

## IS THE PRINCIPLE OF FREEDOM OF INFORMATION COMPATIBLE WITH THE PRINCIPLE OF MINIMUM SIZE OF GOVERNMENT”?

### Comment on “NBN Co Blocks FOI Request: Reputations at Stake”<sup>1</sup>

The article cited above, written by Ben Butler and Lucy Battersby, focused on the refusal of the freedom-of-information officer of NBN Co<sup>2</sup>, David Mesman, to allow Fairfax Media access to the minutes of the meeting of the board of directors in September 2013 on the grounds that “if NBN Co were to publish the director’s attendance, it could also damage a given director’s personal reputation and ability to sit on other boards.” Not surprisingly freedom-of-information expert Peter Timmins reported to *The Sydney Morning Herald* that NBN Co’s claim was “speculative, ridiculous and without foundation” (refer to the article cited above).

Some allowance should perhaps be given for the fact that the September board meeting was convened with members of the previous board, which was appointed by the Labor government. The new executive director was not appointed until 3 October and three of the five non-executive directors, currently sitting, did not appear until 11 December.<sup>3</sup> An announcement was made on 23 September<sup>4</sup> that the entire previous board resigned, but the resignations were not accepted by the minister as at that date. If the September board meeting occurred on or near that point in time, we should not be surprised if some of those board members who were present placed in the minutes a few uncomplimentary remarks about the new minister. Hence, it would seem likely that the members who attended the meeting would be more concerned than those who were absent, about releasing the minutes to the public.

We cannot determine if that is true, and perhaps it is better that way. The greater concern is not why the minutes of the last meeting of the previous board are being withheld. Rather, the concern is, or should be, the possibility that the principle of freedom of information is capable of being squeezed through various loopholes (and perhaps also keyholes). If so, it will have lasting effects unless something is done to change that capability.

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<sup>1</sup> Ben Butler and Lucy Battersby, *The Sydney Morning Herald*, 17 February 2013. Available at: <http://www.smh.com.au/business/nbn-co-blocks-foi-request-reputations-at-stake-20140216-32ttz.html>.

<sup>2</sup> NBN is the National Broadband Network is the government business enterprise that is building a high-speed national broadband network for Australia.

<sup>3</sup> Refer to the NBN Internet site at: <http://www.nbnco.com.au/about-us/our-people/board.html>. Note that the panel at the top states: “This website is currently under review, pending the introduction of new government policy. Some content may not be current. You should not rely solely on this information.” That of course is not surprising, but it nevertheless suggests that little information pertaining to the previous board is likely to remain online.

<sup>4</sup> Adele Ferguson and Eric Johnston, “Entire NBN Board Resigns”, *The Sydney Morning Herald*, 23 September 2013. Available at: <http://www.smh.com.au/business/entire-nbn-board-resigns-20130922-2u835.html>.

The text of the Freedom of Information Act of 1982 is available online from: [http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/consol\\_act/foia1982222](http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/consol_act/foia1982222). Reference will be made later in this comment to Part IV of the Act, which states a surprisingly large number of “Public Interest Conditional Exemptions”. Before that, however, it is appropriate to examine the purpose of FOI Act, as stated in the “Guide to the Freedom of Information Act 1982:”<sup>5</sup>

The declared object of the Act is to promote Australia’s representative democracy by increasing public participation in government processes and increasing scrutiny, discussion, comment and review of government actions. Information held by Government, as the Act further declares, is a national resource that should be managed for public purposes.

The ideology of the present coalition government puts considerable emphasis on *maximum freedom and minimum government*. Freedom of information is presumably one of the freedoms that is to be maximised and this is consistent with the declared objective of the Act. We need an informed civil society if we are to rely on it to preserve representative democracy; and FOI is needed in order that civil society can be kept informed.

The contribution of the FOI Act in achieving this information requirement is limited by eight categories of *exemptions*. They are as follows:

*47B Public interest conditional exemptions—Commonwealth-State relations etc.* This could include information sent to NBN Co in confidence by an authority of a state government in Australia.

*47C Public interest conditional exemptions—deliberative processes.* Not surprisingly, there are exceptions to these exemptions. For example, deliberations on factual information or on operational matters cannot be exempted, but long and careful consideration of what is planned or contemplated may be kept from the public’s view. This is possible despite the fact that public input into what is being considered should comprise a more valuable “natural resource” than public input into something that has already been constructed.

*47D Public interest conditional exemptions—financial or property interests of the Commonwealth or Norfolk Island.* In the case of NBN Co, this would presumably apply to a substantial loss in the asset value of the broadband network, but how can such a determination be made before the network is completed? It is, after all, the integrity of the *entire network*, not of the individual components, that creates most of its value.

*47E Public interest conditional exemptions—certain operations of agencies.* Disclosures under the FOI Act cannot have a substantial adverse effect on the management of personnel or a similar effect on the proper and efficient conduct of operations of an agency.

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<sup>5</sup> This is dated November 2011 and it is much easier for non-legal people to follow than is the text of the act. It is available at: [http://www.oaic.gov.au/images/documents/migrated/oaic/repository/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.pdf](http://www.oaic.gov.au/images/documents/migrated/oaic/repository/publications/agency_resources/guide_freedom_of_information_act_1982.pdf).

*47F Public interest conditional exemptions—personal privacy.* This includes persons living or deceased. While conditions are specified for disclosures to “qualified person”, as defined in the Act, there seems to be little in the way of defining those aspects of personal privacy that are to be protected.

*47G Public interest conditional exemptions—business.* These conditions are similar to commercial-in-confidence classification for documents and other forms of information that may be withheld from the public in order to avoid a breach of good faith under which information is supplied to a government agency. However, it also includes the prohibition of disclosures that “could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.” This suggests that the test for a possible “breach of good faith” can be made before any information is supplied.

*47H Public interest conditional exemptions—research.* Disclosure may be disallowed for research in progress if disclosure before completion “would be likely unreasonably to expose the agency or officer to disadvantage.”

*47J<sup>6</sup> Public interest conditional exemptions—the economy.* The exemption from disclosure in this case arises from undue benefit or detriment of “inside information” that is sufficient to have an adverse effect on a particular sector of the economy or on the economy of a particular region in Australia. The possible forms of “inside information” include, but are not limited to:

- currency or exchange rates,
- interest rates,
- taxes, including duties of customs or of excise,
- the regulation or supervision of banking, insurance and other financial institutions,
- proposals for expenditure,
- foreign investment in Australia,
- borrowings by the Commonwealth, Norfolk Island a State or an authority of the Commonwealth, or Norfolk Island or of a State, and
- access at that time would, on balance, be contrary to the public interest.

Nothing in the Act suggests that offending portions of documents may be redacted, and the remaining portion disclosed. Rather, it appears that all that is necessary to refuse disclosure of an entire document is to find one example of any of above items. Though one would hope that it is never considered, it appears possible, under the Act, to create a set-up in which, for example, research is commissioned and reported on at each meeting of the Board of Directors, but not completed until the assets are sold. Under that scenario, no minutes would ever be disclosed.

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<sup>6</sup> Note that nothing in the Act is placed between 47H and 47J, presumably out of concern that 47I would be interpreted as the number four hundred and seventy one.

In such a case, and again we hope it never occurs, not only is information *non-free* from the public's perspective, but it could also be considered *non-existent*. The point of this being: freedom of information requires a proactive civil society to make frequent and perhaps almost continuous requests for information. If civil society succeeds, then that success is likely to generate an increasingly larger size of government in order for the agencies of the government to retain control of the information they collect and compile for their respective ministers. This follows from the fact that ministers swear an oath "to serve the people of Australia,"<sup>7</sup> while public servants are specifically instructed to serve their ministers. We might hope that the public will benefit eventually, but with an increasingly larger number of rejections of FOI, this become more and more doubtful. It also seems to run against the intent of an Australian law. And that makes it worrying.

A simple explanation is worth considering, even if it is somewhat over-simple. People who are appointed by governments to boards of directors, advisory panels or to some other form of co-opted personnel are likely to consider themselves to be experts by virtue of their respective appointments. Any input from civil society, in comparison, is sub-expert and therefore should be discouraged. What then, is the purpose of FOI acts? Do they merely provide a façade for "increasing public participation in government processes and increasing scrutiny, discussion, comment and review of government actions." No, they provide an opportunity to prevent the self-appointed experts from always winning.

But that opportunity must be grasped by us. We obviously cannot expect the self-appointed experts to do that for us. Complete freedom of information is not possible – some of the exemptions listed above deserve to be exemptions. Similarly, the smallest form of government is more easily effected with a dictatorship<sup>8</sup> and none of us want that. We must seek something between the extremes and there may always be a trade-off between FOI and the size of government. The task should be to manage the trade-off, rather than pretend that it does not exist.

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<sup>7</sup> The Oath of Office (2013) is:

"I, [Minister's full name], do swear that I will well and truly serve the people of Australia in the office of [position] and that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Australia. So help me God!"

From "Oaths and Affirmations Made by the Executive and Members of Federal Parliament since 1901".

Available at:

[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1314/OathsAffirmations#\\_Toc358025341](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/OathsAffirmations#_Toc358025341).

<sup>8</sup> This follows from the fact that one person makes all the political decisions, but in practice most dictators desire (or perhaps need) to surround themselves with a large entourage, so the size of government then depends upon the dictator's ego.