Rescuing FoI: Rescuing Democracy

Bill De Maria, University of Queensland

ABSTRACT

This paper locks the fortunes of Australian democracy to the fortunes of Freedom of Information (FoI). Both, in the author's view, are in deep trouble. To rescue FoI, one needs to understand historical and contemporary manifestations of the depth of official secrecy in Australia. Numerous vignettes, including data from a recent study of Queensland FoI are projected on to a new explanatory 'screen' — a dialectic consideration of the relationship between secrecy and openness. The paper concludes with some consideration of how FoI can be reformed to counter the rising levels of secrecy in Australia.

Dr Bill De Maria is in the Centre for Public Administration at the University of Queensland. He is a long-standing public policy activist with a particular interest in accountability and transparency. He conducted the Queensland Whistleblower Study and his recent book, Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia *has been nominated for the non-fiction award at the Adelaide Festival.*

ISSN 1443-8607
Volume 2, Number 3: March 2002, 167–185
The Drawing Board: An Australian Review of Public Affairs

> Secrecy is the first essential in the affairs of the State.
>
> Cardinal de Richelieu 1585-1642.

> Our [Australian] FoI legislation is compatible with the most illiberal official secrecy regimes to be found in the country.
>
> Paul Finn, 1991.

Introduction

We live in secret times:

> Queensland State Government FoI administrators denied access to information 163,088 times in 1999-2000 (De Maria 2001a: 5).

> South Australia's Freedom of Information Act remains among the nation's most restrictive after the Government recently rejected 11 of the 14 recommended changes by the Legislative Review Committee. (South Australian Legislative Review Committee 2000, *Australian* 2001: 7).[1]

> Two weeks after a FoI application by the *Courier-Mail* for documents relating to child abuse investigation procedures was granted, it was reported that Frank Peach, Family Services Director-General, backed by Premier Beattie, over-ruled his FoI officer and blocked access by invoking the Cabinet exemption.[2] (*Courier-Mail,* 29 June, 6 July 2001).

> In July 2001 a decision was reportedly made to stop the taping of University of Melbourne Council meetings in order to thwart future FoI applications, following a decision by the Victorian Civil and Administrative Tribunal to grant access to Council deliberations. *(Australian*, 18 July 2001:33).

> 19,886 decisions were made in Queensland in 1999-2000 to deny access to documents because they allegedly related to trade secrets and business affairs (De Maria 2001a: 5).

---

1 The Committee found the Act 'complex', 'cumbersome' and 'the very antithesis of the objects [of openness and transparency]' For the government's response see R. Lawson [Minister for Administrative and Information Services] to A. Redford [Presiding Member Legislative Review Committee] 14 May 2001, pp. 1-9.

2 Peach backed down after the *Courier-Mail* issued a Supreme Court challenge to his decision.

The paper has a twofold purpose. First it marks out the problem of rising levels of official secrecy in Australia. Then it offers part of the agenda of reform. In terms of the first purpose the paper puts forth a dialectic understanding of the relationship between secrecy and openness. It then visits the fortress of official secrecy, specifically to understand its history and to scrutinise two new battlements in this fortress: the new bureaucratic refusals to supply information to Parliament, and the equally recent pillaging of the nation's FoI Acts. Recent research into the Queensland Freedom of Information Act is offered at this point to illustrate the developing arguments.

The second purpose is to explore the arsenal of FoI reform that must be built if the age-old dialectic between official secrecy and democracy is to be resolved in favour of openness. Clearly this fortress of secrecy must be attacked from many fronts: the focus in this paper is the FoI front.

Secrecy and Openness: The Sinewy Dialectic

The facts and incidences cited above strongly suggest the dominance, if not transcendence of secrecy over openness. While this view is understandable, it is important to see the relationship between secrecy and openness in dialectic terms. We are not dealing here with a simple monochromatic conflict of push and shove. The connectedness between secrecy and openness is a contradiction in the Hegelian sense of the word. That is, secrecy and openness are at one and the same time conflicting opposites and parts of an interdependent whole. Secrecy and openness may appear to be polarities but in fact they are co-deterministic. Each shapes the other. Clearly secrecy is the 'big brother' in this relationship, but it cannot dominate.

To explain this further it may be helpful to view secrecy and openness as two extreme forms of governance. Administrations, whether they be nation states or local charities can be placed on a governance continuum with secrecy and openness as the polar positions. But the important thing is that their 'spot' on the continuum is never static. Governance systems, like all forms of human construction, are permanently exposed to dialectic driven swings between secrecy and openness. The Australian experience appears to be one of small and short-term fluctuations from a traditional position of secrecy towards openness and then back again to covertness. Openness is a long way from the nature of governance in Australia. But then again secrecy has not totally colonised public administration.

Why a dominance of secrecy in the management of Australia's public affairs? This is a complex question. Some parts of the answer would include the special impacts of post-contact history and politics. White colonisation was explicable in terms of Britain's domestic and international needs. There were few utopian aspirations (such

as the Wakefield Scheme in South Australia)[3] to build a society according to human rights principles.

The adversarial nature of politics is also a suspect that has to be rounded up when we reflect on what drives secrecy. Entrenched inter-party conflicts and fierce electoral competition make secrecy an operational prerequisite.

One must also consider the revolution in government-business relations. Corporatisation (eg. Brisbane Port Authority), outsourcing (eg. Borallon Correctional Centre) and privatisation (eg. Commonwealth Employment Service) are changing the face of both government and business. The marketisation of government services means that a huge amount of enterprise activity is now conducted according to the disclosure-shy protocols of business.

Secrecy is not only the first essential of state, as that arch-intriguer Richelieu tells us, but it is arguable that it is embedded in our society as one of our unspoken core values. How did secrecy get to thrive in the soil of democracy? Or to put the question in dialectic terms, how was it that secrecy became so powerful that it could influence the nature of Australian democracy? I think we can blame the British!

The Tradition of Concealment

One of the many negative inheritances from our British history has been the obsession with official secrecy. Richard Crossman, a former British Labour minister, once said:

> Secrecy is the British disease, and it has reached epidemic proportions. No other western democracy is so obsessed with keeping from the public information about its public servants, or so relentless in plumbing new depths to staunch leaks from its bureaucracy (Robertson 1993:154, Robertson & Nichol 1992).

Where did this culture-of-the-closed come from? When European monarchies did the forced route march to democracy they brought with them system-affirming secrecy traditions that started in a time on the other side of the Middle Ages. Those traditions were blithely unpacked into *Terra Australis* with nary a care about the deep contradiction between secrecy and democracy (Finn 1991:15-18).

Certainly that contradiction was far from the minds of the House of Commons when it rushed the archetypal secrecy law, the *Official Secrets Act,* onto the statute books in a single day in 1911 with no debate about the notorious Section 2. This section, which

---

3 I thank one of the reviewers for reminding me of this.

made it a crime for public servants to disclose any information about their jobs, created, according to the Franks Committee, over 2000 potentially criminal acts (Hull 1998; Hooper 1987; Thomas 1991). The spirit of that Act was transported to Australia and reappeared as equally (some would say more) oppressive public servant secrecy provisions in various crimes acts (Terrill 2000: Appendix II).

Bowed over with the enormous weight of this culture of secrecy, the United Kingdom, not surprisingly, was one of the last western countries to cross the line and implement freedom of information legislation.[4]

Through the generations this British fixation with treating public administration as a covert operation has poisoned the wells of democracy, and remains to this day a worrying migrated feature of public and private sector life in Australia. (Terrill 2000, Finn 1991).

We know for instance that surveys conducted in the last twelve years have found over 150 secrecy provisions in Commonwealth acts and regulations (McGinness 1990: 49), over 100 such provisions in Western Australian law (Western Australian Commission on Government 1996: point 2.3.1.1) and 160 secrecy provisions embedded in Queensland law (Queensland Law Reform Commission 1994: Appendix C).[5] The plethora of official secrecy led a Senate Standing Committee on Constitutional and Legal Affairs to be critical of:

> … (a) fashionable contemporary drafting practice to insert in every new statute a standard provision making it an offence for an official governed by the statute to disclose without authorisation any information of which he has gained knowledge officially (1978: 233).

A Secrecy Pandemic?

Is it accurate to talk of a secrecy pandemic in Australia? It is arguable that this is the case, with an important caveat. Official secrecy is not an all-embracing concealment.

---

4 The *Freedom of Information Act 2000 (UK) received Royal Assent on 30 November 2000.* The government has not yet said when the Act will start operating, creating serious doubt about earlier suggestions that it will be in force for Whitehall by the summer of 2002. This Act is the sixth one drafted since 1976. The other five all failed to progress to law. As at March 2000 over 40 countries have FoI laws. The western country exceptions are Germany, Luxembourg and Poland. See Privacy International, *World FoIA Survey,* (http://www.privacyinternational.org/issues/foia/fois-survey/).

5 The extreme and farcical measures our governments go to keep information from us are scenarios straight out of the madness of Monty Python. For example the Victorian Land Tax Act 1958 prevented disclosure 'to anyone whomsoever'! (*Cowan v. Stanwell Estates Pty Ltd* (1966: 604).

It flourishes with respect to access to a particular class of information - that which could expose government illegality, incompetence or breach of trust. Some examples of the secrecy pandemic:

> In an historic decision in June 1999, the NSW Court of Appeal found parliament had the right to force the State Treasurer, Mr Egan, to produce secret documents relating to the contamination of Sydney's water supply in 1998. Egan had consistently refused to give up the documents, and as a result was suspended from the Legislative Council for five days. (A*ustralian* 11 June 1999: 5).
>
> Interview notes, tapes, and statements collected by investigators for the Marks Royal Commission into the Easton affair have been shredded despite the existence of a preservation policy (*Australian* 27 July 1999: 6).
>
> When asked in June 1999 how much he was paid, the Queensland Police Commissioner refused to say (*The Weekend Australian 26*-27 June 1999: 12), and it took the *Sydney Morning Herald* a 12 months legal battle to find out that the NSW Police Commissioner's remuneration package of $430,000 makes him the highest paid public servant in the land.
>
> In December 1999 it was reported that the Premier of South Australia, John Olson, refused to release details of more than $200,000 in credit card expenditure on travel, wine, food and golf fees clocked up by the state's senior trade official (*Australian* 22 December 1999: editorial).
>
> It is reported that one reason why the Australian National Audit Office's damning report on government technology outsourcing was seven months late was because of the difficulty auditors had obtaining crucial information deemed commercial-in-confidence (Australian National Audit Office 2000).
>
> In October 1989 the Western Australian Auditor-General argued that a general secrecy provision in his own enabling legislation required him to refuse to answer questions put to him by the Standing Committee on Government Agencies (Western Australian Commission on Government 1996: point 2.3.2.1).

These examples have been raised to service the view that, in Finn's prescient words: '…secrecy endures as the primary obligation and openness the exception' (Finn 1991: 85). They are also offered as a critique of a popular strand of commentary (mainly political and legal academic) that celebrates the *presence* of FoI Acts as proof of a new era of openness. These commentaries rarely bother about the day-to-day

performance of the Acts (Pizer 1999: 85-104). This is the purpose of the next section.

Secret FoI Business: The Queensland Example

Queensland is a paradox. It is a highly secretive and undemocratic State,[6] yet it produces the best FoI statistics in Australia. The author recently researched this database, see Table 1 and De Maria (2001a).

Table 1: Queensland FoI Act, State Government Exemptions Invoked, 1999–2000

Exemptions	No.	%	Rank
Matter affecting personal affairs	52751	32.3	1
Matters relating to trade secrets, business affairs & research	19886	12.1	2
Matters affecting legal proceedings	18379	11.2	3
Matters relating to law enforcement or public safety	15395	9.4	4
Matters concerning certain operations of agencies	11029	6.7	5
Matter communicated in confidence	10763	6.5	6
Cabinet matter	8788	5.3	7
Documents to which access may be refused	6235	3.8	8
Matters relating to the deliberative process	5547	3.4	9
Disclosure constitutes contempt of parliament or court	4449	2.7	10
Act not to apply to certain bodies	3872	2.3	11
Relating to investigations by Ombudsman or Auditor-General	1945	1.1	12
Matters affecting relations with other governments	1161	0.7	13
Information as to existence of documents	755	0.5	14
Matters to which secrecy enactments apply	658	0.4	15
Executive Council matter	635	0.4	16
Application of Act to Government Owned Corporations	455	0.3	17

6 As judged by the unicameral nature of its parliament, the executive eclipse of parliament, too few media options, a populist Premier with a huge majority and a decimated Opposition.

Some highlights of Table 1 are:

- the big proportion of personal affairs exemptions
- the strong showing of business and trade secret exemptions (commercial-in-confidence).

The non-personal exemptions contradict the claim that FoI is an effective tool of accountability. When the personal affairs exemption figures are removed (because personal information usually has little to do with accountability) the commercial-in-confidence caveat jumps to 17.9% of exemptions and the legal proceedings exemption increases to 16.6% (De Maria 2001a: 6). We need more fine-grained performance analyses of the FoI Acts. In the absence of such we can, with some conviction, assume that the commercial-in–confidence exemption will continue to record the biggest increases in exemptions as government-business enterprises increase in number (De Maria 2001b). The disclosure avoidance strategy, commercial-in-confidence (CIC), is also at the heart of a new problem facing our parliaments.

Bureaucratic Giants in the Land of the Pygmy Parliament

> Senator Lightfoot: What cash flow is there back to the ABC [for on-line delivery of ABC material]?
>
> Mr Bardwell [ABC]: There is a license fee back to it.
>
> Senator Lightfoot: What is that… unless that is commercial in confidence? You have no idea? Has anyone from the ABC got any idea what it is worth?
>
> Dr Schultz [ABC]: We can take that on notice.
>
> Senator Lightfoot: Could you get that information for us? Was that a yes or no Dr Schultz?
>
> Mr Bardwell: I believe that the individual contracts are commercial in confidence.
>
> Senator Lightfoot: But we would like those. We would like to find out what the ABC is doing with the taxpayers funds, Mr Bardwell.
>
> Dr Schultz: We will take it on notice (Commonwealth of Australia Senate Hansard 2000b).

* * *

Senator McKiernan: … the details of the contract, value of it and terms of the contract, I will ask for them now and give you the option of –

Mr Studderl [Attorney-Generals Department]: I really cannot provide those, for commercial in confidence reasons (Commonwealth of Australia Senate Hansard 2000c).

* * *

Senator Carr: Did all the universities meet this condition [equal enterprise bargaining rights for employees]?

Mr Gallagher [Department of Education, Training and Youth Affairs]: I cannot answer that.

Senator Carr: Why not?

Mr Gallagher: I do not think it is appropriate to start reflecting bit by bit on which institutions met which criteria.

Senator Carr: What possible commercial in confidence issue is involved with this policy statement by the government?

Mr Gallagher: …I will need to consult the minister (Commonwealth of Australia Senate Hansard 2000a).

* * *

Senator McKeirnan: Does the per diem cost for detention vary between detention centres?

Mr Davis [Department of Immigration and Multicultural Affairs]: yes it does vary.

Senator McKeirnan: Do you have those figures?

Mr Davis: I do have them.

Senator McKeirnan: Could you give me those?

Mr Farmer [Department of Immigration and Multicultural Affairs]: Yes.

Mr Metcalf [Department of Immigration and Multicultural Affairs]: I would caution that we might need to look carefully about giving you specific information in relation to each centre because that goes back to the issue of commercial in confidence (Commonwealth of Australia Senate Hansard 2000c).

The image these defiant conversations conjure up for me is one of giant public servants tramping unopposed through a parliamentary land of little people. Bundling their secret papers back into their briefcases, these public servants have found an authority higher than parliament! They now feel confident in keeping information from parliamentary committees by dexterously using the shield of CIC not only to deflect parliamentary inquiries but also to deny access under the FoI laws.[7]

One of the most disturbing attempts to cut the potency of parliament by illegally turning off information to it occurred recently in the Family Court. This is an organisation with a 25-year tradition of secrecy and minimal accountability. The government has finally lost patience with it. In a blistering attack on 27 July 2001, Darryl Williams, the Commonwealth Attorney-General, announced that the Family Court would lose much of its family law role to the fledgling Federal Magistrates Court. The Attorney-General suggested that the Court was inflexible, over-formalised, fragmented, uncoordinated, unplanned and gave insufficient attention to the needs of children (*Sydney Morning Herald* 27 July 2000).

This was the organisation that Senator Brett Mason (Lib, Queensland) slammed into. In what is understood to be the most incisive parliamentary questioning of the Family Court, Senator Mason, as a member of the Senate Estimates Committee, asked a series of questions in May and November 2000 and followed up with a further 39 questions on 19 February 2001. These questions inquired about overdue judgments, travel expenses, consultancy expenditure and the like.

Chief Justice Alastair Nicholson refused to tell Senator Mason:

- the salaries of his personal staff
- whether any judgments had been written by persons other than judges
- which specific judges sat on cases or had leave
- what were the sitting and leave periods for the judges
- the travel costs of judge-administrators.

As far as I know no direct action has been taken against Justice Nicholson for refusing to answer the Senator's questions.

---

7 There is evidence that the CIC problem has been in public administration for a long time, certainly since the 1970s. See Senate Finance and Public Administration References Committee, *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*.

The Pillaged FoI Facts

The twenty-year process of bureaucratic co-option of FoI is, in the author's view, now complete. Like all co-opted concepts, FoI, once a grand revolutionary idea, has succumbed to ordinariness. There is now overwhelming evidence, both empirical and anecdotal, that the nation's FoI Acts are failing fast. This section elaborates some of this evidence. Commonwealth statistics show that while 565,219 access requests had been processed between the date of commencement of the Act on 1 December 1982 and 30 June 2000, there has been no growth in applications for the last four years. In fact there were 1,700 fewer access requests in 1999-2000 than the previous year (Attorney General's Department 2000: 2).

This stagnation can mean a number of things: alternative sources of information, improved proactive release policies[8] and internet access. It can also mean that there are structural and cultural obstacles to access in the Act and in the behaviour of public servants who manage access to decision-making. FoI administration is often in the hands of come-and-go bureaucrats who are not personally fired-up by the concepts of official openness and transparency. This converts into cautious and drawn out applicant-FoI administrator transactions, and review and appeal mechanisms that drag the huge ball and chain of legal formalism.[9]

As disturbing, are the differential access policies between 'personal' and 'policy' applications. With respect to personal information applications (in excess of 87% of all Commonwealth requests in 1999-2000), [10] the FoI Acts work reasonably well. But that's a bit like applauding a lift because it takes you up and down, that's what it is supposed to do. The true test is whether FoI allows citizens access to contemporary governance to enter, in other words, the world of official policy.[11] On that test the FoI Acts at best get mixed results.

---

8 Under ss 8 & 9 of the Commonwealth FoI Act.

9 See Commonwealth Ombudsman's evidence to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000,* April 2001.

10 It is still impossible to distinguish between 'personal' and 'policy' access requests in the Commonwealth FoI statistics. We do know that 87% of all access requests in 1999-2000 were made to just three agencies: Department of Veterans Affairs, Department of Immigration and Multicultural Affairs, and Centrelink. On the whole these were non-contentious requests for personal information. See Commonwealth of Australia, Attorney General's Department, Freedom of Information Act 1982, *Annual Report 1999-2000,* p. 6.

11 The Commonwealth Ombudsman made this point in her own motion inquiry into the operation of the FoI Act. See Commonwealth Ombudsman, *Need to Know,* 3 June 1999. The Attorney-General has announced that the government will accept recommendation 11 from

The statistics in this area can be quite deceptive. In 1999-2000 4.79% of all access requests under the Commonwealth Act were refused outright. This figure is kept small by the huge number of grants in full to personal information claims.[12] What needs to be drawn out from the low rejection statistic is the high refusal rates on an agency basis. Some examples. In 1999-2000 Telstra rejected 32% of applications (148), Department of Employment, Workplace Relations and Small Business rejected 30% (73) of applications and Australian Customs Service rejected 30% (48) of applications (Attorney General's Department 2000: 6).

It is well known that FoI administrators tend to hedge their bets by citing as many exemptions as possible. It can be quite intimidating for a FoI applicant to receive a rejection citing numerous exempt provisions in the Act, with each exemption accompanied by long pro forma insertions of the alleged relevant case law.

There is worrying anecdotal evidence that FoI administrators force documents into exempt categories with inappropriate criteria such as:

- disclosure would embarrass the government
- disclosure would cause a loss of confidence in the government/program
- disclosure would cause unnecessary concern and panic.

The exploitation of the Cabinet exemption provision to block legitimate access to public documents is part of the sorry history of FoI in Australia, more so in the jurisdictions of Victoria and Queensland. In 1999-2000 the Cabinet exemption was invoked 8,788 times in Queensland (De Maria 2001a: 6).

Is there a plausible public interest justification for quarantining Cabinet documents at all?[13] An exception-to-the-rule argument can be made that *some* documents directly pertaining to economic, diplomatic and national security decisions of Cabinet should be kept out of the public domain, but then only as long as the threat to the national interest prevails (as determined by an external reviewer such as the AAT). But that argument presumes a very small class of documents. What we have now is a long quarantine period for *all* Cabinet documents. It seems that the only justification for this broad prohibition is a fear that disclosure would expose government to Opposition, media and interest group scrutiny.

---

this report. In future agencies will have to distinguish between personal and non-personal requests in their statistical accounting.

12 For example the department of Veteran Affairs had a grant in full rate of 99.57% in 1999-2000.

13 On 26 April 2000 the Welsh Cabinet minutes were published, and posted on the internet for the first time, six weeks after the Cabinet meeting took place.

What about pre-Cabinet? FoI statistics in all jurisdictions show the deliberative process to be one of the most common reasons for refusing access. In 1999-2000 the deliberative process exemption was invoked 5,547 times in Queensland (De Maria 2001a: 6). Are not the days going when public servants, particularly at the higher echelons, give fearless and frank advice? The enormous changes in the public service since the Act's inception in 1982, when considered in the framework of this point, suggest that much of the deliberative process is meeting political rather than policy designs. Further much advice is now outsourced to 'experts' beyond the normal accountability loop. This has opened the door to a new and unanticipated reason to withhold, that the expert advice remains the intellectual property of the consultant, and as private information, it is quarantined from FoI discovery.

Is it time for the deliberative process exemption to be repealed altogether? The division between information about government programs and policies and information about how these policies and programs were formed (or abandoned as the case may be) is spurious and indefensible.[14]

Joining the daisy chain of opposition to the spirit of the FoI Act are public authorities who should know better. Labor-controlled Brisbane City Council didn't want the State Opposition accessing details of the City-Valley Bypass. So what do they do? They argued that as a 'government' they don't have to release details of the project. As any teenager studying high school law will tell you, local authorities are not constitutionally recognised as governments. The Information Commissioner said BCC's argument was fallacious (Santoro & Department of Main Roads & Brisbane City Council 2000), and on judicial review Justice Wilson of the Queensland Supreme Court said the same (Brisbane City Council v Albietz 2001: 160). End of matter? No. BCC, with ratepayers' money, is off to the Queensland Court of Appeal.

Similarly the Local Government Association and the Queensland Law Society reached new summits of hypocrisy when both argued that they were not established for 'a public purpose' and hence did not have to respond to any FoI applications. Nonsense said the underfed but earnest Queensland Information Commissioner (Price & The Local Government Association of Queensland 2000, English & Queensland Law Society 1995). On appeal the Supreme Court agreed, seeing through the ruses to avoid accountability (Local Government Association of Queensland v Information Commissioner & Anor 2001).

If over-bureaucratised processing of FoI applications, abuse of certain exemptions (specifically commercial-in-confidence, cabinet and deliberative process) and the avoidance strategies of large public organisations are not bad enough, FoI is being

---

14 The same point was made recently by the UK-based public interest lobby group Campaign for Freedom of Information, with respect to the UK FoI Act.

crippled with charges. It is obvious that the best FoI Act in the world can be brought to its knees by the imposition of charges. Let me give you some examples:

> The Australian Taxation Office recently advised a Perth doctor that it would charge almost $80,000 to provide copies of files related to a disallowed taxation scheme (*Australian* 24 September 2001: editorial, see also *Australian* 19 September 2001: 17, *Weekend Australian* 22-23 September 2001: 18).[15]
>
> *The Herald Sun* recently gave up its $10,000 two year campaign for information about travel perks of Federal politicians after it was given a quote for $1.25 million, which amounted to 32 years of full time work for one public servant (*Australian* 2001: 6).

It is important to note that while the average processing cost per request for Commonwealth FoI applications in 1999-2000 was $442, agencies from time to time bear enormous expenses. For example the Reserve Bank only had 2 FoI applications in 1999-2000, and they cost the Bank $40,454 to process. Similarly the Australian Competition and Consumer Commission received 12 applications in 1999-2000 with an average processing cost of $22,206 (Attorney-General's Department 2000: 23).

While we should be concerned about these particular costs, the general situation is that departments are increasingly voicing their concern about the burden of managing access applications. My response is both uncompromising and unsympathetic, this is the cost of freedom and it should be borne by departments. It could well be that expensive searching for FoI documents is a reflection on agency filing procedures. It should not be grounds to refuse an application.

Another issue here is the 'sufficiency of search' concept. How do we know whether FoI officials have made thorough searches of their holdings for the relevant documents, particularly if those documents contain sensitive matter? The answer is we don't, unless we know of the existence of a document prior to an application for access to it. In most situations we are in the hands of the FoI officials.

It seems that the only way to ensure sufficiency of search is for agencies to publish lists of all files in its possession along with annotated indexes of folios within these files. The proposed Information Commissioner (see below) could be charged with checking the integrity of these lists by random information audits.

---

15 Within four days of the matter becoming public the Taxation Commissioner put an end to the high costings (*Australian* 26 September 2001: 4).

Rescuing FoI

In this final section of the paper an attempt is made to outline parts of a rescue package for FoI.

The Information Commissioner model

It is an extraordinary fact, but the FoI Act, like a child out the front gate, is, at the operational level, unsupervised in all states and the Commonwealth. We need to urgently respond to the vexed issue of FoI oversight and external review. The Information Commissioner model is one way of responding to our failing FoI Acts.[16]

A FoI Commissioner requires a strong legislative base that would allow investigations of breaches of the objectives of the FoI Acts by agencies. Following this line of thinking, FoI Commissioners would then be able to adversely mention these agencies in reports, and in serious cases, be able to send a brief for the charging of agencies in courts of law. The legislative base should also allow the employment of FoI Commissioners as officers of the parliament, rather than as statutory positions under the aegis of the Attorneys-General. In addition to the investigatory function mentioned above, the proposed Commissioners could be tasked to establish and monitor stronger departmental proactive release policies. There is something profoundly undemocratic about citizens having to ask for official information, more so when the asking involves drawn out, formal and complicated processes. At present agencies can release information outside the Act. It is a discretionary power, and as one would expect, given the culture of secrecy in Australia, rarely used with respect to sensitive policy material. We need greater outside-the-Act *mandatory* release of official information. The compulsory release provisions in the British Columbia *Freedom of Information and Protection of Privacy Act* with respect to material that informs the public of significant environmental and safety issues comes to mind. The news that a toxic leak polluted parts of Kakadu National Park, came to us earlier this year, one month after it happened. This is the sort of disclosure that would have been made instantly had mandatory public reporting provisions being in place. Finally, the Information Commissioners would be given exclusive appeal powers (the proposals here include abandoning internal review, see below).

---

16 Queensland and Western Australia have information commissioners. A Commonwealth proposal for such is included in Senator Murray's FoI reform bill currently before Federal Parliament. His Bill was introduced into the Senate on 5 September 2000 as a private members bill. It was referred to the Legal and Constitutional Law Committee on 11 October 2000. The Committee reported in April 2001. Andrew Murray is an Australian Democrats Senator from Western Australia. For a critique of Senator Murray's proposal see W. De Maria, 'FoI Unshackled? The Murray Bill', *Alternative Law Journal,* September 2001.

Either way the people will need more information as to what is held by agencies. I envisage an Official Information Centre similar to, but an expanded version of, the US Federal Information Center (see below).

Delete all exemptions

The greatest stumbling blocks to effective FoI are of course the exemptions. Consideration should be given to the deletion of all exemptions within the FoI Acts and replacing them with a single *harm test*. This would mean that if the release of a requested document would, in the agency's view, cause social or economic harm (closely defined), then the application is simply refused. The agency does not need to attempt to justify how refusal is consistent with an existing suite of exemptions. What it must do however is precisely state in a timely fashion:

- what social or economic harm release of the document would cause
- how real is the possibility of harm
- to whom or to what would the envisaged harm occur
- which factors were taken into account in determining the above three.

Applicants would then have the same choice as they have now; to accept the ruling or to appeal it.

Delete ministerial certificates

The ministerial certificate is just a pleasant re-spelling of 'iron rule'. It has no place in a FoI Act. It protects an enormous amount of clandestine government-to-government dialogue that should be in the public domain.

Speedier processing

Statutory time limits on processing FoI requests, reviews and external appeals should be reduced. The public sector and government owned corporations (GOCs) have had almost 20 years to develop efficient procedures for the identification of agency information, assessment of access status and appeals on those assessments. IT has helped enormously in this regard. I would propose two weeks for the access decision and one month for the appeal.

Reduce Cabinet secrecy

A point above refers to a proposal to abandon all exemptions, including the Cabinet secrecy exemption. An exception-to-the-rule argument can be made that documents directly pertaining to economic, diplomatic and national security decisions of Cabinet should be kept out of the public domain. But then only as long as the threat to the national interest prevails (as determined by an external reviewer such as the AAT, or

from the American model, a Secrecy Commission).[17] A fall back would be that no Cabinet document can be withheld from the public for more than five years.

Electronic FoI

A web and email based mandatory disclosure program could radically increase openness and reduce the scope of FoI Acts. As operates in Sweden, all agencies would log all their documents onto their websites at the end of each day's business. A web search would then enter document registers that would have a synoptic description of the document and an access decision. Those with open access would be viewed immediately or sent to an applicant's email address. The FoI Act would then be the statutory gate through which contentious material would be released if it passed the public interest test.

Official Information Centre

An Official Information Centre, administered by the FoI Commissioners, would hold the e-document registers referred to above. Each document would show whether it could be obtained under the mandatory disclosure program or the requested disclosure program. If access is under the former, the person simply puts in an electronic order. If access is under the latter, the application for the material is made electronically. Electronic search and order facilities would be available at the Official Information Centre and municipal and shire libraries.

Conclusion

The paper has positioned FoI as a key to the evolution of public administration in Australia from a culture of secrecy to a culture of openness. For this to happen FoI itself must be completely renovated. For at the moment, despite the political poetry, FoI does not cut through the secrecy. This is to be expected since FoI was crafted by governments that have a natural inclination to secrecy and are masters at its routinisation. The regeneration task is urgent. Administrations encounter little constitutional and social resistance to their descents into deeper and deeper levels of covertness and concealment. We must rebuild FoI, and this time coat it with the sentimental protection of public ownership. Only an outraged public can save FoI now. It must be educated to the point of cherishing FoI and assisting in its rescue, for to rescue FoI is to rescue democracy.

---

17 Public Law 103-236 created the Commission on Protecting and Reducing Government Secrecy on 30 April 1994. It proposed reforms to reduce the amount of classified information including a national declassification center (see Moynihan 1998).

REFERENCES

Attorney General's Department 2000, Freedom of Information Act 1982 *Annual Report 1999–2000*, AGPS, Canberra.

Australian National Audit Office 2000, 'Implementation of Whole-of-Government Information Technology and Infrastructure Consolidation and Outsourcing Initiative', No. 9.

Brisbane City Council v. Albietz 2001, Queensland Supreme Court.

Commonwealth of Australia Senate Hansard 2000a, Employment, Workplace Relations, Small Business and Education Legislation Committee, 1 June.

Commonwealth of Australia Senate Hansard 2000b, Environment, Communications, Information Technology and the Arts Committee, 17 March.

Commonwealth of Australia Senate Hansard 2000c, Legal and Constitutional Legislation Committee.

Commonwealth of Australia Senate Hansard 2000, Question on Notice, 17 February.

Cowan v Stanwell Estates Pty Ltd 1966, 604.

De Maria, W. 2001a, *Auditing Freedom: The Performance of the Freedom of Information Act 1992 (Qld) 1999–2000,* Centre for Public Administration, The University of Queensland, Brisbane.

De Maria, W. 2001b, 'Commercial-in-Confidence: Obituary to Transparency'?, *Australian Journal of Public Administration,* vol. 60, no. 4, December, pp. 92–109.

English & Queensland Law Society 1995, Queensland Information Commissioner, Decision 95022, 4 August.

Finn, P. 1991, *Official Information,* Integrity in Government Project, Interim Report 1, Australian National University.

Hooper, D. 1987, *Official Secrets: The Use and Abuse of the Act,* London, Secker & Warburg.

Hull, J. 1998, *Commercial Secrecy: Law and Practice,* London, Sweet & Maxwell.

Local Government Association of Queensland v Information Commissioner & Anor, 2001 Queensland Supreme Court, QSC 052.

McGinness, J. 1990, 'Secrecy Provisions in Commonwealth Legislation', *Federal Law Review,* vol. 19, no. 1(2), pp. 49–97.

Moynihan, D. 1998, *Secrecy*, Yale University Press, New Haven.

Pizer, J. 1999, 'Recent Developments in FoI in Victoria', *Australian Journal of Administrative Law,* vol. 6, no. 2, Feb, pp. 85–104.

Price & The Local Government Association of Queensland 2000, Office of the Information Commissioner, Decision 4/2000, 8 December.

Queensland Law Reform Commission 1994, *The Freedom of Information Act 1992. Review of Secrecy Provision Exemption,* Report No. 46.

Robertson, G. & Nichol, A. 1992, *Media Law,* 3rd edition, Penguin, UK.

Robertson, G. 1993, *Freedom, the Individual and the Law,* Penguin, UK.

Santoro & Department of Main Roads & Brisbane City Council 2000, Queensland Information Commissioner, Decision 03/2000, 24 October.

Senate Standing Committee on Constitutional and Legal Affairs 1978, *Report on Aspects of the Freedom of Information Bill 1978 and the Archives Bill 1978.*

South Australian Legislative Review Committee 2000, *Report concerning the Freedom of Information Act 1991*, Government of South Australia.

Terrill, G. 2000, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond*, Melbourne University Press, Melbourne.

Thomas, R. 1991, *Espionage and Secrecy: The Official Secrets Act 1911–1989 of the United Kingdom,* RKP, London.

Western Australian Commission on Government, 1996, *Report 1.* Perth, WA.