

Book Review

Open Government: Freedom of Information and Privacy

edited by Andrew McDonald and Greg Terrill, Macmillan Press, London 1998, 198 pp.

The title of this edited book highlights the ambitious task the editors have undertaken. Nine essays involving five jurisdictions, a majority of authors who are senior public servants, and a brief to explore the linkage between key aspects of official information policy is not a simple task. To their credit the authors and editors have produced an informative and at times authoritative analysis of the two key dimensions of official information policy — freedom of information and privacy.

At first glance I thought that the volume would be no more than a loosely compiled collection of papers given at some weekend workshop. By the time I finished the book my understanding of freedom of information (Fol) and privacy issues had been significantly contributed to by each of the chapters. This book is an essential addition to any library or research collection. It is also a must for any person or organisation involved in information policy development and implementation.

In their preface the editors highlight that the interrelationship between debates over privacy and moves to cast off official secrecy has rarely been explored and more often is treated as parallel but largely unrelated. In addition, the editors note that the debate over official secrecy has largely clustered around two poles. The first pole represents a 'campaign' approach. Around and from this pole have moved the academics, journalists and activists who argue that political and democratic maturity or vitality demands a greater level of openness and accountability than traditionally present in the writer's particular jurisdiction. The other pole is described loosely by the editors as the 'official contributions to the reform debate'. In an interesting depiction, the editors see these official contributions as alternately being 'statements of the need for continuing protection of certain categories of official information, and measured explorations of the prospects for reform'.

The first chapter in the book is by Professor Vernon Bogdanor who explores the constitutional aspects of Fol. He offers an intriguing insight into an apparent British preference for twilight zones, or in his terminology half-way houses, where flexibility and discretion are maximised. Bogdanor notes: '[w]e now live in a half-way house between a system of tacit understandings and a statutory right of freedom of information'.

In the course of his fleeting analysis Professor Bogdanor pinpoints one of the crucial design determinants of a successful Fol policy, namely that 'whether only information or also advice is released is crucial to the success of freedom of information. It is indeed of far greater importance than whether the right to information is statutory or non-statutory.'

In a limited space Professor Bogdanor tries to confront the negative arguments, access to policy information and civil service neutrality, which are the main constitutional barriers raised against the introduction of Fol to a Westminster system. In particular, he relies heavily on anecdotal, albeit accurate, accounts from New Zealand where the *Official Information Act* has had minimal negative impact on the quality, quantity and range of information

provided by the civil service. In an echo of the point raised by the editors in the preface, the author divides the poles in the access debate between the Whig/Liberal view and the Tory view. The Whig/Liberal analysis depicts Fol and open and accountable government as the concomitants of democracy. Whilst the Tory viewpoint assesses the limited, if any at all, role of Fol as being subordinate to the concept that effective government requires effective administration.

The second chapter marks a clear polar transition towards the 'official' or Tory approach to Fol. The author, David Wilkinson, reflects the perspective of a senior Cabinet official. The evolution of official information policy in the late 1980s and particularly in the 1990s is recounted as a carefully managed accommodation with a seemingly inevitable, if not fully reconciled, date with destiny. Whilst not depicted as such, Wilkinson's analysis reads as the recounting of a slow and fighting withdrawal from the heights of secrecy to a more vulnerable position on the plains of accountability.

In terms of the analogy, used in the first chapter, Wilkinson details the transition from one half-way house to another as various policy developments and political pressures required further progress towards openness and accountability. Some of these steps were the by-products of a conscious design to respond to specific needs of specific sectors (access to personal medical records or access to environmental information), or as solutions to damaging exposures like the findings of the Scott Inquiry. Even in the afterword, as a result of the advent of a Labour Government and in the likelihood of an apparently urgent timetable for an Fol Act, the tone was 'steady as she goes'.

Andrew McDonald, in the third chapter, reminds the reader of the relative neglect that archives have received in official information policy, analysis and reform. He provides a valuable post Second World War historical outline of archives policy in the United Kingdom. This outline is more than a mere recounting of significant milestones in the history of archival policy in the UK. McDonald is more interested in closely examining the dynamics associated with this slow liberalisation.

The rest of the third chapter explores the Fol and Archive access relationship across several jurisdictions. It is via this comparative exercise that McDonald makes his greatest contribution by constructing several models to explain differences in the access relationship between jurisdictions. His first step is to apply a two-fold classification scheme to jurisdictions:

- single access regimes which treat archival and current information access identically;
- dual access regimes.

Furthermore, McDonald highlights a number of variables which lead to sharp differences between the regimes classified as dual access. These variables include:

- date of documents
- cost of access

- the role of gatekeepers
- archival threshold dates (30-year rules)
- access exemptions that extend archival threshold dates
- appeals
- quality of documentation (linked to different record management practices).

McDonald's thesis is that the interrelationship between the policy realms of Fol, archives and record management 'should not be overlooked in the future development of open government policy'.

In chapter four, Elizabeth Franks, the UK Data Protection Registrar, explores the overlap, links and interdependencies between Fol and privacy. Her analysis, informed by her role, is primarily framed by data protection and privacy imperatives. Franks explores some of the key elements of the *Data Protection Act 1984* (UK), the EC General Directive on Data Protection, the common law, government information, the claim by journalists for exemption from data protection requirements and the nature and extent of public concern about privacy and data protection.

The inference that can be drawn from her analysis is that her preference would be for legislation on data protection and access to official information to be included in one package or 'progressed in parallel'. A logical deduction from this analysis is that the Canadian provincial dual purpose model of a single information commissioner, handling both Fol and data protection issues, would be her preferred solution.

Robert Hazell starts chapter 5 with the proposition that all countries have to decide the relationship between Fol and privacy either by design or default regarding:

which is the dominant value – privacy or Fol?

how to articulate the interaction between the two.

Ideally no single value ought to dominate in Hazell's opinion because international human rights law is about striking a balance between competing values. However Hazell accepts that the deliberate or default practice of each regime will lead to greater weight being attached to one or other of these information values.

Hazell offers an interesting analytical model, which allows the Fol–Privacy nexus to be handled with greater insight than the more common routine presentation of contesting philosophical preferences. He starts from the basis that designers have a choice they can make about the legislative architecture they will use when implementing policy choices regarding information access. Hazell presents a number of models whilst indicating his preference for an approach that would allow a legislative overlap so that Fol could dovetail with privacy protection.

Nevertheless, Hazell predicts that Britain is more likely to adopt a legislative architecture where the privacy axis is dominant. He is disappointed that this adoption will not be the result of an informed public debate about which axis should be dominant — Fol or privacy. His perception is that external pressures (in particular European) are responsible for a drift towards privacy becoming a dominant value. The final section of the chapter outlines the author's view that, whether laws regulating privacy and Fol are introduced simultaneously, in separate packages or incremental and without synchronisation, the designers need to make a number of critical policy choices. These policy choices include decisions about legislative architecture, legislative definitions, enforcement machinery and departmental machinery.

Greg Terrill's chapter is a wide-ranging coverage of Australian Fol history, practice and current issues. In a relatively short number of pages Terrill manages to educate, inform and update the reader about Australian Fol. In such a short space some could criticise Terrill for the sweep of issues and the surface engagement with a number of fundamental concerns. However, some of the insights he offers will form the kernels of more detailed research efforts in the future. Implicit in Terrill's observations is the acknowledgment of a failure of the legal, history and social science academies in Australia to fully explore the legacy of Fol.

In chapter 7, Judith Aitken provides an extensive account and analysis of the New Zealand *Official Information Act* from its inception to its current operations. In particular, Aitken explains, with well-drawn examples, how the general and specific design elements and principles adopted by the Danks Committee have in the long run achieved their purpose — an achievement that, in retrospect, did not seem possible to many of the campaigners for open government.

She manages to convey to readers from other Westminster jurisdictions an important lesson for those confronted by the conundrum of trying to reconcile Fol with the principles, conventions and other shibboleths of Westminster practice. The lesson from New Zealand is to start anew. The Danks committee, in designing the *Official Information Act*, started from the position of visualising the type and quality of the government policy process that would be needed for a small modern democracy in the future. The Committee then worked backwards in deciding the principles, conventions and practices needed to get to that destination. As a consequence, partial access was to be tolerated to cabinet information, public servants were to be encouraged to express advice at odds with ministerial preferences and everyone was to operate on the basis that the policy process demanded informed participation.

In the second last chapter the reader discovers, not only a critical assessment of Canadian Fol but also, a heartfelt and carefully articulated call for reform. Robert Gillis provides a cool assessment of the achievements and failures of the first generation of Fol whilst prosecuting the case for a much more enlivened and virile second generation of legislation and attitudinal paradigm shifts.

Gillis sets the operation of the Canadian *Access to Information Act* against the background of a civic society which has operated in a trust deficit and where there have been 'sporadic efforts at legislative and institutional revamping of government processes to make them more open, transparent, responsive and accountable'. Gillis accepts John Ralston Saul's critique of access legislation that the political and bureaucratic elite have only allowed legislation on the statute books that preserves, rather than disperses or shares their control of information. John Ralston Saul argues that '[a]ccess to information laws amount to little more than legislative manoeuvres that open or close peepholes'.

Whilst Fol entered into the Canadian political and policy psyche as a symbol of hope, as Gillis recounts, its failure at the first hurdle set down far more limited prospects for this first generation model of access reform. Echoing Terrill's Australian account, and contrasting with the New Zealand picture, the senior bureaucratic and political elite insisted that it would be the legislative

architecture and design principles of the *Access to Information Act* which would have to concede to the imperatives of private, collective decision making within a Westminster-style government.

Gillis touches on, but never directly and explicitly incorporates into his analysis, the concept that the key policy dynamic associated with the implementation of right to know legislation is how a radical culture shift for officials is to be implemented. The Canadians failed to do this and, as a consequence, John Grace, Information Commissioner, has observed that the legislation was unfortunately 'guided by often hostile ministers and a foot-dragging bureaucracy'.

In a little more detail than Terrill, Gillis outlines how quickly legislative and executive goodwill towards the legislation evaporated as Fol was used to unsettle the smooth handling of the political process by the governments of the day. Gillis is not totally negative in his analysis and gives significant airplay to the achievements of Fol including its constant usage by the fourth estate and an acknowledgment by the bureaucracy that the ground rules of access have substantially changed.

Gillis's agenda for reform would include the following elements:

- renewed commitment to information rights role of parliament
- leadership by government legislative standards ethical and value issues performance standards.

At their heart, the reforms outlined by Gillis envisage a second generation model of access legislation in Canada that sparkles under re-energised political stewardship and where a sterile, rule-driven process, designed to delay access is replaced by an ethical and cultural environment committed to open government.

The final chapter, by Irish civil servants Gerry Kearney and Aine Stapleton, is a revealing and strong assessment, from an internal perspective, of the lessons and strategies that could be utilised by their international counterparts faced with a need to introduce Fol legislation. The authors point to the importance that the convergence of a civil service structure orientated to the conventions of Westminster and an official secrecy regime had on access policy in Ireland. A significant feature, mirrored in the countries featured in previous chapters, is that the Irish legislation came into existence against a background of radical political, social and economic changes. The authors argue that Fol cannot be viewed as arising in isolation but that 'developments across political, societal, legal and institutional fronts also favoured moves towards greater openness and accountability by government bodies'.

It was the coming together of a critical mass, within strategic levels of the bureaucracy and political leadership, which was finally able to conjure an Fol Act out of the waves of change sweeping through Irish politics. As late as 1993 Fergus Finlay relates that:

In respect of one issue under this heading, we ran into a brick wall. It was one of the few policy areas that had to be referred upwards to be discussed by Dick and the Taoiseach, because the Fianna Fail negotiators had no room to manoeuvre. That was the idea of a Freedom of Information Act, to which the Fianna Fail side (and their civil service advisers) were implacably opposed. We settled in the end for a written commitment to examine the need for legis-

lation. It was to be a couple of years before Albert Reynolds decided there was indeed a need.

Fergus Finlay, *Snakes and Ladders*, New Island Books, Dublin, 1998, p.153.

Accidentally, and as a by-product of the constant communication with experienced Fol administrators in other civil services, it seems that the Irish stumbled onto the key to Fol success that previously only the New Zealanders had appreciated. Kearney and Stapleton observe 'on reflection, the single critical factor overlooked by us when first approaching Fol was that it was a change process, not just a legislating matter'. The Canadians and Australians had paid lip service to this concept but always deep down believing that a magic mix of watertight exemptions, the right interpretative approach and an appropriate mechanism of judicial review would suffice. If necessary a degree of training might complete the process.

The authors outline an intense and extensive effort within the Irish civil service to lobby for change and a version of the legislation which could attract the largest internal constituency and avoid completely alienating external forces like the media, opposition parties and pressure groups. Kearney and Stapleton's discussion indicates that it was the bureaucratic alliances which were of paramount concern. Yet it is this intensive lobbying and support base within the civil service from 1994 to the final passage of the Act in 1997 which may very well be critical for its long-term prospects. A purist might label the Act second rate given the exemption of complete agencies, no retrospectivity for non-personal records, a fee structure at the discretion of the Minister of Finance and a ministerial certificate process (albeit heavily circumscribed and restricted). Yet these deficiencies will pale into insignificance if the internal constituency remains strongly committed to supporting both the letter and spirit of the legislation.

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