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Editor: Rick Snell
tel 03 62 26 2062 fax 03 62 26 7623
email: R.Snell@utas.edu.au
Web site: http://www.comlaw.utas.edu.au/law/foi/

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

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Comment

This issue contains an updated version of my 1999 Dublin Conference paper on FoI and administrative compliance. Since that time my thinking has been sparked by a number of articles (especially those by Greg Terrill and Alasdair Roberts) and participation in several law reform efforts in Australia. The intriguing question for me is how to ensure, at worst, neutral compliance with FoI Acts and, ideally, positive or active compliance. As can be seen from the article both my research and thinking are still evolving. I have recently returned from a quick but intensive visit to New Zealand, Canada, Ireland and the United Kingdom where a number of ombudsmen, information commissioners, academics and activists have given me even more to contemplate. That whirlwind trip did leave me with the impression that in most jurisdictions the aims, objectives of the legislation and the key questions about access policy are generally the same. The difference lies in the methods chosen to achieve those objectives and the answers that have been chosen.

In light of the above comments, the article by Martin Chulov, 'Hide and Seek', in 'The Media', *Australian* 21–27 June 2001, pp.6–7 is a must read (a copy of this article can be acquired for a fee from <http://www.newstext.com.au/>. Chulov presents an excellent two-page coverage of how political gatekeepers hold, deal with and dispense sensitive information within (although often at odds with) an FoI environment.

In April, Associate Professor Al Roberts at Queens University, Ontario set up a searchable database of Access to Information Requests sent to the Canadian federal government. The address for the database is <http://track.foilaw.net>. At that time, the database included 6665 requests sent to the federal government in 1999. He has now updated the database by adding 5814 requests received by federal institutions between January and August 2000. The database will be updated to April 2001 sometime in the next month. This is a simple, publicly accessible database which he has set up using off-the-shelf software and bulk data obtained through the *Access to Information Act* from the federal government. The federal government has purchased more sophisticated software that would allow public access to its database of ATIA requests, but has not yet activated the software. The database has already allowed empirical research to be undertaken on the imposition and distribution of fees and charges between different agencies and requesters. It would be great to see similar databases created for other jurisdictions.

http://www.foi.law.utas.edu.au

This is the new address for the FoI web site. Over the next few months a series of major changes and updates will be made to this web site. Due to time and workload constraints I have allowed the site to fail to utilise and build on a number of more recent and improved sites and sources of material. A small grant and the allocation of my own funds will see the acquisition of new software and some part-time assistance for a few weeks.

Rick Snell

Administrative compliance — evaluating the effectiveness of freedom of information

The level, type and frequency of administrative compliance are useful measures of the efficacy and wellbeing of a freedom of information (FoI) regime. Studies like those of Roberts[1] have transformed the traditional and static portrayal of administrative compliance into a more sophisticated model of analysis. The compliance focus has moved from a concentration on raw rejection rates, processing times and anecdotes of shredders and sticky labels to an analysis that allows for variance in compliance in terms of agency, time, requesters and types of requests. More importantly a focus on administrative compliance may take us closer to the promise of freedom of information than previous areas of academic concentration in this field, such as the search for an ideal system of external review or an ideal exemption interpretation.

The major players in jurisdictions where FoI has recently been introduced will mark the celebration of its first anniversary in different ways. The FoI Unit in a central government department (varying from the Premier's to Justice Department with an occasional residency in the Treasury portfolio) will be upbeat and quietly pleased at its relatively smooth introduction. The external review body (be it information commissioner, ombudsman or tribunal) will be content that the first array of decisions have generally been free of controversy and avoided major criticisms from both applicants and agencies. Academics have started to shift through the Reviewer's decisions, to catch a hint of the likely jurisprudence and wordplay that will be necessary, to understand the exemption provisions. The press, citizens and opposition MPs will be in the throes of dealing with a mixed bag of wins and losses from their first applications under this new access to information legislation.

Yet the accounts of the following years will generally be wide sweeping generalisations that cannot account for the failure to deliver on the promising start evident at that first anniversary. This article argues that attention needs to turn towards a monitoring and understanding of administrative compliance in the operation of access to information regimes. The Australian, Canadian and New Zealand experience is a story of persistence, and in recent years a significant shift in the magnitude and type of non-compliance. The picture in Australia has been described as one of 'frustration, delay and the haphazard provision of information'.[2]

The first section examines why administrative compliance appears so problematic in access regimes like Canada, Australia and to a lesser extent New Zealand. The question of, and problems about, administrative compliance have perplexed law reform and monitoring institutions in all three jurisdictions. The legislative architecture, intention and committed policy positions of the political and bureaucratic leadership seems to leave little option other than administrative compliance at the very least and active compliance as the norm.

Roberts' analysis is used in the second section of this article, with a significant upgrade in terms of variables and focus, to examine the nature of administrative compliance. Roberts has transformed the previous simplistic approach to the study of compliance with freedom of information legislation. This article adds further dimensions to the model developed by Roberts.

Administrative compliance

In any access to information regime administrative compliance, the adherence to the letter and spirit of freedom of information legislation, should be a non-contentious issue. Requests should be processed in a timely fashion by a bureaucracy committed to achieving the maximum disclosure possible in the circumstances prevailing at the time of the request. Decisions on release should be on the merits of the request and free of political and other considerations not specified in the legislation. Public interest considerations as opposed to more narrow political and bureaucratic interests should be the key determinants in the decision-making process.

There is not the potential for any doubt about what the default level of administrative compliance should be in these three jurisdictions. The legislation received full and vigorous endorsement by all parliamentary parties and the second reading speeches declared to the world a 100% commitment to the principles of open government. The legislation in each jurisdiction is specific — the objective is greater openness and discretion is to be exercised in favour of release. The exemption structure was hotly debated and carefully designed to be limited and each provision is narrowly worded. The formal training provided to public officials in each jurisdiction was, and continues to be, calculated to encourage release and foster an attitude that exemptions were to be applied in a limited fashion and as a last resort. Agencies in each jurisdiction are keen to be on the public record as not only endorsing freedom of information but promoting the strategies they have adopted to release information outside of the legislation.

Yet in each jurisdiction there is a constant stream of official reports, public statements by formal review bodies and academic studies that depict an alarming level and magnitude of non-compliance.[3] The level and type of non-compliance varies within and between the three jurisdictions. On a sliding scale of concern, Canada occupies the highest level of concern. Australia occupies the next slot and is displaying an increasing drift towards a general state of non-compliance. New Zealand occupies the zone of least concern for a number of reasons covered in the final section of this article. The contributing factors include the legislative architecture, history and nature of the freedom of information constituency in New Zealand.[4]

The Roberts model of administrative non-compliance

Roberts' analysis has added a powerful dimension to an understanding FoI legislation in practice. Roberts has argued that administrative compliance in freedom of information can be divided into three categories, namely malicious non-compliance, adversarialism and compliance.

Malicious non-compliance is defined by Roberts as 'a combination of actions, always intentional and sometimes illegal, designed to undermine requests for access to records'.[5] Examples of this type of non-compliance would include the destruction of records subject to an FoI request, avoiding responding to the request or manipulating or removing compromising information from files.[6] In *Table 1* a number of other practices have been included under the

heading of malicious non-compliance, including the use of yellow sticky labels, the deliberate non-recording of information, and the deliberate manipulation of administrative practices to ensure information, which would normally be releasable under FoI, is covered by an exemption.[7]

The second category of administrative compliance can be 'described as adversarialism; a practice of testing the limits of FoI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or departments are adequately protected'.[8] Roberts indicates that adversarialism can manifest itself in several ways including where:

> Officials may adopt very broad interpretation of exemptions and exclusions, or use several exemptions or exclusions to defend the withholding of the same material, with the expectation that information commissioners or ombudsmen will narrow the exemptions and exclusions down to their appropriate scope when the request is appealed.[9]

Further examples of adversarialism used in *Table 1* include: the automatic resort to exemptions instead of trying to facilitate some degree of access; an 'us versus them' mentality; deliberate delays until near the end of mandatory time limits; poor or non-existent statements of reasons; rejection of fee waivers; and an agency perspective that views the external reviewer as an adversary. New Zealand is not immune to this type of non-compliance. In 1989 the then Leader of the Opposition, Jim Bolger complained about extensive time wasting and other practices that showed:

> the Government can, and does, flout the intention of the Act with appalling regularity … There is a growing, almost sinister secrecy associated with government departments and especially SOEs [State Owned Enterprises].[10]

The third category adopted by Roberts is administrative non-compliance, in which public bodies undermine the right of access because of inadequate resourcing, deficient record-keeping, or other weaknesses in administration.[11] See *Table 1* for further indicators of this type of non-compliance.[12]

A shifting focus of academic attention

For a number of years, after the introduction of the legislation, academic analysis of freedom of information in the three jurisdictions was restricted to a study of the text of recent court or tribunal decisions. A new decision would be raked over in the search for interpretational insights and further limitations or exceptions to the operation of exemption provisions.[13]

In the next wave of academic interest this case analysis format was supplemented by reference to raw figures dealing with release rates of information, trends in application of exemptions and time taken to process requests. A further layer of studies was devoted to case studies and/or responses to proposed changes or reviews of the legislation.[14] Other studies started to focus on the type, models and methods of external review.[15]

In the 1980s and early 1990s academics like Zifcak[16] and Ardagh[17] started to seek an understanding of how FoI was operating in relation to different types of requested information. Their studies showed a differential outcome in FoI requests dependent on whether the information being requested was information relating to the personal affairs of the applicant or non-personal affairs such as policy documents. Access to the former was timely, unproblematic and generally successful whereas access to the latter was delayed, contested and rarely successful.

Once the variance in outcomes and performance was established the focus changed to a search for the causes and reasons for the differences. Some authors argued that the attainment of an interpretational holy grail would make a fundamental difference.[18] Their argument was that if the judiciary and external review bodies (ombudsmen and information commissioners) took a leaning, or pro-disclosure approach, towards interpretation of FoI cases the administration of the legislation would shift towards greater compliance.[19] While the influence of the 'leaning' argument has been variable, especially at a judicial level in Australia, it can be effective[20] and is viewed by many reformers as a vital first step in revitalising FoI.[21]

Prior to the 1998 study, of Canadian access legislation by Roberts, compliance issues such as time delays, document destruction and yellow sticky slips were largely relegated to marginal notes or anecdotal accounts. The criticism of administrative agencies and their compliance practices was blunt, unrefined and easily dismissed as an isolated lapse in an otherwise exemplary performance pattern. The attempt to study FoI practice encountered a difficulty in reconciling an array of conflicting findings. In a previous paper I argued that there was the paradox of high level commitment to the principles of FoI by FoI officers and agencies co-exisiting with what the Canadian Information Commissioner described as, a confrontationial relationship between agencies and requesters.[22]

The Roberts compliance model transformed

The Roberts analysis allows a consideration of the magnitude, duration and history of administrative compliance and non-compliance. The distinction of malicious non-compliance and adversarialism has also permitted a more sophisticated and accurate discussion to eventuate about administrative compliance. Previously the debate would list a catalogue of administrative sharp practices but fail to differentiate between minor problems (substandard reasons for decisions) and serious practices (document tampering and deliberate delays).

In *Table 1* a series of further refinements and dimensions are added to the analysis suggested by Roberts. These refinements include two further categories, namely administrative compliance and administrative activism, to cater for those agencies who have achieved the default level of administrative practice in the area of FoI.

These two additional categories not only recognise the positive performance of many agencies but also highlight the aspirational difference between technical compliance and a pursuit of the objectives and spirit of the legislation. This wider spectrum of administrative compliance may also allow for an analysis which can track compliance performance over time. Studies like those of Roberts and this paper have focused on compliance standards in the three jurisdictions 10–15 years since the inception of the legislation. If compliance was examined over time across and within agencies would any pattern or trends emerge? Could a thesis be sustained for Australian FoI practice at the Commonwealth level that there has been a general drift on the compliance spectrum from an active compliance status in 1983 to a general adversarial norm in 2001?

Further dimensions have been added to Roberts' basic model to accommodate the type of requester and type of information requested. In previous articles it has been argued that agencies and jurisdictions seem to have variable responses to different applicants and the types of information being requested.[23] This marked differential in

Table 1: Administrative compliance and FoI

Type of information	Malicious non compliance	Adversarialism	Administrative non compliance	Administrative compliance	Administrative activism
Personal	Shredding	Automatic resort to exemptions	Inadequate resourcing	Requests handled in a co-operative fashion	High priority given to processing requests
Mid level policy	Deconstruction of files	Us versus them mentality	Deficient record management	Objective is maximum release	Objective is maximum release outside FoI
High level policy	Relabelling of files	Sitting on requests	Cost recovery or minimisation major factor	Timely decisions	Information identified and available in public interest - without FoI requests
Type of requester	Sticky labels	Significant delays in processing	Low priority attached to processing of requests	FoI officers key decision makers about release	FoI officers key actors in agency information management
Individual	Pre-emptive exploitation of exemptions	Non-existent or very poor statement of reasons even at internal review stage	Adequate reason statements but often missing aspects (number of documents being withheld etc)	Exemptions only applied as a last resort and to the minimum extent possible	Exemptions waived if no substantial harm in release.
Active group	Fee regimes manipulated to discourage request	Fee waivers rejected	FoI officers play a processing role		
Journalists	Internal reviews uphold original decision 90% + of times	Internal reviews uphold original decision 75% + of times	Internal review seen as preparing a better case for external review	Internal review new decision	Internal review an opportunity to refine information handling
Opposition MPs	External reviews avoided	External reviews depicted as a battle against external reviewer	External review findings not fed back into decisionmaking process	External review decisions used as future guide	Adverse external review seen as a quality control check

FoI performance could be seen as a complicated interrelationship between several factors:

Design principles x type of administrative compliance x type of requester = extent to which FoI applications dealt with in accordance with the objects of legislation.[24]

Agency responses often seem dependent on whether the request is from certain applicant categories such as journalists, members of parliament, non-government organisations or individuals and whether the information being requested is personal affairs information or more contentious information in terms of its political or administrative sensitivity. In New Zealand it appears that the government and bureaucracy have engaged in gamesmanship and information management to offset the effectiveness of FoI for politicians and journalists.[25]

Administrative compliance an inherent dysfunction of FoI?

Terrill provides an insight into why compliance is such an unexpected variable in FoI administration.[26] FoI, according to Terrill, operates in all three dimensions of government information namely political, bureaucratic and legal.[27] The other major components of the 'new administrative law' package (Ombudsman, administrative appeals and judicial review) all tend to operate predominantly within the legal dimension of a citizen's relationship to government. Whereas FoI in Terrill's thesis crosses the boundary into the political and bureaucratic strands.[28]

An inherent capacity to operate in all three dimensions gives FoI its problematic status in the eyes of its administrators. In contrast to the other parts of administrative law, according to Terrill, FoI is not primarily used to bring disputes to closure (a determination in a tribunal or finding by the Ombudsman) nor is its use predictable or limited to a small and identifiable range of parties (individuals affected by a decision, a small number of non-government organisations, reporters on a specific round, ie courts or the Canberra press gallery).[29]

In particular FoI has a number of specific attributes which have the capacity to provoke negative or non-compliant responses from administrators. First it grants a legally enforceable right, in theory only limited by a narrow range of exemptions, to citizens and therefore diminishes the capacity of Saul's systems men from controlling access to power.[30] A simple denial of access or assertion by government officials of a pre-emptive ownership of information can no longer be relied on to control access.

Second, the unpredictable nature of FoI requests in areas of timing, applicant and future application is a nightmare in the age of spin doctors and political management tailored to a public relations agenda. A request may enter the scene a decade after a Minister was reassured that a damaging controversary was now under wraps. A request by an academic interested in understanding the path followed by a particular policy process may fuel front page headlines. A series of requests that initially seemed unrelated (in terms of content, applicant and outcomes) across several departments may transform into a well- informed and comprehensively briefed campaign against a wood chip mill. Every single request has an unknown potential to cause unexpected disruption to a policy process or cause an unplanned roadblock for a particular policy direction.

Third, many of the normal information management techniques of spin doctors and PR specialists have the potential to be counter-productive or to back-fire in the

'rights-democratic' charged atmosphere of FoI legislation. The tactics of denial, delay and spin carry the risk of producing headlines such as 'The Secret State', 'Access Denied', 'The Truth Behind the Cover-up'. Many information management techniques used to counter an FoI request lend themselves to cartoons, which depict the process as poor serfs on the outside seeking informational treasures from their lords and masters or attempts at gaining access to the locked cabinet, or the presence of an overworked shredder.

Fourth, the key gatekeepers in determining access — FoI officers — operate in an environment of diminishing training, resources and increasing pressures to settle for levels of non-disclosure at odds with the legislative requirements of the *FoI Act* or, at the very least, its ethos. FoI officers, generally recruited from the lower levels of the bureaucracy or junior middle-ranked positions, find themselves torn between their clear legislative requirements and the more pressing and immediate perceived requirements of their bureaucratic and political leadership. Furthermore the internal review process directs the more controversial requests, because they now have become contested decisions, to areas of the administration which are even more keenly attuned to the policy sensitivities and ramifications of releasing certain types of information. At the very least these sensitivities and ramifications make certain compliance approaches more tempting. Roberts, in the context of Canada, goes further and argues that:

> Restructuring has provided an opportunity for political executives and public servants to increase their autonomy by strengthening their ability to implement policy without close scrutiny by many nongovernmental actors, including the media, advocacy groups and public-sector unions.[31]

By using the Terrill analysis to take into account the potential for FoI to cause disruption across the three dimensions — bureaucratic, legal and political — and the particular attributes of FoI that amplify this potential for disruption, the variable response to FoI requests in terms of degree and types of administrative compliance is understandable. Terrill also suggests that 'the design of the legislation creates the space for government to engage in passive or even active resistance'.[32] On the one hand the FoI process seems designed to be 'the sum of atomised actions by unconnected individuals'[33] yet in a playing field which delivers a number of significant institutional advantages to the government player:

> The structure of FoI is thus not formally neutral, but creates positions of relative advantage and disadvantage. Governments have the advantage of institutional memory, specialised expertise, and have a longer-term interest in influencing the evolution of case law.[34]

Compliance analysis in the understanding of FoI

Compliance analysis will take us a step closer to understanding the complex matrix of factors which help to determine the efficacy of any access to information regime. An analysis that allows for variance in compliance (between and within agencies, across time and in relation to types of requesters and information requested) allows for a more precise identification of problem areas than the traditional league table approach.[35]

Hopefully compliance analysis may encourage some researchers to revisit the key cases of the past; to not just recount the final words of learned judges but analyse how the request was handled and evaluate the outcomes in terms of quality and quantity of information released. More importantly it focuses attention on the way FoI has been received, adopted and responded to by those who have had the duty and obligation to implement this very problematic reform in governance.

In addition compliance analysis demands and legitimises a greater level of multi-disciplinary and cross-disciplinary approaches to FoI study than has previously existed in jurisdictions like Australia, New Zealand and Canada. In terms of this article the contributions of non-legal academics and authors like Roberts and Terrill have added a far sharper and perceptive focus than the traditional legal academic approach.

Finally a compliance analysis turns attention towards the crafting of reforms that address not only the legislative architecture or interpretational/enforcement problems revealed in litigation but the key areas of attitude and culture. Three key parliamentary inquiries in Australia in the last 12 months have pinpointed the areas of culture and compliance as prime targets of reform.[36]

Steps towards addressing administrative compliance shortfalls

Kearney and Stapleton have observed in the context of Ireland that 'on reflection, the single critical factor overlooked by us when first approaching FoI was that it was a change process, not just a legislating matter[37].' Canadians and Australians had paid lip service to this concept but always deep down believing that a magic mix of watertight exemptions, the right interpretative approach and an appropriate mechanism of judicial review would suffice. If necessary a degree of training might complete the process.

It is likely then that Ireland will, like New Zealand, be ideally placed to achieve a higher and more lasting degree of administrative compliance than experienced in Australia and Canada. The key policy dynamic associated with the implementation of right to know legislation is how a radical culture shift for officials is to be implemented and then maintained in terms of short and long-term administrative compliance with the legislation.

Several steps can be taken to assist with compliance. The first is leadership endorsement of the letter and intent of the legislation. The circulation of the Reno Memo, endorsed by President Clinton, produced a significant cultural change in the handling and determination of US FoI requests. The leadership support needs to be from both the political and administrative branches of government.

The second step is a careful consideration of the level and type and power of the position to which FoI decision making is assigned to within an agency. The allocation of FoI duties to low level officers, with little status or experience and no career path is a recipe designed to foster weak compliance. The decision of where to place FoI functions needs to be based on the internal dynamics, operations and culture of each agency. In some agencies the FoI function will mesh ideally with records management. In other agencies where record management is a dead end file handling function, such an assignment will consign FoI to a marginal position.

Third, the position of an FoI officer should be gazetted or have explicit statutory delegations of authority. The exercise of decisions on release or non-release should be the responsibility, and seen as such, of statutory powers by an independent officer. An FoI officer should be empowered and be under a statutory obligation to say to a Minister's minder: 'Yes I will let you know what requests

for information have been made to this agency. No I will not forward the request to your office to be decided and I will make my own judgement on release.'

Fourth, publicly an awareness of FoI should not be seen as a short-term necessity but as a long-term strategic commitment by governments to the legislation. Most Australian jurisdictions have assigned these functions to small dedicated units within the bureaucracy, which had an enormous positive impact but had a very limited operational tenure. Western Australia has ensured the longevity of these functions by placing the awareness and education functions with the Information Commissioner.

Fifth, the training and resourcing of FoI officers must be done on the basis that the original corps of officers will eventually be replaced. The experience in most jurisdictions has been a heavy outlay in terms of training and other resources to a cadre of motivated and enthusiastic officers with little systematic follow-up. Training and FoI officer development in Australia has become ad hoc, optional and a low priority consideration for public sector managers.

The Office of the Information Commissioner in Western Australia has demonstrated what can be achieved in compliance terms when the education and development of FoI officers is treated as a continuing function and necessity. In May 1998 the Information Commissioner, in conjunction with the FoI co-ordinator's network in that State, conducted a workshop which produced a series of 'FoI Standards and Performance Measures' designed to achieve three aims:

Leadership

- That the WA public sector becomes a leader in applying the processes required by FoI legislation and the objects and intent of the Act.

Community respect

- To enhance the profile of each agency and the WA government within the community.
- To demonstrate to the community and staff in agencies that FoI is taken seriously.
- To focus on the customers of public sector agencies.
- To demonstrate accountability, credibility and integrity.

Continual improvement

- To achieve best practice.
- To introduce consistency so that meaningful comparisons of performance can be made.
- To understand the factors that underpin the success of FoI in agencies, including resources, education and policy issues, and to identify changes to the legislation that may be required.

To support these three major aims the Western Australian FoI officers developed a series of performance standards and measures under four key activities that included managing the FoI process, assisting and advising parties, agency policy and education, and evaluation of performance. The importance of this development is that the FoI officers have developed and articulated performance standards against which their and the agency's compliance with FoI can be judged. A number of the standards are clearly linked to compliance concerns including processing times, adequacy of searches, decision- making processes consistent with the objectives of the legislation and adequacy of reasons.

The sixth step would be the adoption of the Australian Law Reform Commission and Administrative Review Council proposal for an 'auditing' or monitoring role to be undertaken by an independent body to the agency.[38] This monitoring role would include audits of the handling of previous FoI requests. In addition the ALRC/ARC felt that such a body could also work as a circuit breaker where FoI requests have deteriorated into adversarial disputes. The Queensland Information Commissioner commented in regard to this circuit breaker function that:

> Generally speaking, I favour the concept of a facilitator. I have seen many cases where there has been a lack of trust exhibited by an applicant for access toward an FoI administrator who was attempting to negotiate to narrow, so as to make more manageable, the terms of an FoI access application: the participation of an 'honest broker' may resolve an impasse to the benefit of all parties.[39]

The final step would be to institute an annual awards program that publicly rewarded or recognised significant agency achievements in compliance and active pursuit of the objectives of an FoI Act. Australian agencies have displayed a surprising responsiveness to non-monetary award programs (for instance annual report standards). In this area the adoption of an approach like the UK Campaign for Freedom of Information annual awards would be a positive step.

Conclusion[40]

Authors like Terrill and Roberts are leading us from dry, sterile debates and slanging matches about which government is more secretive to a deeper understanding about the wider political, policy and legal dimensions of access to government information. Roberts forces us to concentrate on enhancing and expanding the quality of Australia's 'informational commons'.[41] The greatest tragedy, associated with the non-response by the Australian federal government to the Australian Law Reform Commission and Administrative Review Council reforms released in 1996, is that an increasingly dilapidated, antiquated and flawed *Freedom of Information Act 1982* (Cth) continues to diminish that commons.

In the long term it is imperative that we return to a consideration of the design principles, legislative architecture, administrative practice and objectives of an access to official information scheme at a national level in this country.[42] The focus should be on reforms designed to increase positive administrative compliance under the FoI Act. The delay in implementing the ALRC/ARC reforms and consequential side effects has meant the increased likelihood of administrative compliance practices deteriorating into non-compliant practices.

Compliance analysis will help identify whether unacceptable practices are the fallout effect of government restructuring (cost cutting, focus on outputs versus processes) or the insidious and undesirable penetration of political gamesmanship into the determinations about access to government information. Using this type of analytical model we can better understand the counter attack provoked by the Canadian Information Commissioner because he decided that a policy of zero tolerance would apply to 'late responses to access requests; a new pro-openness approach to the administration of the Access Law … and that the full weight of the Commissioner's investigative powers would be brought to bear to achieve these goals'.[43] The Commissioner reported threats to future careers of staff[44] and that '[w]hen the Commissioner's subpoenas, searches, and questions come too

insistently or too close to the top, the mandarins circle the wagons'?[45] Another factor it seems that we might need to add to the matrix in determining administrative compliance is the attitude/type of approach adopted by the external review body. What happens, with administrative compliance when the external review body switches from an explicit trust in the good faith of those administering the legislation to a determination to see the spirit and letter of the law applied in favour of greater access?

Rick Snell

Rick Snell teaches administrative law at the University of Tasmania.

This paper is a modified version of 'Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand,' Freedom of Information — One Year On, Department of Finance and Department of Law, University College Cork, held at St Patrick's Hall, Dublin Castle, 23 April 1999. <http://www.ucc.ie/ucc/depts/law/infoirl.html> An earlier and less ambitious version of that paper titled 'Australian Freedom of Information: A Promising Start and a Faltering Finish?' was presented as a part of the Seminar in Government Information Policy — 23 March 1999. Constitutional Unit, School of Public Policy, University College London. The author would like to thank the civil servants, academics and policy specialists who vigorously questioned and explored the ideas advanced in that paper. Alasdair Roberts of Queen's University, Ontario and Darius Whelan, University College Cork made significant suggestions for improvement of this paper. For comments on this paper contact r.snell@utas.edu.au

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Developments in Tasmanian freedom of information 1996–1999

This article briefly outlines developments in FoI in Tasmania in the period 1996–1999, the basis for analysis being the FoI Annual Reports and the Ombudsman's Reports for this period. Several trends in the use of FoI legislation are identified. While there are indications of some positive changes in administrative practice, there still remain obstacles to open government.

While such annual report surveys provide a degree of, albeit severely limited, insight into the processes of FoI in a particular jurisdiction more comprehensive studies are required. These studies should ideally include case studies, not just the reported cases but behind the scenes accounts from both applicant and agency perspectives, compliance analysis and careful assessment of the degree to which the informational commons have been enhanced by FoI.

FoI Annual Reports

In accordance with s.56 of the *Freedom of Information Act 1991* (Tas) an annual report must be prepared and tabled on the administration of the Act, specifying:

- the number of requests made under the Act;
- the number of requests refused and the provisions of the Act under which they were so refused;
- the number of applications for review made to the Ombudsman under s.48 and the results of those applications; and
- the total of charges collected for applications made under the Act.

This article is based on data from the Annual Reports for the periods 1 July 1996 to 30 June 1997,[1] 1 July 1997 to 30 June 1998[2] and 1 July 1998 to 30 June 1999[3] (see *Table 1).*

Roberts has argued that the wave of public sector restructuring which occurred in the last decade has undermined freedom of information laws in a myriad of ways.[4] A minor, but important, by-product has been the minimalist approach to reporting that has been adopted in many jurisdictions although few achieve the same degree of minimalism as Tasmania. The Ombudsman's Office is now responsible for the FoI Advisory Unit and for production of both the Ombudsman and FoI Annual Reports. Resource constraints that have plagued the Ombudsmans Office since taking on the FoI review role (the government had promised a 50% increase in staff but instead imposed a 33% reduction) have restricted the annual reports to a compendium of bare statistics, compared to the types of reports produced by the Information Commissioners in Western Australia, Queensland, Canada and Ireland. The differences extend beyond production quality to all facets of reporting but more importantly into the use of the reports as a means of communicating expectations about standards and future performance to agencies.

Requests and decisions

In the 1996/97 period there were 2414 FoI applications received in total by agencies, marking a decrease of 198 from the previous reporting period when 2612 requests were received. Of these, 1702 requests (70%) were received by Tasmania Police — this was a decrease from prior years, attributed to the fact that in March 1997 a pilot scheme was introduced under which an FoI application was not necessary to access prosecution briefs for lower court cases.

Of the prescribed authorities, the Retirement Benefits Fund Board clearly received the largest number of requests (48) followed by the Motor Accidents Insurance Board (22.) It is interesting to note that during the 1996/97 period the Department of Land Management was the only agency that was able to come to a decision with respect to every request received (in that case, 52 requests were made in the period).

The 1997/98 Annual Report notes a decline in the number of applications received, but suggests that despite this the complexity involved in handling the FoI applications has increased. In total, 1441 FoI applications were received. Again, Tasmania Police received 40% of the total requests — but this represented a decrease from the previous year, attributed to the ongoing scheme to encourage the pre-trial disclosure of prosecution briefs. The departments receiving the most applications were the Police and Public Safety Department (501), Transport Department (185), Workplace Standards Authority (178) and the Department of Community and Health Services (174). With respect to the prescribed authorities, the Retirement Benefits Board clearly received the most requests (105).

The 1998/99 Annual Report is notable for its coverage of the reasons why there were decreased levels of FoI applications in various agencies and authorities. While confirming the trend in the previous two reporting periods that the Tasmania Police policy of releasing pre-trial information explained the drop in FoI applications for that department, other case studies were also provided. For example, it is interesting to note that the number of requests to the Department of Health and Human Services decreased by 50%, explained by the fact that the

Table 1: Overview of FoI in operation 1996–1999

Features	1996–97	1997–98	1998–99
Number of requests received by agencies	2414	1441	1165
Agency receiving the most requests	Police and Public Safety (1702)	Police and Public Safety (501)	Police and Public Safety (409)
Prescribed authority receiving the most requests	Retirement Benefits Fund (48)	Retirement Benefits Fund (105)	Retirement Benefits Fund (39)
Number of requests decided by agencies and authorities	2356	1277	1112
Percentage of requests decided to which access was granted in full	35%	46%	28%
Percentage of requests decided to which access was granted in part	44%	21%	35%
Percentage of requests decided within 30 days	88%	80%	85%
Most frequently used exemption provision	Section 30 (information affecting personal privacy)	Section 30 (information affecting personal privacy)	Section 30 (information affecting personal privacy)
Number of requests for internal review of decisions by agencies and authorities	48	45	32
Requests received by the Ombudsman for external review of agency and local government decisions	29	21	16

agency has reportedly aligned its methods of disclosure of information with those endorsed by the *FoI Act,* such that fewer FoI requests were necessary. Similarly, there was a 63% decrease in the number of requests made to the Retirement Benefits Fund Board, explained by RBF's practice of advising doctors that medical certificates provided to the RBF should be made available to the applicant removing the necessity for an FoI application.

The 1998/99 Annual Report notes that the overall number of FoI applications increased only with respect to local councils. This trend was attributed to the fact that FoI was increasingly being used with respect to public liability insurance claims and that access was being sought by members of the legal profession. Anecdotal evidence suggested that a number of local government councils, inexperienced with FoI, were exhibiting poor compliance including time delays, sweeping exemption claims and inadequate reasons statements.

As mentioned, the procedural change instituted by Tasmania Police was the most significant change during this period. The key question was why it took so long to follow the example of Victoria Police after the decision in *Sobh v Police Force of Victoria* (1994) 1 VR 41. The Tasmanian Legislative Council Select Committee Report had recommended this change as early as 1995. The administrative changes made by the Tasmanian Police, RBF and Department of Community and Health Services confirm the positive side effects of FoI but also illustrates how long it can take for such administrative improvements to be adopted. It seems the initial adoption of FoI may inadvertently formalize release practices for a period of time. This practice was observed at the Commonwealth level where the Australian Taxation Office, after application fees were introduced, abandoned its informal procedures on releasing copies of tax returns to taxpayers in favour of a more time consuming and cumbersome formal FoI process.

Outcome of requests

In 1996/ 97, of the 2356 requests made to the State government agencies and prescribed authorities, 2254 resulted in a decision to either grant full or part access to the information or to deny access. Other requests were either withdrawn, transferred in full or in part to another agency or were not able to be processed, often because the agency did not hold the information. Access was granted to 79% of all applications (35% of information requested was fully disclosed while 44% was partly disclosed.)

In 1997/98, of those requests decided, 46% saw full access to the information granted, 21% were granted part access and 12% were denied access to the information sought. The 1998/99 Annual Report notes that of the requests to government departments and prescribed authorities, the level of full access granted to documents declined from 46% in the last period to 28%, while part access rose from 21% to 35%. To counterbalance the reductions in full access being granted, the number of denials of access decreased from 12% to 7%. It is noted that 95% of denials in 1998/99 were due to the fact that the information was otherwise available, often by being purchased.

Nevertheless, the decrease in the levels of full disclosure is a concerning trend. Tasmania continues to record a relatively high level of requests for policy and other non-personal affairs information compared to most other Australian jurisdictions. However, the official statistics, ignoring the recommendations of most major reviews into FoI in Australia during the 1990s, do not record the policy/personal information breakdown.

Timeframe for requests

Section 16 of the Act requires that an applicant must be notified of a decision with respect to the application for access to information within 30 days. In 1996/97, over 88% of all requests were decided within 30 days. This declined a little in 1997/98 to being just over 80%, while in 1998/99 the proportion of requests handled within 30 days rose again to 85%. In 1998/99, over 90% of requests received by local councils were handled within this specified timeframe.

The improvement in 1998/99 is to be commended but an average 16% failure to meet a generous statutory time limit is disappointing. The Tasmanian experience seems to be in line with Roberts' thesis of the impact of restructuring and resource reductions. Most Tasmanian agencies have officers whose FoI duties are allocated as extra duties and tend to give FoI requests low priority.

Timely delivery of information is the key to the success of any access to information regime. Time delays, for many applicants, destroy or severely reduce the effectiveness of

using this process. Professional users such as journalists and lawyers are particularly affected by delays.

Reasons for refusal of access to information

The Report for the period 1996/97 states that the most commonly used exception was s.9 of the Act, which provides that the Act does not apply to information that can be purchased from an agency.

In 1996/97, the most widely used exemption was s.30 of the Act which provides that a document may not be released if it contains information affecting personal privacy. Often applications were made for information the release of which was considered by the agency concerned to be unreasonable given that it related to the personal affairs of a person other than the applicant. For example, Tasmania Police relied on this exemption in 863 instances for requests commonly made for information about witnesses involved in prosecution cases.

Other exemptions frequently relied on were s.27 which exempts internal working information (invoked in 38 instances); s.33 relating to information obtained in confidence (invoked in 36 instances); and s.29 relating to information affecting legal proceedings (invoked in 34 instances). The exemption of Cabinet information was relied on to deny access in 24 instances. In the period 1997–99, ss.9 and 30 were again the exemptions most frequently relied on.

Reviews of decisions

Forty-eight requests were made for internal review of the original decisions made by agencies with respect to information during the 1996/97 reporting period. Of these, 32 were fully upheld, 15 were partly upheld and 3 were reversed. During 1997/98, 45 requests for internal review by the agencies and authorities were made. Of these, 36 were upheld in full, 12 upheld in part and none was reversed. In 1998/99, there were 21 requests for internal review of departmental decisions of which 12 were fully upheld, 7 were upheld in part and 2 were reversed.

The Ombudsman received 29 requests for external review of State agency and local government decisions during the 1996/97 period, and of the 19 reviews conducted of the determinations of State government and authorities, the Ombudsman reversed only 4. The Ombudsman received 18 requests for review of agency decisions and 3 for review of local government decisions in 1997/98. Of the agency decisions reviewed, only one was reversed and none of the local government decisions were reversed. The Ombudsman completed 16 reviews of decisions in 1998/99 — 10 of government departments, 4 of prescribed authorities and 2 of councils.

The volume of requests, the frequency of time limit violations (which guarantee a right of immediate appeal to the Ombudsman), the high level of non-disclosure (especially when partial release rates are included) and the high level of non-personal information would normally produce high volumes of both internal and external reviews. The continued low volume of reviews in Tasmania is an enigma. In part it could be explained by an Ombudsman Office that is under staffed and poorly resourced. The Ombudsman's Office has been low key in the promotion of external review although this in no way explains the low volume of internal review requests. In part the firmness of the agency's refusal, the prospect of delays in the Ombudsman's Office and a perceived lack of independence (of both internal and external reviews) may deter applicants pursuing requests.

Fees and charges

The total revenue collected by the government in the 1996/97 period was $14,018.45, which amounts to approximately $7.85 per request. For local councils, the fees collected amounted to $423.20, being approximately $5.30 per request. The Annual Report notes that the fee structure imposed means that the administrative costs of collecting fees exceed the amount of revenue raised, not to mention the costs involved in the initial collation of the information sought. In many instances, the charges were waived (such as for requests by Members of Parliament, routine requests or requests relating to the amendment of personal information) or were reduced (such as where the request was for personal information or the information sought was considered to be in the general public interest).

Again, in 1997/98 the revenue collected was $4804.70, which amounts to approximately $5.60 a request. These figures represent a decrease on the previous reporting period results. The main reason cited in the 1997/98 Annual Report for the waiving or reduction in charges was the inability of the applicant to pay and the fact that many requests related to personal information.

Finally, in 1998/99 the total revenue amounted to $9120, which approximated $8.74 per request. This represents a significant increase in revenue gained. The most common reason for waiving or reducing fees was that the information was considered to be routine or was not chargeable.

In most jurisdictions FoI has rarely approached minimal cost recovery let alone approaching full cost recovery. Where fees are formally levied they are more often waived or not finally collected. On the surface this is good news for applicants. However these waivers are ad hoc, discretionary and not formal policy. Therefore no applicant can be assured when commencing a request or at any vital decision-making stage (after receiving a fee estimation or internal review etc) whether their request will be a beneficiary of fee waivers or reductions. The complaint that has surfaced in reviews in regimes like New South Wales and the Commonwealth is that the threat of high fees (as opposed to their actual imposition) is used as a crude means of deterring and/or delaying particular applicants especially journalists and non-government organisations.

FoI Unit

The FoI Unit was established in 1992 to facilitate the introduction of the Act and its purpose is to assist in the Act's implementation. During 1996/97, the FoI Unit received some 500 contacts via telephone and in-person advice relating to the operation of the Act. This number remained constant for the following year but increased to 550 contacts for 1998/99.

Only a small section of the Annual Reports is devoted to an overview of the FoI Unit's activities. There may be scope for greater attention to be paid to enhancing the public visibility of the Unit, though the constant level of public contact suggests that the Unit is of some utility. However, the Annual Reports do not contain breakdowns of these contacts and it may be that the Unit's resources are used more by journalists and academics seeking information, and departmental officers seeking clarification of their obligations, than by the general public.

The transfer of the Unit to the Ombudsman's Office has seen the merger of two under-resourced entities. The merger has effectively disguised the full extent and effect of the under-resourcing for the two activities (support/awareness and external review) instead of being a principled and careful move towards implementing a version of the successful Western Australian combination (with the Information Commissioner responsible for awareness/training and determinations). The abandonment of the FoI Unit by the Department of Premier and Cabinet was, at best, a symbolic downgrading in the prestige and authority of the Unit's activities. At worst, it effectively precluded the Unit from being staffed by officers at the middle to senior level in the bureaucracy who had access to the central policy processes of DPAC and central government agencies.

Conclusion

A survey of the Annual Reports for 1996/99 reveals that the FoI reporting process itself appears to be compliant in terms of statutory requirements. Data has been supplied by the Departments, agencies and councils in question to allow some statistical inferences to be made about the use of FoI in Tasmania. Reporting is an important feature of FoI schemes and the adequacy of the data in the Reports represents a slight improvement on earlier Annual Reports.[5]

This short article has identified a number of trends in the use and operation of the FoI Act. First, it is noted that Tasmania Police consistently record the highest numbers of FoI requests. This number is, however, decreasing, presumably in response to the policy of releasing pre-trial information with respect to lower court cases. Second, the Annual Reports indicate that there has been an overall decline in the use of FoI in Tasmania. The 1998/99 Annual Report offers some explanation of this decrease for specific departments and authorities.

This trend may suggest that administrative practices are changing and that agencies and authorities are becoming more aligned with FoI principles and pro-disclosure philosophy so as to necessitate less reliance on the Act to achieve openness in government. The fact that a majority of requests are being handled within the 30-day time frame is also to be commended and suggests some genuine commitment on the part of most agencies and authorities in facilitating the aims of the legislation.

The Tasmanian regime demonstrates the hallmarks of a system that has allocated FoI a minor and incidental role in public administration. The allocation of resources, the staffing and administrative arrangements and capacity of the Ombudsman's Office and FoI unit send a message that the Labor government is not interested in rejuvenating the system.

Rick Snell and Nicole Tyson

Rick Snell is a Senior Lecturer in Administrative Law at the University of Tasmania.

Nicole Tyson is a recent first class honours graduate from the Law School, University of Tasmania.

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VICTORIAN FoI DECISION

Victorian Civil and Administrative Tribunal (VCAT)

McCULLOCH and THE UNIVERSITY OF MELBOURNE [2001] No. 2000/70113

Decided: 13 March 2001.

Factual background

In October 1999 Melbourne Technologies Pty Limited, owned by the University of Melbourne, became a public company and its name was changed to Melbourne IT. At that time the company was the only issuer of *com.au* names in Australia. It was given a five-year exclusive licence in 1996 to register domain names throughout Australia. In April 1999 Melbourne IT was also granted one of five worldwide licences to issue global domain names.

The University of Melbourne considered commercial expansion of the company was best achieved by publicly listing Melbourne IT. In November 1999 the University of Melbourne Council approved the public float of the company and commenced a process of due diligence to secure arrangements for the float. Some 42.5 million shares were offered for sale at an issuing price of $2.20. The University maintained 7.5 million shares in the float and made $78.4 million after expenses. The share price peaked at $17.00 and in late December 2000 was selling for approximately 80 cents.

Procedural history

The applicant, Mr Graham McCulloch, is the general secretary of the National Tertiary Education Industry Union. On 3 April 2000 he sought access to a broad class of taped recordings of meetings of the University of Melbourne Council and Finance Committee. The University denied access to the tapes and Mr McCulloch applied to the VCAT for review of the University's decision. By the time of the hearing the request had been significantly narrowed to only include those parts of the taped meetings dealing with the decision to float Melbourne IT limited. At the hearing the University claimed the tapes were exempt according to ss.30, 38, 33, 32, 34(4)(ii) and 38 of the *Freedom of Information Act 1982* (Vic) (the Act).

Decision

The Victorian Civil and Administrative Tribunal (the VCAT) decided to

release a transcript of the tapes it had prepared for the hearing rather than the actual tapes. The matter was adjourned for final hearing in April. At the final hearing the Tribunal made orders that the documents be released.

Reasons for the decision

Section 30(1) (internal working documents)

(a) The tapes were deemed to be internal working documents of the University of Melbourne.

(b) The Tribunal did not consider releasing the tapes would be contrary to the public interest. Senior Member Megay cited a number of reasons for her decision. In her opinion the tapes were non-controversial, contained no secrets, legal advice or anything that could cause the University embarrassment or expose it to adverse comment. She maintained that the comprehensive media coverage of events surrounding the float removed the necessity for confidentiality. Moreover the results of the decision had also been the subject of a report by the Victorian Auditor General. She suggested that McCulloch's last minute narrowing of the request explained some of the University's previous apprehension at disclosing the documents.

The University relied on a number of public interest grounds supporting the s.30(1)(b) exemption. Some of these included: that there is no allegation of impropriety, that disclosure might result in future decisions to dispense with tapes of council meetings and that disclosure would breach the obligation of confidence inferred from the in-camera nature of the meetings.

The VCAT heard evidence from Mr Len Currie for the University regarding the nature of Council meetings and the information discussed. He said that council members were informed and understood that the meetings were confidential. The issues involved in the floating of Melbourne IT were commercially sensitive. If the tapes were released, he suggested, members might be less candid in their discussions. In his opinion release could possibly lead to the council meetings not being taped in the future.

McCulloch called three witnesses: Ms Alana Chin, Dr Jennifer Strauss and Ms Julie Wells. Ms Alanna Chin and Dr Jennifer Strauss discussed their experiences of being on a University Council and Ms Wells discussed the importance of accountability and transparency of University decisions.

In her written decision Senior Member Megay focused on the evidence of the University's witness Mr Currie. The Tribunal was not satisfied that there was enough direct evidence from Mr Currie that the Council members would be less frank or bold in their deliberations if they knew their thoughts would be publicised in the future. Furthermore Senior Member Megay commented that she would 'be amazed' if Council members had given evidence to that effect. She stated that release of the documents in no way binds the University in respect of future meetings or requires the University to make clearly confidential and commercially sensitive material public.

Section 32 (legal professional privilege)

Following the decisions of *Re City Parking and City of Melbourne* (1996) 10 VAR 170 and *Standard Charted Bank of Australia v Antico* (1993) 36 NSWLR 87 the Tribunal rejected the exemption. The VCAT found nothing in the tapes that would reveal what legal advice was sought and received by the Council from the transcripts. The Tribunal held that the fact that legal advice was received does not make the documents exempt.

Section 33 (documents affecting personal privacy)

The VCAT did not consider releasing the names of Council members would be unreasonable in the circumstances. It was maintained that while some of the speakers in the tapes were identified by name, the content of the transcripts was insignificant and their names are a matter of public record. Senior Member Megay submitted that there was no direct or indirect evidence suggesting the physical safety of the Council members would be jeopardised by releasing their names. In accordance with s.33(3) of the Act the Tribunal made an order requesting the Registrar to notify the Council members that their names may be released and advise them of their rights under s.50(2)(e). The documents would be released if there was no response from the Council members within 28 days.

Section 34(4)(ii) (documents relating to trade secrets)

The VCAT found that there was nothing sensitive in the tapes that would unreasonably disadvantage the University and therefore rejected the exemption. Senior Member Megay rejected Mr Currie's evidence which claimed that disclosure of the information would disadvantage the University in future commercial dealings by revealing approaches taken by it. While the meetings were found to contain information of a business, commercial or financial nature, the tribunal was not satisfied that the information would expose the University unreasonably to disadvantage.

Section 38 (documents to which secrecy provisions of enactments apply)

The Tribunal held that there was no prohibition in the University's Standing Resolutions or in any other University enactment '*applying specifically to information of a kind in the tapes*'. In relation to the Standing Resolutions Senior Member Megay contended that the wording is one of 'preferred conduct not a mandatory ruling'. Furthermore she was not persuaded that the fact that meetings were mainly held in-camera gave rise to the requisite prohibition. She commented that it would be odd if the University, which receives substantial public funding, were able to hide its deliberations entirely from the public.

[D.E.]

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Tel. (03) 9544 0974 email: L.boulton@law.monash.edu.au