ACCESS TO GOVERNMENT DOCUMENTS: SOME

INTERNATIONAL PERSPECTIVES AND TRENDS

FOREWORD

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The Hon. Justice M.D. Kirby, CMG*

COMMON THEMES

Running through the recent reviews of the United States[1], Canadian[2] and Australian[3] Freedom of Information (FOI) laws is the warning of a counter-reformation. That such a response should come should be in no way surprising. Surprising, rather, is the delay of the response and the lack of substantial success which, so far, has attended the counter-revolt.

All three Federations share the heritage of the common law of England. In differing degrees, they share institutions derived from England. With differing emphasis, they share the same administrative traditions, similar curial redress of administrative error and like political ideology. It is true that, in the theory of things, Canada and Australia, being monarchies, are less readily able than the United States to point to the constitutional Grundnorm of the consent of the People. This is not the place to debate that fundamental issue. But in actuality, each of the three Federations boasts a representative democratic legislature, responsive to the will of the people. Although the arrangements of the Executive Government differ and although the position of the Head of State is different in the United States, so much else is similar precisely because much of it is derived from England - English history and English ideas.

We cannot escape that history. But we can learn from the errors of England and we can develop our own legal and constitutional traditions, drawing upon developments in quite different legal systems. So it has been in administrative law. The great moves towards more openness and accountability in our countries derived from Scandanavia, rather than from our traditional legal source in the British Isles. Onto our common law systems has been grafted a number of Nordic ideas. These include the facility of the Ombudsman as an informal advisory Commissioner of complaints and the notion of enforceable public access to public information. This lastmentioned notion was accepted in the United States by the Freedom of Information Act, signed into law on 4 July, 1966.[4] But as Dr. Relyea points out in his contribution, this legislation had a long period of gestation. There began moves in the United States towards greater openness and more accountability in public administration. It has to be said that the influence of the United States Act has been profound throughout the English speaking world. The fact that the Heavens did not fall and that important local advocates of the FOI idea began to preach its adoption, led ultimately to the enactment of parallel legislation at the Federal level in Canada[5] and in numerous of the Canadian provinces (as Ms Hansen points out). It also led to the Australian Federal Act[6], to a statute of the Victorian State Parliament in Australia,[7] to a Bill introduced, but not yet passed, in the New South Wales Parliament[8] and to legislation enacted in New Zealand.[9] It is perhaps important to footnote the fact that the Australian Federal and New Zealand legislation were enacted on the initiative of politically conservative governments. FOI is not the exclusive banner of radical politicians and their

supporters.

A review of the concerns expressed in the United States, Canada and Australia (as illustrated in the contributions to this book) shows certain common themes. They must be defined as the new armoury of the opponents of FOI, principally within the administration. The themes emerge from a consideration of the papers by Relyea, Hansen and Missen.They include:

(a) Concern that FOI is being used (or abused) to breach the legitimate expectations of business secrecy, undermined by the revelation pursuant to FOI of business information supplied, usually under compulsion, to government;

(b) Concern about the use of FOI to undermine, frustrate and delay the processes of law enforcement, particularly by the "mosaic" phenomenan as a result of which, even where identifiers have been deleted, material supplied pursuant to FOI can assist anti-social persons to identify informers or to secure other information which public policy suggests should be secret; and

(c) Concern about the cost of FOI and the suggestion, in hard times, that it is a luxury which, however desirable in principle, our communities simply cannot afford.

THE SPECTRE OF COST

Each of these criticisms deserves careful consideration. In one way or the other, each is touched upon in the contributons to this book. It is not surprising that the same themes should present themselves as the criticisms of FOI in the United States,

Canada, Australia and for that matter, New Zealand. But whereas the United States statute is now nearly twenty years old and is rightly described as a robust adolescent which the American constitutional arrangement makes it difficult to curtail, the same cannot be said of the equivalent laws in Canada, Australia and New Zealand. In those countries, the inheritance of responsible government and, it should be said, the existence of administrative traditions less populist and more elitist, make the sudden reversal of FOI achievements much more likely of success. Especially is this so where governments can point to the high cost of FOI. In all countries, the economic difficulties of government are, by now, well known to their citizens. Likewise, it is so where review reports on the operation of the FOI law are commissioned[10] and where suggestions are made that the FOI law is being abused, as for example by its use by opposition politicians as a research facility or by investigative media journalists as a lazy means to get others on the public payroll to do their work.

The combination of governments long in office (with the inevitable collection of cupboard skeletons they may not wish to have revealed), politicians grown unsympathetic to the legitimacy of demands of accountability outside the traditional venues which they can dominate and public servants hankering for the return of the "good old days" - all present a challenge to the survival of the FOI idea. It is a challenge which supporters of that idea must repell. They must work with special vigour in countries such as Canada and Australia because of the relative ease with which governments, dominating the legislature, can secure the rolling back of legislative entitlements to information. This can be done by frank amendment to the Act. Or, as was attempted in Australia

(so far without success) by an increase in charges which would effectively have barred some at least of the most deserving cases from effective use of the legislation.

It is natural that governments should be concerned about the costs of freedom of information. Every government service invokes the economic problem. Choices must be made between competing facilities. The provision of freedom of information rights, which are enforceable in the courts or in independent tribunals, inevitably brings in their train costs both direct and indirect which the community must bear. These costs divert public resources from other services and from the provision of other benefits for which there is always a constant clamour from noisy, sincere and sometimes well justified lobby groups. In a democracy, with regular elections, governments, and the administrators who advise them, ignore such clamouring at their peril. Accordingly, it is natural and appropriate that the community should regularly pause to ask whether, in respect of freedom of information (or any other reform of administrative law) the community is receiving value for money. Is the facility worth the cost - particularly if to the obvious, direct costs of providing FOI rights is added the indirect costs (such as the provision of court rooms, judges or tribunal members, shorthand writers and so on) and the opportunity costs (the other facilities and benefits foregone by virtue of the decision to stick with FOI).

It was doubtless considerations of this kind that moved the Australian Minister for Finance, Senator Peter Walsh, to tell the Australian Senate on 17 April, 1985 of his concern about the costs of Freedom of Information in the Federal sphere in Australia. He complained that the facility was being misused.

Specifically, he asserted that opposition politicians and former politicians were using it for "fishing expeditions". He continued:

> "I do not find (FOI) embarrassing or uncomfortable. However, I think it would be irresponsible of me not to be concerned about the rapidly escalating cost. In 1983-84 the cost of FOI requests were $17.6 million. The estimate for this year is some $20 million. There has been a rapid escalation in the rate at which requests have been received in recent months. At that rate estimates as high as $35 million as the cost of supplying FOI requests in 1985-86 are in existance. Senator Missen might think that $35 million spent on filling FOI requests is money well spent. In some circumstances there may be a legitimate case to be put for that. But when one delves a bit further and investigates just what sorts of FOI requests are being made, one finds for example that major users, I should say abusers, of the FOI Act are present and former Liberal Party and probably National Party ... politicians.[11]"

The resistance in Australia to the administrative reforms, of which FOI is the centre piece, has not come exclusively from the Government (Labor) side of politics. The new leader of the Opposition in the Federal Parliament, Mr. John Howard (Liberal) took the opportunity in one of his first important speeches to suggest major cuts in the facilities of administrative review, many of them lately introduced by the Fraser (Liberal) Government of which he was a leading member. Specifically, Mr. Howard was reported as saying that he would consider abolishing the

Administrative Appeals Tribunal, the independent Federal tribunal, headed by Federal judges, which performs, amongst many other tasks, the review of disputed claims under the Australian Freedom of Information Act. A winding back of the review mechanisms would certainly appear to be consistent with Mr. Howard's espoused laissez faire philosophy. This philosophy extends not only to the private sector but also to the public sector as well. Accordingly, in Australia, signalled by these political speeches and confirmed by Government endeavours to increase the charges for FOI services, there must be faced a real possibility that, in the name of "cost effectiveness" or "user pays" a major effort will be mounted to limit the operation of the FOI law.

Defenders of the FOI ideal must not be irrational in their defence. If, as Relyea points out the overwhelming majority of applications is made not by individual citizens but by corporations, a case might be made out for differential costing scales. There is no obvious reason why the public purse (and hence the aggregation of all citizens) should fund or subsidise legitimate and expected business costs which can be passed on to the consumers who receive the benefit of them. On the other hand, as Hansen points out in her contribution, efforts to introduce differential costing must be attempted with care. Otherwise means are quickly devised to frustrate them. These means include either the filing of multiple applications to take advantage of threshhold exemptions or the filing of individual applications (as by journalists) to take advantage of exemptions which would not apply to their employers (media corporations).

The question of funding is certain to be an important battle ground for the FOI debate in the decade ahead. Defenders

of the FOI idea must stress the issue of relativities in cost. The cost of golf greens for defence services is perhaps less important than the cost of government information services, as Reylea points out. Relative to such costs FOI remains a modest charge on the public purse.

I hope I will not be thought too suspicious when I say that more than a few administrative Sir Humphreys will urge upon elected Ministers, who find the obligation of openness and accountability momentarily embarrassing, the attractive suggestion that FOI has gone too far. It costs too much. It is sometimes against the public interest anyway. And it should, with deftness and skill, be limited. Without, of course, in any way questioning the "basic right of citizens to have access to that amount of government information that is good for them".

NANNY KNOWS BEST: THE PRICE OF SECRECY

All around the English speaking world (and beyond, for all I know), television audiences of millions laugh once a week at the latest escapades in Yes Minister. The conspiring machinations of Sir Humphrey Appleby as he manipulates the politician Jim Hacker (lately elevated with Sir Humphrey's assistance to Prime Minister) present an elementary course in civics. As is often the case, humour is a marvellous vehicle for education. Without necessarily accepting James Michael's judgment that "Britain is about as secretive as a state can be and still qualify as a democracy"[12], a lesson can be learned from recent events in Britain about the perils of a modern democracy grown too secret. These perils include dangers for the politician. But more importantly, they are dangers for the body politic and for the health of accountable democracy. They are lessons which, I believe, the other English speaking democracies should heed.Many

instances could be cited. I confine myself to two.

* The Ponting case. A high ranking Defence Ministry official, Mr. Clive Ponting admitted leaking ministerial secrets about the 1982 Faulkland's War. He was charged with violation of the Official Secrets Act 1911, when he passed confidential documents to a Labor member of the House of Commons concerning the sinking of the Argentinian cruiser, the General Belgrano, during the war. The member of parliament conceived his duty to be to pass the information to the House of Commons Select Committee on Foreign Affairs. This allowed sensitive information about the precise whereabouts and conduct of the General Belgrano immediately before its sinking to become public knowledge. According to the Economist, Mr. Ponting had failed to follow the "unwritten and little used" tradition of civil servants who think that Ministers are asking them to do something unethical. It seems that the established English practice has been for civil servants in this predicament first to appeal to the Permanent Head of their own department and through him to the Secretary of the Cabinet.[13] Under section 2 of the Official Secrets Act 1911, a public servant may not disclose without authorisation any official information, except to "a person to whom it is in the interests of the State his duty to communicate it". Mr. Ponting contended that, because of lack of candour on the part of Ministers to the Parliament, (and hence to the British public), it was in "the interests of the State" for him to disclose the relevant documents to a

member of the Opposition. This argument was rejected at his trial. Justice McCowan, in his charge to the jury, defined "the interests of the State" as being identical with the interests of the Government of the day. The result of this interpretation would be that the "interests of the State" are to be measured in accordance with the shifting fortunes of successive governments. But the Judge's charge was in line with the notion that public servants are to be loyal to the Government whom the people elect, so long as it acts lawfully.

Notwithstanding this instruction to the jury, Mr. Ponting was acquitted. In the wake of his acquittal there have been many calls in England for the repeal of the Official Secrets Act and the passage of a Bill of Rights and Freedom of Information legislation as proposed by Lord Scarman.[14] The Ponting case has been described as a "mole's charter" precisely because "it exposed, even more widely than before, the lack of definition of the reciprocal rights and duties of government, parliament, the civil service and the individual".[15] Official secrets legislation in Australia and in many countries of the old British Empire remains very similar to the 1911 legislation of Britain. And even where that legislation has been repealed or amended to fit more harmoniously with supervening freedom of information laws, there remain the traditions of the civil service, the oath which civil servants must typically take and the aspiration of advancement which tends to dampen down perception of the pangs of honour

and of ethical conduct, when a civil servant is confronted by the kind of dilemma faced by Mr. Ponting. The official secrets provisions of England, Australia and doubtless other countries, has been castigated by the courts and Committees of Inquiry, as well as by distinguished commentators.[16] But in most parts of the Commonwealth of Nations, the hastily drawn legislation of 1911, and the attitude to State secrecy which it reflects, survives to do daily battle with the new regime, imported from Scandanavia via the United States and which marches under the banner of freedom of information. Lord Scarman put the lament vividly:-

> "My life in the law spans the central years of the 20th century. I was born in the year which saw the enactment of the Official Secrets Act. The two of us were born within a month of each other: and I regret to tell you that both of us are still going strong and are in active, if not continuous, use by our society. You will not, I hope, think me mean or churlish if I confide in you that I hope to live long enough to see the death of my contemporary. I shall be bitterly disappointed though not, I fear, surprised, if I die first."[17]

Perhaps the most significant feature of the Ponting case was the way in which the jury appears to have ignored, or at least circumvented, the instruction of Justice McCowan. Under the heading "Everybody Loves an Independent Jury", the Economist applauded the decision of the jurors. Certainly their decision, in the face of

the Judge's charge, appears to be in the self same tradition that sent many petty thieves to Australia as transported convicts rather than consigning them (as the letter of the law required) to the gallows. The Guardian summed up the feeling of a number of observers:

> "It was the excellent injunction of Dr. Johnson that one should clear one's mind of cant. This the jury of 8 men and 4 women in the Ponting trial at the Old Bailey have cheerfully proceeded to do so. In spite of an adverse summing up by Mr. Justice McCowan, which came close to a direction to them to convict ... the jury in effect told the Government that its politics were not necessarily synymous with the interests of the State. The law in the shape of the Act may be mocked by the verdict, but justice - and the interests of the State, considered not as the voice of one administration but of the enduring British nation - have been well served."[18]

It is ironical, but true that Mr. Ponting, before his embroilment in the moral dilemmas of the Belgrano was, in 1979, head of the Defence Department's procurement section when Mrs. Thatcher's Government came to power. He was nominated by the Head of the Department as the person best fitted to identify savings that could be made within the Ministry. He produced a report identifying more than $7 million worth of savings.

Indeed, the report was so impressive that he was chosen to present it personally to the Prime Minister and in turn to Cabinet. For his labours he was even made an Officer of the Order of the British Empire in the next Queen's Birthday Honours List. However, it seems that some junior Sir Humphreys in the Ministry did not take kindly to his criticisms. As a result he was given "gardening leave", a euphemism for absence with no duties on full pay. It seems that Mrs. Thatcher was informed about this Departmental Coventry. She intervened on his behalf. And within days he was back at work.[19] No doubt when it was discovered, after an inquiry, that it was he who "leaked" the document to the Opposition parliamentarian, those same Sir Humphreys nodded and declared "I told you so".

Following the jury's acquittal, Mr. Ponting was told that because of his "breach of trust" he could not stay with the Ministry of Defence. He then resigned from the civil service and is said to be writing what is intimidatingly called "Volume 1" of a series of books about his experiences in public administration. In the meantime, the inference drawn by the United Kingdom Government from the Ponting verdict has not been the need for greater openness or candour to the Parliament. Nor has it been repeal of the Official Secrets Act let alone introduction of a freedom of information law. Instead, a strict new code of conduct for civil servants has been introduced. It is the first such code to be devised for more than 30 years. The author of the new code is Sir Robert Armstrong, the Cabinet Secretary and

Head of the Domestic Civil Service. Included in the code is the statement of the general duty upon every public servant, serving or retired, not to disclose in breach of the obligation of confidence any document or information or detail about the course of business which has come his or her way in the course of duty as a public servant. In Britain, it seems, the forces of secrecy lose in the jury room but rule the roost in the Government and the administration.

The Westland Helicopter Affair. I say "seems" because 1986 opened with yet another instance of the strange and irregular procedures that tend to be adopted in a state governed too much by the rule of secrecy. In the Soviet Union photocopiers are locked or strictly controlled. In Britain it has not quite come to that. But the attitude "Nanny know best"[20] dies hard. However, every now and again the wall of secrecy must, for convenience, be breached either by a "leak" based on suggested conscience (as with Mr. Ponting) or by an inspired "leak" designed to provoke a particular political effect. This would be appear to have been the objective of those in the Prime Minister's office who authorised the "leak" of a confidential letter of the Solicitor-General, Sir Patrick Mayhew, to the former British Minister, Mr. Michael Haseltine. The letter concerned difficulties which were suggested to exist in respect of Mr. Haseltine's proposals concerning the Westland helicopter company. Although the "leak" would appear to have angered Sir Patrick and to have embarrassed Mr. Haseltine, and although it was said to have been unknown

to Mrs. Thatcher herself, it was certainly approved in her private office after having been initiated by another Minister, Mr. Leon Brittan. The Prime Minister initiated a formal investigation into the source of the "leak". Only then would it appear that the involvement of the Prime Minister's own office was discovered. The result was that Mr. Brittan followed Mr. Haseltine to the back benches. The Prime Minister was interrogated and forced to a vote of confidence in the Commons. The affair was described by many as "squalid". Mrs. Thatcher expressed "deep regret" at the disclosure of the correspondence of Sir Patrick Mayhew. She conceded that "doubtless a number of matters could have been done better". But the fundamental questions of the affair remain unanswered. Most especially, why in a matter of such Cabinet controversy and national importance information apparently thought relevant to be "leaked" should have been withheld from the Parliament and the community in the first place. The disclosure of personal correspondence breaching expectations of confidence is one thing. The non disclosure of matters relevant to informed policy choices of great national importance, is quite another. The forces that line up behind the Official Secrets Act, and the ethos of that statute which continues to pervade English speaking public administration, are most concerned with candour, frankness to Ministers, gentlemanly dealings and the best decisions by those in the best position to make them. Those who line up behind the banner of FOI, on the other hand, derive their political philosophy from the

more authentic democractic notion that democracy is something more than a visit to the ballot box every few years. In the words of the great Madison cited at the outset of his contribution by Dr. Reylea:-

> "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".

INDIVIDUAL AUTHORITY AND POLITICAL ACCOUNTABILITY

Countries such as Australia, Canada and New Zealand, which derive their legal and administrative traditions from Britain owe much to that country. Its institutions, particularly the independent judiciary, the respect for the Rule of Law, the accountable legislature and the honest uncorrupted civil service are matters for legitimate pride. However, the tradition of secrecy which pervades English public administration, and still influences its counterparts throughout the common law world, must be watched most closely. It is fundamentally at odds with the political philosophy that sustains the FOI movement. That political philosophy derives its strength and authority from the rapid expansion of universal education, the recent explosion of information technology (including the media of mass communication) and the fundamental notions that, with few exceptions themselves strictly controlled by law, information should flow freely in countries such as our. Particularly should it do so where that information concerns the operation of the political system and is the basis of decisions affecting many citizens. There are counterveiling considerations which limit the absolute right to know.[21] But an attempt to define those exceptions too widely will stultify economic and social growth

and will constantly invite the embarrassing debacles illustrated by the Ponting and Westland affairs. The new countries of the common law, the United States, Canada, Australia and New Zealand may be willing to exhibit a more robust attitude than Britain to the flow of public information. Ultimately their example and the melancholy and discreditable leaks and crises that attend excessive secrecy, may produce a climate of greater openness in Britain. In time it may even lead, dare it be hoped, to the passage in that country (the inspiration of so many of our liberties), of a freedom of information law with its reassuring promise of individual authority and political accountability. However occasionally embarrassing, such accountability must go beyond mere constitutional mythology. Political accountability with individual authority in an age of large public administration engined by the new technology is what FOI is all about. Ultimately, it is about the distribution of power in a modern State. Ultimately it is a very modern issue of human rights, apt for our time.

FOOTNOTES

* Personal views only.

1. H.C. Relyea, "The Freedom of Information Act in America: A Profile" to be published in T. Riley (ed) International Perspectives on FOI, forthcoming.
2. I. Hansen, "Canada's Access to Information Act: Information and Society Series to be published in Riley, op cit, n 1.
3. A. Missen, Freedom of Information of Australia, to be published in Riley, ibid.
4. Relyea, 23.
5. Access to Information Act, 1983 (Canada).
6. Freedom of Information Act, 1982 (Aust).
7. Freedom of Information Act, 1982 (Vic).
8. Freedom of Information Bill, 1985 (NSW). The failure to enact Freedom of Information legislation in New South Wales has been widely criticised. See eg The Privacy Committee (NSW) Annual Report 1984 17.
9. Official Information Act, 1984 (NZ).
10. The Justice and Legal Affairs Committee of the Canadian Parliament is shortly to undertake a comprehensive review of the Canadian Access to Information and Privacy Acts.
11. Australia, Commonwealth Parliamentary Debates (The Senate) 17 April, 1985. For the more recent debate on the disallowance of the Freedom of Information (Changes) Regulations (Amendment) 1985 see Australia, Commonwealth Parliamentary Debates (The Senate) 13 November, 1985.

12. J. Michael, "The Secretive State" in The Politics of Secrecy, Penguin, 1982, 9.

13. The Economist 16 February, 1985.

14. Lord Scarman, "The Right to Know", in the Granada Guildhall Lectures in 1984, Granada, London, 1985, 70.

15. The Economist, 16 February, 1985.

16. See eg Australia, Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information, AGPS, 1979.

17. ibid, 71.

18. Reproduced in the Guardian Weekly, 17 February, 1985.

19. Sydney Morning Herald, 16 February, 1985.

20. J. Michael, "Nanny Knows Best and Other Reasons" in The Politics of Secrecy, 18 ff.

21. M.D. Kirby, "Media Law Reform - Beyond Shangrila " in the Granada Guildhall Lectures, 37, 44 ff.