

The use and abuse of FOI legislation by journalists

Jack Waterford explains how best to exploit this investigative tool

Journalists have a strange love-hate relationship with Freedom of Information ("FOI"). Every journalist I know is, of course, heartily in favour of it. Few journalists I know - apart from a few I have strong-armed - have actually ever used it. Asked why not, they give a variety of reasons some of which have a strong basis in truth: "FOI takes too long", "the exemptions are so wide you will hardly ever get anything anyway", "it's too complicated".

Whether the basis of these reasons is in fact right or not, journalists essentially do not know what is possible or what can be achieved under the Freedom of Information Acts, and there are only a few people with real street experience with whom they can consult.

While journalists may be in favour of the principle of FOI - or have a baggage of beliefs about its usefulness in an ideal body politic - they have little interest in FOI or its process as such. They are interested in the real information itself and in particular at which is usable or, in their own terms, newsworthy.

News v advertising

Exactly what "newsworthy" means is a much vexed question and depends in great part on a journalist's interests and perhaps on his or her ideology. A conservative definition is the old news editor's dictum: "Son, a dog bites man is not news, man bites dog is". This, according to the celebrated American investigative journalist, Izzy Stone, something that someone doesn't want you to write about - everything else is advertising.

By such a definition very little of what we read in an ordinary, even a good, newspaper is anything else but advertising. The offices of a typical metropolitan newspaper receive daily millions of words in press statements, reports and results of commissions of enquiry among other things and its authors hope that the newspaper will use all of it tomorrow. Little of this material tells the whole truth. Rather it skips and elides material that its writers do not want the public to know and is actually misleading to journalists about the facts in some cases.

Unfortunately, a great deal of the more interesting and newsworthy material sent in to newspaper offices ultimately reappears in relatively undigested form when the journalist involved simply asks no further ques-

tions and rehashes the material he or she has received.

It should be hoped that beneath each journalist's breast is a would-be investigative reporter. I am however also realistic - if not about what beats behind journalists' breasts, then about the practical demands of newspapers.

'Good journalism is no more lazily rewriting extracts from material obtained under FOI than it is lazily rewriting press hand-outs'

Often there is no glaring scandal behind the stories we publish and as someone with some responsibility for getting out a newspaper within a tight budget, I would be unwilling to dedicate thousands of hours of journalistic time or thousands of the publishers' dollars to writing the definitive piece about public holiday arrangements, council rates or government health policy. My job, working for a newspaper rather than a magazine, is to get information of interest and importance to people as quickly as possible.

In short, one major reason why relatively few journalists make use of FOI is that their work is focused on the day-to-day. Even when there are no problems of FOI access, it is rare indeed to get an FOI delivery the same day; indeed to get information inside a month is to be lucky.

FOI uses

FOI is like all other raw journalistic material - the press statements, the telephone calls, the leaks and so-on. By providing the documentary path of how something came to be, use of the FOI facility can often identify, in a way which has not previously been clear, some of the interests which were taken into account and/or some of the problems which were perceived in different possible solutions to a problem.

FOI is not, however, the only way of achieving this result. There have always been other ways in which journalists can

gain access to information, and they make as much use of these as ever. Firstly, there is publicly available information - particularly in cases in which government or the administration is, in effect, arbitrating between competing interests. Politicians and the public relations machineries of those with axes to grind also release a welter of material, and through use of the telephone book and the government directory it is not hard to find out which public servant is dealing with an issue at any particular time.

While FOI and similar legislation have persuaded public servants that merely talking to the reptiles of the press is not a breach of the Crimes Act, it was never hard to ring a public servant and say "I am thinking of writing a piece about this issue. Can you point me to any material which is available? What's the situation as you see it now?" - and so on.

Neither has the use of the leak abated because of FOI. In my experience the leaker is not the public servant who quite properly, if cautiously, briefs a journalist who has asked for confirmation; it is the Minister or politician or someone with an obvious interest in the outcome.

In addition, journalists have a not unnatural tendency to want to beat up something which they think is being held secret and rather less of a tendency to scrutinise that which is on the record. Any skilled senior public servant will know that if he puts out into the Parliament House press boxes 85 copies of the report of a public service task force it may well never appear in a newspaper. Slip the same report into a brown paper envelope to one journalist, saying out of the side of your mouth "you didn't get this from me, remember" and it is likely that it will be the front page headline, no matter how innocuous. Journalists have the same tendency to believe that a story found through use of FOI is more newsworthy than one which has been sitting there all along had only a journalist concerned done the legwork.

Good journalism is no more lazily rewriting extracts from material obtained under FOI than it is lazily rewriting press hand-outs. FOI is a good thing if it is used as an adjunct to good hard work, but it is rarely of much use if it is used as a work substitute.

Another pernicious problem is a tendency of some journalists to think that the

"real story" hidden in the paperwork is the catalogue of corruption, incompetence and the exercise of power for wrong reasons. I would not deny that such things can occur, and when they do, FOI is one of the processes that helps expose it. But the observation should be made that in my long experience with public servants I have found nearly all I know to be decent, honourable people with a keen sense of public interest doing the best job they can.

How to use FOI

A good use of FOI is to master the routine of decision-making. As often as not though, this can be done by looking up a government directory and simply asking someone obviously concerned or by otherwise working out a department's scheme of administration and the types of powers exercised and by whom.

The result of such preliminary enquiry is a focused FOI request which is likely to be processed faster. Moreover, where something has obviously been irregular in the decision-making process, a knowledge of how the system ought to have worked can provide often critical footprints for working out what went wrong and who really was to blame.

The second point I would make is that a process may well have been perfectly regular but a public servant may quite properly, from her or his own perspective, be less than keen on disclosing it to journalists. The mere fact that it is argued that some material is exempt from FOI is not of itself proof-positive that there is some secret scandal being concealed.

A loyal public servant, anxious to protect the Minister, or indeed the Minister himself or herself may attempt to conceal information concerning options canvassed during the decision-making process so as not to provide the opposition with ammunition drawn from draft justifications of possible alternative decisions.

The media here is sometimes a little immature in this respect. If a document shows that an administrator gave a minister options then, no matter which the minister adopted, there is in this country a tendency to say that he or she ignored other material or was in conflict with his or her department and to give it a significance that it does not deserve.

This immaturity is aggravated by the scandal-seeking tendency. If a relatively full disclosure by a public servant or administrator reveals no obvious points of attack, research is most often promptly halted and attention is then focused on some other project. All too often, journalists drop the ball precisely when they have a good story because they have defined the story only in terms of a fairly naive outcome which did

not come about.

A successful or semi-successful FOI request ought to provide the springboard for follow-up telephone calls to the individuals whose names appear on the files seeking fresh information and sometimes the benefit of decision-makers' frank hindsight and perception of events.

Dealing with public servants

When FOI first came in I acquired some reputation for, firstly, making a lot of requests and, secondly, for being willing to litigate them if I did not get disclosure. That reputation as a litigant probably helps me now. In any event I rarely put in a formal FOI request but rather just say to people "look, this is material I could get under FOI if I put in a formal request. Why not save yourself the paperwork and me the time and the energy and just fork it over?" and, surprisingly, they often do.

In advising journalists how to use FOI, I reiterate that FOI is only part of the process of getting information on a story. Informed questions should be directed to the actors in any decision when requesting information on what material is available. A journalist should ask whether there is anything he or she ought read as background to the question being tackled. This can often provide a journalist with the information sought long before the drawn out and excessive bureaucratic process of putting in an FOI request.

Requests for documents should be focused and the advice of the public servant helping to identify the most useful documents available should be sought. A public servant who has helped a journalist frame a request for information is both more likely to comply with that request and to later remember, innocently, another source of relevant information capable of being disclosed.

Once a request is made, I recommend that the journalist making the request not sit around waiting a month or so wondering what is happening. Ring the relevant department and, if the public servants suggest any problem, parry them immediately.

Having assessed the possible uses of and the procedures in FOI, now the more bitter words. The exemption areas of FOI are too wide. The impediments to access, not least in its cost if it is demanded, are substantial. It is sometimes necessary to fight, and to fight hard, without being sure of what you will get in the end. More than ever FOI is not the complete answer to a maiden's prayer. But it is neither completely toothless, nor completely useless.

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The networks have had about 30 years to perfect their Australian programming. Also to be considered is the significant budgeting which would be required to meet the current free-to-air level of Australian content for Pay TV.

In Pay TV's infancy, progress will be conditional on expenditure on suitable overseas software and early development of reasonable quality Australian programming for Pay TV.

There will be a demand by subscribers to receive some Australian content other than news, sport and music channels, which would have basic Australian content by their very content nature. Research underway may allow a further understanding of what levels of Australian content the public wish to view. Initially subscribers will be attracted by the choice available on Pay TV, but continued overseas material alone, with little Australian content, would increase the "churn" factor (the cancellation of service followed by reconnection at a later date) over a period of time.

In devising an appropriate regulatory regime, the Government will have to bear in mind the differences between free-to-air and Pay TV. The body to have regulatory oversight of Pay TV must be able to regulate with a clear understanding that "free-to-air" broadcasting is just that, while Pay TV is based on viewer choice.

A full "broadcast model" (as set down by the Australian Broadcasting Tribunal) would not allow Pay TV to develop fully in this country. There is a view that regulation of Pay TV should match a slightly deregulated free-to-air sector, however, it appears there will still be excessive regulation in that market on some major points, at a time when world trends are to introduce controlled deregulation. But let's not throw the "baby out with the bath water" — there are some proven legislative provisions that can be profitably adopted for Pay TV from the broadcast model.

Whatever regulatory body is to govern the regulation of Pay TV that body must recognise the specialised service that exists between the program provider and the viewer. There is a concern that rigid Broadcasting Act style legislation covering Pay TV would not allow in the resultant program mix, as was noted in the Sanderson Report, an "appropriate level of freedom for viewers to choose".

If that "appropriate level of freedom" is not realised because the legislation is too rigid then Pay TV operators would be forced into a full broadcast model type service. That is, these operators would be forced to schedule similar programs to those offered by the networks, which would not satisfy viewer choice and would defeat the purpose of choice and diversity in programming which should be the object of Pay TV.