



**Open Government:
A Journal on Freedom of Information**

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Editorial

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Welcome

Welcome the 4th issue of "Open Government: a journal on Freedom of Information". Firstly I must apologise to readers for such a log gap between issues – the journal is still alive and well and has plenty of articles in the pipeline. As many of you know I am something of a one man band in producing and editing the journal and the journal has had to take a back sit in the first half of this year whilst I spent some time with the latest addition to my family and fought off the closure of my department at the University.

You may also notice that journal has new look and feel, our journal hosts Scholarly exchange have migrated to the more popular Open Journal Systems (OJS) software (<http://pkp.sfu.ca/?q=ojs>) . The new system does offer some extra features such as RSS feeds and the ability for users to register for email alerts for each issue (something we weren't able to do previously). To register as a reader see: <http://www.scholarlyexchange.org/ojs/index.php/OPENGOV/user/register>

The next issue of *Open Government* will follow shortly after this one and will be a special issue with papers taken from the 4th International Conference of Information Commissioner which took place in Manchester of May this year, hosted by the UK **Complete Issue. Open Government: a journal on Freedom of Information. Volume 2 Issue 1.** Published on 17th August 2006

Information Commissioner. The Conference produced an excellent mix of papers by Commissioners from around the world and from other stakeholders such as NGOs. After the Conference the Open Society Justice Initiative in cooperation with Access Info Europe and the FOI Advocates Network held a civil society meeting to review and discuss the issues presented at the conference. As a follow up the group drafted and published the Manchester Declaration on Access to Information.

<http://digbig.com/4mmch>). More on this next issue.

This issue's articles

This issue contains an article on Freedom of Information laws in two countries we haven't featured so far: an overview of the New Zealand Official Information Act based on some detailed research conducted by Steven Price and a case study relating to Japan's information disclosure law by Lawrence Repta. As precedent setting decisions start to emerge from the UK Information Commissioner's Office, Ibrahim Hasan and Marcus Turle examine implication of some of decisions issued so far related to personal data and commercial interests/confidentiality respectively. In a viewpoint article Paul Kelly offers an insiders view of FOI from his experiences in the Ontario Government.

As ever I welcome quality articles (research, case studies & comment) from around world on the topic of Freedom of Information legislation. I'm also interested to hear from readers with views about issues of themes that the journal needs to cover.

As the journal is open access and non-commercial we have a limited budget for promotion, so please do pass on and promote the journal if you deem it be to be relevant to others. If you are willing to distribute a poster or some flyers at events, conferences etc please contact me at the email address below.

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Regards

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Author: Steven Price

Title: The Official Information Act: A Window On Government Or Curtains Drawn?

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Abstract

New Zealand's Official Information Act 1982 (OIA) looks good on paper – but how is it working out in practice? This article summarises the author's examination of hundreds of OIA requests and responses, and his interviews with people who frequently make requests and officials who have to process them. The article begins with an outline of the content of the OIA. Frustrations reported by requesters and officials are then summarised. In the analysis of requests and responses, it is found that the bulk of requests are processed on time and met with minimal or no deletions. Much useful information is released. However, the author also finds considerable evidence of questionable practices by officials and Ministers, including delays, apparently improper invocation of exceptions, and failures to explicitly address public interest considerations and provide information to requesters about review rights. This article is a truncated version of a longer paper published by the New Zealand Centre for Public Law at Victoria University of Wellington (Occasional Paper 17, November 2005), available at http://www.law.vuw.ac.nz/vuw/content/display_content.cfm?school=law&id=470 or by contacting the author at steven.price@vuw.ac.nz or the New Zealand Centre for Public Law at law-centres@vuw.ac.nz .

Introduction

Introducing New Zealand's Official Information Bill to Parliament in 1981, the Minister of Justice Jim McLay called it "one of the most significant constitutional innovations to be made since the establishment of the office of the Ombudsmen in the early 1960s." Its goals were lofty: to "increase progressively the availability of information" in order to promote democratic participation, political accountability and good government.

Yet to hear some of the criticisms of the Official Information Act (OIA) now, one could be forgiven for wondering whether it has been much of an improvement over the Official Secrets Act 1951, which made releasing official information an offence. "Ministers and officials developed ways of routinely subverting the provisions of the Official Information Act," researcher Nicky Hager has written (Hager, 2002). "It is ridiculously easy to circumvent the Act and to hide information from requesters and Ombudsmen alike," wrote former MP Michael Laws recently. "Of course, all potentially embarrassing information is routinely refused and time delays are simply *de rigueur*" (Laws, 2004). The Ombudsmen's office's annual reports have repeatedly chastised officials for their lack of understanding of the OIA and their tardy responses to requests. The office's new OIA practice guidelines contain a damning list of 57 "misconceptions" about the OIA that persist more than 20 years after its enactment.

A senior public sector official told a researcher that "...the Minister prefers to withhold information except where unavoidable. Information is seen as creating problems not opportunities" (Poot, 1997). Several people have charted methods employed by recalcitrant officials and Ministers to circumvent the Act – providing oral instead of written advice; "sitting on" requests instead of responding to them; providing

spurious reasons for refusing information; even doctoring and shredding official papers (Poot, 1997; Voyce, 1996; Hager, 2002; Harris 1993; du Fresne 1996).

Can things be this bad? It is difficult to tell. Most agencies do not keep statistics about OIA requests (Clemens, 2001). Using the OIA itself, this study sets out to address that gap. OIA requests were sent to 136 agencies that are subject to the OIA - comprising all government departments, all state-owned enterprises, and all national-level Crown entities subject to the OIA - seeking copies of their most recent ten OIA requests and their responses. Data was extracted about who was making requests, how timely the responses were, which exceptions were being relied on, and so forth. All the requests and responses were examined to gain some impression about whether the exceptions were being properly invoked. Finally, two not-for-attribution roundtable discussions were held, first, with frequent OIA requesters (four journalists from New Zealand's leading newspapers, two researchers known for their use of the OIA, and a leading public relations practitioner); and secondly, with five officials who frequently have to process the requests (two from high-OIA volume government departments, two from government agencies that frequently offer advice to other government agencies on OIA requests, and one from a state-owned enterprise). Both groups were asked about their experiences with the OIA, and their views of its strengths and weaknesses.

The results of the roundtable discussions and the data analysis are summarised below, after a brief outline of the key features of the OIA.

OIA Basic Structure

The OIA is designed, as its long title suggests, “to make official information more freely available.” It enshrines in law “the principle that [official] information shall be made available unless there is good reason for withholding it.” The Act’s reach is great. Official information is very broadly defined, and there are no classes of documents, such as Cabinet papers, that are outside the purview of the Act. Almost all government departments, Crown entities and state-owned enterprises are subject to the OIA.

Rights of access are granted to everyone in New Zealand, and New Zealanders overseas. Making a request under the Act is as easy as picking up a telephone (though requests must be specified with “due particularity”). Agencies must respond to requests “as soon as reasonably practicable, and in any case not later than 20 working days” after receiving the request. Agencies can transfer the request if the information is not held by them or is believed to be “more closely connected with the functions” of another agency. They can also grant themselves a time-extension if the volume of information to be searched is so huge that meeting the 20-working-day limit would unreasonably interfere with their operations, or where the need to consult about the request means it cannot reasonably be met in 20 working days. They can impose a “reasonable charge” for compiling the information.

Not all information needs to be released upon request. This is consistent with the third purpose of the Act: “[t]o protect official information to the extent consistent with the public interest and the preservation of personal privacy.” For instance, requests can be refused for administrative reasons contained in section 18, the most

important being that “the information requested cannot be made available without substantial collation or research.”

Officials can also withhold information if they can show that release would be likely to cause particular types of harm set out in the Act. Some types of harm (set out in sections 6 and 7) provide conclusive reasons for withholding information. These include the likelihood that release will “prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand” or would “prejudice the maintenance of the law” or “endanger the safety of any person.”

Certain other types of harm, listed in section 9, provide prima facie reasons for withholding information. These prima facie reasons exist “if and only if” withholding the information is “necessary” to (among other things):

- protect the privacy of natural persons;
- avoid unreasonable commercial prejudice to particular parties;
- protect confidential information in certain circumstances;
- maintain effective government by protecting advice and opinions in certain circumstances;
- maintain legal professional privilege; or
- avoid harm to the government’s negotiations or commercial activities.

Many of these reasons revolve around the concept of “likely” prejudice. In *Police v Ombudsmen* (1988) the Court of Appeal held that this requires “a serious or real and substantial risk to a protected interest, a risk that might well eventuate.”

Nevertheless, agencies must release the information if these prima facie reasons are “outweighed by other considerations which render it desirable, in the public interest,

to make that information available.” (The government can also release information at its discretion even if good reason to withhold it exists under the OIA. Withholding may be justified, but the OIA does not make it mandatory.)

A requester who is dissatisfied with the agency’s response (or lack of it) can seek a review by the Ombudsmen’s office. The Ombudsmen have power to investigate, and can insist on examining the documents at issue to see whether the agency is applying the Act correctly. Ultimately, the Ombudsmen may recommend the release of some or all of the information. On review, an organisation invoking one of the exceptions “would be expected to bring forward material to support that proposition” (Police v Ombudsmen, 1988).

These recommendations are binding unless the Governor-General, by Order in Council, overrides them, something that has never happened.

This, then, is the legal framework of the OIA. The next two sections of this article examine, from different viewpoints, how it is perceived by those who deal with it frequently.

Requesters’ Views

Generally speaking, the frequent requesters were deeply ambivalent about the OIA. The requesters all had OIA success stories. But they were sceptical of officials’ and Ministers’ motives and knowledge of the OIA. The requesters said many officials wrongly believe that OIA requests must be written down – or that the request must specifically mention the Act; if not, the officials believe they can choose whether or

not to release the information. Sometimes officials offer requesters a trade-off, they said, along the following lines: “you will have to put that request under the OIA, which will take time to process – or else I could just give you this particular information right now.”

The requesters suspected officials interpret their requests as narrowly as possible, forcing them to make very sweeping requests. They had all experienced frustrating delays in the processing of requests, particularly when they sought controversial or sensitive material. They listed what they saw as common stalling tactics used by officials:

- transferring requests between agencies;
- seeking clarification of the request, then treating this as a new request with a fresh 20 working day time limit;
- insisting that they are “working on it” or “conducting consultations”;
- claiming that the person processing the request is away or sick or that it is “on the Minister’s desk” awaiting final approval;
- waiting for weeks and then refusing the request;
- losing or simply ignoring requests; dragging the chain when the Ombudsmen become involved; and
- brazenly not releasing information immediately even after agreeing to do so following an Ombudsmen’s investigation.

By the time the information finally arrived, it was often no longer newsworthy. This, they thought, was often the point of the delays.

The requesters said officials and Ministers select from a menu of illegitimate reasons to deny them information. Some have nothing to do with the OIA: “the information
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doesn't belong to us"; "it's now wrong, we've changed our view, so you can't have it"; "we've consulted X and they won't let us release it"; "we have no interest in taking part in your survey."

As well, seasoned requesters were, by and large, cynical about the use of the OIA's withholding clauses. In particular, requesters said the government uses these exceptions to withhold anything that can remotely be described as commercially sensitive, Budget-related, confidential, related to international trade or security, or official advice. The requesters reported enormous inconsistencies in the way the exceptions are administered. Some agencies tended to withhold whole documents, rather than considering whether parts could be released. Many agencies appeared to adopt blanket policies concerning legal advice, policy documents, or documents supplied by third parties, rather than considering them case-by-case. Many deferred to the wishes of their Ministers rather than making the decisions themselves. Requesters also complained that they were sometimes confronted with enormous charges that seemed designed to deter them from pursuing requests.

Several requesters also suspected that information gets shredded sometimes, or given back to its source to frustrate access. And when the requested information does arrive, they wondered whether it was really complete. A lawyer said he had never been provided with any e-mails in response to any of his many OIA requests, and could not believe that no relevant ones existed. The New Zealand Law Commission (1997) has expressed concerns about this too, noting that even the Ombudsmen "may find it difficult to ascertain, for example, whether information supplied by an agency in accordance with requests is indeed all the relevant information held within the scope of the request, rather than simply enough to satisfy the requester on each occasion."

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Former Radio New Zealand political editor Alastair Morrison is one of many to comment on a different matter: the government's increasing use of methods of managing information releases to minimise their detrimental impact (Morrison 1997). The government waits until Christmas Eve before releasing the information, he says. It sends out a "public relations package" with the information. It buries the requested information in a mass of other material. It releases the information to all journalists together - or to a friendly journalist first - to deny the requester a scoop. (The roundtable journalists suspected that some of the stacks of paper stamped "released under the Official Information Act" that land in their in-tray may not have ever been requested by anyone at all. It may be a clever ruse to get them to read the material, or to release some information in the hope that no-one realises there's more.)

The news was not entirely bad. None of the requesters would want to go back to the days before the OIA. Du Fresne (1996) calls the OIA "a vital piece of legislation which has prised open many doors which previously had been firmly shut." Some requesters were full of praise for some of the officials they deal with – particularly the officials who, from time to time, suggest quietly "why don't you ask for this?" or who battle to release information they think should not be withheld. Some agencies are much more open than others, the requesters said. As well, most requesters accepted that problems with the OIA are frequently due to poor training, resourcing, or record-keeping rather than bad faith.

Officials' Views

The officials seemed as ambivalent about the OIA as the requesters, but for different reasons. They supported the concept of open government, and the principles behind the OIA. In fact, some wished journalists would take more interest in the policy-making process. Many said that the possibility of their advice becoming public strengthened its quality. "There is nothing like the prospect of outside academic or interest group scrutiny to make you write accurately and neutrally," commented Marie Shroff (1997), when she was Cabinet Secretary.

However, they said the OIA is an enormous burden to administer. They criticised many requesters for not thinking hard about the precise information they wanted, or for simply trying to get officials to do their research for them. Requesters were often vague, and sometimes asked the organisations to form opinions (which the OIA does not require them to do.)

Requests, they said, were increasingly taking the form: "all documents relating to Y including emails (and deleted emails), minutes, briefings, memos, drafts, correspondence, reports, aides memoire, file notes, Cabinet and Cabinet committee papers." This could create days of work - sometimes weeks or months, they said. First, the relevant information must be identified. It may be spread across different files, held by different staff members, in different parts of the country. Relocations, high staff-turnovers, interdepartmental mergers, computerisation, restructuring, and multiple recording, filing and archiving systems often add to the complexity of the task. The increasing use of e-mail for consultation and feedback on policy proposals and draft documents, for example, quickly multiplies the numbers of relevant documents that may be relevant to a request.

Next the agency has to take a view on whether release would damage any of the interests protected in the OIA. It is often difficult to delegate or centralise this task, the officials said, because expertise is needed to evaluate which information may truly be damaging if released. People familiar with the documents and the issues may need to be consulted, as well as third parties who may have privacy or confidentiality interests, legal advisors, and other agencies who may have contributed to the creation of the information. If there are political sensitivities, the Minister is consulted. It is not uncommon for some key people in this chain to genuinely be sick or overseas.

After that, officials need to go through the relevant documents, copy them, and painstakingly delete the information that needs to be protected. Finally, in many cases, the work needs to be checked.

The task, said the officials, is a thankless one. Some requesters are abusive, demanding and suspicious. They do not seem to realise that theirs is not the only OIA request in the pipeline, or that OIA processing is not the most well-resourced or high-status government activity, or that OIA requests are seldom the most important or pressing item on officials' workloads. In fact, say the officials, they often release information that could properly have been withheld, because they do not have time to consider all the issues page-by-page, or because they want to avoid a battle with the requester.

The officials pointed out that the OIA calls for some fine judgments to be made about the applicability of nebulous standards - the likelihood of harm, the public interest, the effect of disclosing advice. OIA requests are often delegated to junior staff, they noted. Some admitted that they are not necessarily best-placed to evaluate issues

such as likely commercial prejudice; they may have little time to consult large numbers of people about privacy or commercial interests; they may not want to be seen as betraying their Minister by releasing embarrassing material; they may feel acutely that minor statements taken out of context from preliminary policy documents and published in the media can do a lot of harm.

Poot (1997) has explored the nuances of this last point. Policy is a complex, iterative process, officials told him. "Options and issues released at an early stage may not be what they were later discerned to be," said one. Drafts are often put together to promote dialogue or explore ideas and are not designed to be definitive or painstakingly accurate. Journalists seldom provide this context, but often create a "sideshow" that interferes with rational decision-making processes. Increasingly, they are younger and more aggressive, seeking quick turnaround stories involving personalities, scandals or public money. "Provocative ideas can be really misinterpreted," one official told him. Worse still, politicians' requests are often politically motivated, "used more for political grandstanding than for improving policy development." The increasing need for negotiation with coalition partners and other parties has also complicated the policy-development and decision-making process.

So it is not surprising that many officials take a cautious approach to the release of information. Arguably, it is appropriate to adopt a careful approach to nebulous standards when there is an avenue of review available through complaint to the Ombudsmen's office. Moreover, even when they recommend release, they can be overruled by Ministers.

The officials said they do their best to meet the needs of the requesters and the dictates of the OIA. However, it seems from the data examined for this paper that

not all officials are as conscientious and knowledgeable about the OIA as the ones who attended the roundtable.

Quantitative Data

Of the 136 agencies contacted for this research, 13 agencies did not reply, and two merely provided their own selection of "representative" requests instead of the last ten they had received. These were excluded from the quantitative data. A further 21 agencies had received no requests. Thus, the dataset assembled for this research covers 100 agencies: 36 government departments, 13 state-owned enterprises and 51 Crown entities. Some agencies had received fewer than ten requests in the past year. The total number of requests in the last-ten-requests database is 694.

Bear in mind that the following information is subject to significant limitations. First, the dataset generally does not include the many oral requests for information received by agencies every day. Technically, these are usually requests under the OIA, but (presumably for reasons of administrative convenience, or ignorance of the fact that they constitute OIA requests) they are not put through the processes most agencies have set up for dealing with OIA requests.

Secondly, the dataset is not truly a random sample of all requests. A properly representative sample of the most recent OIA requests at a particular date would largely comprise requests to high-OIA-volume agencies such as the Police and the Ministry of Health. In order to explore the impact of the OIA across a range of agencies, the primary dataset included no more than ten requests from any one agency. This affects all the data, and needs to be borne in mind throughout.

Thirdly, as discussed, some agencies did not respond. Nor is it absolutely clear that those who supplied requests did not, mistakenly or deliberately, omit some.

Still, the information extracted paints a broad picture of the OIA in operation. The following is a summary of the results: more detail is available from the full version of this paper cited in the abstract above.

Almost a quarter of requests (23%) came from politicians, their staffers and political research units. The media and individual members of the public made about 20% of requests each, and the rest were about evenly split between academics, lawyers, companies and lobby groups.

Only 20% of requests were classed as "very wide" – asking for "all documents" concerning a particular topic, for example. Just over a third (35%) sought specific documents or information and the rest were somewhere in between.

Generally speaking, OIA responses were processed far more quickly than frequent OIA requesters might have predicted: in 13 working days, on average. Extensions were relatively rare (5%), and 87% of unextended requests were met on time. There was little difference in processing time between different requesters, or between different agencies (though state-owned enterprises were a little slower on average).

Overall, 18 % of requests were refused entirely. However, 59% of requests were met without any deletions, and 74% with at most only slight or partial deletions. This is probably because much of the ordinary business of the OIA does not relate to information that is extremely sensitive. It is also because the vast bulk of requests (80%) are reasonably well-targeted, rather contrary to the impressions of officials.

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Political requesters (politicians, political staffers and political research units, who these days are making more and broader requests than anyone else) seem to get particularly good service. Their requests were processed slightly faster than average and they faced a lower withhold rate. The media fared worse than average on both counts. Strikingly, media requesters are almost twice as likely to have information withheld than academic ones. It is possible that this relates to the nature of the information being requested.

The roundtable requesters accurately identified the most commonly used grounds for withholding information: those relating to privacy, confidentiality, commercial prejudice and policy advice. Information was withheld or refused in response to 41% of requests, and of those 41%, more often than not the deletions were substantial or the information was withheld entirely. In particular, the exceptions protecting the policy process, commercial activities and confidentiality were usually used to withhold large amounts of information (or all of it) rather than make small deletions. Where information was withheld under section 9 (where lower-level interests such as privacy, confidentiality and sensitive advice must be balanced against the public interest), almost three-quarters of responses failed to expressly consider any public interest favouring release of the information.

Overall, 29% failed to advise requesters of their right to seek a review. Most significantly, individual members of the public making requests were not told of their review rights in 47% of responses. Charges were made or imposed in only 4% of responses.

Qualitative Data

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This research revealed that a good proportion of ordinary OIA requests are about holding decision-makers accountable, seeking a window on the processes of government, and marshalling resources for research, political opposition, or public critique. Dozens of requests were made for all manner of policy-related information: briefing papers on the Shared Parenting Bill, policy papers on sex offender tracking, papers on assisted human reproduction, information about child smacking law reform, public and private road partnerships, use of the whistleblower protection law and tax concessions for film production, to name but a few. Individuals and groups sought reasons (and sometimes minutes, correspondence and documents containing the decision criteria) for decisions that went against them: a student who missed out on a scholarship, for instance; a bus company that was not awarded a school bus contract; and a group who were turned down for environmental legal aid.

Consider, too, the following examples from the dataset:

- A resident used the OIA to obtain data on road accidents in her area and information on how speed limits could be lowered, following the tragic road-accident death of a young girl.
- A manufacturers' lobby group believed some new water-heating regulations were poorly researched, and wanted to challenge them, so used the OIA to obtain the cost-benefit analysis that they were based upon.
- An anti-abortion group found via the OIA that the top five certifying consultants for abortions each received consultancy fees of more than \$100,000 in the past year.
- An OIA request revealed Treasury's reasons for opposing the government's painted apple moth airborne spraying programme: it has a 20-40% chance of failure,

it is likely to exceed its \$130 million budget, and the estimated economic benefit if it succeeds is only \$58 million.

- A newspaper's OIA request about the Defence Force's Orion aircraft revealed that they suffer equipment failures every second flight.
- Parents looking to challenge their child's expulsion from a particular school asked the Ministry of Education for data about the number of expulsions at that school in recent years compared with others in the area. The data revealed an enormous disparity.

This is the stuff of democracy. The examples demonstrate that useful – and even embarrassing – information is regularly released through the OIA. Moreover, officials sometimes went further and provided information beyond that requested. Many tried to work with requesters to accommodate their needs, apparently spent long periods searching for and vetting information for release, provided detailed and careful explanations when information was denied and, where necessary, explored alternative ways of making information available (with deletions, or via summaries, for instance).

However, this was not always the case. It was disturbing to see how often officials and Ministers withheld information in apparent contravention of the OIA. Examining hundreds OIA requests for this project revealed that when information was withheld, it was usually unclear whether the law was being applied correctly. Not infrequently, responses included reference to wrong sections. Officials often made simple assertions that information was "confidential" or "commercially sensitive" without appearing to understand that these do not, in themselves, provide reasons for withholding information. Although officials are not required to refer to the public

interest in their responses, they are required to consider it, and there was usually no evidence that they had done so.

Alarminglly often they issued refusals that appeared unlawful. One agency developed its own standard rule about the release of information, attempting to justify it on six different grounds in different cases. It admitted in a covering letter that its "approach to answering OIA requests is in need of a thorough review." A few times, agencies used OIA justifications for withholding information from Privacy Act requests (the Privacy Act regulates data management about natural persons and contains a separate access regime). One organisation refused to supply information it held simply because it was prepared by another organisation.

Without detailed knowledge of the information at issue in these requests and the various interests involved, it is difficult to offer definitive analysis of the refusals. It may be that some of them have since been subject to a complaint to the Ombudsmen (in fact, a few of the responses included correspondence with the Ombudsmen relating to particular complaints). However, most do not get referred to the Ombudsmen, who receive about 1200 complaints a year from the thousands of OIA requests that are made. Thus, the following comments are, of necessity, impressionistic. However, many of the documents raise concerns on their face.

Common problems included:

- Reading down requests, so that parts were ignored or construed narrowly
- Wrongly asserting that drafts are not subject to the OIA
- Withholding whole documents, when only small deletions were justified
- Refusing the information because various third parties (those with privacy interests, or companies who had supplied the information, for instance) had not consented to release

- Stating that policy decisions were “still under consideration”, and refusing all information about them, without considering the other statutory elements of the policy exceptions (one of which requires, for example, that release would prejudice the maintenance of public affairs)
- Replying that the information “doesn’t exist” merely because it is not written down
- Wrongly asserting that confidentiality clauses (for instance, in settlement agreements) mean the information cannot be released
- Transferring sensitive requests to the Minister (this is only lawful when the department believes that the request is more closely connected with the Minister’s functions)
- Invoking prejudice to national security in international relations in circumstances where the danger seemed remote at best
- Improperly invoking the privacy exception, to protect information such as the box office receipts from Peter Jackson’s films
- Properly invoking the privacy exception, then failing to delete names properly so that, for instance, the name of a three-year-old accused of sexual abuse in a child care centre, as well as the name of his mother, the alleged victim and her mother were readable in one requests. Also readable were the name and traffic conviction history list (including three drink-driving convictions) of another requester
- Imposing or proposing charges up to \$140 an hour that seemed designed to discourage requests

It may be that some of these refusals were justified. For instance, there may be good reason to refuse a particular draft document, if the statutory criteria of a particular exception is met. But the responses seldom addressed the relevant statutory criteria of the exceptions, so it was not clear that officials even understood them. The

Ombudsmen's annual reports from the past ten years indicate that 58% of complaints to the Ombudsmen are resolved, formally or informally, in favour of the release of further information - supporting the suggestion that the exceptions are too often incorrectly invoked.

Conclusions

The project has uncovered much that is encouraging: more, in fact, than the OIA's critics might have predicted. Many requesters sought and received information under the OIA that enabled them to better understand, critique and participate in the decisions affecting their lives. The majority of requests were apparently met in full. The vast majority were met on deadline. There is evidence that many officials applied the OIA conscientiously and did not withhold information without careful and reasoned consideration of the grounds in the OIA. Charging for information was very rare. Some officials even went out of their way to offer extra information. Indeed, officials may well have released information that could properly have been withheld under the OIA, although of course while the OIA provides grounds for withholding information, it does not make such withholding compulsory.

However, there is also much to be concerned about. About one OIA request in eight breached the 20 working day statutory deadline, without providing an extension. Most often, when information was withheld, the responses provided little evidence that the law was being followed properly. Bland assertions of "confidentiality", "commercial sensitivity", and "privacy" abounded. In more than a quarter of cases, responses did not refer to the requester's right to complain to the Ombudsmen. In almost three-quarters of cases, officials and Ministers failed to explicitly balance

public interest considerations, and when they did, they rarely provided more than lip service. It is possible that behind these glib responses lay a careful, but unexpressed, consideration of the statutory grounds for withholding, but it is difficult to have confidence about that.

Many agencies seemed to wrongly regard policy advice as constituting a class of documents that need not ever be released, and certainly not until the Minister has seen them. Whole documents were refused when deletions could have been made or summaries provided. Charges seem to have been employed on occasion to frighten people off. The various guidelines on the OIA seem to have been frequently flouted. Twenty years after the passage of the OIA, agencies have little excuse for these sorts of mistakes. Taken together, they seriously compromise the OIA's ability to fulfil its constitutional role of promoting accountability and participation.

References

439 NZ Parliamentary Debates 1908 (23 July 1981)

Clemens, Dave (2001) Requests made under the Official Information Act 1982: A survey at the agency level (Research Paper, Victoria University of Wellington)

Cropp, A (1997) Digging Deeper: A New Zealand Guide to Investigative Reporting (NZJTO, Wellington)

du Fresne, K (1996) The right to know: a media viewpoint Artifacts, 185.

Hager, N (2002) A Researcher's View of New Zealand's Official Information Act, in International Symposium on Freedom of Information and Privacy (Privacy Commissioner, Auckland)

Harris, S (1993) State sector corporatisation escapes net of the Official Information Act National Business Review 22 October

Laws, M (2004) Ghosts more believable than 'official truths' Sunday Star-Times 29 February 2004

Morrison, A (1997) The Games People Play: Journalism and the Official Information Act in The Official Information Act, Legal Research Foundation Seminar

New Zealand Law Commission (1997) Review of the Official Information Act 1982 Available at www.lawcom.govt.nz/UploadFiles/Publications/Publication_42_118_R40.pdf

Office of the Ombudsmen, Annual Reports, available at www.ombudsmen.govt.nz

Office of the Ombudsmen, Practice Guidelines – Official Information, available at www.ombudsmen.govt.nz

Official Secrets Act 1951, section 6 (New Zealand; now repealed)

Official Information Act 1982 (New Zealand) Available from: www.legislation.govt.nz or www.ombudsmen.govt.nz

Police v Ombudsman [1988] 1 NZLR 385

Poot, E (1997) The impact of the Official Information Act 1982 on the policy development process (unpublished Master of Public Policy research paper, Victoria University of Wellington)

Shroff, M (1997) Official Information Act: Politics, Power and Procedure in The Official Information Act, Legal Research Foundation Seminar

Voyce E (1996) The provision of free and frank advice to government (unpublished Master of Public Policy research paper, Victoria University of Wellington).

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Title: Business confidentiality versus human health: the role of Japan's information disclosure laws

Volume 2 issue 1

Abstract

This case study presents a detailed description of events covering a ten-year period from the filing of a freedom of information lawsuit in 1995 through final court judgment in 2005. The plaintiff is a resident of a city of 170,000 who successfully obtained a court judgment directing disclosure of diagrams of a biotechnology laboratory built near his home.

The case illustrates approaches to resolve the conflict between the desire of residents to know about nuisances near their homes and the desire of businesses to maintain confidentiality of sensitive information. It also provides a detailed example of the operation of Japan's information request procedures and litigation process. The narrative and legal analysis rely heavily on original Japanese court documents.

Governments obtain large volumes of confidential information from business entities through the regulatory process. Sensitive to the importance of protecting trade secrets and other confidential information, drafters of freedom of information laws ordinarily provide an exemption for confidential business information. However, the interest in protecting business confidentiality sometimes conflicts with a strong public interest in disclosure of the same information. In such cases, the freedom of information laws of many countries provide for a balance of interests in order to determine whether information should be withheld or disclosed.

Japan's national and local laws establish "public interest overrides" requiring that human health and certain other public interests prevail in cases of such conflict. This case study tells the story of one of the leading court precedents in Japan interpreting such a provision.

INTRODUCTION

The freedom of information laws of many countries explicitly require government officials to take the “public interest” into account when determining whether to disclose certain kinds of requested information. Disputes sometimes arise over how such a broad concept should be applied, especially when requested information comes within an exemption for confidential business information.

Because the most powerful catalyst to the formation of a freedom of information movement in Japan was the fear of mass injury due to defective drugs and other consumer products, resolution of this conflict has been an especially important issue there. Early Japanese proponents saw the FOI law as one safeguard against such disasters. Accordingly, the ordinances of the local governments of Japan and its national freedom of information law provide public interest overrides requiring the disclosure of information which may serve to warn of a threat to public health or safety even though it would otherwise be exempt as a trade secret or confidential business information.

The Japanese approach to this issue crystallized at a very early stage. In 1982, the same year that the legislators of Canada, Australia and New Zealand passed national freedom of information legislation, the first wave of local government legislators in Japan were doing the same. Of greatest importance, the legislative assembly of Kanagawa, a prefecture bordering on Tokyo with a population of approximately six million, adopted an information disclosure ordinance in October 1982 that would set the pattern for other local governments and for Japan`s national law to follow.

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The 1982 Kanagawa ordinance exempted confidential business information from disclosure but nonetheless required disclosure of such information where this might be necessary "to protect human life or health" or "to protect consumers from extreme difficulties related to daily life" (Repeta, L., 1999, p. 56).

In the more than two decades since, Japanese officials, administrative review panels and courts have confronted the puzzle of how to balance the interest in protecting confidential business information against other public interests. Cases where information has been disclosed include the names of companies with large numbers of complaints for fraudulent sales practices, details of the disposal of industrial wastes, and a wide variety of information concerning real estate, including applications for development under urban planning law, applications to review designations of protected forest land, notifications describing construction projects and others. Litigation has buttressed the right of agricultural communities to learn the types of pesticides used at golf courses nearby despite assertions that such information is a valuable commercial secret. On the other hand, authorities have denied requests for design specifications for industrial facilities and other construction projects and the names of companies that have been found to utilize banned substances in their products (Uga, K., 2001, p. 138).

In one of the most important cases interpreting Japan's national law, the national administrative appeals board (board members are appointed by the Prime Minister) recommended in February 2004 that the public-interest override be applied to disclose a list of hospitals that had distributed a blood coagulant tainted with hepatitis viruses. This recommendation overturned a non-disclosure decision by the Ministry of Health. The Ministry had withheld the information on the ground that release of hospital names could cause severe economic injury to the listed entities.

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The case study that follows describes litigation leading to one of Japan's most important court precedents in this area, a decision of the Osaka High Court which became final in 2005. The Court held that the interest in public health outweighed the interest in business confidentiality in this case and invalidated the decision of a city government to withhold.

A BIOTECHNOLOGY LAB IN THE NEIGHBORHOOD

The Great Hanshin Earthquake struck at 5:46 a.m. on January 17, 1995, causing more than five thousand deaths and massive structural damage throughout the port city of Kobe and the surrounding area. It was the most lethal earthquake to strike Japan since the Great Kanto Earthquake of 1923. "The sky was black and the vibrations were terrifying," said Takashi Futaki, a resident of the City of Takatsuki, located about twenty-five miles east of Kobe. Mr. Futaki lives only 80 meters from the boundary of a biotechnology research center owned and operated by the Japan Tobacco Company (JT). "The electricity went out. I immediately picked up a flashlight and ran toward the JT facility to see if there was any damage. But I was so afraid of what might be released, I turned around and ran back home" (Futaki, T., 2004).

Construction of the JT biotechnology center in Mr. Futaki's neighborhood commenced in 1991 and was completed in 1993. Its mission is to develop new pharmaceutical products through recombinant DNA technology and other methods. Stocks of disease-bearing organisms are maintained and used in the ordinary course of work at the site. The biotech center is surrounded on all sides by homes and small retail shops, separated from the JT property by a narrow two-lane road. When residents learned of JT's plans to build in 1989, they launched a campaign to stop

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construction, but failed. Construction went forward and the facility began operations in 1993. Two years later, the earthquake struck.

Mr. Futaki is a high school teacher who has been concerned about environmental issues throughout his adult life. He was the leader of the residents' group that opposed JT's building plans. The unexpected Kobe earthquake¹ was especially frightening to Mr. Futaki. He and his family live within close proximity to laboratories where disease is cultivated and injected into lab animals and where gene-splicing and other biotechnology experiments take place. His brother was injured in a building collapse in another part of Osaka prefecture. As he pondered these facts, he saw a television documentary showing structural damage to a university biomedical research lab in another part of the Kansai area caused by the big quake. He and his neighbors had failed to stop construction of a potential source of biohazards in the neighborhood. What else could they do? Mr. Futaki resolved to learn as much as he could about the nuisance in his neighborhood.

INFORMATION REQUEST

Takatsuki is a city of over 350,000 (City of Takatsuki Website). The Takatsuki city council adopted an information disclosure ordinance in 1986, among the earliest of Japan's local governments to take such action (Ordinance No. 40, 1986).² Like disclosure ordinances all over Japan, it enables any resident to request to examine documents in the possession of the city. The ordinance establishes a general rule of

¹ Major earthquakes have repeatedly struck the Kanto (Tokyo) region throughout modern history and minor earthquakes are experienced frequently. This is not the case in the Kansai (Osaka-Kyoto) region. Somehow, the "slip fault" that runs beneath the city of Kobe had remained undetected.

² A revised ordinance was promulgated by the city on July 16, 2003.

disclosure. City officials are authorized to withhold information only if they can cite a reason listed in the ordinance.

Two months after the earthquake struck, Mr. Futaki filed an information disclosure request seeking the floor plans and specifications for each floor of each building in the JT research center (hereinafter "floor plans"). He knew that JT was required to obtain building permits from the city of Takatsuki and that the floor plans would be attached to JT's application for a building permit. He hoped these documents would provide some comfort regarding the threat of biohazards in his community, or at least some clues to the nature of what was going on in those big buildings down the street.

Before deciding on the request, the city contacted Japan Tobacco to solicit the company's opinion regarding disclosure.³ JT responded that the documents contained confidential business information and disclosure would result in significant injury to its competitive position, thus claiming protection under one of the grounds for nondisclosure provided by the city ordinance. The city agreed with JT's position and formally denied Mr. Futaki's request on March 28, 1995, twelve days after he filed. In the wake of this defeat, he responded with two actions. First, on May 17, he appealed the city's decision to the Administrative Review Board appointed by the mayor and then, on August 23, he filed a separate information request for all documents related to meetings held by a "specialist committee" appointed to review safety measures employed at the site. Both steps would lead to the disclosure of additional information.

³ The Takatsuki Ordinance explicitly provides for this procedure, Art. 9.

On April 30, 1996, the Administrative Review Board formally recommended that the City disclose records related to vibration tolerance for the facilities utilized in DNA experiments and in experiments involving disease-bearing organisms. The City released these documents three months later. The City also released documents related to the specialist committee. Mr. Futaki would later write that he “fairly danced down to the city office” when he received notice that he could see the material. But the pro forma documents he was shown did little to answer his questions about the JT operations, so he filed suit on October 7, 1996, seeking a court order mandating full disclosure of all requested documents (Futaki, T., 1997, p. 32).⁴

JT immediately intervened in the suit, seeking an order prohibiting the city from releasing its documents. JT was joined by its real estate development affiliate, JT Real Estate. Both companies declared that the documents contained valuable business information the disclosure of which would injure their competitive standing, presumably by enabling competitors to learn details of the design and construction of the facility.

THE TAKATSUKI FACILITY

Like other big cigarette producers around the world, JT has pursued a diversification strategy of its business, primarily by developing pharmaceutical and food products. As one element in this strategy, the company constructed the research facility that inspired this litigation. The Takatsuki research center represents a very large investment, with more than ten thousand square meters of

⁴ See also, Complaint and Futaki, T., 1996.

floor space and four hundred staff on site, approximately half conducting technical work. In a 1997 article, Mr. Futaki described it as follows:

This 'research center' is of such grand scale that pre-existing large pharmaceutical companies probably could not build it. It includes 'level P3 facilities' designed to conduct gene-splicing experiments. In addition, in order to develop new pharmaceuticals, it utilizes many different varieties of disease-bearing organisms, dangerous chemical substances and radioactive elements. This is an extremely specialized facility where a large number of animal experiments and other operations are conducted on a daily basis (Futaki, T., 1997, p. 27).

Mr. Futaki completed his description with the observation that "applying ordinary common sense, this is not the kind of thing you would build in a densely populated area in front of a train station" (Futaki T., 1997, p. 27).

JT had operated a cigarette manufacturing plant at the Takatsuki site for many years. After it was closed in the 1980s, the city entered into negotiations to acquire the site for a public park. But the discussions failed and late in 1989 Mr. Futaki and other residents were invited to an information session at which the company disclosed its plans to build a new pharmaceutical research center. This was his first notice of JT's construction plans. Another information session was held in April, but according to Mr. Futaki the content was the same. Using an overhead projector, JT spokesmen explained JT's transformation from a government entity to a public corporation and its shift in business strategy to rely less on tobacco products and more on other businesses including pharmaceuticals. Then they provided an overview of the process of developing new drugs, barely touching on the topic of

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genetic experimentation. They provided little detail in response to residents' questions about safety issues (Futaki, T., 1997, pp.29-30).

Mr. Futaki knew nothing about biohazards at the time but, suspicious of the company's motives, he commenced research. As he examined the writings of Japanese scientists, he became alarmed.

TOYAMA

JT was not the first to propose construction of major genetic laboratories in the midst of a crowded residential area in Japan. The National Institute of Infectious Diseases (NIID), Japan's largest biomedical research center, is located in the Toyama section of Shinjuku, Tokyo. A government entity overseen by the Ministry of Health, Labor and Welfare, the NIID is Japan's counterpart to the American National Institutes of Health, which is charged with conducting the highest level of research on infectious diseases in the United States. The institute is located immediately to the south of Waseda University, a prized central Tokyo location inside the Yamanote Line.⁵

In the early 1980's the Ministry of Health proposed consolidation of government infectious disease laboratories, which were scattered at several locations around Tokyo. The center of the proposed consolidation was to be Tsukuba, Japan's "Science City," located fifty kilometers northwest of Tokyo and the home of a major national university and many other research institutions. But leaders of the research

⁵ The Japan Rail "Yamanote Line" forms a large circle which serves, among other things, to define "Central Tokyo." See "JR Yamanote Line" [Online], <http://www.japan-guide.com/e/e2370.html> [Accessed: 18th April 2006].

laboratories resisted this move, arguing that the proposed location was too inconvenient for its hundreds of researchers and other staff.

Mr. Futaki's research showed that he was not alone in opposing the operation of biotechnology labs in densely populated communities. He learned that, as in the Takatsuki case, a group of local residents had organized to oppose consolidation of infectious disease research at Toyama. (The Tokyo residents' group was joined by Waseda University.) But their complaints were brushed aside and the consolidation was executed as planned. So on March 22, 1989, a coalition of 128 individuals filed suit in Tokyo District Court, seeking an order to shut down the center as a dangerous public nuisance (Tokyo District Court, 1989).⁶ Subsequently, the number of plaintiffs increased and several similar suits were also filed. Mr. Futaki himself labels the Shinjuku facility as the "No. 1 Worst" and the JT Takatsuki facility as the "No. 2 Worst" (Futaki, T., 1997, p. 31).

THE 'SAFETY AGREEMENT' BETWEEN TAKATSUKI AND JT

Takatsuki city officials were aware that JT would conduct activities at its new research center that presented the possibility of life-threatening injury to members of the surrounding community. But since there was no law requiring a specific approval for construction of genetic research or infectious disease laboratories, local government had little authority to stop the project. JT had operated a cigarette factory at this site for many years, so it was zoned for industrial use.⁷ When it decided to convert the site to its present use, the proposed structures were required

⁶ The request for an injunction was denied. Subsequently, the Tokyo District Court decision was upheld on appeal (Tokyo High Court, 2001). Background to the suit is provided in Association of Plaintiffs and the Attorneys Team, eds., 2001).

⁷ The area is called "*murasaki-cho*," literally meaning "purple-town." Futaki himself suspects that this name was selected due to the smoke produced by the factory.

to comply with the general Building Standards Law, which sets minimum standards governing such matters as height-to-space ratios, setbacks from property lines and general construction safety codes. The law said nothing to limit or control the activities that might take place *within* the new buildings.

Nonetheless, the mayor and city council members are elected officials and they were well aware that more than seven thousand individuals had signed petitions opposing the JT research center. In an effort to maintain harmony between city residents and Japan Tobacco (and insure safety to the community), the city organized the negotiation of a three-party agreement (*kyotei*) among the company, the residents and the city government. According to Mr. Futaki, the resident group insisted on several conditions including prohibition of "P3" level activities, prohibition of experiments on animals and others. These proposals were rejected. An impasse was reached after only a few negotiating sessions, so the city decided that the only practical course was to conclude a two-party compact. The city had already issued building permits and construction had started. There appeared to be little leverage to persuade JT to accept conditions it opposed. So the city went ahead and concluded an agreement on its own with JT on March 3, 1993.

The agreement provided for the appointment of an expert panel to oversee safety issues at the new research center. Members included representatives of the city government and Japan Tobacco, and five 'specialist' members. Four of the latter appointees are professors at Kansai area universities and one is the head of a clinic operated by Osaka Prefecture. The committee met three times between conclusion of the 'Safety Agreement' and opening of the Takatsuki facility in September 1993. It has met annually thereafter (Futaki, T., 1997, p. 32).

THE TAKATSUKI SUIT

Takatsuki is an incorporated city within Osaka prefecture. In order to challenge the city's non-disclosure decision, Mr. Futaki would have to file suit in Osaka District Court. His primary opponent in the litigation would not be the city; it would be the Japan Tobacco Corporation, one of the richest companies in the country.⁸ In order to succeed, he would need good lawyers willing to take on a potentially long and exhausting fight. As a public high school teacher and father of three, Mr. Futaki did not have the money to hire them. He approached a lawyer he had met in the anti-nuclear movement years before, but the man was not interested in this case. Mr. Futaki then hit upon a simple and direct solution to his problem.

The offices of the Osaka Bar Association are located in a central part of the city, in a grey office building next to the courthouse on the north bank of the Yodo River. When Bar Association members checked their mailboxes one day, they found that Mr. Futaki had delivered a memorandum to each of them seeking representation in his dispute with JT and the city. Eight lawyers took him up on the offer. None had met Mr. Futaki before. Each worked from a separate office and some had been unacquainted prior to representing Mr. Futaki. The team spanned generational lines, with two attorneys in their sixties well-known for their involvement in public interest cases and three with less than two years of experience. They all worked *pro bono publico*. Mr. Futaki paid related costs from his own pocket, but the lawyers worked for free.

⁸ Japan Tobacco Company is listed on the Tokyo Stock Exchange but the national government owns two-thirds of outstanding shares.

Mr. Futaki told them his story and they set about drafting a complaint. The nineteen-page document provides a clear description of the claim (Complaint, *Futaki v. Toshio Emura, Mayor of Takatsuki*, 1996). After reciting the administrative history of the request, it describes the physical circumstances of the JT Property, stressing its proximity to Takatsuki Station and listing dimensions of 63,759 square meters on the ground and floor space of 15,392 square meters. Then it shifts into a description of the gruesome consequences that could result if infectious material maintained on-site is released, citing the AIDS pandemic as an example where infectious disease has quickly spanned the globe, resulting in incalculable human suffering. This kind of injury is especially terrifying because victims may not be aware of their condition until years after they are infected and, even then, may not know the cause.

The complaint declares that regulation of the building of such facilities in Japan is “completely inadequate,” depending on “autonomous safety measures” selected by facilities builders themselves. It cites guidelines issued by the Science and Technology Ministry and by the National Institute of Infectious Diseases, but says they are not legally binding and there is no way to determine whether facilities operators actually follow them. In summary, it declares that “in Japan there is no requirement of environmental impact evaluations for biotechnology facilities, no safety standards set by law, and no on-site inspections at all” (Complaint, p. 9).

In contrast, the complaint describes much tighter regulations in other parts of the world, including the requirement of environmental impact statements in the United States, a directive of the EU governing council requiring public disclosure of evaluations of impacts on the environment and potential threats to public health prior to construction, tight German regulations and guidelines issued by the World Health Organization (Complaint, pp. 7-8).

In the plaintiff's view, the Japanese government had defaulted on its obligation to provide reasonable measures to protect public health. Takatsuki residents had no choice but to take on the task themselves. The hapless residents had earnestly sought to learn the nature of the JT operations in their midst, but had been met only with superficial statements, obfuscations and refusals to provide meaningful information. In the plaintiff's search for a means to hold JT accountable, the plaintiff had hit upon the Takatsuki disclosure ordinance, "in the present circumstances, the sole means to secure the safety of biotechnology facilities is through strict monitoring by the eyes of the citizens" (Complaint, p. 18). To the question of how citizens could accomplish this task, the complaint concludes with this flourish:

(T)he request for information disclosure in this case fills a gap in legislation and carries the great significance of making possible the inspection for dangers posed by these facilities and confirming their safety from the viewpoint of residents. It is not too much to say that this lawsuit is the sole means of realizing access to information concerning biotechnology facilities (Complaint, pp. 18-19).

THE DISTRICT COURT DECISION

At the time he filed suit, Mr. Futaki expected a quick judgment instructing the city to release the documents. This was not to be.

The first court hearing was held on December 11, 1996, and the final hearing four years later on December 4, 2000. During the course of the trial, the court conducted 23 live sessions. In addition to pleadings and evidentiary statements filed **Complete Issue. Open Government: a journal on Freedom of Information. Volume 2 Issue 1.** Published on 17th August 2006

by all parties, the court considered the testimony of five witnesses. Japan Tobacco called two of them: the associate director of its Takatsuki center and an executive from the architectural firm that designed the facilities. They spoke of the confidential nature of the information embodied in the documents and safety features employed at the facility (Futaki, T., 2003, p.46-47). Takatsuki called one witness, the scholar who had been appointed head of the disease research center operated by Osaka prefecture and to serve on the specialist committee charged with monitoring safety at the JT facilities under the terms of the "Safety Agreement." Mr. Futaki himself testified about the threat perceived by neighboring residents and the importance of public disclosure (Ibid.). Finally, his attorneys were allowed to call one other witness, a licensed architect who had once worked in the design of manufacturing facilities but in recent years had shifted to the role of advising residents and consumers of the risks presented by production facilities located near residential areas.

This architect, Yukio Kawamoto, had become so concerned with the threat of biohazards that he had become the executive director of a public interest group called the "Citizens Center for Prevention of Biohazards." His testimony was intended to show that valuable information concerning safety measures could be learned by examining the requested documents and that the documents were unlikely to contain any information whose release would cause meaningful injury to JT (Futaki, T., 2003, pp. 47-48).

The primary issue before the Court was application of Section 6(1)(2) of the Takatsuki ordinance, which protects information "the disclosure of which would cause damage to the competitive standing or other proper interests" of a business

(Ordinance No. 40, 1986). The Court separately considered the interests of Japan Tobacco and JT Real Estate.

JT presented evidence indicating that the time required to develop a pharmaceutical product ordinarily runs from ten to eighteen years and development costs total 15-20 billion yen. Timing is critical. The producer first to the market with an effective drug can collect big revenues. Several different products are at various stages of development in the Takatsuki labs at any time. Accordingly, the court found there is no question that the leak of valuable development information to a JT competitor could result in significant financial loss (Osaka District Court, 2001, 61-62).

With this pragmatic view of the risk, the court nonetheless concluded that release of the documents at issue would be unlikely to cause this kind of injury. When Mr. Futaki filed his original request in 1995, four years had already passed since the floor plans were submitted to the city office; as the court was drafting its opinion in 2001, ten years had passed. The court concluded that in an industry characterized by constant change, the likelihood that release of these old architectural drawings would shed light on “such matters as the direction, speed, scope or administration” of JT research, and thereby cause significant injury to JT, was low. Accordingly, the exemption for confidential business information did not apply.⁹

⁹ This paper addresses the competitive injury aspect of Article 6(1)(2); the exemption also applies to “other proper interests” (Ordinance No. 40). Both the District Court and High Court recognized that disclosure of the floor plans would cause injury to JT’s interest in maintaining security at the facility.

The Court reached a different conclusion when it considered the interests of JT Real Estate. Noting that dozens of technicians, including some architects holding first class licenses, had participated in the design of a highly specialized building with many unusual features, the court ruled that the floor plans embodied valuable know-how and their release would clearly present a real threat of significant competitive injury to JT Real Estate (Osaka District Court, 2001, p. 68). Therefore, the documents qualified for protection under Section 6(1)(2) of the ordinance.¹⁰

Before the Court could reach the conclusion that the city had lawfully withheld the documents, however, its analysis would have to clear a second hurdle. A proviso to Section 6(1)(2) states that, regardless of the competitive injury that may result, information must be disclosed if it concerns "business activities that present a risk of injury to human life, the human body or health" (Ordinance No. 40, 1986, Art. 6(1)(2)).

A release into the community of disease-bearing organisms or other hazardous materials maintained at the Takatsuki site could cause the outbreak of disease and perhaps death. In addressing whether the nature of this risk was such that the documents must be released, the Court held that the term "risk" (*osore*), as used in the Takatsuki ordinance, referred to "the concrete and certain risk" present in this specific environment (Osaka District Court, 2001, pp. 75-76). In order to evaluate this specific risk, the Court entered into an intensive analysis of the numerous safety measures employed by JT and the city to ensure that such a ruinous discharge would

¹⁰ The court also found that injury to JT Real Estate would occur due to disclosure of confidential information protected by copyright law and by character rights enjoyed by the copyright holder. Requests for copies of architectural drawings raise an obvious conflict between public policy granting monopolies to copyright holders and granting citizens broad access to information held by government. These issues were argued by the parties and the Osaka High Court resolved the dispute in favor of disclosure. Analysis of these issues is beyond the scope of this paper.

never happen; the Court considered safeguards in place to prevent such leaks and to respond to them should they occur. The court's discussion of these matters ran to more than twelve-typed pages of the opinion and concluded that, if the Takatsuki center is operated in accordance with the rules governing experiments and general safety, then the threat posed by the JT Takatsuki operations would be reduced below the level of risk that triggers disclosure under the Takatsuki ordinance (Osaka District Court, 2001, p. 90-91).

The District Court recognized that it was tracking a moving target: "Of course, these standards are not absolute; daily confirmation and education are indispensable" (Ibid.). To accomplish these oversight tasks, the Court noted that the Takatsuki city officials retained the right to inspect the facilities and that the expert committee required under the "Safety Agreement" had been established to serve this very purpose. The Court therefore upheld the city's decision to withhold the information. It was total defeat for the plaintiff.

More than ten years had passed since Mr. Futaki began his opposition to construction of the pharmaceutical research facility in his neighborhood. Six and a half years had passed since the Kobe earthquake. Faced with defeat in Osaka District Court, he now contemplated the possibility of an appeal. Assuming the appellate court would agree with the District Court's assessment of the confidential nature and competitive value of the floor plans to JT Real Estate, the success of the appeal would depend on persuading the appellate court that the interest in public safety nonetheless required disclosure. To accomplish this, Mr. Futaki's attorneys would have to demonstrate either that the JT safety measures were inadequate or that the lower court had applied the wrong standard in gauging the level of risk that

triggers disclosure under the Takatsuki ordinance. On July 12, 2001, they filed an appellate brief of forty pages focused mainly on these issues.

WARNING SIGNS

By tearing a great fissure in the earth and rattling the Futaki house 25 kilometers away, the Great Hanshin Earthquake had severely frightened Mr. Futaki and driven him to act. Another quake might bring down the walls of the JT compound and spill pathogens into his living room. But he and his neighbors were about to see a live demonstration that earthquakes were not the only threat. As the case moved forward, other nasty warnings of potential disaster appeared.

On December 20, 2000, just after the parties had completed final arguments before the trial court, an apparently deranged employee of the JT Takatsuki facility carried a radioactive substance from the plant and sprayed it around the entrance to the local railway station.¹¹ Although the volume of the substance released was not sufficient to pose a real threat of harm and no one was reported injured, the incident was a shocking display of vulnerability to this kind of attack. The perpetrator himself was employed as a researcher at the JT facility and appeared at the station in his white lab coat carrying three beakers of the material. When the 40-year-old man was apprehended, he is reported to have muttered barely comprehensible statements along the lines of, "This is a transient world and I acted to return the

¹¹ Asahi Shinbun, Dec. 20, 2000. This event was widely reported in the major Japanese news media.

world to its origin."¹² An occurrence like this would immediately send the thoughts of any Japanese to the 1995 sarin gas attack in the Tokyo subway carried out by members of the *Aum* doomsday cult, which caused twelve deaths and more than five thousand injuries.

The site chosen by the man in the lab coat was well-suited to causing large-scale human injury. Takatsuki Station sits astride the Tokaido line of JR East, the main trunk line running through Japan's great population centers. The station is commonly used by nearly all residents of the city and anyone who has business there. Passenger traffic is heavy. The JT facility is only a half-mile away.

Not long after this incident, there was more bad news. In June 2001 there had been an excessive discharge of a regulated substance (dichloroethane) from the JT Takatsuki facility but JT did not report the incident to the city as required. After a whistleblower notified a city council member who then sought action, the city demanded a report and conducted an on-site inspection (Osaka High Court, 2002, Sec. II(7)).

These incidents occurred against a background colored by a long-running series of incidents of malfeasance at regulated entities around the country. As judges of the Osaka High Court considered Mr. Futaki's appeal in the summer and fall of 2002, they opened their morning newspapers to find shocking details of systemic failures in Japan's nuclear power industry, including widespread falsification of plant inspection reports and cover-ups of defective equipment. In lieu of repairs, company personnel created false reports indicating that everything was fine. These disclosures

¹² The quotation is from, *The case of scattered radioactive materials*, http://web.ffn.ne.jp/kross9/archive/2000_12.html [Accessed: May 2004] [This site has since been closed.].

led to the forced resignations of the chairman, president and other high-ranking officers of TEPCO (Tokyo Electric Power), the world's largest electric power company. Even as this saga unfolded, in a completely unrelated case, nuclear power industry executives were being tried for criminal negligence in relation to unlawful procedures that led to the deaths of two workers at another nuclear power facility (*Tokaimura Criticality Accident*, 2000). A guilty verdict would be delivered by the Mito District Court only two months after the Osaka High Court's own decision in the Takatsuki case.¹³

THE HIGH COURT DECISION

On December 24, 2002, a three-judge panel of the Osaka High Court issued a judgment overturning the lower court decision and handing victory to Mr. Futaki. The High Court agreed with the lower court determination that release of the documents would cause competitive injury to JT Real Estate sufficient to warrant protection, but it also agreed with Mr. Futaki that the level of "risk of injury to human life, the human body or health" was sufficient to override the business interest and require disclosure (Ordinance No. 40, Art. 6(1)(2)(a)).¹⁴

The ordinance itself provides no answer to the question "What *level* of "risk" requires disclosure?" In addressing this question, the Court noted that in the current "age of high technology," a vast array of business activities present risk of injury; the court even went on to say it might be difficult to identify business activities that

¹³ A useful description of several highly publicized food contamination and other product defect cases that occurred during this period appears in Nottage (2004). This book also provides some description of the defective drug cases of the 1960s and 1970s that provided a catalyst for the launch of Japan's freedom of information movement.

¹⁴ The city of Takatsuki waived the right of appeal. Japan Tobacco and Japan Tobacco Real Estate, intervenors in the litigation, filed requests for appeal with the Supreme Court of Japan.

present no risk of injury whatever (Osaka High Court, 2002, Sec. II.3). In order for society to function, there is a broad range of “accepted dangers” (*yurusareta kiken*) recognized by society without the need for special safety measures. Following this logic, the Court declared that the term “business activities” as used in the proviso means “activities that present a possibility of injury to human life, the human body or health and *whose existence would not be allowed by society in the absence of special safety measures*” (Ibid. [emphasis added]). Information concerning activities that carry this level of risk must be disclosed.

JT had worked hard to allay the Court’s fears over dangers at the Takatsuki site with evidence of safety measures employed there and the oversight role of the “Safety Committee.” Now the High Court somehow turned this evidence against it, explaining that the focus of the statute was on the risky nature of the business operation itself and not on the effectiveness of measures taken to reduce the risk. JT’s safety measures did not change the underlying nature of the operations: “to the contrary, the necessity of these special safety measures to the business operations in this case” itself served as recognition of the risk contemplated by the disclosure ordinance (Osaka High Court Decision, 2002, Sec. II.6). The High Court showed no interest in the task of evaluating safety measures in the manner of the lower court. For the Osaka High Court, the key question became: “Are these the kinds of activities for which society would require ‘special safety measures’?” (Osaka High Court Decision, 2002, Sec. II.5).

The answer was obvious: “Recombinant DNA technology has a relatively short history,” wrote the Court. It continued:

Because there are aspects for which it cannot be said that sufficient experience concerning its safety has been accumulated, it is important that any and all appropriate measures be employed to prevent injury from unforeseeable and unknown dangers before it occurs. Moreover, once damage to the environment has been caused by live organisms, recovery is difficult; in particular, care must be given to the ecosystems of present and future life forms in order to allow future generations to inherit a good living environment (Ibid).

Such an evaluation of these matters, said the Court, is generally recognized as the "contemporary sense of society" (*genzai no shakai tsunen*). According to the "general sense of society" (*ippantekina shakai tsunen*), other activities such as the JT Takatsuki operations are not allowed by society unconditionally, they are allowed only when accompanied by special safety measures (Osaka High Court, 2002, Sec. II(5)(6)). The High Court ruled in favor of disclosure. JT and JT Real Estate filed an appeal with the Supreme Court that was not joined by the city. On March 1, 2005, the Supreme Court issued notice that it would not accept the appeal and the High Court judgment became final (Supreme Court of Japan, 2005).

THE ORIGIN OF JAPAN`S PUBLIC INTEREST RULE

The requirement that public officials disclose business secrets in order to protect public health is an original contribution of Japanese activists to information disclosure law. The U.S. Freedom of Information Act (FOIA) provided the primary model for these activists as they searched for a tool to improve government accountability in the 1970s, but the U.S. FOIA has no provision empowering public officials to disclose business secrets in any circumstance. Exemption Four of FOIA

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protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential” (5 U.S. Code, Sec. 552(b)(4)). The JT floor plans clearly qualified under this standard. U.S. law does not allow this finding to be weighed against a “public interest.” Under the U.S. FOIA, that would have been the end of the analysis and the information declared exempt from disclosure. The Japanese legislators and legal experts who studied the American law did not find this to be an acceptable result (Information Clearinghouse Japan, 2002). They rejected the American model of absolute protection for business secrets.

Although the Osaka High Court decision concerned application of the disclosure ordinance of one small city, Japan’s national law and most or all of its nearly three thousand local disclosure systems carry similar language (Repeta, L., 1999, 2001). The local disclosure rules each bear a similar structure, creating a right to examine documents except for information that comes within a short list of exempt categories of information. The national law, which came into effect in 2001 (fifteen years after Takatsuki), exempts six categories of information from disclosure, including sensitive business information and information that might identify an individual (Law No. 42, 1999). Like the ordinance addressed in the High Court decision, however, the national law qualifies the latter two exemptions, mandating disclosure in cases where government officials (or courts) determine that “it is necessary to publicly disclose information in order to protect human life, health, livelihood or property” (Law No. 42, 1999).

The single most powerful force that drove Japanese people forward to demand information disclosure systems was anger at mass injury or outbreaks of disease caused by defective food and drug products. Japan’s open government proponents believe that many such incidents resulted from the failure of government officials to

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take timely action and that they could be avoided or the severity of the injuries reduced if government accountability is improved by better public scrutiny.

The first widely recognized prototype for a Japanese information disclosure law was released by the Japan Civil Liberties Union (JCLU) in September 1979. The primary draftsman was a young lawyer who had served on the plaintiffs' team in a litigation seeking compensation from the government and pharmaceutical companies for birth defects caused by the drug thalidomide. Article 5(1)(5) of the JCLU proposal provided an exemption from disclosure for business information only when release would cause a real danger of "a severe disadvantage" (*ichijirushii furieki*) and where non-disclosure is judged appropriate "in comparison with other interests" (JCLU, 1979). The brief commentary published together with the proposal baldly states that there are "much greater social values" than business confidentiality (JCLU, 1979, p. 29).

The "Citizens Movement for an Information Disclosure Law," a coalition of citizen organizations and individuals, was formally launched in 1980, and in 1981 adopted its "Eight Principles of an Information Disclosure Law" (Information Clearinghouse Japan, 2002).¹⁵ Principle number 4 declares that "information relating to matters affecting the life, health and security of mind and body of the people . . . shall be absolutely subject to disclosure and disclosure thereof shall not be denied for any reason" (Ibid). When the influential Kanagawa ordinance was adopted by its prefectural assembly the following year, it also required that government records which include business secrets should be disclosed upon request when necessary to protect human life or health from business activities (Repeta, L., 2001). Like the city

¹⁵ An English translation of the Eight Principles is appended to Information Clearing House Japan (2002).

of Takatsuki, local governments all over Japan adopted disclosure rules with similar provisions.

The same logic applied when it was time to consider a national disclosure system. After a year and a half of deliberations, a commission of fifteen experts led by retired Supreme Court Justice Reijiro Sumida delivered a report on December 16, 1996, that set the foundation for the law that would pass the national parliament in 1999 (Administrative Reform Commission, 1997, pp. 214-31). The Commission carefully examined foreign models, especially the U.S. Freedom of Information Act. When it came to an exemption for business secrets, they looked closely at the American provision, in particular the controversial leading case in the area, *Critical Mass* (Ibid., pp. 214-18).¹⁶ The Commission rejected the American rule of absolute protection for business secrets, instead proposed a balance-of-interests rule, much like the 1979 JCLU proposal. The law passed by the Diet would drop the balancing approach and supplant it with an “override” structure much like the Takatsuki rule (Law No. 42, Art. 5).

INTERNATIONAL COMPARISONS

In her comprehensive study of the “public interest” in Commonwealth freedom of information laws, Meredith Cook warned that cases involving a balance between a public interest and another protected interest “should be read with caution because it is inherent in the public interest test that its application will vary from case to case” (Cook, M., 2003, p. 9). Balancing conflicting interests inevitably requires careful

¹⁶ Pages 214-218 contain a Japanese Translation of the U.S. Dep’t of Justice memorandum analyzing the *Critical Mass* decision (*Critical Mass Energy Project v. Nuclear Regulatory Commission* (II), 975 F.2d 871 (D.C. Cir. 1992)).

study of the particular circumstances of each case, placing heavy responsibility on officials who make initial disclosure decisions and the courts and administrative review panels that oversee them. The United States Congress has resolved this problem with an absolute rule: if confidential business information is present, it must be withheld (5 U.S.C. Sec. 552(b)(4)). There is no room to consider “public interest” and no balance to be applied. Japan and many Commonwealth countries, on the other hand, show much greater confidence in the abilities of their officials and courts to weigh conflicting interests and deliver results that best serve society.

Moreover, in Japan’s case, national and local legislatures have provided little guidance to help determine the concrete circumstances that justify release of otherwise protected information. When it interpreted the language of the Takatsuki ordinance to craft its resolution, the Osaka High Court liberally called upon the “general sense of society,” an undeniably subjective standard of judgment (Osaka High Court, 2002, Sec. II(5)(6)). Judicial resort to this general standard is not unique to the determination of information disclosure cases. In fact, John O. Haley, a leading foreign scholar of Japanese law explains that “expressions for ‘the sense of society’ are among the most frequently used phrases in Japanese judicial opinions” (Haley, J.O., 1998, p. 157). He traces the origin of the practice to general civil code principles imported into Japan from France more than a hundred years ago.

When the Australian and Canadian national disclosure laws were adopted in 1982, they included provisions similar to the Japanese requirement to disclose business secrets when necessary to protect public health. The Australia Commonwealth Freedom of Information Act requires that officials consider public interest factors both for and against disclosure. According to the Meredith Cook study cited above, the public interest in disclosure has been found to outweigh the

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interest in exemption in cases involving “promotion of public interest in the processes of government,” “making a valuable contribution to public debate on an issue,” “environmental, and health and safety concerns,” “examining the effectiveness of controls and safeguards in relation to health and quality controls or safeguards against water pollution,” and other matters (Cook, M., 2003).

Canada’s “Federal Access to Information Act” was adopted in 1982 and came into effect the following year. It provides a general right of access to government documents subject to exemptions. Two categories of exemptions, including the commercial information exemption, provide specific overrides to allow disclosure when it is in the public interest. Some provincial laws have similar provisions. Section 20(6) of the Canadian federal law permits the disclosure of commercial information from a third party if this would be in the public interest as it relates to health, safety or protection of the environment and the public interest in disclosure clearly outweighs any injury to the third party. This rule does not apply to third-party trade secrets.

Disclosure laws adopted subsequently by Commonwealth countries have expanded the requirement of public interest disclosure. For example Article 27(2) of the Freedom of Information Act of Ireland exempts “commercially sensitive information” from disclosure; however, this is qualified by Article 27(2)(e), which requires officials to grant requests where “disclosure of the information concerned is necessary in order to avoid a serious or imminent danger to the life or health of an individual or to the environment.”

Most recently, the Freedom of Information Act of the United Kingdom was adopted by Parliament in 2000 and the individual request procedure of the act came

into effect in January 2005. The act provides a general right of access subject to exemptions for 25 categories of information. Disclosure of information in seventeen of the categories is to be determined by applying a balancing test. Section 2(2)(b) of the act recites the balancing test as follows: "In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

The exemption for "commercial interests" is subject to this balance of interests rule. Accordingly, if officials applying the law determine that the "public interest" in disclosure outweighs the interest in maintaining commercial confidentiality, the information must be disclosed. The law does not provide a definition for "public interest."

FINAL COMMENT

Information disclosure systems have a limited mandate—to enable people to see existing documents—and cannot be expected to solve the entire problem of popular participation in the administrative process. The plaintiff in the Takatsuki case himself cried out at the failure of Japanese law to provide a regulatory regime to enable residents like him, and others, to have input to the process that approved construction of the biotechnology laboratory. But it is the very broad concept of the freedom of information law that enables it to fill gaps such as this and at minimum to provide citizens a means to obtain important information otherwise beyond their grasp.

REFERENCE LIST

ADMINISTRATIVE REFORM COMMISSION (1997), *The Information Disclosure Law System*, Tokyo: Dai-Ichi Hoki (in Japanese).

ASSOCIATION OF PLAINTIFFS AND THE ATTORNEYS TEAM (eds.) (2001) *Biohazard Trial, the Legal Theory for an Injunction Stopping Experiments at the Institute for Infectious Diseases*. Tokyo: Ryokufu (in Japanese).

CITY OF TAKATSUKI, Ordinance No. 40 of 1986.

CITY OF TAKATSUKI, Website (in Japanese). Available at:
<http://www.city.takatsuki.osaka.jp>. [Accessed 18th April 2006].

COOK, M. (2003) Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000. *The Constitution Unit* 97.

COMPLAINT, Takashi Futaki v. Toshio Emura, Mayor of Takatsuki, filed 7th Oct. 1996.

FOIA *see* FREEDOM OF INFORMATION ACT

FREEDOM OF INFORMATION ACT, 5 U.S.C. Section 552.

FUTAKI, T. (1996) Information Disclosure Request, Filed 23rd Aug, 1995.

FUTAKI, T. (1997) Requesting Information Concerning the JT "Pharmaceutical Research Center": How Should Information Disclosure Apply to Bio Facilities? *Technology and Humanity*, March 1997. [In Japanese].

FUTAKI, T. (2003) Requesting Information concerning the JT Pharmaceutical Research Center: The JT Takatsuki Biofacilities Information Disclosure Suit -- Victory on Appeal. *Technology and Humanity*, March 2003. [In Japanese].

FUTAKI, T. (2004) Author Interview, 11th March 2004.

HALEY, J.O. (1998) *The Spirit of Japanese Law*. University of Georgia Press.

INFORMATION CLEARINGHOUSE JAPAN (2002) *Breaking Down the Walls of Secrecy: The Story of the Citizen's Movement for an Information Disclosure Law* [Online] [Available at: <http://freedominfo.org/features/20020727.htm>] [Accessed 17th April 2006].

LAW NO. 42 OF 1999, *Law Concerning Access to Information in the Possession of Administrative Agencies*, Art. 5 (2-2). English translation, available at:
<http://www.soumu.go.jp/gyoukan/kanri/translation3.htm> [Accessed 17th April 2006].

JAPAN CIVIL LIBERTIES UNION (1979) *Aiming at Establishment of the People's Right to Know* (JCLU).

JCLU *see* JAPAN CIVIL LIBERTIES UNION.

NOTTAGE, L. (2004) *Product Safety and Liability Law in Japan – From Minamata to Mad Cows*, RoutledgeCurzon.

ORDINANCE NO. 40 (1986) *see* CITY OF TAKATSUKI.

OSAKA DISTRICT COURT, Decision of 29th June, 2001. (Case No. (Gyou) 138 of 1996) (unpublished).

Complete Issue. Open Government: a journal on Freedom of Information. Volume 2 Issue 1. Published on 17th August 2006

OSAKA HIGH COURT, Decision of 24th Dec., 2002. (Case No. (Gyoko) 67 of 2001.)
(published at Hanrei Times, No. 144, p.180.

REPETA, L. (1999) *Local Government Disclosure Systems in Japan*. The National Bureau of Asian Research (includes an English translation of the 1982 Kanagawa ordinance).

REPETA, L., (2001), *The Birth of the Freedom of Information Act in Japan: Kanagawa 1982*, MIT Japan Working Paper. Available at: <http://www.freedominfo.org/countries/japan.htm> [Accessed 17th April 2006].

SUPREME COURT OF JAPAN, Decision Not To Accept the Appeal. Case No. (Gyohi) 84 of 2005.

TOKAIMURA CRITICALITY ACCIDENT (2000) Nuclear Issues Paper, No. 52 [Online]. Available at: <http://www.uic.com.au/nip52.htm> [Accessed 20th December 2005].

TOKYO DISTRICT COURT, Decision of 27th March, 2001. (Case No. (wa) 3621 of 1989).

TOKYO HIGH COURT, Decision of 29th Sept. 2003. (Case No. (Ne) 2435 of 2001).

UGA, K. (2001) *Information Disclosure Law Theory [Joho Kokai Ho no Riron]*, Tokyo: Yuhikaku.

UNITED STATES CODE, see U.S.C.

U.S.C., see Freedom of Information Act.

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Title: Confidentiality and commercial interests—the verdict so far

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There is undoubtedly much to celebrate in the UK's new freedom of information regime. As I note in the Preface to my book, *Freedom of Information Manual*, "... in times of insecurity we must be at our most vigorous defending our freedoms, because that is when governments take steps to limit them, pleading necessity ... the Freedom of Information Act is a welcome counterweight to a trend which seems increasingly to be tipping the scales towards government interference and control." (Turle, 2006).

Whilst I still stand by those words, I also sympathise with the supplier community. With the advent of the Freedom of Information Act 2000 (FOIA), supplier information in the hands of public authorities is now a treasure trove of contract bids, tender evaluations, performance reviews and pricing details, and those companies supplying to government are almost unanimous in condemning the new rules for not protecting them. The White Paper, *Your Right to Know* (Cabinet Office, 1997), which foreshadowed the Act, appeared to recognise the importance of protecting companies from harmful disclosure. It even included a mechanism for third parties to appeal public authority decisions to disclose, if disclosure could cause "substantial harm". No such provision made it into the Act, however, so suppliers are left at the mercy of their public authority customers when decisions are made about releasing information.

With this in mind, suppliers need to know what options they do have to prevent disclosure. In this article I look at the operation so far of the two FOIA exemptions

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which are of most interest to suppliers: s.41, which applies to confidential information, and s.43, which deals with information which is commercially sensitive. Both exist in recognition of the principle that open government should take account of legitimate commercial interests. The interpretation of these exemptions is therefore of paramount importance to companies supplying to government. In Part 2 of this article (to follow in the next issue of *Open Government*), I will look at what other avenues companies should explore in order to protect themselves.

The s.41 exemption – information provided in confidence

It is curious that until February this year, there had not been a single Decision Notice from the Information Commissioner dealing with the FOIA exemption under s.41. The Derry City Council decision in February was the first, and since then a rash of cases have appeared in quick succession. While we are still waiting for the first Tribunal judgment, we at least now have eight Commissioner Decisions for reference. There have also been a number of cases in Scotland examining the equivalent exemption in the Freedom of Information (Scotland) Act 2002.

Of the eight Commissioner decisions since February, three are of particular interest to suppliers. These are the cases involving Derry City Council (FS5006753, 21 February), Boston Borough Council (FS50064581, 6 April) and Pembrokeshire County Council (FS0067633, 6 June).

The Derry City Council case concerned a request for the Council's contract with Ryanair for its use of Derry Airport. The Council refused the request, applying a blanket exemption on the basis of s.41. On appeal, the Information Commissioner ordered the Council to disclose. Even a cursory reading of the transcript makes it

clear why Derry's claim for confidentiality was doomed from the first. It applied the exemption to the entire document when it should at least have considered whether some parts of it could be redacted. It failed to take account of the absence on or within the document of any indication that it was confidential. It also took no account of the age of the document (six years) nor the fact that much of the information it contained was already in the public domain.

The Boston Borough Council case focused on a report prepared by the company responsible for developing and managing a local sports arena. The report related to the project history, the company's work in initiating the development, and the council's financing of it. It also contained information about the company's future plans, together with those of a third company to whom part of the running of the arena had been subcontracted. The Council claimed that the report had been provided to it in confidence and that disclosure would give rise to an actionable breach, thereby engaging s.41. In his decision, the Commissioner accepted that the report had been supplied on the mutual understanding that it was confidential and that it would not be passed to others or used for purposes other than those contemplated at the time it was written. The Commissioner also agreed that the information itself was worthy of protection because it comprised sensitive information of a commercial, legal and financial nature (it included, for example, information about the company's plans for recovering its construction costs, disclosure of which would have been likely to prejudice that activity). The report itself was marked "private and confidential". The information having met the legal requirements for confidentiality protection, the Commissioner went on to consider whether the Council had any defence to a claim for a breach (which would mean that the s.41 exemption could not apply).

The report had not been widely distributed and its details were not common knowledge – there was thus no question of its confidentiality having been waived. The Commissioner also considered whether there could be any public interest defence to a claim. There were clear public interest factors favouring disclosure, mostly notably local community debate about the construction and management of the arena, and the level of public funding which the Council was providing. At the same time, the Commissioner accepted that disclosure could prevent reclamation of some of the public funds already used to support the project, and could have direct consequences for the project's viability and the financial position of the companies managing it, which in turn could be detrimental to the Council because it might have to provide additional funding as a result to support the arena in its early trading years. Balancing all these factors, the Commissioner held that the public interest in withholding the report outweighed the factors favouring disclosure.

The Pembrokeshire case is of particular interest because part of the information at issue was a list of contracts, provided as evidence of past experience, to support a tender. The Decision Notice therefore provides guidance about the Commissioner's view of the status of client and customer lists (something which all suppliers, in my experience, guard very closely). The Commissioner decided that such information was not sensitive and did not merit protection under s.41. The reasons for this were as follows:

- There was no evidence that when originally supplied (in July 2000) the information had been provided in confidence. The Council argued that it could not have anticipated a freedom of information request five years before the fact, but the Commissioner was not persuaded that this gave rise to any duty of confidentiality.
- The Council did provide evidence of a retrospective assertion of confidentiality, from October 2004, but the Commissioner was not persuaded that this engaged s.41.

- The Council claimed that the party behind the request had an acrimonious relationship with ORA Ltd (the company whose customer list was at issue) and that disclosure of customer details would result in an approach to ORA's customers in order to challenge the company's credentials and those of its Managing Director, Dr Ryan. In relation to this, the Commissioner held that the evidence did not support the contention that approaches would take place, nor did it establish what the detrimental effect on ORA or Dr Ryan would be. Further, in the Commissioner's view:

"If such approaches did take place and they were designed merely to find out whether work was undertaken with those organisations, then the disclosure would, if anything, serve the interests of a greater transparency in relation to the Council's relationship with ORA Ltd and Dr Ryan. Whilst this may represent a detriment to Dr Ryan in the event his claims prove to be untrue, this is not the sort of detriment the Commissioner believes is needed to establish a duty of confidentiality. If there was a real prospect of direct prosecution or intimidation of Dr Ryan, this would amount to a significant detriment, but this was not established ...".

There have been a number of decisions by the Scottish Information Commissioner on s.36 of the Freedom of Information Scotland Act 2002 (the equivalent, north of the border, to s.41 of FOIA). One case is of particular interest because it concerns a public procurement: Decision 028/2005 – Ms Cartlidge and the Scottish Executive. The information at issue in that case was a breakdown of the cost of a digital television pilot involving the Scottish Executive. Ms Cartlidge also asked for the names of any private sector companies involved in the project, and information about the costs of the contract.

The Scottish Executive released the name of the company involved in the project, Thunderchief Pictures Limited, and some details of the cost breakdown. It refused to disclose other costs information on the ground that this was covered by a contractual confidentiality restriction which brought it within s.36. The Commissioner held that s.36 did apply, although not simply because of the existence of the contract clause. Evidence presented in the case included an email from the company to the Executive claiming that release of the information would considerably damage its commercial interests as it would enable competitors to undercut it in any future tender. The Commissioner observed that:

“information contained in concluded or terminated contracts decreases in sensitivity with the passage of time. Having considered the contract between the Executive and Thunderchief (which terminated in April 2004, only eight months before the information request), I consider that not enough time has passed in this case to sufficiently degrade the commercial sensitivity of the information to the extent that no damage would be done to Thunderchief’s interests should the information be released...”

One other point worthy of note is the injunction threatened against Birmingham City Council earlier this year by American gaming company, Las Vegas Sands. According to reports, the threat was made when Birmingham notified the company that it was about to disclose financial and contractual information relating to a proposal for a super-casino at Birmingham City Football Club. In the event, the Council agreed not to disclose pending a High Court judicial review, but the judicial review application was thrown out (Birmingham Post, 2006).

The s.43 exemption – commercial interests

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Government statistics indicate that on average about one in five cases cite s.43 as a basis for non-disclosure. Along with s.41, it is consistently one of the three most common exemptions applied whenever information is refused. There have been a number of Decision Notices in which s.43 has featured, the most significant being the National Maritime Museum case which was appealed to the Information Tribunal in January (John Connor Press Associates Limited v The Information Commissioner, EA/2005/0005).

The National Maritime Museum had received a request for documents and correspondence relating to payments to Conrad Shawcross, an artist whose work the Museum was exhibiting as part of an ongoing series called Continuum. The Museum disclosed a copy of their contract with Shawcross, together with three invoices submitted by him and various budget statements and emails relating to the contract. However, all financial details were redacted on the basis that disclosure could prejudice the Museum's negotiations with the proposed next artist in the series.

John Connor Press appealed to the Information Commissioner, whose Decision Notice was published in June 2005. Readers will be aware that the Commissioner agreed with the Museum that the public interest in protecting its bargaining position "during active and contemporaneous negotiations for a project of a similar nature" overrode, for the time being, the public interest in disclosure. Releasing the financial details of the negotiations which had immediately preceded the current and ongoing negotiations could, in the Commissioner's view, prejudice the Museum's ability to get value for public money. The Commissioner noted however that the likelihood of prejudice would diminish with time and with the conclusion of the active negotiations, to the point where the balance of the public interest would shift towards disclosure.

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John Connor Press appealed the Decision Notice on two grounds: first, that the Commissioner had wrongly decided that s.43 was relevant, and secondly, that even if s.43 did apply, the public interest in disclosure outweighed the likely prejudice to the Museum's commercial interests. The Tribunal overturned the Commissioner's ruling, deciding that the words "likely to prejudice the commercial interest of any person" in s.43(2) required a "real and significant risk" of prejudice, which the evidence in the case did not support. In particular, the contract information which the Museum had already disclosed "reduced very materially the value of the financial information that was withheld."

The Tribunal observed that even with the financial details redacted, the contract contained a substantial amount of information which would be of considerable value to any prospective exhibitor. For example, the Museum had disclosed the fact that it had contributed to Mr Shawcross's costs of exhibiting (and that other organisations had similarly contributed), that copyright in the artwork had been retained by Mr Shawcross, and that the Museum's contribution would be refunded if the work was sold within three years of the exhibition. The Tribunal concluded that the evidence put before the Commissioner had been insufficient to justify his upholding the exemption. The most significant element of the case is that the sensitivity of the information which the Museum had sought to protect was held by the Tribunal to have been diminished by the Museum's disclosure of other, less sensitive, information. This could have alarming implications. It means that information which is not protected by an exemption (and must therefore be disclosed) may diminish the sensitivity of other, exempt, information to such a degree that it thereby emerges from exemption under s.43.

With the Tribunal and the High Court adopting a strict approach to both the confidentiality and commercial interests exemptions, and the Commissioner warning suppliers they must learn to live with an enhanced risk of disclosure, the lie of the legal landscape is starting to look perilously rocky. In my follow up article in the next issue, I will be looking at ways suppliers can protect themselves, whether before, during or after the FOIA request lifecycle.

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References

Birmingham Post (2006) Casino bosses lose legal battle to stop The Post publishing. Birmingham Post. March 8th. Available online at: <http://digbig.com/4hagt>

Cabinet Office (1997) Your Right to Know: The Government's proposals for a Freedom of Information Act. (CM 3818) TSO. Available online: <http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm>

Freedom of Information Act 2000, (c.36). OPSI.

Available online at: <http://www.opsi.gov.uk/acts/acts2000/20000036.htm>

Information Commissioner (2006) Decision Notice FS50066753. Public Authority: Derry City Council 21st February 2006. Available online:

http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50066753.pdf

Complete Issue. Open Government: a journal on Freedom of Information. Volume 2 Issue 1. Published on 17th August 2006

Information Commissioner (2006) Decision Notice FS50064581 Authority Boston
Borough Council 6th April 2006. Available online:

http://www.ico.gov.uk/cms/DocumentUploads/Decision_Note_FS50064581.pdf

Information Commissioner (2006) Decision Notice FS50069498 Public Authority:
Pembrokeshire County Council 22nd February 2006. Available online:

http://www.ico.gov.uk/cms/DocumentUploads/Decision_Note_FS50069498.pdf

Information Tribunal (2006) Decision: John Connor Press Associates Limited v The
Information Commissioner (25 January 2006) Available online at

http://www.informationtribunal.gov.uk/our_decisions/documents/connorpress_v_info_commissioner.pdf

Scottish Information Commissioner (2005) Decision 028/2005 – Ms Cartlidge and the
Scottish Executive. Available online at:

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision028.htm>

Turle, M (2006) Freedom of Information Manual. Sweet and Maxwell.

Author: Ibrahim Hasan, Act Now Training, UK

Title: Personal Privacy and the Right to Know

Volume 2 issue1

A number of recent decisions of the UK Information Commissioner's Office (ICO) under the UK Freedom of Information Act 2000 (FOI) have shed light on the balance between personal privacy and the right to know.

If an FOI request is made for information about a third party, section 40 requires a public authority to ask itself, would disclosure of this information breach one of the eight principles under the Data Protection Act 1998 (DPA)? If the answer is yes then FOI provides an absolute exemption to disclosure of such information. The main DPA principle is the first one; information must be processed fairly and lawfully and the processing must be justified in accordance with schedule 2 (and schedule 3 in the case of sensitive personal data). There other parts to the section 40 exemption (if a DPA section 10 notice is served) but for this discussion of recent ICO decisions they are not relevant.

When dealing with requests for personal information, it is important to distinguish between professional personal information and private personal information. In Decision Notice FS50068973 involving Calderdale Council (Information Commissioner 2005a), ICO ruled that the names of officers who had been on a recruitment trip to Australia should be disclosed to the applicant. Whilst the names were considered to be personal data it was felt that it was fair and lawful to disclose them considering the nature of the officers' role, the amount of public money spent and the responsibility given to them to carry out the task.

The higher up an individual is within an organisation the more the public have a right to know what they do and how much they get paid for doing it. In Decision Notice FS50062124 involving Corby Borough Council (Information Commissioner 2005b), the complainant requested details of the total amount of money paid to the Former Temporary Finance Officer employed by the Council. ICO took into account the fact that the Council has been publicly criticised for the way in which the officer's appointment was handled and that he received a significantly higher rate than would normally be paid for such positions. ICO ordered the information be disclosed. The Decision Notice states:

“...it has been recognised for some time that individuals occupying senior posts within public authorities are likely to be subject to greater levels of scrutiny than those in more junior roles. This helps to ensure accountability of those individuals for their actions. We are satisfied that the Former Temporary Finance Officer could not have reasonably expected that the requested information would remain confidential. Disclosure of the requested information should inform the ongoing debate on this issue and help to ensure that processes are implemented by the Council to avoid similar problems in the future.”

In Decision Notice FAC0064579 involving Southend on Sea PCT (Information Commissioner, 2006c), the complainant, amongst other things, asked ICO to rule on whether the PCT was justified in withholding copies of staff contracts on grounds of third party confidentiality. ICO concluded that the PCT was for the most part justified in relying upon the personal data exemption. However, it did consider that some standard parts of GP contracts should have been released.

Public authorities will henceforth find it very difficult to keep employees' expenses information secret. The public has a right to know how public money is being spent. This especially so if the subjects are senior figures with a public role.

In Decision Notice FS50072319 involving the House of Commons (Information Commissioner, 2006d), the complainant requested a breakdown of the travel expenses claimed by individual MPs for the most recent year for which figures are available into the following four categories: rail travel, road travel, air travel and bicycle. An aggregate figure for travel expenses for each MP is already published but this figure is not broken down into different categories of transport, as the complainant requested. The House of Commons withheld the information on the basis that it was exempt under section 40(2) of the Act. ICO found that the requested information is personal data which can be disclosed without contravening any of the principles of the DPA and, consequently, that the exemption does not apply.

Thus far we have considered cases involving disclosure of personal information about public sector employees or officials. ICO seems to be much more loathed to disclose information about Jo Public.

In Decision Notice FS50078588 involving Avon & Somerset Constabulary (Information Commissioner 2006e) the complainant requested copies of documents relating to the trial of Jeremy Thorpe, the former Liberal Party Leader who was acquitted in 1979 of conspiring with three others to hire a hitman to murder Norman Scott. The scope of the initial request was then narrowed to a copy of the Senior Investigating Officer's report and the police authority considered the information to be exempt from disclosure under, amongst others, section 40 (personal information).

ICO was satisfied that some of the requested information constituted personal data

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relating to living individuals and that its disclosure would be unfair and involve contravention of the first DPA principle. It gave weight to the fact that those involved were found not guilty by the court and the fact that their reputations would suffer. It also considered that those who cooperated with the police during the investigation had a legitimate expectation that their details would not be disclosed except in the proceedings.

Many request received by public authorities will be about information received from third parties in an employment or complaints context. Again the balance at present seems to be in favour of the privacy of the individual.

In Decision Notice FS50069257 involving York Hospitals NHS Trust (Information Commissioner 2005f), the complainant requested information relating to a particular workplace grievance procedure. The request was refused under section 40. The Commissioner decided that if the third party personal data (including that about individuals who had consented to information being disclosed to the complainant) was disclosed to the general public there would be a breach of the first DPA principle. In the light of these recent ICO decisions it is fair to say that public sector employees, and those whose personal information is held public sector organisations, can no longer expect total confidentiality. Depending on the nature of their information and their involvement with the authority, it may be that there information is disclosed to the wider world.

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References

The Freedom of Information Act 2000. (c.36) London, HMSO.

The Data Protection Act 1998. (c.29) London, HMSO.

Information Commissioner (2005a) Decision Notice FS50068973 Public Authority:

Calderdale Council. 24th November 2005. Available online:

http://www.informationcommissioner.gov.uk/cms/DocumentUploads/Decision_Note_FS50068973.pdf (Accessed 3rd April 2006)

Information Commissioner (2005b) Decision Notice FS50062124 Public Authority:

Corby Borough Council (Information Commissioner 2005b) 25th August 2005.

Available online:

<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/62124%20DN.pdf> (Accessed 3rd April 2006)

Information Commissioner (2006c) Decision Notice FAC0064579 Public Authority:

Southend on Sea PCT (information Commissioner, 2006a) 15th March 2006.

Available online:

http://www.ico.gov.uk/cms/DocumentUploads/Decision_Note_FS0064579.pdf

(Accessed 3rd April 2006)

Information Commissioner (2006d) Decision Notice FS50072319 Public Authority:

House of Commons (Information Commissioner, 2006b) 22nd February 2006.

Available online:

http://www.ico.gov.uk/cms/DocumentUploads/Decision_Note_FS50072319.pdf

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(Accessed 3rd April 2006)

Information Commissioner (2006e) Decision Notice FS50078588 Public Authority:
Avon & Somerset Constabulary (Information Commissioner 2006c) 22nd February
2006. Available online:

http://www.ico.gov.uk/cms/DocumentUploads/Decision_Note_FS50078588.pdf

(Accessed 3rd April 2006)

Information Commissioner (2005f) Decision Notice FS50069257 Public Authority:
York Hospitals NHS Trust (Information Commissioner 2005c) 7th November 2005.

Available online:

http://www.informationcommissioner.gov.uk/cms/DocumentUploads/Decision_Note_69257.pdf

(Accessed 3rd April 2006)

Author: Paul Kelly

Title: Information is power

Volume 2 issue1

Freedom of Information (FOI) regulations are only as effective as powerful – and semi-powerful – people want them to be. All too often, the desire is to make them as weak as possible.

The Mike Harris government was an ultra-Conservative movement that governed Ontario (Canada's most populated province) from 1995 to 2002. Elected under the mantra of the "Common Sense Revolution" the Harris government was characterized as being anti-welfare state, anti-union and pro-business. Not really such a bad reputation to have at the time.

But, perhaps most of all, the Harris government soon became the target of massive FOI requests asking about ministerial spending and the exclusive awarding of lucrative consulting work.

As with most fortresses, when the questioning started, the drawbridge was cranked up. Sometimes too late as wretched excesses were uncovered. Other times, the requests were denied outright or killed in their infancy by a standard of operational procedure that encouraged the destruction of records.

Having worked in the Harris government for its entire reign for two cabinet ministers through four different ministries – with access to four cabinet committees as a Senior Policy Advisor – I can assure you that I was the very model of FOI efficiency.

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I kept no records. If you had come to my office – which was about 18' by 24' – you would have wondered if anyone worked there at all. It was devoid of any personal affects or decorations. It had a desk with a computer and a chair – period.

There were no stacks of paper on top of the desk and there were no briefing notes or binders. It was empty. It was legendary in fact.

As someone with an extensive background in politics, I subscribed to the G. Gordon Liddy M.O. – be prepared to be shot on a street corner at any time. Carry all your information in your head, that way no one can get at it.

Very early on in 1995, all staff where given presentations on FOI. Basically, we were told that any thing you have can be accessed. So keep nothing. I took that to the extreme. We were permitted to keep our own separate, personal notes in a small workbook or pad. This could not be FOI'ed because it was personal and reflective of our own thoughts – not government.

Everything else, I shredded or deleted – I kept no emails.

I have to this day, about 12 small blue or black workbooks detailing everything I did in government. Trust me, taking note at a meeting unnerves a lot of people but ensures your personal safety and job security. "You know where the bodies are" was something I heard quite often.

So my job was quite simple when it came to FOI. The FOI officer would come to my door to ask if I had any records.

I was required to look – for billing purposes. A search fee was another roadblock – and then we would chuckle and end the game. I looked after my own shop.

In one instance – an internal dispute about land surveyors – I turned over hundreds of documents. I wanted much of it released into the public record and it made our office look good. So the system could be used very effectively for your own purposes.

But that was a rarity indeed. Overall the aim was to thwart FOI at every stop. How so? Well, let me count the ways:

Mistakes in the Request: a very strict, literal reading of the request. If the requester makes a mistake in a title, or date or any other matter – “No such document exists”.

Nixonian Attempts to Rewriting History: the Harris government spent a lot of time – as Nixon did in transcribing tapes – going through the soon-to-be-released information getting people to pay back money billed for meals and other treats. It failed in its attempts as the spending became an issue and the attempts to cover-up did too.

Cabinet notes and briefing notes are covered under “Advice to Minister” – which is not FOI-able. There are legal ramifications – based on a lawyer-client premise but I saw stuff which was not mind-blowing or secretive – but newsworthy.

Contract work is also covered by “Advice to Minister” – and under government guidelines contracts under \$25,000 can be sole sources by a ministerial staff member to another person without tender – repeatedly. So seven ministries could contract

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one person at \$6,000 for 6 months work (never completed) and have it never appear in government accounts or be FOI'ed.

Outright direction to destroy all documents: Currently in Ontario there is an investigation into the Harris government's handling of the Indian occupation of Ipperwash Provincial Park. An Ontario Provincial Police Officer killed a native. The investigation centers around whether the government directed the police to take aggressive action. Obviously, government should not direct police on how to handle demonstrations.

Central to the current investigation are notes kept by a public servant at a meeting between Premier Harris, several cabinet ministers and police the day of the shooting. Those notes are accessible to the public because a public servant took them.

However, on two occasions, I was directed, as were other staff that worked for the provincial parks minister to destroy any and all records we may find in our files on Ipperwash. Briefing notes prepared for the meeting, personal notes of previous staff, everything.

I had none so it was not a matter for me. If others did, they would have done as directed in the interest of career advancement. My own secrecy oath does not cover illegal activity and I think such a direction would be illegal but certainly improper.

So in many ways, information is power but first you need a place to plug into it. My own opinion is that there is no end to the ways you can thwart legitimate requests for information to avoid bad headlines and public relations. My fear is that eventually the requesters may give up. That would be a sad day indeed.

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Conference Report

Scholarship & the Freedom of Information Act: Year One¹⁷
A British Academy¹⁸ Specialist Workshop convened by
Professor Peter Hennessy, FBA, Queen Mary and the National Archives, London, UK,
11 February 2006

Report compiled by Rosaleen Hughes (Queen Mary), Alban Webb (Queen Mary) and
Stephen Twigge (The National Archive)

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N.B. These notes are intended to reflect the main points of discussion and represent those issues on which general agreement was reached at the end of the day.

Points in Conclusion

- **A Rolling Conversation**

There was agreement to welcome and accept the Lord Chancellor's offer of a rolling conversation between Whitehall and the academic community¹⁹. It was hoped that such an engagement would both inform government officials and provide scholars with a better understanding of FOI legislation and implementation.

To achieve a successful FOI regime the Lord Chancellor expressed the view that a constructive approach between 'user' and 'provider' was not just a good idea, but fundamental to its ongoing success.

¹⁷ Details of the Programme of speakers: <http://www.britac.ac.uk/events/2006/foia/prog.html>

¹⁸ More information about the Academy may be found at: <http://www.britac.ac.uk>

¹⁹ Lord Falconer's speech is available at: <http://www.dca.gov.uk/speeches/2006/sp060211.htm>

- **Academic Working Party on FOI**

The academic community needed different, rather than privileged, treatment under FOI and there was agreement that a single focus should exist to address academic interests. Accordingly, it was suggested that an Academic Working Party be established which would act as the academic voice in the 'rolling conversation' with the DCA.

It was suggested that the Academic Working Party on FOI should be established under the auspices of the British Academy. It was agreed that an approach should be made to the British Academy to take forward this proposal.

- **Resource Neutrality and the 30 Year Rule**

Concern was voiced on the implementation of FOI under a 'resource neutral' regime.

The immediate concern was that resources would be diverted from standard record review to handling FOI requests. If this occurred, there was an increased possibility that records would not be transferred to The National Archives after 30 years.

The continued release of public records on the 'drop dead' date (as Sarah Tyacke called it when Keeper of the Public Records) is an essential, fundamental and minimum requirement. There was wide agreement that sufficient resources should be made available to maintain both FOI releases and transfer of historic records to The National Archives.

- **Departmental Implementation of FOI**

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It was evident that government departments had responded differently to FOI. The Foreign Office and the Welsh Office were singled out for praise, but a number of people expressed dissatisfaction at unreasonable delays and obscurantism by both the Home Office and the Ministry of Defence. There was often a gap between rhetoric and reality.

- **Collective Ministerial Responsibility**

It was felt that the exemptions in the Act which referred to collective ministerial responsibility and communications between ministers had been enforced with some inconsistency and were acting as catch-all clauses for the refusal to disclose information under FOI.

Examples were presented at the seminar in which there seemed to be little or no reasonable justification for the retention of particular information under this heading. If the intention was to retain all Cabinet and Cabinet Committee related information for 30 years it was not clear why Sections 35 and 36 had been made subject to the public interest test.

It was important to apply the intellectual argument for openness and to stress that security and secrecy were not always the same thing.

- **Publication Scheme for FOI Releases**

There was concern that the responsibility for keeping a comprehensive and up-to-date record of all releases across government under FOI was not being addressed. This needed to be remedied. It was suggested that The National Archives might act as a common service facilitating a central resource of FOI releases from central government.

It was essential that such a resource be established as soon as possible before the volume of FOI releases became too large to manage effectively.

- **Proactive Early Block Releases**

In order to advance scholarship academics needed access to blocks of material on key events. It was not possible to make informed judgements from single documents. The FCO has already led the way on this. It is suggested that the Academic Working Party act as a clearing house or review body which could draw up lists of requests for the early release of documents on significant historical events or themes, e.g. 1984/miners' strike.

The promotion of certain archival themes, or classes of documents for release under FOI (and the Public Records Act) could prove extremely valuable to both academics and government departments in opening up whole areas for informed debate and thereby reducing the FOI burden on departments by removing the need for repeated and identical requests on a particular issue.

Suggestions of themes or archival collections that could usefully be reviewed in this way would be welcomed.

- **Research Project Planning**

It was felt that the specific requirements of academics and their students should be taken into account by public bodies (and Whitehall in particular) when handling FOI requests.

The time and funding constraints imposed on research mean that long delays in establishing whether information can or can not be released under FOI very directly affects the scope, accuracy and validity of research programmes.

The possibility of developing a concordat between the academic community and public bodies was proposed. This could be brokered, in the first instance, by the Academic Working Party in its dealings with government departments.

- **Charging Regime**

It was hoped that any future charging regime would address the needs of the academic community. The possibility of introducing a fees regulation waiver for scholars should be seriously considered by DCA if amendments to legislation were brought forward.

- **JISCmail**

It was decided that the establishment of a forum to discuss the implementation, effect and output of FOI would be useful to the academic community. Accordingly, an **Complete Issue. Open Government: a journal on Freedom of Information. Volume 2 Issue 1.** Published on 17th August 2006

internet discussion forum should be set up under JISCmail - in which ongoing debates and online file storage of appropriate material could be maintained and updated at minimal expenditure of effort and resources. It was hoped that the discussion group would complement and inform both the Academic Working Party and DCA users panel.

The JISCmail forum could also act as a back-up repository detailing and logging FOI releases, updated by members when new information is released to them.

To facilitate discussion of FOI implementation within the academic community, it was proposed that permission to collect and circulate the email addresses of attendees to the TNA-British Academy FOI seminar should be sought. Permission to use emails would be circulated to those attending the seminar.

- **Relations with Other Organisations**

It was considered important to the success of any oversight of the workings of FOI that the academic community should have open and effective relations with other interested groups and users of FOI. Lines of communication and cooperation should be established with other organisations and groups. Suggestion put forward included the Royal Society, journalists and other users of public-interest information.

- **DCA FOI User Group**

The decision to establish a panel of Freedom of Information users, to be chaired by Baroness Ashton (DCA), was broadly welcomed. The first meeting of the panel is scheduled for March 2006. The panel will consist of representatives from a number of

constituencies and will be concerned with their experiences of accessing information under FOI legislation. It is intended that 'users' views inform and shape the development of FOI policy.

While the initiative was to be commended, it was thought essential that its membership, workings and discussion be transparent and open to scrutiny. Outside interests should be kept informed of the panel's considerations and there was a wish that the Academic Working Party should be kept up to date with its work and receive regular reports and updates.

- **Constitutional Affairs Select Committee**

It was considered important that academic input into the implementation of FOI should not be carried out in isolation. It was thought appropriate that the Select Committee on Constitutional Affairs should be kept informed of future activities and proposals.

- **Digital Records**

It was highlighted that FOI does not only apply to paper 'documents' and much material is now 'born digital'. This raises the issue of how the right to know should be applied to digital records and how access, in 20 or 30 years time, will be managed as technology now current will, by then, be rendered obsolete.

- **Civil Service Code**

The Civil Service Code is currently under review and it was suggested that some provision should be included stressing the importance of record keeping not only to ensure a well-maintained historical account, but also to enhance informed decision making and accountability in government.

Book Review

Carey, P and Turle, M eds (2006) Freedom of Information Handbook, London: Law Society. ISBN 185328968X

Volume 2 issue 1

Review by Dr Andrew Flinn, School of Library, Archive and Information Studies, University College London, a.flinn@ucl.ac.uk

Freedom of Information and information law generally engages several different audiences or user groups, each of which interacts with the legislation and with the literature which supports the legislation from different perspectives. There are the applicants who use the legislation to obtain information; then there are those involved in the management of records and information and whose work underpins successful compliance with the legislation; and finally there are those freedom of information officers, executive officers, senior administrators, lawyers, judges and many others whose responsibility it is to manage and oversee the working of the legislation. Each of these groups approaches the FOIA from its own perspective, and has its own growing literature addressing these perspectives. Nevertheless many of these works, while addressing one particular audience have much of value for the other groups, and so it is with Peter Carey and Marcus Turle's Freedom of Information Handbook.

Published by the Law Society, it is as the title suggests a comprehensive and practical account of the FOIA as it applies to England, Wales and Northern Ireland but not Scotland (the separate Act there is not covered in any detail in this book), pointing the reader to appropriate parts of the Act or the official guidance issued and explaining their significance. Diagrams and flowcharts are included to help describe and systemise decision-making processes. Reading it through from start to finish there is some repetition of information, but that is because it is designed to be used

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as a reference tool, with users consulting and re-consulting the appropriate sections as needed. After a general introduction which puts the FOIA in its historical and international context, and outlines some of the criticisms that have been levelled at the law, there follows chapters dedicated to publication schemes, the application of the exemptions and the public interest test, the impact of the act on the private sector, some initial reflections on the utility of the act as a media tool, on related information legislation and on the appeal process. The editors and contributors all come from legal backgrounds and have significant experience of working within this field – Carey edits the journal Privacy and Data Protection while Turle is the editor of Freedom of Information.

The central chapters on the exemptions are written by Turle and detail each exemption in turn, including definitions and applications, and where appropriate advice on the working of the public interest test. Tomlinson's chapter on the implications of FOIA for the private sector, examines not only the risk of the unwanted disclosure of private sector information held by a public sector institution and strategies to be adopted to minimise this risk but also the possible benefits of FOIA to the private sector as a tool for obtaining useful and commercially sensitive data from the public sector. The chapter on data protection explores the interface between the DPA and FOIA and offers advice on how to resolve the apparent contradiction between privacy rights and public freedom of information. A further chapter details the implications and rights bestowed by the important but generally little known Environmental Information Regulations (2004).

The final chapter examines the role and powers of the Information Commissioner and outlines the appeal and review process as set out in the legislation and guidance but has little by way of detail of how this might work in practice.

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It is with the latter that the book's greatest difficulty lies - the timing of its publication. The text was completed in the first six months of full compliance with FOIA and much in terms of the use of exemptions, the success and/or failure of requests and the workings of the appeal and oversight process remains 'amorphous', at the very beginning of an evolving landscape. This is not meant as a criticism as such, there is clearly an immediate need for a clear and coherent practical guide for those charged with managing compliance with the provisions of the FOIA and related information law but any future revised edition will be clearly be on firmer ground with regard to the working of the act and its oversight. This is particularly the case in the chapter on the media's experience of using FOIA. Similarly several contributors refer to the importance of the Information Commissioner to the effective functioning of a right to access to information, however at the time of their writing it was far too early, particularly in terms of the appeal process, to come to any clear assessment on how successful or otherwise the IC was. Turle expressed optimism but in many ways the jury is still out on the question.

Some typographical errors have slipped through the editing process, of which the European Convention for the Protection of Human Rights (page xxxii) raises the broadest smile. That said however, in his short forward, the Information Commissioner Richard Thomas recommends the handbook as 'an invaluable tool in navigating this important new regime' for all practitioners, he is right and there is also much to interest and inform information managers and those who request information as well.

Book Review

Turle, M (2005) Freedom of Information Manual. London. Sweet and Maxwell. ISBN: 0421922400

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Review by Steve Wood, Senior Lecturer in Information Management Liverpool John Moores University and Editor, *Open Government: a journal on freedom of information*

There are now many texts on the market that cover the UK Freedom of Information Act, from the very detailed legal text by Phillip Coppel to the accessible citizen handbook by Heather Brooke. For the practitioner having a handy textbook can be a very useful tool even when there is so much guidance and information provided online. The UK Freedom of Information Act (FOIA) and associated SIs are complex pieces legislation (some might say unnecessarily so) plus taking into account the interplay between the Data Protection Act 1998 and the 2004 Environmental Information Regulations (EIRs) means the embattled practitioner often has many sources to consult and interpret. Added to this the multitude of guidance and case law that appears on any almost daily basis from the DCA, ICO and information tribunal.

This book is what I would call an "accessible legal text" in that a practitioner without a formal legal background could pick up the text and use it as well as being of value to those with more formal backgrounds. The layout and standard of citation is of a legal text. The length and size is more easily portable compared to some of the more detailed texts available such as Coppel. I would also say the text is accessible enough for a user of the FOIA to pick it up if they were using the Act on a regular basis or were contesting a complex case.

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Chapters 1 and 2 follow the text of the FOIA and EIRs respectively with commentary and references to relevant statutes, cases, decisions etc plus the guidance issued by the ICO and DCA. The text has included references to most of the decisions available at the time of going to press (Sept 2005). This does make it currently the most up to date text on the market. The second part covers the public interest test, making requests and implications for private sector.

In terms of reference value the text also scores well in pulling together all the following official documentation, that I don't believe another text has done as comprehensively:

- Both S45 and S46 Codes of Practice
- Code of Practice under EIRs
- Table of exemptions
- OGC Civil Procurement Policy and Guidance

Chapters 1 and 2 are well written and offer much useful insight and discussion and are comprehensive in their dealing with each part of the legislation. These chapters take each section of the legislation – offering a commentary on each. The sources drawn upon are wide ranging and up to date for example the discussions draws upon overseas examples for the discussion of vexatious requests as well the DCA/ICO guidance. Also issues such as the ICO/Central Government Memorandum of understanding and the Clearing House are all covered. The chapters on the FOIA and EIRs could offer greater cross-referencing to tease out the differences between the two.

The text also contains some useful guidance on how to make requests – going into some depth about how to narrow requests down (what Turle

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calls staged and layered requests) and how to appeal and challenge. This added to the section on the implications for the private sector also make this text useful for those who work outside the public sector.

However I do add some caveats about this type of text generally and wonder if there is a need for a supplementary mode of delivery for the text. One of the problems with these types of text is the rapidity with which they quickly become dated – this is especially true for FOI given that case law and precedent setting is at such an embryonic stage. This text which can still be thought of as new, having only come out a few months ago already feels dated: for example the discussion of the S32 exemption for court records on p108 highlights the Bridgnorth Council decision in which the ICO upheld the use of S32(1)c for a court case transcript. Since publication of the FOI handbook the Information Tribunal ruled that the construction of S32(1)c “excludes a transcript from the application of s.32(1)(c)”, although not issuing a new notice because the information had been destroyed. It would be useful at these points in the text that the reader was alerted to the fact that the case was pending an appeal and the reader could be pointed to an online source. These types of text would in my view be greatly enhanced by some form of updated online companion.

The Freedom of Information Manual by Marcus Turler is a text that offers an accessible commentary of the legislation combined with case law and taking the above factors into account it would be a useful addition to most practitioner’s bookshelves. Overall – definitely recommended – though the reader will have to read between the lines in some areas and look to make sure the information they have is the latest available.

Book Review

Chapman, RA and Hunt, M (2006) Open Government in theoretical and practical context. Aldershot. Ashgate. ISBN 075464642 4.

Volume 2 issue 1

Review by Richard Martin. Head of Information, Human Fertilisation & Embryology Authority, UK

In the UK, the first half-decade of the new millennium was notable for a flurry of legislative activity and public sector development and deployment relating to information access and use. Since 2000, the Data Protection Act 1998 (DPA) has been implemented, as have the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR). These Acts and Regulations have provided a framework for greater transparency and openness in government, supplying the public with a platform from which to query decision-making processes, access and make use of data, and question the length and purposes for which information is held. Running in parallel with the legal implementation, have been a series of high-profile public inquiries – the Victoria Climbié Inquiry 2003, the Richard Inquiry (Soham Murders) 2004 & 2005, the Hutton Inquiry (Death of David Kelly) 2004 and the Butler Review (Intelligence on Weapons of Mass Destruction) 2004, for example – that have further revealed the machinations of government, in its broadest sense, as well as highlighting the importance of information management and recordkeeping.

Despite progressive gains during the Major and Blair Governments, the shift from secrecy to absolute transparency in government is far from complete, and is unlikely ever to be so either in the UK or any other country. It has been fascinating to observe, though, how the UK FOIA, in particular, received such a mixed reception from campaigners, political scientists and journalists in the lead up to its full implementation on 1 January 2005. Such groups felt let down by the discrepancies

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between the promise evident in the new Labour Government's initial White Paper of 1997 and the finalised legislation that was given Royal Assent in November 2000. Exception was taken with the number of exemptions established by the Act, excluding access to information relating to national security and the formulation of government policy, for example, as well as with the right given to Ministers by s.53 to veto decisions made by the Information Commissioner. Yet, as documented by Alasdair Roberts in *Blacked Out* (2006)²⁰ and the Organisation for Economic Co-operation and Development's (OECD) Public Governance Committee's 2005 *Effective Open Government* report, it would appear that the UK legislation is very much in tune with information access legislation established in other liberal democracies around the globe. Indeed, since full implementation there has been a sense of qualified satisfaction with the UK Act, if not with the late 2004 amendments to the s. 45 Code of Practice and the proposed 2006 fees review.

The early 2005 *zeitgeist* is captured by *Open Government in a Theoretical and Practical Context* a collection of essays edited by Richard A Chapman and Michael Hunt, which evolved from the Public Administration Committee (PAC)²¹ Workshop on Freedom of Information held at Durham University in April 2005 just a few months after the Act came fully into effect. This slim volume pulls together contributions from Parliamentarians, practitioners and academics. It has as its primary focus the topic of Open Government in the UK, although there is some commentary on the situation overseas too, particularly in South Africa. While there are chapters on the Hutton Inquiry (ch. 6) and the Committee on Standards in Public Life (ch.8), much of the book is given over to two themes: (1) the UK FOIA, its history, evolution, shortcomings and potential benefits; and (2) accountability in public office.

²⁰ also see review in this issue of *Open Government*

²¹ <http://www.york.ac.uk/depts/poli/pac/>

Despite the contributions from FOI practitioners such as Susan Healy of the National Archives (ch. 10) and Frank Cranmer of the House of Commons (ch. 13 – background note) this collection is pitched at the academic reader, with the chapters on public accountability and whistleblowing (ch. 5) and on e-Government and FOI (ch. 11) being especially theoretical. It will be of particular interest to political scientists and legal historians. Its price of £50 also will mean that it is more likely to find its way into libraries than into the homes of casual readers as has been the case with Heather Brooke's *Your Right to Know*²² (Pluto Press, 2004; <http://www.yrtk.org/>). That said, there is still much to commend the book to FOI practitioners. Healy's chapter and that contributed by Stephen James (ch. 3) will find resonance with record managers, data controllers and fledgling information access officers who lived through the era of the Code of Practice on Access to Government Information, the training and awareness period of the months leading up to January 2005 and the immediate post-implementation FOI period during which colleagues visibly twitched as one approached their desk with the latest FOI case files to process and take them away from their 'day jobs'.

The editors bemoan the lack of contributions from either the Department for Constitutional Affairs (DCA) or the Information Commissioner's Office (ICO) but, given public statements from these two bodies throughout the past 20 months both at conferences and in print, it is unlikely that much would have been added to the quality already contained in the volume, from the jaunty overview offered by Lord Goodhart (ch. 2) to the keen analysis of Geoffrey Hunt (ch. 5) and Barry O'Toole (ch. 7). If there is a criticism to be levelled at *Open Government in a Theoretical and Practical Context* it is that it stands as a snapshot in time, some three and a half months after the full implementation of the FOIA, and reads more like a journal than a cohesive study. The reader, from the perspective of late Summer 2006, is either

²² Reviewed in Volume 1 Issue 3 of *Open Government*

left wanting further development of the arguments raised or is already rebutting some of the claims against the potential (in)effectiveness of the UK Act given all that has happened since the contributors first discussed the issues at the PAC Workshop.

In their preamble to the contributors' chapters, the editors differentiate between the terms 'freedom of information', 'access to information' and 'open government', which they suggest have been used synonymously in the past. Chapters on non-FOI topics such as the Public Interest Disclosure Act 1998 (ch. 5), the Hutton Inquiry (ch. 6) and the role of special advisers in the Blair Government (ch.7) do help broaden our perspective of the notion of 'open government', which is clearly distinct from the other two terms. There is less clarity on the distinction between 'freedom of information' and 'access to information', and it would have been useful to have more on the DPA, EIR and Re-use of Public Sector Information Regulations 2005 in this respect. However, where the editors' introduction and the chapters written by Lord Goodhart (ch. 2), Simon James (ch. 3), Michael Hunt (ch. 4) and James Michael (ch. 9) are particularly useful to legal historians is in providing a brief overview of the timeline that culminated in the introduction of the FOIA. This includes the Croham Directive of 1977, the Code of Practice on Access to Government Information introduced by Major's Government in 1994 and updated by Blair's in 1997, the White Paper of 1997 and the draft Bill of 1999.

It was suggested earlier that there was a level of qualified satisfaction with the Freedom of Information Act 2000. Many, including the contributors to the PAC Workshop, either explicitly in the case of Lord Goodhart or implicitly in the case of several others, have indicated a desire for the Act to be reviewed and modernised in the not-too-distant future, regaining lost ground on the original 1997 White Paper. Similarly, this reviewer is left eager for more from the contributors to *Open Government in a Theoretical and Practical Context*. How have subsequent events, information disclosure from central and local government departments, the NHS and

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the police force, new government policies and FOI case law affected their points of view? Is the FOIA weaker or stronger than they had anticipated? Do media-fuelled scandals involving David Blunkett and John Prescott, while not a good advertisement for the probity of Government Ministers, reflect well on the openness of the modern political system? What have their own experiences been both as users of the Act and practitioners responding to requests? How do practitioners strike a balance between the not inconsiderable requirements of the Act and fulfilling the core business of their departments? It would be pleasing to see their arguments developed further in the electronic pages of this journal or elsewhere. In the meantime, *Open Government in a Theoretical and Practical Context* is recommended for its thought-provoking analysis of the early days of the FOI era.

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Book Review

Roberts, A (2006) *Blacked out: Government Secrecy in the Information age*. New York. Cambridge University Press. ISBN 0521858704

Volume 2 issue 1

Review by Thomas M. Susman, Partner, Ropes & Gray, Washington, USA

I have an addiction. I am a freedom of information junkie, and I have been addicted for over three decades. What's more, I have spent a great deal of that time trying to persuade others, both inside and outside the US, to share this passion, this preoccupation. No wonder I was able to read Alasdair Roberts' *Blacked Out* in two sittings. It is informative, comprehensive, engaging, challenging and – in a word – satisfying.

Roberts' story opens with a story. A series of stories, actually. And, unlike the dark title of the book, these stories are not about information's being "blacked out" but about governments' being "lighted up." The first tells about how disclosures under the Right to Information Act in the Indian state of Rajasthan revealed widespread fraud and corruption in the food rationing system. Another tells about how information found under the Thai Right to Information Act showed that influence by leading politicians and business people skewed admissions practices in a prestigious elementary school in Bangkok. In Japan, the story is the release of the names of hospitals supplied with contaminated blood products; in the UK, the disclosures of over a million pounds in EU farm subsidies paid to the royal family. These and others are the stories of FOIA successes around the globe. And a comforting group of stories they are.

There is also lots of carefully documented history in the volume. Based on my own research into and involvement with evolution of the FOIA and open government

in the US, I found the historical discussions to be accurate and thorough. But this is ground that has been plowed before. Likewise, Roberts' discussion of secrecy and security is not news; it has been masterfully explored by former Senator Moynihan in his little book on Secrecy. And Roberts' description of the Bush administration's efforts to undermine open government practices and policies has already been eloquently deplored by Tom Blanton in a number of hard-hitting articles.

Roberts himself does a masterful job in explaining and exploring the many faces of bureaucratic resistance to open government and the tactics employed – particularly in Ireland, Canada, and the UK – as part of the "ideology of resistance" to disclosure laws. Governments that are adopting or amending their access laws, as well as FOI law users and advocates, can learn much from these lessons in recent history.

I think Roberts is at his best as he analyzes more deeply and more insightfully than has been done in one place before why freedom of information will not always take root and flourish. The challenges he identifies consist of not just bureaucratic resistance but structural impediments. His cases in point:

- Information is being increasingly shared within networks – which has become imperative in the international war against terrorism – but with this comes the necessity to prevent disclosure of that information. The result is that the penchant for secrecy of international institutions will now stand in the way of access to information under national laws. (Roberts' remedy: let national rules govern disclosure.)

- The privatization of governmental functions and consequent building up of information in private institutions not subject to open government regimes also stand as substantial barriers to disclosure. (Here Roberts argues for a South African-style right to information held by private organizations.)

- Supranational institutions are now assuming what were formerly domestic roles for government (the EU and WTO are two obvious examples); this leads inexorably to the holding of information pertaining to national interests by international bodies with long traditions of opacity. (Robert would like to see greater transparency in these institutions, but recognizes the likely insurmountable obstacles in the way.)

- There is a "metamorphosis of government information" from a finite number of paper documents into near uncountable electronic records results in a stockpile of "liquified" information; this tends to align businesses against disclosure, impose unmanageable costs and burdens on NGOs that desire access to complex technical databases, and in many jurisdictions raise threats to personal privacy.

Roberts occasionally betrays an outsider's bias, most often when he portrays as usually evil (that is, inimical to greater transparency) the role of business interests in the world of information protection and disclosure. But he also shows a remarkable neutrality when he acknowledges that his assessments and predictions might be wrong (regarding, for example, the implications of supranational institutions) and when he recognizes that proposals he favors have no practical chance of being adopted (like the application of public access regimes to private organizations).

Blacked Out provides much food for thought. But the stories with which it opens are the sweet desserts; the last paragraphs – with their bleak assessments – could provoke a bout of indigestion. "The problem of excessive secrecy has worsened recently," opines Roberts. And instead of the public's fighting back to maintain open government information, there is "an alternative and bleaker scenario." This is a scenario—

in which complaints about secrecy are deployed by citizens to rationalize their disengagement from the political process, or their tolerance of noxious policies. How, after all, can citizens be expected to participate actively in politics, if critical information is being withheld from them? How can they share responsibility for the actions of their leaders if they have incomplete knowledge of those actions?

The with this depressing thought, the last paragraph becomes a call to arms: "The struggle to advance transparency is important, and it is far from over." Professor Roberts gives us, with his history lessons, success stories, and keen analysis and insights, a valuable weapon in our battle to stem and ultimately reverse the growth of government secrecy in the information age.