TOO MUCH OF A GOOD THING? BALANCING TRANSPARENCY AND GOVERNMENT EFFECTIVENESS IN FOI PUBLIC INTEREST DECISION MAKING

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'A democracy requires accountability, and accountability requires transparency.'[1]

The 'new age' of transparency heralded a raft of reforms to the *Freedom of Information Act 1982* (Cth) (*FOI Act 1982*) that shifted control of information away from government in a bid to increase transparency and accountability. Conclusive certificates, for example, were abolished in 2009[2] and a number of exemptions, including the exemption for deliberative documents, were made conditional on a single public interest test in 2010.[3] Transparency is not, however, an absolute and cannot be an end in itself; it has value only insofar as it enhances accountability. Even then, the proper balance must be struck between transparency, efficiency and effectiveness.

This paper considers the role and importance of transparency and its relationship to the public interest test in the *FOI Act 1982*. It examines the basis and impact of recent reforms and asks whether they do, in fact, strike the right balance in respect of the deliberative processes of government. Have the reforms resulted in more accountability or less? Is there a danger that we now have 'too much of a good thing', that is, transparency, but that efficiency, effectiveness and even accountability have been inappropriately compromised?

A culture of secrecy

While our public institutions exist to serve the community and should, therefore, be open to public scrutiny, they have their own internal drivers that militate against transparency and public accountability. Early to mid-20th century scholars studying government and bureaucracy, such as Max Weber and Carl J Friedrich, came to the conclusion that one of the defining characteristics of such organisations is a tendency to protect, rather than share, information. Friedrich based his analysis on an empirical examination of the central administrative bodies in a number of countries including England and the United States.[4] He noted that there was a time when *arcana imperii*, or State secrets, was the prevailing characterization of information in the hands of government, which was not routinely shared with those outside government.

Friedrich's empirical studies highlighted the fact that organisations consistently put rules and regulations in place to enforce secrecy, particularly in relation to controversial or competitive matters. This is certainly true at the federal level in Australia. In a 2009 report, the Australian Law Reform Commission identified over 500 provisions in 176 pieces of legislation that imposed some obligation of secrecy.[5] In addition, legal obligations of confidence, both at common law and in equity, will apply to government bureaucrats in some circumstances.

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More recent research into organisational theory considers the informal elements that permeate an organisation such as group dynamics and culture. If one of the cultural values of an organisation is secrecy it is likely that decision makers within the organisation will also place a value on secrecy because compliance with cultural norms and values is rewarded. Florence Heffron notes the difficulty of changing organisational culture because the values of the organisation are often internalized and unconscious.[6] There is evidence that government bureaucrats, like members of any other organized group, tend to identify with their group and because of this:

> In making decisions their organizational loyalty leads them to evaluate alternative courses of action in terms of the consequences of their action for the group.[7]

The need for and limits of transparency

Transparency, it seems, does not come naturally to governments and even where disclosure of documents is allowed, or even required, by law it may be that conflicting cultural or organisational factors are at work. This apparent tendency to secrecy has been widely criticised in relation to the approach of the current Australian Government on issues such as border protection;[8] foreign aid;[9] the dismantling of the Office of the Australian Information Commissioner[10] and also more generally.[11] The tendency towards secrecy must always be borne in mind when discussing accountability measures, including transparency.

On the other hand, it is worth considering whether too much transparency might have a downside and whether the 2010 reforms have found the most appropriate balance between too little disclosure and too much. Transparency is often brandished as a value in its own right. Attorney-General Ramsey Clark, in introducing FOI legislation for the first time in the United States in 1967, referred to disclosure under the *Public Information Act* as a 'transcendent goal'.[12] Transparency in liberal democratic theory is seen as one of the pillars supporting integrity in government and public policy and as an antidote to corruption.

Albert Meijer, however, discusses some of the problems with transparency such as the costs, including opportunity costs, of realisation; the avoidance strategies that may evolve in response; and the possible erosion of trust and confidence as a flood of unsorted information is disclosed leading to confusion and uncertainty. He notes the work of Mark Bovens, 'who warns against the dark side of transparency and its potential to drag government through the mud time and time again.'[13] He concludes that transparency has an upside and a downside and that it is necessary to consider both if the debate is to be helpful.

There is a need for a more nuanced and instrumental approach to transparency: transparency is only valuable when it is actually contributing to effective decision-making and accountability. David Heald lists a range of other values that may be traded off with increasing levels of transparency including effectiveness; trust; autonomy and control; confidentiality, privacy and anonymity; fairness; legitimacy; and even accountability itself.[14] He illustrates his point with the apt metaphor that while some sunlight is a good thing, overexposure can be damaging.[15]

This paper focuses on two areas in which the drive for transparency needs to be carefully balanced: effectiveness and accountability. Heald suggests, for example, that too much transparency, or the wrong kind of transparency, can disrupt organisational functioning. He suggests that overexposure of the process of policy making is likely to have the result that 'real policy-making shifts backwards into secret confines, with proposals less subject to challenge … and poorly documented'.[16] This will result in less effective decision-making and less accountability. Statements by senior federal bureaucrats indicate that this is, indeed, what is happening[17] and in response it is important to consider carefully whether the 2010

amendments to the *FOI Act 1982* found the correct balance between requiring too little disclosure and too much.

Freedom of Information legislation as a balancing act

FOI legislation is often viewed as a tool for promoting transparency. Moira Paterson, for example, writes of freedom of information laws as belonging to the category of 'laws which contribute to the objective of transparency' contrasted with 'laws which operate to detract from transparency'.[18]

Considering, however, that a large part of the *FOI Act 1982* is concerned with establishing exceptions and exemptions from the general right of access to information, a better approach is to consider FOI legislation as a tool for achieving the balance between the disclosure of too much and too little information. On the one hand, there are the overall goals of the legislation, which can broadly be described as enhancing accountability of policy and decision making and encouraging public participation in the democratic process.[19] On the other hand is the recognition, expressed primarily in the form of exemptions to the general right of access to information, that this right is not absolute and is limited by other public interest concerns.

These competing interests have to be balanced when responding to requests for information. In *Harris v Australian Broadcasting Corporation*, Beaumont J said 'in evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other.'[20]

Problems arise, however, in relation to how a decision maker ought to decide, in individual cases, whether the interest in confidentiality outweighs the interest in disclosure. In particular, there is a question about the legitimate role of executive government in balancing the public interest in individual cases.[21] Richard Mulgan has suggested that in freedom of information cases 'it is appropriate that the government should not act as judge in its own cause but should refer the decision to an independent body'.[22] The implication is that it is unwise to trust to government the task of balancing public interest arguments, and that self-interest, rather than public interest, might motivate government decisions to withhold information.[23] This perception has problematic consequences; unless there is public confidence in government FOI decisions, it is unlikely that the regime will deliver the promised benefits of enhanced accountability and public participation.

The 2010 amendments to the *FOI Act 1982* attempted to tackle the problem of public interest decision making. This paper examines those changes in the context of internal working documents and concludes that they compromise the ability of the decision maker to balance the various public interest considerations in play and that they are likely to lead to disclosure avoidance behaviour which will reduce, rather than increase, accountability.

***FOI Act 1982* prior to amendment**

The focus of this paper is the public interest in the disclosure of government's 'internal working documents': documents that relate to the 'deliberative processes' or 'thinking processes' of government.[24] In order to understand the recent amendments, it is first necessary to understand the approach taken to balancing the competing public interests of transparency and effectiveness in the original legislation.

Balancing tools

If the role of FOI legislation is to strike the balance between too much and too little information, then two of the key tools that the *FOI Act 1982* used to strike that balance in relation to internal working documents were the principle of maximum disclosure and a public interest test.

Principle of maximum disclosure

Prior to the amendments, the principle of maximum disclosure was established in the objects clause (s 3) and in s 11 as follows:

> 3. (1) The object of this Act is to extend **as far as possible** the right of the Australian community to access to information in the possession of the Government of the Commonwealth by—
> ...
> (b) creating a **general right of access** to information in documentary form in the possession of Ministers, departments and public authorities, **limited only by exceptions and exemptions necessary for the protection of essential public interests** and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities.
>
> 11. Subject to this Act, every person has a **legally enforceable right to obtain access** in accordance with this Act to—
> (a) a document of an agency, other than an exempt document; or
> (b) an official document of a Minister, other than an exempt document.
> [Emphasis added]

The effect of these provisions was to establish disclosure as the default position unless the government could demonstrate that this would be contrary to the public interest (or private and business interests). Thus, the starting point was that there was an over-arching public interest in disclosure.

Public interest test

At the same time, however, the legislation recognised, through the inclusion of exemptions, the importance of government being able to withhold information where necessary. The onus was on government to show why, in particular cases, an exemption applied such that disclosure would be contrary to the public interest. In relation to internal working documents, the relevant exemption was set out in section 36:

> **Internal working documents**
> 36 (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—
> (a) would disclose matter in the nature of, or relating to, opinion advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
> (b) would be contrary to the public interest.[25]

Alongside this was the power to issue conclusive certificates[26], the effect of which was that the responsible Minister could conclusively certify that internal working documents were

exempt from release under the Act because disclosure would be contrary to the public interest.

Simon Murray has noted that section 36 'is concerned with instances where public disclosure of a document would prejudice the integrity and viability of the decision making process'.[27] The concept of public interest was not defined in the legislation. This lack of definition can be seen either as the legislation's biggest problem, or its greatest advantage. It was a strength because it meant that all relevant factors could be taken into account and given appropriate weight, making it highly adaptable to circumstances and changes over time. But it was a weakness because it left open two questions:

- what public interest concerns might outweigh the interest in disclosure, and
- what weight ought to be given to those public interests?

There was no universal agreement in relation to these issues, and early Administrative Appeal Tribunal (AAT) case law took a relatively cautious approach, finding that a number of factors—including the seniority of those involved, the possible inhibition of frankness and candour in future, and the likelihood of confusion or unnecessary debate—would lead towards a finding that the information in question ought not be disclosed.[28] Academics, including Paterson,[29] Peter Bayne and Kim Rubenstein,[30] and Rick Snell[31] criticised this approach, suggesting that reliance on these factors as a matter of course was inappropriate, and contrary to the objects of the Act. Over time, the approach of the AAT shifted, with the *Re Fewster*[32] line of cases, for example, taking a more restrictive view of the application of these factors, such that by 1995 Snell noted that the AAT had begun to favour a presumption of disclosure.[33] The case law seemed to be moving gradually in the direction of greater transparency, without the need for any legislative action.

In 2006, however, the High Court in *McKinnon v Secretary, Department of Treasury*[34] found that it had limited power to review the Government's assessment of the public interest in cases where a 'conclusive certificate' had been issued. Judith Bannister concluded that the decision in *McKinnon* effectively precluded any real review of government decision-making in this area,[35] a concern that was echoed by mainstream journalists.[36] In the following year, the Australian Labor Party placed FOI reform at the heart of its election platform,[37] a pledge which led, in turn, to a series of legislative amendments.

2009/2010 amendments

In 2010, the *Freedom of Information (Reform) Act 2010* (Cth) inserted into the *FOI Act 1982* a new objects clause and public interest test. Whilst several other changes—including the abolition of conclusive certificates[38] and the establishment of the position of Information Commissioner with full powers of merits review[39] amplified the impact of these amendments on internal working documents.

In the *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (Hawke Review) Allan Hawke AC stated:

> The purpose of exemptions is to balance the objective of providing access to government information against legitimate claims for the protection of sensitive material. The exemptions provide the confidentiality necessary for the proper workings of government.[40]

This suggests that the need for balance is still at the heart of the legislation. A closer look, however, suggests that the legislation has been re-focussed away from balancing competing interests in favour of promoting transparency.

Still a balancing act?

As noted above, properly conceived, the function of FOI legislation is to strike the balance between too much and too little disclosure. The original objects clause expressly acknowledged that the right of access to information was limited 'by exceptions and exemptions necessary for the protection of essential public interests'. The new objects clause substituted by the *FOI (Reform) Act 2010*, however, removes the express reference to this limitation and provides in part:

> **3 Objects—general**
> (1) The objects of this Act are to give the Australian community access to information held by the Government...
> (2) The Parliament intends, by these objects, to **promote Australia's representative democracy** by contributing towards the following:
> (a) **increasing public participation** in Government processes, with a view to promoting **better-informed decision-making**;
> (b) **increasing scrutiny, discussion, comment and review of the Government's activities** … [Emphasis added].

The exemptions themselves still exist, although in slightly different form; but the change in the objects clause indicates that the purpose of the legislation is no longer to strike the balance between transparency and the other interests, but to promote transparency.

Blunting the balancing tools?

In addition to shifting the focus of the legislation away from balance, the amendments have 'blunted' the tools available to decision makers assessing the public interest in order to promote transparency outcomes. As noted above, the tools used to strike the disclosure balance in relation to internal working documents in the original legislation were the principle of maximum disclosure and the public interest test. The amendments strengthened the principle of maximum disclosure through the changes to the objects clause set out above. The real change, however, has been in relation to the public interest test.

The *Freedom of Information (Reform) Act 2010* (Cth) separated exemptions into two categories. In the first category are 'absolute' exemptions, meaning that if the document falls under the definition of the exemption, it is exempt, with no further consideration of public interest.[41]

The second category covers 'conditional' exemptions. Even a document that falls within the exemption will be released unless the government can demonstrate that to do so would be contrary to the public interest. The 'internal working documents' exemption previously found in section 36 was re-cast as a conditional exemption in section 47C, and a single public interest test was applied to all conditional exemptions by section 11A(5):

> The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

The application of a public interest test in relation to deliberative documents is a longstanding practice; what is striking about the amendments is the attempt, if not quite to define the public interest, then at least to determine which factors must and must not be taken into account when considering the public interest by the insertion of section 11B into the *FOI Act 1982*.

Relevant factors cannot be taken into account

New section, 11B, states that it is to be used for the purpose of 'working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest'. It does so by listing factors that may, and may not, be taken into account when conducting the public interest balancing test, dividing them into 'factors favouring access' and 'irrelevant factors'.

As a result of the insertion of section 11B the following factors cannot be taken into account:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
(aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
(b) access to the document could result in any person misinterpreting or misunderstanding the document;
(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
(d) access to the document could result in confusion or unnecessary debate.

These factors, or variations of them, have in the past been used to support an argument that to disclose internal working documents would compromise effective government decision making. Most notably, the AAT in the *Howard* case, discussed above, found that the likelihood of disclosure causing confusion or unnecessary debate, or the high seniority of the author of the document, were factors which might suggest that disclosure was not in the public interest. Reliance on these factors is now prohibited following the amendments to the legislation. As noted above, the approach of the AAT had begun to shift by the time of the amendments, and it was less routinely accepted that the presence of these factors could lead to compromised government effectiveness if the information was disclosed.

This shift in understanding of the public interest does not necessarily mean, however, that these factors will never, in any circumstance, or at any time in the future, be relevant to a decision on disclosure. Mulgan has noted that judgements about the public interest are essentially political in nature,[42] meaning that what constitutes the public interest shifts with time, circumstances and changing political views. Indeed the 1995 ALRC report on the *FOI Act* recommended against legislative guidelines on the public interest because:

> Just as what constitutes the public interest will change over time, so too may the relevant factors. For this reason, the Review considers that administrative guidelines issued pursuant to the Act are generally preferable to legislative guidelines.[43]

It is unclear why the government went against this advice. Whatever the reason, the result is that we can no longer be confident that the *FOI Act* is capable of ensuring that decision makers can take all relevant factors into account in all cases. If, as a result of the inclusion of this list of factors in section 11B, the government is unable to make out a legitimate case that effectiveness will be compromised by disclosure, then an increase in transparency will have come at the price of effectiveness that is compromised, and could result in disclosure of information that is contrary to the public interest.

The weight attributed to relevant facts

The original public interest test in section 36 provided complete flexibility in respect of the weight that ought to be given to particular factors in individual cases. The amended

legislation has changed this situation. The change was recognised by the Hawke Review, which stated:

> The test is **weighted in favour of giving access** to documents so that the public interest in disclosure remains at the forefront of decision making. It is not enough to withhold access to a document if it meets the criteria for a conditional exemption. Where a document meets the initial threshold of being conditionally exempt, it is then necessary for a decision-maker to apply the public interest test.[44] [Emphasis added]

This is essentially a restatement of the principle of maximum disclosure: that disclosure ought to be the default position, unless to disclose is contrary to the public interest. However the legislation goes further than this, promoting disclosure not just through the structure of the Act, but by making it easier to make a case for the public interest in transparency, and more difficult to make a case for competing public interests such as government effectiveness, in individual cases. It does this by including a list of factors that support disclosure, but omitting to include a list of factors which support withholding information.

List of factors supporting disclosure

In addition to setting out factors that may not be taken into account, section 11B also sets out a list of factors that will support disclosure of information:

> **Factors favouring access**
> (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
> (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
> (b) inform debate on a matter of public importance;
> (c) promote effective oversight of public expenditure;
> (d) allow a person to access his or her own personal information.

These factors are so broadly drafted that it is likely that at least one will be present in every case: each case is likely to start with a weight on the scales in favour of disclosure. Further, each of these factors is 'generic' in the sense of not being case-specific. By contrast, government arguments about the harm that might result from disclosure are generally required to be specific and to be accompanied by persuasive evidence in order to be accepted by the Office of the Australian Information Commissioner and AAT.[45] The effect of this amendment is that whilst specific evidence is required in order to make a case for withholding information, generic arguments may be sufficient for a case to disclose information. This results in an in-built imbalance—a 'tilting' towards disclosure.

No list of factors to support withholding

This 'tilting' effect of the amendments is intensified by the fact that section 11B contains no list of factors that may be used to support non-disclosure. In his second reading speech, Anthony Byrne, Parliamentary Secretary to the Prime Minister, said that this was 'in keeping with the intention of the reforms to promote disclosure'.[46] The Explanatory Memorandum to the 2009 FOI (Reform) Bill[47] and the Hawke Review suggest a slightly different explanation:

> Factors favouring non-disclosure are not listed because most conditional exemptions include a harm threshold, for example, that disclosure would, or could be reasonably expected to, cause damage to or have a substantial adverse effect on certain interests. Where a decision-maker is satisfied that an initial harm threshold is met that is in itself a factor against disclosure.[48]

This analysis does not assist in relation to the exemption for deliberative documents: section 47C does not include a harm threshold. It exempts from disclosure any 'deliberative matter', without explaining the harm that the existence of the exemption is designed to prevent. This places those seeking to demonstrate the application of the exemption in a uniquely difficult position; there is no list of factors that may support non-disclosure, and the exemption itself provides no guidance. The Hawke Review acknowledges this and says that the 'absence of a clear indication of the harm that the exemption is designed to protect results in the exemption being subject to differing interpretations and difficult to apply.'[49] The Information Commissioner's published guidance, whilst containing a list of factors that might support an argument that disclosure is contrary to the public interest, makes no specific reference to potential harm to the deliberative process.[50]

In the absence of both a list of factors favouring non-disclosure and a 'harm threshold' in the exemption itself, decisions about the release of internal working documents are likely to be weighted in favour of disclosure.

Greater weight for transparency

The aim of the amendments was to promote greater transparency in order to combat the culture of secrecy described above. The importance of, and priority given to, transparency is appropriately reflected in the very existence and structure of the Act; in the general right to information and in the principle of maximum disclosure.

However whilst promoting greater transparency was one of the aims of the Act, when making individual decisions the approach must be to:

> identify factors favouring disclosure and factors not favouring disclosure in the circumstances and to determine the comparative importance to be given to these factors.[51]

The inclusion of a list of factors in section 11B interferes with this process, making it more difficult for decision makers to determine the relative importance of relevant factors by tipping the scales towards disclosure in individual cases. The amendments make it easier for decision makers to make a case for the public interest in disclosure than to make a case for the public interest in non-disclosure. This does not necessarily mean that the public interest in disclosure is in fact stronger than the public interest in withholding the information; rather the amendments constrain the power of the decision maker to draw conclusions on the relevance and weight of factors, by weighting the scales in favour of disclosure in all circumstances. It blunts the public interest balancing tools available to decision-makers in an attempt to achieve, not the correct balance, but a particular result: transparency. The result, in short, is legislation which gives greater protection to the public interest in transparency than to the public interest in effective government decision-making. If it is accepted that there is a public interest in effectiveness and integrity of government decision-making—as the very existence of the exemption for internal working documents suggests—then it is unclear why, in this context, this interest is not given equal protection. In the context of FOI, it seems, some public interests are 'more equal than others'.

Effect of the changes: more transparency but less accountability?

Part of the problem with the rhetoric surrounding the amendments is that it does not acknowledge that the increase in transparency comes at the price of reduced protection for competing public interests, including the public interest in effective government decision-making. Indeed, it comes at the price of blunting government's public interest decision making tools in ways which might reach beyond the *FOI Act 1982*.[52] Nevertheless, as long as this trade-off is acknowledged, it might still be argued that the amendments achieve a

proper balance if the reduction in effective government decision making results in greater transparency which leads, in turn, to an increase in accountability and public participation.

Questions arise, however, as to the overall impact of the amendments. Whilst the amendments may have made withholding some documents more difficult, it is unlikely that they will have resulted in genuine cultural change—a belief in or commitment to the benefits of transparency. Indeed on one view, these amendments have not only failed to bring about cultural change, but have encouraged government to engage in activity aimed at avoiding disclosure. For example, whilst the Hawke Review did not accept that the *FOI Act 1982* has a negative impact on the provision of 'frank and fearless advice',[53] a number of senior bureaucrats have since expressed views consistent with those of the Secretary to the Treasury, John Fraser, that:

> Freedom of information is not a bad thing in itself. But open policy debate means people have got to be candid. And at the moment a lot of it is done orally, which is a pity. It's a pity for history and it's a pity because I'm not smart enough to think quickly on my feet. And writing something down is a great discipline.[54]

The paradoxical result, then, is that whilst the legislation seeks to promote transparency, it might have resulted in less accountability: if less is written down, then there is less to disclose.

Conclusion

In the context of the culture of secrecy, it is understandable that people look to the *FOI Act 1982* as a way of promoting greater openness. Certainly robust legislative requirements—including a principle of maximum disclosure—are necessary preconditions to an open, transparent government.

But legislation that aims to promote transparency without an appropriate balance between disclosure and non-disclosure is misguided. Such legislation makes it more difficult for government to withhold information, seemingly on the basis that the government routinely withholds information to protect itself, rather than the public interest. Of course that sometimes happens, and checks and balances need to be put in place to guard against it. Abolishing conclusive certificates and establishing the position of Information Commissioner were steps towards improving that oversight.

But for 'public interest' decisions to be meaningful, decision makers must be able to take into account all relevant factors, and must be free to attribute to those factors appropriate weight in the circumstances. If we accept that one of the legitimate roles of executive government is the balancing of the public interest in individual cases, subject to review, then we must ensure that the executive has the tools to do that properly, and then make whatever changes are necessary to culture to ensure that the tools are used correctly. We are unlikely to solve the problem simply by blunting the tools.

Endnotes

1 Barack Obama (US President), *Freedom of Information Act: Memorandum for Heads of Executive Departments and Agencies* (2009).
2 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth).
3 *Freedom of Information (Reform) Act 2010* (Cth) sch 3, cl 30.
4 Carl J Friedrich, 'Some Observations on Weber's Analysis of Bureaucracy' in Robert Merton et al (eds), *Reader in Bureaucracy* (The Free Press, 1952) 27, 29.
5 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 22.

6 Florence Heffron, *Organization Theory and Public Organizations: the Political Connection* (Prentice Hall, 1989) 219.
7 Herbert A Simon, 'Decision-Making and Administrative Organisation' in Robert Merton et al (eds), *Reader in Bureaucracy* (The Free Press, 1952) 185, 190.
8 Heath Aston, 'Abbott Government Under Fire for Secret Bid to Hand Back Asylum Seekers to Vietnam', *Sydney Morning Herald* (online) 17 April 2015.
9 Adam Gartrell, 'Savage Cuts and Secrecy: the Abbott Government's New Aid Paradigm', *Sydney Morning Herald* (online) 14 June 2015.
10 Sophie Morris, 'Abbott Government Weakens FOI and Public Service Disclosure', *The Saturday Paper: The Monthly* (online) 20 June 2015.
11 Rodney Tiffen, 'The Abbott Government's War on Transparency', *Inside Story* (online) 5 June 2014.
12 Ramsey Clark (US Attorney-General), *Memorandum for the Executive Departments and Agencies Concerning Section 3 of the Administrative Procedure Act* (1967).
13 Albert Meijer, 'Transparency' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 507, 519.
14 David Heald, 'Transparency as an Instrumental Value' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance* (Oxford University Press, 2006) 59, 60.
15 Ibid.
16 Ibid 62.
17 Stephen Easton, 'FOI Laws: Fixing the Chilling Effect on Frank Advice' *The Mandarin* (online) 18 June 2015.
18 Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005), 2.
19 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Freedom of Information, Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979) 21-22.
20 *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.
21 See, for example, Peter Bayne, 'Freedom of Information: Democracy and the Protection of the Processes and Decisions of Government' (1988) 62 *Australian Law Journal* 538 for an early discussion of the different approaches to the factors relevant to the public interest test under *FOI Act 1982*.
22 Richard Mulgan, 'Perspectives on the Public Interest' (2000) 95 (March 2000) *Canberra Bulletin of Public Information* 5, 9.
23 Rhys Stubbs refers to 'Australia's antagonistic environment of public administration' (Rhys Stubbs, 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43(4) *Australian Journal of Political Science* 667, 672). See likewise the reference to a 'longstanding battle between the courts and Ministers and their bureaucracies for control over the release of government information' in Gerard Craddock, 'The *Freedom of Information Act 1982* and Review on the Merits' (1985) 8 *University of New South Wales Law Journal* 313, 314.
24 See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 (14 March 1984) for a discussion of the types of document covered by this exemption, including both policy and non-policy documents.
25 The section goes on to explain that it does not apply to purely factual material and certain reports.
26 The power to issue conclusive certificates also applied to *FOI Act 1982* s 33 (documents affecting national security); s 33A (documents affecting relations with the states); s 34 (cabinet documents); and s 35 (executive council documents).
27 Simon Murray, 'Freedom of Information Reform: Does the New Public Interest Test for Conditionally Exempt Documents Signal the Death of 'the *Howard* Factors'?' (2012) 31(1) *The University of Tasmania Law Review* 58, 64.
28 *Re Howard and the Treasurer* (1985) 7 ALD 626, 634–635.
29 Paterson, above n18 at 294–299.
30 See Bayne, above n21; see also Peter Bayne and Kim Rubenstein, 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *Australian Journal of Administrative Law* 107.
31 See, for example, Rick Snell, 'The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues from the Heart of Government' (1995) (57) *Freedom of Information Review*.
32 *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN 266.
33 Rick Snell, 'The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited' (1995) 2 *Australian Journal of Administrative Law* 197.
34 (2006) 229 ALR 187.
35 Judith Bannister, *'McKinnon v Secretary, Department of Treasury*. The Sir Humphrey Clause - Review of Conclusive Certificates in Freedom of Information Applications' (2006) 30 *Melbourne University Law Review* 691.
36 See, for example, Nicola Roxon, 'Freedom of Information Under Attack', *The Advertiser* (Adelaide), 8 September 2006; 'The Failure of FOI', *The Canberra Times* (Canberra) 9 September 2006; 'Calls for Urgent Reform of FOI', *The Canberra Times* (Canberra) 7 September 2006.
37 Kevin Rudd and Joe Ludwig, 'Government Information: Restoring Trust and Integrity', Election Policy Document (2007).
38 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth).
39 *Information Commissioner Act 2009* (Cth).

40 Allan Hawke, 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*' (2013) 39.
41 Examples of such exemptions include those which cover documents affecting national security, defence or international relations (*FOI Act 1982* s 33), and Cabinet documents (*FOI Act 1982* s 34).
42 Mulgan, above n22, 9.
43 Australian Law Reform Commission, *Open Government: A Review of the Federal* Freedom of Information Act 1982, Report No 77 (1995); Administrative Review Council, Report No 40 (1995) [8.14]. The only exception was a recommendation that the legislation make clear that 'potential (or actual) embarrassment is not a valid criterion.'
44 Hawke Review, above n40, 42.
45 See, for example, *Re Cleary and Department of the Treasury* (1993) 31 ALD 214 at 221–arguments about the provision of free and frank advice 'will not be accepted 'in the absence of compelling evidence'; likewise in [*Re Fewster and Department of Prime Minister and Cabinet (No 2)* [1987] AATA 722 at [11]], such arguments will not be accepted 'unless a very particular factual basis is laid for the making of the claim'.
46 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2009, 12971–3 (Anthony Byrne, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade).
47 Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009, 13.
48 Hawke Review, above n40, 42.
49 Ibid 48.
50 Guidelines issued under section 93A of the *Freedom of Information Act 1982*, Part 6—Conditional Exemptions [6.29] <http://www.oaic.gov.au/publications/guidelines/Guidelines-s93A-FOI Act_Part6_Conditional-exemptions.pdf>.
51 Hawke Review, above n40, 42.
52 For example, the *FOI Act 1982* approach to the public interest test is already being used as a model for the application of the public interest test in other areas. See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 151 [9.41].
53 Hawke Review, above n40, 48.
54 John Fraser (Secretary to the Treasury), quoted in Easton, above n17.