

# Freedom of Information

# Review

ISSN 0817 3532

ISSUE No. 102

## Contents

### Articles

- Contentious issues management —  
The dry rot  
in Fol practice?  
by Rick Snell 62
- Cabinet exemptions in Australia —  
saying goodbye to  
the Midas touch?  
by Rick Snell 65
- Commercial-in-confidence — time  
for a rethink?  
by Rick Snell 67
- Fol officers — a constituency in  
decline?  
by Rick Snell 69

## 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  
Maeve 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) 102 *Fol Review*

© LSB Co-operative Ltd 2002

## Comment

This issue contains four works in progress. The articles are not meant to be definitive and conclusive but to provoke discussion and feedback. The first article on contentious issues management attempts to outline why the active involvement of ministerial minders or press units in the determination and processing of Fol requests is unacceptable. The differential treatment of requesters is a major threat to the fair administration of Fol laws. Such practices once again raise the puzzling spectre of agencies adopting an 'internal law' which deliberately subverts or in some cases contradicts both the letter and spirit of the legislation. These 'internal laws' are adopted by agencies that do not hesitate to apply other laws rigorously. In part the article is concerned with the importation of private sector practices and ethics into the public sector without allowance for any modification to meet the requirements of public office and public trust.

The article on cabinet exemption continues my long-term campaign to get Australian legislators to accept that there needs to be a greater degree of openness at the heart of government. The argument that the Westminster system can only operate with a large core of secrecy and/or is not threatened by an excessive amount of secrecy has started to lose support. In this article I examine changes introduced by the government into the South Australian parliament that allow for a greater level of transparency. Furthermore, the former Victorian Premier, John Cain, a strong advocate for Cabinet secrecy, has conceded that in some areas of Cabinet decision making a greater degree of openness (especially retrospective) is now needed. In a third article I consider various approaches and possible changes that can be made to the treatment of commercial-in-confidence under Fol legislation.

The fourth article explores the role of Fol officers and looks at whether it is a role in decline. In discussions with Fol officers, in many jurisdictions, I am constantly reminded that they are the keys to making Fol systems function effectively. Yet there are few jurisdictions, if any, that continue to allocate appropriate resources, recognition, training or other support to their Fol officers. Furthermore, there are strong indications from many jurisdictions that there has been a significant decline in the number of experienced Fol officers as a percentage of total Fol officers. Training programs have vanished or decreased in frequency and other staff are rarely made aware of Fol as a central program of government.

The next issue will contain a shortened version of Ron Fraser's paper presented to the Public Law Weekend at the ANU in Canberra in November 2002. The full article will eventually be published in the *Federal Law Review*. This article neatly encapsulates the debate over law reform and is the considered reflection of a person who has had an important connection to Fol development in Australia. His piece will also serve as a timely reminder of the 20th anniversary of Commonwealth freedom of information. Also 5 January 2003 will mark the 30th anniversary of the tabling in federal Cabinet of Lionel Murphy's original proposal for freedom of information. The history of Commonwealth Fol from that point has not been one of swift and uncomplicated implementation. The then Attorney-General probably never expected that his simple proposal would still be a contentious issue in public policy 30 years on.

**Rick Snell**

## Contentious issues management — The dry rot in Fol practice?

Improvements in information management within governments have been a significant feature of the last decade. They have ranged from developments in record management to software that allows the tracking of responses to ministerials. In addition, the staffing, profile, authority and functions of media offices within departments have transformed from low levels and being reactive to occupying critical niches in the decision-making processes. Governments have also taken to hiring not only journalists to staff these media offices but, increasingly, PR specialists including those trained to be proactive and those with capacity to manage contentious issues. In addition, the number of such specialists starts to exceed the combined total of the fourth estate in each jurisdiction.<sup>1</sup>

The amount of money, time and deliberation spent on management of government information to pre-empt or limit access to information that supports or sells the government's story far outstrips resources devoted to providing unrestricted access to more government information. The amount of money spent limiting reporting on the *Tampa* and delivering the government's version can be contrasted to the amount devoted to delivering an accurate, timely and informative briefing to citizens, parliament and the fourth estate. Marian Wilkinson's story on the *Tampa* using Fol is an oft repeated one of delays, cost barriers and techniques to manage a contentious issue.<sup>2</sup>

Contentious issues management in relation to Fol is a term that has gained currency in Canada.<sup>3</sup> Contentious issues management occurs where certain Fol requests are managed differently than other requests either because of the type of information being requested (high profile, politically and policy sensitive) and/or the type of requesters (opposition MPs, journalists or particular NGOs). In Ontario once a request has been identified as contentious 'the process requires the immediate notification of the Minister and Deputy Minister, along with the preparation of issue notes, briefing materials, etc. Cabinet Office is often involved in this process.'<sup>4</sup>

The problem with extending Contentious Issues Management to Fol is not the notification or preparation of briefing materials for Ministers. The problem is the subjecting of the processing and final determination of the request to political and information management considerations instead of the legal and public interest considerations required by the legislation. Contentious Issues Management if used for Fol requests exacerbates further the strategic imbalance highlighted by Terrill.<sup>5</sup> Terrill has expressed concern that individual, infrequent users of access systems find themselves confronted by a player that holds all the cards, has the benefit of long-term institutional memory and specialised expertise. If the government player is able to stack the deck, delay the playing of critical cards and to deliberately exercise discretion against selected users then the game has become rigged rather than permitting an unintentional strategic imbalance.

Many Fol Officers, Government Ministers (serving and former) bemoan the fact that Fol evaluation appears centred 'on whether the political opposition of the day, the

media and political activists can make enough fuss about what they are unable to get'.<sup>6</sup> Yet if they allow the access game to be played in a way that deliberately restricts or delays scrutiny then their criticisms lack significant credibility. Most Fol legislation (except those Acts undermined by subsequent amendment) constructed their exemption, processing and fee schemes on the basis that requests for information would only be denied or restricted to protect the public interest or only by considerations imposed or allowed by law. All Fol legislation places an obligation on decision makers to make decisions as quickly as possible and to use discretions in favour of release. Fol Officers who are compelled, or do not protest the external interference, to take longer, charge more, ignore documents in certain locations and to claim exemptions as an act of first resort are acting contrary to the letter and intent of Fol legislation.

Contentious Issues Management in the area of Fol is not an alternative, or an acceptable addition, to the decision making processes authorised by legislation. The practices resorted to by those taking a contentious issues management approach (delays, high fees, avoiding discovery of documents) are never legitimate or defensible. One of the intriguing aspects of Fol practice is how quickly abuses or misuses of the process become institutionalised. Cabinet exemption and commercial-in-confidence are two other areas that quickly deviated from normal handling processes to ones specifically construed to hide information likely to be requested.

### The Canadian experience

Between the release of the Ontario Information and Privacy Commissioner Report in 2001 and the present time a number of concerns have been raised by various organisations and individuals about the practices identified as contentious issues management.<sup>7</sup> Roberts argues that in retrospect the development of such an administrative practice is not unexpected, albeit unwelcomed. Roberts argues:

Fol laws influence the balance of power within political systems. Opposition politicians, journalists or advocacy groups are better able to hold government to account, and more successful in exerting influence within the policy process, if they can obtain documentary evidence of impropriety or misjudgment, or evidence that reveals the structure of internal debates over policy. Conversely, political executives and officials find that their autonomy and room for manoeuvre is enhanced if they are able to resist demands for disclosure of internal records.<sup>8</sup>

As explored in two recent papers I have argued that Fol operates in a across four dimensions of government, namely, political, bureaucratic, civic and legal.<sup>9</sup> Therefore, it is unlikely that the administration of Fol will remain neutral or static. Over time the interactions within and between those four dimensions will produce different types of compliance outcomes. Roberts draws our attention to the public administration literature which shows that 'statutory objectives can be substantially altered through the exercise of official discretion'.<sup>10</sup> Furthermore, Roberts, drawing on the work of Jerry Mashew,<sup>11</sup> suggests that 'organizations charged with implementation of a statute may develop an internal law of administration to guide the exercise of discretion'.<sup>12</sup> This exercise of discretion will

be guided primarily by 'unpublished written instructions and interpretations combined with standard routines and with developmental and decisional practices'.<sup>13</sup>

Roberts, using an econometric analysis of 2120 requests handled by Human Resources Development Canada in 1999–2001, has produced a study that suggests the concerns about contentious issues management may have significant supporting evidence. His empirical study demonstrates that 'requests which were identified as sensitive, or which came from the media or political parties were found to have had longer processing time even after other considerations are accounted for'.<sup>14</sup> Roberts argues that the operation of this 'internal law' in relation to the exercise of discretion (in this case against particular users) directly confronts and violates a principle that is integral to access schemes namely that of equal treatment. McNair and Woodbury declare that the principle of equal treatment is an 'overriding principle of Canadian access law'.<sup>15</sup> The Canadian Access to Information Review Task Force stated:

Coordinators, or other officials with delegated authority, are administrative decision-makers when they decide on a right conferred by the Act ... [T]heir decision has to be made fairly and without bias. Neither decisions on disclosure nor decisions on the timing of disclosure may be influenced by the identity or profession of the requester, any previous interactions with the requester, or the intended or potential use of the information.<sup>16</sup>

### Is there evidence of contentious issues management in Australian Fol practice?

The most damning evidence that contentious issues management is well entrenched in Australia comes from two previous government officials. One was the head of the Tasmanian Government Media Office and the other a former Victorian Fol Officer. This can be coupled with stories like that by Paola Totaro<sup>17</sup> and concerns raised in the recent NSW Ombudsman Annual Report. In a previous article<sup>18</sup> I have explored more generally the relationship between spin doctors and Fol indicating that at the time of writing that article there were only slight hints of contentious issues management playing any role in Australian Fol practice.<sup>19</sup>

Ellen Whinnett, a Tasmanian reporter, was surprised, after making a routine follow up on an Fol request, to be told that the Fol officer was awaiting a response back from the Department's media unit. Her story provoked a strong defence from the government arguing that Ministers and their advisers had a right if not a duty to be kept informed of all activity, including Fol requests, in their portfolio. The strongest defence, however, came in a letter to the *Sunday Tasmanian* from the former head of the Government Media Unit under the previous government. (See *Box 1*). The former head of the Media Unit not only confirmed that such referrals were common practice during her period of office but that deliberate steps were often taken to delay or undermine the request especially if it was from a journalist or member of parliament.

This letter demonstrated the triumph of political spin over both legality and hallowed conventions. The letter was not only a mea culpa but a dispassionate presentation of a view of public administration that allows the public interest to be dismissed for pure political opportunism. A generation of reinventing government, the hiring of private senior managers and specialists to fill public sector roles with no induction course into public sector ethics and values have led to the simple equation

### Box 1— Putting a new spin on government Fol ploy

Regarding your story 'Spin-doctors defended' (*Sunday Tasmanian*, 24 February 2002), I can say that communications officers and advisers' knowledge of Freedom of Information (Fol) requests has been far from 'routine'.

It has been common practice, regardless of the government in power, for communications officers (including Media Office staff) to provide advice and warn of potential negative media implications on Fol requests.

Both in my positions within government departments, and as the head of the Media Office, my tasks included advising a secretary or minister against the release of certain Fol material.

This advice was always based on potential negative media rather than what might have been in the public's best interest.

As a communications adviser, your job is to protect the government or an agency and ensure positive spin.

And yes, having that information does give you considerable advantage, as Peg Putt points out.

There were certainly times when a journalist was on to a good story but it was generally fairly easy to put them off the track with some creative delaying tactics, as I mentioned in my book *Going Public: Communicating in the Public and Private Sectors*.

Dr Kay Chung  
Sandy Bay

Source: Letters Page, *Sunday Tasmanian*, 3 March 2002.

that good private practice automatically translates into acceptable public sector behaviour.

During the late part of 2001, and early 2002, concerns started to appear that the handling of some requests in Victoria especially from opposition MPs and journalists were starting to bear the hallmarks of a contentious issues management strategy. Furthermore, the advent of stories like those by Paola Totaro in the *Sydney Morning Herald* seem to indicate, as had stories about his experiences by Ross Coulthart,<sup>20</sup> that contentious issues management could be seen to have two clear phases. First was the internal phase where time delays, fees and exemption claims were used to help manage the request. The second, external, phase was the use of a series of tactics to kill, swamp or divert attention away from the newsworthiness of any story or public use of the released information.

Chris Tinkler, in the *Sunday Sun Herald*, using the experiences of a former Fol officer, outlined a series of tactics that could be used to delay or hide information.<sup>21</sup> (See *Box 2* for an outline of the tactics used to delay or frustrate requests.) Don Coulson, a Victorian Fol Officer made redundant earlier in 2002, argued that:

The Bracks Government's image of openness and transparency is a façade and a sham ... The Government's public position on Fol isn't supported by its activities with Fol.

I have seen it erode the effective release of information, removing expertise and taking the bullying of Fol officers to a level even the Kennett Government didn't, pretty much across all areas.

Its not that Kennett and the others before him didn't try to enforce their ideas, but the officers could stand up to them because the public service was more independent. I believe there are fewer successful applications in public interest matters [under the Bracks government] than ever under Fol.<sup>22</sup>

In an earlier response to criticism about interference by spin doctors in the processing of FoI requests the Victorian Attorney-General, Rob Hulls issued new guidelines that 'allowed ministerial advisers to put con-

### Box 2

SIMPLY leaving damaging documents out.

NOT searching properly, then claiming documents cannot be found.

INTERPRETING a request narrowly to exclude damaging information,

STEERING an applicant away from potentially damaging information by redefining the request in correspondence, offering other information as a compromise or burying the applicant in masses of irrelevant documents.

PUMPING applicants for extra information to find out why they want documents, before briefing ministers and advisers.

HIDING behind the excuse that requests are too voluminous or time-consuming to process, often without helping applicants to narrow down exactly what they want.

CLAIMING documents are not available in a readable format.

SCARING an applicant with suggestions of exorbitant costs.

DELAYING the release for months and even years with clarifications and re-clarifications until an issue is stale, or until after an election.

DELAYING the release by saying an application has been overlooked, the department is overloaded with requests and is understaffed.

*Source: Chris Tinkler, 'The FoI's bag of dirty tricks,' Sunday Herald Sun, 10 November 2002, p.4.*

siderations to an FoI officer for or against the disclosure of information.<sup>23</sup> This was an Orwellian masterstroke. A previously suspect practice becomes legitimate because it was now enshrined by ministerial guidelines.

The NSW Ombudsman Report for 2001–2002 raised a further concern in regard to the differential handling of FoI requests especially the handling of the release of requested information by journalists and parliamentarians. Concerns about deliberate attempts to undermine the use of FoI by the timing and nature of release of information have been raised previously.<sup>24</sup> The NSW Ombudsman reported that he has received complaints that:

On a number of occasions during the year, different agencies released documents or information to the media before or at the same time as releasing the documents or information to the FoI applicant.

In all cases the applicants were members of Parliament from an opposition party. In at least two cases the applicants read about the results of their FoI application in the media before they received a determination from the agency. The media report referred to the applicant by name and reported that the information had been released as a result of their FoI application.

Our views on this approach, which we conveyed to the agencies concerned, are that:

- As a general proposition, we support openness in government and agencies should be applauded for decisions to make information public that they had previously refused to release

- FoI applicants have no entitlements, in the FoI Act or elsewhere, that would prevent an agency from using its discretion to release to other people [including the media] information that is the subject of a FoI application
- While it has been argued that disclosure under the FoI Act is in effect 'to the world', an agency should not assume that documents released under FoI will be given to the media by a FoI applicant or that this is the motive behind the FoI application
- If an agency decides to release information publicly [other than in response to a FoI application] the agency is either doing so for its own purposes or to inform public debate.
- If an agency decides to release information to the media and a FoI applicant at the same time, they should tell the applicant and refund any money the applicant has paid. Otherwise the agency would be making one person pay a fee for information that was being made freely available to others. This argument becomes even stronger if the agency makes the information.<sup>25</sup>

While the NSW Ombudsman's report focused on requests from opposition members of parliament, there is no doubt that journalists, NGOs and the occasional citizen agitator could easily find themselves subject to the same differential treatment.<sup>26</sup> Morrison gives a couple of interesting examples of how different techniques can be used to take the sting out of a story or request:

The Education Review requested submissions made by a bidder for the teachers' payroll contract. The unsuccessful bidder had been a major payroll operator and had subsequently made a submission to the Ministry of Education setting out disasters that were likely to occur as a result of shifting the contract. Its predictions, despite the obvious self-interest, proved correct.

The Ministry released the submission, but it came in a public relations package setting out the context the Ministry would expect any reasonable journalist would be morally obliged to report the information in. Furthermore, the Ministry issued new information that cast a bad light on the company that made the submission.

Another version of this technique that I have experience is to release information at the same time as a confidential call from the agency's public relations person giving off-the-record material designed to put pressure on you not to print.<sup>27</sup>

### What is the problem?

In large part it is the differential treatment that is the major problem. Delays can happen, documents can be overlooked, a cautious FoI officer can resort to too many exemptions and documents can be released at a busy time such as Budget Day or when Annual Reports are tabled. Nonetheless when the delays, oversights, timing and release arrangements are done hand in glove with (or at the behest of) ministerial advisers, media units or public relations strategists then the access game is being rorted and good governance has been sacrificed on the altar of political expediency.

There is a fundamental difference between seeking expert public relations advice on how best to sell the idea of a multi-million dollar project (such as changes to the Ashley Detention Centre and Risdon Prison in Tasmania) in contrast to allowing a PR strategy to determine the size, scale or even existence of the project. There is a similar difference in letting a media unit know, after the decision is made, that an opposition MP will be given certain information under FoI and the deliberate inclusion of the spin doctors in deciding whether to release any information and the timing of that release.

The Groom administration (Liberal Tasmania, 1994–1995) wheeled out its senior public servants before the Legislative Council Select Committee into FoI

to lament how Westminster in its purest conception needed to be nurtured and cradled in secrecy. Yet it is now revealed that ministers, public service mandarins and their Praetorian Guard of advisers have hocked the crown jewels of public service trust, integrity and independence for momentary political gain. It is not acceptable in our Westminster system, by convention, nor allowable by law, for public servants empowered under the FoI Act to make decisions in the public interest to seek the advice of spin doctors, let alone be dictated by it.

The Children Overboard saga has demonstrated how far previous shibboleths of the public service, impartial and fearless advice, have given way to forelock tugging and political sensitivity. Instead of the tomes and legacy of Westminster it seems our public servants now quickly flick through their communications manual to pull a couple of quick ones over the odd journalist, opposition MP or trusting citizen.

Some of the important legacies of Westminster have been allowed to fade away or have been jettisoned including individual ministerial responsibility. Other sacrosanct elements of Westminster such as the necessity for Cabinet solidarity have been tarnished to protect the mundane formulation of government policy and administration from scrutiny under the FoI Act. Yet those who answer the call to duty in the public service (be it a government minister, judge, or public servant) should never forget that their primary purpose is to serve in the public interest. Hiring journalists and purveyors of communication advice can serve the public interest by improving our understanding of government, its policies and plans for the future. However, when doctors of spin and merchants of communication accept money from the public purse, they do it for the public interest, not to defeat it.

**RICK SNELL**

*Rick Snell teaches law at the University of Tasmania.*

## References

1. 'Government press offices cost over £2m a year to run', *Irish Times*, 30 May 2001, p.6.
2. Wilkinson, Marian, 'Revealed: How Howard brushed aside the Tampa's medical alert', *Sydney Morning Herald*, 28 October 2002; Wilkinson, Marian, 'Damaging documents withheld or censored', *Sydney Morning Herald*, 28 October 2002.
3. I first heard this term used by an official from the Ontario Treasury Board Secretariat in May 2002 in an informal interview with Al Roberts and myself. Later that day we heard the term used again at the Ontario Information and Privacy Commissioner's Office in Toronto.
4. Ontario Information and Privacy Commissioner Annual Report 2001.
5. Terrill, Greg, 'Individualism and freedom of information legislation,' (2000) 87 *FoI Review* 30-32.

6. Cain, John, 'FoI must reflect the new global game', *Age*, 17 September 2002, p.15.
7. See Roberts, Alasdair, 'Administrative Discretion and the Access to Information Act: an "Internal Law" on Open Government?', (Summer 2002) 42 *Canadian Public Administration* 175-194, copy used for this paper at <<http://faculty.maxwell.syr.edu/asroberts/research.html>>.
8. Roberts, A., above, ref 7, pp.2-3.
9. See Snell, Rick, 'Freedom of Information and the Delivery of Diminishing Returns or How Spin Doctors and Journalists have Mis-treated a Volatile Reform,' in (March 2002) 3(2) *The Drawing Board: An Australian Review of Public Affairs* 187-207 at <<http://www.econ.usyd.edu.au/drawingboard/>>; Snell, Rick, 'Administrative Compliance — Evaluating the Effectiveness of Freedom of Information,' (2001) 93 *FoI Review* 26-32.
10. Roberts, A., above, ref 7, p.4.
11. Mashew, Jerry, *Bureaucratic Justice*, New Haven, Yale University Press, 1983, p.213.
12. Roberts, A., above, ref 7, p.4.
13. Mashew, J., above, ref 11, p.213, quoted in Roberts, A., above, ref 7, p.4.
14. Roberts, A., above, ref 7, abstract.
15. McNairn, Colin and Woodbury, C.D., *Government Information: Access and Privacy*, Carswell, Toronto, 2000 quoted in Roberts, above, ref 7, p.5.
16. Access to Information Review Task Force, Access to Information: Making it work for Canadians, Ottawa, Treasury Board Secretariat, 12 June 2002, p.124 quoted in Roberts, A., above, ref 7, p.5.
17. Totaro, Paola, 'No such thing as a free set of documents', (2002) 101 *FoI Review* at 60.
18. Snell, Rick, 'Freedom of Information and the Delivery of Diminishing Returns or How Spin Doctors and Journalists have Mis-treated a Volatile Reform,' (March 2002) 3(2) *The Drawing Board: An Australian Review of Public Affairs* 187-207 at <<http://www.econ.usyd.edu.au/drawingboard/>>.
19. For a more general coverage of journalism and ministerial minds see Richardson, Nick, 'Playing Political Games: Ministers, Minds and Information', in Stephen Tanner (ed.) *Journalism: Investigation and Research*, Pearson Educational, 2002, pp.170-83.
20. Coulthart, Ross, 'FoI Reveals Hospital Shortcomings,' in Stephen Tanner (ed.) *Journalism: Investigation and Research*, Pearson Educational, 2002, pp.165-9.
21. Tinkler, Chris, 'Secret State: Labor's FoI Pledge a Façade', *Sunday Herald Sun*, 10 November 2002, p.1.
22. Tinkler, Chris, above, ref 21, p.4.
23. Baker, Richard, 'FoI Rules Change Again,' *Age*, 10 August 2002, p.6.
24. See Morrison, Alastair, 'The Games People Play: Journalism and the Official Information Act,' in Legal Research Foundation, 'The Official Information Act,' February 1997, pp.34-5. Also Coulthart, Ross, 'Why the FoI Act is a Joke or 'Don't Shoot the Media, We're Doing our Best,' (1999) 81 *FoI Review* 43-6.
25. NSW Ombudsman, Annual Report 2001-2002, p.73.
26. Dickie, Phil, 'Getting Past Spin Cycle, Part 1,' *The Brisbane Line* see <[http://www.brisinst.org.au/resources/dickie\\_phil\\_spin1.html](http://www.brisinst.org.au/resources/dickie_phil_spin1.html)> and Part 2 at <[http://www.brisinst.org.au/resources/dickie\\_phil\\_spin2.html](http://www.brisinst.org.au/resources/dickie_phil_spin2.html)>.
27. Morrison, A., 'The Games People Play: Journalism and the Official Information Act,' p.35.

## Cabinet exemptions in Australia — saying goodbye to the Midas touch?

John Cain, former Premier of Victoria, in a short article has argued that Victoria's Freedom of Information legislation needs a critical review to allow greater scrutiny of what has, and is, occurring between the state and private sector.<sup>1</sup> The precise detail of the reforms envisaged by Cain is unclear. Reading between the lines he appears to want reforms both to the Cabinet exemption provision but

more certainly in the area of commercial-in-confidence. Cain's possible shift in regard to the Cabinet exemption is a remarkable turnaround from his previous hardline defence of this exemption.<sup>2</sup>

I said in the introductory speech to the FoI Bill in September, 1982, that the 'Cabinet oyster' must be protected. Good decision making in the Westminster tradition demanded it.<sup>3</sup>

Cain argues:

But now the whole game has changed. Government, pursuing the economic rationalist line, has sold to the private sector most publicly owned infrastructure. Services, previously delivered by government for years, have been farmed out to private contractors. There was a sweeping application of the commercial-in-confidence exemption to maintain secrecy as the Kennett government sold public assets, and billions of dollars changed hands.

An amended FoI Act has the capacity to provide transparency into what goes on between government and the private sector.

The cost/benefit analysis of privatisations of the 1990s is yet to be done. The public should know all about the public/private deals, and what the private sector does with public money in providing public services. The act should ensure a capacity to intrude into this public/private relationship.

Until this information is available, the public will not be able truly to assess the success or failure of the shift from the public sector to the private sector in the provision of essential services and infrastructure.

The rethink by Cain on Cabinet secrecy coincides with a remarkable reform currently before the South Australian Legislative Council (Upper House). The Freedom of Information (Miscellaneous) Amendment Bill was introduced in August 2002 by the government and passed by the Lower House. The Bill is part of the minority Labor Government's '10 Point Plan for Honesty and Accountability'. Among its provisions are amendments to the handling of Cabinet information. The Bill is part of a two-stage process. The first stage is changes to the legislation, the second stage is a series of non-legislative measures to improve public sector culture. The Bill requires the Minister responsible for a Cabinet submission to recommend to Cabinet whether some or all of the information can be released after the Cabinet decision and to specify what period of time non-release should be (up to the maximum period in the FoI Act). Furthermore the Minister for Administrative Services, Mr Weatherill stated:

Importantly the Bill also clarifies the status of documents attached to submissions for consideration by Cabinet or Executive Council.

There has been great concern that a practice existed under the former government where a document, which would not normally be exempt from FoI legislation, would be attached to a Cabinet submission in order to give it exempt status. This is clearly unacceptable.

In order to receive exempt status a document must be specifically prepared for submission to Cabinet or Executive Council. Merely because a document is attached to a submission is not enough to give the document exempt status. The Bill reaffirms this by further limiting the potential for abuse of the Cabinet confidentiality exemption.<sup>4</sup>

These changes are in the context of previous Australian practice and prevailing orthodoxy about the necessity for extensive protection of Cabinet secrecy, a revolution. When coupled with John Cain's possible concession that greater transparency is needed at the highest levels of government decision making this could be the start of one of the most important sea changes in Australian history.

Blunt and blanket attempts to preserve the 'Cabinet oyster' have lumbered Australian governmental information management with an antiquated system which defaults to secrecy. Over the past 20 years Australian citizens, time after time, have been refused access to even the most mundane and non-sensitive information on the basis that it could reveal a decision of Cabinet not yet officially published or that had indirectly been swept up into

the deliberations of Cabinet. It was an exemption originally designed to protect the final deliberations of Cabinet and the principle of Cabinet solidarity. Yet while citizens are denied access to information to judge the quality of advice being relied on by Cabinet, former Cabinet Ministers reveal in their memoirs blow by blow descriptions of tight votes and bitter struggles inside the Cabinet room.<sup>5</sup> Journalists often receive detailed briefings pre and post-Cabinet meetings.

Part of the attractiveness for governments in keeping the Cabinet exemption free of any public interest test or any test that deals with determining information sensitivity is the necessity to pretend that their decisions are infallible. The Queensland Government would prefer to cloak every document, from construction invoices to Cabinet minutes, involving the Goodwill Pedestrian Bridge in Brisbane in absolute secrecy than allow their critics access to information to shape and guide their critiques. Thousands of documents concerning the Goodwill Bridge, many of them of a technical nature, were put before a Cabinet sub-committee and therefore attracted exemption under s.36(1) of the Queensland FoI Act. The Queensland Cabinet should be free to inspect every document held by public agencies in Queensland but such inspection (whether detailed or nominal) should not result in all the information being given the same protection as that of the opinions and deliberations of members making Cabinet decisions.

As the Queensland Cabinet exemption contains no purposive test at all, it is the most extreme example of the blanket approach to Cabinet information. Nevertheless, in other Australian jurisdictions, clear examples have occurred of Cabinet being used to sweep sensitive information under the carpet. The Australian FoI Cabinet exemption seems to operate like a Midas touch: everything quickly acquires the status of gold be it Christmas closing times three years ago or newspaper clippings.<sup>6</sup>

George Soros argues that individuals and governments instead of aiming for infallibility and certainty ought to embrace an open society. Soros raises the concept that our 'thinking can never quite catch up with reality, for reality is always richer than our comprehension. Reality has the power to surprise thinkers, and thinking has the power to create reality.'<sup>7</sup> In their handling of access requests for information about the Goodwill Bridge, the Beattie Government, like most governments, demonstrated a willingness to accept the illusion of infallibility and all the shortcomings of a closed society. In many ways government secrecy assumes that it automatically maximises both the quantitative and qualitative use of information.

Gregory Treverton argues that there is, in the information age, and in an age of information, the imperative to reshape intelligence information.<sup>8</sup> He postulates that there have been many changes which necessitate a shift in government information handling and collection that can 'produce high-quality understanding of the world using all sources'.<sup>9</sup> Treverton argues that as the role of the state transforms from doer to one that cajoles, incentivises, or facilitates<sup>10</sup> more and more the 'role of government will be to convene groups of the willing'.<sup>11</sup> It will need to work more often with ad hoc alliances between private citizens, companies and/or non-government actors who will often 'act around and through government'.<sup>12</sup> In other words the state will not always be the central actor nor will it always be the prime

collector and distributor of information for policy formulation. Governments will more frequently be forced to deal with more information intermediaries and will need to exchange and share information more freely.

Blanket Cabinet exemptions, as opposed to highly selective exemptions based on the sensitivity of the information, interfere with the sharing, collecting and analysing of information to fully inform the policy processes. The management of openness/secretcy is to ensure that the value of information is recognised, handled appropriately and enhanced. Default secrecy handling (where in doubt everything is secret) fails to ensure maximum protection, maximum enhancement and special treatment of the most valuable information. All information is treated the same. So, in the example of the Goodwill Bridge, the Cabinet Sub-committee uses a crude blanket device — the Cabinet exemption — to remove from the public domain and future planning processes simple technical information.

The South Australian Cabinet reforms offer a far more sophisticated and sensible approach to the management of sensitive or secret information:

- requiring the key decision on classification to be made at the time of creation;
- requiring consideration to be given to the expected sensitivity life cycle of the information; and
- preventing the Cabinet process being used to hide information which is not germane to the central deliberations of Cabinet.

Thus a South Australian Cabinet sub-committee operating under the proposed changes would have been able to inspect the technical documents associated with a bridge construction program without converting the information into a state secret.

**RICK SNELL**

*Rick Snell teaches law at the University of Tasmania.*

## References

1. Cain, John, 'Fol must reflect the new global game.' *Age*, 17 September 2002, p.15.
2. Cain, John, 'Some reflections on Fol's early years' (1995) 58 *Fol Review* 54.
3. Cain, J., above, ref 1, p.15.
4. South Australia, House of Assembly *Hansard*, 28 August 2002, at 1402.
5. See Blewett, Neil, *A Cabinet Diary: A Personal Record of the First Keating Government*, Wakefield Press, Adelaide, 1999. See review by Johns, Gary, (2000) 46(2) *Australian Journal of Politics and History* or at <<http://www.ipa.org.au/pubs/special/bookreviews/Blewettreview.html>>.
6. These are examples of information denied to me because of claimed Cabinet exemptions.
7. Soros, George, *Open Society: Reforming Global Capitalism*, 2000, p.24.
8. Treverton, Gregory, *Reshaping National Intelligence for An Age of Information*, Cambridge University Press, 2001.
9. Treverton, G., above, ref 8, p.2.
10. Treverton, G., above, ref 8, p.51.
11. Treverton, G., above, ref 8, p.52.
12. Treverton, G., above, ref 8, p.60.

## Commercial-in-confidence — time for a rethink?

A swag of law reform bodies, parliamentary committees and academics have pinpointed concerns with accountability, oversight, transparency and an increasingly dysfunctional relationship with the current Fol system. The Australian Law Reform Commission, Administrative Review Council, Commission on Government (WA), Victorian Public Estimates Committee, the Australian Senate, parliamentary committees in South Australia and Queensland, Auditor-Generals and Ombudsman in South Australia, Victoria and New South Wales have all expressed concerns with commercial-in-confidence in general and in particular how it has been used in conjunction with accountability mechanisms like Fol.

Set out below are three brief reforms and/or analysis which suggest ways of addressing the problems between Fol and claims for commercial-in-confidence.

### 1. The South Australian Reforms

The South Australian Government has also provided John Cain with a possible solution to his concerns about commercial-in-confidence.

The Bill proposes to limit the application of these exemptions by requiring that all contracts signed after the commencement of the Bill will be disclosed when requested by a Fol application.

However the exemption from disclosure will still apply if it contains a confidentiality clause, which has been approved by a Minister.

This proposal only affects the actual contract and not pre-contractual documents or documents generated in the course of the administration of the contract. Additionally, the confidentiality clause may only apply to specific provisions of the contract, leaving open the option for confidential material to be omitted and the remainder of the contract disclosed.

With this amendment we have sought to balance the practical issues associated with negotiating contracts and the desire for full disclosure. If for instance a company was to argue, and it would be demonstrated, that the publication of certain information could jeopardise an important contract, a Minister could choose to approve a clause keeping the information confidential.<sup>1</sup>

These reforms are in addition to the Labor Government keeping in place the previous government's policy initiative the South Australian Contract Disclosure Policy that was released in April 2001. (See *Box*).

### 2. Rethinking the types of claims to protect

There is a need for academics and other critics to go beyond the alarm-raising stage and reconsider how Fol legislation should handle the concept of commercial-in-confidence. Last year in Adelaide in a talk to the Australian Institute of Administrative Law I advanced the thesis that the period of reinventing government at both national and subnational level, outsourcing and the new public managerialism had produced a fundamental change in the types of information being classified as commercial-in-confidence. Furthermore there had been a change in the type of requesters and the reasons behind those Fol requests thus exposing a design flaw in the provisions associated with claims for commercial-in-confidence.

Roberts argues, that there is not merely an associational link between these changes and the problems arising for Fol administration but indeed the marginalisation of civic participatory reforms like Fol are a predictable outcome of a policy agenda that is designed to 'restore

Background on the South Australian Contract Disclosure Policy can be found at <<http://www.contracts.sa.gov.au/ContractDisclosuresInfoSheet.htm>>.

The following is a summary of the exemptions from the policy taken from the above web site:

In general terms the government's policy means that summaries of all government contracts for goods, services or works will be made publicly available through the Internet. Publication of full contractual documentation will also be required for some contracts.

The policy applies to contracts with all 'public authorities' (as defined in the *State Supply Act 1985*) and includes SA Water Corporation, TransAdelaide, SA TAB and SA Housing Trust.

There are some exemptions from the policy based on the type and size of the contract. A summary of the application of the policy is below.

Additionally, the policy does not require disclosure of any contract or other material in any of the following cases:

- Genuinely confidential business information where it can be clearly demonstrated that a party or other person would gain a commercial advantage or be disadvantaged by the disclosure of such information;
- Trade secrets/intellectual property — where the release of such information would prejudice a party;
- Defense and National Security information, matters affecting public safety or matters affecting security of government facilities;
- Public interest — where it can be demonstrated by the Government that a person or a group of persons could be seriously harmed either socially or economically from the release of such information;
- Legal risk — where disclosure would be contrary to the provisions of an Act, found an action for breach of confidence, be a breach of contract or be contrary to an order of a court.

Specific contract information supplied by a potential contractor seeking to enter into a contract with government may, in exceptional cases, be excluded from the policy principles of disclosure, however, a genuine and clear justification for the exclusion must be shown.

the governability of western democracies by restricting the capacity of citizens to exert influence over policy in key sectors'.<sup>2</sup>

Roberts further argues that: 'The erosion of information rights as a consequence of domestic governmental restructuring is neither temporary nor inadvertent: on the contrary, it is a critical part of the effort to make policy processes more manageable'.<sup>3</sup> This restructuring is accompanied by a process where:

- the governmental tendency to secrecy/information management and restriction is amplified;
- what is being requested has a heightened political sensitivity;
- there is greater contestability of legitimacy;
- problems are caused for traditional public accountability mechanisms (auditor-generals, parliament, ombudsman, FoI, judicial review).

In the Adelaide talk I speculated that sometime in the 1990s there was a transformation in the type of information that was being handled as claims for commercial-in-confidence under various Australian FoI legislation. At some period there was a change in scale, scope, size and quality of information being sought and the type of individual or group making the requests (see *Table 1*).

**Table 1: Commercial-in-confidence pre- and post-mid-1990s**

| Features  | Pre mid-1990s  | Post 1990s   |
|---|--|--|
| Nature of request                               | Single instance  | Multiple   |
| Scale of request                                | Small  | Large  |
| Type of requester                               | <ul style="list-style-type: none"> <li>• Individual</li> <li>• Infrequent investigative reporter</li> <li>• Backbench opposition MP</li> </ul> | <ul style="list-style-type: none"> <li>• Organisation</li> <li>• Political/business key reporter</li> <li>• Frontbench high profile opposition MP</li> </ul> |
| Political dimensions                            | Low  | High   |
| Bureaucratic dimensions                         | Low  | High   |
| Civic dimensions                                | Low and local  | High and state/national  |
| Legal dimensions                                | Routine  | Central and critical   |
| Time period for which information was important | Limited  | Extended   |
| Commercial value                                | Low  | Very high  |

As a result of these changes the handling of such requests became more problematic. Moira Paterson has clearly pinpointed a major problem with the drafting of the provisions that are used to handle commercial-in-confidence claims under FoI like ss.43 and 45 of the Commonwealth *FoI Act*. She argues that such sections either have very low threshold requirements to qualify for the exemption or that 'there is a positive disincentive for agencies to exercise their discretion to grant access to any document that appears to fall within this exemption provision'.<sup>4</sup>

The low threshold and disincentives to exercise discretion for release may have been appropriate for the scenarios depicted in the pre-mid-1990s column in *Table 1*. In those circumstances the exemptions were dealing with small-scale, often once-off requests that often involved the commercial dealings of small firms with the information being requested usually for reasons not central to the commercial activity. Yet more recently many of the requests have a different nature, purpose, target and involve accountability issues at the most intense intersection between bureaucratic, legal, civic and political considerations. The requests often involved the need for details by key public actors (parliamentarians, journalists, NGOs) for information about large contracts (high dollar amounts for considerable time periods) stemming from critical choices being made at high governmental level. The threshold required to handle a request for information handling Rocco's Plumbing contract with a local primary school should be dealt with differently than a request dealing with Plumbing International Inc's bid to provide plumbing services across the public sector for next 20 years.

It would be interesting to see the above thesis/speculation put to the test and some empirical research undertaken to disprove the claims.

### 3. Changing perspectives — treating it as a competition test

In a similar vein while researching for this article I came back in contact with a very thought provoking unpublished article by Chris Finn.<sup>5</sup> Finn concluded that:

Commercial information is over-protected from disclosure under contemporary FoI legislation. This over-protection is evident quite apart from democratic arguments that the 'public right to know' may over-ride established commercial interests. Viewed solely in economic terms, the existing levels of protection for business information appear hard to justify. FoI legislation should be redrawn so that business information is only protected where its release will cause demonstrable harm to the competitive process itself. It should not be sufficient to justify exemption, as is currently the case, either that the material is of a commercial nature, or that its release will cause some harm to the individual enterprise.<sup>6</sup>

Finn is arguing that the re-engineering of the exemption provisions is required so that the interests being protected are precisely identified and weighed against both democratic and market interests in the liberal flow of information. Quoting Stevenson<sup>7</sup>, Finn states:

In a free market economy that is by definition dependent on the liberal flow of information, the question is not whether the disclosure of 'commercial secrets' will be disadvantageous to a particular firm but what effect a change in the law governing the protection of those secrets will have, over the long run, on the economic incentives of a corporation to engage in socially productive activity.<sup>8</sup>

Under this approach it may well be worthwhile keeping Rocco's Plumbing contract with a local primary school confidential so that a small local business is able

to compete against multinational firms entering a small local market. Whereas the damage done to Plumbing International Inc's short-term state operations by the release of contractual details relating to a long-term and exclusive provision of services across a complete sector may have few long-term effects on its competitive engagement at a local, subnational, national and international level.

**RICK SNELL**

*Rick Snell teaches law at the University of Tasmania.*

### References

1. South Australia, House of Assembly *Hansard*, 28 August 2002, p.1403.
2. Roberts, Alasdair, 'The Informational Commons at Risk,' in Daniel Drache (ed), *The Market or the Public Domain: Global Governance and the Asymmetry of Power*, Routledge, 2001, pp.175-201. The version used in this article is found at <<http://faculty.maxwell.syr.edu/asroberts/research.html>> p.8.
3. Roberts, A., above, ref 2, p.8.
4. Paterson, Moira, 'Commercial in Confidence Claims, Freedom of Information and Government Accountability — A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing,' in R. Creyke and J. McMillan (eds), *Administrative Justice — the Core and the Fringe: Proceedings of the 1999 National Administrative Law Forum*, Australian Institute of Administrative Law, Canberra, 2000, p.256.
5. Finn, Chris, 'Commercial Confidentiality and Competition Law: The Proper Scope of the Exemption,' presented at 'FoI and the Fight to Know' held in Melbourne on 19-20 August 1999. The conference was organised by Communications Law Centre and the International Commission of Jurists, unpublished.
6. Finn, C., above, ref 5, p.12.
7. Stevenson, R., *Corporations and Information: Secrecy, Access and Disclosure*, John Hopkins University Press, 1980, p.9.
8. Finn, C., 'Commercial Confidentiality and Competition Law: The Proper Scope of the Exemption,' p.12.

## FoI officers — a constituency in decline?

Over a series of articles I have been exploring the roles played, in reality and potentially, by key elements in what can be termed the FoI constituency. The two previous articles have examined journalists and parliamentarians.<sup>1</sup> This article reflects on what should be considered the core of that constituency, namely, FoI officers. FoI officers are arguably the secret to the success or failure of FoI legislation. Other factors (attitudes of Ministers, budgets, abuse by particular users and the mechanics of access) will, in particular cases, play a more dramatic role but it is the performance, attitude and approach of FoI officers which sets the environment within which those other factors can operate. In another article I argued:<sup>2</sup>

Access to information literature rarely mentions FoI officers. If they are mentioned it is as marginal extras in a game largely played by the media, applicants and key insiders (be it spin doctors, senior bureaucrats or Ministers). In previous papers I have explored the concept of an FoI constituency,<sup>3</sup> first raised by Roberts;<sup>4</sup> the central concept is that the vitality of FoI requires an active constituency (made up of various groups including applicants, the media, academics, public interest law firms, citizen groups). Very often FoI officers are excluded from the list,<sup>5</sup> however as journalists and researchers like Coulthart, Kearney and Waters, indicate it is often the quality and nature of the relationship between the applicant and FoI officer which makes all the difference. Waters found that the journalists' experience with FoI officers was that 'they also commented on the very different attitudes they find — some FoI officers seem genuinely committed to the ideal of open government, trying to

help applicants get as much information as possible, while others are deliberately, and often creatively, obstructive.<sup>6</sup>

Terrill argues that FoI structurally favours the government due to the benefits that accrue to a long term institutional player including institutional memory, specialised expertise, resources and an ability to concede individual cases to avoid unhelpful precedents. If Terrill is correct then as the gatekeepers for this long-term player, FoI officers have the greatest capacity to make the access game fairer and more evenly balanced. Indeed they offer the faint possibility of exercising their judgment, discretion and influence to achieve the long-term objectives of FoI legislation.

Yet law reform submissions and reports have found FoI officers, as a class, to be under resourced, denied the training, respect and status they deserve, and forced to act as guardians both of informational trash and treasure. More importantly they are denied the capacity and opportunity to utilise FoI legislation to assist in the information management, policy development and learning capacity of their organisations.

In any examination of compliance it is the attitude and role of the FoI officer that can produce the largest shifts between compliance categories. An FoI regime or particular departments and officers can manifest different types of compliance with FoI legislation. It is important to

realise the role Fol officers can play in determining the level, type and quality of compliance with the legislation. Generally, as Youngman has argued, Fol officers have a choice, and are often required to perform all, of a range of roles from ringmaster, juggler, lion tamer to tightrope walker in the Fol arena.<sup>7</sup> As ringmaster the Fol officer presides over an application from the original request to dealing with the aftermath, be it positive or negative within the agency. As the juggler the Fol officer 'has to deal with the rights and needs of the agency, the applicant, the third parties and the external reviewers'.<sup>8</sup> Any Fol officer who operates in accordance with the legislation will be forced to occasionally switch to a lion tamer role, whether it be to deal with the reactions from within an agency, by an applicant or by a third party in response to a decision not in their favour. Finally, there is the unenviable role that occasionally an Fol officer is forced to play, namely, that of the tightrope walker. As Youngman observes:

The tightrope walker is the final and most dangerous stage. Fortunately many of you will not find yourself in this position. This can occur when management, perhaps mistakenly, claims there are no documents but you feel they exist. The best way to deal with this sort of situation is to remind managers that failure to deliver up documents can place them in a position where they can be charged. In NSW they could be charged under the Ombudsman's Act, the State Records Act or the ICAC Act. You can also ask for a signed statement from senior managers that the documents do not exist. Tell them this will be placed on file and produced in the event of an investigation. It is amazing how many documents can mysteriously turn up.<sup>9</sup>

In the advent of a Contentious Issues Management strategy<sup>10</sup> being adopted in an agency, the type of role played by the Fol officer will be critical. It will be the Fol officer's choices that will determine whether smart communications strategy as depicted by Dr Chung<sup>11</sup> stays within the bounds of appropriate public service conduct or whether it drifts towards the unethical and unacceptable. The Fol officer is the central and generally determinative person in the Fol process:

I think the promise of Fol was encapsulated in a video produced by the Queensland Attorney-General's Department called 'Forward to the Past'. It depicted an energetic and devoted Fol officer carefully applying the legislation to a range of applications. In each scenario, the spirit of the legislation was applied and, in the case of non-disclosure, it had to be significant before information was exempted. Even journalists and other troublemakers were directed to information and further avenues where they had a chance of at least continuing their crusade.

That video, in my opinion, visualised Fitzgerald's concept of information being the linchpin of the democratic process. The vignettes incorporated in the video resonated with the concept that access to Government information is a foundation or democratic principle and right — indeed, an essential prerequisite for citizenship.<sup>12</sup>

As Youngman indicates, the role played by the Fol officer is often determined or shaped by the actions and expectations of other actors. Sometimes these will be internal, and at other times, external to the agency. The positive and negative influences of external actors on the mindset of the gatekeeper is rarely considered. Academic articles, media accounts and testimony of frequent users before parliamentary committees are generally silent or more often than not harshly critical of the shortcomings, omissions and frequently alleged malpractices of Fol officers.

Discussions with Fol officers reveal that certain types of requesters have a major negative impact on their attitudes and commitment. Heavy concentrations of these

particular types of users within an Fol system have the potential to seriously undermine the commitment of Fol officers. In association with other elements such as severe budget restrictions, lack of central support and increasing involvement of political staffers in Fol requests the activities of these users can cause significant shifts in compliance. The next few paragraphs explore some of these negative user types.

At a training session for Fol officers the day before the Info Two Conference, I first heard the expression 'serial applicant'.<sup>13</sup> An experienced Fol officer gave a talk about the workload imposed by those applicants pursuing a particular issue or narrow range of requests. Serial users make repeat requests, often at regular intervals and generally view the encounters as part of an adversarial contest between themselves and the agency. Despite outlining how these applicants are generally annoying and heavy consumers of limited resources the Fol officer did point out that occasionally the persistence of serial applicants did uncover deficiencies in record management practices or less than exemplary decision-making processes.

A second type of applicant that can undermine the Fol process is the 'Wasted Effort'. This is the applicant who requests access to large volumes of information, located in several areas and requires the commitment of several days or longer from the Fol officer to process the request. The rub comes when after the information has been located, examined and sorted into exempt and releasable the applicant is no longer interested in the request.

A variant of the above is the 'Lazy Do-gooder', generally a journalist, activist or opposition MP who justifies their trawling expeditions on the basis of the public interest. Yet despite large volumes of information being released promptly, with fee waivers and with few exemptions being claimed, the applicant fails to use the information — whether to ask a question in parliament, provide background for an article or to inform public debate. At one conference I heard of an Fol officer who spent several months collecting, collating and releasing information to an opposition MP on coronial inquests. None of that information was ever used.

A series of law reform and parliamentary reports on Fol have made suggestions to improve public service culture and support for Fol. The South Australian Legislative Review Committee suggested the need for a centrally coordinated program of public service education, training and accreditation.<sup>14</sup> The Queensland Legal, Constitutional and Administrative Review Committee recommended an Fol Monitor to provide independent monitoring of compliance, training and awareness and to develop a whole of government strategy designed to facilitate the greater disclosure of information outside the Act.<sup>15</sup> The Commonwealth Law Reform Commission and Administrative Review Council Report of 1995 made similar suggestions. In an interesting but damning paradox the Commonwealth Government has ignored the reforms and even allowed the support unit in the Attorney-General's Department (that received high praise in the Report) to be downsized and marginalised to the extent it is almost invisible. The Law Reform Commission in New Zealand recommended that the Ministry of Justice should be 'given responsibility for ensuring a more co-ordinated and systematic approach to the functions of oversight, compliance, policy review, and education in relation to the Act'.<sup>16</sup>

The Canadian Access to Information Review Task Force considered that a comprehensive and systemic approach was needed which would necessitate reforms and actions.<sup>17</sup> The recommendations the Task Force suggested included the areas of:

- tools and systems
- incentives for users and providers
- skilled access staff
- supportive managers
- adequate resources
- good records management
- educated and assisted requesters
- performance measurement and reporting
- effective compliance approaches
- training of public services
- educated third parties.

### Enhancing the role of Fol officers

There is a need to maintain and build on the dedication and hard work of Fol officers, who value and advance key public service values of service to the public in the public interest. In another article I argued that such a dedicated cadre would have the following impact on Fol administration in addition to any legislative mandates or external pressure:

- preventing or minimising negative compliance shifts
- promoting and/or increasing the likelihood of positive compliance shifts
- minimising or curtailing the 'below-the-line' activities of spin doctors
- facilitating and improving the media's capacity to use Fol as a precise and informed information and accountability tool.<sup>18</sup>

In that article I reported that:

In the past twelve months I have given presentations to, and met with, Fol officers in several jurisdictions.<sup>19</sup> There has been a perceptible but subtle shift in the commitment to and support of access legislation. Experienced and senior co-ordinators have retired or moved onto new areas of responsibility. In the wake of these old hands is a younger cohort who have had less opportunity to view Fol as anything other than another burdensome responsibility. Furthermore even those committed veterans who remain have grown weary from defending the promise of Fol from the spinners from within and the scribes from without.<sup>20</sup>

A number of steps need to be taken to enhance and support the role of Fol officers.

### Visibility

The Canadian Task Force concluded that 'one of the greatest obstacles to establishing a culture of access in the public service is the invisibility of much of the work, and the perception that this work is of little value'.<sup>21</sup> Therefore managers and Ministers must act both formally and symbolically to highlight and reward the work and activity of Fol officers. Steps need to be taken to 'provide visibility, positive incentives and accountability for access'.<sup>22</sup> Fol performance indicators have been included in the performance bonuses for Ontarian public service managers. The Task Force made the following recommendations:

- responsibilities related to access to information and information management to be included in the job description of officers and managers;

- objectives related to access to information and information management to be part of the accountability agreement and performance reviews of all managers;
- government institutions to discuss their performance on access to information on a regular basis at management meetings;
- when new programs are established, an access to information component to be included from the outset as an integral part of the program;
- access to information goals to be integrated in annual corporate plans for government institutions.

### Standards

Fol officers in each jurisdiction should get together and adopt Fol standards and measures like those that have been formulated in Western Australia. These standards and performance measures would allow early and easy identification of best practices and agencies or areas that were experiencing problems. This information could be used to export good practices to other agencies and divert resources, training and assistance to struggling Fol officers.

### Support networks

Support networks need to be encouraged, resourced and maintained between Fol officers. Apart from Western Australia, where the support networks are supported by an institutional player, the Fol Commissioner, networks in other jurisdictions have disappeared or diminished in size and frequency and rely on the goodwill and/or drive of a small handful of people or indeed often only one person. The NSW Fol and Privacy Practitioners Forum serves as both a model and a warning. As a model it has been operating without any formal or resource support from government, yet still holds regular get togethers and brings Fol officers from a range of departments and levels of government together to share information, expertise and for newer officers to pick up useful contacts. The network provides regular updates on statutory and case law developments and attracts a range of guest speakers. As a warning, the Network clearly displays all the strains associated with a volunteer grouping. First, while still attracting high numbers of officers, the numbers are starting to dwindle. As the Network is voluntary, its activities are not given the same recognition in the staff development activities of agencies as paid for and professional training courses. Second, it tries to be all things to a range of officers but without the resources to do so. Third, it relies on a small number of volunteers and, in particular, Phillip Youngman.

### Narratives

There is a need for Fol officers and those on the outside such as journalists, academics and activists to start telling stories that help us learn how to improve Fol. I think this message from a public servant sums it up perfectly:

One of the soft levers I'm intrigued with, is story telling — the power of telling the right stories (how positive compliance is achieved, how people have solved the problematic issues, how the Minister did the right thing, how the Minister visibly supported his Fol Co-ordinator, how the Premier posts proactively all his expenses on his web site etc) incorporating them in the lore of the institutions as a way of integrating new behaviours in organisational culture.

By the same token, I wonder how much damage we create by circulating the wrong stories (from the very very bad such as how requesters and Fol co-ordinators were tricked, but also

how all ministers are against Fol etc). In this context I wonder about the culture-changing potential of statements such as 'the love of secrecy is so deeply ingrained in the public service that they will go to any lengths to maintain secrets' by Information Commissioners.

I am not talking of being soft with the public service or praising poor performance but contributing to the creation of a 'can do' attitude and a folklore of heroes the very people you want to influence, the public servants, can identify and empathise with. From what I read recently, I understand that this is a key requisite for a 'learning' story to work.<sup>23</sup>

## Conclusion

Fol officers have largely been neglected in academic studies, commended for their dedication by law reform bodies and painted as part of a government campaign against releasing information by the media and activists. The Canadian Access to Information Review Task Force has concluded that the key to making access to information work is the role of, support and tools given to and the commitment of Fol officers. The greatest worry is that on all three fronts there are signs of decline. This decline also accompanies a generational change in the ranks of Fol officers and there is a significant danger that the commitment, understanding and perceptions of these newer Fol officers will suffer.

**RICK SNELL**

*Rick Snell teaches law at the University of Tasmania.*

## References

1. Snell, Rick, 'In search of the the Freedom of Information constituency: Case 1 — The Media' (1998) 78 *Fol Review* 81. Snell, Rick and Upcher, James, 'Freedom of Information and Parliament: A Limited Accountability Tool for a New Constituency?' (2002) 100 *Fol Review* 35.
2. Snell, Rick, 'Freedom of Information and the Delivery of Diminishing Returns or How Spin Doctors and Journalists have Mistrated a Volatile Reform', in (March 2002) 3(2) *The Drawing Board: An Australian Review of Public Affairs* 187-207 at <<http://www.econ.usyd.edu.au/drawingboard/>>.
3. Snell, R., above, ref 1, pp.81-84.
4. Roberts, A., 'Limited Access: Assessing the Health of Canada's Freedom of Information Law.' <<http://faculty.maxwell.syr.edu/asroberts/research.html>>.
5. Nader, Ralph, 'Freedom From Information: The Act and the Agencies,' (1970) 5(1) *Harvard Civil Rights — Civil Liberties Law Review* 14.
6. Waters, Nigel, *Print Media Use of Freedom of Information Laws in Australia*, Australian Centre for Independent Journalism, Sydney, 1999, p.10.
7. Youngman, Phillip, 'The Role of the Fol Officer in Government Agencies,' presented at 'Fol and the Fight to Know' Conference, Melbourne, 19-20 August 1999. The conference was organised by the Communications Law Centre and the International Commission of Jurists, unpublished.
8. Youngman, P., above, ref 7, p.2.
9. Youngman, above, ref 7, p.6.
10. See article in this issue: 'Contentious Issues Management — The Dry Rot in Fol Practice?'
11. See article in this issue 'Contentious Issues Management — The Dry Rot in Fol Practice?'
12. Transcript from public hearings held by the Queensland Legal, Constitutional and Administrative Review Committee, 11 May 2000 testimony of Rick Snell.
13. Info 2, Second National Freedom of Information Conference, Gold Coast 7-8 March 1996.
14. Legislative Review Committee of South Australia, *The Freedom of Information Act 1991*, Adelaide, September 2002, p.3.
15. Queensland Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report 32, December 2001, 4.1-4.4.
16. Law Reform Commission, New Zealand, *Review of the Official Information Act 1982*, Report 40, October 1997, para E31.
17. Access to Information Review Task Force, *Access to Information: Making It Work for Canadians*, June 2002.
18. Snell, Rick, above, ref 2.
19. Including Canada, New Zealand, Ireland, South Australia and Tasmania.
20. Snell, R., above, ref 2.
21. Access to Information Review Task Force, *Access to Information: Making It Work for Canadians*, p.161.
22. Access to Information Review Task Force, *Access to Information: Making It Work for Canadians*, p.161.
23. 'Comment' (2001) 94 *Fol Review* at 32.

## Fol Review Index: Numbers 97-102, 2002

### Articles

|   |        |
|---|--------|
| Anderson, Ken. 'Access and privacy in Canada: developments from September 2001 to August 2002'  | 100:53 |
| Clemens, Dave. 'Using the Official Information Act (NZ) to investigate its use: A survey at the agency level'   | 98:18  |
| Hodgson, David; Snell, Rick. 'Freedom of Information in Queensland: A preliminary analysis of the Report of the Queensland Legal, Constitutional and Administrative Review Committee' | 99:26  |
| Lamble, Stephen. 'Freedom of Information, a Finnish clergyman's gift to democracy'  | 97:2   |
| Monk, Paul. 'Breaking the addiction to secrecy: intelligence for the 21st century'  | 100:50 |
| Missen, Senator Alan. 'Freedom of information — the Australian experience'  | 100:42 |
| Roberts, Alasdair. 'NATO's web of secrets'  | 100:46 |

|   |        |
|---|--------|
| Sadler, Pauline; Harman, Frank. 'Freedom of information legislation and open and accountable government: A comparison between Victoria and Western Australia' | 98:14  |
| Snell, Rick; Upcher, James. 'Freedom of information and parliament: A limited accountability tool for a key constituency?'                                    | 100:35 |
| Snell, Rick; 'Cabinet exemptions in Australia — saying goodbye to the Midas touch?'   | 102:65 |
| Snell, Rick; 'Contentious issues management — The dry rot in Fol practice?'   | 102:62 |
| Snell, Rick; 'Commercial-in-confidence — time for a rethink?'   | 102:67 |
| Snell, Rick; 'Fol officers — a constituency in decline?'  | 102:69 |
| Timmins, Peter. 'The NSW Administrative Decisions Tribunal: Leading Cases'  | 97:8   |
| Totaro, Paola. 'No such thing as a free set of documents'   | 100:60 |
| Vaughn, Robert. 'The relationship between freedom of information and whistleblower protection'  | 99:29  |

### Victorian VCAT decisions

|  |       |
|--|-------|
| Kelly and Department of Treasury and Finance | 98:23 |
|--|-------|

### Overseas Developments

|   |       |
|---|-------|
| US District Court rules that World War I German invisible ink formulas must still remain hidden from the public | 97:12 |
|---|-------|

**Editorial Co-ordinator:** Elizabeth Boulton  
**Typesetting and Layout:** Last Word  
**Printing:** Thajo Printing Pty Ltd, 4 Yeovil Court, Wheelers Hill 3150  
**Subscriptions:** \$66 a year or \$44 to *All LJ* subscribers (6 issues)

**Correspondence to Legal Service Bulletin Co-op.,**  
**C/- Faculty of Law, Monash University, Clayton 3800**  
**Tel. (03) 9544 0974 email: L.boulton@law.monash.edu.au**