

BOOK REVIEW**Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State*

by MOIRA PATERSON

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Knowledge, as Sir Francis Bacon once famously remarked, is power. He was referring to the value of a good education, but the phrase applies equally well to politics. Information is the very basis of democratic life, because citizens who do not know what their rulers are doing are clearly in no position to hold them to account.

Despite being a fundamental practical requirement, transparency is by no means unproblematic. Modern bureaucratic states play a somewhat contradictory role as the subjects of democratic scrutiny and, simultaneously, the ultimate sources of a good deal of the information required for its exercise. The effectiveness of secrecy and outright deception in insulating rulers from unwanted scrutiny by the ruled has been recognised since at least Machiavelli's time. Influence over information in the public sphere has implications reaching beyond this, though, because it allows those in power to shape the issues on which they will be judged and the very standards by which they will be held accountable. There is also a latent contradiction between democratic accountability and the need to govern effectively, which implies subordinating the flow of information to the needs of decision-making and the structure of authority.

The competing logics of executive government and democratic responsibility are a permanent feature of contemporary society. The inconsistent, partial and unsatisfactory results of the process by which they are reconciled are neatly displayed in official responses to terrorism at the dawn of the 21st Century. The Australian government, like its counterparts worldwide, has granted itself greater powers to investigate and prosecute domestic terrorist activities (for example, the *Anti-Terrorism Act 2005* (Cth), which was passed on 6 December 2005). It has done so with the more or less tacit consent of many Australians, who are quite understandably afraid of being injured or killed. But greater security has come at a price, namely the semi-permanent surveillance (and implicit criminalisation) of an increasing proportion of the population, reduced scrutiny of the authorities conducting that surveillance, and a watering-down of legal protections. In addition to undermining civil rights, national security has proved a handy excuse

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for Ministers seeking to shut down unwelcome criticism and extend state authority in areas only tangentially related to combating terrorism.

The information technology revolution has transformed the way citizens and states negotiate the balance between effective administration on the one hand, and the protection of civil and political rights on the other. The explosive growth of global telecommunications networks and the spread of personal computers have multiplied the speed, capacity and variety of ways in which we can record, transmit and use what we know. From new capacities come new practices: governments have always collected information on their citizens, but never in such depth or quantity as the present, and never with such capacity to analyse and act upon it. Citizens, for their part, have always had the means to find out what their governments are doing, but with the Internet and 24-hour cable news they can now be better informed than ever before about events almost anywhere in the world as they take place. These new capacities and new practices have given rise to heightened expectations that governments will become both more effective and more responsible, and we should expect that the contradictions this implies will therefore continue to manifest themselves.

The relationship between states and citizens is not just one of free-flowing exchange or naked power politics. It is, of course, also a question of law. Legal regimes such as freedom of information, public records and privacy are both the product of past struggles to define access to government information, and determine the conditions under which future struggles will take place. Moira Paterson is a legal scholar with a long-standing interest in these questions. In *Freedom of Information and Privacy in Australia* she argues that the factors discussed above, 'changes in public administration, developments in information technology and a new preoccupation with the threat of terrorism' are basic to any understanding of existing 'legal rights and obligations concerning access to government information' (at 1). That is the point of departure for this book, a detailed and thorough contribution exposing the three main statutory regimes covering information held by Australian governments and citizens' access to it.

Freedom of Information and Privacy in Australia is an attempt to capture the fundamental unity and superficial heterogeneity of Australian freedom of information, public records and privacy laws. This is by no means an easy task. On the one hand, the three regimes overlap extensively in theory and in practice, so that the question of how Australian citizens can and do access information held by their governments cannot be answered comprehensively without reference to all three. On the other hand, the instruments which make up each regime have generally not been drafted with broader questions in mind. They are a complex patchwork of Commonwealth and State laws, the products of different political compromises and historical circumstances.

The question of privacy provides a good indication of this complexity. The Commonwealth public sector is subject to the regime in the *Privacy Act 1988* (Cth), which was introduced in response to concerns about 'big brother' government raised when the Hawke government proposed a national identity card (at 20). It seeks to protect citizens by restricting the way in which public agencies process and share personal information. The Act also contains a second

regime applying specifically to the tax system (see, for example, *Privacy Act 1998* (Cth) ss 17, 28), which was introduced at the same time and in response to similar concerns (after abandoning the Australia Card, the federal government introduced tax file numbers as a compromise which would allow it to achieve many of the same purposes). State and Territory public sectors are also subject to broadly similar regimes, enshrined in legislation such as the *Privacy and Personal Information Act 1998* (NSW). Privacy legislation also bears the mark of changes in the scope of public administration, and particularly its relationship with the private sector. Originally, the *Privacy Act 1998* (Cth) did not apply to the private sector. The first steps in this direction were taken in the mid-1990s, when it was amended to include a regime applying only to the credit industry. A general private sector regime was only introduced in 2000, in an attempt to encourage public confidence in e-commerce and to ensure that Australian businesses would not be disadvantaged by overseas legislation preventing cross-border transfers to jurisdictions without privacy protections in place. The 2000 amendments also dealt specifically with health records, and overlap with legislation in NSW, Victoria and the ACT applying to public or private sector organisations holding health records (such as the *Health Records and Information Privacy Act 2002* (NSW)).

Freedom of information laws, for their part, demonstrate the interrelationship between legal regimes and changing norms, and the multiple factors influencing executive responses action in this constantly-shifting arena. Freedom of Information legislation was introduced in most Australian jurisdictions in the 1980s. Paterson notes (at 2) that it followed the introduction of a similar regime in the United States in the late 1960s and renewed judicial activism locally in support of citizens' access to government information. But looking beyond the blackletter history, it is surely significant that these laws first appeared on the statute-books when the effects of the information technology revolution were beginning to be felt beyond their original institutional settings, when the penetration into everyday life of media such as television was increasing dramatically, and in the wake of upheavals in the political landscape of in the 1970s. The 1980s were a time, in other words, when people expected transparency from government, and when the means and institutional interests were emerging to provide it on a large scale. The very existence of the *Freedom of Information Act 1982* (Cth) demonstrates that the executive was responsive to the demands of the electorate and the effects of judicial review. But the competing logic of executive government ensured that this response was by no means simply one of acquiescence. Governments have attempted to mitigate public access to information directly through claims of privilege and, indirectly, by charging applicants for access to documents. Both have been hotly contested in the courts; interestingly enough, in cases to which media organisations were parties.

Paterson's arrangement of her material allows her to emphasise the theoretical ground shared by these three regimes without glossing over the specific differences between them. The book is divided into sections according to process rather than regime or area: the first section of the book provides an overview of

each legislative regime; the second discusses access and amendment rights; the third exemption provisions; and the fourth review procedures. She also simplifies her task by focusing on the Commonwealth, NSW and Victoria, the jurisdictions whose regimes provide models for the other states and territories. Brief summaries of all jurisdictions are provided in an appendix.

Freedom of Information and Privacy in Australia is first and foremost a guide to the law in place in November 2004. It is not a sustained theoretical discussion, although the introduction and overview sections provide critical analysis, syntheses of relevant academic debates and good histories of legislative reforms and the social developments which produced them. A detailed bibliography and footnotes throughout provide leads for further research. It will prove useful to those with a practical interest in the field, or those requiring a single comprehensive point of reference.