Freedom of Information - from the Age of Enlightenment to the Digital Age, and Beyond

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This paper provides an overview of the origins and operation of information access laws that apply to government-held documents. It discusses some contemporary issues and challenges that face such laws in the digital age and beyond, with particular reference to the *Freedom of Information Act 1992 (WA).*

A defining characteristic of most governments that prevailed well into the twentieth century was the tendency to protect, rather than share, information. This was the concept of 'arcana imperii' (state secrets) whereby information in the hands of government was not routinely shared with those outside government.[1] However, unwarranted secrecy surrounding government policy, decision or action has long been regarded as the antithesis of good government, with moves to address it dating from the eighteenth-century Enlightenment Age.

With the advent of the Information Age in the mid twentieth century *freedom of information* (**FOI**) law emerged as a key antidote to excessive state secrecy. FOI law is alternatively, more recently, sometimes called *right to information* (**RTI**) or *right to know* (**RTK**) law, and generically such laws are referred to as *information access laws.* Such laws are frequently promoted in functional democracies as a key mechanism for ensuring government accountability and transparency. Some information access laws explicitly state that government-held information and data are public assets, to be managed for public purposes.[2] A strong correlation between access to information and trust in government also underscores the accelerated growth in information access laws, particularly in the final two decades of the twentieth century.

The United States was the first modern democracy[3] to enact FOI law in 1966.[4] Australia and New Zealand followed in 1982.[5] WA enacted an FOI Act in 1992. Britain did not overturn official secrecy until the new millennium.[6] In 2020, over 120 countries across the world now have some form of information access law.[7]

In their most basic form, such laws generally provide a right to access government documents, subject to certain exemptions and/or exceptions, and often include a right to amend or correct personal information in government documents.[8] Reformed or recently enacted laws also place significant emphasis on pro-active disclosure of government information and data. Most information access laws seek to balance the right of citizens to information whilst also providing protection for some documents and/or information so that government can function effectively.

Today governments operate in an environment that is increasingly information rich and digitally enabled. This is often accompanied by, or leads to, changing citizen expectations of government services. It is now commonly understood that information and its control play a critical role in the relationship between governments and their citizens[9].

Considering the role and significance of information access laws in a functional democracy, this raises the issue of whether reforms are needed for such laws to remain relevant and effective in the digital age?

The development of information access laws across the world

During the eighteenth-century Enlightenment Age, Sweden and Finland enacted laws requiring their governments to provide citizens with the right to access official information and related rights to publish such information.[10]

The impetus for FOI laws in the US began in earnest in an era of increasing government secrecy during the Cold War with the Soviet Union. Senator John Moss, elected to Congress in 1952, began advocating for greater government openness following mass sackings of federal employees accused of being communists during the McCarthyism period. When Moss asked to see the records associated with the dismissals, the administration refused to hand them over. After Moss became chairman of a congressional subcommittee on government information in 1955, he held hearings about government transparency and conducted investigations into federal agencies withholding information. Newspaper editors, journalists, educators and scientists were among those who supported Moss's campaign against government secrecy, while many federal agencies and their leaders opposed it as being detrimental to their work. In 1966, after more than a decade of effort, Moss was able to gather enough support in Congress to pass the first United States FOI law.

President Lyndon Johnson, the US President at that time, initially believed the proposed FOI law would limit the ability of government officials to communicate and function effectively. Ultimately he agreed to the law and, upon signing the Bill, said that "*I sign this measure with a deep sense of pride that the United States is an open society*". [11]

However the initial US FOI Act lacked the necessary force to oblige federal government agencies to comply. It wasn't until 1974 (after the Watergate Scandal involving the Nixon administration and increasing public concern over the Vietnam war which peaked with the release of the Pentagon Papers) that Congress amended the FOI Act with a series of laws designed to promote greater accountability and transparency in government decision making.[12]

Despite these ground breaking developments in the US, a global tendency to default to state secrecy persisted for a long time, particularly in Britain which did not repeal its broad-reaching *Official Secrets Act 1911* until 1989.[13] In 1989, there were still only 13 national information access laws in the world. Britain finally enacted an FOI Act in 2000 but the government delayed its implementation so that it only became fully operational in 2005.

New Zealand was an early adopter of modern information access laws in 1982.[14] The NZ law provides that all government information is to be open unless there is "good reason" to protect it. Absolute exemptions or exclusions are minimal, and mostly relate to national security which must be established by those claiming such an exemption. Although the laws were initially met with alarm by some politicians and a large number of public servants, the prevailing contemporary view is that they significantly changed the culture of government to one of openness under which a great deal of information is now made public as a matter of routine and open government is now deeply ingrained.[15] In 2018 NZ took a significant step reforming the cabinet confidentiality exemption so that most cabinet records are now released after only *30 days* unless there is a good reason not to.[16] This is in stark contrast to the decades of protection for cabinet records under state and federal information access laws in Australia. As a world leader in FOI laws, this factor plays into a consistently high rating for New Zealand on various international indices that rank countries on transparency measures.

The development of federal FOI laws in Australia has been described as follows:

> *It was the passing of freedom of information legislation in the United States in 1966 and the growth of the consumer rights movement there that prompted a push for FOI legislation in Australia. It is a measure of the entrenched assumption of secrecy within government and bureaucracy (inherited, no doubt, from England) that it took a decade and half before FOI became law in Australia in December 1982.* [17]

Across Australia, FOI laws were often driven by major political events that raised significant public concerns about lack of transparency and corruption. Ricketson explains this as follows:

> *Federally, although the Act was eventually introduced by the Fraser Coalition Government, the initial impetus came from the Whitlam Labor government, which had spent 23 years in opposition during the Menzies era and beyond. In Victoria, FOI was introduced by John Cain (in 1982), whose Labour Party had been in opposition since 1955 and who was trenchantly critical of purportedly corrupt 'land deals' by the Liberal government in its final years. In New South Wales, Nick Greiner brought in FOI in 1989 after railing about endemic corruption within Neville Wran and Barrie Unsworth's Labor governments the 1970s and 1980s. In Western Australia, FOI was passed in 1992 in the wake of the Royal Commission into WA Inc, and in Queensland, Labor's Wayne Goss came to power after his party had been in opposition for 32 years. In the furore surrounding the institutionalised corruption revealed by Tony Fitzgerald QC, in his exhaustive inquiry (which concluded in 1989), Goss promised to unflinchingly implement Fitzgerald's wide-ranging reforms, which included freedom of information. In Tasmania, the independent Green MP Bob Brown seized the opportunity of the Green-Labor accord Government to push through FOI in the early 1990s."*

Changes in the field of administrative law during the 1970s and early 1980s also contributed to the development of Australian information access laws. The 'new administrative law' served to increase openness and transparency in government while also supporting public administration and the rights of individual citizens.[18]

First generation information access laws are often characterised by adoption of a 'pull model' in which the public must pull information out of the government system through an FOI request, subject to any relevant exemptions/exceptions applied by a government agency. Second generation information access laws more commonly adopt a 'push model' because they encourage or require agencies to push information out to the public through proactive release rather than discretionary access. Qld,[19] NSW[20] and the ACT[21] have clear 'push model' style laws which support broader pro-disclosure public sector information regimes.[22]

Despite jurisdictional differences, Australian information access laws share similar objectives that, at a minimum, provide a right of access to government-held documents that is intended to enhance government transparency and accountability.

WA FOI Laws

In Western Australia the *Freedom of Information Act 1992* (WA) (**FOI Act**) is regarded as a hybrid of the push and pull models. It operates to provide a discretionary right of access to documents of state and local government

subject to a valid access application being made (i.e. documents must be pulled out). However it also requires state and local government agencies to regularly publish an *information statement* describing i) what kinds of documents the agency usually holds and how they can be accessed; and ii) information that enables members of the public to participate in the agency's policy formulation and performance of its functions. The FOI Act also requires that an agency's internal manuals are to be made available to the public.[23]

The origins of the FOI Act lie in the 1992 seminal report of the *WA Royal Commission into the Commercial Activities of Government and Other Matters* which dealt with various political and financial scandals of the 1980s (commonly referred to as the 'WA Inc. Report').[24] In addition to numerous findings and recommendations that were particularly scathing of the lack of proper documentation for government decision-making and associated poor record keeping, the Commission referred to several fundamental principles of good government, including the 'trust principle'.[25]

The Commission identified three goals necessary to safeguard the credibility of democracy and provide an acceptable foundation for public trust and confidence in our system of government:

- government must be conducted openly;
- public officials and agencies must be made accountable for their actions; and
- there must be integrity both in the processes of government and in the conduct expected of public officials.

One of the key recommendations was that FOI laws be enacted in WA as a matter of priority. Other recommendations included a review of secrecy laws, establishment of an Administrative Appeals Tribunal and an anti-corruption body, implementation of whistleblowing procedures, increased powers for the Auditor-General, a limitation of confidentiality agreements in commercial dealings with government, and the establishment of an independent Archives Authority (which ultimately became the State Records Office).

A subsequent Commission on Government (**COG**) was established in response to the recommendations of the Royal Commission. COG delivered a report in 1995, Part 2 of which addressed topics of open government, accountability and the administrative

system. In connection with 'open government' the COG Commissioners noted the importance of public access to information in the democratic process.[26]

In the Commissioners' view, information is the key to accountability and, to fulfil that purpose, information of or about government must be made *optimally* available or accessible to the public and it must have *integrity*.[27]

The emphasis on '*optimally'* available recognised that official secrecy does have a place in the conduct of government. However, openness should be the norm, with secrecy as the exception. Regarding the '*integrity'* of information, the Commissioners explained that government information must give a proper picture of the matter to which it relates. It must not aim to mislead or to create half-truths.[28]

The WA Inc. and COG Reports significantly enhanced government accountability and transparency by championing the introduction of the FOI Act, the *State Records Act 2000* (WA) and other measures.[29]

The FOI Act became operative in 1993. The Preamble says it is *"(A)n Act to provide for public access to documents, and to enable the public to ensure that personal information in documents is accurate, complete, up to date and not misleading, and for related purposes".*[30]

The objects of the FOI Act are to enable the public to participate more effectively in governing the state, and make the persons and bodies that are responsible for state and local government more accountable to the public.[31] The WA Supreme Court has stated that these objects:

> *"form the essential bedrock of open, democratic government. Their policy importance … cannot be overstated."*[32]

The FOI Act creates a general right of access to government-held documents, subject to limitations in the Act including exemptions for documents containing certain types of information.

During the second reading speech in 1991 the Hon. David Smith, the then Minister for Justice, explained how the exemptions and, more broadly, the Act were intended to work:

> *"Although the public has an interest in access to information, they also have an interest in the proper functioning of government and in protecting the privacy of individuals and the commercial interests of business organisations. The Bill is intended to strike a proper balance between competing interests. Schedule 1 contains a limited number of clearly defined exemptions necessary to protect certain essential public and private interests. However, even where an exemption may apply, it is not a prohibition on disclosure; where they can properly do so, Ministers and agencies are free to make that information available. In addition, most exemptions incorporate a public interest test which specifically requires a consideration of the public interest in disclosure. The Bill further protects the privacy of individuals and the commercial interest of businesses about whom the Government hold information by ensuring that documents containing personal or business information about third parties is not given out without the third party being consulted."*[33]

After almost 30 years since its enactment, the FOI Act remains largely unchanged. Access to thousands of government documents has been given both within and outside of the FOI process over that time. During 12 months over the 2019/20 financial period there were more than 18,000 access applications made to WA

state and local government authorities. Over half of these access applications were for personal information held by health-related agencies (a trend similar to that seen in many other jurisdictions). Almost 90% of all access applications resulted in the applicant receiving full or partial access to the requested documents. Only less than one per cent of those agency access decisions were reviewed by the Information Commissioner. On those measures, the FOI Act appears to serve the community reasonably well.

However, recent national data provided by Australian Information Commissioners and Ombudsmen administering FOI/RTI laws about how such laws are used also reveals some other interesting trends.[34] Since 2014 WA has consistently had the highest rate of formal access applications per capita, one of the highest rates of full or partial access to requested document/s and the lowest rate of external review application in Australia. Whilst no published commentary is yet available to explain these trends the possibility exists that the high rate of use of the FOI Act to successfully obtain non-contentious information may be due to an overdependence on the formal processes of giving access to documents pursuant to the FOI Act as opposed to simpler, less costly and more timely, administrative or informal access obtained outside of the FOI Act.

Information access laws in the Digital Age and beyond

A 2018 survey highlights rising levels of e-government internationally.[35] Governments are, increasingly, large collectors and repositories of digital data. The use of big data for automated decision making is also becoming more common. Australia is no exception to this global digital trend.

Accompanying digital transformation there is a growing demand for transparency around government use of technologies - particularly in respect of artificial intelligence (**AI**) or machine learning - and accountable management of vast data pools particularly those containing personal or private information. The increasing proliferation of digital records and data also raises the issue of how we readily locate useful and relevant data. These are just some of the contemporary challenges for information access laws.

Many years ago Marie Shroff, a former NZ Privacy Commissioner, forecasted that information access laws must keep pace with, and embrace the development of, new and emerging technology as society moves into the digital age. She suggested that the challenge is to harness these new technologies to better serve the democratic ideals that underpin information access laws.[36]

The increasing relevance of information access and privacy laws in this digital paradigm was also the subject of a 2019 article examining how trust in government can be maintained at a time of significant digital disruption. The author observed:

> *As digital government begins to take shape, the public sector is entering a new era of citizen expectations. Emerging technologies offer opportunities for collaboration, information sharing and data analysis, all of which can support better policy and services. But there are growing public concerns about privacy and security; questions about ownership and appropriate use of personal information. Is open government still relevant? Governments worldwide are striving to maintain public trust at a time of significant disruption. Agencies are under pressure to be more transparent about their actions and decision-making processes.*[37]

The author went on to consider some of the challenges and opportunities in this changing environment:

> *Open government has never been more critical for meeting customer expectations, building confidence and delivering public value. … Information governance by-design can play an important role in overcoming challenges and supporting reform, reducing the cost and complexity associated with both proactive and responsive information release.*

All Australian states and territories, other than Western Australia and South Australia, have privacy legislation governing the handling of personal information. Some also have data-sharing legislation. While the FOI Act provides some limited protection for personal information and a right to amend personal information in government records, it is not a comprehensive privacy framework.

Proposed privacy and data-sharing legislation for WA appears to be on the government's agenda. It was the subject of a public discussion paper developed by the Department of Premier and Cabinet in 2019. To date the Government has yet to decide upon the timing and form of those proposed laws.[38]

So, even with the prospect of enhanced protection for personal and private information in WA, the issue arises whether the FOI Act can continue to fulfil its democratic objectives at a time when most, if not all, documents will be 'born-digital'?

Marie Shroff considered the possibility that digital technology has the potential to open up and facilitate information access to achieve a truly participative democracy. She suggested that future FOI reform must focus on the digital environment and practical problems of compliance, such as multiple versions of a document and the administrative burden of FOI requests.[39]

Proliferation of digital records is already an issue of significance. That trend will only continue such that questions about what records we create, retain and make accessible will assume far greater importance than ever before. It therefore seems obvious that document governance must be at the front of mind in the digital age if we are to make sense of, and hold accountable, government decision-making.[40]

Others also point out that when the opportunities of the digital age combine with a willingness to be more transparent that this allows for a more authentic and deeper form of engagement with the community and citizens.[41] Some countries, like Taiwan for example[42], have already seized upon these opportunities with significant success particularly in response to the challenges presented by the current Covid-19 pandemic.

While proactive information and data disclosure occurs in some parts of the WA public sector[43] the concept of 'open by design' - in which non-sensitive government information and data is, by default, made open and accessible from creation – is not embedded in any state-wide information management policy or information access law.

Whatever legislative or policy reforms emerge in the future, it would be in keeping with the current objects of the WA FOI Act for the public sector to further embrace open and transparent government by proactively pushing out (at no or low cost) more administrative and scientific data, and other non-sensitive digital information, which is both interactive and searchable. The availability of such information would have numerous benefits. It would assist in the legibility and accountability of government decisions thereby engendering public trust; and provide opportunities for new insights, new services and even other benefits that the most enlightened and creative thinkers have yet to imagine.

In that environment, a formal FOI access request to access government - held documents would be a last resort reserved for the more contentious or sensitive information where a balancing of the applicable exemptions and public interest factors under the FOI Act is required.

Endnotes

1 '*Too much of a good thing? Balancing transparency and government effectiveness in FOI public interest decision-making*', Danielle Moon and Carolyn Adams, AIAL Forum no. 82, at pp. 28 – 39.

2 For example, see clause 1 (b) in the Preamble to the *Right to Information Act 2009* (Qld) and the Objects clause in section 3(3) of the *Freedom of Information Act 1982* (Cth).

3 The US laws were preceded by a much earlier law enacted in Sweden in 1766 that required government to make information available to the press to enable it to report on the affairs of State to its citizens.

4 The *Public Information Act 1966* (US) - When the two-page bill was signed into law, it was enacted July 4, 1966, but had an effective date of one year later being July 4, 1967.

5 The *Freedom of information Act 1982* (Cth); and the *Official Information Act 1982* (NZ)

6 The *Freedom of Information Act 2000* (UK)

7 Source: https://www.article19.org/issue/access-to-information/ accessed on 14.10.2020.

8 In WA, s. 10 creates a right to access documents of an non-exempt agency (subject to and in accordance with the FOI Act) and s.45 of the FOI Act creates a right to apply to amend personal information in documents of an agency if the information is inaccurate, incomplete, out of date or misleading.

9 *Freedom of Information and Privacy in Australia: Information Access 2.0*, Patterson Moira, 2015, Reed International Books Australia Pty Ltd trading as LEXIS-NEXIS at p. 1

10 The principal proponent of the Swedish laws was Anders Chydenius (1729-1803), a member of the political establishment, who advocated for openness and good governance in government.

11 In his signing statement LBJ attempted to downplay the new FOI law by focusing on the exemptions for national security and the Act's scope for interpretation. However the last sentence of his statement is the most enduring: sourced from https://www.history.com/topics/1960s/freedom-of-information-act on 15.10.19.

12 The *Government in the Sunshine Act 1976* was one of these amending acts that provided, with ten specified exemptions, that 'every portion of every meeting of an agency shall be open to public observation'. It applied to the operations of the federal government, Congress, federal commissions, and other legally constituted federal bodies.

13 The *Official Secrets Act 1911* made the unauthorised disclosure of *any* information on any subject an offence. This remained the law until the early 1970s. Very piecemeal progress towards granting citizens access to certain or select kinds of government information began when FOI bills were introduced into the Parliament in 1978, 1981 and 1992 but which were either defeated or fell away on each occasion. In 1997 the government published a white paper on *Your Right to Know*.

14 *Official Information Act 1982* (NZ)

15 Paper presented to the FOI Live 2005 Conference in London, 16 June 2005, entitled '*The Official Information Act and Privacy: New Zealand's Story*' by Marie Shroff (former Cabinet secretary and NZ Privacy Commissioner) accessed at https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/newzealand/official_info_act_privacy_newzealand_story.pdf.

16 'In confidence' cabinet submission papers for decisions taken as recently as last week are marked "proactively released".

17 Ricketson, M 1996, 'Freedom from Information', *Freedom of Information Review*, 63, pp.26 – 28.

18 G Terrill, *Secrecy and openness: the federal government from Menzies to Whitlam and beyond*, Melbourne University Press, Melbourne, 2000; and M Paterson, *Freedom of information and privacy in Australia: Government and information access in the modern state*, Lexis Nexis, Chatswood, 2005, p. 4.cited in Dr Mark Rodrigues, Cabinet Confidentiality (28 May 2010) at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/CabinetConfidentiality

19 *Right to Information Act 2009* (Qld)

20 *Government Information (Public Access) Act 2009* (NSW)

21 *Freedom Of Information Act 2016* (ACT) – this is the most recent FOI law but it only became fully operative in 2018. It has a clear emphasis on open access and pro-disclosure of government information in the ACT.

22 Note that the *Freedom of Information Act 1982* (Cth) has been partially modernised in this way since it was amended in 2009/2010.

23 These are manuals used by the agency in connection with the performance of its functions that affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public may be entitled or otherwise subjected to.

24 The Royal Commission was established in 1990 to examine, inter alia, the commercial dealings of the Brian Burke Labor Government.

25 The 'trust principle' was described by the Commissioners as being the principle that the institutions of government, and the officials and agencies of government, exist for the public to serve the interests of the public.

26 The COG Commissioners referred in this regard to the 1980 High Court case of *Commonwealth of Australia and John Fairfax & Sons Ltd* **(**1980) 32 ALR 485 at 493 in which the then Chief Justice said: *"…. 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 in that information is that it enables the public to discuss, review and criticise government action."*

27 At [2.1.10] of the COG Report.

28 Recommendations 1 and 2 of Chapter 2 of the COG Report on 'Open Government'

29 These measures included the creation of the *Public Sector Management Act 1994*, a public sector standards commissioner and public sector commission and later enhancements to the Auditor General's Act 2006.

30 The FOI Act also informs the way that FOI and information access is practiced by agencies.

31 Section 3(1) contains the objects section. Section 3(2) provides for how the objects of the Act are to be achieved. See also further s.3(3) which provides that nothing in the Act is intended to prevent or discourage the publication of information, or the giving of access to documents, or the amendment of personal information, otherwise than under the Act if it can properly be done or is permitted or required by law to be done.

32 Martin J in *Water Corporation v McKay* [2010] WASC 210 at [38] available online at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WAICmr/2009/35.html.

33 Hansard 28 November 1991, at p. 7170.

34 Refer to Metrics 2, 3 and 6 in the National Metrics on FOI Use sourced on 15.10.20 at https://www.oic.wa.gov.au/Materials/OpenGov/OpenGov_Metrics5.PDF#page=5.

35 United Nations E-Government Survey 2018 Report of the UN Department of Economic and Social Affairs, *Gearing E-Government To Support Transformation Towards Sustainable And Resilient Societies*, accessed at https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2018-Survey/E-Government%20Survey%202018_FINAL%20for%20web.pdf on 16.10.19.

36 See n.14 above.

37 S. Sherman, **'***How Can The APS Maintain Trust At A Time Of Significant Disruption?'*, Mandarin Online, https://www.themandarin.com.au/103784-open-government/ 11 February 2019

38 Information about the progress of this project is available at https://www.wa.gov.au/government/privacy-and-responsible-information-sharing.

39 See n.14 above.

40 See the WA State Records Office 2018 publication '*Born Digital – Managing Government Information and Data*' available online at http://www.sro.wa.gov.au/sites/default/files/born_digital.pdf.

41 *Opening Government – Transparency and Engagement ion the Information Age* published by ANU Press, 2018, edited by Wanna J. and Vincent, S. at page 14.

42 See *Hacking the pandemic: how Taiwan's digital democracy holds COVID-19 at bay* https://theconversation.com/hacking-the-pandemic-how-taiwans-digital-democracy-holds-covid-19-at-bay-145023 accessed on 22.1.21.

43 For example see the WA Open Data Portal at https://data.wa.gov.au/Blog/open-data-portal.