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Transparency?

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The rationale for introducing freedom of information (FOI) legislation in both Australia and the United States was to provide the public with the means of accessing government documents. Accountability and transparency are considered to be key features of a democratic state. However, years of attempting to obtain documents both in Australia and the U.S. have led me to believe that the system largely serves to provide only the appearance of transparency. Rather than providing access to information, ironically, the FOI system contributed to the cover-up of crimes against humanity, such as torture.

I started the FOI process around ten years ago, when I attempted to obtain documents relating to the torture of Australian citizens in Guantanamo Bay. After a series of back and forth with U.S. and Australian agencies that spanned approximately six months, I was forced to narrow my requests down to specific time limits, which inevitably meant that much of the information I was seeking would be left out of the request. The reason given by the Department of Prime Minister and Cabinet in Australia was that the scope of the request would result in what they deemed a “practical refusal.”

That is, under the Australian FOI Act, a government department is able to refuse to search for documents if they believe it would unreasonably divert resources from the department.¹ This clause is used frequently in order to prevent specific information from being subject to the Act in Australia.

Once the request has been narrowed, my experience is that the process is drawn out for months, and sometimes even years. For example, I am currently in a battle for torture-related document requests I submitted to the Department of Prime Minister and Cabinet in 2012-2013. The common excuse provided by the Department is that it is seeking to consult with third parties – namely the U.S. government and those former officials who are quoted or to whom the request pertains. It became clear to me that the requests involving the Australian government's knowledge and acquiescence in the extraordinary rendition program were being stalled due to officials within the former administration under Prime Minister John Howard (1996–2007) being “consulted” for their input into the relevant documents, and redactions. This provides not only the means for governments to stall the release of documents for years, but it also allows those who may have been involved in illegal or immoral activities to redact documents that may cause them embarrassment. In the end, after waiting for years, the documents relating to rendition were either exempt from release on “national security” grounds or so heavily redacted as to be useless.

Refusing to release documents on national security grounds is a significant issue and my experience is that this clause of the FOI Act is overused and interpreted broadly so that information is kept from the public. The close relationship between the U.S. and Australia is used excessively by the Australian government to prevent the release of documents. In many cases, the Australian government has argued it would affect international relations or cause damage to the relationship with the U.S. government, despite the strengthening of the inter-government relationship since 2001, and the expansion of military and intelligence ties. This was the main argument used by the government in relation to documents I requested from the Department of Defence that sought information about the training of Australian Special Air Service (SAS) forces in interrogation techniques by JSOC (Joint Special Operations Command), a U.S.-based SAS squadron involved in torture and extrajudicial assassination. Not only did Australian government officials use the national security defence, they also argued that they could not even confirm or deny the very existence of documents sought. In this case, which I eventually took to the Administrative Appeals Tribunal, the government basically argued that even if the documents existed, they would be exempt on national security grounds. During the hearing, the government's witness was able to provide secret evidence to the tribunal that I was unable to hear, and therefore unable to argue against. There were even secret affidavits submitted.²

Despite many of the same difficulties, the situation in the U.S. has proven to be different and, in some cases, slightly better. It has been easier for me to obtain documents from the U.S. government and its agencies than the Australian Government. Whilst the documents I have obtained from the U.S. government have been heavily redacted, the only agency to provide me with a Glomar response (where an agency will not confirm or deny the existence of documents) was the Central Intelligence Agency (CIA).³ The U.S. system has more scope for appeal given that it takes place in the court system. Clearly there are significant flaws in the U.S. system given the heavy redactions in most of the documents I requested, and the appeals process being very long and drawn out. Overall, however, I received more material from the U.S. Department of Defense, U.S. State Department, U.S. Department of Justice, Federal Bureau of Investigation (FBI), and CIA than I did from all Australian departments combined.

In effect, my experience of the FOI in both countries is that for sensitive topics, the system serves to justify secrecy while promising transparency, thereby protecting those involved in morally dubious activities.

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- 1 See Office of the Australian Information Commissioner's *FOI Guidelines*, "Part 3 — Processing and Deciding on Requests for Access," <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-3-processing-requests-for-access>
- 2 Administrative Appeals Tribunal, <http://www.aat.gov.au/about-the-aat/access-to-information/freedom-of-information>
- 3 A Glomar response or Glomarization occurs when federal agencies (or courts) neither confirm nor deny the existence of records. For cases and history, see the U.S Department of Justice *Guide to the Freedom of Information Act*, Exemption 1 (2013) at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption1.pdf> and Reporters Committee for Freedom of the Press, "F. Agency's Refusal to Confirm or Deny Existence of Records," <https://www.rcfp.org/federal-foia-appeals-guide/exemption-1/ii-appealing-agency%E2%80%99s-withholding-records-substantive-grou-10>