

Commonwealth Ombudsman National Conference

Plenary Session 3: Openness in a secret world

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It is a given that there are problems and have always been problems with accessing certain information held by government, but I think describing ours as a “secret world” is going a little too far. We have come a long way from the days of Official Secrets Acts, and current developments suggest the future is bright and dare I say somewhat more transparent.

Open government is very popular at the moment, there is political will to drive reform, and the last eighteen months have seen a real push towards changing the way people access information.

The Federal government followed through on an election promise to reform FOI as part of broader accountability reforms, and have recently put forward substantial amendments to the Commonwealth FOI Act. The first stage is a bill to remove conclusive certificates from the Act, which was passed by both houses last week and it is envisaged that there will be an independent Information Commissioner overarching separate FOI and Privacy Commissioners.

Soon after becoming Queensland Premier, Anna Bligh instituted an independent review, accepting and implementing their recommendations. New Acts dealing with access to information and information privacy are now in force.

Tasmania and the ACT have also moved to reform their FOI systems, with Tasmania conducting a review and releasing a draft Bill for comment, and the ACT moving to remove conclusive certificates from their Act.

In NSW, my office had been calling for an independent review of FOI for 15 years. None came, and in April last year I decided we would review the Act ourselves. We selected a representative sample of 18 agencies, looked into their FOI practices and procedures, and spoke with the staff dealing with FOI applications. We released a detailed public discussion paper, to which we received more than 70 submissions. Our final report entitled *Opening up government* contained 88 recommendations aimed at improving the way people access information in NSW.

The response from government has largely been a positive one. We have a number of new pieces of legislation, the *Government Information (Public Access) Act*, or GIPA which is expected to come into force early in 2010, and the *Government Information (Information Commissioner) Act*, establishing an office of Information Commissioner, which is already in force.

The key deviation from our recommendations is the creation of a separate office of the Information Commissioner. We considered this issue very carefully, and recommended the role sit within our office. I will discuss why we made this recommendation later on. The office of the Information Commissioner has been established, with Privacy Commissioner Ken Taylor acting in the role until the beginning of next year. The position has recently been advertised.

The next six months will be crucial. For the new system to be effective, many of the initial guidelines and effective training have to be well and truly in place. In Queensland, the Information Commissioner has worked quickly to draft guidelines for the new Acts, as well as travelling across the State providing training in regional areas.

Each government's response to accessing information and the systems they are establishing have differences. There are, in my view however, four key elements essential to the success of each. These are:

1. Commitment from the top
2. True cultural change
3. Getting the balance right
4. Developing effective relationships.

Commitment from the top

For any change to be effective, the tone from the top has to be right. Staff at all levels look to those above them for approval of their decisions. Frontline staff look to their managers, senior staff look to their Directors General and CEOs, CEOs look to their Minister, and (at least in theory) Ministers look to their Premier or Prime Minister.

This is why it is so important that the message has to come, loud and clear, from the head of government, that the public interest requires information to be released unless there is some form of harm or detriment that would result from its release. In Queensland, Anna Bligh has released a statement of principles, in which she describes information as the "lifblood of democracy". She goes on to say that:

The process of government should operate on a presumption of disclosure, with a clear regard for the public interest in accessing government information. The Queensland public service should act promptly and in a spirit of cooperation and in a spirit of unity to carry out their work based on this presumption.

Government information must be valued as a public resource that contributes to an open and participatory democracy and improves government decision-making.

This is the right sort of message to be sending to everyone involved in providing access to information.

Until recently, the former Special Minister of State and now Defence Minister Senator Robert Faulkner was driving federal FOI reform. Senator Faulkner has long been a champion of open government, and has contributed to countless Senate committees to ensure information about government is in the public sphere. I hope that the level of drive and commitment shown to date continues, and we see final legislation presented shortly.

It is early days, but I am a little wary of the leadership approach in NSW. The Premier has been very vocal on the need for FOI reform, but at the same time recent changes have seen responsibility for access to information pass quietly from the Premier into the portfolio of the Attorney General. FOI commentators Matthew Moore and Peter Timmins recently questioned whether this was the right fit, with Timmins commenting that the new system is 'a whole of government administrative reform, not a primarily legal issue that fits with the responsibilities of the First Law Officer of NSW.' He went on to say that 'the Premier should be standing behind the Information Commissioner, particularly when other ministers will need to be required to toe the line.'

This system may work, and the Attorney may have the clout to bring about change. But my preference would be for the Premier to remain visible, vocal and out front in leading these

important changes. This point is reinforced by the fact that following the Premier's acknowledgement of the FOI Act being flawed – in memoranda calling for more openness and several press releases – our FOI complaint numbers have gone down by almost half.

True culture change

Ideally, strong leadership from the top will help to encourage change. But long standing change can't rely on brave heads of department and courageous Premiers and Prime Ministers. It cannot just be a trickle-down effect, and it has to survive a change of government. This is possibly the most important, as well as the most challenging role for any new Information Commissioner. He or she will need to provide clear guidance to staff at all levels dealing with requests for information, and help them to change the way they think.

This will involve developing and implementing clear and easy to use guidelines, able to be updated to keep pace with change. They will need to develop comprehensive training for all staff involved in access to information. At the same time, they will have to keep a close eye on the way agencies are applying the legislation, providing guidance where needed, as well as recommendations for change.

To achieve all of this, the Information Commissioner will need to quickly develop a strong reputation within the public sector. This will be particularly challenging for a new and comparatively small stand-alone body.

Talk of culture change is usually focussed on recalcitrant, risk-averse public servants and politicians intent on self preservation. This is unhelpful, because the need for change goes further than this. Certainly in NSW, for the last few months not a day has gone by without a couple of stories attacking different aspects of the government's performance often using information obtained through FOI applications. There is blood in the water, and the press are circling.

I have previously spoken about the inherent conflict for politicians attempting to encourage the implementation of access to information legislation. To be fair, in the current climate it is not surprising this conflict exists. I realise the media need to maintain their market share, but they also need to make sure the information they get from government is reported evenly and fairly. All too often it is only the negative angle that is reported – or to make a story more interesting it is intentionally sensationalised.

Under the Queensland, Commonwealth and NSW Acts, agencies are required to maintain a disclosure log. This will provide a list of, and ideally, easy public access to information that has been released in response to an application. Once the information is in the public sphere, agencies will be able to counter any misrepresentation or misreporting.

Getting the right balance

While I believe more information needs to be made available, I am not saying that everything should be available to everyone. Some of the information held by government, such as information relating to protected disclosures or security sensitive information, should not be readily accessible.

We have to make sure that the balance is right between what is released and what is withheld.

I do not think we have the right balance now. For a long time, the reaction of many agencies when they receive an application has been to start by trying to fit the information requested within an exemption. This has not always been a logical or a justified fit.

Our report highlighted exemptions that have been commonly misapplied and misused, particularly around business affairs and internal working documents. Agencies are also very liberal in their use of legal professional privilege as a method for refusing access, many contriving legal relationships to attempt to create a barrier to any subsequent release of information.

This is why the introduction of an overriding public interest test is so important. Agencies will have to turn their minds to the public interest first, and when they refuse access, they will need to clearly state why it is in the public interest not to allow someone access to information. Several of the submissions we received commented that the public interest was an amorphous concept, and frontline staff could not be expected to apply such a test. I disagree. The public interest is a consideration in a number of other decision making processes, and I see no reason why access to information should be treated any differently.

Effective relationships

The final key to future success is effective relationships, particularly between the various oversight and watchdog bodies involved. The success of any system lies in its structure. In our final report, we recommended the Information Commissioner be placed within our office. This followed careful consideration of all of the possible models.

We did not make this recommendation because of a lack of work, or a desire to increase our jurisdiction, responsibilities or power. We simply felt our office was the best fit and that it made sense for the Ombudsman to also be the Information Commissioner.

Twenty years of work in this area has shown us that there are very few one-issue matters. Broader administrative failings, such as poor record keeping, come up time and again. These will not fall within the Information Commissioner's jurisdiction, and there will need to be clear referral systems to make sure all the relevant issues are considered. More broadly, issues such as privacy, protected disclosures and access to information are all interrelated. The more agencies involved in making sure the schemes in these areas are operating properly, the greater the risk of a fragmented and inconsistent approach. Cooperative and complementary approaches to similar issues are vital to the success of these systems. Even with the best legislation and procedures in place, I am still concerned that problems are likely to get lost in the shuffle.

Setting up another watchdog body can create confusion for both government agencies and the public. If anything, I believe we should be working to reduce the number whenever possible. Stand-alone, small single jurisdictional bodies also face greater challenges exercising their authority, achieving change, and gaining and maintaining recognition and standing.

Having said this, the creation of an independent Information Commissioner is still a very positive development and I see it as such. In NSW, the government has committed \$3 million to establish the new office, with a prospective yearly budget of around \$4 million. I have committed my office to working closely with the Information Commissioner to ensure the best possible outcome.

Conclusion

It is pleasing after so long to see significant progress in this area, and I am optimistic that it will continue and the reforms we are seeing will lead to much greater openness by Government. But Ombudsman, other watchdog bodies the media and public will in my view need to continue to play a role in pushing for greater openness and transparency in government, to ensure the reforms have traction and are sustained. I suspect that will be the only way we will be certain that the results measure up to the promises.

