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"FOI With Bite : Recipes for Openness"

ABSTRACT

This paper attempts to answer the question: what are the essential ingredients required for FOI to have an impact on the openness of government agencies? The author draws on experiences in several English-speaking jurisdictions to propose that the major requirements for success include four sets of factors.

Firstly, it is critical to have a framework of accountability in which the information released under FOI can be effectively deployed by citizens. FOI is far more powerful when information thus obtained can be used to challenge and change the decisions of government. Secondly, strong legislation needs to contain clearly stated objectives, an emphasis on disclosure, narrowly framed exemptions, public interest tests, low fees, protection from liability for officials, penalties for breaches, and independent external review. Thirdly, crucial administrative supports for FOI include adequate resources for both agencies and review bodies, firm requirements for training and compliance, and strong leadership and support from the highest levels of government. Finally, it is essential that appropriate training be provided to the staff according to their role in the process. Strategies to ensure that training material and guidelines are high-quality, up-to-date and consistent with review decisions must be developed. Specific benefits for both the agencies and for individuals can be presented along with judicious use of cautionary tales and dangers to be avoided. The training can be conducted by government and non-government providers, although the potential for Information Commissioners to be involved may be limited by their legislatively-prescribed role and their resource levels.

Is training on its own sufficient? The author believes that training is a necessary ingredient in the overall recipe for open government. But only when it is conducted in the context produced by the other factors described, is training likely to result in noticeable movement towards the "culture of openness and participation" which is the target.

"FOI With Bite : Recipes for Openness"

INTRODUCTION

Good afternoon. To begin, I should declare my interests. I have worked as an FOI practitioner and trainer for just over 25 years – half inside government and half as a private consultant. I have been an in-house FOI trainer in a single agency; provided FOI training across the whole of government from a central agency; worked on joint training with Information Commissioners; worked with universities and NGOs; and as a sole private sector provider. I have experience in 8 jurisdictions, including the local, state and federal levels in Australia, in Ireland and the United Kingdom, and I am currently working on a project in China on introducing FOI. I have made decisions on over a thousand FOI applications, at first level and as a reviewer, and have trained over 6,000 public servants in FOI. Having also written a book on the public interest balancing test, made my own FOI requests and taken a number of them to external review, I see FOI from multiple perspectives.

In preparing this paper, I reflected on the many training situations I had been involved in, to identify the ingredients most likely to achieve greater openness. I wanted to be able to give you the perfect recipe. I had almost finished, when I realised that first I needed to discuss the most important aspect of effective training for openness: the legal and administrative contexts in which training is delivered. To extend the metaphor, a well-trained chef can only produce good results in a clean kitchen, with proper resources (including good staff and sufficient time) and strong support from the managers of the restaurant. And of course, plenty of customers to taste their wares! So here's my menu for your consideration:

Essential Ingredients for FOI With Bite

1. Accountability framework

2. Legislative components

3. Administrative support

4. Training

1. ACCOUNTABILITY FRAMEWORK: INFORMATION IS POWER … BUT ONLY IF IT CAN BE USED

Openness is much easier to achieve when FOI is part of an overall administrative law package that allows citizens to make effective use of the information they gain under FOI, even to challenge or change the decisions of government. For individual citizens, the ability to challenge a decision (at little or no cost) not to grant a pension or benefit, or a visa, can change their life circumstances dramatically. Without such avenues, citizens may obtain information under FOI revealing poor decision-making, even corruption, but be unable to do anything with the information other than write letters of complaint or seek media attention.

As an example of how an accountability framework can be constructed, in the mid-late 1970s the Commonwealth of Australia introduced several pieces of reforming legislation, culminating with FOI itself in 1982.

These were:

- *Administrative Appeals Tribunal Act 1975 (AAT)*
- *Ombudsman Act* 1976
- *Administrative Decisions (Judicial Review) Act 1977 (ADJR)*
- *Freedom of Information Act 1982 (FOI)*

Later legislation *(Archives Act 1983 and Privacy Act 1988*) extended what FOI had begun in the areas of information use and disclosure, and records management. There are of course other accountability mechanisms such as external audit and whistle-blowers protection, but these are outside the scope of this paper.

Using the package of mechanisms a citizen may seek information from government (under FOI); seek the reasons for decisions (under ADJR); complain about delays and maladministration (Ombudsman); and challenge decisions on points of law (ADJR) or their merits (AAT). All of these things are within the reach of the ordinary citizen at effectively no cost, other than costs for legal representation. When I have conducted

training in jurisdictions without such mechanisms, FOI is often seen as a toothless tiger – information is power only if it can be used. It gives people "pieces of paper" rather than information. Public officials' awareness of the potential uses of the information makes them take FOI more seriously.

Hand-in-hand with this is the need for the public to be aware of their rights to use FOI (and other mechanisms) in the first place. Legislation is tested and improved as a result of usage, and without people using it, much of FOI is pointless. Whose role is it to educate the public? I would say it is the responsibility of every government agency and every public official who interacts with the public. FOI should be embedded into all of government's dealings with citizens. Realistically, this can be achieved by FOI rights being incorporated at a central level into all relevant publications (web and print), charters of rights, template letters, policies and procedures. A regular program of public education sessions, working with non-government agencies in their sector, is an effective strategy. As each has a somewhat different perspective to offer, participation by government agencies, Information Commissioners, non-government agencies and the media are all useful. If government fails to provide, the other bodies should step in, providing they have sufficient resources.

2. SPECIFIC LEGISLATIVE PROVISIONS TO GIVE FOI SOME 'BITE'

The most important ingredient to achieve a culture of greater openness is the legislation itself. To those of you in the audience who are working to bring FOI to a new jurisdiction, I want to assure you that there are specific elements of the legislation that are very much worth fighting for. The main elements that in my view are required for FOI to effectively promote openness are:

- Clearly stated objectives with an emphasis on disclosure;
- Broad requirements for proactive disclosure and publication;
- Narrowly framed exemptions, with public interest tests on a majority of them;
- Low fees and charges, or at least waivers on the grounds of hardship and public interest;
- Protection from legal liability for officials in making disclosure decisions;
- Administrative defences to minimise abuse of the Act;

- Penalties for breaches and improper or obstructive conduct;
- Requirement for agencies to collect and report statistics on FOI performance;
- Independent external review bodies with powers and sanctions.

Time does not permit me to address all of these, so I will select a few aspects to discuss briefly.

Exemptions as a Limit on Openness

Just a few words about one of my favourite subjects, public interest and FOI. Probably the most difficult aspect of FOI decision making is assessing the factors in favour of disclosure versus the factors against disclosure: weighing the competing public interests against each other. Openness is best achieved in a regime where there are public interest tests within the legislation, but a further benefit is that public servants' awareness is increased by exposure to discussions of public interests in favour of disclosure, while undertaking the balancing tests. These tests force the public servants to think about the interests of, and benefits to, the wider community.

Most importantly, of course, the critical information of government must be able to be released under the FOI legislation. As Justice Michael Kirby, now of the High Court of Australia (then President of the NSW Court of Appeal) said, speaking extra-judicially, in his discussion of the seven deadly sins of FOI:

> "The second deadly sin is to pretend to FOI but to provide so many exceptions and derogations from the principle as to endanger the achievement of a real cultural change in public administration."[1]

A very common instance of this is the exemption for Cabinet documents, which lies at the heart of the decision-making processes of government. The way this exemption can be abused was described by the Queensland Public Hospitals Commission of Inquiry in 2005. The Commissioner, the Honourable Justice Davies, a retired judge of the Queensland Court of Appeal, accepted evidence that:

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[1] Hon Justice Michael Kirby "Freedom of Information: The Seven Deadly Sins". Justice: British Section of the International Commission of Jurists 40th Anniversary Lecture Series. London 17/12/1997. http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm

> "… governments of both political persuasions … abused the Cabinet process in order to avoid information deemed sensitive or politically embarrassing falling into the public arena. This was because s36 of the *Freedom of Information Act* 1992 provided for an exemption from Freedom of Information disclosure of documents which, in effect, were submitted to Cabinet."

Commissioner Davies also accepted the evidence of an officer who "procured a 'fridge trolley' in order to deliver and retrieve documents associated with Cabinet submissions which collected surgery waiting lists in Queensland public hospitals in response to a Freedom of Information application which had been lodged seeking hospital waiting list documents."

In other words, any documents which the Minister wanted to exclude, were simply loaded onto the trolley and trundled through the building where Cabinet met, and this was sufficient to meet the tests for exemption under FOI.

The Commissioner went on to find that:

> "The conduct of Cabinet, in successive governments, in the above respect, was inexcusable and an abuse of the *Freedom of Information Act*. It involved a blatant exercise of secreting information from public gaze for no reason other than that the disclosure of the information might be embarrassing to Government."[2]

The sorry situation described above was the result of amendments made to the exemption concerning Cabinet documents, about which the Queensland Information Commissioner said:

> "In fact, so wide is the reach of s.36 and 37, following the 1993 and 1995 amendments, that they can no longer, in my opinion, be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional conceptions of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the

[2] p.476 Hon Geoffrey Davies Queensland Public Hospitals Commission of Inquiry November 2005 Chapter 6 Part F - A culture of concealment and its consequences http://www.qphci.qld.gov.au/

> professed objects of the FOI Act in promoting openness, accountability and informed public participation, in the processes of government."[3]

No amount of training of FOI practitioners can compensate for the overly broad reach of this exemption provision. To say nothing of the example set for them of role-models at the highest levels of government deliberately avoiding possible release of information by this conduct.

Another mechanism which frustrates openness and furthers secrecy are conclusive Ministerial certificates which effectively preclude the Commissioner or Tribunal from a review of the merits of the exemption decision. The recent Australian High Court case *McKinnon v Secretary, Department of Treasury*[4] affirmed the limits on review caused by such certificates, resulting in increased political pressure on the government to reform this aspect of the legislation.

Costs as a Deterrent

Excessive fees can be used to frustrate a culture of openness. The costs of using FOI should not be prohibitive to the average user. The majority of non-personal FOI requests are not made by ordinary citizens. From the little we do know about usage statistics, the media are probably the heaviest users in terms of making non-personal requests, with business users the next largest group.

Where FOI is too costly, individual citizens will not make use of it. Estimates of costs for large-scale non-personal requests can run to tens of thousands of dollars. So an affordable FOI regime, or one with sufficient waivers on the grounds of financial hardship or public interest, is an essential ingredient. The waivers should themselves be subject to appeal, and the powers of the appeal body (or Information Commissioner) have to be sufficient to enforce a fair and proper interpretation of these terms. If this is done, then non-government organisations, lobby groups, and ordinary citizens will make use of the legislation, and will ask the kinds of questions which will lead to an increase in the openness of government. To quote Justice Michael Kirby again, "The fourth

[3] p.21 Third Annual Report: Office of the Queensland Information Commissioner 1 July 1994-30 June 1995

[4] McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 229 ALR 187; (2006) 80 ALJR 1549 (6 September 2006) http://www.austlii.edu.au/au/cases/cth/HCA/2006/45.html

deadly sin is to render access to FOI so expensive that it is effectively put beyond the reach of ordinary citizens."[5]

Powerful External Review as a Remedy

Perhaps the most significant way that the legislation can achieve openness is to endow a strong external review body, such as an Information Commissioner, with sufficient power to enforce the law. This means the power to make binding decisions, i.e. overturn any decisions which are not in keeping with the legislation; the power to place sanctions on agencies who are not applying the Act properly, and penalties of sufficient force which can be imposed at a personal level, so that public officials are very clear that there will be consequences for their failure to comply. If the Commissioner lacks some of these powers, a higher level review body, usually a court, should have the powers.

FOI can be seen as toothless if the external review body lacks power. However the external body also has to have sufficient resources to be able to deal with the volume of cases in a timely manner, without the chronic backlogs which have beset most Commissioners I have worked with. It is hardly a deterrent to the recalcitrant public servant to know that a failure to respond within the time limit, a "deemed refusal", can be appealed to the review body, when that body will not be able to deal with it for months or even years to come. By the time it is dealt with, the political heat may well have gone out of the issue, or so they may hope.

3. ADMINISTRATIVE SUPPORT FOR FOI

Without key administrative components, even the best-framed legislation will be hard-pressed to achieve openness. These administrative supports include:

- Strong leadership and support for FOI from the highest levels;
- Adequate staff and other resources to undertake FOI responsibilities in agencies;
- Initial and refresher training for all relevant staff;
- Compliance with FOI embedded as a performance measure;
- Adequate records management systems;

5 Hon Justice Michael Kirby "Freedom of Information: The Seven Deadly Sins". Justice: British Section of the International Commission of Jurists 40th Anniversary Lecture Series. London 17/12/1997. http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm

- Adequate resources for external review bodies.

FOI 'Champions'

To take the first point, clear leadership from Ministers and Chief Executives is critical during implementation, and it needs to be further reinforced when the inevitable embarrassments occur following FOI disclosures. Sadly, the more usual response from governments to such embarrassments is to weaken the legislation through retrograde amendments or to cut resources to FOI, making it unworkable. In Australia we will have had 25 years (as of next week) in which to see the effects of these factors.

In 1996 the Australian Law Reform Commission undertook a wide-ranging review of the federal FOI Act, and noted:

> "4.12 The culture of an agency and the understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the Act achieves its objectives. A negative attitude, particularly on the part of senior management, can influence an agency's approach to FOI and seriously hinder the success of the Act in that agency."[6]

A more recent report commissioned by media representatives discussed the continuing culture of secrecy in Australia, including the following comments on FOI performance by senior officers:

> "There are few visible signs of leadership and advocacy for open government principles within government. On the contrary, some comments by prominent officials do nothing to affirm the importance of FOI. For example the Secretary of the Treasury, Dr Ken Henry, has said that as a result of FOI requests which he judged were "motivated by a desire to either embarrass the Government and Treasurer or the Department", communication on sensitive policy issues is likely to be verbal rather than committed to paper.

[6] ALRC Report 77 Open government: a review of the federal Freedom of Information Act 1982 http://www.austlii.edu.au/au/other/alrc/publications/reports/77/

> These observations about the dangers of FOI send a message to officers across the public service about how FOI gets in the way of what might be regarded as proper public administration."[7]

In such a context, how realistic is it to expect junior officers to make the courageous decisions to release any contentious material under FOI? In some agencies, occupying an FOI position can be seen as career suicide.

FOI on Starvation Rations

Quite simply, to implement and maintain FOI properly costs money. (It should be noted however that even the most generous estimates of its cost show it to be a tiny fraction of the money spent by most governments in disseminating information of their own choosing.) In some jurisdictions, governments have stated that FOI will be brought in at no net cost, thus dooming it to failure. Sufficient funds have to be made available for pre-implementation work: setting up the infrastructure of FOI, preparing material for proactive publication schemes, conducting records management audits, preparing policy guidelines, developing information technology support systems, and providing training. The ongoing maintenance of FOI requires sufficient resources to deal with requests, particularly if low fees do not bring in any revenue to support the function.

However, where significant work has to be undertaken in areas such as improving records management, it is important that the management of government agencies see this as an investment, as a benefit in itself, and one that will lead to greater efficiency for themselves as an organisation. It may not be possible to produce historical data to demonstrate that within the particular agency, but there is a growing body of (anecdotal) evidence across the world, in countries that have implemented FOI, to show that records management improvements flow from FOI and more than pay for themselves over the long term.

4. TRAINING FOR FOI WITH BITE

Who Should be Trained?

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[7] p. 104 **Report of the Independent Audit into the State of Free Speech in Australia** Report; Chaired by Irene Moss, AO; Commissioned by: Australia's Right To Know Coalition 31st October 2007; http://www.news.com.au/files/freespeechinaustralia.pdf/

If training in FOI is delivered only to the practitioner levels of an organisation, then FOI will not succeed in achieving openness. The training has to begin at the top, even if only in the form of briefings at a strategic level. The chief executive officer and executives of all public sector organisations have to be aware of FOI and its implications. More than that, they have to be aware of the penalties for non-compliance and Parliament's instructions to achieve a more open and participative democracy. However, where there is no direction from the top, or worse, a direction against FOI from the top, then no amount of training of the junior officers, who are the practitioners, will achieve openness.

To make clear the level of support for FOI and its objectives, senior officers could attend or introduce the training courses. An alternative I have used is that at the beginning of each training session, I showed a short video with a statement of support for the aims of the legislation from the Attorney-General and the Premier of the jurisdiction. This sent a clear message to the trainees about the top-level support for the concept of openness.

Ideally, target groups for training in an organisation would be:

- The executive, or most senior, officers (at least at a strategic level)
- The practitioners, who undertake the actual decision-making at initial and internal review levels
- Any staff who are involved in records management functions (as their role in locating the documents is crucial to being able to make proper decisions)
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The rest of the staff of the organisation should have at least an awareness of FOI, so that they can see how it impacts on their everyday work. For each document that they create, they know that it could ultimately be released under FOI; for all records that they handle, they know that they must be able to be retrieved for an FOI request.

Challenge of Getting to The Right People.

In the course of my work I have rarely managed to get the attention of a CEO or Minister for more than 10 minutes to work with them on understanding FOI, outside the context

of a specific FOI request (and then it is usually about arguing exemptions). Even Ministerial advisors, those key players, are too busy to attend more than a half-hour briefing. I am often asked to condense what would be a 2-day training course into a 15-minute timeslot on the agenda of a busy Executive meeting. I have developed several ways of handling this, such as using headline FOI horror stories, and take it as an enormous achievement to have my timeslot extended to half an hour. I was recently asked to prepare a brief but terrifying presentation for an executive group, where the senior Legal Advisor wanted the penalties emphasised – examples are in the two slides shown here. But to be truly effective in a move to greater openness, there needs to be far more education at the highest levels.

Quality of Training

The training itself has to be of consistent and of high quality. In terms of consistency, a good example is the state of South Australia, which has amended its FOI Act to require that FOI decision-makers must be accredited through completion of approved training. This ensures a consistency in interpretation and approach, and also establishes a camaraderie and a network amongst the practitioners, so that they are able to provide mutual support, particularly given the occasional requirement to make difficult decisions which have internal political consequences inside their organisations. Practitioner networks are an essential ingredient of effective FOI, and have been used to great effect in jurisdictions such as Ireland, the United Kingdom and Australia.

The training has to be based closely on the specific legislation, enhanced by reference to the interpretation of it by appeal bodies. In jurisdictions with a large body of relevant decisions, it is an increasing challenge to keep guidelines and training materials up to date. It is difficult even to provide an accessible, digestible body of case law to practitioners, especially to those (the majority) not legally qualified. As examples, the body of case law at federal level in Australia, or at Commissioner level in Queensland, or Tribunal level in Victoria, would run to thousands of pages. Some approaches have been: to provide bulletins with summaries of recent decisions; provide a well-designed index (by section of the Act, or topic-based) to full-text decisions online; provide an annotated Act, with relevant decision extracts in footnotes; or to convert them into manuals of guidance for practitioners. Reading these decisions is enormously beneficial to practitioners in seeing the analysis and reasoning behind decisions, as well as reinforcing the role and power of the external review body. However, with some decisions over 100

pages in length, it is daunting for practitioners struggling with statutory deadlines and backlogs.

Clarity and Consistency in Interpretation

The interpretation and policy of the act need to be clearly stated, so that all public officials can apply them consistently, legally, and properly, and these policies should be endorsed at the highest levels.

In one jurisdiction with which I was involved, we arranged for the policy manual to be endorsed by Cabinet, the highest level of government. When in doubt, and when it was challenged in a training or decision-making context, its support from the highest levels was clear. I have also trained where it was made a mandatory requirement for the senior officials of all public sector agencies to attend briefing sessions of at least one-half day duration, and all decision-makers and internal reviewers were required to attend a two-day training course. Attendance was recorded and reported, and those who failed to attend were contacted by a senior manager and their attendance was rescheduled. This resulted in the entire body of FOI decision-makers being trained prior to implementation, and gave a firm foundation for the consistent and proper application of the Act.

In that same jurisdiction, the Information Commissioner set out a clear statement supporting the intention of the Act in achieving greater openness in government from the earliest decisions. The exemption provisions were explained in great detail, the public interests were carefully weighed and considered, and the decisions provided clear guidance for the decision-makers within agencies on the interpretation that would be placed on the Act by the review body. Over subsequent years, in challenges to the courts, these decisions were all upheld on points of law, which added to the clarity and certainty of the interpretation.

I am sad to say that, after a period of years, which you might call the ‘honeymoon’, the government’s response to these clear statements of openness in interpreting the Act resulted in the Act itself being amended to reduce the level of openness. This has occurred in several jurisdictions and is an all too common pattern.

Who Does The Training?

In terms of the role that Information Commissioners can play, in many jurisdictions this is prescribed by the legislation. In some they are required to take a broad role including training and outreach; in others, they are limited to a narrower role relating only to the resolution of disputes. This affects their ability to participate in offering training programs, as their funding is frequently tied to those roles they are explicitly charged to perform under the legislation. Some Commissioners' resources are so limited that they operate with a constant backlog of appeals, leaving them no time to undertake training, however keen they may be to do so.

Where the occupants of freedom of information positions are themselves professionals, such as lawyers or information specialists, their professional associations and academic institutions have a role to play. Indeed, many of the courses they would undertake to enhance their knowledge of FOI would make them eligible for accreditation or continuing education points. However, such courses are not always suitable for the non-professional or administrative level FOI people, as they frequently assume other legal knowledge and use legal jargon not directly drawn from the FOI sphere.

Another strategy which has had some success is to have external speakers involved in the training, for example, representatives of the media who have made use of the legislation. Sometimes this has the effect of stultifying discussion from the group members who are at least a little anxious in front of journalists; however, their perspective is certainly a valuable one. Non-government organisations with a history of involvement in FOI (such as the Campaign for FOI in the UK) can also provide training, although they may not have the same level of acceptance by the bureaucracy.

Where the agencies, especially the FOI lead agencies, fail to deliver training, who then has the responsibility? If lack of staff or financial resources is the problem, it may not matter, as there will be no one to attend the training. If attendance at training can be mandated, and Commissioners are sufficiently resourced to provide it, then they are well placed to do so in terms of their knowledge and commitment to the concepts of openness and accountability. As most jurisdictions with which I am familiar do not have mandatory training, we must develop ways of enticing decision-makers to attend. In an era of economic rationalism, emphasising the cost-savings from reducing FOI appeals and complaints is effective. Where FOI is embedded into performance contracts of senior

staff, and their performance pay is tied to achieving certain FOI goals, this provides additional incentives to train their staff to manage FOI well.

Carrots: Selling the Benefits of FOI

As with all messages, when you are selling something, it makes sense to point out its benefits to your audience. FOI is designed to make the government more open and accountable, but this can be perceived as exposing one's own agency to criticism and embarrassment. Public officials who would (by releasing the documents) be the instrument of that criticism may be subject to pressure, or worse. During the training, it is important to emphasise the protection of individual officers from legal consequences of release, and the benefits of FOI to the organisation quite apart from achieving openness from the public's point of view. This becomes easier once there is a longer history of FOI within the jurisdiction, as specific examples can be used to support the claims of achieving these benefits. With FOI in so many countries around the world now, there are numerous instances of such benefits which can be marketed from other jurisdictions. I have a collection of press clippings and cartoons, featuring what you might call the good news and the bad news of FOI disclosures, which can make the FOI message more memorable.

Some of the most obvious benefits in the countries I have worked in have accrued to the internal efficiency of the organisation itself, in records management and the quality of decision-making generally. Records hold information, and information is the lifeblood of FOI. If information cannot be located, then no decisions can be made to release it, and no openness is achieved. Overhauling the records systems has been an inevitable ingredient in FOI implementation, and it is one that is frequently ongoing as there is no perfect solution.

But improvements in records management don't just benefit FOI processes. Improvements in records management benefit the entire organisation. Instead of having boxes of papers literally in the basement, the attic, in cupboards, under the stairs, the records are located, decisions are made about whether they need to be kept, and if so, for how long. Where they do not need to be kept, they can be destroyed, thus minimising the haystack which has been building up over the years, such that good quality information can't be found. The sheer volume of records can be dealt with and brought under control. In areas such as electronic information, where there are still many challenges, FOI has

drawn attention to areas such as deficiencies in emails. As many of you would know, emails are a popular type of document requested under FOI, as applicants know that emails are where people are not on their guard. Addressing and remedying such deficiencies benefit the entire organisation.

FOI, in tandem with other accountability mechanisms, highlights deficiencies in administrative decision-making. The potential for exposure exists for every decision made, for every document created. An awareness of this seems to have been sufficient to improve the standards of decision-making in many areas of government. The benefits to the clients are obvious; the benefits to the government agencies include a reduction in complaints, appeals, and cases lost in courts and tribunals.

So the benefits in records management and decision-making are great selling points for FOI; while placing a figure on the savings is not possible, they are discernible to many public servants.

Another selling point is to appeal to the public officials as FOI users themselves. Of course they can use FOI as citizens, in the data protection sense of seeking access to records about their health or tax matters, or for wider policy issues. However in some places, one of the unfortunate results of selling FOI to public servants as users has been that they, as a group, have become very active users of FOI. The main area of interest has been to do with their own personnel records, more specifically those where there has been a dispute with their organisation. The Australian Commonwealth made amendments to the FOI Act to restrict such use, by making public servants utilise the provisions of the Public Service Act to seek access before they were able to exercise their rights under the Freedom of Information Act. This came as a response to, not hundreds, but literally thousands of requests from unhappy employees about numerous aspects of employment, (including but not limited to) appeals against promotion, grievances, and disciplinary matters.

This has also had the unfortunate effect of giving FOI something of a bad name to the executive of the organisation, where it may appear to them that inordinate amounts of time are being spent on, as they see it, airing the dirty laundry of purely internal matters of staff administration. So while this is still a good selling point in terms of public servants using FOI, it should be used with some caution.

Sticks : Awareness of The Consequences

"You can change behaviour, even if you can't change attitudes." This was something we used to say when conducting training to introduce Anti-Discrimination legislation in Australia. FOI is also a change process, and one where attitudes matter. If people are aware of the sanctions that will be applied for non-compliance with legislation, if the trainees believe that the top level of their organisation expects them to apply the legislation fairly and properly, then their behaviour will comply even if their private views about the level of openness were different. It is probably a matter of generations to change attitudes thoroughly, and even after 25 years of FOI in Australia, we are still not there. However I see progress in the fact that the younger recruits don't believe there ever were "bad old days" when you could not find out why you didn't get a promotion, let alone read the comments made about you. They expect openness, at least as regards themselves, so it is easier to extrapolate from that to being open in their work.

Training to provide knowledge alone is not sufficient, though it is an essential beginning. In order to change behaviour, and perhaps eventually change attitudes, the types of training that are most effective are those that are interactive, where they can observe the behaviour of other members of the group, and where feedback can be given by the instructor. Role-plays, case studies, exercises, and discussions are therefore the most effective methods.

I have often wished for more sanctions to be applied by Information Commissioners and others, so that I would have a greater supply of "horror stories" to tell in training courses. Even when Commissioners have used their powers to enter premises and search for records, I have noticed the entire agency taking FOI much more seriously after such events. I am certain that a serious financial penalty or jail term would have a salutary effect.

CONCLUSION

If training alone could achieve openness, I would have seen much more dramatic changes from my 25 years of work in FOI. There is a vital role for training, and without training, the other ingredients would not be sufficient to achieve a change in the culture towards openness. However with none of the other ingredients, training will achieve nothing; and when most of them are lacking, it can achieve, at best, pockets of openness, but never the wholesale shift of government which is the goal.

So the ideal recipe for openness is the right combination and quantity of ingredients, constant stirring and a watchful food critic. In the face of the many interlocking challenges facing us all, openness can only grow in importance. I hope these FOI recipes have provided food for thought and discussion. Bon Appetit!