

## **Complementary or Conflicting? Benefits and disadvantages to being both an Ombudsman and an FOI Commissioner**

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I am very pleased to have the opportunity to speak on this topic this morning. As we all know, allowing members of the public to access certain information about their government is an essential democratic right. It lets people look behind important decisions, question their foundation and their merit, and in some cases, bring about a change in direction or a change in policy. Some of the most important social, political and economic discussions in Australia and around the world have been started, fuelled and informed by access to information requests. If this right to information is unnecessarily constrained or removed, we must question whether we are living in truly free and democratic societies.

Having said this, it is also important to recognise that this is not, should not and cannot be an unlimited right. There is certain information that should not be freely available. This can include information relating to certain issues of national security, and certain personal and private information. But it is essential that there be a demonstrable overriding public interest against the disclosure of such information in making the decision.

This balancing act has been the subject of extensive international comment for a number of years, with high profile and well-known players, and I will not add to it today. I will say that, from my experience as Ombudsman, governments cannot simply withhold information because it fits neatly into a particular box or category. For example, a number of years ago it was alleged that trolley loads of documents were wheeled through the Cabinet rooms in the Australian state of Queensland in order to ensure the entire contents of each trolley attracted the protection of being cabinet related documents and therefore confidential.

It is ensuring the right balance is achieved that makes having an independent, effective, strong and forward-thinking oversight body so important. Someone has to ensure the system is working as it should, and have the ability to recommend change and report publicly when it is not.

I will be speaking today primarily from my own experience in my home state of New South Wales, as well as touching on other Australian jurisdictions. This will include some history, some information about our 2009 review of the New South Wales Freedom of Information Act, what has happened since that review, and some of the future issues and challenges offices involved in overseeing and promoting access to information will face. Most importantly, I will raise and address some of the arguments for and against including the responsibility for overseeing these systems within an Ombudsman's office.

New South Wales is one of six states and two territories that make up the Australian Federation. Each jurisdiction has its own access to information legislation and supporting system, and there is also Federal access to information legislation. In the last ten years, there have been a number of reviews of the various legislative schemes, each followed by either new legislation or wholesale amendments to existing legislation. In most cases, new oversight

responsibilities have either been provided to an Ombudsman or a new stand-alone body has been created to perform these functions.

Regardless of the model chosen, it is encouraging that each jurisdiction now has some level of independent oversight making sure the system is working as it should. In some, this has been a relatively new development. In others, this role has either been formalised or expanded.

At the Federal level, there is the Office of the Australian Information Commissioner. The current Commissioner is John McMillan, the former Commonwealth Ombudsman. I am sure many of you know John, and he is attending and presenting at this conference.

New South Wales, Queensland, the Northern Territory and soon Victoria, all have stand-alone Information Commissioners. In Western Australia, Tasmania and South Australia, this role is performed by the Ombudsman.

Access to government information in my home state of NSW has a long and occasionally colourful history. The possibility of introducing legislation was first raised in Parliament in 1979. It took a further ten years of Parliamentary back-and-forth for the Freedom of Information Act to come into force.

My office was given a role under the legislation to conduct external reviews of agency decisions on access applications. We also dealt with complaints about process issues that arose out of applications.

When the Act was finally introduced, the then-Deputy Premier commented that:

*This freedom of information legislation will strengthen democracy by helping to provide people with a basis on which government policies and actions can be discussed and debated, as well as allowing the performance of the government to be judged fairly at election time. It will permit a more informed electorate to make rational judgements.*

This language commonly accompanies the introduction of access to information legislation. Unfortunately, the reality does not always live up to the lofty statements of principle. The legislation was amended more than 60 times in twenty years. Exemptions were added, wording was changed, resulting in an unwieldy, confusing and frustrating piece of legislation.

Legislative changes have had a detrimental impact in other jurisdictions as well. In Ireland, for example, Information Commissioner and Ombudsman Emily O'Reilly has spoken about the damage done by 2003 amendments to expand and strengthen certain exemptions, and introducing application fees, internal review fees and even fees for external review by the Ombudsman.

Damaging legislative amendments are only one of the ways in which access to information systems are robbed of their effectiveness. Another, and I am sure this is not unique to New South Wales, is the impact of both government and agency culture and commitment.

Statements of principle and objects provisions are very important, but if they are not applied in practice they mean very little. My office's experience in New South Wales was that everyday, uncontentious matters were generally handled quite well. There were delays in some cases, and in others the exemptions were applied a little too readily. But most were dealt with appropriately.

The real problems arose in relation to what I will call “contentious” applications. These came from advocacy groups, they came from opposition members of Parliament. And of course they came from the media. They also involved information that was potentially damaging or embarrassing to government.

I will give one quick example of how these types of matters ended up with us. Several years ago now, the Department responsible for our roads received a request for a journalist. They were seeking information about average journey times on two major roads, as well as information about the standard of the roads. The journalist was surprised when his request was refused, as he and others had received this information easily in past years.

He requested a review by our office. We were surprised when we made preliminary informal inquiries and discovered the agency had hired an external consultant, at substantial expense, to investigate and respond to us.

Following a detailed investigation we found that, among other things, the agency had a system in place where final decisions on requests from journalists or members Parliament were sent to the relevant Minister’s office for comment and occasionally amendment before being finalised. All to avoid releasing what, in this case at least was fairly innocuous information that was clearly in the public interest.

In Australia in 2008 and 2009, there was a very encouraging trend. Governments for various reasons –including of course political expediency – began to reform access to information systems. There were reviews by independent panels of experts and law reform commissions. In my State of NSW, there was no such announcement, and so I decided to conduct my own review.

This was a substantial piece of work. We commenced 18 separate investigations into a representative sample of government agencies. We requested a great deal of information about their FOI procedures, and reviewed a sample of their determinations. We also released a public discussion paper calling for submissions on every aspect of the system. We received almost 100 submissions from agencies, academics, commentators, journalists, politicians and, of course, members of the public who had used the system. We also conducted a great deal of research, drawing on the experience of other jurisdictions across Australia and around the world. In our final report, we made 88 recommendations for reform.

The consistent element of each set of final recommendations, including my own, was the importance of independent and impartial oversight. There was, however, certainly no single approach recommended or adopted. We recommended that the role sit with the Ombudsman, and that a Statutory Information Commissioner position be given the same standing as a Deputy Ombudsman. A similar approach was taken when the Community Services Commissioner was brought into our office.

I did not make this recommendation lightly, and I certainly was not seeking more work or to simply expand our jurisdiction. I did it because I genuinely believed, and still believe, that my office was the best fit for the role in NSW. Of our 88 recommendations, 85 were accepted in full. Interestingly, the only sticking point and main recommendation the government did not accept was the information commissioner coming into our office.

When our new access to information legislation was debated in Parliament in 2009, the then Opposition leader, now Premier, Barry O'Farrell said:

*... we believe that the office of the Information Commissioner should be located in the office of the NSW Ombudsman. There is no doubt that, as the originator of this reform effort, as the office that has done the hard yards in advancing reform to open government in this State and also because of its experience and knowledge, the office of the Ombudsman should be home to the Information Commissioner.*

A similar commitment was included in the government's election platform. Sadly almost two years later this has not come to pass.

Thankfully, in NSW we were lucky to have a strong appointee to the newly created position. Before becoming Information Commissioner, Deirdre O'Donnell served as the Western Australian Parliamentary Ombudsman and the Australian Telecommunication Industry Ombudsman. Deirdre has worked hard to develop a foundation for her office, and continues to plan for the future, citing keeping pace with technological change as being one of the most important areas of focus for her office. I will come back to this later.

So which model works best? Should responsibility for overseeing access to information be provided to an Ombudsman, or is it best to create a new, dedicated agency to perform this important function?

These are not simple yes/no questions, and I do not believe there is a one-size-fits all solution. There are a number of influencing factors, including the structure of the relevant jurisdiction, the number of existing oversight bodies and, the funding and powers provided to any new agency. I want to touch on some of the arguments in favour of both, and provide some insight gained from our experience.

The first benefit of placing the Information Commissioner within an Ombudsman office is a basic one, but I believe it is the most important. Reputation is the foundation of all oversight bodies. It takes time for the community to trust in your effectiveness. It also takes time for agencies to realise that you are willing to find quick and informal solutions in the public interest, but that if they are resistant or combative, you will move to a formal investigation, and possibly report and comment publicly. A new body has a very real challenge in building this reputation and trust.

There are also some very practical benefits. Support services – including human resources, information technology, accounts, record keeping and so on – are often forgotten in discussions about new small agencies. Yet these are vital to the success of oversight bodies. An established body has these up and running, and if they have managed to maintain their independence, they have control of them. This is far more difficult for a smaller, newer body, particularly in tight financial times. Reliance on other established government agencies for these services creates a perception of dependence and as a result, a lack of independence.

As I mentioned earlier, my office had a long history with access to information. In conducting reviews and dealing with complaints, we developed a very good understanding of what worked and what didn't. We also understood the way in which various agencies worked. Some were very cautious in their approach to releasing information, some took a great deal of time to process applications. And some (sadly not that many) had very good systems in place and released information quickly and appropriately.

One reason why we developed this strong understanding was that we did not deal with access to information matters in a vacuum. We dealt with these agencies on a range of other issues. The NSW Police Force is a good example. We not only dealt with FOI reviews and complaints. We also oversee the handling of all serious complaints about police. We had contact with police through our community services work, our employment related child protection work and our work with Aboriginal communities. This depth of work informed our understanding of how the agencies operate, and this was invaluable when assessing how they respond to access to information requests.

Our twenty years experience also showed us there were very few matters that were just about access to information. Quite often, when we began to look into the decision making around an access application, we uncovered evidence of a broader administrative failing. We could then use our coercive powers, and draw on the investigative experience of our staff and our office, to look into the matter more thoroughly.

Understandably, a single-issue, single-function body has neither the capacity nor the mandate to do this effectively, and has to be alive to circumstances where it is more appropriate to refer a complaint, or an aspect of a complaint, to another integrity body. The New South Wales legislation provides for this, and my office has entered into an agreement with the Information Commissioner to allow for the quick and easy transfer of both individual matters and information that may be of use to the other body. We have not to date received a great deal of information or referrals.

When the various pieces of access to information legislation were introduced, reformed or replaced, the allocation of responsibility under each varied. In some jurisdictions, the Ombudsman is responsible for both oversight and review, in others the Information Commissioner is the sole oversight and accountability body. In others, they share responsibilities. In most if not all jurisdictions, Tribunals and Courts also have a part to play. It is important that there are adequate and appropriate avenues for complaint and review, but we have to be mindful of the risk posed by an overly crowded and confusing landscape. This can mean that matters are lost in the shuffle and that those seeking a review are frustrated by being shunted from one body to another. Some may give up, others may not even know where to start.

If a decision is made to provide a body with oversight, complaint handling and review roles, in my view they should, as much as possible, be the only body responsible. As I discussed earlier, it is however important they can refer matters or particular parts of a matter to other appropriate bodies for consideration.

So far, I have only addressed the advantages of providing an Ombudsman with this role and the challenges for a new body. While in NSW I strongly believe this was the preferable model, this may not be true of all jurisdictions. I don't want to just present one side of the argument, and there are good and appropriate reasons that support establishing a new separate body.

The first is symbolism. This cannot be discounted, as it can have an important impact on the culture within the public sector. A clear statement from government that it takes access to information seriously, and is willing to establish a body with the requisite powers, independence and funding can have a positive impact on the approach taken by agencies and their staff.

Some have also argued that a new body can demonstrate a break from the past, that new legislation needs a new champion.

Others suggest that Ombudsman should not be given too many responsibilities, and that having a single-issue body can provide greater expertise and specialisation among its staff.

I have often felt that having multiple bodies communicating the same or similar messages around ethics, openness and accountability can create confusion. This has been put to me from a different perspective. If a clear, consistent message is coming from different independent bodies at different times and in different contexts, there is more chance of it getting through.

And finally, certainly in Australia, there is a trend to house a Privacy Commissioner or function within or alongside the Information Commissioner. Some believe a Privacy Commissioner performs a necessary advocacy role, and that this does not sit well with an Ombudsman.

I have to confess I am not completely swayed by any of these arguments. I still feel that, as was the case in NSW, if there is an existing oversight body that can perform a function already working effectively with the public sector and with an established reputation, and they are funded appropriately, it seems problematic, particularly in a time of financial strain, to start from scratch and create a new untested agency.

As a number of sessions at this conference have and will show, adequate funding is a difficulty for all oversight bodies, and is equally challenging for information commissioners. In Australia, John McMillan recently told a Parliamentary Budget Estimate Committee hearing that he did *'not have adequate resources to discharge all the functions, as required by the Act, in an efficient way.'*

In any event, whether the functions reside with an Ombudsman or a separate independent agency – currently the same questions arise. Where do we go from here? What future challenges will access to information oversight bodies face? Technological advances have dramatically and permanently changed the way in which governments and communities communicate. It is no longer a one-way conversation, and people will not wait 14 working days for a response. This is particularly true of access to information.

Expectations have changed, with people wanting and in many cases demanding access to information quickly and easily. Once they have it, they expect it to be easily searchable and reusable. This has largely been driven by changes to private sector service provision. Communities do not see any reason why there should be a difference between their interaction with a government Department providing them with essential services and their bank or telecommunications provider.

There is an increasing demand for government to make more information available in a broad range of areas, and for this information to be easily re-usable. Information is no longer merely used to hold government to account and to look behind a decision. It is being used by communities to make informed choices. Government are attempting to meet this demand, with more and more information being made available.

For example, the My School website was established in Australia several years ago. It was initially built around the results of a national program to assess literacy and numeracy. There was a great deal of debate around its creation, with some teachers and principals claiming that releasing what they saw as comparative tables would disadvantage certain schools. The Government pressed on with the site, and it now provides communities with a broad range of information about their child's school. They can see where the school's funding comes from. They can see what it is spent on. They can see how the school compares to schools of similar size. Put simply, they can look at information, and use that information to make a more informed choice about their child's education.

Raw data from government is being used to build apps on public transport, weather, land use, population distribution to name just a few. In some instances, it is helping to make individuals a healthy profit. In other cases, it is changing the face of very important areas such as scientific research.

While these advances have certainly changed the face of access to information, they will not mean that access to information applications stop. There will still be information that government does not want released. This may be for legitimate reasons, or it may be to avoid adverse public discussion and embarrassment. This may ultimately mean more and more of the applications that end up with an oversight body will be for what I referred to earlier as contentious information.

Technological changes also bring with them a range of new challenges in addition to changing demands and expectations. Information is no longer stored on paper; emails and other electronic messaging are the norm. The way we communicate, and particularly the speed with which information is made available, can create problems, including release of the wrong information and effective recordkeeping.

In conclusion, I do not think there is one model preferable to the other. Both Ombudsman with an access to information role and stand-alone Information Commissioner can work successfully and contribute positively to the public interest. What is likely to be the most important factor is the political context in which they work and political will to support them. Without a positive context and support, neither body will succeed.

The most important thing is that when a separate body is established, we work together with a shared commitment to the principles that underpin both organisations – openness, accountability and transparency.