

Open Government and Freedom of Information

by
Geoff Gallop

Opening Address, FOI Conference,
Perth, 21 November 2019

MY TOPIC FOR TODAY

- OPEN GOVERNMENT
 - A people's right to know
 - A people's right to be involved
- FOI legislation and administration – what part does it play?

MY THEME FOR TODAY

- IT'S A CHALLENGING BUSINESS FOR THE DECISION-MAKER
- CHARACTER & JUDGEMENT REQUIRED

“Perhaps we have grown too fond of the false dichotomy between a government of laws and one of people, and have forgotten that laws do not enforce themselves, but are enforced by people”

(Prof. M.A. Cameron, 2019)

TWO WAYS OF LOOKING AT GOVERNMENT

“Open government is a contradiction in terms: you can be open, or you can have government”

Sir Arnold Robinson, Sir Humphrey's predecessor in Yes Minister.

TWO WAYS OF LOOKING AT GOVERNMENT

“Openness in government is the indispensable prerequisite to accountability to the public. It is a democratic imperative”

WA Inc. Royal Commission, Second Report

TWO VERSIONS OF OUR WESTMINSTER SYSTEM – (1)

- FOCUS ON
 - (i) ELECTIONS (legitimacy) and
 - (ii) THE EXECUTIVE (delivery)
- ACCOUNTABILITY COMES FROM
 - (i) PARLIAMENT AND ITS PRIVILEGES
 - (ii) POLICE AND THEIR POWERS
 - (iii) OCCASIONAL INQUIRIES

KEY IDEAS

- Getting things done
- Delivering for the people
- Confidentiality
- Ministerial responsibility
- Electoral democracy

TWO VERSIONS OF OUR WESTMINSTER SYSTEM – (2)

- Going beyond electoral democracy to “monitory democracy” (Prof. John Keane, 2011)
- Power is given on conditions and agencies created to guard these conditions and prevent abuse.
- AGENCIES OF ACCOUNTABILITY

Auditor-General, Ombudsman, Information Commissioner, Public Sector Commissioner, Inspector of Custodial Services, Corruption and Crime Commission, Parliamentary Inspector of the Corruption and Crime Commission, Commissioner for Children and Young People.

KEY IDEAS

- Getting things done properly
- Due process
- Transparency
- Trust
- Monitory Democracy

“PARTIES” AT THE TABLE OF GOVERNMENT

- On outcomes

Business and Productivity Party v Sustainability and Outcomes Party

- On process

Power and Control Party v Integrity Party

WORK-IN-PROGRESS

“At best these conflicts within the public sector represent a work-in-progress”.

“...the public interest remains intact as a question mark attached to all that we do”.

Geoff Gallop, “Balancing competing interests within the public sector” in Tom Frame (ed.) Who defines the Public Interest? (Connor Court, 2018)

FREEDOM OF INFORMATION – WHAT LIES UNDER THE DIFFERENCE?

CAUTION ABOUT DISCLOSURE

- Should governments have some “scrutiny free” space?
Thinking things through?
- Are some matters of state “out-of-bounds? Privacy?
- Is openness always good for democracy? Wartime?
National security?
- Can’t governments be pushed “off-track”? Responding rather than delivering? Time management?

WHAT LIES UNDER THE DIFFERENCE? SUPPORT FOR DISCLOSURE

Right to Information Act 2009 (Qld)

Parliament recognises that in a free and democratic society –

- (a) There should be open discussion of public affairs; and
- (b) Information in the government's possession or under the government's control is a public resource; and
- (c) The community should be kept informed of government's operations, including, in particular, the rules and practice followed by government in its dealings with members of the community; and

Support (2)

- (d) Openness in government enhances the accountability of government; and
- (e) Openness in government increases the participation of members of the community in democratic processes leading to better informed decision-making; and
- (f) Right to information legislation contributes to a healthier representative, democratic government and enhances its practice; and

Support (3)

- (g) Right to information legislation improves public administration and the quality of government decision-making; and
- (h) Right to information legislation is only 1 of a number of measures that should be adopted by government to increase the flow of information in the government's possession or under the government's control to the community.

TWO FORCES

- Governments responsible for the information they have and its use for security and welfare of the people.
- The Public with a democracy – endorsed “right to know” and be “involved”.

HOW DO WE FIND THE PUBLIC INTEREST?

“In relation to the decision-making in particular, the meaning of the term, or the objective of or approach indicated by the use of the term, is to direct consideration towards matters of broad public concern and away from private, personal, parochial or partisan interest”.

Chris Wheeler, [AIAL Forum](#), No 72

FIRST RULE OF FOI

In determining whether the disclosure would be contrary to the public interest it is irrelevant that it may

- cause embarrassment to the government
- cause a loss of confidence in the government
- cause the applicant to misinterpret or misunderstand the information.

RECOGNISING BIAS

- Politics – keeping the Minister happy
- Self Interest – not unsettling the hierarchy
- Organisational Interest – avoiding embarrassing revelations
- Bias may be “built in” and subconscious about, for example, the integrity of the Media.

THE PROBLEM REMAINS

“The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that ‘the public interest’ can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.”

High Court of Australia, McKinnon Case

FINDING THE BALANCE

- What does Parliament tell us?
- What does the Judiciary tell us?
- Lots of other “advisers” but the Legislature and the Judiciary set out the laws within which such advice is to be assessed.

WA LEGISLATION

- Seventeen (17) exempt ideas, nine (9) of which have a public interest test attached.
- Is the Parliament telling us that it is not in the public interest to disclose the 8 types of document without a test? [e.g. legal professional privilege].

THE OTHER EXEMPT DOCUMENTS

- Information not exempt if disclosure is, on balance in the public interest.
- Material relating to disclosure of deliberative process only exempt if disclosure, on balance, is contrary to public interest.
- A judgement call is necessary.

THE COURTS

“It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action”.

High Court of Australia, Fairfax Case

THREE QUESTIONS

- Should FOI legislation refer to “reasons for refusal” rather than “exemptions”?
- Reasons for Refusal – recognisable detriment or harm.

NSW Review of FOI Act, 2009

ANOTHER QUESTION

Should offence provisions be included in FOI Act?

- the placing of “undue pressure” on decision-makers in order to influence a determination
- for decision-makers who “wilfully fail to comply”

NSW Review, 2009; GIPA Act - Offences

A FINAL QUESTION

Should more information be provided to the public “as a matter of course”?

- Pro-active disclosure
- Publication Schemes
- Disclosure logs

FREEDOM OF INFORMATION FROM

