

Public records — current issues in control and access prior to privatisation

by Helen Townley and Rick Snell

Privatisation and outsourcing of government functions have become a fact of life in the 1990s, with policy debate now focusing on how much and how far. Some examples of traditionally public enterprises which have been privatised, or are prime targets for privatisation, are the sale of the Commonwealth Bank and proposed partial sale of Telstra, the corporatisation of the CES in the 1996 Federal Budget, and the frequent desire of the Tasmanian Government to have the sale of the Hydro Electric Corporation publicly debated.

This trend is not unique to Australia. Countries such as the United States and New Zealand have also grappled with the issues involved in privatisation of bodies and functions for some years. There are important issues to be considered whenever public functions or bodies are transferred to the private sector whether it be on a permanent or temporary basis. A number of aspects about access to 'public' information in private hands arise even in the absence of privatisation. From the perspective of the public's access to information, the preservation of access to records (relating to those functions or held by a private body) will be a key issue for the remainder of the decade. The authors will deal with the issue of privatisation and Fol in a future article.

Until recently, public access to information in Australia generally depended on whether the information was held in the public or private sector. Fol legislation operating in all States and Territories except the Northern Territory provides a general right of access to government-held information. However, there is no corresponding general right of access to information in the private sector. The late 1980s and early 1990s may be remembered in Australia as that brief interlude of access between the transfer of information from governmental secrecy regimes to the sanctuary of the private sector.

The transfer of records from the public to the private sector, is likely to result in loss of public information access rights unless special provision is made. This issue is multifaceted and raises questions about when a record passes from public to private control, when a record which appears to be privately owned remains subject to information access rights etc. These questions are starting to emerge as important issues in various Fol jurisdictions. Circumstances which may raise these questions of public versus private information access rights include:

- an agency retaining a right of access to documents created by a private body performing outsourced functions, but purporting to waive that right;
- an agency taking possession of files of private companies in the course of their functions;
- a contract between an agency and a private body conferring an immediate right of possession to certain documents created by the private body.

This short article is designed as an initial attempt to explore a number of these key questions that arise in association with, but not directly linked to, the moves towards privatisation and outsourcing of government functions. The questions include:

- how far does the meaning of 'possession' extend?

- when can an agency waive an immediate right to possession?
- are there circumstances in which documents will be deemed to be in the possession of an agency?

Possession

The term 'possession' is generally not defined in Fol legislation,¹ leaving its meaning to be determined according to the common law. Physical possession is not necessarily required, a right to immediate possession (or 'constructive possession') may be sufficient. For example, constructive possession would apply where a consultant is employed by a government agency or a government service is outsourced under a contract, and the contract provides that the agency is entitled to immediate possession of documents held by the private sector body. Even where the contract makes no specific reference to access to documents, the relationship and dealings between the contractor and the government body may establish that the government has an immediate right of possession to certain documents under the general law (especially in the area of agency law).

Fol already applies to some private sector documents. The application of Fol to documents received by, rather than created in, an agency, is common to all Australian Fol Acts. Fol makes no distinction between private sector documents voluntarily provided to an agency and those acquired by the agency under a statutory power of compulsion. The exemptions for commercial affairs, personal information and confidentiality are considered sufficient protection for all types of private sector information. Despite this longstanding approach to private sector records accessible under Fol, occasionally some agencies raise concerns that the protection is inadequate and difficult to administer in practice. No Australian jurisdiction has to date amended its Fol legislation in response to such concerns, suggesting agencies have failed to demonstrate any substantial detriment to themselves or their private sector clients resulting from this approach.

The NSW Ombudsman Guidelines make it clear to agencies that 'documents held' includes documents temporarily held by an agency.² An example of this would be company documents held by a Fraud Investigation Unit of the Police. For many years the position in the United States had been somewhat different due to the significant use of the FoIA legislation for commercial purposes. The commercial use of Fol has been the principal use of that legislation in the United States since the early 1980s.³ Corporations and other litigants discovered that the government was an information warehouse that held information about third parties. Businesses had learned that:

the FoIA could be used to gather information about competitors that could be used to gain a commercial advantage. In fact, the vast majority of the FoIA requests were made by business executives or their lawyers, who in the words of Judge Patricia Wald, 'astutely discerned the business value of the information which government obtains from industry while performing its licensing, inspecting, regulating and contracting functions'.⁴

The US Supreme Court developed a 'central purpose' test for use when dealing with law enforcement informa-

tion or personnel and medical files.⁵ The Court in the *Reporters Committee* held 'that when the request seeks no "official information" about a government agency, but merely records what the government happens to be storing, the invasion of privacy is unwarranted'.⁶ The US Courts worked on the presumption that disclosure was restricted to information that would serve the central purpose of the legislation, that is, ensuring that the governments' activities are subject to scrutiny.

Right to immediate possession may be waived

It seems that a government agency may waive a contractual right to immediate possession of documents. In *Mildenhall v Department of Premier and Cabinet* (1995) 8 VAR 478; (1995) 58 *Fol Review* 65 the applicant requested access to documents relating to a survey of public attitudes conducted by a contractor at Cabinet's request. All documents produced under the agreement became government property and had to be delivered to the project officer on the termination of the agreement or completion of the project. Clause 6.7 of the agreement required the company to provide the project officer with six copies of each written report 'as well as copies of the data collected in statistical form which shall be in a machine readable form'. At the time of the Fol request the project had not been completed but the company had in its possession a computer disc recording the original survey results.

The Victorian AAT noted that at general law there is longstanding authority for interpreting 'possession' as including a right to immediate possession. Although the AAT expressed some doubt about whether it was appropriate to extend the meaning of 'possession' in this way, it concluded that the broad approach was correct. The AAT decided that clause 6.7 gave the contracting government agency a right to immediate possession of the hard disc. However, it found that the right was waived when Cabinet told the company that it did not need to provide statistical data in machine readable form (that is, Cabinet waived its right to the information on the disc).

This case illustrates the difficulties involved in relying on a contractual right to possession of documents held in the private sector. It demonstrates that agencies may be able to frustrate access to such documents by declining offers by the private sector body to provide those documents or documents in a particular form. Taken to an extreme, reliance on contractual access rights could give agencies a discretion about which of their documents held by a private sector body will be subject to Fol.

The changing public sector environment and possession

The following examples illustrate the difficulties associated with the practical application of the 'possession' requirement. There are three main scenarios involving:

- e-mail,
- official documents in a private location, and
- private documents in an official location.

E-mail

Technological developments may put pressure on/stretch the traditional concept of possession. Despite the common perception that the ephemeral nature of e-mail makes it somehow different to paper records, e-mails are documents and therefore Fol legislation applies to them in the same way as to other documents. In an earlier article in *Fol Review* Campbell comments: 'As govern-

ment communications are increasingly carried out via electronic mail . . . "documents" may cease to exist in tangible form or in a narrow, physical sense'.⁷ Hard copies of e-mail communications fall into the familiar category of paper-based records, but this is more problematic where there is a deletion of e-mail without hard copies being made. To our knowledge, this issue has not yet arisen in an Australian case. However, records management authorities are recognising the potential for inconsistent treatment of electronic records and providing guidance to agencies. For example, the Tasmanian *Guidelines for the Management of Electronic Records*⁸ emphasises that agencies need to develop e-mail policies covering issues such as access, permitted uses and filing, and that electronic messages including e-mail, electronic data interchange, and electronic funds transfer are subject to Fol. The Tasmanian Information Strategy Unit suggests as a short-term measure ensuring that relevant file numbers are included in e-mail communications. The Australian Archives *Keeping Electronic Records* provides similar general guidance.

The Canadian Information Commissioner's 1994-1995 Annual Report provides an example of the problems that may arise in relation to e-mail and Fol requests/records management issues. The Commissioner's investigation of an allegation that an agency had failed to identify all relevant records in response to an Fol request revealed that an officer had deleted e-mail messages about the subject of the request because she wanted to avoid storing excess records. Although the department had a backup tape system which stored e-mail messages, the tapes were reused every 5-10 days, so the messages could not be recovered. The Information Commissioner's report *Information Technology and Open Government* warns of the dangers of mass deletion of e-mail records, for example, on returning from holidays.⁹ Although it is unlikely that all e-mail messages will be important enough to be retained as permanent records, each message must be examined to determine its value.

The archives implications of destroying e-mails without proper consideration has also been recognised in the United States. The Florida Attorney-General has held that e-mail records are subject to the *Public Records Act*, and accordingly must not be destroyed except in accordance with approved retention schedules adopted by the public sector agency.¹⁰

Official documents in a private location

The 1990s have seen public sector downsizing and the imposition of efficiency dividends place increasing pressures on public servants. Public servants appear to be acquiring traditionally private sector work habits, with a trend towards officers taking work home for completion outside standard hours. The WA Information Commissioner has commented on workers in some government departments storing public records in their homes or offices instead of properly filing and archiving them.¹¹ The removal of files from agency premises by an officer of that agency clearly does not of itself affect the agency's right to immediate possession of those files. However, if the agency is not aware of the practice, or does not implement a monitoring system, the potential for loss or accidental destruction or damage of files or documents is a real possibility.

Home-based work has become an option for public servants in the 1990s. Modern technology enables public sector employees to work from home on a department