

In October 1980, the publishers of a book entitled 'Documents on Australian Defence and Foreign Policy 1968-1975' made plans with newspapers, The Sydney Morning Herald and The Age, to publish a series of extracts from their book. These extracts, to be released in three instalments on 8, 10 and 11 November, included unpublished documents on the A.N.Z.U.S. Treaty, Australian and Indonesian relations regarding East-Timor and correspondence between the Prime Ministers of Australia and New Zealand.

The Commonwealth, believing these extracts posed a threat to national security and foreign relations, applied for an injunction to block their publication. The injunction was granted at 12:45am on 8 October, but not before 60 000 copies of The Age instalment were released.

A legal case ensued between The Commonwealth and Fairfax Media. It was claimed that because the documents were not released by the Government, Fairfax would be violating copyright law by publishing them. Fairfax argued the extracts were critical of the Government and should be considered news, pushing for a defence of fair dealing. The Commonwealth won, the injunction remained, and the book was not published.

What one may see as another blow to the free media in the everlasting battle between journalists and their governments, was actually indicative of Australia's eagerness for freedom of information (FOI).

Judge Anthony Mason, when ruling in favour of the Commonwealth, was clear in his contempt for secretive governments.

"It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action," he said.

He added that the privacy of governments should be looked at “through different spectacles” to that of its citizens. Primarily, because governments are bound to the public interest.

It was these sentiments held by Judge Mason and a growing number of Australians that led the country to adopt the Freedom of Information Act 1982 two years later.

The Act granted a general right of access to information held by the Government with a few exceptions in the name of public interests.

Later, in 2010, the Act was amended to define its objective as “increasing scrutiny, discussion, comment and review of Government activities”. It added that information held by the Government was a “national resource”.

It presupposes a large role for the media in analysing and disseminating this information to the public. A role appreciated by journalists.

The MEAA, Australia’s largest media union, outlines FOI as “a key tenet of a healthy, functioning democracy” and cements it as “a cornerstone principle of journalism”.

Despite the legislation and processes of FOI now being firmly established, and the media’s role in fulfilling its objectives well understood by most, it is a remarkably underutilised tool for the press. The reason for which has become increasingly evident.

In September, the Office of the Victorian Information Commissioner (OVIC) launched an investigation into the timeliness of FOI requests. It noted, in 2018-19, 18 per cent of decisions to requests were made outside the statutory time frame, meaning many of these documents

were rendered irrelevant by the time of their release. It's one issue, among many, faced by the rest of Australia too.

In its investigation of Australia's FOI regime, the Guardian attributed this decline to the Abbott Governments gutting of the Office of the Australian Information Commissioner (OAIC). The department was left with two-thirds of the 100 staff minimum needed to properly carry out its tasks.

In 2017-18, FOI refusals were at their highest at 17 per cent, and requests being granted were at their lowest at 50 per cent. These numbers are likely to be even higher this year, partly due to the COVID-19 pandemic.

Lawyer and FOI expert, Peter Timmins told the Guardian a thorough evaluation of Australia's FOI laws and practices was needed to make them "fit for the 21st century".

A report released by the Australian Legal Information Institute (AustLII) highlights the relationship between Australian journalists and the FOI regime in 2003.

"A common criticism among journalists interviewed is that, while the existence of the FOI regime is important, the obstacles they face in the Act to access documents means its practical value as an investigative tool is minimal if existent at all," it said.

Some journalists even told AustLII they believed "agencies use time delays to discourage use of the FOI process". A suspicion confirmed by an anonymous OAIC insider who told the Guardian, "a lot of the tactics are really just to delay the release, particularly until the heat is gone out of something".

Although some areas of journalism require the use of FOI regularly – like political, defence and health reporting – the AustLII report

concluded most “journalists and editors remain hesitant to make regular use of FOI”.

This spike in refusals to release Government information is not necessarily an example of wrongdoing on the Government’s part. Although, some tactics and actions reek of bad faith.

The OAI stipulates that if releasing certain information is “against the public interest” the Government has the right to refuse its release.

In understanding this, it becomes clear that the problems of Australia’s FOI regime are far greater than its timeliness or refusals.

The FOI dilemma lies in the conflict between Governments and the media. A battle that has raged since the dawn of western democracy.

In an attempt to execute its fourth estate role as representative of the people, the media will invariably clash with the Governments duty to govern. A conflict of public interest.

Any democratic government should concede that being held to account by the media is what makes it democratic. It seems that many in today’s Parliament find the short-term gains of secrecy far greater than the long-term gains of openness.

Judge Mason’s upholding of “public discussion and criticism” is far more popular than what it once was, but its implementation still falls prey to the same-old battle he presided over in 1980.

Bibliography

- Australian Legal Information Institute. 2020. *The Use By Journalists Of The Australian Freedom Of Information Regime*. [online] Available at: <<http://www.austlii.edu.au/au/journals/FoIRw/2003/3.pdf>> [Accessed 21 October 2020].
- Knaus, C., 2020. *How A Flawed Freedom-Of-Information Regime Keeps Australians In The Dark*. [online] the Guardian. Available at: <<https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>> [Accessed 16 October 2020].
- Legislation.gov.au. 2020. *Freedom Of Information Act 1982*. [online] Available at: <<https://www.legislation.gov.au/Details/C2020C00246>> [Accessed 21 October 2020].
- Mason, J., 2020. *THE COMMONWEALTH OF AUSTRALIA V. JOHN FAIRFAX & SONS LTD.*. [online] Available at: <<https://jade.io/article/66877>> [Accessed 21 October 2020].
- MEAA. 2020. *The Public's Right To Know*. [online] Available at: <<https://www.meaa.org/news/the-publics-right-to-know/>> [Accessed 21 October 2020].
- OAIC. 2020. *Freedom Of Information*. [online] Available at: <<https://www.oaic.gov.au/freedom-of-information/>> [Accessed 21 October 2020].
- Office of the Victorian Information Commissioner. 2020. *Information Commissioner Launches Investigation Into The Timeliness Of Freedom Of Information In Victoria - Office Of The Victorian Information Commissioner*. [online] Available at: <<https://ovic.vic.gov.au/mediarelease/information-commissioner-launches-investigation-into-the-timeliness-of-freedom-of-information-in-victoria/>> [Accessed 21 October 2020].

- Stewart, D., 2020. *Assessing Access To Information In Australia*. [online] Available at: <<http://press-files.anu.edu.au/downloads/press/p314521/pdf/4.-Assessing-Access-to-Information-in-Australia.pdf>> [Accessed 21 October 2020].