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# The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited

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*The way any legislation is interpreted can have a fundamental impact on its efficacy. The impact on legislation designed to be a key component of a system of open government such as freedom of information legislation is even more significant. This article examines why the first decade of interpretation of FOI in Australia has failed to give full operation to the objects and purposes of the legislation. The spread of FOI to all Australian States has been accompanied by the adoption of a "leaning" in favour of disclosure approach to interpretation by State review bodies including Ombudsmen, Information Commissioners and State Supreme Courts.*

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## INTRODUCTION

The interpretation and application of any legislation has the potential to frustrate its purpose. In the area of freedom of information the approach adopted towards interpretation is even more crucial. For those favouring a transition from a state that indorses and encourages secrecy to a society that operates on the principles of open government, it is vital that a "leaning" approach is taken towards freedom of information (FOI) legislation. This approach emphasises that FOI legislation should be interpreted with a bias towards disclosure and that public access ought not be frustrated by the courts, or other review bodies, except upon the clearest grounds. Therefore any doubt ought to be resolved in favour of disclosure. If the "leaning" approach is adopted then the burden of persuasion must rest upon the governmental party resisting disclosure. The rationale for this approach to interpretation stems from the fact that administration of FOI legislation by necessity lends itself too easily to be, in the words of Sir Harry Gibbs, "administered in a tardy and grudging way".<sup>1</sup>

This "leaning" or "tilting" approach should not be seen as a mechanism to release sensitive information but as a safety check which would ensure that claims for exemptions are justified and can be proven as being so on reasonable grounds. The New South Wales Ombudsman commented:

"the long-term answer is, in my opinion, to create an organisation or body charged with promoting FOI which has sufficient political influence to counterbalance the natural tendency of government and bureaucrats to lean towards the avoidance of public scrutiny."<sup>2</sup>

An Australian bureaucrat, steeped in the traditions of Westminster, who is given the choice between disclosure and avoiding public scrutiny

<sup>1</sup> Sir Harry Gibbs, Foreword to *Keeping Them Honest: Democratic Reform in Queensland* (University of Queensland Press, 1992), p xvi.

<sup>2</sup> NSW Ombudsman, "Freedom of Information — Way Ahead". Special Report, Jan 1995.

will be predisposed to lean towards non-disclosure. The task is to incorporate a series of legislative, administrative and interpretative hurdles within the framework of FOI regimes which ensures that claims for exemption are well founded and operate to ensure maximum access to public information. Agencies would still be able to exempt sensitive and confidential information. The argument of this article is aimed at requiring agencies to establish credible and well reasoned justifications for non-disclosure. The demand is for the doors of government to stay open more often than not.

Attitudinal change is essential if FOI legislation is to achieve the important and long term liberal democratic objectives set for it by the various Australian parliaments. Public servants, in administering an FOI Act, must approach it from the basis that there is a presumption in favour of disclosure and that exemptions should only be claimed when there is a foreseeable risk of harm to an agency. If the courts, and other review bodies such as Ombudsmen and Information Commissioners, do not ensure that this presumption is predominant then major access problems will occur. The Western Australian Information Commissioner has noted the problems in that jurisdiction in relation to the attitudinal difficulties of senior management in agencies to meet their statutory obligations and take a more open approach to decision-making.<sup>3</sup> In the *NSW Ombudsman Guidelines* issued in December 1994 the New South Wales Ombudsman stated:

“When dealing with FOI complaints my office will now initially presume access should have been granted to all requested documents. This approach is based on and designed to further the objects of the FOI Act.”

The Canadian Information Commissioner has made a similar recommendation:

“this report also makes a plea for government leadership in support of the value of openness. In particular, the Prime Minister should give specific written direction to his ministers and senior officials that public access to government information is not to be unreasonably delayed or denied. The clear direction should be: Find a way to release information, not a way to withhold it.”<sup>4</sup>

Many applicants in Australia are justified in feeling that agencies tend to play “Pick An Exemption, Any Exemption Will Do” when they deal with non-personal information requests. Regular users of FOI in Australia find it difficult to escape the conclusion that current practice appears to place the onus on the requester of information to demonstrate that the exemption being claimed is invalid.<sup>5</sup> The Canadian Information Commissioner categorised access law as expressing “a single-request, often confrontational approach to providing information — an approach which is too slow and cumbersome for an information society”.<sup>6</sup>

In a 1991 paper entitled “Freedom of Information: Torchlight but Not Searchlight”, Spencer Zifcak argued that the interpretation of the Commonwealth FOI Act had helped to compromise its effectiveness. The interpretation of the Act:

“has distanced the practical operation of the legislation from the principles and understandings which underpinned it at the time of its formulation. As a result, the Act has been much less successful than it might have been in drawing government to account.”<sup>7</sup>

<sup>3</sup> *First Annual Report of the Office of the Information Commissioner WA 1993-1994*, p 27.

<sup>4</sup> Information Commissioner of Canada, *Annual Report Information Commissioner 1993-1994*, p 7.

<sup>5</sup> For a more detailed exposition of this argument see R Snell, “Hitting the Wall: Does Freedom of Information Have Staying Power?” 1994 National Administrative Law Forum, “Are the States Overtaking the Commonwealth?”, 7-8 July 1994, Brisbane.

<sup>6</sup> Information Commissioner (Canada), *op cit* n 4, p 7.

<sup>7</sup> S Zifcak, “Freedom of information: torchlight but not searchlight”, paper presented at National Conference on Administrative Law (1991) 66 *Canberra Bulletin of Public Administration* 162.

In Zifcak's view the AAT had adopted a cautious approach to the interpretation of key exemption provisions in the Act, and its caution "has increased rather than decreased over time"<sup>8</sup>. He argued that since 1983 considerations in favour of non-disclosure have been emphasised, rather than those supporting release of information.<sup>9</sup>

"Principles and understandings prevalent at the time the Act was introduced have been blurred, and sometimes lost sight of, as layer upon layer of freedom of information case law has accumulated."<sup>10</sup>

When Zifcak wrote that article, FOI was operative at the federal level and in two States.<sup>11</sup> However, in 1995 FOI legislation is operating in every Australian State and now incorporates local government in several jurisdictions. The dramatic and rapid spread of FOI legislation makes the question of interpretation even more important. Coincidentally this extended coverage of freedom of information appears to have occurred with the adoption by the State Supreme Courts of Victoria and New South Wales, and a number of other review bodies, of a more expansive interpretation of the FOI Acts. The decisions in two cases *Sobh v Police Force of Victoria (Sobh)*<sup>12</sup> and *The Commissioner of Police v The District Court of NSW and Perrin (Perrin)*,<sup>13</sup> and by those other review bodies may herald a fundamental shift in the interpretation of FOI legislation. There is evidence that the courts and other FOI review bodies<sup>14</sup> are moving towards an interpretation that favours disclosure, rejecting the maintenance of traditional restrictions on access to information. These developments may indirectly but significantly affect other established areas of law or practice, such as the discovery process at the lower court level. If this approach is entrenched then the onus would be firmly and permanently on agencies to justify why documents should be exempted.

Current practice appears to place the onus, especially in relation to requests for policy and other high level documents, on the requester of information to demonstrate that the exemption being claimed is invalid. If the approach in *Sobh* and *Perrin* is followed, then the presumption would be restored that the various Australian FOI Acts have produced a shift or "tilt" in favour of disclosure so that, in case of doubt, decision-makers and review bodies should favour a construction supporting disclosure over a construction which favoured non-disclosure. Zifcak explored the fundamental difference such an approach would theoretically have on current FOI case law. The decisions of State review bodies such as the Queensland and Western Australian Information Commissioners have revealed the practical impact.

With many governments starting to retreat from the original goals and objectives of FOI by imposing prohibitive fee schemes,<sup>15</sup> widening exemption provisions<sup>16</sup> and excluding government business enterprises and other statutory bodies,<sup>17</sup> such a fundamental change in interpretation is to be encouraged. The Freedom of Information Amendment Bill (1994) introduced into the Tasmanian Parliament in October 1994 represents the nadir of this negative response to the impact of FOI legislation.<sup>18</sup> On a more positive note the Commonwealth has commenced a review of the *Freedom of Information Act 1982 (Cth)* from the perspective that the Commonwealth legislation may have slipped behind developments in access laws at the State level in Australia.<sup>19</sup>

<sup>8</sup> Ibid at 163.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Victoria and New South Wales.

<sup>12</sup> [1994] 1 VR 41.

<sup>13</sup> (1993) 31 NSWLR 606.

<sup>14</sup> Especially the Queensland and Western Australian Information Commissioners.

<sup>15</sup> Especially Victoria and the Commonwealth. See K Harrison and A Cossins, *Documents, Dossiers and the Inside Dope* (Allen & Unwin, St Leonards, 1993), pp 9-11; *Tasmanian Freedom of Information Bill 1990*, a report prepared for the Green Independents in Tasmania by the Communications Law Centre, pp 33-36.

<sup>16</sup> S Zifcak, "Kennett's FOI: Open and shut" (1993) 45 *FOI Review* 26; A Cossins, "Paving the way for less open government in Victoria: Amendments to the Cabinet documents exemption" (1993) 45 *FOI Review* 27.

<sup>17</sup> See *State Owned Enterprises Act 1992 (Vic)*, *TT Line Arrangements Act 1993 (Tas)* No 39 of 1993, Sched 2. M Batskos, "Applicability of Administrative Law to Government Business Enterprises: The Victorian Perspective Under the State Owned Enterprises Act 1992" *Australian Institute of Administrative Law Newsletter*, No 14, 1993.

<sup>18</sup> This Bill, and the general operation of the FOI legislation in Tasmania, is now under scrutiny by a Legislative Council Select Committee. The Select Committee will most likely produce a report towards the end of 1995.

<sup>19</sup> See "Freedom of Information", Issues Paper No 12, September 1994, a joint review by the Australian Law Reform Commission and the Administrative Review Council. A discussion paper was released in June 1995.

The mystery is that a decade of interpretation of the Commonwealth and Victorian FOI Acts had not unanimously reached the simple conclusion that FOI legislation required a presumption in favour of release when exemptions were being considered, a conclusion reached with relative ease and simplicity by Justice Kirby in *Perrin*. The protective cloak of secrecy that has been an article of faith for those who have administered the Australian version of the Westminster system may have been more deeply entrenched within public administration than the drafters of FOI legislation had anticipated. Given the long struggle and earnest debates that preceded the passing of each FOI Act in Australia there could be no doubt as to what was intended to be achieved by these Acts. As Justice Kirby stated:

“to judge the radical nature of the legislation, it is appropriate to contrast the legal regime which it introduced with that which preceded it. In the place of rules of common and statute law which forbade, prevented and punished the disclosure of official information, the Act adopted a general policy of disclosure.”<sup>20</sup>

### GENESIS: LET THERE BE OPENNESS

Australian Hansards are littered with glowing speeches heralding the dawn of a new era of accountability and openness with the advent of FOI legislation. Courts and tribunals, with only a few exceptions, have, however, failed to give full effect to the objects of this radical legislation. Parliamentary speeches introducing the various Bills leave no doubt as to how the Acts would operate to ensure the maximum access to government-held information. It is therefore regrettable that the caution which tribunals and the Federal Court have demonstrated is continuing. Two examples, from New South Wales and Tasmania, will suffice to reflect the aims and intentions of various parliaments in enacting FOI legislation. In the Second Reading Speech introducing the New South Wales Freedom of Information Bill the Minister stated:

“This Bill is one of the most important to come before this House because it will enshrine and protect the three basic principles of democratic government, namely, openness, accountability and responsibility. It is only if these three principles are firmly in place in the form of legislation that we can say with confidence that we have a truly democratic State Government . . . It has become commonplace to remark upon the degree of apathy and cynicism which the typical citizen feels about the democratic process. Voters feel that, having made their marks upon ballot papers on polling day, they can have no further effect on, and make no further contribution to, the process of government until the next election. This feeling of powerlessness stems from the fact that electors know that many of the decisions which vitally affect their lives are made by, or on advice from, anonymous public officials, and are frequently based on information which is not available to the public. The government is committed to remedying this situation . . .

This freedom of information legislation will strengthen democracy by helping to provide the people with a basis on which government policies and actions can be discussed and debated, as well as allowing the performance of the Government to be judged fairly at election time. It will permit a more informed electorate to

<sup>20</sup> *Perrin* (1993) 31 NSWLR 606 at 612-613.

make rational judgments. This is obviously preferable to forming opinions based on the present diet of sensational leaks and reports isolated from their context.”<sup>21</sup>

The prime importance of the objects section in FOI legislation was demonstrated in a report prepared for the supporters of the Tasmanian FOI Act.<sup>22</sup> In his Second Reading Speech to the Tasmanian House of Assembly, Dr Bob Brown made the following comments:

“I can do no better than to quote the Queensland Catholic Commission of Justice and Peace’s cogent reasoning for freedom of information as a vital and necessary component of modern day democracy:

‘For democracy to be government-by-the-people an informed electorate is essential. This can only happen if people are guaranteed access to information — what decisions are made, how they are made and why they are made. For citizens to believe in the democratic process, they must believe they are part of the process. For citizens to believe that the process is just, it must be seen to be just. And fundamental to this is for a citizen to have access to information held by government.’

Indeed the events in Queensland leading up to the Fitzgerald Inquiry illustrate the argument for freedom of information as an essential protector of democracy. Mr Fitzgerald summarised his opinion thus:

‘Information is the lynch-pin of the political process. Knowledge is quite literally power. If the public is not informed it cannot take part in the political process with any real effect.’

Yet politicians easily forget their obligations to the public. They have a habit of forgetting that fundamental democratic principle: the public is the government’s *raison d’être*. Perhaps that line should be repeated ten times aloud before every session as a constant reminder to us all? Strong freedom of information legislation enshrines that principle and gives it legal binding.”<sup>23</sup>

Other examples could be given but, clearly, despite reservations in the ranks of governments and bureaucrats, it was decided to fundamentally change the administrative traditions of Australian governments from secrecy towards open government. This trend has been followed by the United Kingdom with the release of the White Paper on open government<sup>24</sup> and the subsequent adoption of the *Code of Practice on Access to Government Information* which came into force on 4 April 1994.<sup>25</sup> Professor Paul Finn has argued that Commonwealth and State governments in Australia have responded to public pressures to pass freedom of information legislation so as to increase the quality and vitality of the citizen-State relationship.<sup>26</sup> Professor Finn suggests that Australia is moving from a governmental regime which can be described as governmental authoritarianism, where availability of information is subordinate to government interests, towards a constitutional system he designates as liberal-democratic where “the public availability of information is an important value to be promoted in a democratic society especially where this enables the public to discuss, review and criticise government action”.<sup>27</sup>

The achievement of this model liberal democratic system envisaged by Finn and members of the High Court in cases such as *Australian*

<sup>21</sup> New South Wales *Parliamentary Debates* (Legislative Assembly). 2 June 1988, p 1399.

<sup>22</sup> Communications Law Centre. *Tasmanian Freedom of Information Bill 1990*, pp 10-11.

<sup>23</sup> *Tasmanian House of Assembly Debates*, Forty First Parliament, Second Session, Vol XII, 28 November 1990, pp 5221-5222.

<sup>24</sup> *Open Government*, presented to Parliament July 1993, Cm 2290.

<sup>25</sup> For more information see Parliamentary Commissioner for Administration — Second Report, Session 1994-95. *Access to Official Information: The First Eight Months*, House of Commons, United Kingdom, 14 December 1994.

<sup>26</sup> P Finn, *Official Information, Integrity in Government Project*, Interim Report 1, Canberra 1991.

<sup>27</sup> *Ibid.*