INTERNATIONAL CONFERENCE OF INFORMATION COMMISSIONERS
OTTAWA OCTOBER 2011
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Limiting the limitations: Designing exemptions that balance both effective and accountable governance.

Pigs in the City 1818

The challenges of making FOI regimes effective remind me of the challenges Professor Hendrik Hartog described in his classic essay "Pigs and Positivism". [1] The subject of his essay, the custom of keeping pigs on New York City's streets, is a similar challenge to the custom of secrecy in government. Nineteenth century American laws with respect to Pigs in the City can shed some light on the design of FOI regulatory frameworks and perhaps the prognosis of the current approaches.

Pigs roamed pre-industrial New York streets where it was the custom of people to fatten them on the city's wastes. However they also defecated, apparently offended the ladies by copulating in public, destroyed pavements, and occasionally killed children. There was debate in government circles over a long period of time as to what to do. Several attempts to control the pigs through government regulation were thwarted either by being voted down or by the laws being repealed after community opposition. The contest here was essentially between the interests of the poor and the power elite, unlike FOI where the contest is more likely between the media and civil libertarians and the power elite.

In 1818, when there were no laws on the statute books banning pigs from the streets, Mayor of the City, Cadwallader Colden, took it upon himself to sit as a judge of the quarter sessions court to hear the charges (he had brought about by empanelling a grand jury) against two individuals for a common law misdemeanour of "keeping and permitting to run hogs at large in the city of New York". A nominal fine was imposed on Louis Lashine who offered no defence to the case. The other defendant, a butcher named Christian Harriot hired attorneys. A full trial was held on the question of whether he could be convicted of maintaining a public nuisance because he owned pigs that were sometimes found on the city's streets. Mr Harriet was convicted as charged and had to pay a nominal fine.

How did this criminalisation of keeping pigs on the street change behaviour? According to Hartog, there is historical evidence that pigs persisted on the street for another 30 years, primarily because people did not agree with the law as decided by the authorities of the time. People continued to assume and assert their own distinctive norms and interpretation of the norms – their own laws- as the prevailing authority in much the same way as government continues to assert its own custom of secrecy. There were competing values, customary law and approaches to government.

[1] Hartog, Hendrik. 1985. "Pigs and Positivism", *Wisconsin Law Review*, 899.

What finally brought an end to the pigs on the street? Was it effective legislation? Was it the normative effect of legislation over time? The answer could be salutary for our approach to the design of FOI laws and strategies for changing public sector cultures. The end of pigs on the street could be attributed to the cholera epidemic of 1849 when up to 100 people were dying a day. Health officials were becoming aware of the link between faecal contamination of food and water due to poor sanitation. The first NYC sewers were built in the 1850s. While pigs had been commonly accepted as scavengers of rubbish, they were targeted in a new campaign as being unsanitary. According to Hartog:

> *City officials vowed to obliterate pigs from the face of the city. Owners resisted, sometimes violently, and many hid their pigs in the basements and cellars,…*

(reminiscent of some poor record keeping practices and public servant ploys used to hide documents from public scrutiny)

> *By 1849 police had taken 5-6 thousand pigs into custody.* (Our job is easier in some respects, harder in others.)*Thereafter, if numbers of pigs remained in the city, their presence in the streets had become surreptitious and unambiguously "criminal".*[2]

	Pig owners v power elite	Civil libertarians v power elite
Values	Pigs are valuable because they scavenge and keep the street clean, they provide cheap food for the poor v Pigs defecate, copulate and kill	The free flow of information to the community is essential to effective working of democracy. Public sector information is a community resource. The political interest of the government does not override the public interest v Confidentiality is a pillar of professional public service Open government is an oxymoron Public sector information is a government resource. Political interest of the government can override the public interest in certain circumstances
Customary law	Pigs have always been kept in the city and allowed to roam; legislative attempts have failed or been repealed. v Judge made law that criminalises Pigs on streets as a public nuisance	A right to access information which recognises the need to protect essential interests v The power elite controls the flow of information to the community. Government information belongs to the government. Access to policy advice undermines

[2] Ibid., p 924

		the conventions of public service neutrality and individual ministerial responsibility
System of government	Presidential form of democracy Political representative is also the judge	Westminster form of democracy Monitoring compliance and merits review undertaken by authority independent of executive government

Queensland 2007

In *Bennet v President, Human Rights and Equal Opportunity Commissioner*[3] Justice Finn struck down a Commonwealth regulation banning public servants from disclosing any official information without authority saying:

> *Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not.*

Properly applied, exemptions that reflect 'necessary secrecy' do not need to be limited. The topic given to me, *Limiting the limitations: Designing exemptions that balance both effective and accountable governance* asks us to consider two questions:

(i)"When is secrecy necessary for good government?" and;

(ii)"How can exemptions be designed to limit a 'surfeit of secrecy' arising from their application?"

A recent review of Queensland's FOI laws considered both of these questions.

Review of Queensland's FOI legislation

I recommend the discussion paper and review report to you as I won't have time to highlight all of the significant design features of the resulting legislation.

The Queensland Cabinet approved the terms of reference for a broad ranging review of FOI and an independent panel chaired by Dr David Solomon AM was appointed. Some of you would have met David at the International Conference of Information Commissioners in New Zealand. The Information Commissioner's experience and thinking he was able to glean influenced the recommendations in the Review Panel's June 2008 final report. The government responded in August 2008 by supporting 116 of the 141 recommendations, partially supporting 23 and not supporting 2 minor recommendations.

Terms of reference

The Independent FOI Review Panel was asked to assess whether the FOI laws were working effectively and what improvements could be made in the context of the Premier

[3] (2003) FCA 1433 at p98

announcing to Parliament that the FOI legislation is one of the most important accountability mechanisms for a healthy democracy and that

> *"By establishing this independent review panel to comprehensively review our freedom of information laws, my government is demonstrating its ongoing commitment to open and accountable government."*

General findings of the Independent FOI Review Panel
Hartog's three themes, values, customary law and distinct system of government were never far from the surface in the review undertaken

The review found that FOI in Queensland had not achieved what had been intended by the legislation primarily because the values in the public sector around secrecy, and the values of the political class around the control of government information, had triumphed over the law, in much the same way as the pig keepers had triumphed over NYC's attempts to outlaw their practices. Despite the FOI Act's intention as expressed in the Second Reading Speech that

> *Government is merely the agent of its citizens, keeping no secrets other than those necessary to perform its functions as an agent…*

the review found that agencies looked for reasons not to disclose matters. Where they could loosely fit documents within a category of exemption, agencies gave an automatic answer of 'no' to the access application, with the public interest test rarely applied properly. Consequently the structure of the exemptions was changed (discussed later).

In addition to reporting that the atmosphere within the public sector was not conducive to the fearless application of FOI law, the Independent FOI Review Panel commented on the serial amendments made by successive governments to restrict access rights under FOI. Consequently where the wording of exemptions, in particular the Cabinet exemption was inconsistent with the object of the Act, recommendations were made for changes (discussed in detail below). The review did not go so far as to explore the brake on serial amendments that may be afforded by having the FOI Act regarded as one of the constitutional statutes, as it is in New Zealand, or of having information rights enshrined in the State's Constitution as it is in over 50 national constitutions, most recently Pakistan's.

The review commented that the necessary pre-conditions to sustain freedom of information law and practice in the spirit of the original draft of the Act were in Dr Solomon's words

- a favourable policy momentum (read health imperatives)
- congruent political will (read officials vowing to obliterate the pigs from the streets)
- a supportive architecture including a **strategic information policy together with a governance framework** that (might work to remove the equivalent of thousands of pigs from the streets) but certainly provide for clearly articulated roles for all relevant agencies including the Public Service Commission, the Information Commissioner, Qld State Archives and the QG Chief Information Office. The

architecture includes **a new Act** which has as a basis the notion that information is to be pushed into the public space rather than pulled out of the government space.

These contextual matters generally provide a kind of brake on the application of exemptions by agencies. The push model itself does not directly limit the exemptions, though it does entail some cognitive behaviour change: as agencies are forced to change their practices of administrative release and publishing through publications schemes, the change in behaviour will reinforce a more pro-release culture. A customary pro-release culture, will effectively limit the inappropriate application of exemptions. There are other design features of the Act that provide an effective brake which I will return to at the end if time permits.

When is secrecy necessary for good government?

Queensland's new *Right to Information Act* 2009 contains almost half the number of statutory exemptions as were in the old Act. The exemptions that remain are strict exemptions where the Parliament considered there was a paramount public interest in non-disclosure. No public interest test is applied to an exemption. The public interests to be protected in this way are subject of little public criticism, those being what the community's customary law accepts. They include national security, law enforcement, Cabinet documents; executive council documents; the Vice-regal exemption, legal professional privilege and information stipulated in a very limited number of Acts (such as the notifier details in child protection complaints). The Queensland Parliament decided in these circumstances, largely reflective of Westminster conventions, secrecy is necessary for good government. While there is commonality of thinking around these categories of documents in most Westminster jurisdictions, I note that in other jurisdictions legal professional privilege is subject to a public interest test; the Cabinet exemption may be more or less tightly restricted and few other jurisdictions have an exemption for Investment Incentive Schemes.

Importantly, the legislation reminds readers at each decision point that even if a document can be classified as exempt, the agency has a discretion to release it. The repetition of this discretion in each relevant provision has a normative effect. This discretion is being used, particularly in those parts of the bureaucracy trying to embrace the new open government approach. The legislation is also clear that the grounds for refusal are to be interpreted narrowly.

The unrestrained exemption

The Independent FOI Review Panel recommended the repealing of conclusive certificates, perhaps an exclusively Australian legislative device that effectively removed executive government decision making on FOI matters from administrative review and effective judicial oversight. Conclusive certificates gave Ministers the power to override the relevant independent tribunal's jurisdiction to review agency access decisions in a manner reminiscent of the New York City Major's ability to empanel Grand Juries which recommended the laying of charges and then to sit as a judge in court.

The Cabinet exemption
Unlike written constitutions in most other Westminster system jurisdictions, the Queensland Constitution makes specific reference to the Cabinet as a body and captures what is otherwise a convention - that Cabinet is collectively responsible to the Parliament. The review found that Queensland's Cabinet exemption was the most restrictive in the country and made a number of recommendations to change that.

The Cabinet exemption now explicitly covers decisions, submissions and briefing notes and all other matter that would, if made public, compromise the collective ministerial responsibility of Cabinet. It does not cover attachments and annexures. It is now subject to a purpose test meaning that it applies only to documents brought into existence for the purpose of submission to Cabinet, which includes Cabinet Committees. The restricted access period for Cabinet documents has been reduced from 30 to 10years, after which release is subject to other provisions of the RTI Act.

The Report also recommended that government should develop a process where a discretion to routinely release material that falls within the exemption be developed and the Queensland Government has done so. The Premier and the Cabinet Secretary now regularly determine what information should be released proactively, including summary minutes of the Cabinet meeting and submission/decision summaries and the time frames for such release.

The Vice Regal Exemption
The Panel proposed that the exemption for executive council documents be retained on the basis that it is inappropriate for the Governor, as the Queen's representative be subject to FOI legislation. It was recommended that the body within the executive branch of government over which the Governor presides, Executive Council, should similarly be exempt. The exemption is necessary to complement the Cabinet exemption as the Executive Council is the formal expression of Cabinet. Additionally s48 of the Constitution, dealing with the Executive Council, includes a provision requiring members of the Executive Council to take or make an oath or affirmation of office and secrecy prescribed in a schedule to the Constitution.

Information briefing incoming Minister exemption
Along with the Constitutional convention of collective responsibility, the report recommended the constitutional convention of ministerial responsibility also be protected. The Report found that whatever the view on whether the significance of individual ministerial responsibility had diminished over time, the fundamental precept is that a Minister cannot be responsible for his or her portfolio unless he or she knows what is happening within the department. The Report found that there would be a real governance problem if the FOI law was to inhibit the free and frank provision of information by officials to Ministers. For the most part these documents will be covered by the Cabinet document exemption. Ministers are briefed regularly on matters they will be involved in in Cabinet. To ensure the free flow of information, the Report recommended three other classes of documents be exempt: incoming government briefs, parliamentary question time briefs and estimates briefs. Parliamentary question time

briefs and estimates briefs were already adequately protected by parliamentary privilege under the FOI Act and so the Government agreed to draft an exemption that would also protect incoming government briefs. Since the passage of the Act a number of other jurisdictions in Australia have adopted the practice of administratively releasing incoming government briefs.

"How can exemptions be designed to limit a 'surfeit of secrecy' arising from their application?"

The review was concerned that the approach of the old Act, which framed all public interests as an exemption to most of which a public interest test was applied, had played into the hands of the culture of secrecy by permitting decision makers to refuse access if a document could be categorised under any one of the exemptions. Certainly it is within our own experience that decision makers often neglected applying a public interest test; or when it was applied, it leant to protect the secrecy interests.

To remove the surfeit of secrecy, the new Act provides a limited number of strict exemptions but requires all other information to be released unless it would be contrary to the public interest to do so. This approach changes the decision making process from one of categorising the document under the exemptions in the Act to requiring the decision maker to consider the effects of disclosure of a particular document.

The new Act simplified the public interest test by replacing the three public interest tests with one test. When considering access applications, agency decision makers have two questions to answer: "Does the request fall within the scope of an exemption?" If it does, the document is exempt. If it doesn't, access is to be provided unless disclosure on balance is not in the public interest. The framing of the test in this way emphasises the change in policy approach where the starting point now is that information will be released unless there is a valid public interest to be protected.

The application of the public interest test is simplified for decision makers by having the process prescribed in the Act. Its prescription requires a genuine application of the mind of the decision maker to the facts of a matter. The Act also provides a non exhaustive list of the various public interest factors to assist decision makers in identifying relevant factors for consideration in the process of deciding whether the disclosure would, on balance, be contrary to the public interest. The list also makes the term 'public interest' more accessible to applicants, makes decisions clearer for applicants and better equips them to argue their case. The list captures the various public interests that underlay the exemptions contained in the old Act and that no longer exist as exemptions. These factors have been determined by Parliament to continue to be important.

In applying the public interest test, the legislation requires decision makers to

- identify any factor that is irrelevant to deciding whether, on balance, disclosure of the information would be contrary to the public interest and then to disregard it,
- identify any relevant factor favouring disclosure,
- identify any relevant factor favouring non disclosure and to
- have regard to those relevant factors.

One of the important design features of the Act was to provide a non exhaustive list of irrelevant factors. These are:

> *1. Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government*
> *2.Disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document*
> *3.Disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant*
> *4.The person who created the document containing the information was or is of high seniority within the agency.*

The list of irrelevant factors reflect some of the more contentious debates in FOI and conclusively settle the approach to be taken in Queensland. The declaration of these factors as irrelevant in the legislation is highly important to establishing a consistent approach on these issues and to remove the debate that has plagued FOI decision making since the inception of the legislation.

The Office of the Information Commissioner has been charged with developing guidelines to assist in the application of the public interest test and a range of other guidelines to assist parties- an important device to limit the application of the exemptions to appropriate cases.

Other features of the new Act that limit secrecy

The new Act, the new *Right to Information Act 2009* itself contains more features to limit the ability of agencies to maintain unnecessary secrecy than I can speak about in any reasonably amount of time. Here are a few other features, but not an exhaustive list.

The Objects clause

Firstly the object of the new Act has noticeably different features: The old Act had many of the ambitions commonly featured in FOI legislation. The new Act explains why openness is desirable, sets out the relationship between open and accountable government and democracy, includes a reference to better quality decision making, limits reference to the essential interests that must be protected and instead speaks about the consequences of disclosure. Some commentators are of the view that the mentioning of the essential interests to be protected in the Objects detracts from a pro-disclosure bias.

The presumption of openness

All public sector documents are considered open as a starting point with a reduced number of statutory exemptions. The review noted that the Queensland legislation was modelled on the US FOI Act, a model which might be more successful in a system of government where the executive arm of government is not controlled by parliamentarians. The review also noted key differences[4] in the approach taken in the NZ

[4] Key differences have also been spelt out by Rick Snell in his article "The Kiwi Paradox: A comparison of Freedom of Information in Australia and New Sealand", *Federal Law Review*, Vol 28, No 3, 2000

system which is regarded as being relatively successful. There the presumption of openness underpinned an FOI system

While the wording of the old FOI Act was intended to be pro-disclosure,

> *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland Government,*

The wording of the new Act makes it clear that the presumption of secrecy is replaced by the presumption of openness in a variety of places. The Acts states that information in the government's possession is a community resource, and that

> *The Government is proposing a new approach to access to information. Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.*

This is reinforced by placing a making it mandatory in decision making to give access…

> **Section 44 Pro-disclosure bias in deciding access to documents**
> (1) It is the Parliament's intention that if an access application is made to an agency or Minister for a document, the agency or Minister should decide to give access to the document unless giving access would, on balance, be contrary to the public interest.

The merits review body
The review considered whether merits review of agency decision should be a part of a specialist statutory authority or be a part of a generalist civil and administrative review tribunal. The government's decision to retain a specialist decision maker, the Information Commissioner, increases the likelihood that the case law that follows the new Act will not simply adhere to the old customary law applying the old presumption of secrecy but will apply the new presumption and appropriately limit the application of the exemptions.

Monitoring and Independence
What gets measured gets done. The Independent FOI Review Panel attributed part of FOIs failure to the fact that there was no monitor and no accountability. The Information Commissioner now has those roles under the legislation. The Information Commissioner is appointed by Governor in Council and is responsible only to a parliamentary committee. Having a monitor of compliance with the law provides another incentive in the system for the public sector to change values, norms and customary law around information management practices.

Support
The Information Commissioner now has a new role in supporting agencies by providing authoritative advice and guidance on the application of the laws and best practice in right to information and information privacy.