory regulators act independently, power has been – and can be seen to have been – dispersed somewhat.

But legislatures will also usually provide for judicial review, so that the courts also have a role. The courts can interpret the rights the legislature has conferred and, if necessary, adjust the way the Executive or the regulator has administered the scheme in particular cases. By these means, and by attendant media coverage, the legislature may learn of controversies involving the Executive which can be further investigated by more traditional parliamentary methods such as questions with or without notice, or committee inquiries.

In these ways, access laws disperse among the branches of government pieces of the power to disclose information, or, as James Madison put it, 'the power knowledge gives'. I think we can say that good government is assisted – partially at least, and in a modest way - by *the design and processes* of access laws generally as well as by particular *results of those processes*.

Individual cases may or may not result in the timely disclosure or correction of relevant information such that accountability is enhanced and objectives of access laws are fulfilled. But (assuming always that the various actors can and do play their proper parts), I argue that society benefits from the mere assertion and adjudication of enforceable access rights.

When the law provides for open forums in which claims to secrecy can be tested, other factors tend to come into play. Information seeps out. People blow whistles. Ministers succumb to spin doctors' advice to cut losses and may countermand the bureaucracy's preference for persisting with a secrecy claim. Democratic government is an untidy business, and there is a certain comfort in that fact alone.

Let us turn now from the general point to a contemporary illustration of it. You may be aware of reports from the United States that the National Security Agency (NSA) has collected a vast amount of records from telecommunications companies about phone calls and emails made and received by millions of Americans. This disclosure adds to reports in December 2005 that the NSA had eavesdropped, without judicial warrant, on international calls to and from the US. President Bush authorised the measures after 11 September 2001. Reports indicate that the NSA has not listened to every call or read every email, but instead has amassed an enormous amount of data showing which phone numbers called which other numbers, and the dates and times of calls. Linking phone numbers to individuals associated with those numbers is relatively straightforward. By applying the power of computers and pattern recognition software to this data, it is possible to work out, or to infer, who has called whom, and when. Data mining emails can produce richer data. In response to these disclosures, journalists in the US have expressed concern that government mining of their records may disclose their confidential sources, with a consequent chilling effect. Similar questions arise about the privacy of activities of Members of Congress and their staff, and about those in civil society organisations who from time to time may oppose government policies or seek to have them amended.

Let us leave to one side the issue of whether it would be lawful, without judicial warrant, for the telecommunications companies to provide the data of millions of Americans to the US Government's technologically sophisticated spy agency. And we will pass over the issue of whether it would be lawful for the NSA to collect and process that data as reported. Court proceedings have been instituted in the US. An initial decision by a District Court judge is that the activity is not lawful.[5] That decision has been appealed by the Administration and we must await the result. It is to the fact of these processes, rather than their outcome, that I wish to draw your attention.

A brief diversion: turn your thoughts to the implications for privacy of the practices attributed to the NSA if such practices were to become widespread. We leave vast amounts of data behind us as we use many of today's technologies – ATMs, credit cards, loyalty programs run by airlines and retailers, new types of ticketing, GPS-equipped vehicles, consumer items

with RFID chips embedded in them, and mobile phones. Who is to have access to that data? How are they to be authorised to sift it for the facts, or inferences, that the data may seem to reveal about how we live? Will we know it happens? Who will test the accuracy? Can we see the data about ourselves, and the conclusions that may be drawn from the data? May we appeal the consequences of the decisions made on the basis of those conclusions?

The scope and speed of new information technologies heightens the need for enforceable rights to seek information.

The democratic mechanism I described – debate, decide, try, gather evidence, review, try again – can only work well if fuelled by sufficient information. As change accelerates, so must the supply of the information.[6]

I have watched the operation of FOI and privacy laws from several angles for over 25 years. I believe that they have their legitimate parts to play[7] and that they must be assessed with subtlety and renewed with regularity.

Endnotes

1 This paper draws on talks I gave as Victorian Privacy Commissioner 2001-2006, most to be found at www.privacy.vic.gov.au, go to Publications then Speeches. I have also used material delivered at the Saskatchewan Institute for Public Policy, University of Regina in September 2006, a version of which appeared as 'The Value of Privacy' in *European Human Rights Law Review* (2006) Number 5.

2 *Secrets: On the Ethics of Concealment and Revelation* (Vintage, 1989) p 11.

3 Archon Fung, Mary Graham, David Weil, *Full Disclosure – the perils and promise of transparency* (Cambridge University Press, 2007) p 19.

4 From amongst a burgeoning literature in relation to one issue, the re-balancing of liberty and security in response to terrorism, see, for instance: Michael Ignatieff's *The Lesser Evil – Political Ethics in an Age of Terror* (Edinburgh University Press, 2004), Tony Coady and Michael O'Keefe eds. *Terrorism and Justice – Moral Argument in a Threatened World* (Melbourne University Press, 2002); Victorian Privacy Commissioner, Submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee in relation to the Terrorism (Community Protection) Bill, March 2003, [and submission on an amending Bill, January 2006] available at www.privacy.vic.gov.au >Publications>Reports and Submissions>Submissions; Lord Carlile, UK Independent Reviewer in relation to terrorism measures, 'Counter-Terrorism Legislation in the UK Human Rights Context', address to the Sweet and Maxwell Human Rights Conference, London, 17 October 2003 and *Proposal by Her Majesty's Government for changes to the Laws against Terrorism, Report by the Independent Reviewer*, 6 October 2005; Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges', Attlee Foundation Lecture, London, 11 April 2006; and the Congressional Record of the proceedings of the US Senate during the passage of the *Military Commissions Act 2006* (S3930), 28 September 2006.

5 *American Civil Liberties Union v NSA*, Case No. 06-CV-10204-ADT-RSW, Document 70, Filed 08/17/2006, United State District Court Eastern Michigan, Southern Division (Detroit) Hon. Anna Diggs Taylor. Documents relating to the same issue, litigated in the Northern District of California (no. C-06-0672-JCS), may be located through www.eff.org

6 For an extended treatment of this deceptively simple assertion, see Cass Sunstein, *republic.com* (Princeton University Press, 2001).