Freedom of Information and the Right to Know

The Communications Law Centre hosted a conference in Melbourne on August 19-20 concerning that well known currency of democracy, information.
Julie Eisenberg and Sandy Dawson report

Prominent local and international officials, practitioners, academics and commentators discussed how Freedom of Information (FOI) laws are working in practice, their limitations and sometimes controversial application.

FOI and the media

A group of media practitioners, commentators and academics reviewed the stumbling blocks for media use of FOI, coming up with several reasons as to why the media struggle with FOI.

Investigative journalist **Bill Birnbauer** from *The Age's* Insight Team graphically illustrated the absurdities of the operation of FOI by holding up a memo disclosed to him under the Act. It was several pages long, completely blacked out, apart from the words "Dear Mike" and "Regards." He thought that government agencies regarded the media as a "pest" and had replaced the spirit of the FOI with strict interpretations of statutory provisions, making its use frustrating. He said that FOI had become more difficult in the past 10 years, citing a broad request he made years ago for plans of nuclear power stations (which disclosed nine sites under consideration and the thinking of senior bureaucrats) as one which now would be regarded as too voluminous. In his view the bottom line was that FOI laws gave journalists the key to information: one which doesn't always fit and may require jiggling, but should be tried.

His colleague at *The Age,* **Mark Forbes**, continued the theme of media as watchdog, expressing the view that the desperation of governments to block access is common to all in power. He started using FOI in 1992 with significant successes but saw it as increasingly politicised and sometimes useless. One of his best stories came from refusal to use FOI: he was told of controversial documents by a confidential source but did not pursue them through FOI as he thought the government would be likely to block an application. The documents eventually "fell off the back of a truck". *The Age* ran the story, dealing with the bidding for Melbourne's Crown Casino, and subsequently made an FOI application for more documents. Despite its apparent importance, the application failed to meet "public interest" grounds and the documents were withheld. Forbes argued the balance of proving the need for disclosure should be reversed and that recent amendments to the Victorian Act will continue to frustrate the disclosure of important information to the public.

One of *The Age's* lawyers, **Cindy Christian** from Minter Ellison, spoke of the lawyer's encouragement of journalistic use of FOI, particularly when it helped firm up the legal defences to a defamation action. But recent amendments to the Victorian Act were making it harder to obtain information identifying an individual and delays were problematic.

In one case, a newspaper requested information about donors who had funded a professorial appointment of an ex-Labor Minister at Melbourne University. The paper successfully defended the University's appeal, the Supreme Court finding that the University, as a corporation, could not rely on the "personal affairs" exemption. Although a significant journalistic success, the court decision came nearly two years after the first application, underlying how easily appeals can be used to stifle stories until, in some cases, they might no longer be newsworthy. Christian spoke of the use of the free speech cases, *Stephens and Lange,* to assist in defining how the "public interest override" operates in an FOI context. Despite these recent FOI decisions the Victorian legislation seemed to "raise the bar."

Rick Snell from the University of Tasmania thought that Australian journalists didn't have the commitment long term to FOI and treated it as "not belonging to them". In the US, it was common to find coalitions of journalists and editors with a wider journalistic interest in FOI, rather than just organisations such as *The Age*. Journalism schools in the US give it far more attention than here and there are major journalistic awards for the use of FOI in stories. Australia had a long roll call of burnt-out journalists who had bad experiences with FOI. But Snell thought that they also lacked strong strategic vision, being content to work with the legislation rather than lobby for change. He called for journalists to propagate ideas

for legislative reform.

Nigel Waters, consultant in Information Policy, discussed his recent research for the Australian Centre for Independent Journalism, which involved interviews and analysis of *The Age, Sydney Morning Herald* and *Australian Financial Review*. He concluded that one can't blame individual journalists, who are struggling to use FOI in their spare time. He blamed the media organisations, which he said need to support training and awareness, exchange of ideas, payment and allow journalists longer lead times. He thought FOI should be used more as a primary source rather than corroborative and not always in stories with high expectations of scandal.

Matthew Ricketson from RMIT thought that time, cost and laziness on the part of some journalists were problems. He asked why journalists were less successful than opposition politicians in using FOI, and reflected that opposition politicians were in for the long haul, with three years to plan and mount FOI cases. He thought journalists should keep some FOI applications on the backburner.

International perspectives

International speakers from Canada, the UK, Ireland and New Zealand showed that Australian concerns about the dangers of unduly restrictive FOI laws are reflected elsewhere.

Professor Alasdair Roberts from Queens University in Canada used his recent empirical studies on the operation of FOI laws in Canadian provinces to illustrate how the resistance comes not just from the letter of the legislation but also from changes in administrative policy. His work translated anecdotal gripes into hard evidence about bureaucratic approaches and revealed the inadequacy of complaint driven enforcement mechanisms where government departments are involved in large scale non-compliance with their obligations.

His mid-1990s national studies found a significant decline in the number of FOI requests processed and completed by major departments on time at a time when the FOI watchdog, the Information Commissioner, had its budget drastically cut, resulting in the almost halving of resources available per complaint. He thought an alternative way to enforce freedom of information was to move away from complaint/incident-based mechanisms and use institutional statistics and public reporting to monitor performance.

Other research into the impact of significant fee increases for FOI requests and appeals in Ontario showed a sharp decline in requests for information, especially complex requests. An attempted study of British Columbia had been stymied by his failure to get data, despite 14 FOI requests. This experience underlined the point that while the laws might look good on the books, the use of fees and other administrative restrictions can significantly weaken true freedom of information.

Maurice Frankel, Director of the Campaign for FOI, expressed serious concerns about FOI in the UK, which was currently dealt with in various pieces of legislation and a little used Code of Practice which had been "launched on a public holiday with a tiny advertising budget and noone knows about it". **(See separate story on page 8).** He described the recently proposed draft *FOI Bill*, as "very poor". While broad in its scope, it had many negative aspects. One was a proposed "jigsaw" exemption which meant that any information whose disclosure was not harmful could be withheld if in combination with other information it would be harmful, even if the other information could never be disclosed. Under the draft Bill it is not possible to demand information from an authority if the evidence incriminates the authority, something Frankel saw as a peculiar adoption of a personal privilege against self incrimination. There was also scope for retrospective exemptions. There was no harm test, no exclusion for factual information and departments didn't have to confirm or deny the existence of information. In some ways, the scheme of the draft Bill was akin to saying, "the information you want the most you can't have".

Maeve McDonagh of University College, Cork, Ireland described the new Irish Act as the "offspring of Australian parents". Though in its infancy, she thought it showed promise and may be more successful than its Australian parents.

While broadly similar to the Australian legislation, one of its weaknesses was that it only applied to named bodies, which could be extended by regulation. Its retrospective effect was limited - it only applied to records created after the Act came into force. The exemptions were complex, described by one senator as "reaching the outer limits of obscurity". However, there were positive features: for example, Cabinet documents were only exempt if they were created *for* Cabinet. The Act also extended to cover records in the hands of government contractors where relevant to services being provided to government and required these records to be handed to the public body where the application had been made. In its first year of operation, there had been a similar number of requests for information to comparable Australian jurisdictions. As there had only been a small number of review decisions so far, it was hard to assess its operation. However, in early cases the Commissioner had refused to accept arguments that information should be exempted as commercial in confidence in the absence of

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clear evidence. Similarly where the >

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"public interest override" applies, the court found that those arguing against disclosure must show that harm is *likely* to occur (this was currently on appeal to their High Court). The climate in Europe was for strengthening rights of access to public information. McDonagh thought the Irish framework was fair but it was too early to say if the initial goodwill would endure.

Sir Brian Elwood, Chief Ombudsman of New Zealand, said the NZ FOI Act had been operating well for 17 years, and in his view, it furthered the right to know in appearance and substance. Its purposes were to progressively increase the availability of official information to New Zealand people to achieve the dual objectives of enabling more effective participation in making law and policy and ensuring accountability of Ministers of the Crown and officials. The Act makes it clear that the starting principle is availability: information should be made available unless there is good reason to withhold it.. Four problems identified in a 1997 review (the burden of large and broad requests, delays, resistance by agencies outside the core sector and the absence of a combined approach) didn't bring into question the underlying principles of the Act. Nevertheless, he hoped that more information would be released as a matter of course without the need for formal requests.

FOI in action

Spencer Zifcak, from La Trobe University looked at the underpinning of the cabinet exemption and commercial documents exemption, both of which the Victorian government have expanded despite opposition. Despite little prospect of legislative change, he thought it was important to reconsider them.

Looking firstly at the cabinet exemption, ministerial responsibility was underpinned by three rules: confidence, unanimity and confidentiality. Cabinet had collective responsibility: a decision of cabinet was of all its members, who should be able to discuss issues freely without individual views being known. Defining what were cabinet papers was important: he thought that only documents undermining cabinet unity should stay confidential. A new definition of cabinet documents under the Victorian FOI Act was wrong in including all documents considered by Cabinet. In practice, it meant any documents Ministers want to be removed from the public gaze could be turned into briefing papers or given to Cabinet. This underlined a strong case for reform.

As regards commercial documents exemptions, the problem in this area was the breadth of the exemption provision and increased claims due to corporatising and outsourcing of government contracts. Under the present Victorian exemption, it is only necessary to show the government agency had documents or they contained business, commercial or financial information. Under section 50(4) disclosure can be ordered if there is an overriding public interest. There is no clear guidance about what should be taken into account: the Act should be amended to make it clearer. A proper commitment to accountability required certain information such as tender and public service contracts to be open to public scrutiny.

On the issue of how the exemption should be framed, it was of great importance that private interests in non-disclosure be weighed against public interest. Zifcak noted that *The Australian* had suggested that Victoria was the most secretive state and these two exemption provisions explained why. As the first Victorian director of FOI, he found it regrettable that 17 years later he was having to give such a depressing account. The case for reform was as strong if not stronger now because although the FOI Act is on the books, it is there in form, not substance: there is a serious need to reintroduce the substance.

Chris Finn from the University of Adelaide analysed FOI from a competition viewpoint, concluding that the legislation gives too much weight to commercial considerations. A flourishing democracy and competitive marketplace both depended on free flows of information. The argument against restricting information was that it disturbed efficiencies. In the same way, individual competitive disadvantage was not akin to hindering the competitive process.

FOI preserved monopoly positions where governments outsourced large services. When the tendering process was run again after several years, incumbents tried to keep commercial information from competitors. This could turn public monopolies into private monopolies.

Commercial information may include innovations, management/ organisation innovation, strategic information, or numerical data. The rational for protecting this type of information (incentive to innovate) only applied to genuinely innovative information. But once market return is reached, public interest demands dissemination of that information, otherwise the competitive process may be affected.

There was little empirical evidence to support the suggestion that protecting commercial information delivers gains. The FOI Acts in Victoria and the Commonwealth are almost 20 years old and framed in a different era. There is now a vastly different relationship between government and business: many services are delivered to the public on behalf of the government by private businesses. Concepts of competition have also

changed. Governments at all levels accept the need for a fiercely competitive economy - they may be out of step in providing too much protection through FOI.

Lawyer **Tom Brennan** from Corrs Chambers Westgarth took a constitutional law perspective, arguing that he was less pessimistic than other speakers after the landmark early 1990s High Court free speech cases. Those cases had entertained the idea that due to the constitutional responsibility to vote, each citizen has a right to share the offices of government or engage in administrative functions: there was considerable unexplored constitutional law defining what this means in practice. There could be implied limitations on the legislature and executive denying information. Officers of the executive were bound to make decisions and give effect to the constitution rather than defeat it.

Openness in Australia

The panel discussion focused on how open access to information is in Australia, not just at a government level. David Buckingham from the Business Council of Australia drew attention to the fact that in a business environment we need to consider how best to achieve the objective of openness. The Annual General Meeting, the most obvious way for shareholders to access information by asking what they want to know, rather than receiving the information distributed to them, is not necessarily the most effective means. Buckingham cited Telstra as an example - will it be necessary to use the Sydney Football Stadium to house all the shareholders who wish to attend? What of the other millions of shareholders? The need for transparency is often more easily stated than met.

Simon Molesworth QC from Environment Australia pointed to the need for openness to enable the community to participate in and respond to the democratic process in the environmental area. Without better information, how are citizens supposed to be meaningfully involved? One of the criticisms of government is that decisions are made without consultation. This, according to Molesworth, reveals the real issue. But the community, he said, can help itself by being more concerned about environmental issues. The challenge is to improve the monitoring of how the environment is being treated and protected. This involves reforming reporting obligations, such as changing the obligation of Environmental Auditors (who have been appointed in New Zealand and Canada) to report to Parliament to an obligation to report to the public. The process of Environmental Impact Statements needs to be opened to allow the community to understand them and to have more opportunity to participate. Molesworth sees this being achieved by following a model of community monitoring through Community Review Committees, appointed to review business' voluntary environmental reporting.

Michael Gawenda from *The Age* referred to the role of the media in scrutinising organisations and individuals with the power to shape how we live our lives. It is important to entrench a culture which is consistent with allowing the media to fulfil such a role. Gawenda discussed the impact of the communications revolution which has occurred in the last five years. The mass of information with which we are now faced presents a new challenge - it is not so much about the quantity of information available but rather the quality of that information. Power is now defined by the extent to which information can be controlled, and by how that information is presented. That there are more people in public relations than journalism illustrates the problem. He pointed to the US where politicians expect to speak to journalists and expect to be accountable, and contrasted the situation in Australia where journalist avoidance is the norm.

Felicity Hampel QC stressed the need to remember that government is actually for *us*, something which seems to be forgotten as the essential background to any discussion about FOI. We should remind government of this in the attempt to preserve involvement in the process of government. The trend of politicians to promise FOI in opposition and to curb it in government must be eliminated. The problem of privatisation and outsourcing leading to less disclosure must be examined so that electors are not cut off from the process of government.

The Information Age

Victor Perton MP pointed to the revolution which the Internet will cause in FOI. It will allow wider participation in the government process, participation from not just within Australia but internationally. While he admitted to having used FOI while in opposition to embarrass the government, he commented that the focus of FOI needed to be recast so that disclosure was the starting point. At present, the FOI legislation requires that you suspect the documents are there, that you are able to identify them and that you pay high costs to obtain them. There is no reason, that information cannot be published as a matter of course electronically without having to be requested first, according to Perton.

The Internet as Harbinger

Roger Clarke from the Xamax Consultancy remarked that the entire FOI conference was misinformed. The real topic is the Information Age, not FOI. The discussion at the conference was the same discussion that had taken place for the last 20 years about FOI, and until people realised that FOI is actually under threat

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because of the Information Age, the debate is meaningless, he said. His strongest point was that for FOI to work, it must apply to information as it is communicated now. For

The disclosure of one letter above all undermined the profession's objections. This began: "I've seen the patient, I've seen his wife, I've seen his two kids and I've seen their pet rabbit, and in my opinion the rabbit is the most intelligent of the lot of them".

Revealingly, those doctors who believed in openness showed what a difference a positive approach made. In one practice, patients were handed their files as they arrived and invited to browse though them before their appointment. Many maternity patients are given their records to keep at home. Some professionals had feared the women would lose their notes but in one study not one woman did so - although 26% of clinic-held records were missing when needed.

In another study, detained psychiatric offenders, mainly suffering from paranoid schizophrenia, were given supervised daily access to their records. The psychiatrists reported that "there was no indication that access fuelled antagonisms between patients and staff. Most patients thought they were better able to discuss their problems with staff, better able to put forward their own views and considered that access enabled them to correct errors".

And in a conclusion which could also be seen as addressing some of government's concerns about disclosure to the population at large, they added: "This study lends no support to the view that 'access' would lead to time consuming demands, paranoia and deteriorating relationships".

Maurice Frankel is director of the UK s Campaign for Freedom of Information

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example, the current legislation does not apply to data, only to printed versions of documents. While this is a perfectly valid problem of definition to point out, it doesn't necessarily invalidate the debate.

Review processes

Following the Parallel Sessions, **Justice Murray Kellam**, President VCAT, **Judge Kevin O Connor**, President ADT NSW, and **Eugene Biganovsky**, SA Ombudsman, presented the FOI experience at a review level in their respective States. This was of particular interest to those who had attended the Practitioners parallel session earlier in the afternoon, where FOI in practice was discussed, focusing on how government agencies and departments deal with requests at the application stage.

Justice Kellam explained how FOI requests and reviews are treated, culminating in VCAT's role under the Victorian FOI legislation. He analysed the Victorian legislation as recently amended, explaining that after internal review by the relevant department or agency, which is supposed to be objective, or review by the Ombudsman, an application to VCAT for review of the decision may be made.

The hearing in VCAT is a new hearing, a fact often taken advantage of by parties who rely on additional grounds at this review stage. VCAT has the same power as the original decision maker, and can allow access to otherwise exempted documents by virtue of the public interest override, subject to certain requirements. Justice Kellam referred to the case of *Department of Premier and Cabinet v Hulls* (1999) VSCA 117 as an example where the public interest was so strong as to demand the release of the documents notwithstanding the original factors which rendered them exempt. Also analysed was *Coolson's* case which led to the amendments to the Victorian legislation which seek to provide protection of information that would disclose identity or address. No case has yet raised an issue under these amendments.

Judge O'Connor looked at the situation in New South Wales, where between 1989 and 1998 there were very few written, reasoned decisions produced by the District Court. The main source of guidance in this period is the Ombudsman's published guidelines for government agencies.

Perrin's case, *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 has given guidance in decisions in NSW. The Court of Appeal, especially Kirby P, stated that the FOI legislation should be construed as requiring disclosure rather than exemption. The onus was said to be on the agency claiming the exemption rather than the applicant seeking access to the information.

Julie Eisenberg and Sandy Dawson

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