Diploma in Journalism throughout New Zealand. It is also the subject of a chapter in Digging Deeper, which is published by the Journalists Training Organisation as a guide to investigative reporting. Author Amanda Cropp gives the Act a qualified welcome, emphasising its limitations as well as illustrating its uses with practical cases studies such as the 20/20 story already mentioned.

Freedom of Information is also covered as a source in most journalism courses in Australia, but generally more cynically — reflecting what appears to be a more negative experience. Occasional bursts of enthusiasm for using the Australian laws — prompted in particular by useful guides from the Communications Law Centre — or by infrequent high profile successes — appear not to last long, and the overall message to journalists seems to be that FoI belongs in the 'too hard' basket. Perhaps the New Zealand experience should give Australian journalists new hope, as well as illustrating changes to the law which could make it work better.

Nigel Waters

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The better part of discretion — US style

Recently, [United States] federal agencies reported to the Justice Department on the status of Freedom of Information Act (FOIA) backlogs, and on programs designed to enhance current access capabilities. The reports present a glimpse of where agencies are three years after Attorney General Janet Reno's 1993 memo instructing agencies to make greater use of 'discretionary disclosure.' They also assess how much work is needed for agencies to comply with provisions — such as FOIA backlogs and the availability of electronic records — of last year's FOIA amendments.

Freedom of information laws work best when agencies subject to them believe in maximum public disclosure. Too often, agencies have emphasized the exemptions in the law and used them to withhold any information that arguably fell under them. Frustrated requesters have suggested the laws had become 'freedom from information' statutes.

The 1993 Reno memo was designed to change that, and it is only by altering the mindset of bureaucrats that the implementation of such laws can ever be changed for the better. But merely telling agencies to emphasize greater disclosure does not do the trick if that change in policy is not constantly monitored and agency staff is not routinely educated on the need to emphasize disclosure.

In the past, there has been no reward for staff to disclose information. Instead, disclosure of embarrassing information or information that agency officials would prefer not be public has always had the potential to damage an employee's career. In other words, it has always been more acceptable to err on the side of withholding than on the side of disclosure.

Employees risked violating the law by improperly disclosing classified information, trade secrets or personal information clearly protected under the Privacy Act. But the language of FOIA itself does not speak in terms of 'shall not disclose.' Rather, it tells agencies that information falling within one or more of nine exemptions does not have to be disclosed.

'Foreseeable harm'

Under the Reno memo, agencies are to make discretionary disclosures unless they can articulate a 'foreseeable harm' flowing from disclosure. This creates a standard for discretionary disclosure and forces an agency to consider the actual risks of disclosure when reviewing documents. If it cannot articulate a reasonable, concrete risk, then, under the terms of the Reno memo, the records should be disclosed.

The two federal exemptions most specifically affected by the Reno memo are the exemption allowing an agency to withhold trivial administrative details and the exemption encompassing various discovery privileges — the deliberative process privilege, the attorney-client privilege and the attorney work-product privilege. The exemption covering trivial details has largely been written out of existence by the Reno memo, since there can be no foreseeable harm in disclosure of trivia.

But the exemption for privileges continues to give agencies difficulty. Most agencies reported to the Justice Department they have disclosed more information. But at least one suggested the Reno memo had made for more work, and the ability to routinely withhold draft documents as deliberative made life much easier for agencies. Such comments reveal agencies' lack of understanding of the role of discretion in making an open records law work effectively.

Banking records

There is another exemption in the federal law that seems ripe for application of a foreseeable harm test, but, sadly, has yet to be subject to such a standard. That exemption applies to bank examination records. The extremely sparse legislative history on the exemption seems to indicate that Congress wanted agencies — particularly financial ones like the Federal Reserve, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency — to be able to withhold bank records where disclosure might cause a run on a bank or, for some other reason, result in its financial collapse.

But the language of the exemption does not talk in terms of a harm standard. Instead, it allows agencies to withhold bank examination reports and related records. Traditionally, the financial agencies have used this exemption broadly and the few courts that have ruled on its application have upheld such a use.

However, there is no legal reason why financial agencies are required to withhold records under the exemption. When deregulation of financial institutions led to widespread collapses of banks and S&Ls, government agencies were still loathe to disclose information, even on banks that closed down. Applying the banking exemption requires a harm test that does not broadly sweep all banking records into the exemption, but discloses most records unless there is a foreseeable harm.

Nevertheless, it is worth mentioning that the reports to the Justice Department indicated some of the financial agencies, particularly the Comptroller's Office, were

currently disclosing significant amounts of records through Web sites or fax-on-demand systems.

Discr tion is . . .

Discretion is not a two-way street that allows agencies to use their discretion to either disclose or withhold. Freedom of information laws are always based on the philosophical concept that the public has a right to access government information and withholding should be the exception, not the rule. Based on that premise, it would be foolish to assume that laws explicitly designed to maximize disclosure would give agencies the discretion to withhold information any time they could fit it into an exception.

In freedom of information laws, discretion flows in the direction of disclosure, not in the opposite direction. Discretion embodies what the Reno memo articulates — that disclosure is the rule unless there is evidence of actual harm in disclosure. Agencies make decisions every day of the week. To assume disclosure of records that reveal something about the decision-making process must be routinely withheld because they fall under an exemption, is nothing short of ridiculous. Where an agency can show that revealing the decision-making process will cause an articulable harm, then the agency may have established an acceptable reason for withholding such information. But to say that disclosure will inhibit candor is only to reiterate the long-abandoned argument that the public should not be able to know about what its government does, and that government should be able to operate in secret.

Discretion is an important part of freedom of information laws. Legislatures realized there would be times when records should not be disclosed, even though they could be disclosed. Those are the occasions when a 'foreseeable harm' standard should come into play. Such an assessment should also include weighing public interest in disclosure against the interests in withholding the information. But discretion should never be seen as a legislative license to withhold just because the law permits it.

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Quietly limiting openness — the Canadian experience

Just before British Columbia's last election, Finance Minister Elizabeth Cull proudly produced a budget that promised an $87 million surplus in 1997. It would have been good news if the Government hadn't fudged the numbers. Documents obtained through British Columbia's freedom of information (FoI) law showed that the Government knew it was using grossly exaggerated revenue estimates. Within three months, the deficit was $470 million.

As this case shows, citizens support FoI laws because they help to keep governments honest. Understandably, governments aren't always as enthusiastic about FoI. So the latest news from British Columbia is not surprising. In late March, BC Information Commissioner David Flaherty complained that the Government was cutting resources for the offices that handle FoI requests, and hiking fees for processing requests. Flaherty says that the changes will seriously harm open and accountable government in British Columbia.

Flaherty has good reason to be concerned. There are already serious problems of delay in responding to FoI requests in British Columbia. In 1995, more than half of FoI requests to the provincial Government got a response within one month. Last year, the median response time was two months, and almost 40% took longer than four months.

Delay is a serious problem in other jurisdictions as well. The response time for requests to the Ontario Government has also been steadily declining for years. And in Ottawa, the Federal Information Commissioner, John Grace, has called delays in handling FoI requests 'a festering, silent scandal'. Complaints to his office about slowness increased by 320% between 1992 and 1997. On average, the Chretien Government now takes longer to handle FoI requests than the Mulroney Government ever did.

In Newfoundland, cutbacks have had a more obvious impact on freedom of information. In 1990, the provincial Government fired its ombudsman, as part of an effort to cut spending that 'serves no useful purpose'. Part of the ombudsman's job had been to help individuals who had difficulties with FoI requests. On a per capita basis, Newfoundland's law is now the least-used in Canada.

There are other ways in which Canadian governments are quietly restricting the effectiveness of FoI laws. Several governments are now contracting-out major functions to businesses that are not covered by FoI laws. What's more, those businesses may have the right to protest if governments decide to release information about their contracts.

For example, the Nova Scotia Government recently contracted with a private firm, the Atlantic Highways Corporation, to build the new Highway 104. When the Nova Scotia Government agreed to provide details about the contract in response to an FoI request, AHC went to court to stop the release of information. The Supreme Court rejected the appeal but AHC succeeded in delaying release for eight months, while it attempted to negotiate a similar deal with the New Brunswick Government.

In some cases, governments and contractors may simply agree to treat contractual information as confidential. Under some laws, this may make it much more difficult for members of the public to get the information needed to judge whether government is being tough in negotiating and enforcing contracts.

Several governments are also transferring public functions to new industry-managed organisations that fall completely outside FoI laws. Air traffic control functions have been transferred to Nav Canada, a corporation run by aircraft operators that is not covered by FoI law. The proposed new St Lawrence Seaway Corporation would also be removed from the federal FoI law.

Ontario and Alberta are also transferring regulatory functions to industry associations that are not covered by provincial FoI laws. In Ontario, these new 'administrative authorities' have been advised to make records accessible, but citizens have no formal remedy if the authorities