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In search of the Freedom of Information constituency: Case 1 – The Media

In a conference paper earlier this year I argued that 'the design of Fol is based on a premise that raw information gained from governmental holdings will be converted into information that can be used to participate in policy development and at a later stage evaluate the policy process in retrospect. Journalists, lawyers, lobby and community groups and academics are meant to be key actors in this conversion process.'¹

Roberts argues that the absence of an active constituency is a key contributing factor in the failing health of Canadian access legislation.² In 1970 Ralph Nader urged that 'there need to be institutions, be they universities, law reviews, public interest law firms, citizen groups, newspapers, magazines, or the electronic media who systematically follow through to the courts on denials of agency information'.³

In a series of discussion pieces, of which this is the first, I propose to examine the health and level of activity of the core components of the Australian Fol constituency. As with the Canadian experience I have the feeling that the Australian constituency is not active, and this weakness plays a critical part in the general malaise that grips Australian Fol practice. There are exceptions such as the pro-active programs undertaken in Western Australia by Fol officers and the Information Commissioner or the rare positive judicial review outcome like *Hamilton v Environmental Protection Authority* (reported in (1998) 77 *Fol Review*).

These discussion pieces are meant to prompt discussion and reactions and are not designed to be conclusive depictions of Fol practice and procedure in Australia. I want to explore whether this 'constituency' thesis has any validity or can make any contribution to our understanding and design of Fol or other access to information regimes.

The Australian media could and should play a key role in Fol. Rather than limiting the focus to the courtroom we need to lift our focus to the complete interplay between Fol, governance, citizenship and democracy.

It is difficult to overstate the importance of the media in freedom of information. Both as individual professionals and as organisations, journalists to my mind have a responsibility to educate themselves and the community they serve about Fol. Their role goes far beyond merely using Fol.⁴

It has been argued that the media has a responsibility to inform the community about Freedom of Information, thereby promoting the legislation's aim of public participation in democracy.⁵ Journalists and Fol are treated in the literature as symbiotic. Some critics attack access legislation precisely because it is seen as unduly the toy of a privileged informational elite which includes journalists and lobbyists.⁶ At the very least the news media and the objectives of Fol legislation are seen as a natural partnership. Morrison observed, in the New Zealand context, that the contest between the Government and the opposition is at the heart of a liberal representative democracy and that:

A competent news medium presents the contest in a way that allows citizens to judge whether the public good is being served, and aids those who think it is not to influence decision-making in an informed manner. In that respect, the objectives of the news media and the intent of the Official Information Act are at one.⁷

A concern of many writers, academics and reformers, in the early stages of the legislation's operation, was the extent to which the news media and especially print journalists picked up and used FoI. Journalists like Jack Waterford or Paul Chadwick were held up as paragons because they had used and continued to resort to FoI to find, develop, explore and add substance to their stories. In the first Queensland Annual Freedom of Information Report it was stated that:

The communications media play a vital role in maintenance of our democratic system, one of which the media themselves are self consciously aware. FoI offers the media a powerful investigative tool to open government to public scrutiny, to criticise the rationale for decisions rather than simply reporting the fact of decisions being made, to expose incompetence, malice and wrongdoing in public administration. In the hands of a skilled journalist, FoI can expose the thought processes of government; it can fill in the background; it can lay bare underlying assumptions and values. Every story beginning 'Material revealed under FoI today ...' will be a minor victory for the legislation.⁸

Yet the experience in Tasmania throws considerable doubt on the ability or acceptance of the media to perform either educative,⁹ publicity¹⁰ or accountability¹¹ functions in conjunction with FoI. A series of undergraduate research studies in Tasmania undertaken between 1993–1998 confirm the low usage by journalists of FoI. The studies indicated that media use of the *Freedom of Information Act* had been minimal, and that journalists perceived many impediments to using FoI. These studies have confirmed a number of points made by other studies of the relationship between the media and FoI.¹²

The relative failure of the Australian media to consistently use FoI and to perform an active disseminating role has major ramifications. FoI legislation was designed and enacted on the basis of its efficacy as a mechanism which would allow the citizen to become aware of, and if motivated involved in, the policy formulation process before the executive and/or bureaucracy had determined their final and often non-negotiable positions. Yet Hazell notes that this direct empowerment in the absence of informational go-betweens was overly optimistic:

with the wisdom of hindsight it was naive to suppose that individual citizens ever would be the major users of the legislation. The public are seldom direct consumers of government information: they rely on others (the media, interest groups, political parties) to process the information for them and to select items which will appeal to their own particular range of interests and prejudices.¹³

The theory

The perceived wisdom about the relationship between FoI and the media centers around an interplay between the media's Fourth Estate role and the argument that FoI cannot be effective without public awareness of its existence and effective use. The media is seen as having a crucial role to play in the success of FoI in two ways: by ensuring public awareness of the legislation, and by using FoI to render its role as democratic watchdog more effective.

As the media is the major disseminator of information in our society, public awareness of FoI is strongly dependent on media coverage. Due to the scarcity of media and governmental publicity for FoI, the public is likely to remain largely ignorant of FoI's powerful potential. The media has a responsibility to inform the

community about FoI, thereby promoting the Act's aim of public participation in democracy.¹⁴

The media plays a crucial role in the democratic process as a watchdog over government, and use of FoI is critical to its effective fulfilment of this role. Some consider the media to be the fourth element in the democratic process, with the role of reporting on the other components — the executive, Parliament and the government.¹⁵ If the media is to effectively carry out this role, it must obtain accurate, unbiased information and ensure it reaches the public. Use of FoI facilitates this process. The major public benefits of media FoI use have been identified as:

- 'FoI and a free press are two of the several checks and balances essential in a true democracy.'¹⁶
- The media can educate the public in the importance and use of FoI.¹⁷
- FoI allows journalists to set the news agenda rather than just reacting to politicians and press releases.¹⁸
- Active and organised media use of FoI will '... enrich the amount, quality and credibility of media reporting of government ...'¹⁹ and will educate journalists and the public about governmental processes.
- By using FoI the media participates in the democratic process.
- By pursuing appeals, the media can test the weak points of FoI legislation, and ensure interpretation of the Act by higher authorities.²⁰

As Zelman Cowan argued:

It is the responsibility of the press to inform the public so it can bring its influence to bear in an informed and intelligent manner; The press is thus an essential cog in the machinery of self-governance. To whatever extent the press fails to meet these responsibilities, democracy suffers.²¹

The practice

A study by Nigel Waters demonstrated the relatively low use of FoI by journalists.²² As with the Tasmanian studies, Waters research (see *Table 1*) shows that the Australian media have a tendency to wait for others to use FoI and then piggyback a story of the requests that are brought to their attention.

Table 1
References to FoI in the
Sydney Morning Herald, 1.1.95–30.6.95²³

References to:	
FoI requests by <i>Herald</i> or other journalists	10
FoI requests by opposition politicians	8
FoI requests by individuals or public interest groups	5
FoI law reform in Australia	16
FoI laws and requests overseas	3
Trivial or humorous references	4
Total	46

Jack Waterford has been highly critical of the lack of use of FoI by fellow journalists.²⁴ Waterford has also pointed out that the low usage is further marred by inappropriate and unskilled use:

If a relatively full disclosure by a public servant or administrator reveals no obvious points of attack, research is most often promptly halted and attention is then focused on some other project. All too often, journalists drop the ball precisely when

they have a good story because they have defined the story only in terms of a fairly naive outcome which did not come about.²⁵

Closely linked with this inappropriate and unskilled use are many of the hurdles faced by those seeking information.

The bureaucracy has fashioned a parody of the Act's true purpose: to obstruct and discourage, slowly and at whatever cost it might be possible to get away with, any disclosure of information which might cause the slightest embarrassment.

Dennis Muller, Associate Editor, *Age*, August 1988

The Tasmanian research highlighted a number of potential impediments to the use of Fol by journalists including:

- inappropriateness of issues,
- format inappropriate,
- time constraints,
- other sources more effective,
- breadth of exemptions,
- costs of obtaining information,
- lack of knowledge of Fol and its procedures,
- complicated and time-consuming process.

The media use of Fol is variable over both time and jurisdiction. The *West Australian* and, especially, the *Age* have a proud and extensive record in the use of and reporting of Fol cases and issues. The project by Nigel Waters and the Australian Centre for Independent Journalism to collate practical experiences of Australian journalists use of Fol, mentioned in (1998) *77 Fol Review*, will hopefully provide examples of many more examples of the efficacy of media usage of Fol as a constructive journalistic tool.

The recent publication of *Reviving the Fourth Estate* by Julianne Schultz throws some interesting light on this theory vs practice paradox.²⁶ Schultz points out the concept of the fourth estate has proven to be a variable and flexible notion but is still one which forms the intellectual paradigm within which Australian journalists see themselves belonging or upholding. However, in practice, as her title suggests, the Australian media's performances and normal workday routines rarely take place within or contribute to that fourth estate. In an otherwise excellent 238-page book Fol is only mentioned in the index a mere five times. In only one of these references is Fol legislation mentioned (the US Act). The other four references are to the generic term 'freedom of information' used in parallel with freedom of speech. If a noted Australian journalist and academic writing about, and attempting to resurrect, the ideal of a fourth estate marginalises or ignores Australian Fol legislation then I believe there is a problem.

Journalists: active members of the constituency or just visitors?

A singular focus on the level of use of Fol by the media misses the major problem. What is a more important question is the degree to which journalists, their professional associations and intellectual leadership involve themselves in the wider dynamic of Fol operation at both the Commonwealth and State level in Australia. A quick visit to web sites like the British Columbia Journalists Committee for Freedom of Information at <http://www.corp.direct.ca/bcjc/> or the US Reporters Committee for the Freedom of the Press at <http://www.rcfp.org/> reveals a level of activity and support for Fol unseen in Australia.

Both of these sites are constructed and maintained by journalists and their professional organisations to not only provide a resource for their members but as part of a wider advocacy role in relation to Fol. Most states of the United States have an active Fol coalition, with very strong input and support not only by individual journalists but by their professional organisations. Fol is seen as integral to the fourth estate role of the US media.

Yet when we look at Australia, and remove the contributions of a key handful of journalists, why is the roll call so poorly attended? Where is the visible profile and contributions of the Media and Entertainment Arts Alliance on Fol issues around Australia? There is starting to be movement on the station with a greater interest being shown by the Australian Centre for Independent Journalism and the Communications Law Centre in the current operations of Australian Fol. Yet that stirring begs the question of why so little interest by Australian journalists either individually or collectively?

What has intrigued me, as I have attended the two national Fol conferences and various other forums where Fol issues have been given a place on centre stage, is the almost complete lack of representation by journalists in any capacity. Yet in the United States and Canada, to a lesser degree, the media play key roles not only in the sponsoring, reporting of and organisation of these forums but also in terms of the intellectual contribution.

With the exception of Paul Chadwick, I have never been approached by an Australian journalist or their professional bodies to talk about the strategic or big picture developments of Fol in Australia. I have been approached for comment, for my observations, to help with Fol requests or to provide background but not to discuss a journalistic vision about Fol's fourth estate capabilities and capacities. This day to day operational interest in Fol is not to be dismissed but it is only the minimum entry contribution of a member of the Fol constituency. The shape, structure and ongoing efficacy of the legislation at both national and State level seems to be missing from the vision Australian journalists have of their role and professional responsibilities.

The argument can be made that the Australian media is at best a de facto and largely non-participating member of the Fol constituency in Australia. Looking at the history of the introduction of Fol in Australia this may not be a surprising conclusion. Fol largely entered the domain of the Australian fourth estate as a 'gift' from the other estates of the body politic. Using Waterford's analogy, Australian journalists have found themselves in possession of a journalistic tool of which they have only a passing appreciation and which they have allowed to rust away at the bottom of their toolkit or in some jurisdictions to be severely damaged. Journalists, media organisations and associations have, since the arrival of this 'gift', fought strong campaigns against its removal or serious alteration. Yet those struggles have been largely reactive and late in the day responses to fairly blatant attempts at curtailing the efficacy of Fol by the Executive arm of government. What has been missing has been the proactive, long-term nurturing and monitoring of Fol practice, legislation and outcomes.

In the next instalment of this discussion series I will address the role and performance of Fol officers. Any members of the fourth estate are welcome to contribute to this discussion on the media's role and relation to access to information legislation.