

Information Flows: The real art of Information Management and Freedom of Information

Rick Snell and Peter Sebina

Peter M Sebina is a lecturer in archives and records management at the University of Botswana. His research interests are in records and information management in governance, especially in the access to information arena. Peter has completed his PhD at the University College London on 'Freedom of Information and Records Management: a learning curve for Botswana'. He has been involved in records management improvement exercises in Botswana, and lately he has been involved in the *Building Integrity in the Public Sector Information Systems in the ICT Environment* project of the International Records Management Trust in Zambia. Another project has taken him to Mafikeng, in the Northwest Province of South Africa, where he and a colleague led an appraisal exercise of the former homeland of Bophuthatswana records.

Rick Snell is a senior lecturer in administrative law at the University of Tasmania. His research interests are in Freedom of Information, Ombudsman and public sector governance. His publications have covered a broad range of topics including freemasons and German settlers in nineteenth-century Tasmania, property rights in airspace and he is currently working on a paper about persistent or troublesome users of

* This paper is a significantly expanded and extended version of the paper 'Looking for a New Theoretical Framework on Access to Information: Unifying the Disparate Elements' delivered at the Access and Privacy Conference in Edmonton Canada, 8-9 June 2006. The first draft of this paper was presented at the RMAA 23rd International Conference, 19 September 2006, Cairns, Australia. The authors would like to acknowledge with gratitude their indebtedness to the two reviewers of this article. The reviewers comments were thoughtful, helpful and challenged us to develop our ideas.

complainant mechanisms. His major focus at the moment is writing, researching and teaching in the area of comparative Administrative Law. He was editor of the *FoI Review* for ten years.

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

Bob Hawke, Australian Prime Minister, 1983.

This paper puts forward ideas about trying to take public access to government information from where it currently is - a few painful, costly and hard fought steps from its strongly resisted implementation - towards where it should be in an information age. The current state of play in Australia after more than twenty years of experience is barely measurable. The comments in this paper are focused on the capacity of citizens to access non-personal affairs information on a routine and relatively unproblematic basis. If in other areas of the information revolution we had accepted the same minimal results as we have with Freedom of Information (FOI) then the Internet, laptop computers, iPods and BlackBerries would have all remained unbelievable elements of speculative science fiction.

In this article, some of the key paradoxes and riddles of the Information Management and Freedom of Information relationship are explored. Joseph Stiglitz's ideas of information economics are applied to demonstrate why records management and FOI are not only compatible but essential partners in an information age.¹ The way institutions and society manage the access to, and protection of, information is a critical catalyst in the creation of good governance and deliberative democracy. Information managers can provide important insights for those concerned with increasing transparency and accountability. In an age of information it should be of little surprise to find that the rapid uptake of laws like FOI has been phenomenal. In the last decade the number of countries with some type of FOI legislation has increased from a small handful to over seventy countries. Yet this outbreak of transparency is bound to disappoint unless records management, FOI, privacy and archives are

understood as interplay between several different information systems. The direction, timing and quality of information flows becomes the key issue and the avoidance of stagnancy an important objective.

We need to develop better theories and consequently better tools of analysis to finally arrive at what our parliaments wanted to achieve with a stroke of the pen twenty-five years ago when passing the *Freedom of Information Act*. This critique is not meant to underplay the achievements of access legislation. Information on a regular basis is entering the public domain via access requests lodged around the world. A recounting of successful cases can be an inspiring experience. Reading the first chapter of Alasdair Robert's new non-fiction book *Blacked Out: Government Secrecy in the Information Age* creates that type of positive experience.² Yet as the rest of the chapters in his book and indeed the title suggests, the highlights of open access are often more the exception than the rule. This is especially true for those wanting to use access to information regimes to engage on an informed basis in public policy debate, discussion, formulation, implementation and evaluation.

Access to information in the twenty-first century: The ideal

If we were to design an information management system in the twenty-first century how would it operate?³ Ideally an effective information system would achieve the following mantra derived from Paul Chadwick, Victoria's Information Commissioner:

'The 19 words'

The right information
To the right people
For the right reason
In the right way
At the right time

Whilst these words were derived and applied to a privacy context they are just as applicable as a guide or objective for access to information, records management, archives, and e-governance. It would be derived from a formula that is simplistic, idealistic but also aspirational for a world where access to reliable, high quality and timely information is a key if not critical ingredient in our lives whether we are engaging the

political, economic, social, private or public spheres of our lives. McDonald and Ardern described a similar, albeit more detailed, future where information management is effective for governments but is designed to be citizen-centric:

The year is 2011. All the initiatives designed to improve the Government information management infrastructure that were started ten years ago to support its program delivery and business processes, have been successfully implemented. Not only have these initiatives dramatically changed the information management landscape and led to major improvements in program and service delivery, they have also substantially improved access to Government information resources.

The infrastructure of policies, standards, people and systems is in place to clearly assign accountability for the management and provision of access to government information. Information is shared within and between government institutions respecting the various legal and regulatory requirements. Government jurisdictions have built on the lead established by earlier initiatives such as the Canadian Health Network and have collaborated on the joint delivery of services including information services.

The high quality of the information management infrastructure enables the Government to deliver cost effective, relevant, citizen-centric programs and services while continuing to carry out its priorities of transparency and openness.⁴

Google™ in eight short years has achieved its outstanding success because it has strived to deliver reliable, high quality, timely and user appropriate information.⁵ It has not been an overnight and revolutionary achievement but a continual evolution in the development of search engines, search tools and unceasing attempts to find ways of linking people to information they might at some stage want to access. Whilst Google has its limitations as a search engine it nevertheless continues to undergo constant redevelopment whereas Freedom of Information processes remain relatively static.

How does the information environment of our access schemes compare in feel, experience and outcomes to the information environment offered by Google? Few if any of us operate in jurisdictions where the attempt to access non-personal affairs information about government activity is unproblematic or an experience that we would encourage others, friends or workmates, to attempt. Few of us sing the praises of our access legislation - nor is it used to the extent we would expect by journalists, opposition parliamentarians and non-government organisations. Rarely do those involved in public policy debate use access schemes to supplement or enrich their understanding or their contributions to public policy debate, formulation, evaluation or scrutiny. When they do, the quality and direction of debate and discussion improves but rarely results in access to information becoming a regular or routine practice from that time onward. Our records management systems are rarely designed, linked, or staffed to enhance a dynamic citizen-centric access system.

We need an information system versatile enough to cope with information that changes character and sensitivity over time and between contexts. We have to achieve on one hand what Justice Michael Kirby of the High Court of Australia, in a recent leave to appeal application (in the McKinnon case) described as that necessary but small zone of secrecy or protection and the movement of information between that small zone and a far larger and more dynamic zone of accessibility.⁶

The versatility of an information management system is a critical requirement. The ideal is a seamless or well managed information traffic system that can manage the intersections between access schemes, privacy regimes and records management. In most jurisdictions we do not manage that intersection or information flow very well. Most of us still approach the issues, problems and policy of information management with emphasis on our speciality - whether access, privacy, archives, records management, information systems or information economics.

The priority or key objective of a twenty-first century Access to Information Act should be (like Google) to progressively increase the ability of citizens to access and use an ever improving (in terms of quality and quantity) pool of information. A vibrant and vital information commons is the goal. An access to information scheme for non-personal affairs information, should be a simple routine action that is used infrequently or only as a last resort. Governments should be committed to achieving a proactive and systematic flow of information to and from its citizens.

The present: Ad hoc, variable and highly contested information provision

Records managers are operating in a zone far removed from the ideal described above. The provision of policy type information under access schemes in Australia tend to be ad hoc, haphazard and increasingly rare without a heavy presence of spin. The level of access is variable across jurisdictions, between agencies and within agencies over time. Indeed some officers and agencies come close to being models of ideal access. The problem is that these officers and agencies are the exception rather than the norm.

The Australian experience: a few vignettes

To illustrate this point examine the following Australian experiences:

January 1996 - The Australian Law Reform Commission passed 106 recommendations to improve and repair the *FOI Act 1983*.

The review uncovered a disturbing culture of secrecy in some government agencies. The FOI Act establishes a rebuttable legal presumption in favour of the disclosure of requested documents. Unfortunately, this does not reflect the approach taken by some government agencies. The review found that some agencies decide immediately not to disclose information and quickly consult the list of exemptions to find some way to justify non-disclosure. As one submission stated:

'It is my sad conclusion ... that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts'.⁷

August 2005 - *The Canberra Times* argued in an editorial 'The Freedom of Information Act may as well be scrapped'.⁸

December 2005 - *The Sydney Morning Herald* attempted to access final documents used in the 2005 budget process on the government's 'Welfare to Work' program. This program was considered by most commentators and the government as the most important change in the welfare system for fifty years. The newspaper wanted documents showing the financial modelling, how many people will be affected, number expected to get

jobs, financial impact and how the new system compares with welfare systems in other countries.

The Department of Employment and Workplace Relations identified approximately 3400 pages fitting within the FOI request, estimating it might release 313 pages with processing costs of \$13 000. The applicant was required to pay 25 per cent of that estimated fee upfront before any further processing.

The applicant's request to reduce or waiver the fees in the public interest were rejected by the Department because:

- a) Newspapers will not give a guarantee to publish *all* pages released.
- b) Whilst these documents would be of interest to welfare recipients, and to some other members of the community more broadly, they would not be of interest to a substantial section of the public.

The above are examples of two very high, if not impossible, thresholds for the release of information in the public interest or for the reduction of fees. The journalist is still contesting the imposed fees. She will be facing one of the most senior administrative law partners from one of Australia's largest firms. The message: the government will determine what Australians will know about the 'Welfare to Work' Program and under what conditions.

March 2006 - The Commonwealth Ombudsman Report into Handling of FOI requests by government agencies concluded:

There is an uneven culture of support for FOI among Australian Government agencies. Some agencies are displaying a clear commitment to FOI, and are supportive of the Act's objective of extending as far as possible the right of the Australian community to access information in the Government's possession ... Other agencies do not as firmly demonstrate such a commitment. Deficiencies include excessive delays in the processing of some FOI requests, lack of consistency in acknowledging FOI requests in a timely manner. Delays in notifying charges and inconsistencies in their application, and variable quality in the standard of decision letters, particularly regarding the explanation of exemptions imposed.⁹

This followed two previous Ombudsman Reports, an Auditor-General Report and a Senate Legal and Constitutional Legislation Committee report that reached similar conclusions in the last decade.

May 2006 - Since December 2002 *The Australian* newspaper attempted to access policy documents relating to the First Home Buyers Scheme and Tax Bracket Creep. These were largely internal working documents relating to information leading to the preparation of the 2002 budget. In May 2006 the Australian High Court heard arguments in the case. There have been four budgets since the documents were created - including numerous changes to the Australian tax system and considerable change to the market for first home buyers. Total cost to *The Australian* newspaper prior to the High Court action was \$700 000. So the final legal bills for both parties will be over \$1.5 million.

September 2006 - *The Courier-Mail* asserts that 'FOI [is] stripped and beaten' fulfilling the 1994 prediction of Fred Albietz, then Queensland Information Commissioner, that the 'FOI Act is in danger of dying the death of a thousand cuts'.¹⁰

The lessons?

A series of key institutional players - the Australian Law Reform Commission, the Commonwealth Ombudsman, the Auditor-General and a Senate Committee have all carefully pinpointed problems in access, processing and variable compliance to the FOI Act over a ten year period. A number of leading media organisations continue to be thwarted in accessing background documents on key policy programs that have been central issues in federal election campaigns.

Policy and background documents do find their way into the public domain but rarely without some degree of government resistance and generally require a level of public persistence not envisaged in the design of the legislation. The following summary by Frank Devine outlines one of those successful cases by *The Australian's* FOI Editor Michael McKinnon:

By dogged and artful use of FOI, McKinnon had prised loose a consultants' report that revealed serious failure by the Tax Office to collect money due to it, lagging \$5.49 billion behind in 2000-01 and probably doing worse in 2001-02, though the media had not, as I write, persuaded them to

own up. McKinnon got the consultants' report with a single, routine FOI application - after three months. But the report was sprung loose relatively easily because McKinnon had just spent a year in an almost identical case plodding through initial application, an internal review he called for after being refused access, and finally a successful appeal to the Administrative Appeals Tribunal. The Tax Office gave in on the uncollected taxes report because this precedent convinced them they couldn't win.

To his astonishment, McKinnon learned during the course of his long uphill trudge that many senior tax officials, including a deputy commissioner, had not even heard of the consultant's report until he lodged his FOI request.¹¹

The need for a new theoretical framework?

The problems of access to information are not new nor are they uncatalogued. Yet our tools in identifying the problems, understanding their causes and then devising solutions whether short term or long term seem deficient. With a few exceptions we have approached access regimes - their performance, evaluation and reform - with a heavy concentration on the legislative architecture and have often accepted that the failures or problems as isolated instances or exceptions to the norm. We need to find a theoretical framework that accepts that the access to information process is a complex system, one that necessitates a mixture of approaches by administrators and by users. The Canadian Access to Information Review Task Force noted that measurement of effectiveness of an access system is determined beneath the surface or by more intangible inputs than its legislative architecture.¹²

A model of analysis needs to be developed that can cope with access schemes which operate in heavily contested terrains and where they often reflect, and sometimes determine, informational settings between:

- secrecy/openness
- privacy/disclosure
- spin and deliberative dialogue
- closed and open sources of information.

A theoretical framework is needed that accounts for highly volatile arenas mentioned above. Yet we require such a framework to adjust to the problematic and uncertain operation of these informational settings because access to information schemes:

- Grant legal and enforceable rights of access to citizens and non-government parliamentarians.
- Are unpredictable in terms of requestor, type of request, timing and outcome.
- Cede management of requests (eventually) to an independent body such as the Commissioner, Court or Ombudsman.
- Confront government information management techniques (accepted as normal or smart communications practice in other areas) that are portrayed as excessive secrecy or cover-up.
- Rely on key access administrators to operate in an environment of diminishing or constrained training, resources and confronted by strong pressures promoting non-disclosure.
- Are exposed to unpredictable and generally uncontrollable surges in demand.

Freedom of Information therefore becomes a problematic minefield of competing and often contradictory expectations. Furthermore, as Dr Colin Hughes recognised in 1983, compared to the other administrative law reforms FOI was 'political dynamite' and treated as such by the bureaucracy.¹³ This complexity of pressures was captured by Philip Doty who noted that there are a number of paradoxes or riddles present in the operation of access schemes:

- Riddle 1 - The relationship of FOI to the nature of the state.
- Riddle 2 - The relationship among main actors is marked by mutual cooperation and mutual scepticism both adversarial and collegial.
- Riddle 3 - Understanding the relationship between citizen and information.
- Riddle 4 - Managing the unrealistic expectations.¹⁴

The aspirational ideal of Paul Chadwick's '19 Words' may be a few steps closer if a theoretical framework can be developed. The rest of the paper will provide some initial responses or approaches to developing this framework. In particular the focus will be on understanding and developing the relationship between FOI and records management.

Combating information asymmetry in the public sector

The application by the Noble prize winning economist Joseph Stiglitz of the theory of information asymmetries to the public policy arena provides a powerful analytical tool for better understanding access to information and its relationship to records management.¹⁵ The importance of access to information and effective records management partly arises from the need to counteract and contain the tendency towards, or persistence of, state secrecy. Stiglitz argues that secrecy in government is attractive as it provides some insulation against being blamed for mistakes or failures.¹⁶ Governments often impose restrictions on access to information, thereby rendering themselves non-transparent in their operations. Greg Terrill argues that the realities of state secrecy predisposes governments to exploit their structural advantages in managing information.¹⁷ Governments, according to Terrill, have the advantage 'of institutional memory, specialised expertise, and have a longer term interest' in shaping the information environment to the disadvantage of citizens - in particular, opposition groupings and the fourth estate.¹⁸

Information asymmetry is a term associated with the field of economics, especially with what is known as economics of information. The term, 'information asymmetry', took centre stage in the writings of Joseph Stiglitz who along with George Akerlof and Michael Spence received the 2001 Nobel Prize for their exploratory work on the topic.¹⁹

Information asymmetry in the public sector refers to an environment where there is information disparity between those that govern and the governed, leading to flawed agency relationships.²⁰ In lay terms, information asymmetry refers to a situation in which relevant information is known to some but not to all parties involved in a transaction. In terms of government-public relationships, information asymmetry indicates that those who have been mandated to govern have greater access to information on policies, programs and services that are meant to satisfy the needs of the public, while the public themselves have limited access

to this information.²¹ Where such asymmetries exist, imperfect information results, thus denying the public full knowledge of how government responds to their needs and how decisions affecting them are determined. When members of the public are uncertain or do not fully comprehend government policies, programs and services, they require access to reliable government information to reduce that uncertainty. This uncertainty is what economists call 'risk' in that members of the public are at risk of not fully utilising government programs and services because they do not sufficiently comprehend their due benefits. Through access to the same sources of information that the government enjoys and its subsequent use, members of the public are better placed to reduce the risks which limited access brings about.²²

The need to reduce the levels of information asymmetry between government and citizens arises from the reasoning that information which government holds and uses is harnessed through taxes or grants and loans taken on behalf of the public.²³ Given that it is the public who pay for the collection of the information, its maintenance over time, and use, the assumption is that it is *they* who own it and government is just its custodian on their behalf. Government is the custodian because it has been mandated to serve the people, hence attends to the public interest and will. As a result, it is anticipated that government will adequately look after the information it uses as it serves the people and will further enable them to have access.

Invariably, government-held information is a public good like all other public goods. Unlike other public goods, government-held information is a non-rival good which members of the public should be able to consume without too much restriction.²⁴ Information is thus a public commodity which records how a government works on behalf of the electorate who brought it to power. Access to that information by the public is on the one hand, a guarantee that their funds are put to wise use and on the other, an assurance of government's capacity in accounting for the various activities in which it is engaged. Access to information can also build trust of citizens in the government in that they tend to appreciate that what is being done in their name is done in the open.²⁵ If governments were to acknowledge that information asymmetries exist and that there is a need to reduce them, this would be read by the electorate as an attempt at making the governance process more transparent and less secretive.

Many methods exist in which information asymmetry between government and the citizens can be reduced. The media, both state owned and private, informs the public about government programs and services. Politicians do the same and parliament, through its various committees and question-answer sessions, provides information which can help to reduce the asymmetries. The problem with this arrangement is that government determines the information accessed. This *modus operandi* has its own flaws. Where government alone is left to decide the coverage of information, and when to release it, the asymmetries do not disappear. When measures are adopted to decrease the asymmetries, members of the public should have the opportunity of deciding which information they want to access to, and to determine when they would want to do so rather than government determining this need single-handedly.

Access to information is important in reducing information asymmetries. Imperfect information results from the absence of a *modus operandi* (one which both realises the value of access to information and seeks to improve the level of access between government and citizens). Specifically, access to information or even the capability of citizens in expressing themselves freely, cannot rely solely on government being the determiner of information to be released. Where this exists, government will release only the information depicting it in a good light while the rest will be withheld. This practice retains or increases the asymmetries and limits free expression to what government wants the people to know. The reduction of the asymmetries is achieved by buttressing government's practice of proactive disclosure of information with the ability of citizens to gain access to the information they require. The capacity to reduce information asymmetries will only be effective once FOI legislation has been enacted, and enabled by effective records management. FOI has 'a unique capacity to disturb the existing bureaucratic culture'²⁶ while good records management will provide an assurance information is created, retrievable and held for appropriate timeframes.

Paul Hubbard argues that secrecy 'creates an artificial scarcity of information; by its definition a secret is a piece of asymmetric information'.²⁷ By being secretive, governments contribute to information asymmetries in that they have relatively unlimited access to information while they release into the public domain only the level, type and quality of information that best serves the interests of government and more

particularly the governing party of the day. Secrecy also 'denies citizens the right to information and therefore privileges the interest of government, including the unelected and thus less accountable bureaucracy, over that of polity'.²⁸ Secrecy exacerbates corruption and information management deficiencies in that a government mostly responds to its own needs rather than to those of the public. Corruption, Laura Millar observes, that 'thrives when citizens have limited access to information about what their government is doing. Reliable, trustworthy records are their means of determining whether revenue collected on their behalf is spent on services that benefit them'.²⁹ Government through civil servants can create secrets which are beneficial to itself rather than the public.³⁰ Laura Neuman notes:

The consequences of corruption globally have been clear: unequal access to public services and justice, reduced investor confidence, continued poverty, and even violence and overthrow of governments. A high level of corruption is a singularly pernicious societal problem that also undermines the rule of law and citizens' confidence in democratic institutions.³¹

Access to information is crucial, on a day to day basis, to ensure the accountability of public authorities and as an anti-corruption mechanism. The key is that FOI, supported by an effective records management system, enables members of the public to know, understand and exercise the rights government have set aside for them. Access to information provides an incentive to the democratic governance process in that whatever government does is subject, directly or potentially, to public scrutiny. The recognition of the importance of access to information by governments, denotes a move away from a culture of secrecy to openness and transparency.³² Secrecy which results from restricted information, restricts public participation in the decision-making process of government and further hinders the ability of citizens to participate meaningfully in the entire democratic process.

Effective attempts at reducing government secrecy will be attainable if a two-pronged approach is adopted. The first approach is for government to acknowledge that it is under an obligation to inform the public - an obligation that is grounded on both democratic requirements and the

necessities of good corporate governance. In line with the acknowledgement, government will undertake to provide citizens with access to information. Secondly, citizens have to be conscious of the fact that government is there to serve their needs, having given it the mandate to rule on their behalf. Therefore, citizens must be in a position to demand and be able to effectively access government information.³³ This combination of government carrying out its obligation to inform citizens and citizens in turn understanding that they have a right to access information can help reduce state secrecy and the associated inefficiencies caused by asymmetrical information distribution.

This focus on information asymmetries provides some better understanding of, and responses to, the first three of Doty's FOI riddles. Furthermore Stiglitz's analysis highlights how important an effective relationship between FOI and records management is to creating, or shifting the balance towards, a citizen-centric information environment.

Public Sector Governance: A facet of the FOI and records management relationship

Access to information through FOI legislation is based on the existence and availability of information. Access is 'dependent upon government decisions and activities being recorded in some form as part of the business process and, latterly, valued and preserved as an important corporate resource'.³⁴ When citizens seek to gain access to information 'they are not expecting a public servant to provide that information verbally. They expect to receive the original records, the evidence of the decisions and actions'.³⁵ Access to information by virtue of FOI legislation presupposes access to the records which government will have received, held and used. Records management therefore is important in the creation and maintenance of information which apart from supporting business process and the capture of history supports the provision of the access through FOI legislation. As governments legislate FOI they should endeavour to develop sound records and archives laws which will assure and support access to information. 'Such legislation must define the record-keeping process and ensure that government is required to manage public information in an accountable, transparent and effective fashion'.³⁶ Without good records management FOI legislation becomes encumbered because:

- information can be manipulated, deleted or lost
- citizens cannot prove equal or unjust treatment
- human rights violations are difficult to challenge
- the public cannot make an informed contribution to the governance process
- individuals cannot satisfy themselves that the information held by government about them is appropriate and correct.³⁷

In this section we argue that the role record management plays in an ideal corporate governance model should be emulated in public sector governance. Although the corporate governance model is derived from the private sector, it is applied here to a government-citizen framework. In this public sector framework, corporate governance practice would suggest that government has been given the responsibility to govern (they are the board) on behalf of the citizens (shareholders). As a result, government is expected to put into place a practical framework which clearly spells out its processes and the modalities for achieving them, as well as stating how it will account and be held to account by citizens. To do so would reduce the level and impact of information asymmetries in the Australian public sector to a significant degree.

Corporate governance is seen as a diverse discipline concerning the management of institutional processes.³⁸ The Australian National Audit Office defined corporate governance as 'processes by which organisations are directed, controlled and held to account'.³⁹ According to the Organisation for Economic Co-operation and Development, corporate governance comprised six principles:⁴⁰

- Responsibility for an effective corporate governance framework.
- Rights of all shareholders and clear ownership functions.
- Equal treatment of all shareholders.
- Clear and functional roles of shareholders in corporate governance.
- Disclosure of information and transparency of the governance process.
- Responsibility of the board.

Anthony Willis, a partner in the Phillips Fox Solicitors in Canberra, Australia, opined that the requirements of corporate governance are as follows:

- Due process: Doing things in an agreed, documented, controlled and appropriate way.
- Transparency: Doing things in a way which is open to appropriate scrutiny.
- Accountability: Having to answer for things one does.
- Compliance: Having systems to ensure that things are done properly.
- Laws: Meeting applicable legal obligations.
- Security: Having systems to ensure protection of information.⁴¹

Therefore an ideal corporate governance model when applied to the public sector suggests that government is expected to be transparent in its dealings with and on behalf of citizens. Government has to account to citizens for its performance and it has to have in place measures which citizens can use to hold it to account. The 2003-04 report *Recordkeeping in Large Commonwealth Organisations* released by the Australian National Audit Office, argued that records management 'is a key component of any organisation's good corporate governance and critical to its accountability and performance'.⁴² The same report continued to mention that 'sound recordkeeping can assist an organisation's performance by better informing decisions; exploiting corporate knowledge; supporting collaborative approaches; and not wasting resources, for example by unnecessary searches for information or redoing work'.⁴³

Implicitly, an ideal corporate governance model hinges on two things: good records management, and access to information. Good records management captures information and evidence of business to enable organisations to be transparent; to enable them to account and be held to account; and to prove that they transact all public affairs within the confines of the law. Access to information, especially by virtue of FOI legislation, enables citizens to ascertain the level of transparency of public sector organisations. It also affords citizens the opportunity to hold organisational performance accountable as well to enable them to

evaluate whether all the organisational functions were conducted within the ambit of the relevant laws and regulations.

The adoption of a corporate governance model brings public sector records management and FOI legislation into a mutually supportive relationship. As Figure 1 below shows, when governments take over the responsibility to govern, they directly or indirectly promise to perform to their utmost in handling public affairs. Therefore, as they transact public functions, governments are expected to proactively account to and enable citizens to hold them to account. Also, it is expected that governments will inform citizens on the due processes of public functions, and to enable citizens to seek and to gain access to records and other information which may help them understand the processes undertaken and the accounts made. However, government can appraise its performance for citizens if it creates and manages records.

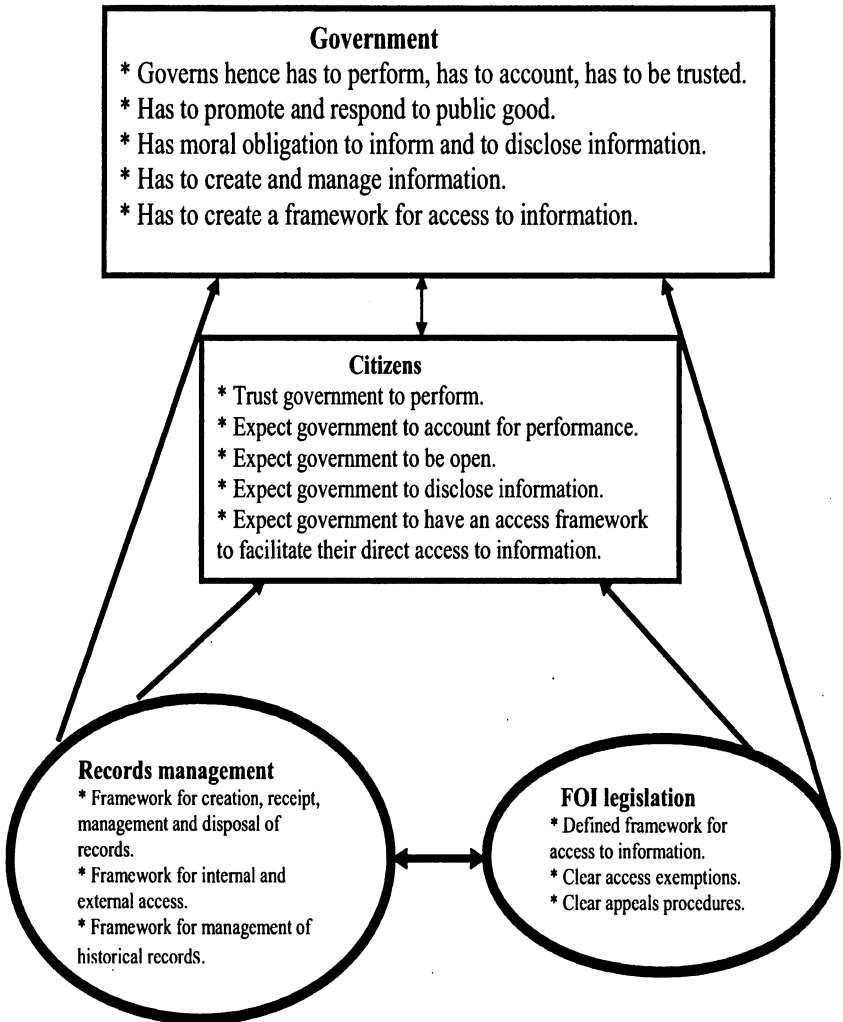


Figure 1. Corporate governance based relationship between records management and Freedom of Information.

FOI legislation allows government to enable citizens to hold it to account without waiting for it to account to them. Citizens can make enquiries into the different aspects of governance and FOI legislation enables them to gain direct access to the records which answer their queries. As Willis observed 'the records held by an organisation are what make it possible for people who have a right or obligation to know what has been done, to see exactly what has been done and how it has been done'.⁴⁴

Records management shares with FOI the capacity to enhance the corporate governance model. Where a government adopts a corporate governance model predicated on both good records management and FOI legislation, the expectation is that a government will become more responsible. Therefore, if governments are unable to maintain and operate good records management programs, it is unlikely that they will be transparent and accountable, let alone be able to prove that due process is followed when carrying out public functions. Where good records management is lacking, record capture becomes problematic and FOI becomes problematic. Where good records management exists and FOI legislation is effective, governments can prove their responsiveness to citizens through being transparent and through their ability to explain and to report to citizens.

The relationship which records management shares with FOI under the auspices of an ideal corporate governance model can also lead to clearer and viable information networks. First will be the networks that develop within government. FOI laws mandate governments to know the records they hold, where they are kept, how they are kept and their modes of access. Essentially the law expects government agencies to embrace good records management practices in that they have to know the types, content, context and structures of the records they hold. Within this perspective, government agencies will seek to understand how records are held and how they are accessible both internally to respective public servants and to public oversight bodies like the Auditor General. They will also endeavour to ensure that compliance to FOI legislation and compliance to good records management becomes a shared responsibility among staff of an agency, and the general public outreach service will develop clearer networks through which staff can access information.

Further viable information networks will develop between citizens and governments. Where governments observe their obligation to inform citizens, and where citizens can actively call upon governments to

account, formal access to information networks are created. Once governments know that citizens have the liberty to seek direct access to records, they will create within the public service procedures which will make this possible. Citizens too, in utilising the right which FOI bestows on them, will always seek to explore the various access to information networks which the legislation develops for their use.

When records management and FOI legislation converge to enhance a corporate governance model, the relationships which citizens share with government become more explicit and will be further refined. From this perspective, access to information is no longer solely determined by government (addressing Terrill's concern about structural imbalances)⁴⁵ since citizens can seek and can gain direct access to the information which serves their varied needs. Through good records management, government is more likely to succinctly record and inform citizens of what it does and how it does it. By virtue of access to recorded information, citizens are also likely to make out the levels of the relationship they share with government and determine the depth of their involvement in all matters of governance. In this respect, public servants are likely to develop a preference (or at least acceptance) for transparency and accountability. They are also likely to enhance the capacities of government's obligation to inform citizens and to create an accommodative atmosphere which will encourage direct access to official information. Hence, adoption or adaptation of a corporate governance model, records management and FOI legislation elucidates and strengthens the relationships which government and citizens share.

Matthew Flinders observed that information which government proactively releases is unlikely to be the sort which citizens may want to access through FOI legislation.⁴⁶ The United Nations Development Programme (UNDP) in their *Access to Information, Practice Note* of 2003, argued that a government's discretion to release information into the public domain is done 'without understanding the needs of the users, or the contexts in which they can access and use the information'.⁴⁷ Access to information following this model is not demand driven and will be inappropriate to the individual needs of citizens.⁴⁸ In corporate governance, it is crucial for citizens as shareholders in governance to be afforded the opportunity to validate the information which government makes available.

Using FOI and records management to produce a cultural change

A key concern of the corporate governance model when applied to the public sector is how governments will attain higher levels of transparency and become more responsible to citizens. The ability of governments to become transparent and responsible is driven by good records management and is supported by a framework which will keep citizens informed about the governance process. Although these are just expectations, some governments are known to be less open while others are more open. The adoption of FOI legislation predicated on good records management has the potential to reverse the secrecy which some governments are known to have institutionalised. Any attempt by a government to move away from a culture of secrecy to openness through FOI legislation will be incapacitated if records management is weak. A weak records management system will hinder the culture change in that a government may experience difficulties in accessing records from which it can extrapolate information for proactive disclosures. Where the information is accessible, it may be incomplete or may be strewn across many unrelated files making repackaging information for the disclosures complicated. A weak records management system will also make it difficult for a government to verify whether it holds certain information when a request is made for its direct access.

In a polity which is secretive or where secrecy is predominant, access to information and records management operate differently. As Table 1 shows, access to the records which a secretive government creates and holds, is restricted and limited mostly to public servants and the executive branch of government. Even amongst the public servants, access to the records will be restricted depending on their levels of sensitivity. In a polity which is open and transparent, good records management and FOI legislation can collaborate to enhance corporate governance.

	Secret	Open
Access	Restricted, Limited, uncontested	Lesser restrictions, fewer limits, contestable
Audience	Internal to government	Internal to government and external to citizens
Information flows	Static	Dynamic

Table 1: Records management functions in secret and open environments

Even though secretive governments may improve the quality and capacity of records management, access to the information will remain uncontested and access will only be made available internally. Secrecy, Stiglitz observed, gives those in government exclusive control over public knowledge.⁴⁹ Records provide information and evidence of business transactions and therefore provide knowledge of a government's business function. If governments have sole control over records, a credible source of corporate knowledge, they are likely to (or be heavily tempted to) guard against, or strictly control, access. When this occurs, the asymmetries and state secrecy which access to information theoretically is meant to address or reverse will remain intact.⁵⁰ Stiglitz warned that:

... secrecy is corrosive: it is antithetical to democratic values and undermines democratic processes; it serves to entrench incumbents and discourage public participation in democratic processes; and it is based on the mistrust between those governing and those governed and at the same time exacerbates that mistrust.⁵¹

When governments adopt FOI legislation, the complexion of corporate governance should change as secrecy is replaced by openness and transparency. As some UK respondents for Sebina's thesis argued: 'FOI creates a move away from the culture that all this information is secret to all this information is open'⁵² ... FOI inculcates an openness mentality. Government starts to think about openness and seeks to develop and

mould its business base on openness'.⁵³ Realistically, the move towards more openness and better transparency is arrived at through enabling citizens to gain insight into the activities of government. Through this process, citizens are to develop thorough knowledge of how a government transacts each one of its activities. The adoption of FOI legislation can lead to better transparency but transparency can only be proven to function if information exists and citizens can gain direct access to it. Hence, governments may adopt FOI legislation but it will have to be built into good records management so that effective transparency and openness can be developed.

Consequently, the relationship which records management shares with FOI under a corporate governance model forces governments to reflect and find ways through which they can improve their performance and maintain the trust of citizens. For instance, as governments think of adopting FOI legislation, the thought should be 'are we creating and holding information which citizens can access, even directly?' This thought should then trigger another one, 'are we creating the right records in terms of informational and evidentiary content? Do these records adequately inform and provide evidence of what we do? Will citizens understand what they express if they were to access them? Are they sufficient in providing proof of transparency?' Intrinsically, when FOI legislation is considered as part of improving corporate or public sector governance, good records management should be included. The success of FOI legislation 'rests firmly on the ability of government to create and maintain - and citizens to seek out and obtain - reliable, trustworthy and accurate government records'.⁵⁴

From a corporate government standpoint, good records management and FOI legislation creates an environment where lesser restrictions and limits to access of official information will exist. Added also, will be an emerging realisation that access is not only limited to a government's desire to disclose information but extends ability of citizens to gain access to official records. Hence, when a government creates and uses records, it has to do so knowing that citizens may ultimately seek to gain access to them.

Conclusion

This paper has only concentrated on one key facet of the complex and dynamic relationship between FOI and records management. We have suggested that the operating rationale of the corporate governance model can be applied to the public sector to address the problem identified by Stiglitz of significant information asymmetries between state and citizens. When coupled to a sound and dynamic records management system, FOI has a significant cultural change capacity. We have traditionally approached public sector information management from a generally static perspective and usually with a frame of reference limited or isolated to a single perspective such as FOI, privacy or archives for example.

Our attention should be redirected to managing information flows. Whilst Chadwick's nineteen word mantra is simplistic it does provide us - whether as records managers, citizens, information custodians or an inquiring fourth estate - with a rough ready reckoner. Adapting the corporate sector model of governance to a public sector environment provides a citizen-centric framework that is focused on information flows rather than the alternative of an ad hoc and patchwork government information environment that focuses on warehousing information.

Endnotes

¹ Joseph Stiglitz, 'Transparency in Government', *The Right To Tell: The Role of Mass Media in Economic Development*, World Bank, 2002, pp. 27-44.

² Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*, Cambridge University Press, 2006.

³ See: J McDonald and Christine Ardern 'Information Management and Access to Information - A View to the Future', *Report 7, Access to Information Review Task Force*, Appendix B for various definitions of information management at <<http://www.airtf-geai.gc.ca/paper-future1-e.html>> accessed 4 September 2006.

⁴ *ibid.*

⁵ David A Vines, *The Google Story*, MacMillan, 2005.

⁶ See: HP Lee 'Freedom of Information: A Court Adrift', Australian Press Council News November 2006 - vol. 18, no. 4 at <http://www.presscouncil.org.au/pcsite/apcnews/nov06/foi_court.html> accessed 1 April 2007, for an outline of this case.

⁷ Senator Andrew Murray, Speech, Australian Senate 5 September 2000 <http://www.democrats.org.au/speeches/?speech_id=455&display=1%5D> accessed 28 May 2006.

⁸ Editorial, 'The Freedom of Information Act May As Well Be Scrapped', *The Canberra Times*, 4 August 2005.

⁹ Commonwealth Ombudsman Press Release March 2006. See <http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/aboutus_mediareleases_2006> accessed 1 April 2007.

¹⁰ John Doyle, 'FOI stripped and beaten', *The Courier-Mail*, 4 September 2006.

¹¹ Frank Devine 'Confronting the Curse of Sir Humphrey' <http://www.the-rathouse.com/guestroom/FD_FOI.html> accessed 28 May 2006.

¹² Access to Information Review Task Force, *Access to Information: Making It Work for Canadians*, Report of the Access to Information Review Task Force, June, 2002.

¹³ C Hughes, 'Commentaries', *Federal Law Review*, vol. 14, 1983, p. 31.

¹⁴ Philip Doty, 'Freedom of Information in the United States: Historical Foundations and Current Trends', 1st Freedom of Information National Conference Mexico November 2000, p. 19-21. <http://www.utexas.edu/research/tipi/reports2/foia_doty.pdf> accessed 5 September 2006.

¹⁵ Stiglitz, *op.cit.* see note 1. Stiglitz's application of information asymmetries to public policies was developed with colleagues George Akerlof and Michael Spence.

¹⁶ Stiglitz, *op.cit.* see note 1.

¹⁷ G Terrill, 'Individualism and freedom of information legislation' *Foi Review*, 2000, vol. 87, p. 30.

¹⁸ *ibid.*

¹⁹ See for instance: Stiglitz note 1, pp. 27-9.

²⁰ A more detailed and extensive discussion about information asymmetry can be found in R Snell, 'Freedom of Information Practices' in *Agenda*, vol. 13 no. 4 2006, pp. 300-3.

²¹ Stiglitz, *op.cit.* see note 1, pp. 27-28.

²² BR Kingma, *The economics of information, a guide to the economic and cost-benefit analysis for information professionals*, 2nd edn. Englewood, CO: Libraries Unlimited, 2001, p. 89.

²³ The next few paragraphs are a summary of the ideas and arguments present in Stiglitz *op.cit.*, see note 1.

²⁴ Stiglitz, *op.cit.* see note 1, p. 28.

²⁵ Peter Sebina, 'Freedom of Information and Records Management: A Learning Curve for Botswana', PhD thesis at:

fn 181. Personal interview with UK/12, 18 May 2004 . Copy available at <www.ricksnell.com.au>.

²⁶ J Gilbert 'Access denied: the Access to Information Act and its effect on public records creators', *Archivaria*, vol. 49, 2000, pp. 83-123.

²⁷ P Hubbard, 'Freedom of Information and security intelligence: an economic analysis in an Australian context', *Open Government: a journal on Freedom of Information*, vol. 1, no. 3, 2005, pp. 4-21. Available at <<http://www.opengovjournal.org/>> accessed 8 February 2006.

²⁸ J Gilbert, *op.cit.* see note 26.

²⁹ L Millar, 'The right to information-the right to records. The relationship between record keeping, access to information, and government accountability', Commonwealth Human Rights Initiative, 2003, unpublished, p. 2. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/articles/record_keeping_ai.pdf> accessed 07 February 2007.

³⁰ Stiglitz, *op.cit.* see note 1.

³¹ L Neuman, 'Introduction' in L Neuman (ed.) *Access to Information: a key to democracy*, The Carter Centre, 2002, available at <<http://www.cartercenter.org/documents/1272.pdf>> accessed 10 March 2005.

³² L Millar, 'The right to information the right to records: the relationship between records keeping, access to information, and government accountability', CHRI contribution, May, 2003, available at <http://www.humanrightsinitiative.org/programs/ai/rti/articles/record_keeping_ai.pdf>, accessed 5 April 2005.

³³ For a more extensive account of this argument see R Snell and J Upcher, 'Freedom of Information and parliament: A limited accountability tool for a key constituency?', 2002, *FoI Review*, no.100, pp. 35-41.

³⁴ J Gilbert and T Karlebach 'Culture shock? A brief look at the Canadian experience thus far', New Delhi: Commonwealth Human Rights Initiative, 2003, available at: <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/canada/jay_gilbert_tanya_karlebach.pdf> accessed 12 March 2006.

³⁵ L Millar, see note 29.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ S Turnbull, 'Corporate governance: its scope, concerns and theories', *Corporate Governance*, vol. 5, no. 4, 1997, Blackwell Publishing, pp. 180-205. Available at: <<http://www.ingentaconnect.com/content/bpl/corg/1997/00000005/00000004/art00002>> accessed 9 March 2006.

³⁹ Australian Government, Australian National Audit Office, *Public Sector Governance*, Volume 1: Better Practice Guide-Framework Processes and

Practices, Canberra, Commonwealth of Australia, 2003, available at: <<http://www.anao.gov.au/director/publications/betterpracguides.cfm?pageNumber=2>>, accessed 1 April 2007.

⁴⁰ Organisation for Economic Co-operation and Development (OECD) 'OECD principles of corporate governance', Paris, OECD, 2004, pp. 17-66, available at <<http://www.oecd.org/dataoecd/32/18/31557724.pdf>> accessed 8 February 2006.

⁴¹ A Willis, 'Corporate governance and management of information and record', *Records Management Journal*, vol. 15, no. 2, 2005, pp. 86-97.

⁴² Australia Government, Australian National Audit Office *Recordkeeping in Large Commonwealth Organisations*, Canberra: Commonwealth of Australia, 2003, Available at: <<http://www.anao.gov.au/website.nsf/publications/478b4a27724e193bca256da50074796c>> accessed 5 June 2006.

⁴³ *ibid.*

⁴⁴ Willis, *op.cit.* see note 41.

⁴⁵ Terrill, *op.cit.* see note 17.

⁴⁶ M Flinders, *The politics of accountability in the modern state*, Aldershot: Ashgate Publishing Ltd, 2001, p. 320.

⁴⁷ United Nations Development Programme, *The practice note on access to information*, Oslo, United Nations Development Programme, 2003, vol. 4. Available at: <<http://www.undp.org/policy/docs/policynotes/a2i-english-final-4649027220103883.pdf>> accessed 5 May 2006.

⁴⁸ United Nations Development Programme, *op.cit.*, see note 47, p. 4.

⁴⁹ Stiglitz, *op.cit.*, see note 1, pp. 34-35.

⁵⁰ Stiglitz, *op.cit.*, see note 1, pp. 30-31.

⁵¹ Stiglitz, *op.cit.*, see note 1, pp. 34.

⁵² Sebina, *op.cit.*, see note 25, Personal interview with UK/14, 21 May 2004.

⁵³ Sebina, *op.cit.*, see note 25, Personal interview with UK/17, 6 January 2005.

⁵⁴ L Millar, *op.cit.*, see note 29.