authorities will be able to point to the Ombudsman's Office conduct in this case as a precedent for how to treat similar internal problems in the future.

The incident also reinforces the need for FoI legislation to apply more thoroughly to bodies such as the Ombudsman, ICAC and Auditor-General. An organisation might be on the side of the angels but it too is fallible.

By changing the way public agencies deal with information, and in particular embarrassing information or 'bad news', one may well change the way potential whistleblowers will need to behave.

Perhaps the Senate inquiry currently being conducted into whistleblowing legislation will produce a more satisfactory response than in NSW. In the meantime it would seem most unlikely that any NSW whistleblower would be willing to seek the help of the NSW Ombudsman's Office given the way it responded to one of its own.

Conclusion

Much more empirical data and reflective thought will be needed to confirm these thoughts and anyone interested is welcome to join me in the study.

If I were the chief NSW bureaucrat I would ask every chief executive to sit down and make a list of every record within their organisation and then prepare an information release program so as to make them public. As Conrad Black has shown, if you do not do so the information will turn up in someone's memoirs sooner or later anyhow.

Members of the NSW Chief and Senior Executives Services could be paid more based on an assessment of how much material was actively released to the public without any statute requiring them to do so.

The other thing I would do is start drafting one piece of legislation to cover access to government information to deal with FoI, annual reports, whistleblowing and the active identification and release of information.

The worst that can happen is that the quality of government decisions might improve.

Bruc Smith
Bruce Smith is a Sydney lawyer.

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The silent strangling of freedom of information

'It is now commonplace, for example, to find departments arrogantly ignoring their statutory duty to process FoI requests within 45 days. Of special concern to secretive mandarins and thin-skinned Cabinet members are people who seek policy documents or files that shed light on the reasons for Government actions. Of course, it was just this type of information that FoI was designed to elicit.'

The FoI campaigner and then Opposition leader in the Legislative Council, Mark Birrell, in a newspaper article on 12 September 1991.

Mark Birrell, Minister for Major Projects, distinguished himself as one of the first Kennett Government Ministers to obstruct freedom of information requests for documents that would reveal the reasons behind a controversial government action — the decision not to proceed with the partly completed museum building on Southbank.

The need for accountable government, the need to inform the public about government decision-making processes, to foster healthy public debate on policies that will have a wide impact, and to uphold the spirit of the *FoI Act* appears to be not so urgent, indeed even necessary, when you are the one holding the reins of power.

Mr Birrell, as Opposition spokesman on FoI, was at the forefront of a five-year campaign against attempts by the Cain and Kirner Governments to limit the scope of FoI legislation. In particular, he battled in Parliament and through the legal system to prevent attempts by Mr Cain to extend the *FoI Act's* exemption rule for cabinet documents. He was backed in his fight by an outraged public and media.

How times change.

In May this year, the Government of which Mr Birrell is a part, introduced sweeping amendments to the State's FoI legislation. It has extended the definition of a Cabinet document so far that even documents that contain quotes from documents that relate to an issue discussed by Cabinet — but may not have been presented or used in a Cabinet discussion — now qualify for a Cabinet exemption.

Other amendments by the Attorney-General, Mrs Wade, included imposing a $20 lodgement fee for FoI requests, the lifting of a $100 ceiling on the processing costs for requests, and the lifting of the exemption for MPs for FoI charges. Another piece of Kennett Government legislation, the *State Owned Enterprises Act*, also restricts the reach of FoI legislation by excluding from it corporatised government instrumentalities. A regulation,

proclaimed on 7 December also imposed a $150 fee for the lodgement of an appeal to the Administrative Appeals Tribunal against FoI rulings by government departments and agencies.

Mr Birrell's nightmare scenario as Opposition FoI spokesman has become the real-life torment of the new Opposition spokesman on FoI, the Labor MLA for Albert Park, Mr John Thwaites.

Mr Thwaites's attempts to uncover the reasons behind major government decisions, possible breaches of regulations and even funding cuts to government services in his own electorate have been frustrated at every turn. Departments have breached their statutory duty to respond to his FoI requests within 45 days, have caught him up in an endless round of prolonged appeals in the Administrative Appeals Tribunal, ignored Tribunal rulings to pay his costs as well as legal precedents set by the Tribunal in its judgments.

In October 1992, only weeks after the Kennett Government was elected, Mr Thwaites sought documents from the Office of Major Projects relating to the museum project. The office flatly refused his request and his appeal against the decision was to be heard on 20 July. On 16 July, the documents he was seeking were sent to him by the office.

On 27 May, he requested all documents relating to the Kennett Government's decision not to proceed with the building of the museum on Southbank. The office did not reply to his request until July when Mrs Wade's amendments extending the definition of Cabinet documents had come into effect. The office said every document it held on this matter was exempt from FoI on the ground that they were cabinet documents, using the new broader definition. Mr Thwaites' appeal against this decision is due to be heard by the Tribunal on 15 March — ten months after the request was made.

The Government's willingness to abide by Tribunal rulings is highlighted in another FoI request by Mr Thwaites, this one to investigate complaints by Melbourne advertising agencies about the tender process for the awarding of government advertising contracts.

His application for all documents relating to government advertising contracts to the Department of Premier and Cabinet on 30 November 1992 went unanswered until March 1993 when some documents were released. On 8 September, one of a number of days set down to hear his appeals against the Government's reluctance to disclose documents, government lawyers argued that they could not proceed with the hearing because the Government's director of communications, Mr Peter Bennett, was overseas and needed to be present. The Government was ordered to pay costs but has failed to do so. The Tribunal has yet to hand down its ruling on the case.

Perhaps the most disturbing case of the Government's obstinacy over FoI is that relating to the salary of the head of Treasury, Dr Michael Vertigan. In October, the AAT ruled in favour of the *Sunday Age* in an appeal it lodged against the Government's refusal to release details of the salary of the head of the Department of Premier and Cabinet, Mr Ken Baxter. The precedent set was used successfully by Mr Thwaites in appeals against the Government's refusals to release the details of the salary of the Director of School Education, Mr Geoff Spring, and the Director of the Department of Health and Community Services, Dr John Paterson.

Despite the clear legal precedents, the Treasury is still refusing to release Dr Vertigan's salary details. This is the type of case where Mr Thwaites and other applicants will be forced to pay the new $150 fee to appeal.

In the seven months since Mrs Wade introduced amendments to FoI legislation in Parliament, it has become clear that the Government intends to use those amendments to do everything it can to frustrate attempts to have its decision-making processes opened up.

It has also ensured that the cost of using FoI legislation has spiralled beyond the reach of many members of the public and lobby groups.

Lyn Dunl vy

Source: Age, 17.12.93.
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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

FORBES and DEPARTMENT OF PREMIER AND CABINET
(No. 93/7996)

D cid d: 20 September 1993 by Deputy President R.J. Ball.

Section 33 — information about remuneration package.

The applicant made a request on behalf of the *Sunday Age* for details of the salary and consultancy packages of Mr Ken Baxter, secretary of the department and Public Service Commissioner together with any other documentation in relation to his employment. Some of the documents were claimed exempt under s.28 and this was not challenged. Those denied access on the basis of s.33 were examined by the Tribunal.

Information relating to the salaries of people in similar positions in other contexts were referred to including private companies and the practice in New Zealand. In those cases the salaries were described in bands of $10,000. The salary band shown in the material that the department was prepared to release had a band of $62,200 and the Tribunal held that this was too broad. However, the Tribunal was not prepared to allow the disclosure of information which displayed the total cost to the employer as it would involve the unreasonable disclosure of information relating to the personal affairs of Mr Baxter such as his private address, identity and amounts of mortgage repayments, identity of children's schools and the amount of fees paid. The Tribunal therefore only required the decision under review to be varied by disclosing Schedule D of the Contract of Employment of Mr Baxter with deletion of all items except the amount specified as the remuneration package.

[K.R.]