

OPEN GOVERNMENT – REALITY OR RHETORIC?

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Open government and FOI have received a great deal of attention lately, principally in the wake of the High Court appeal in the case brought by Michael McKinnon, a journalist for The Australian newspaper, against The Treasury. The case concerns a conclusive certificate applied to documents dealing with bracket creep and the First Home Owners scheme – both matters of great public interest and debate.

The case has stimulated quite a deal of media and public commentary. A prevailing theme in that commentary is that the case is a watershed in the development of FOI, and that the health of the FOI Act and open government in Australia hinge on the outcome of the case. One newspaper report (SMH, 18-19/3/06) captured the prevailing spirit when it spoke of 'deepening disillusionment with the operation of the country's freedom of information laws', saying that the *McKinnon* case is 'the only real hope for getting better access to government information' and that 'the case will shape the future of freedom of information'.

While acknowledging the importance of the case, I want step back from it and take a broader view, of open government generally, and of FOI in particular. I will speak later in this talk of problems with the FOI Act, but overall I think that the practice of open government is alive and flourishing in Australia; the days of uncontrollable discretionary secrecy of the kind that pre-dated the FOI Act are largely gone. Cases like *McKinnon* remind us that there will always be disputes about where the boundary between secrecy and openness lies, and that the disputes will become more intense the closer one gets to policy-making on sensitive political issues. Those disputes are important in evaluating the health of open government, but it is equally important to note that the boundary has substantially shifted over the past twenty years, moved by a host of different pressures and developments.

The FOI Act itself is one of the forces that have shifted the boundary. It is significant that government agencies received just under 40,000 FOI requests in 2004–05 and granted 94% in full or part. Admittedly many of those requests are for personal records documents, but it is nevertheless a form of access that did not exist 25 years ago. The newspaper reports of the cost and difficulties experienced by journalists and politicians in obtaining FOI access also have to be balanced by other regular reports in The Australian, the SMH and The Age that are based on documents obtained under FOI, on matters such as the error rate in Centrelink, disclosure of private information by the Child Support Agency, or cost overruns in Defence contracting.

Many other features of our system of government now play an important role in ensuring open government. If I can use my own office as an example, one of our functions is to prepare a report on every person who has been in immigration detention for two years, which is then tabled in the parliament and published on our website. Nearly 60 such reports have now been published, and collectively they show a great deal about the internal functioning of the system of immigration detention. Another function, which also results in reports that are tabled in the parliament, is to inspect the records of law enforcement agencies concerning their use of coercive powers to undertake telephone interception, electronic surveillance and controlled operations. More broadly, in our normal complaint work we routinely obtain comment, advice and documents that are shared with members of the public.

Nor are we the only mechanism that examines the workings of government and makes information available to the public. Parliamentary committees have been very effective in recent times, on matters as diverse as military justice and the government of Norfolk Island. Committees are still active and effective, notwithstanding that the Government now controls both houses. Recent examples are the Estimates round, the unanimous parliamentary report this week criticising the unauthorised arrivals bill, and the split report of the Parliamentary Joint Committee on Intelligence and Security on whether to proscribe the PKK as a terrorist organisation.

Beyond the Parliament, we have examples such as the Cole Royal Commission into Australian Wheat Board. It has received and published a large volume of documentary material, such as cables, emails and briefing papers. It has received oral evidence and cross-examination of many government officials, including the Prime Minister, Deputy Prime Minister, and Minister for Foreign Affairs.

I could go further and describe many other mechanisms and developments that have transformed government in Australia from a tradition of secrecy to a culture of openness. The description would include features as varied as the web, annual reports, outsourcing, consultation mechanisms, talk-back radio appearances by government ministers, and Senate resolutions on publication of government contracts.

This greater openness and transparency, under FOI and other mechanisms, has been good for government, good for society, and good for democracy. It is reasonably well-accepted that the standards of public service at the national level in Australia are very high in Australia – indeed, in recent times, the country has won international awards and recognition for the standard of public service.

In my view the administrative law framework, conferring upon the public the right to obtain government documents and to challenge and seek review of government decisions, is an important part of the explanation as to why the quality of government administration in Australia has steadily improved over the last two decades. It has helped to make government responsive, interactive, careful, reflective, evidence-based, and accountable.

But we don't always acknowledge this. Often, perhaps increasingly, we hear complaints from within government about the burden, the inconvenience and the downside that laws such as the FOI Act impose on government agencies and processes. Two common complaints are that some FOI requests are burdensome or meddlesome and impose an administrative burden that interferes with the efficient functioning of government; and that FOI is distorting the research and advice

functions of the public service, for example, by inducing public servants not to record their advice either frankly or at all.

Without separately debating those criticisms, I can readily concede that there is some truth in them. I can think of examples in my own office where I found FOI requests to be a nuisance, or I tempered or censored my written thoughts with the possibility of publicity in mind. FOI does come at a price and at some inconvenience. But those drawbacks have to be seen in context.

I will use as a comparison the laws that underpin the system of financial integrity in government. The public service is subject to rigorous and detailed requirements about financial accounting and reporting. All agencies give a high priority to strict compliance with those laws; there is considerable training of public servants in compliance; there is a highly developed expertise across agencies; and the laws are given high priority in the administrative functioning of agencies. It is recognised that these legal requirements are a purist form of regulation that sometimes goes further than it needs to, but by and large it is accepted within government that these laws ensure financial integrity, suppress corruption, avoid conflicts of interest, control the revenue, and instil public confidence in the system of public administration.

The democratic integrity of a system of government is as vital as its financial integrity. Laws that underpin democratic integrity – such as FOI laws – are an important part of the framework that we simply have to accept as part of the business of government. Transparency in government is an essential plank of the platform for realising other social and political objectives. Transparency and executive accountability go hand in hand. Without transparency administrative justice is diminished, and democracy is destabilised.

And yet, as I say, the public service is more likely to question the value of or give a lower priority to democratic framework laws such as FOI, than to other laws that are part of the framework of government, such as laws dealing with financial reporting and contract procurement.

It is important therefore that we always pay close attention to how well the FOI Act is working. It is only one of many mechanisms that ensure transparency in government, but the Act embodies and underpins the democratic commitment to open government. So let me say a few words about how well FOI is operating nowadays.

My office published an own motion report on FOI earlier this year, based on an investigation of FOI administration in 22 agencies. The principal conclusion in the report is that there is an uneven culture of support for FOI among Aust government agencies. FOI works well in some government agencies – they display a clear commitment to FOI, they have well-developed systems and expertise for ensuring that FOI requests from the public are administered in accordance with the spirit and the procedures of the FOI Act, they manage to deal with most FOI requests within the statutory time limits, and they have a defensible practice on sensitive issues such as public interest cost waivers.

But FOI doesn't work as well in some other government agencies. In some there are excessive delays in FOI handling; delay in notifying charges and inconsistencies in the application of the charges rules; and a variable quality in decision letters and explanations for exemptions being applied.

That is indefensible. A person's enjoyment of the rights conferred by the FOI Act should not depend on the agency to which their FOI request is made. There should

be a uniform commitment to FOI objectives across government – a whole of government standard, as it were. We expect all agencies to perform at a uniform standard in administering financial integrity laws, and we can equally expect consistency in the administration of democratic integrity laws.

These findings were echoed recently in a report of the Victorian Ombudsman. It similarly pointed to problems in FOI administration of excessive delay, inadequate reasons for exemption claims, and inconsistent classification of FOI requests as 'voluminous'.

My own report, *Scrutinising Government*, made only two key recommendations to ensure that FOI works better and for addressing the problems highlighted in the report.

The first recommendation was the need for a clear statement by each agency head to staff of the agency expressing a commitment to sound FOI practice and the goals of the FOI Act. This is one area where leadership counts: the head of an agency can have a great influence on whether there will be a positive or a negative FOI culture within the agency. If there are problems across government in how an important framework law is being administered, then an appropriate reform is for the leaders within government to remind officers of the importance of the law. I am aware that some agency heads have already adopted that recommendation and issued a statement to staff of the agency. I will soon be following up with agencies to see how many have implemented this recommendation.

The second recommendation was for the appointment of an FOI Commissioner, perhaps attached to the Ombudsman's office. There needs to be a constant, independent monitor, who is an authoritative source of advocacy for good FOI practice in government. In many other areas of government we have statutory officers who provide leadership and advocacy on the important planks of our democratic system – such as the Privacy Commissioner in relation to the protection of personal privacy, the Human Rights Commissioner on compliance with human rights standards, a Public Service Commissioner on the ethical standards of public service, and an Ombudsman on the principles of good administration. It is time that we had an Information Commissioner to advocate the principles of open government.

The creation of an Information Commissioner should not be perceived as an extra burden on government. One of the key roles of an Information Commissioner would be to provide expert and objective commentary on issues that are often the subject of polarised debate. An example is the debate between journalists and government about, on the one hand, whether government agencies are unhelpful to the media and use costs as a deterrent to providing FOI access or, on the other hand, journalists are being unrealistic in how an FOI request is being framed or which documents are being sought. Other issues on which the debate is sometimes intense but unilluminating are whether FOI requests are having a stultifying effect on research and frank advice within government; and whether the concept of 'public interest' is being properly applied within government as a ground for FOI fee waivers.