Congress granted the scholar and the scoundrel equal rights of access to the agency records.

An assertion that he would repeat six months later in *Reporters Committee v. Dept. of Justice*, 816 F. 2d 730 (D.C. Cir. 1987). Circuit Court Judge Frank Easterbrook noted the same right of disclosure when he wrote in *Dept. of the Air Force v. Federal Labor Relations Authority*, 838 F. 2d 229 (7th Cir. 1988), that:

> the *Freedom of Information Act* says that 'any person' may obtain information. Either all requestors have access or none do. The special needs of one, or the lesser needs of another, do not matter. The first person to get the information may give it away; so if one person gets it, 'any person' may.

Dissenting Justice Antonin Scalia, in *Department of Justice v. Julian*, 486 U.S. 1 (1988), said that:

> the reasoning of the cases, like the reasoning of the scholars and the language of the statute, recognises no such thing as a 'third party requester', since it affirms that *all FoIA* requesters have equivalent status, and equivalent right to the *public documents* that the *FoIA* identifies.

Certainly the 'any person' standard is a hallmark of the *FoI Act*, establishing a principle of universal access which is not available in open records acts in many other countries. But it is important to recognise that the 'any person' standard can be a double-edged sword, allowing broad access on one side, while serving to restrict it on the other.

Harry Hammitt
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Old FoI fears find new lease of life in Tribunal

Jack Waterford weighs up the effects of the Act seven years after its introduction, and looks at a recent decision which revives the old arguments about disclosure and the public interest. This article appeared in The Canberra Times on 23 February 1990, and is reprinted with permission.

Remember the old candour argument that was always the standby for the official desperate to avoid having to hand over a document under Freedom of Information or court process — the notion that if the doings of public servants were not shielded they might not give frank and fearless advice?

The argument buried by the High Court in *Sankey v Whitlam* (1978) 142 CLR1 even before FoI came into effect, and rejected innumerable times since by all manner of courts and tribunals, has suddenly found a new lease of life — and from a most unlikely source, the President of the Administrative Appeals Tribunal, Justice Trevor Hartigan.

Against public interest

In a FoI decision handed down earlier this month, Justice Hartigan included as reasons for concluding that the public interest was against disclosure of particular documents, propositions such as this:

> This is a communication from an acting assistant Secretary to the minister . . . it is therefore a communication between two high-ranking persons. It is imperative that the minister is informed by his department of all relevant matters, particularly sensitive matters such as another minister's submissions on a proposal. The disclosure of this document may jeopardise the willingness of these officials to fully communicate all relevant information in such a manner . . . the nature of the material is such that to release it would prejudice the decision-making processes of the government.
>
> [Another document] was created at a very high level of government with the intention that it be disclosed only at that level, consequently its disclosure would necessarily breach the need for confidentiality in communications intended for that level . . . the nature of the document is such that the author must have intended that it not be disclosed, consequently disclosure of the document would necessarily inhibit the production of documents of this sort that are necessary at this level of government.

Albeit somewhat differently phrased, this is the old candour argument used by the old guard of the public service to oppose FoI from the start. It has never, except in this judgment, before found favour in a case, though there were skerricks of the argument available in a decision, *Howard v the Treasurer* (1985) 3 AAR 169, once handed down by Justice Darryl Davies, Hartigan's predecessor. The most charitable thing one could say about the *Howard* judgment is that it excited little favour among Justice Davies' colleagues, and was rarely if ever subsequently relied on by them or by Justice Davies himself.

A weaker tribunal

The danger of the most recent decision is that Justice Hartigan now presides over a tribunal somewhat weaker in quality than in the past, considerably more burdened with work and under pressure to produce quick judgments based on precedents. The worry is that the judgment will stick, and that others will rely upon its reasoning.

If this is the case, FoI as an instrument of serious investigation of government action and policy may as well be given away. It might retain some residual value for the person attempting to find his or her own personal file, or for the person seeking details of some decision which, however important to the applicant, was an innocuous and routine exercise of government power.

Sensitive issues

But the judgment says, in effect, that if senior officials and ministers are involved on a sensitive issue, the materials should be exempt on public interest grounds. It is very difficult to find such a line of reasoning in the *FoI Act* itself, or in the propaganda which has been used over the years to sell it.

The strange thing is that there was very little in the FoI action itself compelling the conclusion. The case had involved an application by Liberal MP Ken Aldred for documents associated with the national security implications of giving the Soviet Union's fishing fleet access to Australian ports. Not surprisingly, as departments claimed, and as Justice Hartigan found, most of the documents were exempt either for being Cabinet documents or because they included material divulged in confidence by overseas agencies, including intelligence agencies. Given the width of exemptions in the *FoI Act*, no one could complain of this result.

But Justice Hartigan found that a small number of the documents were not capable of being so categorised, and went on to consider whether these documents were 'internal working documents' (he found they were), and whether the public interest required disclosure or not. Once again, the internal working documents section of the *FoI Act* proved itself the most problematical section.

Spirit of FoI

To say that Justice Hartigan's conclusion on the subject is both against the authorities and renders a nonsense of the spirit of the *FoI Act* is not to deny that there have not been powerful forces arguing for the point of view that he took, or that there is not evidence in support of it.

When the Act was first mooted, senior public servants argued that public service advisers could not work in a goldfish bowl. They had to give frank and candid advice, often on the run. If they knew that every word they wrote could be carefully scrutinised by outsiders, they might tailor their advice to circumstances, be ultra-cautious, and never commit anything to writing.

Moreover, it was argued, this might disadvantage politicians and good government. First, loyal public servants would not want to embarrass their ministers by canvassing options they felt duty-bound to put but which they knew would be unacceptable to the minister, and potentially dangerous to him should it emerge that he had rejected it. Second, ministers themselves might demand only materials with the capacity to make them look good should they subsequently emerge.

The argument is founded on the concept of ministerial responsibility and of the public servant as cypher. The minister gets the advantage of the best, most fearless and most frank advice, makes a decision according to his own best judgment, and accepts the responsibility for it. Why should it be the public servant who is in the firing line? Why should the fact that possible alternative lines of action were available be used against the minister when the judgment should be on what is actually done?

Even since the Act has come into effect, a number of public servants have claimed that the *FoI Act* has had the chilling effect they feared. Treasury, for instance, actually claimed before a Parliamentary committee, that since the passage of the Act some advice no longer went to the Treasurer in writing. It was now oral advice — explicitly so that no record existed.

Professionalism of public servants

It is, however, quite significant that no public servant has yet claimed that the Act has had the effect of actually denying the best advice to a minister — even if the vehicle for the communication of the advice is said to have changed. And I have sat through quite a number of FoI hearings at which I have heard public servants express the concern that other public servants might be less candid in future if materials of this sort came out: I have never yet heard one admit that the possibility of disclosure would modify his or her own advice.

Public servants, and the most senior public servants at that, are, after all, supposed to be professionals. They are supposed to be experts in the administration of their particular fields, they have quite a number of statutory and other protections from the politicisation process and the ministerial whim, and they are paid to give fearless and frank advice. No doubt some of them are susceptible to the same human weaknesses as any of us — not least the impulse to tell ministers what they want to hear — but must the system work on the assumption that they are so frail?

The most robust view of public servants — firstly that they will do their job and give the best advice in their power regardless of the consequences — is not only the line adopted by modern court until this month's decision, but can actually be said to assist in good government.

First, it keeps ministers and public servants on their toes. Ministers have the right to demand the loyalty of their public servants, but they do not have the right to insist that they write the records and the advices so that they only support the decision which was ultimately adopted. A minister conscious of the fact that the full record of the decision-making process may come out may be somewhat less inclined to make a purely political decision but to concentrate on making the right one; just as public servants, anxious to protect their reputations should a decision ultimately go wrong, will be anxious to demonstrate that the minister had access to all of the options and considered views on the merits and demerits of each.

Quality of files

One of the immediate effects of FoI, in a similar area, was to put pressure on public servants not to put on files personal, insulting, often libellous and wrong comments about the persons with whom they were dealing. At the time, there was some concern that FoI-able files might become so sanitised as to become meaningless. To the contrary most agencies now openly acknowledge that the quality of file-keeping has considerably improved since.

Second, against the risk that material will not go on file is the importance of record-keeping in any administration as big as the ordinary government departments. One can never know when the questions may come, or from what direction: it might not be an FoI request, it might be a legal challenge, a question on notice in the Parliament, a query in a parliamentary committee, a press query or simply a voter's representations to a minister. Or the questions could come from the Auditor-General, the Ombudsman or any other area of the administrative mechanisms.

In these days of a highly mobile public service, in which many middle and senior officers do not sit in positions for long periods, and in a time when there are literally thousands of decisions made, many on the run, one cannot rely on human memories or reconstructions. There has to be a record. If the record is kept deliberately thin so as to avoid an assault under the FoI process there is a serious risk that scrutiny will not reveal the material justifying the decision which was made, or failing to reveal whether it was according to law or made for the right reasons. Those who fiddle with the record run a serious risk of being hoisted with their own petard.

In short, in the long term, FoI should have no appreciable effect on reducing the quality of the record, even if, in early days, there may have been a tendency to truncate the record, or to temper advice with a view to history or outside scrutiny.

Public servants have usually benefited from such scrutiny if only because, usually, it shows they had their eyes on the ball.

Quality of work

It would be difficult to find a public servant doing his or her best who could claim in 1990 — the eighth year of FoI — that it had done them, or the quality of their work, any damage. It is not difficult to find some who had their reputations enhanced.

If the new heresy of Justice Hartigan is a correct statement of the law, the *FoI Act* ought to be amended to make it clear that ministers and their senior advisers are as subject to the Act as the lowest public servant. The Act always intended, indeed it explicitly provided for, it.

Chances of reform

Is there any hope that this might happen? Probably not from the Labor Government which has little left of the reforming zeal that made some of its members some of the fathers of the Act. One could be as cynical about the Liberals. On the other hand, the fact that a few senior Liberals — John Howard, Ken Aldred and Neil Brown — have had some frustration with FoI while in Opposition may mean that if the Liberals win, some reforming zeal might lead to some change before being in government infects them with pragmatism.

It was Senator Gareth Evans, after all, who commented cynically in 1983 that he would have to slip in FoI reforms quickly before his colleagues got too used to power. Alas, he was a little late and never got many reforms in place: his colleagues were got at by their advisers.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

SCHORAL and COMMUNITY SERVICES VICTORIA
No. 890284
Decided: 10 October 1989 by Deputy President K Dimtscheff.
Request for documents relating to applicant's former wife and her children — whether applicant had enhanced standing rights under s.13 — claims for exemption under ss.31, 33 and 35 — procedures when respondent unable to locate documents.

The facts

Mr Schorel entered into a *de facto* relationship with Mrs Celia Jackson for approximately three months in 1984. At the end of this time the couple separated, though some contact continued as they had a child in 1985. Some time later the Jackson family was the subject of inquiries by the District Community Policing Squad and on 27 August 1986 the Morwell Children's Court heard protection applications for the children. The Court ordered that the children be placed under the wardship of the Director-General of Community Services, although the youngest child born to the applicant and Mrs Jackson was later released into the care of the applicant. The applicant, who was aggrieved at the terms of the order, and in particular, those events leading to the placement of the children, sought access to documents relating to himself, Mrs Jackson and the children. A large number of documents relating to him and his daughter were released, but those documents concerning Mrs Jackson and her children were withheld and were the subject of the present proceedings.

The standing issue

Section 13 of the Act provides as follows:

> Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to — (a) a document of an agency, other than an exempt document; or (b) an official document of a Minister, other than an exempt document.

In the course of proceedings the applicant contended that he had an enhanced standing beyond that of any other person under s.13, by reason of his relationship with Mrs Jackson. The Tribunal, in addressing this issue, noted that s.13 is devoid of a standing requirement and repeated the oft-quoted phrase of Kenneth Davis, a prominent FoI academic in the United States, that:

> A criminal, communist, troublemaker, officious intermeddler or malefactor, is as much entitled to records as a philanthropist, a saviour of humanity, or an ordinary person.

While not directly addressing the question of whether the Act conferred enhanced standing to a particular person, the Tribunal found that the applicant was neither a parent nor guardian of the Jackson children (excluding the youngest child) and had no better standing under s.13 than any other person.

The exemptions

While the respondent relied on a number of exemption provisions, the only sections considered by the Tribunal were ss.31, 33 and 35. Section 33(1) was the most significant exemption provision relied upon. In considering this application, the Tribunal had little difficulty in finding that the information in the documents in dispute concerned the personal affairs of Mrs Jackson and her children and that disclosure of this information was unreasonable. Noting that Mrs Jackson and her children opposed the release of any information to the applicant, the Tribunal ruled that disclosure would be an unreasonable intrusion of the privacy of the Jackson family, and accordingly upheld the exemption.

Turning to the s.35(1)(b) claim, the Tribunal was satisfied that disclosure of information about the Jackson family, which had been communicated in confidence, would be contrary to the public interest and substantially diminish the respondent's ability to obtain similar information in the future. For similar reasons, the Tribunal also accepted that the s.31(1)(a) claim should be sustained.

Finally, there remained at the end of the proceedings a number of documents which the applicant claimed existed but which the respondent could not locate. The Tribunal, though sympathetic to the respondent's position, ordered that a further search be conducted to locate and produce for the Tribunal any further documents that were found.

[K.R.]

SUTCLIFFE and VICTORIA POLICE
No. G890882
Decided: 22 November 1989 by J Bretherton (Member).
Documents relating to applicant's possession of firearms — access sought to assist applicant in preparation of County Court appeal against firearms conviction — claims for exemption under ss.31(1)(c) and 35(1)(b).

The applicant sought access to documents relating to the reasons for the cancellation of his shooter's licence. The respondent refused the request, claiming that the documents were exempt under s.31(c) (confidential sources of information) and s.35(1)(b) (documents