Public records — current issues in control and access prior to privatisation

by Helen Townley and Rick Snell

Privatisation and outsourcing of government functions have become a fact of life in the 1990s, with policy debate now focusing on how much and how far. Some examples of traditionally public enterprises which have been privatised, or are prime targets for privatisation, are the sale of the Commonwealth Bank and proposed partial sale of Telstra, the corporatisation of the CES in the 1996 Federal Budget, and the frequent desire of the Tasmanian Government to have the sale of the Hydro Electric Corporation publicly debated.

This trend is not unique to Australia. Countries such as the United States and New Zealand have also grappled with the issues involved in privatisation of bodies and functions for some years. There are important issues to be considered whenever public functions or bodies are transferred to the private sector whether it be on a permanent or temporary basis. A number of aspects about access to 'public' information in private hands arise even in the absence of privatisation. From the perspective of the public's access to information, the preservation of access to records (relating to those functions or held by a private body) will be a key issue for the remainder of the decade. The authors will deal with the issue of privatisation and FoI in a future article.

Until recently, public access to information in Australia generally depended on whether the information was held in the public or private sector. FoI legislation operating in all States and Territories except the Northern Territory provides a general right of access to government-held information. However, there is no corresponding general right of access to information in the private sector. The late 1980s and early 1990s may be remembered in Australia as that brief interlude of access between the transfer of information from governmental secrecy regimes to the sanctuary of the private sector.

The transfer of records from the public to the private sector, is likely to result in loss of public information access rights unless special provision is made. This issue is multifaceted and raises questions about when a record passes from public to private control, when a record which appears to be privately owned remains subject to information access rights etc. These questions are starting to emerge as important issues in various FoI jurisdictions. Circumstances which may raise these questions of public versus private information access rights include:

an agency retaining a right of access to documents created by a private body performing outsourced functions, but purporting to waive that right;

an agency taking possession of files of private companies in the course of their functions;

a contract between an agency and a private body conferring an immediate right of possession to certain documents created by the private body.

This short article is designed as an initial attempt to explore a number of these key questions that arise in association with, but not directly linked to, the moves towards privatisation and outsourcing of government functions. The questions include:

how far does the meaning of 'possession' extend?

- when can an agency waive an immediate right to possession?
- are there circumstances in which documents will be deemed to be in the possession of an agency?

Possession

The term 'possession' is generally not defined in FoI legislation,[1] leaving its meaning to be determined according to the common law. Physical possession is not necessarily required, a right to immediate possession (or 'constructive possession') may be sufficient. For example, constructive possession would apply where a consultant is employed by a government agency or a government service is outsourced under a contract, and the contract provides that the agency is entitled to immediate possession of documents held by the private sector body. Even where the contract makes no specific reference to access to documents, the relationship and dealings between the contractor and the government body may establish that the government has an immediate right of possession to certain documents under the general law (especially in the area of agency law).

FoI already applies to some private sector documents. The application of FoI to documents received by, rather than created in, an agency, is common to all Australian FoI Acts. FoI makes no distinction between private sector documents voluntarily provided to an agency and those acquired by the agency under a statutory power of compulsion. The exemptions for commercial affairs, personal information and confidentiality are considered sufficient protection for all types of private sector information. Despite this longstanding approach to private sector records accessible under FoI, occasionally some agencies raise concerns that the protection is inadequate and difficult to administer in practice. No Australian jurisdiction has to date amended its FoI legislation in response to such concerns, suggesting agencies have failed to demonstrate any substantial detriment to themselves or their private sector clients resulting from this approach.

The NSW Ombudsman Guidelines make it clear to agencies that 'documents held' includes documents temporarily held by an agency.[2] An example of this would be company documents held by a Fraud Investigation Unit of the Police. For many years the position in the United States had been somewhat different due to the significant use of the FoIA legislation for commercial purposes. The commercial use of FoI has been the principal use of that legislation in the United States since the early 1980s.[3] Corporations and other litigants discovered that the government was an information warehouse that held information about third parties. Businesses had learned that:

> the FoIA could be used to gather information about competitors that could be used to gain a commercial advantage. In fact, the vast majority of the FoIA requests were made by business executives or their lawyers, who in the words of Judge Patricia Wald, 'astutely discerned the business value of the information which government obtains from industry while performing its licensing, inspecting, regulating and contracting functions'.[4]

The US Supreme Court developed a 'central purpose' test for use when dealing with law enforcement informa-

tion or personnel and medical files.[5] The Court in the *Reporters Committee* held 'that when the request seeks no "official information" about a government agency, but merely records what the government happens to be storing, the invasion of privacy is unwarranted'.[6] The US Courts worked on the presumption that disclosure was restricted to information that would serve the central purpose of the legislation, that is, ensuring that the governments' activities are subject to scrutiny.

Right to immediate possession may be waived

It seems that a government agency may waive a contractual right to immediate possession of documents. In *Mildenhall v Department of Premier and Cabinet* (1995) 8 VAR 478; (1995) 58 *FoI Review* 65 the applicant requested access to documents relating to a survey of public attitudes conducted by a contractor at Cabinet's request. All documents produced under the agreement became government property and had to be delivered to the project officer on the termination of the agreement or completion of the project. Clause 6.7 of the agreement required the company to provide the project officer with six copies of each written report 'as well as copies of the data collected in statistical form which shall be in a machine readable form'. At the time of the FoI request the project had not been completed but the company had in its possession a computer disc recording the original survey results.

The Victorian AAT noted that at general law there is longstanding authority for interpreting 'possession' as including a right to immediate possession. Although the AAT expressed some doubt about whether it was appropriate to extend the meaning of 'possession' in this way, it concluded that the broad approach was correct. The AAT decided that clause 6.7 gave the contracting government agency a right to immediate possession of the hard disc. However, it found that the right was waived when Cabinet told the company that it did not need to provide statistical data in machine readable form (that is, Cabinet waived its right to the information on the disc).

This case illustrates the difficulties involved in relying on a contractual right to possession of documents held in the private sector. It demonstrates that agencies may be able to frustrate access to such documents by declining offers by the private sector body to provide those documents or documents in a particular form. Taken to an extreme, reliance on contractual access rights could give agencies a discretion about which of their documents held by a private sector body will be subject to FoI.

Th changing public sector environment and possession

The following examples illustrate the difficulties associated with the practical application of the 'possession' requirement. There are three main scenarios involving:

e-mail,

official documents in a private location, and

private documents in an official location.

E-mail

Technological developments may put pressure on/stretch the traditional concept of possession. Despite the common perception that the ephemeral nature of e-mail makes it somehow different to paper records, e-mails are documents and therefore FoI legislation applies to them in the same way as to other documents. In an earlier article in *FoI Review* Campbell comments: 'As government communications are increasingly carried out via electronic mail . . . "documents" may cease to exist in tangible form or in a narrow, physical sense'.[7] Hard copies of e-mail communications fall into the familiar category of paper-based records, but this is more problematic where there is a deletion of e-mail without hard copies being made. To our knowledge, this issue has not yet arisen in an Australian case. However, records management authorities are recognising the potential for inconsistent treatment of electronic records and providing guidance to agencies. For example, the Tasmanian *Guidelines for the Management of Electronic Records*[8] emphasises that agencies need to develop e-mail policies covering issues such as access, permitted uses and filing, and that electronic messages including e-mail, electronic data interchange, and electronic funds transfer are subject to FoI. The Tasmanian Information Strategy Unit suggests as a short-term measure ensuring that relevant file numbers are included in e-mail communications. The Australian Archives *Keeping Electronic Records* provides similar general guidance.

The Canadian Information Commissioner's 1994-1995 Annual Report provides an example of the problems that may arise in relation to e-mail and FoI requests/records management issues. The Commissioner's investigation of an allegation that an agency had failed to identify all relevant records in response to an FoI request revealed that an officer had deleted e-mail messages about the subject of the request because she wanted to avoid storing excess records. Although the department had a backup tape system which stored e-mail messages, the tapes were reused every 5-10 days, so the messages could not be recovered. The Information Commissioner's report *Information Technology and Open Government* warns of the dangers of mass deletion of e-mail records, for example, on returning from holidays.[9] Although it is unlikely that all e-mail messages will be important enough to be retained as permanent records, each message must be examined to determine its value.

The archives implications of destroying e-mails without proper consideration has also been recognised in the United States. The Florida Attorney-General has held that e-mail records are subject to the *Public Records Act,* and accordingly must not be destroyed except in accordance with approved retention schedules adopted by the public sector agency.[10]

Official documents in a private location

The 1990s have seen public sector downsizing and the imposition of efficiency dividends place increasing pressures on public servants. Public servants appear to be acquiring traditionally private sector work habits, with a trend towards officers taking work home for completion outside standard hours. The WA Information Commissioner has commented on workers in some government departments storing public records in their homes or offices instead of properly filing and archiving them.[11] The removal of files from agency premises by an officer of that agency clearly does not of itself affect the agency's right to immediate possession of those files. However, if the agency is not aware of the practice, or does not implement a monitoring system, the potential for loss or accidental destruction or damage of files or documents is a real possibility.

Home-based work has become an option for public servants in the 1990s. Modern technology enables public sector employees to work from home on a department

computer modem linked to the agency's file server. Any documents created on the file server are clearly in the possession of the agency. But what about documents created by the employee whilst working and stored on a floppy or hard disc? If the agency owns the computer, its ownership would logically extend to all documents stored on the computer. In addition, the agency would have an immediate right to possession of documents created by its officer in the course of his/her duties, so these documents would be accessible under FoI. Even where an officer personally owns the computer used for home-based work, the agency will have an immediate right to possession of documents on the hard disc created by the officer in the course of official duties, that is, while being paid by the agency.

An issue which has received little attention to date is the potential difficulty in identifying documents located in officers' homes in response to an FoI request. This problem may arise in relation to agency files temporarily located in officers' homes without documentation (as mentioned above), but is more likely to occur in relation to files created through home-based work. Clearly electronic documents created on the agency's server or transferred to the agency in hard copy or electronically will be easily identified at the time of an FoI request. However, undocumented hard copy files stored at home or electronic documents stored on hard disc either permanently or pending transfer to the agency are likely to pose identification problems unless specific strategies are implemented. This is a global phenomenon. The Canadian Information Commissioner's report *Information Technology and Open Government* warns that the growth in home office and mobile computing means that government information is increasingly collected and created outside the agency.[12] The report emphasises that document management technology as well as internal procedures and guidelines '... are important to ensure that such information is not inadvertently (or deliberately) kept secure from access requests'.[13]

The identification of any off-site documents is also a factor to be considered when examining the adequacy of FoI searches. In a previous article, Snell argued that an FoI applicant's ability to identify the documents requested may have a significant influence on the success of a search.[14] This task becomes almost impossible if documents or information are held in non-agency locations. It is highly unlikely that applicants without inside knowledge of an agency's employment practices would be aware of documents located off-site. Without this type of knowledge, even a statement of reasons which outlines locations searched and explains why these were chosen may not assist an applicant seeking documents possibly located off-site. Whilst this may not yet be a major issue, increases in home-based work could adversely impact on the adequacy of FoI searches unless appropriate strategies are developed. Agencies could address this problem by adopting a search pro forma similar to that developed by Hollingsworth[15] and including a section for off-site documents, particularly home-based links to agencies. A pro-forma would also assist agencies in conducting proper searches for electronic documents (Campbell notes that indexes of electronic documents may be lacking or inadequate).[16] In addition to reassuring applicants about the adequacy of searches, this would be a helpful tool for external review bodies considering search issues.

Private documents in an official location

In certain circumstances a personal document can become a document of an agency. However, this does not occur just because a personal document such as a diary or poster is brought into the work environment. Clearly these documents without any further action lack the crucial connection with the functions of the agency. However, even here there is a grey area. A document acquired in a personal capacity such as a journal article or conference paper that is attached to an agency file in the course of the officer's duties will be considered as being received by an officer on behalf of the agency and will be subject to FoI access.

The situations described above are easy to analyse, but others are less clear. One of the authors of this article is an academic. The nature of academic work means that lecturers are considered by their institutions (as opposed to reality) to be always on duty, whether working at home, at a hotel on sabbatical or in a university office. Obviously this does not mean that every document authored by an academic is created in the course of official duties, for example, a personal letter of congratulation to a past student. However grey areas abound. If a lecturer stores documents acquired in a personal capacity such as membership of a professional association, in a ring binder folder owned (and purchased) by the university, are these documents in the possession of the agency? What about an article authored after normal working hours on a university computer or personal e-mail messages on a work computer?

A Canadian case illustrates the type of approach which external review bodies may take to this problem. The Canadian Information Commissioner's 1994-1995 Annual Report relates the saga of a manager of the Immigration and Refugee Board who made a request under the *Access to Information Act* for notes made by another employee concerning a meeting where grievances were aired. The case raised two issues for the Canadian Information Commissioner: first whether the Commissioner had power to compel a person to produce records which the person considered to be his personal property and not a government record; and second, whether the records were 'under the control' of a government agency. In response to the first issue the Commissioner decided that he had the power to inspect the records to determine their status.

In relation to the second issue the Commissioner determined that the records were personal to the employee and not under control of the agency. In coming to that conclusion the Commissioner considered that 'the location of a record (that is, whether it is located on the premises of a government institution) is not the sole determining factor in the control issue'. The circumstances under which it was created or compiled and the reasons for its location will need to be examined. The Commissioner concluded that:

> In this case the records were not created in the ordinary course of the employee's duties; they were not recorded as part of a work-related instrument or task and they were, in content, consistent with personal, diary observations. These facts together with the location of the records supported the employee's contention that the Act did not apply.

Conclusion

We have only skimmed across the surface of issues dealing with access and control in a rapidly changing public sector. In the halcyon days when the first attempts

at FoI legislation had made it to the statute books, and even in the 2nd generation phase of the early 1990s, most of the issues we have raised were considered to be inconsequential or marginal to the main game in town — getting access to the information clearly held by government. The liberators of government information had their sights on the warehouses that contained vast treasure troves of secrets and information weaponry for the demos.

A passage of a few years has seen the confluence of trends — accessibility to e-mail, tele-commuting, contracting out and the transformation of public sector leviathans into sleek harbours of private sector confidentiality. The wake of this confluence can only add to, what Paul Chadwick has recently described as, the malfunctioning of Australia's FoI laws.

Helen Townley is a researcher at the FoI Research Unit, Law School, University of Tasmania.

Rick Snell teaches law at the University of Tasmania.

R ferences

1. Although some FoI Acts do not use the term 'possession' (notably NSW and SA), their terminology has a similar meaning. For example, the NSW *FoI Act 1989* refers to a document 'held' by an agency, which includes a document to which the agency has an immediate right of access or a document in the possession or control of a person in his or her capacity as an officer of the agency (s.6(2)(e)).
2. NSW Ombudsman Guidelines, December 1994, para 2.7.
3. The text in this and the next paragraph is adapted from Snell, R., 'The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited' (1995) 2 *AJ Admin L* 207-208.
4. Cale, F., Fields, D. A. and McBain, J., 'The Right to Privacy and the Public's Right to Know — "The Central Purpose" of the Freedom of Information Act' (1994) (Winter) 46 *Admin LR* 43.
5. *United States of Justice v Reporters Committee for the Freedom of the Press* 489 US 749, 772 (1989).
6. *Reporters Committee* at 780.
7. Campbell, Madeline, 'FoI Access to Electronic Records' (1995) 59 *FoI Review* 70, 74.
8. Information Strategy Unit, Department of Premier and Cabinet and the Archives Office of Tasmania, *Guidelines for the Management of Electronic Records*, January 1995.
9. Information Commissioner of Canada, *Information Technology and Open Government*, Minister of Public Works and Government Services, Ottawa, 1994, p.43.
10. *Access Reports* ,Vol 22, No. 13, 19 June 1996.
11. 'Plea for laws to tackle WA records chaos', The *West Australian*, 1 December 1995.
12. Information Commissioner of Canada, *Information Technology and Open Government*, Minister of Public Works and Government Services, Ottawa, 1994, p.53.
13. Information Commissioner of Canada, above.
14. Snell, R., 'Obviously Four Unbelievers: Adequacy of Searches under FoI, An Act of Faith?' (1994) 50 *FoI Review* 15.
15. Hollingsworth, Simon, 'Searching for an Answer? The Issue of "Sufficiency of Freedom of Information Searches" in the Light of some Recent 1994 Decisions', (1994) 53 *FoI Review* 62.
16. Campbell, Madeline, above.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

MILDENHALL and DEPARTMENT OF TREASURY (No. 94/40317)

D cided: 15 January 1996 by Deputy President Galvin.
Sections 30(1) (internal working document) — 33(1) (personal affairs) — 34 (trade secrets).

Application

On 4 August 1994, Mr Mildenhall, MP requested:

> All documents since the introduction of the Audit (Supply Management) Regulations 1993 relating to the certification by Department Heads exempting contracts and consultancies over $50,000 from the tender process; and all documents relating to certification by Department heads exempting contracts and consultancies over $50,000 from the requirement, in the event of tenders not being publicly invited, for obtaining three written quotations.

Departmental decision

Mildenhall was granted access to some documents and on internal review was granted access to more. By the completion of the hearing, more information was released and he withdrew his request for some of that otherwise in dispute. Four documents remained in dispute.

The Department of Treasury (the Department) relied on ss.30(1), 33(1) and 34(1) and (4)(a) of the Act.

Submissions

Mildenhall and Mr Bracks (the shadow Minister for Employment, Industrial Relations and Tourism) submitted that they were concerned that expenditure without tender had not undergone the market test of competition. Public documents did not reveal the relevant figures and some public test was needed. Awareness of the names of those who made decisions was essential in any assessment of the skill and competence of those engaged. They argued that the public had a right to know these details, as there was a need for the public to have confidence in the letting of public contracts.

The Department argued that the information about names of the decision makers was personal, and the figures sought derived from financial undertakings and fell within s.34(1)(a). It argued that there are public documents which reveal the figures in relation to completed tenders and there are other processes whereby scrutiny was able to take place.

Tribunal decision

The Tribunal went through each of the four documents individually.

Document A2 was a memorandum between a departmental officer and the Secretary of the Department. It was released save for the last paragraph which was said to be exempt under s.30(1). The final paragraph contained matter in the nature of opinion and advice on the suitability of a particular accounting firm for appointment as prudential supervisor of the Treasury Corporation. A witness for the Department stated that she believed the memorandum