Raising secrecy to an art form

Despite fears concerning disclosure of information in the UK, greater openness has led to better relationships, says Maurice Frankel

In December 1997, the UK's new Labour government published its long awaited proposals for a *Freedom of Information Act* (FOI). They were far bolder than anyone had expected. The privatised utilities as well as the public sector would be covered; there was no form of ministerial veto; and in most cases authorities wishing to withhold information would have to show that disclosure would cause not just harm, but "substantial harm". Even by international standards, these were radical proposals. Canada's Information Commissioner marvelled that they could have been produced "by the nation that raised secrecy to an art form, by the nation that produced 'Yes Minister'", and ruefully concluded that they had "left Canada trailing in the dust".

Only 18 months later these expectations were shattered. The Minister responsible for the original proposals was sacked and his successor published a deeply disappointing draft bill, packed with sweeping exemptions. One exemption would protect from access all information relating to "the formulation and development of government policy", including factual information, regardless of whether disclosure would be harmful or contrary to the public interest. Another would protect all information obtained by regulatory authorities during investigations - including those dealing with safety, planning and discrimination.

The provisions on public interest disclosure caused most astonishment. Authorities would be required to consider releasing exempt information in the public interest - a welcome proposal. But they could insist on knowing what the applicant intended to do with the information - a "right to pry" unheard of in FOI laws. This was accompanied by an equally bizarre "right to gag", allowing authorities to disclose information on condition the applicant agreed not to make it public. The bill's Information Commissioner would only be entitled to check that the authority had considered the public interest - but could not override the authority's decision, however overwhelming the case.

The bill's disastrous public reception has since persuaded the government to say it will reconsider some of these provisions. But what had gone wrong? Most countries' FOI laws start off well but later come under attack as governments lose enthusiasm. In the UK, the government got its retaliation in first. Yet the dangers of secrecy ought to be blindingly clear after the UK's experience with BSE, the so-called "mad cow disease". In the late 1980s, an Oxford University epidemiologist asked the UK's Ministry of Agriculture for access to the database of BSE outbreaks. After repeated refusals, he finally gained access in 1996. His analysis showed that the health controls in place when he had first sought the data had not been enforced. Had this been known and acted on at the time, the epidemic would have been reduced by a quarter of a million infected cattle.

But even the British government has been capable of radical openness when it recognised the benefits. In 1994, the then Chancellor of the Exchequer decided to publish the minutes of the monthly meetings at which he discussed possible interest rate changes with the Governor of the Bank of England. Even under FOI such high level, sensitive policy deliberations are usually secret. Here, the minister decided that the overriding priority was to demonstrate to the markets that interest rate decisions were taken for sound economic reasons. If they were taken for reasons of political expediency, the whistle would be blown on him by the bank's now public objections.

It is in the area of medical records that attitudes to disclosure are most revealing. In 1990, the Campaign for FOI succeeded in promoting a private members bill giving patients access to their own records. Anxious doctors published articles warning that files were too alarming to be seen. But the examples they cited undermined their own case, and included comments such as "very high" blood pressure, "unequal pupils" and "I do not understand the cause of these symptoms. I do not know what is going on here". Patients took far greater notice of the personal abuse discovered on some records. These included remarks such as: "doll like woman", "totally self-indulgent, albeit within a very soft sugary package", and - notable for being written about a private patient who was paying his doctor for this -
"on the way to becoming a rich young fool".

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".

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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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