Freedom of Information and Privacy: Some Recent Developments and Issues

The relationship between privacy and freedom of information

It is sometimes suggested that there is a conflict between the aims of privacy protection and those of freedom of information. It is more accurate to speak of occasional tensions between them as the balance between the principle of the widest possible access to government-held information and the principle of limiting the use and disclosure of information about individuals is worked out in particular cases. The Privacy Commissioner, Kevin O'Connor, has pointed out recently that the concept of FoI in the United States, following the excesses of the McCarthy era, grew out of a concern with the moral right of individuals to know and correct the information governments held about them. Both in the United States and in Australia FoI developed wider objectives concerned with government accountability and participation in decision making, but FoI continues to have an important role to play in achieving privacy objectives.

From the outset the *Freedom of Information Act 1982* (*FoI Act*) has had provisions which allow for the protection of sensitive information about individuals (s.41) and for the amendment of records containing information about individuals (Part V). Although the expression is not used in the section itself, the heading to s.41 refers specifically to documents which affect 'personal privacy'.

Because of these aspects of the *FoI Act*, the *Privacy Act 1988* makes provision whereby in practice the FoI Act, although not specifically referred to, governs the question of rights of access to specific personal information, whether it is about the FoI applicant (see the wording of Information Privacy Principle (IPP) 6) or about third parties (IPP 11(1)(d)). It remains to be seen whether there is a residual role for the Privacy Commissioner where an agency, without appropriate consultation under s.27A, releases information which it mistakenly believes is not personal information.

In an early case requiring application of the exemption in s.41, *Re Chandra and Minister for Immigration and Ethnic Affairs*,[1] Deputy President Hall commented that: 'Plainly enough what s.41 seeks to do is to provide a ground for preventing unreasonable invasion of the privacy of third parties'. At the same time he stressed that the test of unreasonableness in the section also required a consideration of the public interest in the disclosure of the information. In the interpretation of the term 'information relating to personal affairs', which was used in the *FoI Act* until amendments made in 1991,[2] the Administrative Appeals Tribunal (AAT) and the courts stressed the 'private' nature of the information protected by s.41.[3]

A further indication of the close relationship between the FoI and Privacy Acts may be seen in the amendments made in 1991 to the *FoI Act* to replace the concept of 'information relating to personal affairs' with the concept of 'personal information' as defined in the *Privacy Act*.[4] While it was not stated explicitly at the time, it is clear that one of the main purposes behind these changes was to bring the two Acts more closely into line. If this had not been done, there would have continued to be a disparity between the Information Privacy Principles in the *Privacy Act* and the practical means by which some of these could be implemented as set out in the *FoI Act*. Another reason, stated at the time, was public concern that the narrow interpretation of 'personal affairs', excluding solely work-related information,[5] was resulting in constraint on the right to seek amendment of personal records under Part V of the *FoI Act*.[6] In effect the result of the substitution of 'personal information' in s.41 was to make the question of privacy protection depend far less on whether the information came within the meaning of the information referred to in the section, and more on the question whether disclosure would be unreasonable.

The following comments deal with some issues relating to FoI and privacy in the interpretation of the two principal elements of s.41(1). They are (1) the scope of the term 'personal information', and (2) the approach of the Full Federal Court in *Colakovski v AOTC*[7] to the interpretation of 'unreasonable disclosure' in s.41(1).

The scope of 'personal information'

Section 41(1) as amended in 1991 now reads:

> A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The term 'personal information' is defined in s.4(1) in terms almost identical to those used in the *Privacy Act*:

> 'personal information' means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion . . .

It is clear from the legislative history of the term 'personal information' that it was meant to be wider than the previous concept of 'personal affairs information'. The Australian Law Reform Commission (ALRC) in its Report on Privacy said this:[8]

> . . . To limit the definition of 'personal information' to information relating to the 'personal affairs' of a person is too restrictive. There is room for doubt about the precise scope of that phrase. Any information about a natural person should be regarded as being personal information. Secondly, the link between the person and the information need not be explicit. If the information can be easily combined with other known information, so that the person's identity becomes apparent, the information should be regarded as personal information. Information should be regarded as being 'personal information' if it is information about a natural person from which, or by use of which, the person can be identified . . .

Fairly clearly the concept of 'personal information' is wider in practice than the generally accepted interpretation of the earlier concept of 'personal affairs information'. As the AAT said in 1993 in *Re Hittich and Department of Health, Housing and Community Services*,[9] the new wording is more expansive than the previous words used. It went on to comment that it is not appropriate to substitute for the term 'personal' a word such as private, since one of the meanings of the word 'private' is confidential or not widely known,[10] and there is no limitation to such information in the definition of 'personal information'. It covers all information that is about an individual.

The suggestion in another AAT decision at about the same time as Hittich, and concerning similar information, *Re Caruth and Department of Health, Housing and Community Services*,[11] that the ambit of 'personal information' is narrower than that of 'personal affairs information', is clearly not sustainable. Nor is the attempt in that case to

revive the dichotomy between information with a private character and that with a public character.[12]

The amendments were successful in achieving the purpose of including work performance information within the definition of 'personal information'. In *Re Slezankiewcz and Australian and Overseas Telecommunications Corporation (No. 2)*,[13] for example, the AAT had no trouble finding, for the purposes of amendment under Part V of the *FoI Act*, that information in workshop records was personal information about the applicant even when they did not refer to him by name.[14]

Similarly, in *Re Warren and the Department of Defence*,[15] following the replacement in the *FoI Act* of the term 'personal affairs information' by the term 'personal information', information about the performance of an Army officer, the amendment of which had been refused by the Department of Defence as not being 'information relating to the personal affairs' of the applicant,[16] became subject to the provisions in Part V of the *FoI Act* for amendment of personal records.

One difficulty is going to be where to draw the line as to whether or not the individual whom the information concerns is identifiable from the relevant information. There is no difficulty where a name or a photograph appears and the individual's identity is 'apparent' from the information.

There is more difficulty where the name does not appear but it may be possible to ascertain the identity from other information. At least three broad situations may be considered:

Where it may be possible to deduce the identity of the individual logically from within the confines of the document itself, i.e. by reference to other information within the document.

Where it may be possible to ascertain the individual's identity in combination with other documents that have been requested.

Where it may be possible to ascertain the individual's identity in combination with other material that is in the public domain, whether this consists of information in material form or the personal knowledge of other individuals.

Although he recognises the policy difficulties that would follow from the interpretation, Peter Bayne suggests that it is only where all the information necessary to ascertain the individual's identity is contained *within the confines of the information itself* that the identity is ascertainable from the information.[17] This is to read the word 'from' as meaning 'only from' the information itself. That approach would rule out both the second and the third cases, though not the first, from being considered as 'personal information'.

The alternative view is that the provision extends also to the situation where it would be reasonable to expect that other people could ascertain the identity of the person whom the information concerns by combining the requested information with other documents being released, or other information extrinsic to the information itself. The word 'from' on that view would be equivalent to the phrase 'by the use of which' in the quotation above from the ALRC's report,[18] and would involve giving the words 'ascertained from' the meaning of ascertained at least in part from, rather than exclusively from, the relevant information. In support of this view it can be argued that unless some such interpretation is adopted, the words 'can be reasonably ascertained' are equivalent to the word 'apparent' and are therefore redundant.

On this reading the word 'reasonably' in 'reasonably ascertained' could be interpreted either as indicating that it would be 'reasonable to expect' that the person's identity could be ascertained from the information, or that the identity could be ascertained by means of efforts which it would be reasonable to take.

What is unclear is:

- whether only information which would be widely recognised as relating to a particular person will satisfy the 'reasonably ascertainable' test; or
- whether it is sufficient if it is reasonable to conclude from the details in the information that there are likely to be some people, with particular knowledge, able to identify the person on the basis of the released information.

The jury is still out on this issue.

An example of this which has arisen is a case where the names of people were removed from information in the belief that the persons concerned would not be identifiable. Unfortunately, the information was such that the subject of the information believed he could easily be identified by members of a particular section of the community. If this sort of information is about a person whose identity 'can reasonably be ascertained from' it, the question for decision makers will be: when can the subject's identity be 'reasonably' ascertained? The limits will have to be worked out in practice.[19] This may mean that decision makers have to be careful before deciding to release, at least without consultation under s.27A of the *FoI Act*, any information that is clearly 'about' an individual, whether or not that individual's identity is apparent from the information itself.

So what is information 'about' an individual? It is suggested in one case that 'it is the identity which is apparent, or can reasonably be ascertained, about an individual from the information that is relevant' under the definition of 'personal information'.[20] However, the prior question is whether information is about a person at all. Only then is it necessary to ask whether that individual can be identified. The term 'about' is a very wide one, but the information must be connected in some way with an individual person.

Recent cases indicate how wide the term 'about' is. The following information has been held to be information about an individual: workshop documents, though on the face of them they dealt only with the manner in which jobs had been done *(Slezankiewicz (No. 2))*,[21] a series of ticks on a form in the boxes next to questions about a person's private life;[22] (possibly) information that discloses that a person held a particular view, or made representations about an issue, at a particular time (raised in *Re Russell Island Development Association Inc. and Department of Primary Industries and Energy*,[23] and see *Re Timmins and National Media Liaison Service*).[24]

It has been questioned at the level of the Full Court of the Federal Court whether a name and address or telephone number of a person is on its own 'personal affairs information'.[25] The same questions may arise in relation to 'personal information'. In practice there is little difficulty, since such information will usually occur in the context of a particular matter or file or other context which will itself tell something about the person, even if it is only that an individual's name appears on a file or a database of a particular agency. The real issue will usually be whether disclosure will be unreasonable or not.

There may also be a question whether particular numbers on their own are information 'about' an individual — for example, a telephone number, a Medicare card number or the numbers of the files of a class of beneficiaries. Clearly such a number together with the name of the person concerned tells us that the individual has this number in this context, but on its own does it tell us anything about anybody? While the situation is still unclear, my own view is that a number such as a Social Security benefit number is information about the relevant person, but whether the person's identity can be reasonably ascertained from the information will depend on the context in which the number would be disclosed and on reasonable expectations about the knowledge that may exist in the community.

'Unreasonable disclosure' under s.41 of the *FoI Act*

Despite the complementary character of the *Privacy* and the *FoI Acts*, it could be argued that recent interpretations by the courts and the AAT has led to a narrowing of the circumstances in which access to personal information will be given under s.41 of the *FoI Act*. I argue that these trends are not irresistible, and are undesirable in principle, but it is necessary to be aware of them.

The form of s.41(1), like that of s.36(1) concerning deliberative process documents, does not imply any leaning towards or against disclosure of personal information.[26] It is only where the disclosure of personal information is 'unreasonable' that the exemption applies. (A similar situation prevails in relation to business affairs documents under s.43(1)(c)(i).)[27] That this was so was recognised until recently in the decisions relating to the application of the term 'unreasonable', where it was said in effect that the sensitivity of the information concerning a third party had to be balanced against the public interest favouring the disclosure of the information, both the general public interest in the disclosure of information and any particular public interest in the disclosure of that specific information.[28]

It has been stated by the AAT that the approaches of the courts and the AAT to the question of 'unreasonable disclosure' were not affected by the 1991 amendments to the *FoI Act*. In *Re Zalcberg and AOTC*[29] the AAT held that the tests of unreasonableness set out in *Re Chandra and Minister for Immigration and Ethnic Affairs*[30] remained relevant, and that whether or not disclosure would be unreasonable is a question of fact and degree which call for a balancing of all the legitimate interests involved.[31] Similarly, in *Re Stewart and Telstra Corporation*[32] the AAT stated that the Full Federal Court case of *Colakovski v Australian and Overseas Telecommunications Corporation*,[33] decided before the 1991 amendments, remained relevant to the amended s.41(1).

Colakovski has been extremely influential in the interpretation and application of the 'unreasonable disclosure' test in s.41(1) and is the source of many of the problems I am concerned about. The facts of the case and the judgments of the court reveal the tensions which can arise between access and privacy considerations under the *FoI Act*.

Mr Colakovski was seeking information from Telecom about traces it had made of nuisance calls to his number. He wanted to discover the identity of the caller or callers. The person or persons who had made the calls not unnaturally did not want those details released. Telecom refused to release information about the name(s) and telephone number(s) of the caller(s) on the ground that to do so would be an unreasonable disclosure of information relating to the personal affairs of the caller(s). The AAT and a single judge of the Federal Court upheld Telecom's decision, and so did the Full Court.

In the Full Court Lockhart J delivered the principal judgment with which the other two judges agreed, adding brief reasons of their own. Leaving aside his Honour's discussion of the concept of 'personal affairs', Lockhart J made the following often quoted statement concerning unreasonable disclosure under s.41. I quote it at length because the qualifications are important. After saying that this was not the appropriate case in which to examine definitively the circumstances that may constitute 'unreasonable disclosure', his Honour continued:[34]

> It is sufficient for present purposes to say that 'every person' has a 'legally enforceable right to obtain access' to documents under the *FoI Act*: s.11. There is no requirement that the person seeking access have a proprietary or any other interest in documents or the information contained in them. The object of the Act, as expressed by s.3, is to give the 'Australian community' the right of access to information in the possession of the Australian government. *What is 'unreasonable' disclosure of information for purposes of s.41(1) must have as its core public interest considerations. The exemptions necessary for the protection of 'personal affairs' (s.41) and 'business or professional affairs' (s.43) are themselves, in my opinion, public interest considerations. That is to say, it is not in the public interest that the personal or business or professional affairs of persons are* ***necessarily*** *to be disclosed on applications for access to documents.* The exemption from disclosure of such information is not to protect private rights, rather it is in furtherance of the public interest that information of this kind is excepted from the general right of public access provided the other conditions mentioned in ss.41 and 43 are satisfied. [Emphases added in all cases]

In this statement Lockhart J comes perilously close to saying that there is a prima facie public interest in the non-disclosure of personal information or business or professional information. That he did not do so is clear from his use of the word 'necessarily' and his reference to the 'other conditions' mentioned in ss.41 and 43. In my view the passage should be read as endorsing the long-held view that all elements of the public interest, including the public interest in the protection of sensitive information affecting privacy, must be taken into account in making decisions under s.41.[35] His Honour's references to the legal right of access to information in the possession of the government and to the absence of any 'need to know' support that view. However, if the passage is read carelessly, it could be construed as supporting the view that there is an assumption that personal information should only be released under FoI if there is a positive public interest favouring disclosure.

Heerey J, who agreed with Lockhart J, took the matter somewhat further in comments that are also open to the interpretation that s.41 tends towards non-disclosure of personal information unless there is a positive public interest favouring it. It should be noted, however, that what he said was not necessary to the decision. He commented as follows on the test of unreasonableness in s.41(1):[36]

> . . . it seems to me that attention is directed, amongst other things, to whether or not the proposed disclosure would serve the public interest purpose of the legislation, which is to open to public access *information about government* which government holds, this being information which in truth is held on behalf of the public. *I do not think it is necessary* in order to make out the s.41(1) exclusion that there is some particular unfairness, embarrassment or hardship which would enure to a person by reason of the disclosure. Such matters if present, would doubtless weigh in favour of exclusion. But if the information disclosed were of *no demonstrable rele-*

> *vance to the affairs of government* and was likely to do no more than excite or satisfy the curiosity of people about the person whose *personal affairs* were disclosed, I think disclosure would be unreasonable.' [Emphases added]

In so far as this statement emphasises that a significant purpose of the legislation is to open up information relating to the workings of government, it has been welcomed by commentators who see its implications for applying the public interest test in other exemptions. It is also to be welcomed in again emphasising the public interest component of s.41(1). However, the statement is cast too narrowly and may unduly limit access to non-sensitive personal information. The object set out in s.3(1)(b) is to create a general right of access to information in documentary form *in the possession of Ministers and agencies,* subject to legitimate government and third party interests being protected. There is nothing in the Act restricting access under it to 'information *about* government' except in the widest sense that government holds, or has held, the information for some purpose.

Again, in so far as the judgement does not require any particular 'unfairness, embarrassment or hardship' to a third party for the exemption to apply, it seems to differ from the earlier decisions which required an examination of the privacy sensitivity of the relevant information.[37]

In his judgment Heerey J refers to the situation in the United States where he says the comparable exemption imposes a considerably stricter test, protecting 'a clearly unwarranted invasion of personal privacy'. Even under this test which the courts have interpreted as indicating a 'tilt' in favour of disclosure, his Honour says, 'the principle appears to be that disclosure will be ordered where it has a public interest purpose and the particular information sought will contribute to that purpose'. Putting it another way, he says that '. . . a court having found invasion of privacy, must weigh against the seriousness of that invasion whatever gain would result to the public . . .'[38]

There is no doubt that Heerey J was correct about the situation in the United States. In addition to the authorities cited by Heerey J, in the case of *US Department of Justice v Reporters Committee for Freedom of the Press*,[39] the United States Supreme Court held that whether disclosure of a private document was 'warranted':

> turned on the nature of the requested document and its relationship to the FoIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties, rather than upon the particular purpose for which the document is requested or the identity of the requesting party. The statutory purpose is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.[40]

In the *Reporters Committee* case the records in question consisted of 'rap sheets' (criminal identification records) maintained by the FBI. They were therefore sensitive documents where there was no doubt that disclosure would be an invasion of privacy. In the Australian context one could not assume that the fulfilment of the definition of 'personal information' would constitute 'an unwarranted invasion of privacy', which is the equivalent of our 'unreasonable disclosure'.

Consequently, I think it may be that, contrary to the suggestions in *Zalcberg* and *Stewart*,[41] the views of Heerey J in *Colakovski* are more affected by the previous wording of s.41(1), in terms of 'personal affairs', than has been recognised. Under that wording and the interpretations of it that were current up until *Colakovski*,[42] there was an emphasis on the 'private' quality of the information encompassed by the term 'personal affairs'. Although Lockhart J moved away from this to some extent in *Colakovski*,[43] refusing to substitute the word 'private' for the word 'personal'. However, one may doubt whether Heerey J's emphasis on the need under s.41(1) for demonstrable relevance to the affairs of government, irrespective of the special sensitivity of information about third parties, should remain influential now that the section applies to a very much wider range of information than it did, some of which has no particular sensitivity.

Of course, even at the time *Colakovski* was decided some personal affairs information was not sensitive, whether inherently or because of a change of circumstances, but such information certainly concerned the individual very closely, as may be seen from St John J's comment in *News Corporation Ltd v National Companies and Securities Commission*[44] that 'personal affairs' encompass 'affairs relating to family and marital relationships, health or ill-health, relationships with and emotional ties with other real people'.

This is not just an academic debate. If the *FoI Act* becomes harder to use to obtain access to non-sensitive personal information, one of the great benefits of the Act, of opening up the vast amount of information held by governments which can be used for important research purposes and for such private purposes as writing family history, will fail.[45] One example of this would be research into the files of the Department of Veterans' Affairs for information concerning the experiences of Second World War veterans. An emphasis on the need for a government accountability element in the information could lead to the exemption of all such documents from this kind of research. (This is not the way the Department of Veterans' Affairs approaches such requests.) There would be a strong public interest argument in favour of disclosure in this case of non-sensitive information, but it would not be a public interest concerned with the scrutiny or accountability of government.[46]

So far there is only one AAT case I am aware of in which the decision was affected by the views of Heerey J, although they have been cited with approval in many subsequent decisions.[47] In *Re Nathan and Department of Employment, Education and Training*[48] the AAT held that disclosure of information might identify the reader of a thesis for accreditation purposes who did not consent to disclosure, and that there was no countervailing public interest which would justify disclosure. In addition, however, it upheld an exemption claim under s.41(1) for the files of other persons who had sought assessment of postgraduate qualifications in the same way as the applicant.

The AAT said that the information was relevant only to the persons concerned, whose consent had not been obtained, and, relying on the views of Lockhart and Heerey JJ in *Colakovski*, held again that there were no countervailing public interest considerations favouring disclosure. The information, it was said, was not the type of information intended to be brought out into the open through the operation of the Act. The decision itself may have been correct, but the reasoning bodes ill for research into even non-sensitive personal information. Whatever the situation in relation to the public interest in a particular case, the nature of the information itself and the circumstances of its provision may be such that disclosure would not be unreasonable.[49]

The third judge in *Colakovski*, Jenkinson J, was concerned about competing privacy interests. He suggested that the provisions of s.14 (which preserves the rights of agencies to release documents, including exempt documents, outside the *FoI Act* 'where they can properly do so or are required by law to do so') should be taken into account in deciding whether or not disclosure was unreasonable. His Honour seems to have been influenced by sympathy with the applicant's desire for access to information to which he, though not the public generally, had a strong moral claim. In the absence of any mechanism for restricting access to the applicant alone (such as that suggested in the Report on FoI Legislation by the Senate Standing Committee on Legal and Constitutional Affairs, but not implemented),[50] the question of release had to be judged by the test of public disclosure. However, his Honour's suggestion that disclosure might be made in such a case under s.14 would be contrary to Information Privacy Principle (IPP) 11, as disclosure would not be required or authorised by or under law (see IPP 11(1)(d)), and such disclosure would not attract the protections of s.91 against actions for defamation, breach of confidence, or infringement of copyright.

Conclusion

The balance between access and privacy protection under the *FoI Act* has not yet been definitively struck. For one thing, the full scope of the expression 'personal information' still remains to be tested in practice. Despite *Colakovski*, there should be no 'leaning' towards exemption of personal information. The circumstances of each case should be carefully weighed to ascertain if there are any genuine privacy interests requiring protection and, if so, whether they are outweighed by the general public interest in access to government-held information or particular aspects of the public interest which relate to the specific information.[51]

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The article does not attempt to deal with the question of amendment of personal records. On recent developments in that area, see Peter Bayne, 'The Privacy Dimension of Freedom Of Information Laws', (1994) 1(3) *Australian Journal of Administrative Law* 162-166.

References

1. (1984) 6ALN N257 at N259 (D33). References in this paper such as 'D33' are to the FoI Decision Summaries series issued by the Commonwealth Attorney-General's Department and published in the *FoI Act* Annual Reports.
2. See ref. 4.
3. See *Re Williams and the Registrar of the Federal Court* ((1985) 8 ALD 219 at 221-2 (D107), and *Young v Wicks* (1986) 13 FCR 85 (D90), endorsed in essence by the Full Court of the Federal Court in *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 (D215). But note some retreat from this position in *Colakovski v AOTC* (1991) 100 ALR 111 at 119 (D273).
4. Freedom of Information Amendment Act 1991, which introduced a definition of 'personal information' into s.4(1), and substituted that term for the term 'information relating to the affairs of (a) person' in ss.12 and 41 and Part V of the *FoI Act*. The definitions differ slightly between the *FoI* and *Privacy Acts* (the *FoI Act* does not contain the words 'or an opinion' in the words in brackets relating to information forming part of a database), and the *FoI Act* does not contain the definition in the *Privacy Act* of 'individual' as meaning a natural person.
5. See, e.g. *Dyrenfurth* case, ref. 3.
6. See the Explanatory Memorandum to the 1991 Amendment Bill and cases referred to in ref. 3 above; Senate Standing Committee on Legal and Constitutional Affairs, Freedom of Information Act 1982: A Report on the Operation and Administration of the Freedom of Information Legislation, AGPS, 1987 (Parl. Paper No. 441 of 1987), paras 15.63-15.71; Graham Greenleaf, 'The question of 'personal affairs' corrupts privacy protection', (1989) 63 *Australian Law Journal*, 561-564.
7. (1991) 100 ALR 111 (D273).
8. ALRC, Report No. 22, Privacy, Vol. 2, para. 1198.
9. Reported as *Re Pfizer Pty Ltd and Department of Health, Housing and Community Services* (1993) 30 ALD 647 (D318).
10. Purvis J went on to quote from the decision of the Full Federal Court in *Colakovski v Australian and Overseas Telecommunications Corporation* (1991) 100 ALR 111 at 119 (D273), to the effect that a person's affairs may be personal to the person notwithstanding that they are not secret to that person. It is an interesting, but entirely academic, speculation whether the courts and the AAT would have continued to move away from the earlier interpretations of 'information relating to the personal affairs of (a) person', which stressed the private nature of 'personal' information (see cases referred to in ref. 3), to something closer to the effect of 'personal information' as defined in s.4(1) of the *FoI Act*.
11. Unreported, 18 June 1993 (D318).
12. Compare *Re Jamieson and Department of Aviation* (1983) 5 ALN N300 (D12) and *Young v Wicks*, ref. 3.
13. 1 July 1992, 40 *FoI Review* 47 (D296). See also *Re Stewart and Telstra Corporation*, unreported, 15 April 1994 (D326), where there was no dispute that the names of investigating officers were personal information.
14. See below on the question of identification.
15. Unreported, 22 December 1993 (D322).
16. *Re Warren and Department of Defence*, unreported, 7 September 1992 (D299).
17. Bayne, Peter, 'The Concepts of "Information Relating to Personal Affairs" and "Personal Information"', (1994) 1(4) *Australian Journal of Administrative Law* 226-235 at 234.
18. Ref. 8.
19. Note the equation of 'reasonable' with 'not irrational, absurd or ridiculous' in *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 (D131). A reading in terms of 'readily' or 'easily' would be preferable. In any case it is an objective not a subjective test.
20. *Re Hittich and DCSH*, ref. 9; cf. Bayne, ref. 17.
21. 1 July 1992, 40 *FoI Review* 47 (D296).
22. *Re Jackson and Department of Social Security*, unreported, 6 November 1991 (D286).
23. Unreported, 13 and 19 January 1994 (D323).
24. (1986) 10 ALD 225 (D105).
25. *Colakovski v AOTC* (1991) 100 ALR 111 at 119 (D273).
26. In this respect it is unlike s.40, for example, where the components of s.40(1) render a document exempt, subject to the public interest balancing test. These components constitute in effect the elements of the public interest tending against disclosure to be weighed against those public interest factors tending in favour of disclosure.
27. See *Searle Australia Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163 at 178 (D294).
28. For example *Re Chandra and MIEA*, ref. 1, and *Wiseman v Commonwealth*, Full Federal Court, unreported, 24 October 1989 (D251).

29. Unreported, 12 June 1992 (D295).
30. Ref. 1.
31. Citing *Wiseman v Commonwealth*, Full Court, unreported 24 October 1989 (D251).
32. Unreported, 15 April 1994 (D326).
33. (1991) 100 ALR 111 (D273).
34. (1991) 100 ALR 111 at 120-1 (D273).
35. For example, *Re Chandra and MIEA*, ref. 1, and *Re PIAC and DCSH and Searle*, unreported, 19 September 1991 (D282). Note the similar conclusion of the Full Federal Court in relation to s.43(1)(c)(i) in *Searle Australia Pty Ltd v PIAC and DCSH* (1992) 108 ALR 163 at 178 (D294).
36. (1991) 100 ALR 111 at 123 (D273).
37. See quotation from *Chandra*, Ref. 1.
38. (1991) 100 ALR 111 at 123-4 (D273).
39. (1989) 489 U.S. 749.
40. Headnote at 750. The approach in the *Reporters Committee* case, of making access depend on the ability of the document to shed the light of scrutiny on the operations of agencies, is strongly defended as being the correct approach to all *FoIA* exemptions by Fred H Cate and others, 'The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act', (1994) 46 *Administrative Law Review*, 41-74. In support of applying this approach to the Commonwealth Act, see Bayne, Peter, *Freedom of Information*, Law Book Company, Sydney, 1984, at 185.
41. Refs 29 and 32.
42. See ref. 3.
43. See (1991) 100 ALR 111 at 119 (D273).
44. (1984) 52 ALR 277 at 293 (D9/2). On the differences between the two terms, see Bayne, Peter, above, ref. 17.
45. See John McMillan, on the question of access to business information in the possession of government in 'Freedom of Information in Australia: Issue Closed', (1977) 8 *Federal Law Review*, 379-434 at 415. The approach being discussed would be equally detrimental in relation to both personal information and business affairs information. There may be strong public interest reasons for disclosing even sensitive information, for example public interests connected with public safety or product reliability, but on the face of them they would not be public interests in the workings of government. See examples given in *Searle* (1992) 108 ALR 163 at 178. One way of avoiding this result might be to argue that research into personal information held by governments is an aspect of accountability, but it seems undesirable to tread this somewhat artificial path in relation to non-sensitive information.
46. And note Report referred to in ref. 6, para. 13.3: '. . . as the committee recognised in 1979, it is desirable to safeguard private information about individuals, but it is not necessary to prevent the circulation of all information about identifiable persons.'
47. For example, *Re Green and AOTC* (1992) 28 ALD 655 at 661 (D298) and *Re Zalcberg and AOTC*, unreported, 12 June 1992 (D295).
48. Unreported, 28 April 1993 (D315). The decision in *Re Fryar and the Attorney-General's Department*, unreported 7 October 1994 (D342) might also have been different if the AAT had not relied on the views of Heerey J.
49. See also *Re Galea and AOTC*, unreported, 5 March 1993 (D311).
50. See Report referred to in ref. 6, paras 13.6-13.21.
51. See *Searle Australian Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163 at 178 (D294).

Parliament and FoI In NSW

It really does not matter who wins the New South Wales election in March 1995 as long as the balance of power is still held by non-aligned, Independent Members of the type currently in the Legislative Assembly. I say this simply because the current NSW Parliament has perhaps unknowingly done more for the cause of FoI than has the *Freedom of Information Act 1989* itself.

There is a case to be made that the operation of the Act has been a failure and things are getting worse, but in Parliament other developments show what really could be achieved with a proper approach backed up by a vigorously enforced law.

As in previous articles, the raw material I have used to draw my conclusions is predominantly based on annual reports.[1] If agencies want citizens to be aware of their activities then the information necessary should be available in annual reports. One should not have to go looking for it.

Standing Order 54 and FoI

Under the Standing Orders of the NSW Parliament, Order 54 (SO 54) allows Parliament to call for all records on any matter to be laid before it. In recent times SO 54 has been used to obtain all the papers relating to such things as the NSW Agent General in London, office 'fitouts' in government agencies and staffing levels at Police Stations.

The traditional MP's methods — Questions either on or without Notice to a Minister — are ineffective because they are either not answered at all, or not answered as comprehensively as desired (except in the case of Dorothy Dixers).

The attitude towards the use of SO 54 goes to the heart of access to information, i.e. what FoI is all about.

It is fairly easy to demonstrate the NSW Government has no commitment to FoI (and it is unlikely an ALP government would behave differently). On 4 May 1994 a motion was moved in Parliament to require under SO 54 the production of all documents showing expenditure from 30 June 1993 on office 'fitouts' and refurbishments by all departments and agencies.

The Hansard record of the debate shows the information had been previously sought by way of Questions on Notice but the requests had been refused on the grounds the cost involved in extracting the information was not justified by its public usefulness. The Premier at the time assured Parliament public servants 'keep a close watch on expenditure . . . to ensure they are no more costly than is essential . . . ' (Hansard, 4 May 1994, p.1890).

The record also shows the motion was opposed on the basis that the issue should have been raised in the Parliamentary Estimates Committees. Nowhere in the debate does anyone mention FoI although one MP observed ' . . . open government is a crucial and essential part of politics in the nineties' and another said 'In the end the motion stands on the right of the public to know' (Hansard, 4 May, pp.1893 and 1894).

The motion was passed and the Government was given six days to produce the papers to the House. On 10 May 1994 the material was presented to Parliament and the Deputy Premier took the opportunity to point out: