

Opening up government: some recent developments

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The day after being sworn in as President, Barack Obama issued three Presidential memoranda. One stressed the importance of open and transparent government, another related to the Freedom of Information Act. In it he said:

A democracy requires accountability, and accountability requires transparency ... In our democracy, the Freedom of Information Act, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Non disclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve ...

All agencies should adopt a presumption in favour of disclosure, in order to renew their commitment to the principles embodied in the FOI Act, and to usher in a new era of open Government ...

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their government. Disclosure should be timely.

This is a clear, strong statement of the President's intent for his administration. However, this sort of political rhetoric is common when discussing open Government. In Australia, we have had three decades of Prime Ministers, Premiers and Opposition leaders making similar statements. As far back as 1983, Bob Hawke observed that:

Information about government operations is not, after all, some kind of 'favour' to be bestowed by a benevolent government or to be extorted from a reluctant bureaucracy. It is, quite simply, a public right.

There is nothing new in talking about the virtues of open Government. There is also nothing new about the distinct lack of will and lack of action following on from such statements.

There are several key reasons why governments are so slow to act to back up their statements of principle.

Firstly, despite their public statements to the contrary, those in government will always be reluctant to release information. They fear being embarrassed, they fear bad press, or an attack on talkback. This creates what amount to a conflict of interest for those in power. On the one hand, they are required to adhere to and apply legislation such as FOI Acts, while at the same time they are very worried about the consequences of such Acts working well.

Secondly, the importance of being able to access government information is often downplayed by public sector agencies. It is arguable that access to government information is fundamental to a healthy democracy. Yet despite this, FOI Acts are viewed as an annoyance, an afterthought, an administrative hoop through which agencies have to reluctantly jump, or more accurately, be dragged through. It is this bureaucratic mindset that leads to most complaints about access decisions and exorbitant costs. Providing access to information should be considered part of the core work of government, not a peripheral concern. People have a right to know what is being done in their name. Providing access to what should be regarded as public information is, quite simply, an integral part of good governance.

These are long-standing and continuing problems – but it is pleasing to note that there are some encouraging developments across Australia that suggest the tide may at last be turning.

A seismic shift?

During the last federal election campaign, Kevin Rudd released a policy document entitled *Government Information; Restoring trust and integrity*. Among other things, it promised that a Rudd government would: ‘significantly reform freedom of information and privacy laws and restructure their administration to ensure the laws are effective in the 21st century.’ This would be achieved by:

- abolishing conclusive certificates
- implementing the Australian Law Reform Commission’s recommendations from its 1996 report into the Commonwealth FOI Act, and
- creating an Information Commissioner to handle complaints, oversight, advice and reporting for FOI and privacy matters.

At the end of 2008, after 12 months in office, Special Minister of State John Faulkner introduced a Bill to Parliament removing conclusive certificates from the FOI Act. This has disappeared into a Senate Committee, and is expected to surface again in March. Both the Prime Minister and Senator Faulkner have indicated another draft bill involving broad reforms to FOI will be released for comment early this year. There has been nothing so far, the year is rolling on, and many who are watching and waiting for the reforms are starting to get restless and feeling a sense of déjà vu.

Queensland has been the one jurisdiction where words have been accompanied by swift and decisive action. Soon after taking over from Peter Beattie, Anna Bligh appointed an independent review panel to look into reforming the State’s FOI system. Chaired by Dr David Solomon, the panel released their final report in June last year. It provided a bold new direction, with an emphasis on the public interest and stressing the need for greater release of information outside of FOI. The government responded quickly, accepting all but two of the panel’s recommendations in August, and releasing not only a Right to Information Bill to replace the FOI Act, but also an Information Privacy Bill for public comment in December.

There have been a number of other encouraging developments in Queensland. In order to streamline the application process, Queenslanders can now lodge their applications for information online. The government has also made a large amount of information considered by cabinet more easily accessible.

In Tasmania, the government instituted a review of its FOI Act at the end of 2008, with a draft bill expected in July this year.

And here in the ACT, a Bill was passed earlier this month to remove conclusive certificates from the Territory’s FOI Act.

Which brings me to NSW, my home State and the government criticised all too frequently for being the most secretive government in Australia. This reputation stems in large part from the poor relationship between the media and government in NSW. Mistrust prevails on both sides, and this muddies the waters whenever government considers issues around releasing information. Journalists feel they are being fed on a continual diet of spin, and Ministers feel they are under constant and unjustified attack. This has only got worse in the last few years, and FOI is often the field on which these battles have been fought.

For fifteen years I and my predecessors have been calling on various NSW governments to institute an independent review of the FOI Act. Unfortunately, there has never been a proper response. And so, in April last year, I decided to conduct a review myself.

There have been a number of encouraging developments since we began the review.

In October last year, the Premier told Parliament that the FOI Act was “broken” and that he intended to introduce a new Act following our review. He commented that ‘the people of New South Wales should be given as much information as possible about the activities of the Government’ and that ‘the days of a secret State are over.’ These were encouraging statements.

The Premier also issued a number of Memoranda to heads of agencies requesting they consider methods of making more information available and requiring Ministerial media releases to be made accessible online. Although positive, these are however, only very small steps, and as one commentator noted, this brought NSW into 1995.

I also question if making media releases publicly available is really an example of greater openness. As US Senator Patrick Leahy observed recently: ‘Press releases tell us when federal agencies do something right, but the Freedom of Information Act lets us know when they do not.’

Our review

While an independent review instituted by government would have sent a better message to the public sector and broader community, there are a number of advantages to my office having conducted the review. We have been able to draw from the approaches in jurisdictions across Australia and around the world to accessing information, as well as the experiences of practitioners and applicants in NSW.

We have a long history with the Act and those practitioners who use it. This interaction has meant we have witnessed many of the failings of the current system first hand. We have seen the delays, the confusion and the frustration of applicants and agency staff attempting to make the best of a poor system.

Independent legislative reviews are usually reliant on agencies coming forward and volunteering information. This review has been different. We have made use of the investigative powers provided by the Ombudsman Act to look into the FOI practices and procedures of 18 separate agencies. These bodies were not selected as a result of a particular failing, but because they were a representative sample of those who deal with FOI applications. We requested information about their FOI activities, audited their FOI files, and spoke with 70 agency staff who handle FOI applications. These interviews were particularly useful, as they allowed staff to speak candidly about their experiences, both good and bad.

The report builds on this work, and contains 88 separate recommendations. I will not take you through all of them, but I will discuss the key components which are central in my view to changing the way people access information.

Accessing information should not be difficult or confusing. One of the main reasons why confusion exists in NSW is the large number of amendments that have been made to the Act over the last twenty years. I do not believe that another round of amendments will improve the situation. We need a new start, and that means a new Act. I have recommended that this be called the Open Government Information Act, and that it be written in plain English. It needs to be easy to understand and easy to use.

Amendments have had the greatest impact on the exemption provisions in the current Act. These need to be pared back, and their emphasis needs to change. Agencies should not look to “fit” information into an exemption, and then claim it purely because they can. They need to operate with a presumption in favour of release, and when they choose to withhold information, they need to provide detailed and clear reasons why they have done so. I have recommended a change in language from ‘exemptions’ to ‘reasons for refusal.’

I have recommended removing personal information requests from the new Open Government Information Act, identifying the benefits of these being dealt with under Privacy legislation. This will only work if there are linkages and corresponding provisions to those in the new Act.

As I have already mentioned, FOI is often not popular within agencies. It is seen as interfering with core business. This attitude has meant that there has been little drive or enthusiasm to ensure FOI operates as it should. I have recommended the creation of an independent Information Commissioner to encourage agencies to release more information, to provide them with guidance and training around what to release, to help them when they fall short of what is required of them, and to hold them to account when they fail to release what they should. The Commissioner will also make sure that the Act keeps pace with community expectations and developments in other jurisdictions.

Many of the applications made under FOI now would be unnecessary if agencies were more proactive and made more information publicly available. This information should be easy to find, easy to search, and easy to understand. Making a formal application really should be the last resort for someone seeking information. We have recommended that NSW follow the United Kingdom’s lead, creating publication schemes and disclosure logs.

A publication scheme will list relevant information available to the public relating to the way in which an agency does its work. Agencies are required to list much of this information in their statement and summaries of affairs. The difference will be that a publication scheme will be placed on an agency’s website, will require the approval of the Information Commissioner, and will need to be kept up to date.

Disclosure logs are designed to encourage agencies to make information already released in response to an application available more widely. Not all responses will be made public. Agencies will be expected to select what is likely to generate broader interest. It is very important that they resist the temptation to view disclosure logs as an opportunity to manage their public image. Proactive disclosure of documents is about government accountability, not media perception. Information, both good and bad, which is of broader public interest should be included, and it should be included as it was released, not in an edited or sanitised form.

These are the central components, but they are not the only ways in which agencies can be more proactive with the information they hold. In a submission to our review, a government department noted a couple of classes of documents agencies could release now, including working papers for finalised policies and decisions that have already been made. Best of all, there is no need to wait for legislative change. All that is needed is a change in attitude.

A new Act, a strong Independent Information Commissioner and more proactive release are the key planks of the recommended system. But there are a few other key recommendations we have made which are worth noting.

Private organisations performing public service roles should come under the new Act. This situation has become more and more common, as the line between public and private becomes blurred. It should not be possible to contract out of providing public access to information about public services to which the community has a right.

Greater protections for agency staff dealing with applications should be built into the Act. We have recommended that it should be an offence under the new Act to place undue pressure on decision-makers. We have also recommended that it should be an offence to wilfully fail to comply with the Act, or to destroy or conceal records.

For the first time in Australia, we recommend the Houses of Parliament be brought within the scope of the Act. This has been a controversial component in the United Kingdom FOI Act, but I feel that the community should be able to have greater access to information about where their funds are going.

The FOI Act was amended in 2006 to provide for greater transparency around government contracts. This was an encouraging development, but it did not extend to State-Owned Corporations and Local Councils. This needs to change, and I have recommended that both of these groups be required to meet these contract disclosure requirements.

What has happened so far

The initial reaction to our report has been positive. In a press release signed the day the report was released, the Premier expressed his commitment to fix what he has described as a “broken” system. He also said that draft legislation will be before Parliament within the first session. I welcome that commitment. I hope the momentum continues and I look forward to working with the government to make it a reality.

What will happen in the future

It is up to the various State and Federal governments where we go from here. Technological advancements will continue to make it easier to access information very quickly and from anywhere. The systems in place to deal with access to government information must keep pace with these changes.

We currently exist with an uneasy combination of paper and electronic records. This will not be the case for long. Any new legislation and supporting systems have to deal appropriately with electronic records, particularly emails, which have proven problematic for agencies.

If they get the legislation right, and provide the needed support, allowing the community to access information will become far easier and more commonplace.

There is a broader benefit to getting access to information right. Government is called upon to make difficult, occasionally unpopular decisions. If the community are provided with some explanatory information and an opportunity to contribute, they are more likely to understand why decisions are made, even if they do not agree with them.

Looking again to initiatives in Queensland, the government has established a web portal to allow members of the public to take part in policy consultations quickly and easily. There are currently 11 open community consultations, dealing with topics as diverse as pipelines for drinking water, reducing car dependency, schools and both the Right to Information and Privacy Bills.

Conclusion

There are signs that various Australian governments are now willing to match three decades of talk with some form of action. However, we see actual change, Ombudsman, Information Commissioners, journalists, academics and commentators must continue to nudge and push governments in the right direction.

I have spoken of the need for strong leadership to bring about a change in culture, but this alone will not be enough. Greater openness and transparency have to become everyday principles and goals, a part of the landscape. If this does not happen, any move towards change will not outlast innovative or courageous Prime Ministers, Premiers or Chief Executives.

What will also assist is a change in all our thinking. It is time to stop thinking of this as about easier access to Government information. Instead, we ought be thinking about making what is in fact public information more accessible.

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