

**PRESENTATION TO THE AUSTRALIAN SOCIETY OF
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What difference will RTI make to record-keeping that FOI didn't?

The connection between record-keeping and access to information regimes, whether they be known as 'Freedom of Information' or 'Right to Information', is so obvious it's never stated. The Queensland *Right to Information Act 2009* is focussed on the question of public access to the documentary sources of government information and documents, in whatever form, are subject of the *Public Records Act 2002*. Good record keeping is a pre-requisite to public access to information. To that extent, here in Queensland, like in many of your jurisdictions, the Right to Information Reforms are supported by a Public Records Act which empowers the State Archivist to make policy, standards and guidelines about making, keeping, preserving, managing and disposing of public records. The State Archivist also has certain enforcement powers.

The US President James Madison, nicknamed the 'Father of the Constitution', recognised in the 1800s the importance of public access to government information when he said

A people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy or perhaps both.

He did not at the time refer to good record-keeping, however later US legislatures strongly made the connection between record keeping and public access to government information. Despite James Madison's early recognition of the need for public access to government information, the right of US public servants to perform their roles anonymously and the right of government departments to treat their records as confidential, were seen then as essential to a properly functioning government.

It wasn't until 1958 that the US legislature started to make inroads into government secrecy when it passed an amendment to the '*Housekeeping Statute*'. The *Housekeeping Statute* allowed departmental heads to make regulations about the running of their departments including regulations for the custody, use and preservation of the records, papers and related property. The amendment made in 1958 to the *Housekeeping Statute* explicitly took away the mandate for official secrecy by declaring that the regulation making power did "not authorise withholding of information from the public or limiting the availability of records to the public".¹ I do not pretend in this audience to know the history of record-keeping but the *Housekeeping Statute* may be the earliest combined version of what we know in Queensland as the *Public Record Act 2002* and the *Right to Information Act 2009*. The US introduced its *Freedom of Information Act* in 1967.

Australia's early public servants inherited the British attitude to official secrecy and as with the Americans, saw anonymity and confidentiality as the twin pillars of professional public service. Inroads were made into this pervasive attitude in Queensland at various times including in 1992 when it introduced its Freedom of Information laws modelled on the Commonwealth legislation which had been

¹ Campbell, Enid & Harry Whitmore, 1966, *Freedom in Australia*

modelled on the American statute. The benefits of those reforms to record keeping are not often discussed.

Impact of FOI

A former federal Sex Discrimination Commissioner by the name of Quentin Bryce made a notation on a complaint file concerning a sex discrimination complaint made by a man, Mr Alexander Proudfoot. The note read "Another example of a man wasting our time with trivia". For those of you with an understanding of the detail of that complaint and of the Convention on the Elimination of Discrimination Against Women would probably agree with the sentiment expressed by the Sex Discrimination Commissioner. The Hearing Commissioner who subsequently heard Mr Proudfoot's sex discrimination complaint against the Sex Discrimination Commissioner stated

The unfortunate notation by the respondent on the memo of 6 September 1990 about "trivia" was an expression of frustration and annoyance. It is a piece of unfortunate "in-house talk", and not any indication of how the respondent discharged her statutory duties. One can well imagine that a good deal of trivial material did arrive from people with a mischievous sense of humour and/or frivolous intent.

I worked at the Human Rights Commission around that time and this matter engendered a flurry of activity and great deal of internal discussion. Most agencies have a similar moment of truth with FOI which leads to long lasting cultural and systems changes. When it is all boiled down, that discussion and subsequent actions taken by the Human Rights and Equal Opportunity Commission demonstrated that public access to government information and public scrutiny of it improves the quality of public administration. In that agency the benefits of FOI were in the culture about and the quality of record keeping, the quality of report writing, general decision making, and by showing that decisions initially taken in error were reversed. With respect to record keeping, FOI focussed management's attention on the need to improve record management including maintaining the integrity of the record. Everyone in the agency became aware that yellow post it notes formed a permanent part of the public record. The Human Rights and Equal Opportunity Commission increased the allocation of resources and the agency's accumulated knowledge base about records management. Apart from this graphic example, evidence based benefits of this kind have been documented in the FOI literature and been a subject at earlier record keeping forums.

What new benefits will RTI bring?

FOI in Queensland has undergone significant reform in response to a review of the FOI Act commissioned by the Queensland Government. The reforms respond to the criticism that Queensland public administration had not fully reaped the benefits intended with the passage of the *FOI Act* in 1992. A significant issue identified with the way in which FOI was administered was that it was treated like an administrative process by a small unit within the agency. The intention of the recent reforms is to ensure that agencies focus on information as a key strategic asset to be used to better inform and better engage citizens in government decision making and activity.

I will now identify some of the specific deficiencies in the old scheme and highlight the way the RTI legislation intends to rectify them with a particular focus on those matters that will affect record keeping. The following then is a list of the expected benefits to be reaped from the Queensland approach to RTI.

- First, narrow interpretation of exemption provisions by agency decision makers which operated as a brake on public access to official information has now

been replaced with a legislative presumption that all documents are open to the public.

- Second, the small number of documents agencies were previously required to publish in a Statement of Affairs has been replaced with a requirement to maximise the publication of government information holdings. Agencies are required to publish significant, appropriate and accurate records. Attention has now turned to what and how that information can be published in an accessible way and so that the volume of information does not overwhelm or create what is termed in consumer policy, a confusopoly.
- Third, the practice of some agencies to only provide information under the FOI Act in response to individual requests for information has been replaced by the 'push' model where agencies are expected to be proactive about the publication of information. This obligation on agencies requires them to analyse demand for information, anticipate demand for information and to use web 2.0 to make broad categories of information immediately available in an accessible format. The implication of this shifts responsibility for FOI from the agency FOI decision maker to the agency as a whole. It also shifts mainstream responsibility for record keeping away from the Records Management Unit to the agency as a whole.
- Fourth, the intention of the regulatory framework is to make formal applications under the RTI legislation a last resort, with citizens being able to freely access already published information holdings or being able to administratively access information. This requirement has focussed senior manager's attention on agency information systems responsible for either the publication or administrative release information. Administrative access schemes will require individual officers not to have responsibility to determine whether 'exempt information' should be disclosed or that disclosure might be contrary to the public interest, but to have responsibility for determining whether it could reasonably be said that information possibly is exempt information or disclosure might be contrary to the public interest. If information is not possibly exempt or contrary to the public interest, they are unable to do so, they should be able to disclose it, subject to secrecy, loyalty, fiduciary and confidentiality obligations.

This requirement means that many more public sector officers need to have a working knowledge of what is an official record, how to assess the category of information they are managing and understand what they can lawfully do with it. To manage the risk for individual staff, agencies will be required to identify the classes of information it is prepared to release administratively, and the officers who can make such decisions through the organisation. Systems will evolve such as ex-ante decision making and commons licensing to so releasable and reusable documents are marked early and easily identifiable by the staff and the public. This will integrally involve every one in the agency in record keeping.

- Fifth, the failure under FOI to focus on improved accessibility of public sector information is being addressed through a strategic information policy which now, for the first time in Queensland includes a focus on information management. This will bring Queensland into what Professor (now Justice) Paul Finn has described as the third phase of information management. This new emphasis will give impetus to rolling reform in information management in Queensland in the next 10 years.²
- Sixth, improved access to official information will also focus agencies' attention on the quality and integrity of the information that is published.

² Finn, Paul, Government Information- law and legislation. 1991. Interim Report. ANU Research School of Social Science. Integrity in Government Project.

- Seventh, what was lacking under the FOI regime was a body which could play a part in promoting RTI and Information Privacy, and monitoring compliance. The RTI reforms put in place institutional governance arrangements to ensure that there is compliance with the object of the new legislation. The Information Commissioner can proactively promote and encourage agencies in their information handling practices and can monitor compliance with the new regulatory framework.

The introduction of such a role and these changes can only improve the prospects of Queensland making good on the Father of the Constitution's vision and the strategic intention of the Right to Information Reforms and the Queensland Government's ambition of having the most open and accountable government in Australia. From this list of reforms and the expected benefits, I'm sure you will agree that the RTI reforms will have a different and more systemic impact on record keeping than FOI achieved.