

Contents

Articles

Freedom of information and parliament: A limited accountability tool for a key constituency?
by Rick Snell & James Upcher 34

Freedom of Information — the Australian experience
by Senator Alan Missen 42

NATO'S Web of Secrets
by Alasdair Roberts 46

Credits

The *Freedom of Information Review* is published six times a year by the Legal Service Bulletin Co-operative Ltd. Articles in the *Fol Review* are refereed.

International Editorial Board

Thomas B. Riley
Harry Hammit
Maevie McDonagh
Ulf Öberg
Melissa Poole
Alasdair Roberts

Australian Editorial Board

Jason Pizer
Anne Cossins
Kim Rubenstein
Bill Lane
Peter Wilmshurst
Helen Townley
Chris Finn

Editor: Rick Snell
tel 03 62 26 2062 fax 03 62 26 7623
email: R.Snell@utas.edu.au
Website:
<http://www.foi.law.utas.edu.au/>

Reporters

Peter Wilmshurst (NSW), Dannielle Evans (Vic.), Emma Sundborn (Cth)

Print Post approved PP:338685/00011

This issue may be cited as
(2002) 99 *Fol Review*

© LSB Co-operative Ltd 2002

Comment

Writing this comment for the 100th issue has been undertaken more in regret than in celebration for the centenary of 'that little green magazine'. Six issues a year, for almost 17 years, of a non-profit and volunteer journal on a topic like access to information is a major achievement. Yet after all these years there should be no need for this journal. Australian FoI ought to have delivered a high level of access to, and availability of, official information to all citizens. A level of access that removed the need for articles about secrecy, reports of decisions ordering the release of information incorrectly, or even improperly withheld, and pleas for urgent reform. Yet the need for something like the *Fol Review* remains.

The *Fol Review* was born in a far different world. It was a world where the first harvests of the new legislation had been collected in Victoria and the Commonwealth and the legislation was viewed with its promise and potential in mind rather than reviewed for its problems and limitations. At state level, in Australia, the possibility of FoI legislation was remote if not far fetched and at international level Australia had joined the thin ranks of a small number of pioneer jurisdictions. Yet in 2002 all Australian states have the legislation and the Northern Territory has introduced its long awaited Information Bill covering FoI, privacy and records management. On the international scene over 50 countries have adopted some type of access to information legislation. Notwithstanding the events and aftermath of 9/11 it is rare to find a country not considering adopting the reform some time in the foreseeable future.

A special tribute needs to be extended to the first three editors of the *Fol Review*. Moira Paterson, Paul Vilanti and, for a few issues, Peter Bayne who managed to navigate the *Fol Review* through its important early years and helped cement its place as a must read item for those interested in Australian freedom of information issues. A special thanks must go to all those who have served on the editorial board and as case reporters over the years. The *Fol Review* has benefited from the contributions of a vast array of writers from various backgrounds who have put forward challenging ideas, careful analysis and interesting articles. Apart from the intrinsic value of each individual article what has been more important has been the cumulative impact of this body of research, opinion and analysis. In recent years law reform organisations and parliamentary committees, from within and without Australia, have drawn heavily for research, solutions and understanding from this rich source of writings on FoI and related issues. For many years the *Fol Review* was one of the rare places you could find any analysis or coverage of FoI issues or cases.

Finally a special thanks must go to Liz Boulton who as Editorial Co-ordinator, read whip cracker, has patiently assisted all editors in helping get the *Fol Review* this far. She has remained unflappable despite missed deadlines, the lack of copy and the erratic contact from the most recent of her editors. Yet without Liz there would have been no *Fol Review* let alone the 100th issue.

Where to for the *Fol Review*? An interesting question and one I have yet to think clearly about but here are some initial thoughts. First I would like to see more articles that look at information issues from a wider perspective

both in terms of topic (secrecy, privacy, whistleblowing, data sharing, records management, archives and information policy) and background (analysis from the fields of political science, history, economics, philosophy etc).

Second, given the rapid spread of Fol, akin to the Canadian Information Commissioner's prairie fire, there is a need for more comparative studies that go beyond a mere detailing of the legislative provisions in the countries being studied. Carol Harlow has argued that 'the context in which post-modern administrative law is required to operate and the problems which it faces are of a global nature'.¹ Harlow observes:

It is perhaps not surprising that those administrative lawyers, generally working in the common law world, who have experienced the full force of privatisation, 'New Public Management' and the sudden tilt away from the interventionist towards the regulatory state, should question the role of administrative law. By and large the experience has proved a chastening one, in which the economist's values of economy, efficiency and effectiveness, together with an augmented accountancy concept of 'value for money', transmitted through audit, have seriously challenged the classic procedural values of administrative law. Public law has lost ground and its sphere seems to be shrinking. While there is general agreement on the nature of the problems, there is as yet little sign that answers are emerging or will be forthcoming.²

As the article by Al Roberts in this issue demonstrates, the development and framework of national access to information legislation may often be influenced, indeed determined or limited, by decisions and developments at an international or supranational level. The creation of trans Tasman agencies (joint Australian and New Zealand institutions) raises the question of whose access regime applies to information held by such agencies. Comparative studies can start to help us navigate the complexities of trying to institute and/or maintain open government in the future.

Thirdly, there is a need for more case studies. Despite 20 plus years of operation in Canada, New Zealand and Australia advocates and supporters of Fol have very few documented and proven examples of the benefits and costs of Fol, how it has operated and the tangible and intangible contributions made by Fol. The *Fol Review* has published a few accounts by journalists and Fol officers but we need more case studies that show how Fol has made a difference. We need to hear and preserve the stories which demonstrate why Fol has made a difference to the professional journalist, local community, individual citizen or parliamentarian.

Fourthly, I would like to see more internal perspectives from those administering the legislation. It is difficult for public servants to make public comment but ways must be found to communicate the ideas, understanding and perspectives of the 'insiders', Fol officers and other public servants about Fol. We need to know where and why Fol works, where it fails and how to prevent it being undermined by misuse and abuse both within government and by certain types of users.

Finally, given the explosion of Fol statutes, there is a need for more articles like that by Peter Timmins in Issue 97 which provides a snapshot of leading cases in a particular jurisdiction. These overview articles allow those outside a particular jurisdiction to find and learn from the leading decisions of other states and countries whether made by judges, information commissioners, tribunals or commissions. The *Fol Review* does not have the capacity to be a quick and concise reporting service for all Fol decisions. It does have the potential to bring

best practice, key decisions and important developments to a wide and diverse readership.

The future of the *Fol Review* is largely in the hands of its readers and contributors. If the *Fol Review* can continue to be a source of information, analysis and insight then it still has a vital role to play. However more contributors are required to allow the *Fol Review* to present a diverse range of views and to contribute to the contest of ideas. And yes Virginia I still believe in Father Christmas and live in hope that one day a media mogul, journalist association, press council, World Bank or other benefactor sends a letter saying 'here is a cheque to keep up the good fight'.

The reprint of Senator Missen's 1984 lecture in this issue is first, a reminder of the past of Fol in Australia especially the struggle to see it onto the statute books; second, it is a warning about the problems which still haunt the compromised legislation; and, finally, it reminds us that the need for individuals to monitor and promote this important legislation never ceases.

We are pleased to bring subscribers a complimentary, consolidated index to the *Fol Review* from Issues 1 to 100 with this 100th Issue.

Rick Snell

[Editorial Co-ordinator's note: The LSB Cooperative sends the strongest vote of thanks to Rick Snell whose enthusiasm has carried the *Fol Review* since 1992. He has edited the publication from far flung parts as he has followed his interest in Fol around the world. Thank you Rick, congratulations on the 100th issue and keep up the good work.]

References

1. Harlow, C., 'European Administrative Law and the Global Challenge,' European University Institute, *Working Paper* RSC No 98/23, 1998, p.1.
2. Harlow, C., above, ref 1, p.1.

To Subscribe!

Freedom of Information Review

\$66 (6 issues) per annum

At the time of subscribing you will be sent all issues for the current year.

Cheque enclosed (payable to LSB Cooperative Ltd) OR

Please charge Bankcard/Mastercard/Visa/Amex

No.

Signature

Card Expiry Date

Name

Address.....

.....

Send to: Legal Service Bulletin Co-operative Ltd, Law Faculty,
Monash University, Victoria, 3800, Tel: (03)9544 0974
Fax: (03)9905 5305 Email: m.gillespie@law.monash.edu.au

Freedom of information and parliament

A limited accountability tool for a key constituency?

Introduction

This article explores the asymmetrical relationship between Freedom of Information (Fol) and parliament and investigates potential conceptual reconfigurations of this relationship. A wider theoretical discussion of sovereignty and the relationship between the rule of law and democracy provides some understanding of the dynamics between the philosophical basis of Fol and its association with parliament. An effective Fol framework must proceed from a holistic approach that fully embraces and harnesses this wider relationship.

The relationship between Fol and the Westminster system is problematic and complex. Fol legislation is often viewed as marginal to the core functions of parliament and a tool limited to Opposition members of parliament that is more tolerated than valued. Yet to ignite and foster a genuinely participatory liberal democracy requires commitment and diligence by both parliamentarians and citizens. Fol can contribute to this democratic enhancement role — indeed it could play an indispensable part. However, Fol appears to become more problematic, and compliance issues arise more frequently, according to the modifications (if any) made to a Westminster system in order to accommodate Fol. Whilst legislation should be designed, administered and utilised to enhance key constitutional conventions governing public administration, Fol Acts appear to be more problematic in terms of outcomes. Significantly Fol is often depicted as a threat or hindrance to effective administration or as undermining important constitutional and other conventions of traditional governance.

This article briefly examines why Fol has remained a limited and often a crudely used tool of accountability for parliamentarians. The genesis of the article was a talk presented to the 13th Commonwealth Parliamentary Seminar in 2001 where the paradox of strong parliamentary support for the concept of access to information was contrasted to the reality of ad hoc, limited and lukewarm utilisation of such legislation once implemented.¹ This article treats parliamentarians as one of the core components of an Fol constituency and attempts to explain that our choice of which sovereignty model we adopt, parliamentary or popular, will enhance or diminish the effectiveness of Fol.²

Fol and parliamentarians — a theoretical partnership

A theoretical symbiosis between Fol and members of parliament does not appear to translate readily into practice. Fol, instead of readily supplementing many of the functions of parliamentarians, seems to produce an indifferent and generally sporadic relationship. Instead of being a tool of first resort by a majority of Opposition members of parliament, Fol is left to the idiosyncratic application by a small and often half heartedly committed handful. This fragmented, haphazard and limited utilisation (principally for point scoring) of Fol seems to assist governments in painting Fol usage by members of parliament as either a misuse or even abuse of a legislative device.

Walter Bagehot, the great theorist of Westminster, thought that parliament, quite apart from its legislative function and its role as an electoral college, had four vitally important roles: an expressive function, expressing the heart of the nation; a training function, whereby the public is subjected to opposing and conflicting viewpoints; an informing role; and a scrutiny and review function, checking the conduct of the executive.³ Many suggest that parliament is in decline as an institution and that its performance in the last four of Bagehot's ideal functions has been declining over several decades. This can be debated. However, parliament is still the pre-eminent institution of our representative democracy. Parliament, and particularly the Westminster tradition of responsible government, has been undergoing substantive change and will continue to do so. While the legislative and electoral college functions still operate relatively unmodified, it is in the other functions set out by Bagehot where change has occurred. The scrutiny and review function of parliament, in particular, has been challenged by relatively recent developments.

Question time, rather than a forum for parliamentary access to information, has been transformed, in the age of mass media and spin into a permanent electoral arena, a spectacle for sound-bites, with paramount emphasis placed on point-scoring and media impact.⁴ Ambitious members and leadership aspirants, torn between the representation of constituents and the membership of a political party, predominantly toe the party line for fear of upsetting their chances of promotion. Political parties and the coterminous increase in executive power exercise an increasingly stringent grip on the operation of parliament and the dissemination of information.

Fol legislation is designed to provide citizens or their agents (such as journalists, lawyers, non-government organisations, Opposition members of parliament) access to information collected, produced, and held by government so as to loosen the executive's grip. As a mechanism Fol allows key actors in the democratic process an enforceable right to seek information which governments and their public servants have decided (intentionally or unintentionally) not to make readily available. Greater access to the government's repository of information or the creation of a lively informational commons is seen by parliamentary reformers as a foundation for most other reforms.⁵

Many of the initial and leading advocates for Fol are parliamentarians who view it as a means of circumventing problems they have with the efficacy of Question Time, annual reports, committee hearings and the operation of government media and publicity units.⁶ The work and parliamentary careers of John Moss,⁷ Ged Baldwin,⁸ Brendan Ryan,⁹ Gough Whitlam,¹⁰ John Cain¹¹ and Bob Brown are examples, from various jurisdictions, of parliamentarians who supported Fol for these parliamentary ends. At the transnational level the same types of themes appear within the demands for greater transparency.¹² Right-to-know lobbyists from the press,¹³ public sector unions,¹⁴ and small groupings of individuals and organisations¹⁵ often support these parliamentary campaigns for reform. This diversity of supporters helps forge links

between the enhancement of government information policy with the rejuvenating effects of open government on parliament, the fourth estate role of the media, the freeing of public servants from the heavy shackles of government secrecy, and the creation of an informed citizenry.

Fol legislation is often a response to issues of executive and bureaucratic secrecy. As Paul Monk emphasises, the dismantling of the ethos of secrecy has a practical component; openness is necessary 'in a complex world, in which there is a superfluity, not a scarcity of information; and necessary just insofar as one wants effective, corrigible and responsible policy-making'.¹⁶ The ability to access information is seen as a fundamental tenet of liberal democracy, a right that strengthens both accountability and participation. Ian Marsh has argued that:

The quality of government information is not some esoteric, abstract subject. It is critically important to the vitality of our democracy. Like money in a market, government information functions as a principal currency in our political system.¹⁷

Members of parliament have a number of roles including a number that are strengthened by Fol. Parliamentarians are primarily elected to serve their electorates; however, they have to balance this commitment with (in most cases) membership of mass political parties and the constraints of party discipline. The majority of parliamentary time is spent on the consideration of legislation. Other functions also include the scrutiny of governmental conduct, and the raising of issues by members of parliament on behalf of constituents. Therefore, the performance of these scrutiny and accountability functions are largely conducted via the filter of political parties and the perspective of the Government or Opposition.

The emergence of a knowledge-based information society adds a new complexity and dimension to the Fol-parliamentarian nexus. On the one hand as Juillet and Paquet note, this new socio-economic environment requires governments and public bureaucracies to 'engage in a social process of collective learning and information sharing'.¹⁸ In this process the art of governance becomes the successful coordination of relationships between the 'state and the rest of society since government has had to become involved in a very intricate way in alliances, partnerships and interactions with other sectors and citizens'.¹⁹

Yet, on the other hand, the constructs of the parliamentary process necessitate Opposition members of parliament attempting to use knowledge gained via this information sharing in ways which will depose the existing political and bureaucratic leadership. This use of information gained via such mechanisms as Fol for denunciation purposes also paradoxically triggers a rationing response from the government. Juillet and Paquet argue that 'if information accessed comes to be used in a selective and biased way for denunciation purposes only, this sort of sensationalist and exposé type use is bound to trigger a rationing of the information made available'.²⁰

The reinvention of the state, the rise of structural pluralism²¹ and a new culture of information management²² all require a reconsideration of the functions undertaken by parliamentarians and the means by which they achieve their objectives — a reconsideration which is still in its early infancy. This reformulation of the roles and functions of parliamentarians is not occurring in isolation. The major backdrop is a substantial decline in the level of

trust, respect and faith both in the institution and members of parliament by citizens.²³

Juillet and Paquet argue that the above points require changes in current practices of information access and, in particular, that two basic guiding principles of information access be adopted:²⁴ first, that access is granted by default and extensive routine disclosure; and second that limits to disclosure be accepted and justified.

This first principle of broad disclosure be tempered by a second principle of necessity of confidentiality to guarantee that excessive transparency does not result in personal harm or unreasonably hamper the ability of the state to operate effectively in the public interest.²⁵

The litmus test for these principles is whether Opposition members of parliament and political parties can exploit the first principle in moderation and concede justified claims by the government for recourse to the second principle. The possibility of access to governmental information is as important for the effective operation of democracy as the ability to discuss that information.²⁶ Roberts has formulated this point as recognising an 'informational commons' the extent and quality of which requires access to the best repositories of information available.²⁷

Fol provides a number of normative functions to help supplement this information commons. First, the use of Fol can improve the effectiveness of parliament as a balance to executive power. The participatory role that Fol encourages could create a more responsive relationship between the parliamentarian and their constituency not withstanding the confines of party discipline. Second, Fol legislation might lead to more productive sessions of Question Time, as members (especially Opposition members) with increased knowledge would be encouraged to ask more searching questions, and Ministers would be better informed to answer them.²⁸ Ideally, the legislative role is made more productive because governments, adopting Juillet's and Paquet's first principle that access is granted by default and extensive routine disclosure, would submit Bills to committees for public hearings to provide a forum for public input, and would take informed Opposition criticisms as opportunities for amendment and modification. This approach would provide the benefits of compromise and concession, as well as the obvious benefits of an informed and civically engaged citizenry.

Yet this theoretical linkage between Fol and parliament is partly confused because, with a few exceptions, we have failed to explore how the concept of public accountability operates in relation to access to information legislation. Franceschet argues that not only is the concept of accountability 'extremely varied and multifaceted' but it has been further transformed since the original introduction of Fol type legislation.²⁹ This transformation has been in part triggered by Fol but also by other changes including the introduction of the Ombudsman, changes in auditing, improvements in records management etc. There now exists a much more 'elaborate accountability framework' but a framework whose dynamic and relationships has barely been explored.³⁰

Problems of access for parliamentarians when reality bites

As a general rule the use by parliamentarians of Fol, despite the theoretical attractions, has been comparatively minor. The exceptions have been Opposition

parties who have used it to maximum effect simply as a tool of denunciation as criticised by Juillet and Paquet.³¹ The compliance problems caused by high levels of adversarial use of Fol and the structural advantages held by governments to perpetuate secrecy produce an environment that discourages long-term use and commitment to Fol legislation by members of parliament. This alienation of access legislation is compounded when members of parliament frustrated by unrewarding Fol experiences, in opposition, take on ministerial portfolios which are besieged by numerous requests that are wide, complex and seek sensitive information. There should be little surprise when once fierce advocates for openness take on leadership roles to narrow or limit access legislation.

Lack of parliamentary usage of Fol

Despite the key and early role that parliamentarians play in proposing a reform like Fol, especially when in Opposition, there is often a limited and ad hoc resort to the legislation post implementation. The Irish Information Commissioner's 1999 report shows only 2% of requests (213) were received from Oireachtas members compared to 14% (1612) from journalists.³² In New Zealand about 50% of complaints to the Ombudsmen about the Official Information Act are from the media, special interest groups, trade unions, parliamentarians, political party research units and companies. Requests from parliamentarians and political party research units amount to 19%.³³ The figure in Western Australia is about 12% for requests for non-personal affairs information.³⁴

Particular Opposition members of parliament in different jurisdictions become well known for their frequent requests, but rarely is there a systematic usage of the legislation. Political Party Research units in New Zealand have started to use the legislation more frequently. The success and openness of the New Zealand regime can in part be attributed to political and bureaucratic leaders supporting the intent of the act and working collaboratively with the external reviewer (the ombudsmen). This has resulted in a much less adversarial relationship among the various parties than has occurred in Australia and Canada. The Victorian Labor Party Opposition in 1999 and 2000 also seemed to be coordinating Fol requests and reviews to great effect. Interestingly the new Victorian Liberal Opposition (the government in 1999 and 2000) has taken a leaf from the Australian Labor Party book and increased their usage of Fol.³⁵ Yet this greater level of activity has seen increased delays in processing requests and involvement of ministerial advisers interfering with the processing of requests.³⁶

Adversarialism

The adversarial nature of parliament creates difficulties for Fol access.³⁷ When Fol operates in an adversarial climate, the integrity of the system and trust between the parties, which is critical to compliance, is diminished. Fol becomes less effective when the applicant is an Opposition MP seeking information relating to a sensitive area of government policy. As Juillet and Paquet argue, in these circumstances there is the probability of a 'dynamic of cumulative rationing of information' being created whereby governments and their bureaucrats try to minimise exposés and critical media coverage.³⁸ In their view 'where access to information requests can come to be regarded as potential triggers for political crises for the government, it would only be natural that many ministers

and public servants would resist a generous interpretation of the law'.³⁹ Or even a generous administration of the legislation.

The power of the executive branch and the rise of party government, as well as the unproductive emphasis in Question Time on 'point-scoring' restricts and frustrates Opposition MPs attempts to obtain information. Furthermore the conflictive nature of party politics typically gives rise to non-compliance and evasion, a tendency to adopt a broad interpretation of exemptions, time delays, and more emphasis on 'spin' and controlled dissemination of information. Therefore, reducing the value of Fol requests to either a theoretical attraction or at best an occasional 'show trial' that demonstrates the legislation is not working due to excessive delays or questionable claims for exemptions.

Structural advantages of government over applicant

Greg Terrill has suggested that the structure of Fol legislation creates positions of relative advantage and disadvantage, maintaining a scenario of atomised individuals against bureaucracy and executive power:

Fol typically involves applications by unconnected individuals who frequently possess little knowledge of the process, and government departments that have the advantage of familiarity with the system and contact with similar players. Collective action by those seeking information is possible, but rarely occurs. The individualism of Fol is confined to applicants; individualism is not a characteristic of government assessors.⁴⁰

The rise of 'party government', furthermore, has a tendency to perpetuate an ethos of governmental secrecy; parties and the executive can readily 'close ranks' against an Opposition member of parliament or investigative media. The nature of party politics means that the handling of Fol requests will be handled largely by Opposition parliamentary 'headkickers' willing to raise the adversarial stakes. Furthermore, Fol has a number of specific attributes that have the capacity to provoke negative or non-compliant responses from administrators, namely:

- it grants legal and enforceable rights of access to citizens and non-government parliamentarians;
- it is unpredictable in terms of applicant, type of request, timing and outcome;
- management of requests is eventually ceded to an independent body (commissioner/court/ombudsman);
- government information management techniques are apt to be portrayed as excessive secrecy or cover-ups; and
- key Fol administrators are operating in an environment of diminishing training, resources and pressures promoting non-disclosure.⁴¹

The theoretical version of the Fol-parliament relationship discounts or ignores these structural barriers to openness and fails to anticipate any compliance status other than neutral or pro-active.⁴² Yet when the structural imbalances and factors conducive to non-compliance are taken into account, the low utilisation of Fol by parliamentarians is not so surprising. Still there is an obligation on key users like parliamentarians to use the legislation skillfully, with moderation and productively. The Opposition MP who files several hundred requests and then fails to follow up the results with questions in parliament, public debate or a more informed critique of a government program poses as much a threat to the efficacy of Fol as does the over-secretive minister. Parliamentarians should

enhance FoI in the following ways: legislative reform; more effective and productive use of FoI; greater support to promote positive and pro-active compliance by administrators; championing the principles and practices of open government when switching from the Opposition backbench to the government frontbench.

FoI and the Westminster System: a threat to core values?

Criticisms citing the incompatibility between FoI and the core values of the Westminster system are misguided. However, there are manifold problems, for the tolerable dissemination and access to information, resulting from the choices made about which version or vision of the Westminster system is adopted. The primary issue is where to draw this limit between, on the one hand, publicity and participation and, on the other hand, the need for exclusivity, secrecy and responsible government. FoI favours civic openness, principles of participatory democracy, and publicity over the ethos of governmental secrecy. Nevertheless, as Jodi Dean argues, 'Publicity requires the secret as its constitutive limit, as that point of exclusion through which the public becomes intelligible.'⁴³ Yet in jurisdictions like Australia and Canada the central tenets of the Westminster system of government seem to demand exclusivity and secrecy as predominant and highly desirable values. Indeed, prior to FoI legislation, these traditional 'closed' values of the Westminster model were cited in Opposition to the disclosure of governmental information directly to the public.⁴⁴ The opinion is still prevalent that FoI sits uneasily with core values and traditions of the Westminster system.⁴⁵

Within this tradition, often promoted or treated as the classical or ideal Westminster model, only the potential retribution of a dissatisfied electorate mitigates against a governmental policy of maximum reticence towards disclosure. Under the classical model the structural advantages, outlined in Terrill's analysis, which help to perpetuate state secrecy are not just kept in place but are considered both fundamental and untouchable. FoI challenges this paradigm. FoI hampers good governance within the classical Westminster model, it is suggested, because the emphasis on disclosure inhibits the quality and level of governmental advice and needlessly disrupts the core tenet of 'responsible government.' Accountability and transparency are seen to be more than adequately catered for by the concept of ministerial responsibility and a vigilant and adversarial parliamentary process.

The Tasmanian government in justifying its amendment Bill in 1994 detailed the damage, both direct and indirect, FoI inflicts on the Westminster process.⁴⁶ The government suggested that FoI deleteriously exposes the conduct of policy formulation, and exchanges between policy advisers and ministers, to potential scrutiny. This scrutiny is premature and more likely to impede than improve the policy formulation and implementation process. It was further argued that the Westminster system demanded a core area — not only Cabinet, but also the policy processes leading to the final Cabinet decision — to develop policy in private. Privacy — or a scrutiny free zone — for policy formulation was needed to avoid the interference from uninformed or misinformed external sources (internal or external to the government and the agency).

The concept of 'responsible government' is fundamental to the Westminster system. But responsible

government is a highly subjective political category. It denotes primarily the majority of democratically elected representatives who form the executive, which is then accountable and remains responsible to the popularly elected house of parliament, the House of Representatives. The executive is thus directly accountable in parliament, and the parliament has the power directly to scrutinise and question members of the executive or, in a crisis, to defeat the government. The conventions of Westminster include subscription to the doctrines of Individual ministerial responsibility, collective responsibility, public service neutrality, and public service anonymity.⁴⁷ FoI either directly or indirectly displaces or challenges each of these doctrines.

Individual ministerial responsibility means that a minister is responsible to parliament for explaining matters relating to his or her portfolio. The minister is responsible to parliament and responsible for potentially making amends if there is a problem within his or her portfolio. The convention provides that there is accountability to parliament for everything that goes on within a portfolio. Therefore, if a Minister chooses to run an agency along more secretive lines, parliament will theoretically hold that minister to account for problems arising from policy failures, accountability lapses and mismanagement. The convention of collective responsibility constitutes the power of the Cabinet as a collective entity that overrides the powers of individual ministers through unanimity and confidentiality. Palmer identifies three main elements of the doctrine: confidence; unanimity; and confidentiality.⁴⁸ Within the Westminster system, the public service is expected to be neutral and anonymous.

These traditions, however, have not received unanimous support and/or have operated anywhere near to the ideal. The executive possesses greater dominance than it did 100 years ago. Former Senator Alan Missen suggests that the tradition of 'individual ministerial responsibility' 'is now long outdated and hardly operating'. Hamer argues that FoI could improve the practice of individual ministerial responsibility by encouraging the fierce questioning of a minister in parliament after the disclosure of actions by a department.⁴⁹ Indeed the crux of Palmer's reassessment of these concepts is that they need to be reformulated and modified to bring them into line with what actually occurs.⁵⁰ The decline of individual ministerial responsibility is inextricably linked with another important development: the growth of 'party government'.

The dominance of political parties has short-circuited the notion of individual ministerial responsibility, and impinged upon the parliamentary function of executive scrutiny. Collective responsibility now extends from the cabinet to the entire party. The power of parliament is now subordinate to the power of political parties, and through the paramount emphasis on party discipline, members of parliament are increasingly responsible to large-scale party machines, while parliament has subsequently declined as a forum for accountability. This is cause for concern. Chandran Kukathas notes of the term 'party government':

This phrase, in many ways, gives us a clearer picture of the system of government we now have than does the more commonly used term 'responsible government'. The description of the political system as one in which the government was responsible to parliament, and parliament is responsible to the electorate is no longer as accurate as it once was.⁵¹

Parliamentary investigations into government activity are easily frustrated by the dominance of political

parties.⁵² Party discipline means that cross-voting is now very rare.⁵³ Question Time, despite the existence of FoI, remains a difficult and hostile arena for access to information, because the executive no longer sees itself accountable to parliament. Accountability to party apparatuses removes the scrutiny of responsibility from the institutional public sphere of parliament to the private and nebulous machinations of the party branch. Collective cabinet responsibility is for many a synonym for 'elected dictatorship.' Palmer argues that the classical concept of ministerial responsibility to parliament has been displaced by ministerial responsibility to the Prime Minister and party.⁵⁴

The neutrality of the public service has been diminished since the introduction of FoI by a series of developments including performance pay, short and long-term secondments between the private and public service, replacement of senior public servants upon change of government and other changes. However, it has been suggested that the public service in Australia, in contrast to other countries such as New Zealand, has always been politicised.⁵⁵ The anonymity of public servants has been seriously challenged by the power of the media. Furthermore, the rise of 'structural pluralism' in the public service — the rise of hybrid organisations that consider themselves public in some circumstances but private in others — has challenged the traditional Westminster notions of ministerial responsibility over public servants.⁵⁶ As Roberts argues, this development 'require[s] an amendment of the long-held belief that the control of administrative behaviour should be the sole responsibility of political executives'.⁵⁷

Clandestine ministerial operations, the dominance of the executive branch of government, greater emphasis on cabinet and party discipline, restricted rules for Question Time and potential for bureaucratic caprice challenge the notion of responsibility solely to parliament. The rise of party discipline and the decline of cross-voting means that the beneficial results of compromise and concession to opposing points of view in the formulation of Bills is lost. The Australian House of Representatives now has a number of subject committees to scrutinise government departments, but all are chaired by government members of parliament. Hamer argues that these committees:

certainly do not investigate matters which the government does not want investigated, which are usually the very matters which should be looked into. Worse still, the committees may be given tasks by ministers, so that the committees are effectively responsible to the ministers who are supposed to be responsible to them.⁵⁸

The sheer volume of parliamentary information is greater today than ever before. Nevertheless, as Parker notes:

much of the output of government printing offices is still unduly complacent, uninformative, and disingenuous ... it is a question whether rather more of this submerged bulk of the administrative iceberg should be more readily accessible to public scrutiny.⁵⁹

FoI legislation can help drag up this iceberg. For example, FoI tempers the dominance of the executive branch and the power of Cabinet, and potentially loosens the iron grip of the party machine by forcing *public* accountability. During the 1978-79 Senate investigation into potential FoI legislation, the impact of FoI on the Westminster system was a paramount concern. Senator Missen found that:

We came to firm conclusions, in that Report, that the opponents of FoI were using the Westminster system as a kind of

straight-jacket, which was restraining democracy in a certain fixed position.⁶⁰

Neither democracy nor the traditions of Westminster are static or atavistic. They are subject to large-scale historical changes in the political culture. The New Zealand Danks Committee proposed that Westminster was a living concept that must be modified according to the need for accountable government. In other words, FoI should be viewed as a means of changing the configurations of power within the Westminster system and addressing the general decline of parliament. As a reform FoI is designed as a reaction to, and a means of addressing, the gap in accountability between modern governments and citizens. Official information should be publicly available unless there is an exceptional reason to withhold it. Vague references to Westminster traditions, or slavish adherence to a frozen construct of Westminster should not be allowed to legitimate governmental opacity or to obscure the community's right to know. The structural advantages perpetuating state secrecy identified by Terrill cannot be overcome by the types of reforms he suggests unless we also manage to bring the core values of Westminster closer to a more open, participative and democratic orientation.

FoI and sovereignty

If FoI is a response to the changing role of parliament, marking a shift away from the notion of responsible government, the further issue arises as to how best to conceptualise the changing relationship between government and citizens resulting from FoI reforms. In other words, FoI may force us to reconsider the basis of sovereignty.

Parliamentary Sovereignty

The classic Westminster system is associated with a view that cedes sovereignty — supreme power — to the elected parliament. This is a view particularly associated with A.V. Dicey, but its genesis is in the political thought of Thomas Hobbes, who argued that citizens demanding protection from war, crime, and violent death must offer their complete submission to the Crown and pursue their private ends within the belly of the Leviathan.⁶¹ Dicey applied these sentiments to parliament: parliament is the supreme law-making body of the Commonwealth and no other person or body, and certainly not an unelected court, can challenge its authority or its laws.⁶² In this tradition, it is argued, sovereignty is a legal concept; a body can only be sovereign if it acts in a way prescribed by law. Dicey suggests, therefore, that legal sovereignty does not belong to the democratic citizenry, but to the legally constituted parliament. Parliament is not in any way a trustee of the people's democratic will.

The doctrine of parliamentary sovereignty underpins the classic Westminster system, and the idea of responsible government slots into this larger interpretation of sovereignty. When it was suggested to Dicey by Leslie Steven that the doctrine of parliamentary sovereignty would not prevent parliament from commanding the slaughter of all blue-eyed babies, Dicey responded that, firstly, members of parliament are rarely insane or maniacal, and secondly, that the electorate would revolt against the statute.⁶³ While the example is extreme, with the dominance of party machines and the executive branch, party government, and the decline of individual ministerial responsibility, we can see that the doctrine of parliamentary sovereignty sits extremely uneasily with the logic

underpinning Fol legislation. If the parliament believes itself sovereign, with no alternative force able to dethrone it, the public's right to know will be seen as a platitude. Parliamentary sovereignty is unable to grasp the political and civic elements and the philosophical basis of open government so crucial to the rationale of Fol.

Popular sovereignty

The notion of popular sovereignty receives its philosophical impetus from figures such as Jean-Jacques Rousseau, Montesquieu, Abbé Sieyès, and John Locke. In this tradition, only the united and consenting will of all can legislate. It is then for the constitution to set limits to the boundaries of democracy, to prevent the tyranny of the majority and the subordination of individual liberties to the common good. The alternative, in Stephen Holmes's apt phrase, is 'soccer-stadium democracy'.⁶⁴

Proponents of popular sovereignty believe that the basis of authority should lie with the constituent power of the people, and that government operates according to the consent of the governed. In Locke's theory, citizens are granted inviolable rights against the state. The government is seen not as the putative embodiment of the citizenry, but the trustee of the democratic will.

While the Diceyan view is anachronistic with relation to developments within the classic Westminster tradition, popular sovereignty and republican theories of government, along with the imputation of rights, have been increasingly championed by the courts.⁶⁵ There is evidence that the changing views of the courts, such as the implied freedom rule, are an impetus for Fol reform and government disclosure.⁶⁶ Even former prominent advocates of the Diceyan paradigm of sovereignty, such as Michael Kirby, now appear to recognise the legitimacy of popular sovereignty.⁶⁷ The classic statement of this conception of popular sovereignty is to be found in Mason J's judgment in *Australian Capital Television Pty Ltd v Commonwealth*:

The elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and action in government and to inform the people so that they make informed judgment on relevant matters.⁶⁸

Popular sovereignty shifts the focus of the Westminster system from the core values of responsible government and collective accountability to the need for openness, transparency, and sluices between parliament and the public, and is much more amenable to the goals and values of Fol. However, popular sovereignty and the best elements of a republican tradition require an alert and participatory citizenry (and media and politicians) prepared to champion the civic importance of Fol and open government.

Fol operates across four dimensions of government: political, bureaucratic, civic, and legal.⁶⁹ The other major components of administrative law (ombudsman, administrative appeals and judicial review) all tend to operate predominantly within the legal dimension of a citizen's relationship to government. However, there is a highly political as well as a legal aspect to Fol: the dissemination of information and the creation of informal and institutional public spheres aids citizens' opinion- and will-formation.⁷⁰ These aspects of Fol fit neatly into a model of popular sovereignty.

In the Lockean tradition of popular sovereignty, the existence of inviolable and indivisible fundamental human rights prevents the tyranny of the majority. The

imputation of rights in relation to Fol — the right of access to information — may well loosen the ethos of secrecy and parliamentary supremacy inherent in the classical Westminster tradition. It may transfer the emphasis from the protocols of cabinet collective responsibility and responsible government to the fundamental right of access on behalf of the citizen; in Roberts' phrase, the boundaries of access would be determined according to 'the deleterious effects of opacity'.⁷¹ Nevertheless, this will not be enough. Although the Westminster system has been content to do without the imputation of individual rights, it would be a mistake to simply champion the right to Fol against the system, as this perpetuates the individualistic basis of Fol access. It must be emphasised instead that these rights are *positive* rights that complement a structure favourable to popular sovereignty, civic deliberation, and self-government, a political structure that responds positively to challenges imposed by parliament. Fol should not be seen as a fundamental individual right but as a positive political right to participatory government, a prerequisite to a vibrant civil society that meets positive law halfway. Developments in the Westminster system mean that either the courts or the citizenry must pick up the slack. Fol provides a way of strengthening a civic ethos of self-governance without delegating an overly political role to the authority of the courts.

Conclusion

This article has contested the view that the relationship between Fol and parliament is a straightforward case of equipping parliamentarians with a ready to use and simple accountability tool. Instead the relationship appears to be complex and the tool itself has several limitations depending on how it is used. Furthermore, while the prevailing view in Australia has been that Fol needs to be modified to operate in a Westminster system it is our contention that it is the Australian variant of Westminster that needs to evolve to accommodate Fol. In this regard we have canvassed whether further exploration of the topic of sovereignty might yield a more thorough understanding of how we can make Fol more effective in terms of both accountability and contributing to better public administration.

The limitations and simplistic nature of our exploration highlight the need for greater input from Australian political scientists into our understanding of how Fol works. This input needs not only to be from the Australian perspective but on a comparative basis as well. The ground seems fertile for both empirical studies (on the frequency, type and outcomes of Fol use by members of parliament) and theoretical exploration of the capacity for Fol to contribute to civic development within a liberal democratic state.⁷²

**RICK SNELL
JAMES UPCHER**

*Rick Snell, Senior Lecturer in Law, University of Tasmania.
Contact r.snell@utas.edu.au
James Upcher BA (Hons) is a law student at the University of
Tasmania.*

References

1. Rick Snell, 'Freedom of Information and Parliament: A preliminary overview of a limited accountability tool' presentation to the 13th Commonwealth Parliamentary Seminar, Parliament House, Hobart, Tasmania 16 October 2001.
2. See Rick Snell, 'In search of the Freedom of Information constituency: Case 1 — The media,' [1998] 78 *Fol Review*, pp.81-84 where the concept of an Fol constituency is more fully explored.
3. David Hamer, *Can Responsible Government Survive in Australia?* Canberra, University of Canberra 1994, at 108.

4. See Rick Snell, 'Freedom of Information and the delivery of diminishing returns or how spin doctors and journalists have mistreated a volatile reform,' in *The Drawing Board: An Australian Review of Public Affairs*, Volume 3, Number 2: March 2002, 187-207.
5. As an example see Michael Cashman, 'Reforming the Institutions: Public Access to the EU Institutions' documents,' at <www.michaelcashmanmep.org.uk/campaigns/freedom_of_information.htm>.
6. See Alan Missen, 'Freedom of Information: The Australian Experience', *The Campaign for Freedom of Information*, <http://www.cfoi.org.uk/missen.html>.
7. Francis E. Rourke, *Secrecy and Publicity*, The John Hopkins Press, 1961, p.28; Harold L Cross, *The People's Right to Know*, Columbia University Press, 1953.
8. R.P. Gillis, 'Freedom of Information and Open Government in Canada,' in A. McDonald and G. Terrill, *Open Government: Freedom of Information and Privacy*, MacMillan Press, 1998, pp.146-147.
9. Maeve McDonagh, *Freedom of Information in Ireland*, Sweet and Maxwell 1998, 27.
10. See G Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond*, Melbourne University Press 2000, pp.11-19.
11. John Cain, *John Cain's Years: Power, Parties and Politics*, Melbourne University Press, 1995 at pp.265-267.
12. Cashman, 'Reforming the Institutions: Public Access to the EU Institutions' documents'.
13. For example the American Association of Newspaper Editors campaigns in the 1950s and 1960s.
14. Terrill, above, ref 10, at 13-14.
15. Harold L. Cross, *The People's Right to Know*, and J. Spiegelman, *Secrecy — Political Censorship in Australia*, Angus & Robertson, 1972.
16. Paul Monk, 'Breaking the Addiction to Secrecy', *The Australian Financial Review*, Friday, 1 March 2002, Review Section, pp.6-7.
17. Ian Marsh, 'The Quality of Government Information, Public Opinion and Adversarial Politics,' *Canberra Bulletin of Public Administration* 83, Feb. 1997, p.76.
18. Luc JUILLET and Gilles Paquet, 'Information Policy and Governance,' *Report 1 — Access to Information Task Force*, Canada, June 2001, p.2,
19. JUILLET and Paquet, 'Information Policy and Governance', p.3.
20. JUILLET and Paquet, 'Information Policy and Governance', p.4.
21. See Alistair Roberts, 'Structural Pluralism and the Right to Information', (2001) 51 *University of Toronto Law Journal* pp.243-271 and Anthony Giddens, *The Third Way and Its Critics*, Cambridge, Polity Press, 2000.
22. JUILLET and Paquet, 'Information Policy and Governance,' p.5.
23. JUILLET and Paquet, 'Information Policy and Governance,' p.7.
24. JUILLET and Paquet, 'Information Policy and Governance,' p.11-13.
25. JUILLET and Paquet, 'Information Policy and Governance,' p.13.
26. Australian Law Reform Commission/Administrative Review Council, *Open Government: a Review of the Federal Freedom of Information Act 1982* (ALRC 77/ARC 40, 1995), pp.11-14.
27. Alasdair Roberts, 'The Informational Commons at Risk,' in D. Rache and R. Higgot, eds, *Recovering the Public Domain: Moving the Boundary Between the Market and the State*, London, Routledge, 2000.
28. Alan Missen, 'Freedom of Information: The Australian Experience'.
29. Mary Franceschet, 'Public Accountability and Access to Information,' *Report 6 — Access to Information Review Task Force*, Canada, November 2001, 2-4. See Henry McCandless, *A Citizen's Guide to Public Accountability*, Citizen's Circle for Accountability, Victoria, BC, 2002 for a interesting and practical exploration of this topic.
30. Franceschet, 'Public Accountability and Access to Information,' p.2.
31. JUILLET and Paquet, 'Information Policy and Governance,' p.4.
32. Annual Report of the Information Commissioner, Ireland, 1999, p.44.
33. Report of the Ombudsmen for the year ended 30 June 2000, New Zealand, p.55.
34. Office of the Information Commissioner, Western Australia, Fifth Annual Report 1998, p.11.
35. Richard Baker, 'Watchdog wants Fol rules relaxed,' *The Age*, 8 May 2002, p.8.
36. Baker, 'Watchdog wants Fol rules relaxed'.
37. See Rick Snell, 'Administrative compliance — evaluating the effectiveness of freedom of information,' (2001) 93 *Fol Review*, 26-32.
38. JUILLET and Paquet, 'Information Policy and Governance,' p.4.
39. JUILLET and Paquet, 'Information Policy and Governance,' p.8.
40. Greg Terrill, 'Individualism and Freedom of Information Legislation', (2001) 87 *Fol Review*, p.30
41. For a more detailed discussion on this point see Snell 'Freedom of Information and the delivery of diminishing returns or how spin doctors and journalists have mistreated a volatile reform'.
42. Snell, 'Administrative compliance — evaluating the effectiveness of freedom of information'.
43. Jodi Dean, 'Publicity's Secret', *Political Theory*, October 2001, p.626.
44. Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information', *Federal Law Review*, Vol.28, No.1 2000, pp.56-58.
45. Rick Snell and Nicole Tyson, 'Back to the drawing board: Preliminary musings on redesigning Australian Freedom of Information', (2000) 85 *Fol Review*, pp.2-6.
46. For more detail of this argument see Helen Sheridan and Rick Snell 'Freedom of Information and the Tasmanian Ombudsman 1993-1996,' *University Tasmania Law Review* Vol 16 No. 2, pp.107-159.
47. Hamer, above, ref 3, at p.160; Matthew S. R. Palmer, 'Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?'
48. Matthew S.R. Palmer, 'Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?'
49. Hamer, Can Responsible Government Survive in Australia?, above, ref 3, at 160.
50. Palmer, 'Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?'
51. Chandran Kukathas, 'Democracy, Parliament and Responsible Government', in David W. Lovell et. al. *The Australian Political System* (Melbourne: Longman 1995) at 161.
52. Hamer, above, ref 3, at pp.123 and 177.
53. Hamer, above, ref 3, at pp.100 and 159.
54. Palmer, 'Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?'
55. Missen, 'Freedom of Information: The Australian Experience, above, ref 6.'
56. See Alistair Roberts, 'Structural Pluralism and the Right to Information', (2001) 51, *University of Toronto Law Journal*, pp.243-271.
57. Roberts, 'Structural Pluralism and the Right to Information', above, ref 21, at p.270.
58. Hamer, above, ref 3, at p.185.
59. R. S. Parker, 'The Meaning of Responsible Government', in David W. Lovell et. al. *The Australian Political System*, Melbourne: Longman 1995, pp.197-198.
60. Missen, 'Freedom of Information: The Australian Experience', above, ref 6.
61. Thomas Hobbes, *Leviathan* (1651), ed. C.B. Macpherson, Harmondsworth: Penguin 1968.
62. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn, 1959.
63. Quoted in R.F.V Heuston, 'Sovereignty', in A.G. Guest (ed.), *Oxford Essays in Jurisprudence*, Oxford: Oxford University Press 1961 at p.199.
64. Stephen Holmes, *The Anatomy of Antiliberalism*, Cambridge: Harvard University Press 1996 at 49.
65. For an overview, see Harley G. A. Wright, 'Sovereignty of the People — The New Constitutional Grundnorm?', *Federal Law Review*, Vol.26, No.1, 1998, 165-194.
66. See Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information'; Missen, 'Freedom of Information: The Australian Experience.'; Roger Douglas and Melinda Jones, *Administrative Law. Cases and Materials*, 3rd edn, Sydney: The Federation Press 1999, at p.110.
67. See Michael Kirby, *Through the World's Eye*, Sydney: The Federation Press 2000, ch.12; Murray Gleeson, *The Rule of Law and the Constitution*, Sydney: ABC 2000 at p.6.
68. (1992) 177 CLR 106 at 139.
69. Snell, 'Administrative Compliance — Evaluating the Effectiveness of Freedom of Information'.
70. See Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, Cambridge: Polity Press 1996.
71. Roberts, above, ref 21, at p.256.
72. A good example of the paucity of this empirical evidence is the study by Neil Nevitte, 'Citizens' Values, Information and Democratic Life,' *Report 2 — Access to Information Review Task Force*, March 2001.

Freedom of Information — the Australian experience

Senator Alan Missen

Lecture to the Campaign for Freedom of Information at the House of Commons, Westminster, 17 July 1984

Editor's Note: *This is an edited version of a talk given in the UK over 18 years ago. While much has changed, many of the weaknesses Senator Missen perceived in the Commonwealth FoI Act still persist. Furthermore, his comments about the relationship between FoI and the Westminster system are even more relevant as this issue goes to print. The talk is also a valuable historical record of one of the key participant's views and role in the development of FoI in Australia.*

Thank you for inviting me to come here to talk to you on a subject that is not new to me and not new to you. I hope I will be able to add to your knowledge tonight. Perhaps I may widen the subject a little further, by discussing the Australian experience in campaigning as well as our experience in the operation of the FoI Act, because I think there are significant factors that arise in both areas that may be useful and encouraging for you people who are in the process of campaigning.

It is my belief that the development of the 'right to know' is something that needs to come to all democratic societies. It is necessary for an informed public to have the right of access to government documents. I regret that this country, which has been such a leader in democratic developments for hundreds of years, is proceeding so slowly in this area. I believe that the experience we have had in Australia, even after two years of operation of freedom of information, has indicated that it is a very necessary improvement for the democratic system. So I will say something about our form of legislation, the type of operation and the way in which we got our FoI Act. I want also to speak, at an early stage, about the Westminster system, and to tackle head on (and I do this in the home of the Westminster system) the arguments that are consistently raised against freedom of information. They are misleading arguments and outdated arguments, but nonetheless are firmly held by senior public servants or 'mandarins' as they are sometimes known. Some hold a fixed vision of an unchanging political system, firmly believing that changes would lead to a weakening of the Westminster principles of government.

In the first place I will say a little about that delusion. When we did our Senate investigation in Australia in 1978–79, we made it clear that we wanted to investigate that argument. In the 1979 Senate Report on Freedom of Information — a 15 month study — the Senators gave a great deal of attention, possibly excessive attention, to the views of senior public servants and tried to find out why they felt this was a dangerous development. We came to firm conclusions, in that Report, that the opponents of FoI were using the Westminster system as a kind of strait-jacket, which was restraining democracy in a certain fixed position. They were not recognising that, far from freedom of information changing the system, the system was indeed changing at all stages, and freedom of information was a response that was needed to the changes that were occurring.

One might say that there is a high road of argument on the subject of the Westminster system and that is the view

that important Westminster tenets must be retained. One of these, of course, is the 'responsible government' argument. Governments in our type of system, yours and ours, arise from election from the people and governments emerge from majorities in the Lower House and remain responsible to it. That aspect will not be changed by freedom of information at all. But there are other arguments that are raised. One is the tradition of 'collective ministerial responsibility' which as felt by some may be radically changed by adopting FoI. It may well be changed to some degree but not substantially. The other traditional principle of 'individual ministerial responsibility' is now long outdated and hardly operating. It requires that Ministers will face parliament and resign if their actions are found to be unsatisfactory. I think this last happened in Britain in 1954 in the Crichton Down case, when a Minister resigned over the actions of his Department, and it has not happened for years in Australia. One has to remember that the party system has become so predominant that Ministers are generally protected by a compliant majority in the House and the idea of them resigning, because of the exercise of their ministerial responsibility (under which public servants can shelter) is something which does not happen.

There are other traditions ascribed to the so-called Westminster system, including the essential non-political nature of the public service. We have not had that for years. Senior public servants are often known, not-so much for their party political activities, but because they have political ideas which are known and promoted and continue to be brought forward by senior public servants from one government to another. Important civil servants operate in this way so they do act in an influential political way to some extent. Also the anonymity which is said to be another feature in the Westminster system, is something which has fallen away very considerably in all these countries — Australia, Canada and the United Kingdom in more recent years. Those arguments are what I would describe as 'the high road' in opposition to FoI and I make no apologies in saying that they are mostly delusions but need to be faced four square by FoI advocates.

There is also a 'low road' of argument which, in many respects, has a closer reality. That is the type of argument expressed by the Hon. James Callaghan, before he was Prime Minister. He showed a type of frankness when he gave evidence to the Fulton Committee some years ago. He used the analogy of a cricket club, and said that parliament just was not like that. His words were:

Frankly half the people in this country are concerned to find things that can redound to the discredit of the Government every day. It is inevitable in this case that a government is going to have some defensive reaction and say 'We are not going to tell you anything more than we can about what is going to discredit us.'

That, I am sure, is an attitude honestly held by him and supported by many people in Government. It is also illustrated in the case of our own Australian Attorney General, Senator Gareth Evans, a great advocate of freedom of information. Without him we would not have achieved as

much as we have. But Senator Evans, just before the Labor Government took office in 1983, said: 'Look, if we are going to do anything to reform the Freedom of Information Act, and if we want to, we had better do it in the first fortnight, before the new government has any secrets to hide.' Unfortunately he did not get going in the first fortnight and when he brought his amending Bill before Cabinet they rebuffed him on two important commitments which the ALP had already made. But through the actions of the Opposition we restored at least one of the major reforms he had hoped to effect.

The Westminster system, as such, has many versions and it varies from one country to another. Our Australian federal system involves an unusual compromise between responsible government and the power of the Senate which protects the states. In other variations, power is given under our administrative law changes of more recent years, to an Administrative Appeals Tribunal which even has the right to reverse ministerial decisions 'on the merits' in many cases. Now that involves some changes in the Westminster system, but its operation is now well accepted in Australia. We know that Ministers are not able to supervise the detailed operations of government departments. Very often decisions are made, often by senior public servants, which need to be looked at on review and changed. So the Westminster system is a developing one — it has different versions in different countries and it cannot stand as a sort of blanket prohibition on any change.

As I have said, parliamentary accountability, so far as Ministers are concerned, is something of a sham. Question time in all the Houses of Parliament proves this. My friend, James Michael, in his very excellent book *The Politics of Secrecy*, gave examples of this from the House of Commons where the idea that you are going to acquire a lot of information by asking questions is not realised. I have just spent an hour or two listening to the Prime Minister's question time this afternoon, and I did not learn very much more, although it was exciting as an entertainment. The fact is that Question Time, unfortunately, means that Members continue to be ill-informed. MPs need to be better briefed, as freedom of information would make them, and Ministers would then have to be better informed to answer searching questions. Moreover, I have mentioned the rarity of resignations of Ministers despite all this talk of individual ministerial responsibility to Parliament.

In regard to 'collective ministerial responsibility', I think Lord Hailsham said something very interesting a few years ago when he pointed out that it was originally devised to protect Ministers from the exercise of Crown pressure if applied individually to Ministers. So collective responsibility was devised. But, as Lord Hailsham explained, the threat now is from 'elected dictatorships'. We have many examples where Prime Ministers are seen to have had too much power. I think Cabinets also have too much power. The office of Prime Minister is developing into a type of presidential system and their control over information is a power in itself. Parliament must restore the balance of power and FoI will assist it.

Not only is the political system changing, but the courts, both in your country and in ours, have in their judgments made a difference. They are mostly concerned with the rights of individuals in litigation to get discovery of government documents and the government has often resisted showing these documents to individuals. Superior

courts, in recent years, have challenged this. In England, the case of *Conway v Rimmer* (1968) was very important because it did indicate that the courts were prepared to go behind the decision of Ministers, reject their arguments, and make documents available to parties in litigation. The Australian High Court case of *Sankey v Whitlam* was also extremely significant. It was a demonstration of the changed attitude of the courts in Australia because there the High Court went behind the certificates of a Minister and said they could not be 'conclusive' in denying discovery of government documents. The judges insisted on their right to look at documents in question and see if they conformed with the Minister's description. The Court did so and required disclosure.

I mention this because the changing views of the courts was a powerful impetus to FoI. But none of this substitutes for the fact that you need to establish a general right to know in our democratic communities. You should not allow lofty references to the Westminster system to justify the failure of governments to move in that direction.

Let me turn now to the ten years from 1972 to 1982 when our FoI Act came into operation. We have since had two years of its operation. On the whole it is an encouraging picture. The Whitlam Government, a Labor government, came into power in 1972 with the promise of a Freedom of Information Bill. It raised some public discussion on this matter but, unfortunately, during three years of power, government did very little except produce a departmental report which is a very disappointing document. It was concocted by public servants, with little or no public input, and when it was tabled, very little public discussion arose.

One of the significant parts of the Australian experience occurred when the Fraser Government came into power. Within a month, the Liberal Prime Minister, Malcolm Fraser, declared a real interest in freedom of information and then undertook that there would be a Bill brought forward by his government. This cross-party support is the significant difference between our two countries.

There is value when from both political sides there are promises, even though governments tend to backslide. But if they have made those promises, they find it very hard to avoid their commitments.

Before the tabling of the Fraser Government Bill in 1978 I had received a draft of the Bill and went to the United States to study developments there. I returned and made many suggestions for amendments, most of which were ignored, and the Bill was tabled. The legislation was somewhat limited in scope, with very widely expressed exemptions. There were two streams of development from that stage: a public campaign, which I am glad to see you are pursuing here, widened the interest of the public and showed them the need and usefulness of freedom of information. In parliament FoI advocates asked series of questions on secret government records. The refusals to disclose highlighted the need for a strongly expressed FoI Act. There was also, of course, a Senate Committee Inquiry by the Standing Committee on Constitutional and Legal Affairs. The Senate in Australia has much more power than your House of Lords, and certain of our Bills go through the Senate first, especially when the Minister is in the Senate. Most of the work on this subject was done by the Senate and debate in the House of Representatives made very few changes and very little discussion took place. The Senate Committee investigation,

which I had the honour to chair, was made up of three Liberal Senators and three Labor Senators. Senator Gareth Evans, who is now the Australian Attorney-General, was Deputy Chairman of the Committee, and worked extremely hard on this matter. Other Senators, my two Liberal colleagues, Senator David Hamer and Senator Chris Puplick (who has been out of the Senate for a few years but is about to return to the Senate), worked extremely well too in this inquiry.

The result was a report which was unanimous, with one or two minor shades of differences in various areas. Senator Evans and I, for example, were rather unhappy that we had to allow our Security Organisations (ASIO) fairly complete freedom from freedom of information. Our other colleagues took a more cautious line and we left it for future consideration. In the course of that inquiry, Senators and staff went to most States. We had submissions from some 169 persons and organisations. There was a great width of interest, by public interest bodies, unions, libraries (librarians were very active), political parties, and all sorts of bodies outside politics. The value of Fol was appreciated by a great number of organisations such as social welfare groups.

In the course of the inquiry we gave every opportunity for the senior public servants to come before the Committee to explain how terrible it was going to be and how the use of Fol was going to lead to enormous problems. Some said that Fol would lead to enormous increases in departmental costs and requirements for extra staff. Others denied this. A couple of interesting examples that were given to the Committee and recorded in its Report demonstrated the exaggerated fears of some public servants. The Electoral Office told the Committee, quite seriously, that they expected in the first year 86,000 enquiries under the Freedom of Information Act about electoral matters. When asked how they arrived at those figures, they said that the number of electors was 8,600,000 and they expected about 1% of inquiries. Well, I have to tell you that, in the first year of operation, there were only six electoral Fol enquiries. From the Immigration Department, which also was a centre of opposition to Fol, witnesses estimated that they would get over 100,000 enquiries in a year, and need enormous increases in staff. In the first year it received 465 Fol requests, to be precise. Many of us are, indeed, disappointed with the response, but one cannot claim that the demand is likely to bankrupt the nation!

After hearing all these witnesses, we came up with 106 recommendations for amendments to the 1978 Bill and the accompanying Archives Bill. We waited about a year for the Fraser Government to respond and its response was disappointing. An election intervened and in due course another amended Bill appeared incorporating some of the Committee's recommendations. Now the very good piece of luck that Fol advocates had in Australia was that, on 30 June 1981, the losing government was losing its majority because there were new Senators coming in and majority would then be in the hands of the Australian Democrats and the Labor Party. A small number of Liberal Senators negotiated with the government. The government commenced the debate on the Bill and it suffered several defeats in divisions. There were 80 amendments proposed by an alliance of Liberal, Labor and Democrat Senators. After the first ten or so amendments the government had lost two or three divisions. They called off the debate and negotiated with the Liberal Senators. There were about eight or nine Liberal Senators

supporting the amendments to the Bill. Because of the fact that the government wanted to get its Bill through and an Act in operation, they had to 30 June to do that. I suppose we really 'blackmailed' the government into accepting some amendments. But we finally got what was still a fairly limited Bill — something like about 35 of the 80 amendments. We were abused by the Labor and Democratic Senators for accepting a compromise. However, it was a deliberate choice to take a Bill that was not strong enough but finally to get something into operation and hope that, in the new parliament, we could improve it. This did, in fact occur.

We had this piece of good fortune, a government determined to meet its commitment, and very different from the misfortune you had here in England where Clement Freud's Bill almost went through before the Labour government was forced to an election. Freud's Bill did not quite pass through the House of Commons. We had good luck on our side.

The Bill which the Australian Parliament passed, and which came into operation in 1982, did have widespread support from many organisations. It was acceptable to the government. If we had insisted on all the amendments being passed, the Bill would have gone back to the House of Representatives where it would never have passed. The Fraser Government would have rejected amendments and it would have gone backwards and forwards for some years. It was important for this not to occur.

So the Bill came into operation, after some delay, in October 1982. The Labor Party, before the election in March 1983, had been promising substantial amendments. While in Opposition, ALP speakers, including Senator Gareth Evans, made some marvellous speeches in support of other amendments, some of which I have been able since to quote back at him. The Labor Party undertook that when they got into office they would implement the rest of the Senate Committee's report. Their words were, 'Labour will implement fully the outstanding recommendations of the Senate Committee on Constitutional and Legal Affairs, to ensure that freedom of information operates in practice as well as in name'. I have tried to hold them to that undertaking.

Labor came into government and proceeded to prepare a Bill. In two major areas which I will mention, they retreated. Cabinet rejected two of Senator Evans' proposals, but the other amendments that are now in the 1983 Bill contained most of the other improvements proposed by the 1979 Senate Committee Report. Some 20 amendments are in the Bill passed in 1983. Among the other improvements is an increase in the availability of the Act for past or existing documents, including documents containing personal information about individuals that may be inaccurate. In our legislation there are provisions for correction of such documents. But you could not, under the 1982 Act, go back beyond the date of the operation of the Act. However, now you can go back forever in the case of any documents which affect you personally. In regard to all other documents, we now go back five years to 1977, covering those matters that people may want to see. That was a big extension which happened in 1983. In the Amending Bill we added public interest tests to a number of exemptions so that, even if the exemption in the Act might say that disclosure might be refused because it might interfere with the operation of a government department, there is an additional 'public interest' clause. Such a document will be released if it is in

the interest of the public that it should be disclosed. There are also changes to the exemptions that have been quite valuable.

The Cabinet documents, which we excluded from disclosure by exemption, have been narrowed down so that factual documents, that may be attached to Cabinet material, can be disclosed. This stops Ministers from tacking documents onto a Cabinet submission. Therefore, all kinds of interesting and useful factual material that the public should have can now be brought out into the public gaze.

The cost provisions now enable our Administrative Appeals Tribunal, on appeals, to recommend that costs be paid by the government and particularly where appeals are made on matters of important public interest.

There were, however, two defects in the amendments proposed last year. As I said, they involved two rejections that the present Attorney-General suffered at the hands of the Hawke Cabinet. One was on the matter of conclusive certificates — the provision which applies to a number of exemptions mainly related to national security, international affairs, the internal working documents of government. A Minister can give a certificate in these areas and his word is final. Now we wanted to change that. We recommended in 1979 that it should go. The Labor Government rejected the Attorney-General's amendments. They have, however, improved the provision by providing that now any such decisions are subject to appeal to the Administrative Appeals Tribunal which can make recommendations which, regrettably, are not binding. But if the Minister still adamantly refuses to go along with that recommendation, he has to table in parliament the reasons, so it can be debated. It is not as good as we want, but I could not get my colleagues to push the amendments any further.

The second defect, where we did have success, was to greatly increase the power of our Ombudsman and his operations in the working of freedom of information. There are a number of amendments which were moved by me last year. They were the same amendments that Senator Gareth Evans, in Opposition, had moved a year before. In fact I read his various speeches into the record. The amendments gave the Ombudsman the power to have an assistant dealing only in freedom of information and that he should go ahead with inquiries even though there might be a right of appeal to the Administrative Appeals Tribunal. So he is authorised to go ahead in the simple way to try to get documents for applicants. He can also appear as Counsel or engage Counsel before the Administrative Appeals Tribunal. That saves a lot of people problems where there is a serious principle involved. Litigants in Australia will not spend their money rashly. If these documents ought to be disclosed, then the Ombudsman can proceed on their behalf. Moreover, he now has increased powers of monitoring Fol operations under the Bill. He can report to the Public Service Board defects and misdemeanours by public servants under the Act, and also he reports to parliament extensively on Fol operations. So those amendments were passed through the Senate last year, against the will of the government. Gareth Evans then accepted defeat with a smile and went back to Cabinet which accepted the Senate amendments and they went through the House of Representatives. The Fol Act now stands as a substantially effective piece of legislation.

Now I want to make a reference to British views on our developments. In the course of this whole Fol campaign your British Civil Service Commission came to Australia and also to Canada, reporting in the midst of our inquiry. I want to say that you have been grossly misled by reports which the Commission made. They came back to England and predictably they did not like the United States Fol methods. They did not like the Canadian development. The Canadians were also going ahead and now have an *Access to Information Act* in operation. Your Commission had this to say about Canada and Australia in their Report:

In Canada and Australia, the Civil Service Division team found that involvement of third parties, whether the Courts or quasi-judicial bodies such as the Ombudsman or a tribunal in assessing the merits of ministerial decisions on disclosure is held to represent a weakening of this (ministerial) accountability to Parliament with the complementing danger of politicising the Courts and other body.

Now that is all absolutely wrong. They had spoken no doubt to some senior public servants, then gallantly resisting freedom of information. Everything that has happened is exactly the opposite, both in Canada and Australia, and they did, therefore, come back with particularly bad advice for the British Parliament, because these things we do accept now — the use of the Ombudsman and Administrative Appeals Tribunal. I was quite amazed by that Report which I had not seen until quite recently.

Compared with the Fol Act that we actually have in Australia and the campaign we have had for it, I know there are differences here. I know there is a different tradition and there may not yet be the active political will. You have not got the same extent of agreement across the political parties as we have had. We had a cautious approach in my own Party but nonetheless a. There was a stronger commitment on the Opposition Party's side and that has made it rather easier. I am told, and see in James Michael's book, that 'nanny knows best' is one of the philosophies of people here, I suppose with experience of being brought up by nannies. I think in our rough crude way we Australians do not have that worry or that undue deference for authority.

You also have the *Official Secrets Act* here. In 1911 it was adopted in one hour in this great Parliament without a great deal of consideration. That Act is an aberration and that is an extra problem that you have. I sometimes think that people think that just getting rid of that Act will get you freedom of information. It won't. But certainly we did not have that problem of needing to repeal an Act of that nature. What we have had is certain all-party support and public support which has been strong. Many newspapers supported the campaign to the hilt.

We have not gone far enough in Australia. I just want to say this now, in point form:

1. Improvements we need are to ensure not only that disclosure of information occurs but that citizens make adequate use of documents obtained. We can get documents under the Act, but we also need to get things changed and we have a natural inertia to overcome.
2. We have to do something about this conclusive certificate blemish — that is a running sore.
3. We have got some rather widely expressed exemptions that need review.
4. In three years there is to be a Parliamentary review of the Act and its operation. We have to look at the exist-

ing secrecy provisions in our laws. In many other Acts, there are as many as 179 provisions elsewhere, that are supposed to be brought into accord with FoI within three years.

5. There are various exclusions and various other problems that require attention.

Remember the principles which the Canadian expert, Professor Rowat, put forward. He said there were three important principles for a good freedom of information Bill:

1. disclosure must be the rule rather than the exception;
2. there must be narrowly defined exemptions justifying secrecy;
3. there must be enforcement through appeals against secrecy to some independent arbitrator.

One can add a fourth criteria to it, in regard to access, because he did refer in detail to these matters. There must be easy access. This is very important. If you have a

marvellous Bill but people do not use it, its not good enough. Legislation must include production and correction of documents which affect people's personal lives. You must charge low fees and have a right of waiver of fees. The public service must be enjoined to ensure it will be helpful to people seeking information. Now I say finally, Mr Chairman, that I wish you every bit of luck in Britain in going ahead with this campaign. It took us about ten years and you have some time to wait, but FoI is an idea whose time has come. It is very necessary for Britain to get back to its role in democratic reform. I hope that you will soon have a strong freedom of information Bill and I am sure it will be of great benefit to and for your people if you manage it.

The full text of this speech can be downloaded from the Campaign for Freedom of Information <<http://www.cfoi.org.uk/missen.html>>. This lecture is reprinted courtesy of the UK Campaign for Information.

NATO'S Web of Secrets

Last December, the international movement for open government marked a small victory: Romania's new right-to-information law came into force. Unfortunately, the victory was short-lived. Four months later, Romania also adopted a new state secrets law that creates a broad authority to withhold information that has been classified as sensitive by government officials.

An earlier draft of this state secrets law was strongly criticised by the International Helsinki Federation, and struck down by Romania's Constitutional Court in April 2001. The new law is only a modest improvement. Article 19, a freedom of expression advocacy group, says that the restrictions on access to information are still 'incredibly broad'.

There have been similar developments across much of Central and Eastern Europe. Ten countries in the region have adopted right-to-information laws in the last decade — while eleven have adopted laws to restrict access to information that has been classified as sensitive. The Slovak Republic adopted its new secrecy law in May 2001 despite protests from non-government organizations. In May 2002, a cross-party coalition of legislators launched a constitutional challenge against Bulgaria's recently adopted state secrets law.

There's a simple explanation for this wave of legislative activity. In 1999, NATO made clear that countries who wanted to join the alliance would need to establish 'sufficient safeguards and procedures to ensure the security of the most sensitive information as laid down in NATO security policy'. Central and Eastern European countries have rushed to get legislation in place before NATO's meeting in Prague this November, where decisions on expansion are expected to be made.

The result has been tight new rules on the treatment of classified information, as well as strict policies on security clearances. In the Slovak Republic, the new security agency will review political and religious affiliations, and lifestyles — including extramarital affairs — that are thought to create a danger of blackmail. The Associated Press reported recently that Romania intends to deny clearances to security staff with 'anti-western attitudes'.

Some observers have asked whether governments in the region are using the process of NATO expansion as a pretext for adopting unnecessarily broad secrecy laws — or whether NATO's requirements are themselves unduly tilted against transparency. These are reasonable questions, but NATO is doing little to help provide answers. Although its security policy is contained in an *unclassified* document, NATO refuses to make it publicly available. It has also instructed its current member countries to withhold their copies of NATO's policy. As a result, requests for the policy made under the freedom of information laws of the United States, Canada and United Kingdom have all been declined. (A similar request to the European Union, which is collaborating with NATO, was also refused.)

A small window into the evolution of NATO policy is provided by a selection of archival records from the 1950s that are now available at NATO's Brussels headquarters. (The rules that determine which archival records will be made publicly available are contained in NATO's security policy, and are therefore inaccessible. Captain Yossarian would be impressed.) These archival records suggest that the criticisms made against the new state secrets laws of Central and Eastern Europe — excessive breadth, combined with onerous clearance rules — could likely be made against the NATO policy itself.

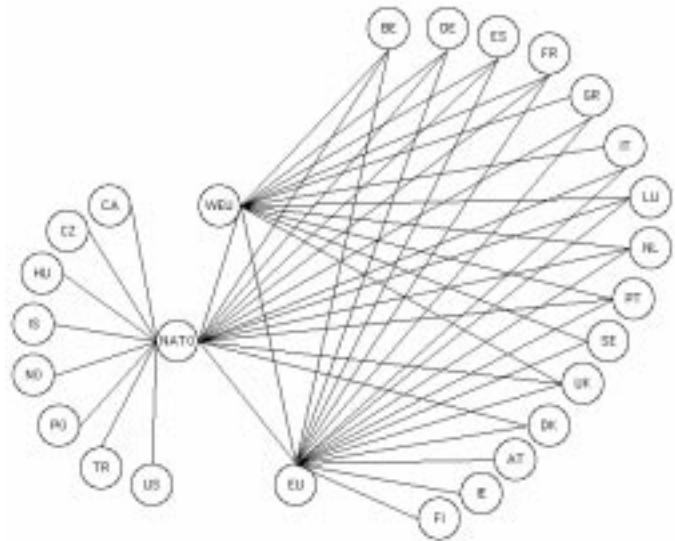
NATO's policy on the handling of sensitive information was codified between 1953 and 1955, in the early years of the Cold War. It was very much a product of that time. Its rules on vetting of personnel mimicked the onerous loyalty requirements adopted by the Eisenhower administration in November 1953 as a counter to the McCarthy investigations. Military planners in the United States and United Kingdom, who dominated NATO in its early years, ensured that NATO policy also included strict rules against disclosure of information.

Behind NATO's closed doors, some governments chafed at the new restrictions. Belgium complained about disproportionate influence of British and American military staff; Norwegian and Danish officials lobbied for narrower definitions of classified information; Italy suggested that

CHART

Parties to Multilateral Security of Information (SOI) Arrangements in Europe

As the following chart shows, European states are subject to an increasingly dense web of intergovernmental arrangements that constrain the use and distribution of information by national governments. At least 17 European states are bound by NATO's security of information (SOI) rules. Ten states are also bound by the comparable SOI rules of the Western European Union (WEU). Many of these states must also conform to the security regulations adopted by the EU in March 2001. The three multilateral institutions are also bound together by SOI agreements: the NATO and WEU in 1992; the EU and WEU in 1999; and the EU and NATO in 2001. This entanglement must make the reform of SOI policies extremely difficult. (ICANN country codes are used in this chart, which does not include candidate coun-



the scope of the policy — regulating even non-NATO information held by national governments — could create 'difficulties of a constitutional nature'. None of these complaints carried much weight. American policymakers wanted stiff rules; the British, desperate for American atomic secrets, acquiesced; and other nations — 'for the sake of unity', as Norway put it — ultimately withdrew their objections.

NATO policy was established long before any NATO member had adopted a right-to-information law — and subsequent laws were tailored to accommodate NATO requirements. One of these requirements is the absolute prohibition of disclosure of any information — however innocuous — received through NATO channels, unless NATO or the authoring state consents. However, many NATO states do not publicly acknowledge the conflict between NATO policy and domestic right-to-information laws — perhaps because this would itself constitute an unauthorised disclosure of the content of NATO's policy.

A more obvious illustration of the impact of NATO rules was provided two years ago in Brussels. In July 2000, the Council of European Union gutted its policy on access to documents by eliminating the public's right to any kind of classified information. Many observers were shocked by the decision. The decision proved to be a prerequisite for a cooperation agreement signed by the EU and NATO on the preceding day. The EU's letter of agreement with NATO was released early this year in response to a right-to-information request by Swedish researcher Ulf Öberg — with the specific reference to NATO's security policy carefully excised. (The Secretary General of the EU, Javier Solana, is also a former Secretary General of NATO.)

NATO policy continues to have an impact within the EU. In March 2001 the EU adopted new and stricter regulations on classified information that appear to conform to NATO requirements. In a sense, the EU is in the same position as countries in Central and Eastern Europe: to engage with NATO, it must adopt its policy on access to information. EU member states — including countries that will be welcomed into the EU at its Copenhagen summit in December — have an obligation to adopt national measures to ensure that the EU's new rules on classified information are respected.

In a May 2000 declaration, eight Central and European countries argued that accession into NATO would help to

consolidate 'the values of the Euro-Atlantic community' throughout the region. Some of these values get more attention than others. Integration might promote democratic government and respect for human rights. But integration also appears to involve some of the less attractive aspects of the Euro-Atlantic way of governing — including the values and institutional apparatus of the national security state.

This phenomenon deserves more attention from proponents of open government. By looking only at the steady diffusion of right-to-information laws, it is easy to conclude that the principle of open government is in the ascendant. Slow but significant reforms at institutions such as the World Bank, IMF and WTO might seem to suggest that intergovernmental organisations are also recognising their obligation to conform to standards of transparency comparable to those imposed on national governments.

This is a partial and misleading view of the world. As the European experience vividly demonstrates, national governments are becoming entangled in a thickening web of multilateral and bilateral agreements that restrict the capacity of national governments to disseminate information within their borders. This trend was already well underway before the events of September 11 — but the new emphasis on intelligence-sharing and military cooperation must certainly give it added force. One of the key hubs in this network of intergovernmental agreements is NATO, an institution that has never been subjected to an intense campaign for improved transparency and therefore clings to unreconstructed views about state secrecy and the sanctity of interstate communications.

No one can dispute that the preservation of secrets is sometimes essential to national security. But citizens are at least entitled to have an informed discussion about the rules that will be used to determine when secrets must be kept. 'Secrecy is justifiable,' says Professor Dennis Thompson of Harvard University, 'only if it is actually justified in a process that itself is not secret'. NATO's information security policy — the unobtainable product of a half-century of secret negotiations — violates this basic principle of democratic accountability.

Alasdair Roberts

August 14, 2002 Alasdair Roberts is an associate professor at the Maxwell School of Syracuse University, and Director of its Campbell Public Affairs Institute. Its web address is <<http://www.campbellinstitute.org>>.