WHERE TO NEXT WITH THE FOI ACT? THE NEED FOR FOI RENEWAL— DIGGING IN, NOT GIVING UP

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Paper presented at the ANU Public Law Weekend, Canberra, 2 November 2000[1]

> *In a world of secrecy and opaque government, serious wrongs can occur which may never come to light. FOI legislation is at once a means of casting the light of scrutiny into the dark corners of government and a contribution to a new culture of openness in public administration.*
>
> Justice Michael Kirby[2]

> *The advent and operating principles of a redesigned smaller state, that functions solely as a marketplace, exploits and compounds existing design defects in Australian FOI legislation.*
>
> Rick Snell[3]

> *But the fight to reclaim the informational commons will also be complicated by problems of policy design and political mobilization. Imposing openness codes was easier when authority was closely held by national and sub-national governments. The task is more difficult when power has diffused away from governments and across borders.*
>
> Alasdair Roberts[4]

Introduction – the importance of FOI

In his inaugural professorial address at the Australian National University in March 2002, John McMillan argued that passage of the Commonwealth *Freedom of Information Act 1982* (FOI Act) had been of fundamental or constitutional importance. It had replaced the prerogative of government to decide what information to release, changed the onus of justification in relation to release of information, and replaced an unstructured government discretion with objective criteria by which an independent reviewer could judge release. At the same time McMillan noted that there had been many criticisms of the operation of the FOI Act in a number of recent reports.[5]

McMillan's views are significant because of his important role as one of the major contributors to the debate over open government in the late 1970s, and his role in shaping the fundamental principles on which FOI legislation could be founded, not least through his work on the influential 1979 Senate Committee's report on the FOI and Archives Acts.[6] I

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* *Information access consultant, Canberra. Former Principal Legal Officer in the Information Access Unit, Commonwealth Attorney-General's Department.* *My sincere thanks to Greg Terrill and Matthew Smith for very helpful comments on an earlier draft of this paper, and to Rick Snell for his immense contribution to our understanding of FOI at all levels: I have plundered his work shamelessly. Thank you also to Madeline Campbell and members of the old Information Access Unit team in the Attorney-General's Department for numerous passionate discussions and insights; it was a rare privilege to work with all of you. None of the above is responsible for what I may have done with their ideas here.*

agree with him that the adoption of FOI involved major and fundamental shifts, and that it contributed to and underpinned many of the trends to more open government that he identifies in his address.[7] Yet despite the symbolic significance of FOI legislation, its actual ability to provide access to significant government policy or administrative information that would genuinely empower citizens has been extremely limited at the Commonwealth level. Moreover, we can see now that there are many things FOI cannot do in the area of accountability, especially if governments and their advisers seek to evade it by not recording sensitive information. In some circumstances there may be better mechanisms, though with their own flaws, such as inquiries by Senate Committees where that process is available, or investigations by the Ombudsman or the Auditor–General.

Nonetheless, there is still a strongly felt need for freedom of information legislation, though some of the language of the 1960s and 1970s now sounds old-fashioned in the conservative 1990s and early 2000s, in particular the concept of 'participatory democracy'.[8] Nonetheless, what that term denoted is still of vital relevance, namely a desire to open up government so that ordinary citizens and groups and coalitions of groups can acquire the information to participate in and criticise the policy-making and administrative process.[9] These days the same concept is framed in terms of 'democratic deliberation', 'democratic discourse', a 'republic of reasons', the need for 'transparency', 'the informational commons' and so on.[10] In the same vein, the High Court has underscored the significance of the free flow of information and broad discussion in achieving a liberal democratic system of government,[11] and Justice Michael Kirby describes FOI as very important in making the idea of popular government 'a more robust and practical reality'.[12]

However, this should not blind us to the fact that FOI has had and still has many critics who would be glad to see it, if not destroyed, then rendered largely ineffective in its capacity to embarrass or challenge government. Others think that the concept has been rendered irrelevant by the changes in the nature of the state in the post-Thatcher/Regan period.[13] Yet others emphasise the need in a knowledge economy for access to the largest repository of information in a country (government), and the contribution of such access to the governance roles of citizens.[14] Alasdair Roberts penetratingly analyses the recent social, political and technological factors that tend to weaken FOI along with democratic participation in decision-making, but he is also prolific in ideas that can help redress the balance.[15] We need to be able at any time to argue the case for effective FOI legislation from first principles, starting from a realisation that the 'design principles' of the current Commonwealth Act are inadequate.

The current situation – neglect, inaction and defects

Twenty years is a long time in the life of a reforming statute that provides an arena for significant contest between government and citizen. My first year in the FOI Branch of the Attorney–General's Department saw a small party of officials happily celebrating the 'fifth birthday' of the FOI Act. Despite the 1986 retreat embodied in the imposition of charges, cessation of promotion of the Act and other changes to administration,[16] there was still a sense that the FOI Act was a live piece of legislation which was significant and demanded serious attention. At the time we were awaiting the report of the first major review of the operation of the Act by the then Senate Standing Committee on Legal and Constitutional Affairs.[17] There was still a significant commitment of resources to assisting agencies to administer the Act in the spirit in which it had been enacted.

Like human beings who celebrate birthdays and anniversaries, if we neglect Acts of Parliament they cannot function properly. In the twenty year history of the FOI Act it has been substantially amended only three times, the last occurring in 1991. None of the major amendments involved a completely systematic rethinking of the best ways to achieve the aims of FOI, the 1983 changes coming closest to that. The central proposals of the latest

1996 review by the Australian Law Reform Commission and the Administrative Review Council (ALRC/ARC report)[18] have not been implemented, and government has not given us any meaningful explanation why not.[19]

The criticisms are well-known, and I will take many of them for granted here.[20] Major difficulties are developing both in terms of the practical administration of the Act and in terms of its structure and the basic assumptions underlying it.[21] No real attempt has been made to update the Act to cope with the massive transformation of the state in the late 80s and 90s.[22] If these difficulties are not addressed, the gap between the pretence and the reality of FOI will widen ever further.

Even minor measures needed to remove redundant provisions of the Act have not yet been implemented, though I understand that some work has been done in this area. More significantly, the government has failed to introduce amendments to the Act to provide for its application to documents in the possession of contractors under outsourcing arrangements, despite the fact that this was promised on 3 February 1998 by the Attorney–General in a press release dealing with both privacy and FOI, and was reiterated by his Department in 2001.[23] Amendments were made to the *Privacy Act 1988* to cover outsourced personal information,[24] but there appears to have been stalemate in the bureaucracy about the means of amending the FOI Act, leaving a significant issue unaddressed.[25] Related issues concerning 'commercial in confidence' claims have also been ignored (see below).

The failure to take action on these measures is a recipe for freezing the FOI Act in time and, of more immediate importance, allows a continued decline in the standards of FOI knowledge and administration by agencies.

A similar situation exists in relation to the ALRC's report on its review of the *Archives Act 1983*.[26] Most of the recommendations leading to wider and easier availability of Commonwealth records of archival significance have not been implemented at this stage.

The appointment and report of the Access to Information Task Force in Canada is in stark contrast to the current situation in Australia. There have been major criticisms of the Canadian *Access to Information Act 1982*, and it is 17 years since the Act was last reviewed, so it is important not to exaggerate the differences in attitude. The fact that the Task Force was made up of public servants, with significant public and research input, has both limited the amount of change it has proposed, and increased the likelihood that it will be acceptable to government. While specific recommendations do not always contain the best solutions (in my view), the Task Force has taken seriously the question of how to achieve a better administrative culture of openness. I will be surprised if government is as indifferent to its report as our government has been to the ALRC/ARC report. [27]

The problem is that changes to the FOI Act, and even to its administration, have had no political priority even in the case of purely machinery matters. Such neglect in areas like income tax, corporations, trade practices or migration is simply impossible to imagine. These laws are in the frontline of government concern, and when some defect or loophole is identified in carrying out government policy, it is promptly attended to.

It is not as though we do not have significant and detailed proposals for change, both legislative and administrative, in the work of commentators like Rick Snell, Greg Terrill, Spencer Zifcak, Moira Paterson, Peter Bayne, Anne Cossins and others.[28] For example, Table 2 of Snell's 1998 article is an important starting point for any reconsideration of the design of FOI, and can serve as a benchmark for advocating reform.[29] I have time to deal only with a few of these matters, and have regrettably not been able to look at the best form of external review.

Renewing and supporting the foundations of FOI

Initiative for legislative change – the Freedom of Information (Open Government) Bills 2000 and 2002[30]

An initiative for reviving the process of reform was provided by the FOI (Open Government) Bill first introduced into the Senate in 2000 by Democrat Senator Andrew Murray. It lapsed as a result of the 2001 election but was reinstated in the same form in 2002.[31] The Bill seeks to implement most of the recommendations of the 1996 Report.[32] Significantly, it has been examined by the Senate Legal and Constitutional Legislation Committee, and despite the negative approach of the submissions and evidence of the Attorney–General's Department (presumably with Government approval), there was cross-party support for the most significant of the ALRC/ARC report's recommendations proposing creation of an FOI Commissioner and recasting the objects clause. (Importantly, the Committee also accepted the need for changes to the fees and charges structure, but I do not have time to deal with that here.)[33] This was in accordance with the views of most of the submissions.

Cross-party support for these two measures is of great significance because their implementation could be expected to have a major effect on the practical administration of FOI by agencies. It could provide some basis for continued approaches to the government parties stressing the need for these two measures if FOI is to be administered properly in the future. At the same time, the opposition Labor Party and the minor parties should be supported in their generally more sympathetic approach to FOI. John McMillan is right that there is a need to build 'a non-aligned culture of support for FOI within the legislature'.[34]

I believe that academic lawyers, political scientists and others could play a more active role, for example by seeking the establishment within an appropriate academic centre or national institute of a standing Forum on Open Government (FOG!) to promote dialogue between academics of all persuasions, politicians, public servants, media representatives, lawyers and citizen groups and individuals who use FOI. It would be good to see concern with FOI and Open Government extended beyond lawyers to other groups who can offer valuable insights into governance and citizen participation issues. Such a Forum could be within a single university or could span a number of institutions in a partially virtual format. It could seek partnerships and financial support from media organisations, law foundations, the Australian Research Council and so on.

Recasting the objects clause[35]

The replacement objects clause proposed by the ALRC/ARC and accepted by the Senate Committee contains a far more explicitly democratic objective for the FOI Act than the existing clause. It speaks of giving effect to the principles of representative government and of:

- enabling people to participate in the policy, accountability and decision-making processes of government;
- opening the government's activities to scrutiny, discussion, comment and review; and
- increasing the accountability of the executive branch of government.

As proposed by the ALRC/ARC report, it would also be desirable to include an acknowledgement 'that the information collected and created by public officers is a national resource'.[36] This is foundational to an open attitude to government-held information, and would be helpful in not restricting the FOI Act to an accountability role. This point can be

important in interpretation, for example in relation to the scope of the personal privacy exemption in s 41.[37]

The revised objects clause provides a symbolic statement that should influence administration and interpretation of the Act. Arguably Victoria and New South Wales have adopted an interpretation of the Act that favours disclosure, but that has not been the case in the Commonwealth jurisdiction. [38] As Matthew Smith points out in his paper (reproduced above), the High Court avoided this issue in its recent decision in *Shergold v Tanner*,[39] and it is uncertain what view it would take if it did address it. The clause accepted by the Senate Committee overcomes the court-created flaw in the present provision depriving it of any interpretative power.

Rick Snell told the Senate Committee that, although largely symbolic (though I think it would be more than that), the proposed change would be likely to produce a 'fundamental transformation in the way that the FOI game is played in Australia … it would have a dramatic impact on the way that agencies approach the interpretation of the exemption provisions and the application of the Act …'.[40] Given the importance of the active acceptance of the aims of the Act in changing administrative culture, taking such a step is vital to a renewal of the practice of the Act.[41] But it is not enough on its own.

A mechanism to improve and underwrite compliance – an FOI Commissioner[42]

Most commentators agree that there is a need for a body with the functions of monitoring, auditing and promoting the consistent and efficient administration of the FOI Act. FOI is not an area in which government agencies can be left entirely to their own resources. This is because of the complexity of the legislation, the self-interest of agencies in non-compliance with the full rigour of the legislative requirements, and the difficulties of keeping FOI knowledge current without central assistance. In this respect the FOI Act has more similarities to the Privacy Act than to the AAT and ADJR Acts.[43]

By facilitating consistency and best practice an FOI Commissioner would contribute significantly to a more open administrative culture, which virtually everyone agrees is the major need if FOI is to succeed.[44] Such an authority could be expected to work in partnership with agencies in achieving routine and well-informed compliance with the often complex and frustrating provisions of the present Act, and help to identify ways it could be simplified. Training in FOI could become a requirement for officers administering FOI or making FOI decisions.[45] It would provide what we now lack, a continuing player committed to the legal policy of the FOI Act.

The cost of establishing such an office need not be great, perhaps somewhere in the vicinity of $1–2 million. These costs could be minimised by co-location with the Ombudsman (as suggested by the ALRC/ARC report),[46] or by conferring the FOI Commissioner role on the Ombudsman, and creating a special unit as recommended in the recent Senate Committee report.[47]

It could be argued that the other jurisdictions in Australia do not have such a mechanism, but where there is external review by an Information Commissioner or the Ombudsman there is a tendency for those bodies to act to some extent as the central standard setting bodies for FOI.[48]

Renewal of government commitment to presumption of disclosure

It is 17 years since a Labor Cabinet directed that 'agencies should not refuse access to non-contentious material only because there are technical grounds of exemption under the (FOI) Act'.[49] This position was reinforced by Labor Minister for Justice Duncan Kerr in a letter to

his fellow Ministers in October 1994.[50] A similar direction from the present Attorney–General, who is politically responsible for administration of the FOI Act, circulated to all agencies and publicised at FOI Practitioners' Forums and in other ways, would provide leadership in regenerating administration of the FOI Act and improving compliance by agencies with the legal policy of the Act of favouring disclosure wherever possible.[51]

Reforming the structure of exemptions (or 'withholding provisions')

> *Exemptions should be designed to serve as a tool of last resort, difficult to justify as the lifespan of information increases, and subject to reassessment.*[52]

Despite, or even perhaps because of, submissions to them concerning the need for a reconsideration of the general structure of the exemption provisions,[53] the Senate Committee last year left questions of the exemptions structure *and* specific amendments to exemption provisions until another day. [54] It is important to pressure federal politicians to establish a *process* to (a) address the individual exemptions that urgently need amendment, and (b) examine proposals for recasting the exemption regime in a way more consistent with the Act's broad objects. The two can only be kept apart with difficulty, which is probably one reason the Committee shelved the issue, but it is totally unsatisfactory to be left with no hint of an ongoing process. What that process should be is hard to say, but I believe the Senate Committee should be pressed to ponder that question and not simply wash its hands of the matter.

Even a poor exemptions regime would not be critical if government and its agencies had internalised the real objects of the Act and were prepared to make all information available that would not cause serious harm to legitimate interests. Sadly, this is not the case, and we need to try to amend the exemption structure to create a greater degree of openness enforceable through external review if necessary. The withholding regime would be improved enormously by a successful amendment to the objects clause as recommended above,[55] but there are other major elements that should form part of a package.

Probably the most pressing need concerning existing exemptions relates to the so-called 'commercial in confidence' exemptions and their relation to government agencies and to contractors. As the ARC and the ALRC/ARC report and others have recognised, this area urgently needs both legislative and administrative attention, but will inevitably raise major issues of design. It would be preferable to have information concerning the commercial activities of all agencies dealt with under s 43 of the FOI Act, which has a public interest component in one of its exemptions, rather than have some protected by a blanket protection in Schedule 2, while uncertainty remains as to the application of s 43 to other agencies. In addition, issues raised by the application of the business affairs and breach of confidence exemptions in the context of outsourcing need urgent attention, including the question of adding a public interest test to the other components of s 43(1) in addition to the present unreasonableness test in s 43(1)(c)(i).[56] These interconnected issues are too important to be ignored just because their solution is difficult and will arouse opposition from some quarters.

The most significant *structural* problems with the present exemptions system (or as Rick Snell calls them, 'withholding provisions', which conveys a less rigid impression to decision-makers) come down to the complexity and lack of coherence of the system, the categorical manner in which many of them are expressed that encourages knee-jerk identification of documents as exempt rather than careful consideration in each case of the degree of expected harm and the balance of the public interest, and the general failure of the public interest test to yield much in the way of disclosure.[57] Matthew Smith (above) has identified some progress in the latter respect in AAT decisions, but there is a long way to go. The benchmark here is *Re Eccleston* in which the Queensland Information Commissioner not

only brilliantly expounded the democratic and practical implications of a public interest test but also decided that significant deliberative process documents relating to the impact of the *Mabo* decisions must be disclosed.[58]

One approach to a withholding regime that is focused on the harm of disclosure is that proposed by Snell and Tyson, namely to apply a substantial harm test at the threshold in relation to all withholding provisions:

> A more stringent threshold test (of substantial harm) demonstrates a stronger presumption in favour of openness and, in practice, would reduce the volume of material withheld (without endangering interests that properly deserve protection).[59]

I agree strongly with the general thought, but would propose translating that aim into practice in a slightly different way. Such a model is advanced for the sake of debate and discussion, and not in any doctrinaire way.

It seems to me that the essential requirement of a fair dinkum withholding structure is that in virtually all cases it allows the balancing of all factors of the public interest relevant to disclosure of specific information, starting from a genuine principle (in the words of the New Zealand Act) 'that the information shall be made available unless there is good reason for withholding it'.[60] Introduction of the following elements of a withholding regime would, in my view, make a significant difference:

1. A general provision to the effect that *information is to be made available unless disclosure would cause substantial harm* (i.e. writing into the legislation an equivalent to the approach mandated by Cabinet in 1985). This would be combined with the discretion referred to in 5 below.

2. A *specific substantial harm test* for as many withholding provisions as possible, although not all provisions can be dealt with in the same way. The word 'substantial' needs to be defined in terms of gravity of effect rather than as something that is 'real or of substance and not that which is insubstantial or nominal'.[61] Similar but separate withholding provisions with public interest tests seem to me to be needed for deliberative process information (s 36) and personal privacy (s 41). In addition, I believe it is important to follow the New Zealand lead here and to substitute for the class exemption for Cabinet documents a harm based test. (I am under no illusions about the difficulty of doing this. Apart from the threat to monopoly of information, it would take public servants out of the comfort zone where certain kinds of information don't need to be considered for disclosure on the merits, and it would involve some compliance costs.)

3. *Reshaping the present public interest tests* so that they become integral components of the withholding provisions and take explicit account of the *impact of a decision to withhold information on achievement of the objects of the Act* (as Anne Cossins has long suggested ought to be the case in relation to all exemptions, but certainly those with a public interest component).[62]

   If the test for withholding information where there is a public interest component is put in terms of a requirement to weigh (i) a reasonably expected substantial prejudice to a listed interest against (ii) aspects of the public interest favouring disclosure, including (iii) the gravity of the impact of refusal of the information on fulfilment of the objects of the Act, this would provide decision-makers with guidance as well as making clear to them, the AAT and the courts that the specific democratic deficit of non-disclosure has to be considered in each case.

4. Wherever possible, introducing a *public interest component* into provisions which do not currently have one, so that the actual harm of disclosure and non-disclosure can always be weighed against each other. This is important in relation to the 'commercial in confidence' exemptions, including breach of confidence (s 45), to which I would add legal professional privilege (s 42) and (if it is not repealed as recommended by the ALRC/ARC report) the secrecy provision in s 38. I hope to expand on these suggestions in another place.

5. Introducing *a genuine discretion under the FOI Act* (not just 'outside' it) to disclose information that could be withheld, and extending the protections in ss 91 and 92 to a bona fide exercise of that discretion, subject to proper consideration of the interests of third parties. (It is doubtful whether s 18(2) would be held by the AAT or the Federal Court to provide a discretion, and the matter should be put beyond doubt.)[63] This would provide flexibility to agency decision makers to disclose information that is technically exempt but which would cause no conceivable harm to any legitimate government or third party interests; in the case of third party interests there should be provision for consultations. (In some jurisdictions, such as New Zealand and Canada, some withholding provisions are excluded from such a discretion. If third party interests are safeguarded through consultation, there seems no need to exclude any provisions from the discretion.)[64]

6. *Allowing the Administrative Appeals Tribunal to review the discretion to disclose information*, which, in the (hopefully rare) cases where there is no specific public interest component of a withholding provision, would allow consideration of an overriding public interest in disclosure.

7. *Removal of conclusive certificate provisions* from the deliberative process and Commonwealth–State provisions because they unfairly upset the public interest balancing process; they are not used in this context in State legislation (except now in the Northern Territory). In practice they also play little real role in relation to security, defence and international relations and Cabinet and Executive Council documents, given that in any case AAT composition and procedures for hearing such matters would take account of the information's sensitivity. I agree with the ALRC/ARC report that Executive Council documents do not need special protection as other provisions will suffice.[65]

8. In addition, Peter Bayne has persistently raised the question of *adding a provision along the lines of s 6 of the Queensland FOI Act to require a decision-maker to take account of the identity (and perhaps the particular interest) of the applicant in determining the consequences of disclosure and the balance of public interest*.[66] The ALRC/ARC report endorsed a version of this, and it should be implemented.[67] At a later stage consideration needs to be given to taking this further to cover the particular interest of the applicant.

These changes would, I believe, create a much fairer balance between the interests of citizens and government without in any way imperilling genuinely sensitive information, and would give far greater effect to the open government ideals of the FOI Act than is occurring under the current structure. In light of the present provisions of the Commonwealth FOI Act they may seem radical, but not when viewed in the light of experience elsewhere (especially New Zealand). The important first point is to get consideration of improvements back on the agenda, and to employ something like the above as a basis for discussion.

Disclosure mechanisms

Every avenue should be exploited that will lead to the greater routine availability of government-held information.[68] This was a major thrust of the ALRC's review of the Archives Act,[69] and was a major theme of the Canadian Task Force Report in 2002.[70] Such an approach is a vital element of an administrative culture favourable to release, reserving the really contentious documents for disputation under FOI rules. The major danger here could be if agencies take to using their information resources to raise revenue by adopting sale prices that unduly limit citizen access to such information.[71] Of course, the Swedish example is the light on the hill: the vast bulk of all government documents are made readily and routinely available either immediately or rapidly after oral request.[72]

A suggestion of Greg Terrill's for overcoming the excessive individualism of the FOI Act would be very valuable in shifting FOI from a one-off release mechanism to one where the disclosure of information to an applicant is followed fairly quickly by publication of a meaningful description of the documents released, eg on the agency's website.[73] This would mean that others interested in the material could also obtain access to the information, unless only that applicant is entitled to access it, but the first applicant would normally have some prior advantage, important to news media. If it is impossible at first to obtain legislative change to this effect, it might still be feasible for the Senate to require agencies to table such statements regularly in a way similar to the 'Harradine List' of policy files – the inconvenience of that for agencies could lead to voluntary performance of this task!

In Canada an interested person can find out the terms of requests made under the federal Access to Information Act since 1999, although to learn the results it is necessary to contact the agency concerned.[74] This is only possible because the Department of Public Works and Government Services already records the terms of FOI requests made to all agencies – although it is understood the record of requests is not complete – and a public interest body makes monthly FOI requests for the details. Something similar could happen here through cooperation. That in itself would help broaden the utility of particular requests to the wider public, and I cannot see why we could not take the extra step and make general information available about the result of requests for policy or administrative documents.

I have not sought to raise the question of rights of access to information that is not in documentary form, but it should be considered as part of a study of the wider issues of open government. Access to such information is provided for in the New Zealand *Official Information Act 1982*, and reportedly works well.[75] It allows for some response even when documents do not exist, and the absence of documents may become a matter of comment by the Ombudsman. This might serve to counter the situation, to which the existence of FOI may well contribute, where records are not created in order to facilitate 'plausible deniability', as in a number of the circumstances investigated by the Senate Select Committee on A Certain Maritime Incident Inquiry.[76]

Renewing FOI from outside

Compliance measures

One method for attempting to get the best out of the present flawed FOI system, and for impressing the argument for reform on the government of the day, is to undertake in-depth studies of the compliance of agencies with the requirements of the relevant FOI Act and of the mechanisms by which they or the government as a whole evade compliance. The pioneer of this work is Associate Professor Alasdair Roberts,[77] and his ideas have been further developed by Rick Snell in an Australian context in several important articles.[78] Snell constructs a continuum that includes: administrative activism, administrative compliance, administrative non-compliance, adversarialism and malicious non-compliance, all of which I

can remember encountering in days gone by. I do not have time to discuss the details and implications here, but in a period of government resistance to change in FOI arrangements, development and application of concepts of compliance would allow FOI users and supporters to identify the kinds and levels of agency compliance, work with particular agencies to improve their performance, and to publicise persistent poor performers. Undergraduate and graduate projects of the kind run by Rick Snell at the Universities of Tasmania and Wollongong as part of their administrative law courses can provide a lot of useful information in this area.[79]

Until a specialist monitoring authority is achieved, such work would also benefit from the involvement of the Ombudsman, and perhaps from work by the Administrative Review Council. One or both of these could take a leaf out of the book of the Western Australian Information Commissioner who sponsored a workshop of agency participants to identify best practice standards and performance measures which have since been made available as a practical guide for agencies.[80]

Renewing FOI usage – building a constituency

Among the major flaws of FOI legislation identified by Greg Terrill is that it relies on isolated individuals asking for information by a mechanism which inevitably advantages government because of its role as repeat player.[81] These criticisms serve to indicate the inherent limitations of such legislation, although adoption of the above suggestions on disclosure mechanisms could go some way to redressing the imbalance.

At the same time, FOI is not necessarily limited to use by largely isolated individuals. Many of the early proponents of FOI were strongly influenced by Ralph Nader,[82] and Nader's view in 1970 was that:

> there need to be institutions, be they universities, law reviews, public interest law firms, citizen groups, newspapers, magazines or the electronic media who systematically follow through to the courts on denials of agency information.[83]

The expectation was that, as in the United States, access to government-held information would expose important instances of abuse of power in areas of consumer law, environmental issues, local government and so on. [84] The actual experience has fallen short of the expectations at Commonwealth level, and perhaps to a slightly lesser extent at State level. We have not so far seen much in the way of well-funded organisations with a specifically FOI orientation like the Nader inspired FOI Clearing House, the FOI Coalition, the Reporters' Committee for the Freedom of the Press and many others in the United States.

Among those who are potential members of an FOI constituency are journalists and other media workers, lawyers, politicians, academic students of government, historians, business (one of the largest users of FOI in the United States and Canada), and lobby and community groups.[85] Some of these groups, of course, will have contradictory interests in relation to FOI, and many remain to be convinced that FOI is of more than marginal utility to them.[86]

There has been a good beginning in the study of the use and promotion of FOI by print journalists, and interesting projects are in progress.[87] The preliminary results show a largely spasmodic use of FOI by journalists in Australia, and some work in bringing the existence of the Act to public attention, while there are some solid examples of FOI contributing significantly to major stories.[88] However, journalists are among those most frustrated by the unnecessary width and abuse of discretions.[89] We need studies at the Commonwealth and State levels that look at their needs and those of users such as historians, political scientists, environmental and community groups and so on.[90] Parliamentarians are another group who

need consideration as potential members of an FOI constituency.[91] Such studies may help us to understand how we can involve such groups in active advocacy for new and more effective FOI laws and administration.

Greg Terrill has also suggested we need to foster courses where students are encouraged by their lecturers to use FOI both for obtaining access to information and to test the responsiveness of the system and to keep pushing when they do not succeed. Rick Snell of the University of Tasmania has been doing this for years, but it would be good to see such opportunities in other universities and in areas such as political science and public administration, as well as law. Academic lawyers could act as advisors to students in other disciplines on the mechanics of making requests and challenging refusals. One outcome of work of this kind could be to amass compelling evidence of needless secrecy, as Jim Spigelman (now Chief Justice of New South Wales) did in the 1970s in his book on political secrecy in Australia.[92]

What I want to suggest is that, even if government remains resistant to FOI change, there are still steps that could be taken by a wide range of interested people to achieve greater use of FOI and greater pressure for FOI reform. Even without the private and corporate resources of the United States, surely we could learn enough from the example of organisations like the National FOI Coalition to set up a wide-ranging body to advocate for Open Government measures and against unnecessary restrictions on access.

It would be necessary to coordinate media and legal organisations, including the Communications Law Centre, the Public Interest Advocacy Centre, the Media, Entertainment and Arts Alliance, environmental and community groups, university teachers in public administration, law, politics and history, and so on. A national organisation would need a website and some part-time labour at first, but need not initially require a huge amount of funding. Approaches to Law Foundations and philanthropic foundations for financial support would be needed.

I have no idea whether we can find the depth of interest to make it possible to achieve this end, but I fear that if we do not do so, FOI will continue to degenerate as a useful mechanism to make supposedly liberal democracy more open, responsive and participatory.

Conclusions

To summarise in a very general way, I believe that advocates of open government need to keep up the pressure on the Federal government to make changes to the objects clause of the FOI Act and establish an office of FOI Commissioner that will provide an institutional guarantee of greater integrity in the FOI system than exists at present, and to institute a process for exploring ways of renewing and redesigning the Act and its administration – from exemptions, to fees and charges, to proactive disclosure measures, to review processes and so on. No government body is currently looking at the need to keep the FOI Act abreast of the major changes happening in the structure of the state, and how to shape it and other mechanisms to serve the end of open government in new circumstances. In Alasdair Roberts' words: 'Old FOI laws no longer seem to cover the most important loci of social power.'[93] The price will be growing irrelevance.

Secondly, however, we should seek to build up the intellectual and practical strength of the open government position in the community and the academy, rather than putting all our eggs in the problematic basket of government action. At the same time, there are ways of assessing the compliance of individual agencies with FOI requirements. These can be utilised to help improve the performance even under the present Act.

The threats and realities of war and terrorism can be expected to reinforce other contemporary trends that favour demands for secrecy and the construction of a 'national security state'. At the same time, growth of secrecy can generate countervailing demands for transparency. This happened in the United States and Australia following governmental deceptions in the Vietnam War and the abuse of power in Watergate and its cover-up.[94] Roberts gives a number of recent similar examples,[95] and our experience with government claims of children being thrown overboard and attempts to withhold information about the sinking of SIEV-X may point in the same direction.[96] In this climate of secrecy, there are nonetheless countervailing forces that could favour a renewal of the ideal of greater access to government information as one of the means to allow participation, debate and challenge in relation to government actions and policy.

Whatever the social, economic and political pressures fostering secrecy, it remains true in Roberts' words that the 'right to self-government – which is itself a basic human right – means little if citizens lack the information needed to make intelligent decisions'.[97] Those opposed or indifferent to FOI have not won the intellectual argument. We need to see they do not win the practical argument either.

Endnotes

1 A shorter version of this paper was published in (2003) 103 *FoI Review* 2.
2 Justice Michael Kirby, 'Freedom of Information: The Seven Deadly Sins', Address to Justice, the British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, 17 December 1997, available through the High Court's website.
3 Rick Snell, 'Rethinking Administrative Law: A Redundancy Package for Freedom of Information?' in S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Papers presented at the 1998 National Administrative Law Forum, AIAL (1999), 84 at 96.
4 A Roberts, 'The Informational Commons at Risk' (August 2000) at 3, available at: http://faculty.maxwell.syr.edu/asroberts/research.html, and published in David Drache (ed.), *The Market or the Public Domain: Global Governance or the Asymmetry of Power* (2001), 175 (book not sighted).
5 John McMillan, 'Twenty Years of Open Government – What Have We Learnt?', Inaugural Professorial Address, 20 March 2002, at 7–8, available through ANU Faculty of Law website; since published in a revised form by the ANU Centre for International and Public Law and the Federation Press as Law and Policy Paper 21, 2002.
6 *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill, and aspects of the Archives Bill 1978*, AGPS (1979).
7 Note 5 above at 7 and *passim*.
8 John McMillan, 'Freedom of Information in Australia: Issue closed' (1977) 8 *F L Rev* 379; Ralph Nader, 'Freedom From Information: The Act and the Agencies' (1970) 5 *Harvard Civil Rights – Civil Liberties Law Review* 1.
9 See eg Kent Cooper, *The Right to Know*, New York (1956) quoted in Anthony S Mathews, *The Darker Reaches of Government*, Berkeley (1978) at 34: 'Openness also tends to create "centres of outside analysis" which frequently enrich planning by enlarging the known policy options.'
10 S Zifcak, 'Freedom of Information: Back to the Basics', in R Creyke and J McMillan (eds), *Administrative Law: the essentials*, Papers presented at the 2001 National Administrative Law Forum (2002) 93 at 95–97, and A Roberts, note 4 above; and see R Snell, 'Administrative compliance – evaluating the effectiveness of freedom of information' (2001) 93 *FoI Review* 26.
11 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, *Nationwide News v Wills* (1992) 177 CLR 1, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For a recent commentary, see Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; see also Anne Cossins, 'Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy under Public Interest Immunity and Freedom of Information Law' (1995) 23 *F L Rev* 226 at 264–268, Peter Bayne and Kim Rubinstein, 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *A J Admin L* 107, and Tom Brennan, 'Undertakings of Confidence by the Commonwealth – Are There Limits?' (1998) 18 *AIAL Forum* 8.
12 Note 2 above.
13 See HW Arthurs, 'Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy' (1997) 42 *McG LJ* 29, referred to by Snell, note 3 above at 85.
14 See eg Luc Juillet and Gilles Paquet, 'Information Policy and Governance', *Report 1 – Access to Information Review Task Force* (Canada), available from website: http://www.atirtf-geai.gc.ca.

15 Alasdair Roberts, note 4 above; see also 'Structural Pluralism and the Right to Information' (2001) 51 *University of Toronto Law Journal* 243, 'Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law' (2000) 60 *Public Administration Review* 298, 'Closing the Window: How Public Sector Restructuring Limits Access to Government Information' (1999) 17 *Government Information in Canada/Information gouvernementale au Canada*.
16 *Freedom of Information Laws Amendment Act 1986* and *FOI Memo No. 84*: *FOI Laws Amendment Act 1986*.
17 *Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra (December 1987).
18 *Open government: a review of the federal Freedom of Information Act 1982*, Australian Law Reform Commission (Report No 77) and Administrative Review Council (Report No 40), AGPS (1995).
19 Ron Fraser, 'Freedom of Information: Commonwealth Developments' (2001) 9 *A J Admin L* 34 at 35–36; Rick Snell has referred to the tragedy 'that an increasingly dilapidated, antiquated and flawed *Freedom of Information Acct 1982* (Cth) continues to diminish [the informational] commons' in note 10 above at 30.
20 See in particular ALRC/ARC report, note 18 above, especially para 2.12 and references and chap 4; and Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the administration of the Freedom of Information Act 1982 in Commonwealth Agencies* (June 1999). For a comparative critique, see Rick Snell, 'The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *F L Rev* 575.
21 See Ombudsman note 20 above for practical problems, Snell notes 3, 10 and 20 above and 52 below for critiques of design and structural flaws.
22 On the transformation and its implications for FOI see e.g. Snell note 3 and Arthurs note 13 above; see also discussion in Luc Juillet and Gilles Paquet, note 14 above.
23 News Release, Attorney–General, The Hon. Daryl Williams AM QC MP, 3 February 1998, 'Freedom of Information to apply to Government Outsourcing'; repeated by Departmental spokespersons before a hearing of the Senate Legal and Constitutional Legislation Committee on 5 March 2001 in its inquiry into the FOI (Open Government) Bill – see Fraser, note 19 above at 35, n 10.
24 *Privacy Amendment (Private Sector) Act 2000* (Cth).
25 On the general issue see *The Contracting Out of Government Services*, Administrative Review Council Report No 42 (August 1998). See also Ron McLeod, Commonwealth Ombudsman, 'Commentary' (2001) 29 *F L Rev* 359 at 361–362, and Moira Paterson, 'Commercial in Confidence Claims, Freedom of Information and Public Accountability – A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing', in Robin Creyke and John McMillan (eds), *Administrative Justice – the Core and the Fringe*, Papers presented at the 1999 National Administrative Law Forum (2000), 243.
26 *Australia's federal record: A review of Archives Act 1983*, ALRC Report No 85 (1998).
27 See *Access to Information: Making it Work for Canadians: Report of the Access to Information Task Force*, Government of Canada (June 2002). For supporting materials, see website referred to in note 14 above.
28 See references throughout this paper. Peter Bayne's work has been more technical than that of some of the others and is less referred to here, but has been vital to the development of ideas concerning the design of legislation.
29 Note 3 above.
30 Some of what is said here is based on my submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the FOI Amendment (Open Government) Bill 2000, Submission No 16, or on Fraser, note 19 above. See also Report of the Committee dated April 2001.
31 The 2002 Bill has since been discharged and replaced by the Freedom of Information Amendment (Open Government) Bill 2003 moved by Senator Murray which reflects many of the recommendations of the report of the Senate Legal and Constitutional Legislation Committee.
32 See Second Reading Speech by Senator Murray, 5 September 2000, *Hansard*, Senate, 17318ff; and Explanatory Memorandum circulated by Senator Murray, available on the Senate *Hansard* site.
33 See Committee's report, note 30 at 53–57.
34 McMillan, note 5 above at 9.
35 For more detail see Fraser note 19 above at 36–37.
36 Para 4.9 and recommendation 4.
37 For some other minor suggested changes, see my submission to the Senate Committee, note 30 above, at 13–15. On s 41, see *ibid*, at 24.
38 *Commissioner of Police v District Court of NSW* (*Perrin's Case*) (1993) 31 NSWLR 606 (CA); *Victorian Public Service Commission v Wright* (1986) 160 CLR 145 (HCA) as interpreted by Victorian courts and tribunals. See *News Corp Ltd v NCSC* (1984) 1 FCR 64 and *Searle Australia Pty Ltd v PIAC* (1992) 108 ALR 163 for decisions of the Full Federal Court that there is no 'leaning' position in the Commonwealth FOI Act. Discussed in Cossins, note 11 above at 268ff.
39 (2002) 188 ALR 302.
40 See *Committee Hansard*, Senate, Legal and Constitutional Committee, 5 March 2001 at 2 (evidence of R Snell).
41 Some further changes to the clause in the Bill are suggested in my submission to the Senate Committee, note 30 above.

42 I have drawn here on my submission to the Senate Committee, note 29 above. See also Fraser note 19 above at 37–39.
43 *Administrative Appeals Tribunal Act 1975* (Cth) and *Administrative Decisions (Judicial Review) Act 1977* (Cth).
44 See Canadian ATI Task Force Report, note 27 above, chap 11, as well as ALRC/ARC report, note 18 above especially at paras 4.12–4.13.
45 See Report of the Legislative Review Committee (South Australia) (September 2000) at para. 6.4. See also the call for a Commissioner in association with outsourcing: 'If no monitoring body is appointed, the value of applying the access provisions of the FOI Act would be lost.' Robin Creyke, 'The contracting out of Government Services – Final Report: A salutation' at 4, address at the launch of the ARC's Report No 42, note 25 above.
46 Note 18 above, para. 6.30.
47 Note 30 above, recommendation 1(d) and para. 3.114.
48 See eg the Western Australian Information Commissioner's role in 'ensuring that agencies are aware of their responsibilities under the FOI Act' and periodic report cards on their performance.
49 See *FOI Memo No 77: Government directions on administration of FOI Act* (June 1985), para 6, and *New FOI Memo No 19: Preliminary and Procedural Points* (December 1993), para 2.6.
50 *Freedom of Information Act 1982: Annual Report 1994–95* at Appendix R. Unfortunately for the impact of this letter in later years, it was buried at the back of the report rather than being placed in a prominent position at the front. The change of government in March 1996 would also have deprived it of continuing impact.
51 Unfortunately, the United States Attorney–General John Ashcroft has repudiated the Janet Reno direction, which was to release information unless it is 'reasonably foreseeable that disclosure would be harmful', in order to achieve 'a maximum responsible disclosure of information'. The new direction stresses the nondisclosure of information when there is a 'sound legal basis to do so' and the Department of Justice undertakes to defend agencies which make a decision to refuse information in such cases. Some Democrat Senators have expressed concern with this development. See: *USA Today*, 17 January 2002, available through: http://www.usa.today.com .
52 Rick Snell and Nicole Tyson, 'Back to the drawing board: Preliminary musings on redesigning Australian Freedom of Information' (2000) 85 *FoI Rev* 2 at 3.
53 In particular from Fraser, note 30 above and Snell, note 40 above. A basic structure similar to that summarised here was developed in my submission. It is drawn essentially from Snell & Tyson note 51 above, Snell note 10 above, Cossins note 11 above, and the New Zealand *Official Information Act 1982*. However, the precise form of the proposals may not appeal to those commentators.
54 This issue is discussed in Fraser, note 19 above at 39–40.
55 See especially Cossins note 11 above at 268–274 for the effect of this in practice.
56 For the arguments, see the view of a minority of four members of the ARC in *The Contracting Out of Government Services*, ARC Report No 42, at 73–75, and Moira Paterson note 25 above; Chris Finn, 'Getting the Good Oil' (1998) 5 *A J Admin L* 113; on s 43 and government agencies, see Fraser, 'Freedom of Information: Testing the Limits of FOI Access – Some recent decisions' (2002) 9 *A J Admin L* 207 at 213–215.
57 Despite the comments in *Searle Australian Pty Ltd v PIAC* (1992) 108 ALR 163 at 169 that fulfilment of the first part of an exemption with a balancing public interest test does not cast an onus on the applicant, that is the way they are normally applied; and note Wilcox J in *Arnold v Queensland* (1987) 13 ALD 195 at 209 who referred to a prima facie exemption if information falls within the first part of an exemption with a balancing public interest test.
58 *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; see also discussion by Cossins, note 11 above at 271–274 and note 61 at paras 109.8.3–109.9.6.
59 Paraphrased in Queensland Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland: Discussion Paper No.1* (8 February 2000), at 18.
60 *Official Information Act 1982* (NZ), s 5.
61 This is the view taken in one line of cases in the AAT based on the view of Muirhead J in *Ascic v Australian Federal Police* (1986) 11 ALN N184 at 185; see eg Forgie DP in *Re Electronic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449 at [83]. For a different view represented in many AAT cases, see eg Beaumont J in *Harris v Australian Broadcasting Corporation* (1984) 50 ALR 551 at 564, and Hall DP in *Re James and ANU* (1984) 6 ALD 687 at 699.
62 See Anne Cossins, *Annotated Freedom of Information Act New South Wales* (1997) at paras 1.13.11–1.13.12.
63 ALRC/ARC report, note 18 at para 8.3.
64 See Snell note 20 on New Zealand.
65 See note 18 above, para 9.14 and recommendation 50.
66 See P Bayne, submission to the ACT Legislative Assembly's Standing Committee on Justice and Community Safety, point 5, and 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 *F L Rev* 287 at 305 and 320–321.
67 ALRC/ARC report, note 18 above, para 4.11 and recommendation 6; see also clause 11A in Schedule 1 of the FOI (Open Government) Bill 2002.
68 See ALRC/ARC report, note 18 above, para 4.17.

69 ALRC, note 26 above chap 18, especially paras 18.8–18.24.
70 Note 27 above, chap 8.
71 See ALRC/ARC report, note 18 above, para 6.26.
72 J Lidberg, 'Freedom of Information as a journalistic tool – a comparative study between Western Australia and Sweden' (2001) 95 *FoI Rev* 42.
73 Greg Terrill, 'Individualism and freedom of information legislation' (2000) 87 *FoI Rev* 30 at 31.
74 The database is available on the following website set up by Alasdair Roberts: http://track.foilaw.net. Note that the Canadian Task Force (note 27 above) recommended that 'information on completed requests across government be made available to the public on a government Web site' (Recommendation 7.3). Under the US Electronic FOI Act there is 'a requirement to post documents or links to information for which there have been multiple access requests' (Canadian Task Force Report at 119).
75 See Snell, note 20 above.
76 See http://www.aph.gov.au/senate/committee/maritime_incident_ctte/index.htm, and Patrick Weller, *Don't Tell the Prime Minister* (2002). The Committee's report was published on 23 October 2002.
77 Previously of Queen's University, Ontario and now Director of the Campbell Public Affairs Institute at the Maxwell School of Syracuse University. See his paper on 'Limited access: Assessing the health of Canada's freedom of information laws', April 1998, and many other papers and articles available from website at note 4 above; and see note 15 above.
78 See notes 3 and 10 above.
79 Numerous undergraduate studies of this kind have been done through the University of Tasmania Law School and the University of Wollongong under Rick Snell. See http://www.foi.law.utas.edu.au/ research link.
80 See Office of the Information Commissioner Western Australia, *FOI Standards and Performance Measures*, May 1998, available from: http://www.foi.wa.gov.au/.
81 Greg Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (2000), eg at 115, and article referred to in note 73 above; R Hazell, 'Freedom of Information in Australia, Canada and New Zealand' (1989) 67 *Public Administration* quoted R Snell, 'In search of the Freedom of Information constituency: Case 1 – The Media' (1998) 78 *FoI Review* 81 at 82: 'Yet Hazell notes that this direct empowerment in the absence of informational go-betweens was overly optimistic: "with the wisdom of hindsight it was naïve to suppose that individual citizens ever would be the major users of the legislation. The public are seldom direct consumers of government information: they rely on others (the media, interest groups, political parties) to process the information for them and to select items which will appeal to their own particular range of interests and prejudices."'
82 Eg Terrill, note 81 above at 17 and 91–92; see also R Fraser, 'FOI and citizen participation in public policy and decision making', Grad Dip in Pub Law essay (1986) at 5–6 and Appendix 1 (author's possession).
83 Quoted Snell, note 3 above at 105.
84 See McMillan, note 7 above at 389–391. And note for use of the US FOIA up to the early 1980s, Harold C Relyea and Suzanne Cavanagh, 'Press Notices on Disclosures made Pursuant to the Federal Freedom of Information Act, 1972–1980' (1982) 3 *Journal of Media Law and Practice* 144.
85 See Snell, note 3 above at 105–106.
86 See Roberts, note 4 above at 28, on the difficulty today of constructing 'coalitions that are powerful enough to push for adoption of policies that promote openness'.
87 For other recent writing on the media and FOI see eg Nigel Waters, *Print Media Use of Freedom of Information Laws in Australia*, Australian Centre for Independent Journalism, University of Technology, Sydney (January 1999), and 'Freedom of information works for the media in New Zealand' (1998) 77 *FoI Rev* 66; Snell, note 80 above; Ross Coultheart, 'Why the FOI Act is a joke or 'don't shoot the media, we're doing our best'' (1999) 81 *FoI Rev* 43; Lidberg, note 71 above; Anina Johnson, 'You Don't Know what you've Got until it's Gone: The French Media's Use of FOI' (2000) 85 *FoI Rev* 6; Paul Atallah and Heather Pyman, 'How Journalists Use the Federal Access to Information Act', *Report 8 – Access to Information Review Task Force* (January 2002); note also a work with a chapter on FOI by Rick Snell and Matthew Ricketson: Stephen Tanner (ed), *Journalism: Investigation and Research*, Pearson (2002).
88 Waters (1999), note 87 above, especially at 15–25.
89 See e.g. Coultheart note 86 above.
90 Note that Terrill, note 81 above, is an example of an historical study where an attempt to use the provisions of the Archives and FOI Acts for research purposes was accompanied by a considerable amount of frustration – see eg 85 and 121–122.
91 On parliamentarians, see Rick Snell and James Upcher, 'Freedom of information and parliament: A limited accountability tool for a key constituency?' (2002) 100 *FoI Rev* 35.
92 Jim Spigelman, *Secrecy: Political Censorship in Australia*, Sydney (1972).
93 Note 4 above at 28.
94 See Terrill, note 81 above at 45–49.
95 Roberts, note 4 above at 12–15.
96 See note 76 above, and resources at: http://www.sievx.com/.
97 Note 4 at 29.