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EDUCATION DEPARTMENT OF VICTORIA

SCHOOL LIBRARY ASSOCIATION OF VICTORIA

THE HOUSDEN LECTURE 1983

MELBOURNE, TUESDAY 6 SEPTEMBER 1983

INFORMATION AND FREEDOM

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INFORMATION AND FREEDOM

The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission
Member of the Administrative Review Council *

KNOWLEDGE GOVERNS IGNORANCE

I am privileged to be invited to deliver this annual lecture. My predecessors have included distinguished educationalists from many countries : James Maxwell of Oregon University, Perry Maxwell of Portland University and Sir Zelman Cowen, lawyer and educationalist. I am no expert in education, though I have had an unconsciounable lot of it in my time. Indeed, my education continues daily. I endeavour to repay my debt to my teachers by a small contribution to community legal education.

Reflecting on the appropriate subject for this address, I tarried for a time at the prospect of reviewing and updating my views on libraries in society, first offered as the opening speech of the 19th Biennial Conference of the Library Association of Australia in Hobart in August 1977.[1] But that, I thought, would be too obvious a subject to choose for this talk. Furthermore, the relentless John Ward decided to relieve me of the quandary of choice by assigning for me an essay:

> I invite you to present the lecture this year on Information and Freedom or an appropriate title.

So that is the topic I have 'chosen'. As usual, John Ward is most perceptive. In the year of the commencement of freedom of information legislation in Victoria[2] and the spread of the same principle in other parts of Australia, it is timely to review the worldwide moves for freedom of information (FOI) and where they are taking us.

The legislation which has been enacted in Victoria and at a Federal level in Australia[3] traces its lineage to Swedish legislation of the early 19th century. But even before that legislation was passed, one of the founding fathers of the American Republic, James Madison, asserted the basic philosophy which underlies FOI laws:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.[4]

The Swedish legislation was copied in 1966 in the passage of the United States Freedom of Information Act of that year. By that Act the Congress made a commitment to asserting the right of the public in the United States to gain access to government information. In the wake of Watergate, the commitment of 1966 was reinforced in 1974 when the Congress enacted a series of amendments introduced by Senator Kennedy. These were designed to eliminate a number of the procedural barriers that had frustrated the public and the press in their attempts to obtain government information. The amendments also closed a number of loopholes, most notably in the areas of national defence and law enforcement, that had been used to justify excessive restrictions on disclosures. The 1974 amendments were the direct outcome of public and political revulsion at the disclosed activities of government during the Nixon presidency. The Pentagon Papers, Watergate, the ITT scandal and domestic intelligence activities demonstrated to the Congress the need for a policy of openness as a legislative protection to inquisitive citizens — always the enemies of secret and oppressive government.[5]

Even before these 1974 developments in the United States, in 1973 a United States expert was brought specially to Canberra to advise the Whitlam Government on the American experience with FOI, with a view to the adoption of similar legislation in Australia.[6] There then followed nine years of deliberation by interdepartmental committees and, later, by the Parliament. During that nine years a number of other laws were passed which enhanced the access by people affected by Federal administrative decisions, to the public service files about them. I refer to the creation of the Administrative Appeals Tribunal with its wide powers of access to official information, the creation of the Commonwealth Ombudsman, also with wide powers of access, and the passage of the Administrative Decisions (Judicial Review) Act 1977. That Act contains an important provision[7] which entitles persons affected by discretionary decisions of Commonwealth officials under laws of the Commonwealth to have access to the critical information upon which the decision was based.

Indeed, the Act requires the very creation of a statement of reasons for the decision in order to facilitate the scrutiny by the courts of the lawfulness and fairness of the conduct of the public officials involved.

All of these were important developments. They were reinforced in the developments of the common law in Australia by decisions of the High Court which enhanced the declared rights of the courts to examine claims by the Executive Government to privilege against disclosure of official documents.[8]

Yet none of these developments was of the importance and magnitude of the Federal Freedom of Information Act. It came into operation on 1 December 1982. Its Victorian counterpart, developed upon similar lines but with different machinery and somewhat broader rights, came into force on 5 July 1983. Clearly, it is too soon to evaluate these two statutes. The time is too short. The experience is too brief. The information available is too scanty. The sample is too small. However, on the brink of further developments in this sphere, it is timely to pause and reflect upon where we are going. It is also important to see our Australian developments in the context of similar moves in like countries.

That, then, is the purpose of this lecture. It is to review, in respect of freedom of information laws, where we are and where we may be going.

DEVELOPMENTS OVERSEAS

United States of America. First, it is useful to examine developments overseas. In the United States, which has proved the vehicle for importing freedom of information laws into the English-speaking world, moves are afoot to cut back the Freedom of Information Act. Senator Edward Kennedy asked recently 'Is the pendulum swinging away from Freedom of Information?' His reference was both to initiatives for amendment of the Act proposed by the Executive Government and also decisions on the Act by the Supreme Court of the United States.

The competing demands of open government and national security are always particularly difficult to reconcile. In Haigh v Agee[9], the Supreme Court of the United States held that the Secretary of State could revoke the passport of a former CIA agent who was pursuing an announced campaign 'to expose CIA officers and agents to take measures necessary to drive them out of the countries where they are operating'. The Supreme Court held that the freedom to travel abroad was, in the United States, subordinate to national security and foreign policy.

The court held that the former CIA agent's conduct was not protected by the free speech guarantee of the American Constitution because it had 'a declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel.'[10] As Senator Kennedy commented:

> Few Americans, and none of the Justices (not even the dissenters) found Agee's activities admirable. However, cases involving unpopular causes often have been at the cutting edge of First Amendment [free speech] jurisprudence.[11]

The United States Freedom of Information Act permits an agency to withhold investigatory records compiled for law enforcement purposes but only to the extent that production of such records would 'dislose the identity of a confidential source'. The drug enforcement administration in the United States has claimed that 40% of requests received by it under the Freedom of Information Act come from convicted felons. It asserts that many of them are seeking information with which to identify the informants who helped to convict them.[12] These claims are easily made. But Senator Kennedy was not convinced:

> So far, no convincing demonstration has been made that existing FOIA exemptions and safeguards inadequately protect these ligitimate objectives of the law enforcement and national security agencies. ... While such fears cannot be ignored, they cannot be used to eliminate public access to non-classified information. ... The value of the FOIA is easy to establish. The FOIA facilitated public access to the Army study of the 1968 massacre at My Lai. Significant misuse of IRS powers in investigating political dissentients was revealed in documents obtained through the FOIA. Much of the evidence used by the government in prosecuting Spiro Agnew for tax evasion was obtained through FOIA requests. More recently an FOIA disclosure of certain Air Force audits revealed that the Federal Government had paid millions of dollars in defense contract lobbying expenses. ... But crime at home and intelligence failures abroad — in Cuba, Afghanistan, Iran and elsewhere — were not the result of FOIA disclosures or of restraints imposed on intelligence agencies to prevent improper conduct. In our haste to combat crime and enhance national security, we must not unjustly blame the FOIA and thereby undo the hard-won reforms of the past two decades which have fostered a welcome and overdue openness in government. The basic strength of America's experiment in freedom is the dynamic quality of domestic debate. In every age, those of limited vision have urged secrecy and pleaded national security. But the bold vision of the Constitution ... has prevailed. Public access to government information is a cornerstone of democratic institutions. Public business is the public's business.[13]

Canada. Concurrent with the commencement of the Victorian freedom of information legislation, the long-awaited Canadian Access to Information Act came into force. The Act gives any Canadian citizen or permanent resident of Canada the right to examine or obtain copies of records of a Federal Government institution, except in limited and specific circumstances. Before the Act came into force, such people did not have a right to information contained in Federal Government records, although often it would be provided on a voluntary basis because of political accountability. From 1 July 1983, if information is requested and is not exempted or excluded by the Act, the government institution in Canada is obliged by law to provide access to it. The burden of proving that information is exempt rests with the government agency.

A fee of $5 is charged to start the process of obtaining information under the new law. This sum must be paid on request. In addition, the applicant must pay for time in excess of five hours spent in processing a request, as well as for any copying and computer processing time involved. If the costs are considerable, the applicant is to be notified before costs are incurred and he may then be asked to make a deposit. The government agency has 30 days within which to respond to the request. If there is a large number of records or if the request is complicated, the agency can extend the time limit, but must inform the applicant that it has done so.

To deal with complaints about the operation of the Canadian Act, an Information Commissioner has been appointed. People dissatisfied can complain to the Commissioner if they believe they have been wrongly denied access to information or if the response takes too long or costs too much. If after complaining they are still unable to obtain the information wanted, they can take their case to the Federal Court of Canada. The Access to Information Act is accompanied by a Privacy Act to enhance individual rights of access to records about himself.

The President of the Canadian Treasury Board, Mr Herb Gray, declared that the coming into force of the new legislation marked a 'new era' in the field of government information in Canada. He undertook to approach the implementation of the new legislation in a 'very positive way'.[14] Opposition spokesmen queried the policy as 'smoke and mirrors'. But the Minister of Justice, Mr Mark MacGuighan, declared that the Canadian legislation was founded on three principles:

* that Canadians should have a right of access to information in government records;
* that exceptions to that right of access should be as limited and specific as possible; and
* that government decisions on disclosure should be subject to independent review — first by the Information Commissioner and subsequently, where need be, by the courts.

Early reports on the operation of the new Canadian legislation appear to give the lie to the critics who suggest that such legislation will result in government agencies being inundated by troublemakers making expensive and worthless enquiries. According to a report[15] only 95 requests were received during the first month of operation of the Canadian law. Forty percent of these were from the media. During the same period, 621 requests were received under the Privacy Act by individuals seeking access to data about themselves.

New Zealand. In New Zealand, the Official Information Act also came into force on 1 July 1983. According to hopeful reports, the legislation will 'lift the wraps on ... long suppressed government documents'. No sooner was the legislation in force than media interests rushed to apply for politically sensitive documents that had been refused before the legislation was enacted. For the first time, the Social Welfare Department supplied an up-to-date copy of its staff manuals on the approach to be taken to unemployment benefits. Positive responses were also acknowledged from a number of other departments, leading an unnamed journalist in the New Zealand Herald to conclude:

> Strong indications have come from various levels within the public service that requests for specific information have far greater chances of success than requests for documents. The common view among officials, who have been gearing up for today's introduction of the new information system, appears to be that bald requests for a document are more likely to be idle and vexatious than those which identify the information sought.[16]

Within a short time of the implementation of the New Zealand legislation, however, the Chief Ombudsman, Mr George Laking, speaking at Waikato University, offered a number of criticisms. The Official Information Act, he said, contained many 'inappropriate or unnecessary reasons' for withholding information. Mr Laking is certainly in a key position to make that judgment for he has to evaluate disputes when they arise. Under the New Zealand legislation, it is for the Ombudsman to make a recommendation to the Minister in the event of a dispute. But the final decision is left to the Minister and is not committed to an independent court or tribunal.

Mr Laking, in his Waikato address, pointed out that the Ombudsman's function had always been to extract information from government departments and agencies and to convey it to people who had complained. But since the new Act came into force on 1 July 1983, the Ombudsman's task had been made profoundly more difficult:

> It is an extraordinarily complex piece of legislation. ... Moreover, despite my strong representations to the Select Committee, the legislature has left in place all the innumerable prohibitions against the disclosure of information to be found in other Acts and Regulations. The large majority of these, in my opinion, could have been repealed as being no longer appropriate or necessary. To me, their continued existence can only act as a disincentive to government departments and others to test their attitudes towards the release of information against the objective, principles and criteria set out in the new Act.[17]

Interestingly, the New Zealand Official Information Act brings government Ministers for the first time within the jurisdiction of the Ombudsman. Although the Ministers have the final say over whether official information will be released, a significant change under the Act is that an Ombudsman's recommendation becomes effective unless, within a specified period, the relevant Minister overrides it. Another change introduced during legislative discussion of the New Zealand Bill was to the effect that the Minister's decision and the reasons for it have to be published, instead of simply being conveyed confidentially to the Ombudsman. In this way, it is hoped, a proper balance will be struck between the power of the Ombudsman and the accountability of the Minister, should he prove too secretive.

AUSTRALIAN DEVELOPMENTS

New South Wales. The developments in the United States, Canada and New Zealand are now reflected by important moves in our own country. In New South Wales, the Governor (opening the Budget Session of the State Parliament on 16 August 1983) announced that a State Freedom of Information Bill would be introduced before the end of the year. The introduction of such legislation in the State of New South Wales was recommended in 1977 by Dr Peter Wilenski. Dr Wilenski presented a draft Bill to the government as an aspect of the improvement of government administration in the State. In 1982 Dr Wilenski revised his draft Bill and, to the acute embarrassment of the government, the Opposition introduced that revised Bill into the Parliament in order to test the government's intentions. Those intentions have now been clarified. According to reports, the NSW Premier's Department has prepared a Cabinet Minute which is now being circulated for the scrutiny of Ministers and their officers.

The State Premier, Mr Neville Wran, indicated that New South Wales would follow the Federal and Victorian Government in the passage of FOI legislation. He said that Cabinet material would not be available to the public, nor would personal files held by the police. The legislation would provide access to the information on which government departments and statutory authorities made decisions. For example, it might be possible to request the minutes of meetings of bodies such as the Electricity Commission. The revised Wilenski Bill provided 21 days for government departments and authorities to respond to requests for information. It exempted all Cabinet material and materials that would affect the privacy of an individual, trade secrets and the like.[18] We must await the exact design of the New South Wales law. However, the firm commitment given in the statement of the government's program indicates that we will not have to wait long.

Victoria. The passage of the Victorian legislation and its coming into force on 5 July, has introduced a revolution, peaceful but profound, in government information practices in this State. The early statistics on the Victorian legislation suggest that relatively few claims have been made in the first weeks. However, it is predicted that, as public interest groups, journalists and individuals become more aware of their rights and more adept in arguing against the use of exemptions, the pressure on administrators will increase.[19] An unnamed bureaucrat is alleged to have said 'Anonymity is gone. We are in the age of accountability'. Another said 'The government has not allowed loopholes to allow public service to hide... We have to live with that'.[20]

Early developments in the Victorian legislation include:

* Charges. Comments on the charges made, which are generally higher than for access to documents under the Federal law. For example, the Victorian charge of $5 for every 15 minutes of a search for documents compares to $3 under the Federal Act.[21]

* Ambit. Various gaps in the coverage of the legislation now seem set to be closed. For example, Victoria's 211 municipal and shire councils are to be brought into the ambit of the Act by amendments to the law expected to be introduced in the Victorian Parliament in November 1983. In 1982 the local government bodies argued successfully with the State Government that they should be excluded initially from the provisions of the Act. Their immunity will apparently prove temporary.[22] Similarly, when it was discovered that the State Insurance Office had slipped out of the net of the Freedom of Information Act, steps were introduced to ensure that similar exemptions were not granted without reference to officials expert in FOI.[23] Fortunately, the government was alerted to the exemption clause in relation to the SGIO before the Bill was enacted by Parliament and the exemption was withdrawn in the Legislative Council.

* Trade secrets. Business commentators have indicated that there is little to fear in the Victorian Freedom of Information Act. In the United States, this legislation has sometimes been used to secure commercially valuable information supplied to government by business competitors. However, section 34 of the Victorian Act exempts any document which would disclose information acquired from 'a business, commercial or financial undertaking' if the information relates to trade secrets or other matters of a business, commercial or financial nature or if the disclosure would be likely to expose the undertaking to disadvantage.[24] Indeed it is now being pointed out that companies which compete against public sector enterprises will have a better chance of getting useful information through FOI because the law is specifically directed at giving access to government documents.[25]

* Educational secrets. Perhaps the noisiest critics of the new law have been educational bodies, fearful that the legislation would be used by students and staff to demand access to information previously regarded as secret. At the outset, it should be said that in the first six months of operation of the very similar Federal laws, the educational authorities in Canberra, subject to those laws, received very few demands under them.[26] The Secretary to the Australian National University is reported as saying that the university had handled only one request for information during the first six months of the Federal Act. Staff had processed a number of initial enquiries from people who thought they needed recourse to the legislation. However, because the university had always had a fairly open attitude, this material was available through normal channels. No additional staff had been added to handle the FOI workload.[27] Despite the soothing words, tertiary institutions in Victoria were reported, on the eve of the commencement of the Victorian legislation, to fear that the new Victorian Act could place heavy demands on their limited staff and financial resources. The Registrar of Melbourne University reportedly said that the main problem was that the legislation had been drafted for large government departments rather than tertiary institutions.[28] Access to examination script books was one of the 'hazy' areas under the Act. At the moment the university destroys the 30,000 books each year. Will they now have to be kept against the possibility of occasional demands for access?

* School secrecy. If that problem seems great, it pales by comparison to the prospect of thousands of Higher School Certificate students seeking access to their examiners' reports.[29] However, opinions have been expressed that exam papers and examiners' comments are likely to be exempt until the marking

process and appeal time is over. The Executive Secretary of the Victorian Institute of Secondary Education, Dr Lindsay Mackay, has said that the Institute has legal advice that it is still allowed to withhold information under the new Act because of secrecy provisions in the Victorian Institute of Secondary Education Act 1976.[30] Time will tell whether this view of the Victorian legislation will be tested.

Federal. The Federal legislation in Australia came into force on 1 December 1982. Between 1 December 1982 and the end of June 1983, a total of 5,593 applications were made under the Federal Freedom of Information Act.[31] The number of requests reported by agencies between December 1982 and June 1983 are as follows:

December	735 by 87 agencies
January	605 by 77 agencies
February	709 by 78 agencies
March	772 by 85 agencies
April	640 by 60 agencies
May	1154 by 75 agencies
June	978 by 80 agencies

These figures represent an average of 799 requests each month. The majority of requests reported by agencies were directed to client-oriented agencies of the Commonwealth. In fact over two-thirds of the applications made were in this order. In this way the Australian Federal figures reflect the position in Canada, indicating that claims in the nature of privacy claims (ie access to one's personal records) far outnumber claims of a general character of access to public documents of a governmental nature. The statistics for the four major Federal departments are as follows:

Department	Dec 82	Jan 83	Feb 83	Mar 83	Apr 83	May 83	Jun 83	Total
Social Security	189	133	173	199	133	184	166	1177
Taxation	103	104	152	186	153	267	168	1133
Vet Affairs	62	63	82	109	95	358	282	1051
Immigration and Ethnic Affairs	69	43	73	61	63	77	76	462

Other agencies reported to be receiving a significant number of requests include the Department of Defence, the Australian Federal Police, the Department of Health, the Department of Home Affairs and Environment, the Australian Public Service Board and the Attorney-General's Department. I understand that more detailed figures are to be supplied in the Attorney-General's Annual Report on the Freedom of Information Act.

I hope that this will be so. It is vital that someone or some agency in Australian Federal administration should be closely monitoring the experience under the FOI Act. In Australia, too often we pass legislation and then assume that it will have the result which the designers intended. There is very little monitoring of Federal legislation to evaluate its precise effect. The Family Law Council monitors the Family Law Act. The Administrative Review Council monitors a number of administrative laws. But the latter body does not have the resources, or possibly the statutory power, closely to examine the directions and patterns emerging from the multiple FOI claims on the Federal administration in Australia. The Attorney-General's Department is collecting statistics from Federal agencies, month by month. These statistics will provide a very useful basis for evaluating the overall impact of the new law. It is essential that adequate resources should be given to the study of patterns and directions. Otherwise, the preventative value of legislation of this character would be lost, in a concentration of effort on simply responding to individual claims. We should aggregate experience and draw lessons from it. For example, a persistenly recalcitrant government agency (I will not name one — if it exists) continuously reversed on appeal, should have its attitudes drawn to political and public attention so that they can be corrected, to bring even the most obdurate official into line with the new policy.

Under the Federal legislation in Australia, for various constitutional reasons, review of contested decisions to reject a claim to access under the FOI Act lies ultimately in two independent tribunals. These are the Administrative Appeals Tribunal and the Document Review Tribunal. The latter tribunal is comprised entirely of Federal Court Judges. It has been announced that it will be terminated and its jurisdiction merged in the FOI jurisdiction of the Administrative Appeals Tribunal (AAT). That tribunal is an independent body headed by Federal Court Judges. But it also comprising other persons with relevant background and experience at a high level. Already, the AAT is marking out for itself an important role in the interpretation and application of the Federal law. A stream of decisions is now emerging from the AAT to clarify the new legislation. I now turn to some of these:

During the period 1 December 1982 to 29 August 1983, there have been 105 applications to the Administrative Appeals Tribunal (AAT):

* 19 have been finalised
  ** decisions have been made in 6 of these cases
  ** the remaining 13 were withdrawn

* 6 cases have been heard and presently stand reserved for decision
* 12 cases have been deferred
* 2 cases were referred by the AAT for hearing before the Document Review Tribunal
* the remaining cases were part heard or in preparation for a preliminary conference procedure provided under the AAT legislation.

In the light of these figures, a number of comments can be made:

* Recourse to the AAT for challenge appeals has not been great. The 105 applications represent less than 2% of the total requests made under the Federal FOI Act. The fear of a flood of litigation in the AAT has, so far, not borne fruit.
* The relatively high number of applications withdrawn can be explained partly because agencies have conceded a number of the early cases where one of the grounds in issue had been whether access should be granted to 'prior documents' ie documents which came into existence before the passage of the FOI Act.
* The jurisdiction producing the highest number of applications to the AAT is the Australian Capital Territory, 40 applications in all. Perhaps that simply indicates the greater familiarity of journalists and others in Canberra with the legislation and with its beneficial review provisions.

The decisions brought down by the AAT under the FOI Act are already an interesting, developing jurisprudence. Take the following cases:

* Tenant dispute. On 24 May 1983 the tribunal had to consider an application for access to documents relating to personal affairs as a government tenant and particularly documents relating to allegations made by a neighbour. The tribunal found that the file pertaining to the relevant document could not be neatly divided into periods of time specified by the applicant in his claim. A dispute arose as to the speed with which it was reasonable to impose an obligation on the government agency to supply documents in the voluminous material involved. A 'staged provision' of documents was proposed and this was supported by the tribunal. However, the tribunal emphasised the importance of 'progressive release of documents as they become available'.[32]

* Social security informant. In June 1983 the tribunal had to deal with a claim for access to information about an anonymous telephone call which gave certain intelligence about the applicant, a person receiving a supporting parents' benefit under the Social Security Act 1947.

A note of the record of the telephone conversation in question was available but should it be offered with deletions by the department, so that the identity of the person who supplied the information would be guarded? The applicant contested that a 'confidential relationship' exempted under subsection 22(1) of the Act existed between the informant and the Director-General of Social Security. The tribunal, however, expressed the view that the complete record of the telephone conversation made by the officer recording the telephone call received was an exempt document under the FOI Act. The applicant was, accordingly, not entitled to copy of it. The information had been supplied in connection with the enforcement or proper administration of the law, namely the Social Security Act. Whether the information given was true or false was not for the AAT to determine.[33]

* Background documents. At the end of June 1983 the AAT had to decide a request for access to documents which came into force before the legislation, which were not personal documents but which were claimed to be necessary for 'a proper understanding' of documents which were accessible. Under subsection 12(2) of the FOI Act a special exception to prohibition on access to 'prior documents' exists in relation to:

> (b) the document or that part of a document ... access to which is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister to which that person has lawfully had access.

In a determination on the facts, the AAT found that the journalist was seeking information beyond the ambit of the Minister's press release. The latter did not 'seek or purport to deal with the techniques of estimation' of budget materials. Nor was the material sought necessary for a proper understanding of the publicly available budget papers.[34] The tribunal also held that its powers to decide matters were limited to the provision of access specifically granted under the FOI Act. The tribunal rejected a contention that it could grant access to documents on a discretionary basis under the general injunction provided in section 14 of the Act:

> 14. Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents) otherwise than as required by this Act, where they can properly do so or are required by law to do so.

The AAT pointed out that the section did not purport to confer any discretionary power on an agency or a Minister. It was no more than declaratory of Parliament's intention. It was expressed in the negative in order to emphasise that it preserved existing rights to access to documents in accordance with the Act. Accordingly, it did not give rise to jurisdiction in the AAT to review the refusal to give a beneficial application of the provisions in the particular case.

* Documents 'in possession'. In August 1983 the tribunal had to consider a defence raised that certain documents sought from the Capital Territory Health Commission were not in the possession of that body but in the possession of trustees of the Canberra Hospitals Private Practice Trust Fund. Unexpectedly, the tribunal was required, in this decision, to examine the interaction between the FOI Act and the equitable obligations owed to a cestui iue trust. Nonetheless, the tribunal held that there was some information which the Commission had that the applicant was 'undoubtedly entitled' to receive. It ordered that these matters should be further investigated.[35]

* Police documents? In August 1983 the tribunal had to consider a request for access to documents relating to police investigations of the applicant. The police granted access to all documents which they said they had located after a search. The applicant, however, alleged that other documents must exist. Further searches were conducted but these were reported by police to have failed to locate further documents. The applicant was so notified. He brought an application for review. A preliminary question arose as to whether there was a decision in relation to the provision of access and in particular whether a decision had been made 'refusing' to grant access. The tribunal pointed out, in the facts of the case, that no request had been made for internal review within the agency involved (the Australian Federal Police). For this reason, the AAT held that it had no jurisdiction.[36] On the wider question, the tribunal ventured a number of comments. It indicated its opinion that:

> There are, on the other hand, indications within the Act that the expression 'refusal to grant access' is used not only in relation to documents that are known to exist but also in circumstances where a requested document has not been located, may not be capable of being located or may not even exist ... Furthermore, it requires a high degree of confidence in the filing systems of large agencies to assume that documents can always be readily identified and

located upon request. The probabilities are that, in at least a percentage of cases where requested documents are said to be incapable of being found, these documents nonetheless do exist and have simply been incorrectly filed or filed under some unexpected reference. Thus a claim by an agency that a requested document cannot be found does not necessarily mean that no such document exists.[37]

Confidential personal files. Finally, at the end of August 1983, an important decision was handed down in a case involving a request for access to confidential personal files. In that case, the question arose as to whether the FOI Act provided only for access to information which can be disclosed to the general public or whether, in the case of a claim made by access to one's own documents, the tribunal should always consider a different principle of confidentiality. The case involved a claim by an officer of the Department of Foreign Affairs to have access to a file of records of confidential information relating to his abilities and activities in the department. Were these files, which were undoubtedly confidential against the world at large, confidential against the applicant, the very person dealt with in them? The AAT pointed out that the FOI Act was ambivalent in respect of the issue of disclosure. Subsection 3(1) asserts the object as being to extend, as far as possible, the right of the Australian community to access to information in the possession of the government. It urges the interpretation of the Act 'so as to further the object' so set out. However, the AAT points out that in Australia there is not yet a right of privacy legislation such as exists in the United States to complement the FOI Act — or, it might now be said, also in Canada to complement the Access to Information Act. Such legislation will shortly be reviewed in a report of the Australian Law Reform Commission.[38] That report may be expected to be tabled in Federal Parliament before the end of 1983. However, at the moment, legal claims for access to one's own records can only be made under the FOI Act. There is no Privacy Act as such. The AAT pointed out that if the applicant for access were to be treated as a member of the general public, the FOI Act would create only a very limited right of access to information relating to personal affairs. Section 41 of the FOI Act exempts documents the disclosure of which 'would involve the unreasonable disclosure of information relation to the personal affairs of any person'. However, subsection (2) provides that the provisions of the exemption 'do not have effect in relation to a request by a person for access' to his own documents. The AAT points out that section 41 is not the only provision in the FOI Act where a clear distinction arises between disclosure to the applicant and disclosure to the world at large. Section 45 is also relevant. It exempts documents the disclosure of which 'would constitute a breach of confidence'. Such is the image that must be negotiated.

What interpretation was to be assigned to this provision? Was it to exempt disclosure of personal documents on the basis that they would constitute a 'breach of confidence' or was that provision excluded in the case of personal documents of the applicant himself? The Tribunal decided that the former was the correct construction:

> Plainly there are many documents held by departments the disclosure of which to the world at large will constitute a breach of confidence but the disclosure of which to an applicant will not constitute a breach of confidence as, for example, because it was the applicant who supplied the information to the department ... It necessarily follows that, if disclosure under the FOI Act is disclosure to the world at large, then there will be many documents with respect to which the FOI Act creates no rights of access to any person. There could be a hiatus simply because some other enactment precluded disclosure to the public though not to an applicant or because disclosure to the public would be a breach of confidence though disclosure to the applicant would not ... We think the object of the FOI Act is that the right of access be as wide as possible and that it is not the intent of the Act that the right of access be limited only to documents properly disclosable to the public at large ... In our opinion the FOI Act thus gives to Mr Witheford a right to obtain access to his confidential 'ex' files if disclosure of the files to him would not be a breach of confidence covering the files and if the files were not otherwise exempt.[39]

The tribunal then proceeded to examine the assessment report going back some 20 years. Some of them were marked 'in confidence' but clearly this could not finally determine the issue. Before the hearing, a number of documents previously refused were granted — thereby showing the beneficial operation of the Act in breaking down secret administration. However, a number were also withheld. That constituted the issue for resolution in the tribunal. A possible distinction between documents relating to the 'personal affairs' and those merely being on a personal file was referred to but not decided by the tribunal.[40] The tribunal referred to the awkward procedure which was followed by it because the applicant appeared unrepresented in the proceedings. At the hearing it made an order prohibiting disclosure of the documents to the applicant. The documents were then produced to the tribunal but not to the applicant. The AAT said that in appropriate cases where the applicant was represented by counsel, it might feel justified to permit the documents to be seen by counsel though not by the client.

But the tribunal then reached the crunch point of the decision. It held that information supplied by one public servant to other on the footing that the second public servant would have a duty to keep it confidential was exempted under the Act, even though related to the personal affairs of a third public servant. At least the AAT held that this was the case in respect of documents which came into existence before the FOI Act came into operation. It reserved the question of whether, the new openness having been introduced by the Freedom of Information Act, a different position might obtain in respect of documents created after the Act commenced.

It is not clear that this kind of confidence was intended to be protected by the FOI Act. But whether intended or not, the application of the confidence exemption within the Federal public service and in respect of prior documents, will have widespread ramifications. Before the FOI Act came into force, the rules of the game was confidence and secrecy. It can therefore be expected that great use will be made of this provision for exemption, unearthed in this case. It may even require an amendment of the Act to narrow down the exemption to cases where something more than an expectation of confidence existed as between the parties exchanging information personal to the applicant.

CONCLUSIONS

This review has been a 'Cook's tour' of the freedom of information laws enacted in a number of jurisdictions in recent months.

The British system of administration had many fine qualities. But openness was not one of them. One bureaucrat told the Franks Committee inquiring into the British Official Secrets Act in 1971:

> Once you embark on the business of striptease of govemment where do you stop?

To this, a Peer of the Realm responded:

> Do you not think that instead of seven veils there are about 77? Are you frightened of trying to get a few off?[41]

The veils of secrecy which surrounded public administration in post-Imperial British countries are now at last being stripped away. There need be no fear. There is no great risk of unseemly immodesty. A number of veils will always remain, in the form of:

* the exemptions provided under freedom of information legislation;
* the ingenuity, resourcefulness and determination of public servants to insist on those exemptions;
* the equivalent determination of some Ministers to uphold a zone of secrecy either because of their inclinations that way or because they sincerely believe that candour and frankness at the highest levels may be lost by too great an openness in administration.

Whether it is Ottawa or Wellington, Canberra or Melbourne, the new regime is now undoubtedly with us. The debates will continue about:

* the extent of the exemptions
* the cost of access
* the time limit for providing access
* the effectiveness of the review machinery
* the extension of FOI laws to other jurisdictions, particularly in Australia
* the complexity of the legislation, with its maze of gateways to be negotiated by client and judge alike
* the aggregation of experience so that the recalcitrant may be encouraged to embrace the new principle of openness.

But we have undoubtedly entered a new era. Its jurisdiction has been described in these terms:

> Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the public soon become ignorant of their own affairs, distrustful of those who manage them and — eventually — incapable of determining their own destinies.

The person who said this was Richard Nixon.[42] And he had cause to know what he was talking about.

FOOTNOTES

* The views expressed are personal views only.

1. See M D Kirby, 'Libraries in Society' in Library Association of Australia, Proceedings of the 19th Biennial Conference, Hobart, 1977, 1.

2. Freedom of Information Act 1982 (Vic).

3. Freedom of Information Act 1982 (Aust).

4. James Madison, cited in E M Kennedy, 'Foreword : Is the Pendulum Swinging Away From Freedom of Information?' in 16 Harvard Civil Rights — Civil Libs L Rev 311 (1981).

5. Kennedy, 312.

6. The Commonwealth Freedom of Information Act 1982 comes into effect, (1983) 57 Australian Law Journal 61. See also L J Curtis, Freedom of Information : The Australian Approach, (1980) 54 Australian Law Journal 525. Cf editorial (1983) 11 Aust Bus Law Rev 1.

7. Administrative Decisions (Judicial Review) Act 1977 (Aust), s.13.

8. See eg Sankey v Whitlam (1978) 142 Cth L Rpts 1.

9. 101 S Ct 2766 (1981).

10. id, 2783.

11. Kennedy, 313.

12. id, 315.

13. id, 316-7. Emphasis added. Cf A Adler, 'Dangerous Information — a Dangerous Concept' 6 TDR 24 (1983).

14. As reported, the Times, 4 July 1983, 4.

15. Letter to the author by Mr S Skelly, Canadian Ministry of Justice, 8 August 1983.

16. NZ Herald, 1 July 1983, 12.

17. G Laking, Address at Waikato University, Hamilton, NZ, Winter Series, August 1983. This criticism could apply equally to the survival of secrecy provisions in Australian Federal legislation. These are now being reviewed.

18. Sydney Morning Herald, 17 August 1983.

19. P Chadwick, 'Stripping Victoria's Veils of Secrecy' in the Age 5 July 1983, 13.

20. ibid.

21. The Age 29 June 1983, 5; the Australian 2 July 1983, 10.

22. The Age 25 August 1983.

23. The Age 27 June 1983, 25.

24. Freedom of Information Act 1982 (Vic) s 34. See the Age 19 July 1983, 27.

25. Chadwick, n 19 above. Cf the Age 21 July 1983, 25.

26. Information quoted in the Australian, 22 June 1983, 17.

27. ibid.

28. ibid.

29. The Age 5 July 1983, 3.

30. ibid.

31. Information supplied to the author by the Federal Attorney-General's Department, Canberra.

32. Eastman and Department and Territories and Local Government, AAT A 83/31, unreported, 24 May 1983.

33. Munsie and Director-General of Social Security, AAT Q 83/30, unreported, 21 June 1983.

34. Waterford and Department of the Treasury, AAT A 83/3, unreported, 29 June 1983.

35. Mann and Capital Territory Health Commission & Ors, AAT A 83/5, unreported, 5 August 1983.

36. Wilson and Australian Federal Police, AAT V 83/81, unreported, 12 August 1983.

37. ibid, 14.

38. Australian Law Reform Commission, Privacy (ALRC 22), 1983, forthcoming.

39. Witheford and Department of Foreign Affairs, AAT A 83/32, unreported, 26 August 1983, 3-4.

40. id, 9.

41. Franks Committee hearings, cited Chadwick, n 19.

42. R Nixon, cited id.