JOURNALISTS, FREEDOM OF INFORMATION LEGISLATION AND INVESTIGATIVE REPORTING

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It is by now generally agreed, I think, that FOI has been a considerable disappointment so far as its use by journalists has been concerned. Pushed very hard, some of us can remember a story or two of political significance where the outcome was influenced by the use of Freedom of information legislation, but it would be idle to pretend that many of these were the great stories of the day. And even when they were important stories, it is often very difficult to pretend that FOI was the ingredient which made the story a very significant one.

Now, normally, when I talk about this, journalists find it very easy to get into a defensive posture. We do not make great use of it, they will say, because we are very focused on stories which are due to be published tomorrow, or, at the latest, next week. Our editors sweat us and do not give us the time or the opportunity to beaver away on possible stories which are not going to come to fruition for at least a month or so. And FOI always takes at least that long. And that is if it works. So, even if it was working, and even it was a valuable tool of research and disclosure, we might not be able to make as great a use of it as we could, simply because of the priorities which our masters and mistresses set for us.

But then again, that was assuming that it would work. And we all know, don't we, that it doesn't really work. Almost anything which is sensitive will be covered by some exemption clause or another, so anything you get will not disclose anything very much. If, by legal skill or by accident, you do get something which is useful, you can be sure that government will move to close what it will describe as an unintended loophole, as, for example, by a massive extension of the description of documents characterised as Cabinet documents. Or they will use the weapon of costs to fight you off. And delay, and, as often as not, the time, expense and further delay of appeals, so that by the time you do get anything, if you do, it's too late for it to be newsworthy. In some cases, moreover, a government which sees that it is going to lose will seek then to spoil any story which you are going to write by making a general release of the documents.

I have been through many of these frustrations, and, sometimes, depending on the company, I have expressed them in much this way myself. When, I am reflecting in general company on the experience with FOI, I often say, for example, that one should look at it in three parts.

The first part is in relation to the right of individuals to get access to documents about themselves, whether in pursuit of some theory about how the bureaucracy has ground them down, or, often, for some highly practical reason associated, for example, with their efforts to get a social security or Austudy benefit, or whatever. There are some sensitive privacy issues in this area – mostly concerned with the rights of third parties whose names appear on your file, perhaps because they have dobbed you in, but the general record of FOI legislation in this field is pretty good. And this is of course the area in which by far the greatest number of requests come in, whether at the

Commonwealth, or at the state level. A high proportion end up as satisfied customers, though an American observer of FOI would say that rights about this sort of access ought not properly blong in an FOI Act but in a privacy Act.

The second area of FOI use involves applications for information about routine decisions of government. By routine, I mean decisions made in the ordinary course of duty by bureaucrats, who may be applying some government policy but who are not really injecting much of their own discretion into it. That is, ministers and senior officials are not closely involved in the case, and, at the initial stage at least, do not greatly fear any controversy or embarrassment from anything which may emerge from disclosure. The people who are making the request, by and large, are interested parties, if none the unworthier for that. In some cases, they may be people or businesses affected in the financial or property interests by some decision which has been made – a zoning decision, perhaps, or a customs determination. In other cases, they may be lobby groups who want to influence a decision, or who, having become aware of a decision, want to see the basis upon which it was made, so that they can determine whether they should challenge it, or whatever. In some cases, the interest is disinterested, but forms part of some wider study – looking, for example, for patterns of administration, preparing some history or wider research.

In general, in this area, the FOI record is not so bad either. In this area, indeed, it is often the case that informal access is readily obtainable, without the process and paperwork of FOI itself. Officials are not usually greatly hurt by providing access, and often find it useful as a part of securing popular consent for decisions which have been made. There are a range of groups – lawyers, accountants, lobbyists, unions, agents, and community groups who have now integrated some FOI requesting into their ways of working. Sometimes that list includes journalists, but the nature of such stories is that usually the FOI access is only a small part of the story.

The third area, and the one in which, obviously, we are most interested involves material which is likely to cause some problems for government. I do not necessarily mean by that, necessarily, that the contents of documents on the record will necessarily prove that the minister is a liar or a fool, or that a bribe has been taken or a power used improperly or corruptly or whatever. Rather, the very subject matter is controversial and the stuff of politics at the level of government at which it is kept, and those who are responsible for the politics have, as a part of their general operating strategy, a fierce desire to keep control of the information being fed into the debate. In this sense, the disclosure of fact X, or opinion Y, may not necessarily do any harm at all. But it might not be a convenient part of the public relations strategy, or it may reveal as a fact, a fact always so embarrassing in Australia, that there were different attitudes to the problem in question, that different people thought that it might be tackled in different ways, perhaps even that the minister, or whoever failed to follow the advice of some adviser. In many cases, it might reveal things far more fundamentally embarrassing than that, but even evidence of a disagreement or difference of approach can often make a story.

It is here that the record seems very poor. Officials fight to keep documents of this sort out of the public record. If they lose, they campaign to weaken the legislation to make sure that it cannot happen again. Even before they succeed or fail, they put every obstacle, including delay, charges, claims of exemption and so on, in the way, so that many of those making requests will get frustrated and give up. And the next time around, not bother. Moreover, such encounters acquire some status of legend, so that it is not only the journalist in question who is discouraged, but her or his workmates as well.

It is true that journalists have made very limited use of FOI. There are reasons why this is so, and they reflect as badly on journalism as on alleged inadequacies of the FOI Act.

The surprising thing, really, is that few journalists even understand their rights under the Act, have even a passing idea of how a request might be framed, what sort of documents might be available and what they might expect.

Of course every journalist in Australia, and certainly every one in Canberra, had firmly believed in FOI before it was enacted. Everyone agreed that the government had been too secretive. But when I began organising training courses for journalists in 1982, a few months before the Act came in, there was no great interest. Even among those who were, most were hard pressed to answer a question such as "Now, tell me a document or a file you have always wanted to get your hands on and let's talk about a strategy for getting it out." The only document anyone could think of was a copy of the Government's secret direction to Qantas.

Of course it was true that the Commonwealth FOI Act, as it then was, gave only limited access to documents created before December 1982. The fact is, however, that journalists' talk of the secretiveness of government was hot air. Most of what they were talking about was style, and few of them had a detailed enough knowledge of the processes of government to be able to imagine what a paper trail could look like.

Generations of leaks - some of which were single documents that were quite damaging to governments - led some to imagine that the bureaucratic filing cabinet consisted entirely of ticking time bombs and could not imagine how mundane it usually was.

As I remarked before, even a prompt FOI-request turnaround, conducted in good faith, may take several weeks or even months. But most of the media is organised around the day to day.

A big newspaper might sometimes be willing to devote some journalistic resources to stories that take longer to get up, but a long view in most newspapers is about a week - and that's still far too short to be making effective use of FOI.

It may be that in early days great vigour is shown in putting in scores of requests. But if they fail to uncover gold - and I will come back to that - and in fair quantities, media executives and their owners are likely to be asking questions about the resources poured into the area.

And if there is one thing true of the media - Queensland I would say is an excellent example - things that are hard or expensive to do tend not to get done. It is easy enough to fill up a newspaper with material which does not cost a lot to generate.

We get back, however, to the fact that most journalists are very much day-to-day workers, and getting access to documents under FOI takes rather longer than a day.

A lot of journalists like to imagine themselves as investigative reporters, whatever that may mean, but mostly they are writing instant material, reactive to some other instant event, and without much background. Moreover, few have much of an understanding of how an administration works.

Even the idea of using FOI hardly ever occurs to them; on the odd occasion when it does, their requests are often very scattergun and impossibly broad; they often interpret consultation attempts by FOI officers with great suspicion and refuse to negotiate; and they write off consequent failure to get very much as proof that the Act is toothless and useless.

FOI, whether at Commonwealth or Queensland level could certainly have more teeth, but it is not as useless as that.

But there is another factor. Journalists are not, of course, interested in FOI as such, but in information. FOI is just one way of getting information out. Many of the mechanisms for getting information - departmental public relations machinery, annual reports, statements, ministerials, even leaks - have always existed.

Some of these mechanisms now operate better as a result of FOI, at least in the sense that fewer public servants think that answering a telephone call from a journalist is prima facie breach of the Crimes Act.

The better all of these mechanisms, formal and informal, proper and improper are, the less feeling of a need to use FOI there is.
There are times when judicious use of FOI throws extra light on an issue, changes the complexion of a problem or otherwise brings out a bloody good story.

But there are lots of times when the most it can offer is a gloss on past events, often fast moving ones where things have moved on considerably since the documents were generated or requested. It is not difficult for a journalist to become discouraged.

I stress this because some people who went gung ho into FOI and who have later ended up denouncing it as a waste of time have failed to realise that FOI is only one of the tools of getting information. It will bring in extra information but rarely bring in the story itself.

Good journalism is no more lazily rewriting extracts of material obtained from FOI than it is in rewriting handouts. It is about following up information and putting all of it together.

Now any skilled senior public servant will tell you that if he puts in all of the Parliament House boxes 50 copies of a report on an area of government operations, representing man-years of effort on the part of public servants bringing all of their knowledge and their expertise to a problem, and nothing will appear in the paper. Slip the same report into a brown envelope and hand it over to a journalist saying out of the side of your mouth "Remember, you did not get this from me" and is likely it will be on the front page.

Journalists have a not-unnatural tendency to want to beat up something which they think is being held secret and rather less of a tendency to scrutinise that which is on the record. This often happens with FOI. It often adds little to a story which has been sitting there all along, if only the journalist would do a bit of legwork.

Another problem - often in the same area - is for the would-be crusading investigating reporter to think that the real story buried under paperwork is a catalogue of corruption, mismanagement, incompetence and the exercise of power for the wrong reasons.

Now there are such stories. No doubt even in Queensland. And when they exist, I hope that FOI is one of the processes that brings it to light.

But I have to record that this is not always the case. I have been writing about public administration for many years, in a rather more specialised way than is common on most newspapers. I have read thousands of public service files and spoken, I guess, to thousands of public servants.

Almost all, I have to admit, are decent and honourable men and women, with a keen sense of public interest, doing a difficult job the best way they can. In almost all of the decisions in which they are involved or have given advice, the advice or actions have been honest and done to the best of their ability.

Now we from our great height, with all of the benefits of hindsight, may still find things to criticise. We may feel that the public servants were mistaken, that they failed to give enough weight to this particular factor and attached undue weight to that factor. We may think that their own perspectives or backgrounds blinded them to the relevance or significance of something I think is of great moment.

We might even think they were out of their depth or not as good as they could have been.

All of these are judgments we can make, and indeed, report on, without thinking that the person concerned is a knave, a cheat or a liar. And, of course, if the person is corrupt or whatever, he or she is hardly likely to record how and why on the file.

So I always counsel some presumption of regularity. Indeed, I think that any journalist or investigator who wants to use FOI should master just what the routine and the regular operation is: find out, using publicly available material, including FOI statements of department organisation and procedure, to work out how a decision would come to be taken, who would be involved and so on. Indeed, someone with a knowledge of what is regular can more easily establish, from the footprints in the paper trail, just what went wrong and how.

I might add that when, as sometimes happens, one gets FOI documents that do not disclose scandal but proper and regular administration, it does a journalist no great harm to record the fact. Those who go into a request wanting only one answer often drop the ball precisely when they have a good story - because they defined the story, with inadequate information, in terms of naive expectations.

A successful or semi-successful FOI request ought to be the springboard for follow-up: ringing individuals who names appear on the files, asking further questions, getting fresh information, and, often, the benefit of decision-makers' frank hindsight and perspective of events.

But that is often a process which should begin before an FOI request. If you are working on any story to deal with government, the first question you should ask is about what material is or ought to be on the record about it. And one should look at the public record first.

If I am thinking of writing about a particular area of government policy or practice, one of the things I often do is to pick up the government directory, and establish from it who the official is with charge over the area. Then I ring them up and signal my interest in their area. I'll be wanting to ask them some questions, of course. But I realise that they are busy men or women. Is there anything they think I ought to read before I take up their time?

The first thing that happens, often, from such a non-confrontational approach is that the official will say, yes, there was a major review of our operations completed fairly recently which the department published as a monograph, and, of course, a Senate committee looked us over two years ago, and that provides the basis of what we do. So you should read those. In fact, I've got copies and will get them to you.

It is amazing, indeed, how much such material exists. That it does, indeed, is often a tribute to old FOI cases, but the fact is that an amazing amount of material now is available on the record. At the Commonwealth level, for example, departments are used not only to publishing detailed annual reports, but extensive documents for senate estimates committees, parliamentary functional committees and other forms of external review. In the modern era, where one has to fight hard for budgets, one of the questions which officials in the department of Finance will often be asking is about reviews of operations and systems which scrutinise how well policies and programs are working, and, again, it is not uncommon for such material to be available, if one asks. Similarly, Auditors-General have often given programs the once-over. A Parliamentary library officer may have prepared a general paper. Often, Internet research will show a considerable amount of such material, much of which has never directly led to a story being written.

Now it is unlikely that any such document will disclose, in bald terms, a major problem, piece of poor administration or whatever. But they will often be frank about policy conundrums, or canvas different policy options in ways that the minister's press statement could never afford.

In any event, I counsel, one should read the material available first. And use that to go back to the official with further questions. It might even be that this informal process has by itself produced much of the information you need. It may be that the exchange produces it. In any event, one should usually go the FOI path only after such styles of inquiries have failed to produce what you want.

Should FOI officers be doing more to encourage journalists to use to Act? I am not sure. Should they be doing more to assist those who want to use the Act? The answer is yes, but I would not argue that journalists are entitled to special treatment or that one should go to extraordinary lengths.

What I do argue, however, is that consultation, particularly by phone, begin immediately - and that it be essentially friendly and helpful consultation, explaining what sort of documents you have and designed to help focus the mind on what is actually wanted.

As I commented before, most journalists have little idea of how a bureaucracy works. Their initial queries are likely to be very naive or to be impossibly wide. I remember once a journalist from The Canberra Times put in a request to Social Security for "all documents associated with the assets test", this shortly after the Government had introduced it. Our friendly DSS FOI officer rang cheerily to inform that the request would be granted but that we would need four semi-trailers to pick the material up. After consultation we took all that we wanted - I think about a dozen documents.

Some journalists, no doubt, are likely to treat any attempt at consultation with great suspicion, as an attempt to throw one off the track. Some, no doubt, are quite secretive about what they are actually looking for. I do not think that they deserve any special mercy from the resources rules.

Indeed, some journalists, no doubt, exhibit some of the signs of querulous paranoia, even if they are not the average FOI officer's most serious problem in this regard. Someone was quoting Ian Freckelton's description of the condition at an FOI conference I once attended:

> "The psychiatric condition that is responsible for the phenomenon of vexatious complaint lodging may be described as querulous paranoia. One of its typical symptoms is a fierce determination to succeed against all odds. Institutional boundaries and technicalities that would normally be effective barriers become subsumed in the paranoid's mind into conspiracies that have been hatched to prevent the complainant from establishing his or her right. Righting the imagined wrong becomes a cause, a moral crusade, into which all manner of people can be drawn if they are not watched. Generally some kind of wrong has initially been perpetrated, whose redress becomes an obsession that eventually becomes a full time occupation.
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> "A common tactic of the querulent paranoid is the scatter-gun approach by which a wide number of individuals and institutions are simultaneously blasted with letters of complaints. Generally, these missives will be pages long with the writing densely packed, covering all of the page and eschewing margins or spaces between paragraphs. There is likely to be a liberal use of capitalisation for especially virulent expressions of frustration. The appearance of multiple exclamation marks is also a distinguishing characteristic. There more artistically minded querulent paranoids are given to employing differently coloured inks for emphasis and cutting out captions and quotes from newspapers to help make their points. Those using typewriters display a particular affinity with the star asterisk key."

I hope that none of this describes my own tactics when I was active on the FOI front, though I suppose that, on occasion, with 20 or 30 active AAT appeals going, and, at one stage, about 200 active requests, one or two FOI officers might have thought it.

There would have been, I would have thought, a few differences. For one, I always adhered to the rule of never sending a letter that took more than two minutes to dash off - and sometimes to that second rule of never sending one that took the recipient less than four hours to answer.

Every one of my requests was actually focused on following up a story idea I had, and I never, though I was once or twice tempted, used the FOI request as an act of revenge.

The reason I cited it, actually, was that one of the first people it brought to mind was an FOI officer in one of the agencies with a special fondness for coloured pens and markers.

If he was providing documents, they would be liberally covered with perhaps a dozen different coloured markers - say red for release in full, green for release with deletions, black for refused under Section 36, Brown for refused under Section 37 and so on.

Getting access would always take hours as he shuffled these markers about. On one occasion he commented to me that he had already had to spend 10 hours overtime on this particular job. I had wanted the information, but not urgently, and apologised for keeping him in. Not at all, he insisted. He loved overtime. Indeed, here, and he pulled out a sheet of paper with black ink on it, are a few interesting documents you ought to ask for so that I can get some more.

My favourite FOI case, though I was outsmarted on it, involved the oil painting of Malcolm Fraser. It was commissioned by Parliament but Fraser did not like it so it was sent to the warehouse and another $12,000 portrait was commissioned. We asked to see the reject and were told no. So we asked for access under the FOI Act, arguing that, of course, an oil painting was a document. We were quite right, but we were so impressed with our cleverness that we reported our brain-wave. What then happened, of course, was that all of the other media, including the television channels put in requests as well. And when the department decided to gave in, it gave access, by inspection, at about 2pm. That is it was on all of the television stations before it appeared in The Canberra Times.

The other favourite involved the registry indexes. At the time of the Walsh purges, Peter Walsh accused me, along with a number of politicians, of abusing the Act for cheap research and fishing expeditions. He hurt my feelings. I had never been scatter-gun. But I thought, if you want a fishing expedition, I'll give you one. And I sent a letter to all departments saying I want your central registry index of all working files. A computer printout would be fine. The response was amazing. I had to negotiate a bit, of course - I was never interested in client or staff files, or, generally, ones from personnel and management divisions, but I was interested in policy documents. I do not need to tell you that the very title of a file can often give the story away. But, generally it is rather difficult to contruct an exemption just for a file title.

Of course the more efficient departments had it all on computer. Others had registry indexes on microfiche, others on cards. The sheer waste and inefficiency of some operations was staggering: only God knows, for example, how one would ever locate a file in a hurry at DAA, Foreign affairs or the old Department of Territories.

Oddly, the central, most sensitive departments - Prime Minister's, Treasury and Defence were not only among the quickest to supply the agreed request but charged least for doing so. Treasury never gave anything away, least of all to me, but only wanted $50 for its computer printout. Transport, on the other hand, claimed that it would cost it $1500 to do a printout. I think, at the end of the day, these differences said something about efficiency.

But, let me tell you, when I put in the next generation of requests - for specified files identified from these indexes, I was not fishing. I might add that government departments are now required by the Senate to publish such lists of files, and they do so twice a year, though very few journalists bother to scan them. Most maintain their lists on their web sites; some put it in their annual reports. In most cases, the titles of the files is usually enough to give you a fair idea of the contents.

Let's now talk a few technical issues. A quick whizz through the Act, some comments on exemptions, then some practical points about making requests.

First, it is important to realise that the FOI Act in Queensland, as with other Australian FOI legislation has two separate parts. One is about an obligation on the part of departments and authorities to make information available to the public, whether the public likes it or not, and another is about their obligation to provide information on request. In terms of the FOI request much of the attention goes on the second issue, but it is worth spending a moment or two on the first, first.

The Queensland Act has its first part obligations under Sections 18 to 20. Section 18 requires an agency to publish a regular detailed statement of who it is, what it does, how it does it, what its

arrangements for consultation are, to list all of its boards, powers, and functions, and to describe all of the sorts of documents which it holds.

Section 19 requires it to have available for inspection its policy documents - all of the internal rules, guidelines, manuals and interpretations used for carrying out its job. The internal Bibles of the department, in effect, must be open to public gaze. The Section in fact goes further, holding that a person cannot be prejudiced by the existence of an unpublished internal rule.

It can be very important to call for and study such documents if one is writing a story about say, the procedures used for adopting children, a police internal investigation, how a shire handled a tender or whatever. These after all set the standards against which conduct can be judged.

Moreover close study of all of these documents, along with other publicly available documents such as annual reports, budget papers, government directories and so on give the outsider a strong feel for the way a department works, who actually makes the decisions, and how the decisions should have been made. If you have that knowledge, you ought to be as much of an insider as any departmental officer.

The Second part of the Act deals with rights of access. Put simply, one can ask for any document in the hands of government, provided (in effect) that it is not already publicly available), that one has asked in writing, that it is not exempt, and that one has paid a modest fee. Moreover, the Act imposes a positive duty of consultation upon agencies to help you frame a request. That duty can extend to advising you what documents exist, helping you to frame the request in a way that will capture the documents you actually want.

I might add here that although the Act is called a Freedom of Information Act, it is in fact a freedom of access to documents Act. One cannot use it to find material which does not exist on paper.

One cannot use it, strictly, simply to find information; one can use it to find documents upon which the information one wants is contained. Nonetheless, when you are drawing up a request, it usually does one no great harm to shape it in terms that ask for information. "I want all documents", you might say, "that would enable me to discover how the tender process worked, and how the contract was eventually given to Smith Brothers".

This is especially useful in a pre-consultation process. They might come back to you and say that, strictly, a host of technical specifications put in by each of the tenderers was included: do you really want that as well, because, if you do, it's going to cost you an extra 1200 photocopies. And you can then say that no, you do not want it.

It is important to be somewhat specific. There is a section in the Act which permits the refusal of requests which would involve an inordinate amount of time to answer and, given Commonwealth experience, it is not hard to justify the need for some such provision. But if one consults, if one is not too paranoid about dealing with officials and accepting their word for something, one can almost invariably hone a request down to size. Some will not.

A few years ago, when the new Parliament House was being built in Canberra, the Wilderness Society demanded every piece of paper which had anything on it having any reference to rainforest timber. In the nature of bureaucracy on such a big project, there were tens of thousands of such documents, but 99 per cent of them were minor matters of specification or detail, and only the

tiniest percentage had anything to do with the policy of using rainforest timber. They were asked to negotiate their request down to Size. Convinced they were being conned, they refused to. The construction authority then refused to deal with the request on the basis that it would take several staff-years to process, and they were upheld.

There are a range of broad grounds for exemption. Cabinet and executive council documents and documents that could be claimed to be legally privileged are exempt once they are proved to be within that class.

A number of other class documents are exempt, but it has to be demonstrated of them, first, that they belong in the class and, second,. that disclosure would be against the public interest.

This class included matters affecting relations with other government, some statutory officer papers. There are also a number of privacy-oriented exemptions.

The only exemption on which I will spend any time at all, though I am happy to canvas any is the internal working document exemption, in the Queensland Act, Section 41. It is important to see what it covers and what it does not. The exemption is not designed to keep facts from view. It is designed to protect an agency's internal thinking processes, the period in which they juggle between different options before deciding which way to go. The information used to make the decisions is available, but not the evidence of the pondering. Well, actually, that is going too far. In fact even the evidence of the pondering must be available, unless the agency can show that some public interest would be affected by disclosure. The onus is on the agency to make out its case.

It is clear from the cases which have been argued that one cannot make a generalised class claim - one cannot say, in effect, ""Look, if these sorts of documents became available, officers would be afraid to make decisions in case they are criticised". Instead one has to show something particularly sensitive about the particular materials.

I will not devote any attention to the section of the Act dealing with changing inaccurate materials on files. But the section on appeals is worth a moment. The Queensland legislation in this area is very progressive, and, because your Information Commissioners takes advantage of the scope to be informal, possibly the best in Australia. The process is also free.

When refused access, one should not automatically appeal. One should look at the reasons and see whether they stand up.

But if one does not believe that they do - and, especially in the first few years of the Act when everyone is feeling their way, many will be too conservative or too protective of themselves - one should appeal, first to a higher official in the agency and then to the Information Commissioner, again, in Queensland a very progressive official who writes the best judgments in Australia.

The onus of proving that information should not be released is, of course, entirely on the agency. One should be prepared to challenge their assertions and draw them out. It is often handy to have the Part 2 materials in front of you when you do it, to use the agency's own materials to challenge their point of view.

Good hunting.