

TRANSCRIPT

**Radio interview: Mr Justin Davidson, Australian Government Solicitor's Office;
Mr Mark Hummerston, Assistant Privacy Commissioner;
Mr Peter Maywald, Secretary to Government
Radio Norfolk – George Smith
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GEORGE SMITH: Mark Hummerston was appointed Assistant Privacy Commissioner in 2006. He has primary responsibility for overseeing the compliance activities in that office. He has experience in corporate management, including human resources, finance, information technology, communications and legal services. He has an MBA from the Southern Cross University.

Justin Davidson joined the A-G's Information Access Team in the Canberra Office litigation group in 2003. He worked within a litigation team in the Department of Finance and Administration and as a lawyer in the Information Access Team, Justin regularly provides written and verbal advice on the *Freedom of Information Act 1982*, the *Privacy Act 1988* and the *Archives Act 1983* and secrecy provision issues, as well as representing a range of Commonwealth and ACT agencies in Administrative Appeals Tribunal and Federal Court litigation matters.

With that, I would like to introduce and welcome the two of you into the studio this morning, and also our Secretary to Government, Peter Maywald. We're here to talk about the freedom of information stuff. Norfolk Island probably isn't overly familiar with freedom of information, because information is fairly free here anyway, being a small community. What is FOI or freedom of information all about? Could one of you pick up on that question for us please?

JUSTIN DAVIDSON: Freedom of information is about making sure there is a mechanism in place for people to access information about what the government is doing. So fundamentally it is about improving the operation of representative democracy. In the Commonwealth, just like here in Norfolk Island we've got a parliament. Parliament is elected to represent the people and make decisions in the best interests of the community. The Freedom of Information Act is the mechanism that makes sure that we've got a way to get hold of information about what decision making practices are going on and what direction the government is going to be taking us.

GEORGE SMITH: Does that mean that we can get hold of any information?

JUSTIN DAVIDSON: In theory, that's the starting point, yes. Absolutely anybody can ask for absolutely anything. That's the fundamental premise of FOI. There are some exceptions to the things that you can get hold of, but the starting point

is – you don't need to prove any special interest or reason for seeking access - all you have to do is say is "I'd like this please".

GEORGE SMITH: And that's usually forthcoming?

JUSTIN DAVIDSON: Look, generally it is. The FOI Act sets out exhaustively the circumstances in which a government is allowed to say no. So, what it really does is it takes away some of the discretion to just refuse access on the basis that we don't really feel like handing it out and prescribes certain circumstances, such as where disclosure would interfere with law enforcement activities, or where disclosure would breach someone's privacy or interfere with someone's business affairs as being some of the only circumstances in which that information can be refused.

GEORGE SMITH: The information that people usually go for – is it usually about governments?

JUSTIN DAVIDSON: Yes, it's information in the possession of government. But, government's in possession of a lot of information, and a lot of information about individuals. The Commonwealth experience is that about 85% of requests are people seeking access to information about themselves. So a typical scenario might be – someone applies for a pension, the decision-maker knocks them back and they want to understand why it is that they were refused. And so they use FOI as a way of gathering information about the decision-making process. That's a classic FOI application.

GEORGE SMITH: So if it's about something personal for yourself, generally you should be able to get that information – unless as you said it interferes with some law-making things...?

JUSTIN DAVIDSON: If you're seeking access to information about yourself, usually you get it.

GEORGE SMITH: Is there a time limit? I'm only taking this from cheap television, and they will say that "under the FOI Act we can now reveal that in 1965 some politician did X...". What's that all about?

JUSTIN DAVIDSON: In the Commonwealth sphere, documents will be subject to the FOI Act if they're less than 30 years old, but any document created in the last 30 years is potentially releaseable under FOI. So if I make an FOI request, the government has 30 days to make a decision on whether to hand that material over. In the Commonwealth, if a record is more than 30 years, then it falls under a different regime, which is called the Archives Act. Generally it's a bit of a freer regime, so it's easier to get information under the Archives Act because if it's more than 30 years old, it's typically less sensitive.

GEORGE SMITH: Okay – and is there any further time like 50 years, where some things cannot be released, say in somebody's lifetime, so if you go back that far does it get easier then under the Archives Act?

JUSTIN DAVIDSON: The only records that are kept really locked up tightly in the Commonwealth are Cabinet records – Cabinet notebooks, so records of the actual deliberations of the Prime Minister and his or her Cabinet – they're locked up for 50 years, but after 50 years, even they are available. Information about individuals – usually the individual will be consulted before information about them is released. Obviously, if the individual has passed away that becomes more difficult, but even then their family might be consulted. Apart from Cabinet notebooks, information is generally up for grabs, subject to those exemptions.

GEORGE SMITH: And if somebody from here – if people want to access any of this information, how do they go about it? Do they see you guys? Or is there somebody else here? Is there an agency that they can talk to first?

JUSTIN DAVIDSON: Well at the moment, it's only Commonwealth agencies on the mainland which are subject to the FOI Act. The thing that we are here doing is promoting awareness of the FOI Act as something that might be extended to the Norfolk Island Administration. So let's assume we're just talking about this current situation – what you do is you write a letter to the Commonwealth agency which has the documents or that you think has the documents that you are interested in and you just say I would like access to – dot, dot, dot – fill in the blanks – and then it's up to that agency to go ahead and find the documents and give you a decision. If you're not happy with how that process is going, there are bodies around that can assist you. At the moment, the Commonwealth Ombudsman can assist, and in the future the Commonwealth is reforming the FOI Act to introduce a statutory officer called the FOI Commissioner, very much like the Privacy Commissioner, and the FOI Commissioner will have a role in giving people assistance to make their FOI requests.

PETER MAYWALD: If I could just add to that George, while there is no statute in Norfolk Island at the moment, if you want Norfolk Island Government information you make application to either the CEO of the Administration or the Minister. If you were not satisfied with the decision you could take that to the complaints system – there is an administrative complaints system – so you can take any administrative decision or action to that system. So, if I asked for all the records about previous Chief Ministers and I was not happy with the answer I could take that to the administrative complaints system. And what people will hear next week, when the Ombudsman comes here, the Ombudsman will ultimately become the backup to that system. So, if you were not happy with the decision on island, you could take that to the Commonwealth Ombudsman. That requires some fairly minor legislative change by the Commonwealth. That's likely to be explained next week when the Ombudsman's representative is here.

GEORGE SMITH: Okay. Mark, what's your role in this?

MARK HUMMERSTON: Well, one of the things that's also being looked at is the extension of the Commonwealth Privacy Act to Norfolk Island. I guess, at its simplest, the Privacy Act is based on two simple elements. Firstly that people are and ought to be entitled to control information about themselves, so that a person ought to be able to have a reasonable degree of say in where information about themselves goes, and be consulted when that information is being disclosed by agencies to other agencies. And I guess the second principle is that in order to assist people exercise that control, the Privacy Act says that there ought to be a set of rules that apply to government agencies and apply to the private sector in how they must handle personal information of individuals. So with those two streams working together – firstly that an individual should have control and secondly there should be sets of rules that government agencies and organisations should adhere to – the purpose is to ensure that people can be certain that personal information about themselves is being dealt with in such a way that it is protected. Particularly in this day of technological development where you can go onto the Internet and Google your own name and find all sorts of things that you never knew existed, with the ability of technology to gather that sort of information, and for anyone to gather it, then we need to have systems in place that give the individual back some control about their personal information – their name, their address, their date of birth, their credit card numbers, their bank account numbers, their health status - all those things that people want to hold to themselves as personal and whom they want to decide who should know about it. The Privacy Act is about ensuring that that control remains with the individual as far as possible.

GEORGE SMITH: So if Justin did a Google search and found some information about himself that he didn't want there, he can come to you or your branch, and you can look into it? Is there anything you can do about it?

MARK HUMMERSTON: In those circumstances, let's assume that Justin does a Google search and finds a website that contains information about him that he's not happy for them to hold and he makes a complaint to the Privacy Commission, we would then contact the organisation and ask them how it was that they obtained that information, whether they obtained it legally and then if we were satisfied that they had legally obtained it, how they were holding it, how they were using and in fact if Justin was unhappy with that he would be able to ask either directly or through us for that information to be removed. So there's a regime in place designed to help – a regime that doesn't always work absolutely all the time, because currently the Privacy Act is limited to Commonwealth jurisdiction, so if it was an overseas organisation it's much more difficult. But for organisations that operate in Australia, they need to comply with Australian law. So we do about 1200 investigations a year and in the majority of those cases they are resolved to the individual's satisfaction.

GEORGE SMITH: That's very good. Is that getting harder, with the technology that's around?

MARK HUMMERSTON: There's no easy answer to that. We are fortunate that the Privacy Act was designed to be technology neutral, so it doesn't have specific provisions that relate to specific technologies, which means that we've got a set of rules that have broad applicability, so even though technology has advanced significantly – the Privacy Act was basically written before mobile phones, before camera phones and the Internet was in its infancy – 20 years later we think the Privacy Act still works pretty well. Technology is certainly providing some challenges and there has been a recent review of the Privacy Act and there are a series of recommendations before the Commonwealth Government presently about tightening up some of the process and that will include a recommendation that the Privacy Commissioner should have the power to develop codes of conduct that might apply to specific technologies that are yet to be invented. So that's trying to move the Privacy Act forward to cover what we don't know but might possibly happen in the future.

GEORGE SMITH: I take it that Norfolk Island doesn't have that at the moment – the Privacy Act doesn't extend to the Island?

MARK HUMMERSTON: It extends to some of the private sector on Norfolk Island, but not all of the private sector and it doesn't currently cover Norfolk Island Government Administration. The proposal – and this is obviously a decision for government and not a decision for the Privacy Commissioner – but if the Act's coverage is extended it would then cover Norfolk Island Government and Administration. It would mean that there's a single set a rules that people can rely on to help them protect their own privacy whether they are dealing with the government or private sector.

GEORGE SMITH: Thank you for those answers. With FOI, Justin, you said before that somebody just needs to write to a particular department, but we're not always engaged with the mainland agencies as much as you might be living in a state or a territory – so if there's somebody in the community who wants to find out something but who should I write to or what should I write...?

JUSTIN DAVIDSON: The FOI Act is designed to be user-friendly, and one of the ways it does that is that it places a positive obligation on Commonwealth agencies to assist with the making of a proper FOI request. So, there's two answers to that question. The first is that the Department of Prime Minister and Cabinet has responsibility for FOI and if people are on the Internet they can go to that website and get more information at www.pmc.gov.au. The other answer to that question is – if you're not quite sure who to send the letter to – just take a punt, pick any agency that you think might be close like the Attorney-General's Department and say "...I'd like to request some information please, this is what I want, I'm sorry if I've picked the wrong agency, but if I have I know that you will

transfer it across to the right one for me” and agencies do do that all the time. So if in doubt send it to the Attorney-General’s Department or send it to Prime Minister and Cabinet and they’ll send it on.

GEORGE SMITH: That makes it a lot easier. Is there any cost?

JUSTIN DAVIDSON: With Freedom of Information, although it’s called freedom it’s not always free. At the moment, there’s a \$30 application fee that applies. The Government is reforming FOI and they are going to do away with that fee in the near future – that’s the proposal, but at the moment there is a \$30 fee. There are some charges that can be applied as well to the processing of a request, but if you are someone who is in a situation of financial hardship, so if you are a pensioner for example, or if you’re making an FOI request that’s for everyone’s benefit, so it’s an issue of public interest like Norfolk Island’s tourism campaign or the way in which government works, rather than just being about you and your circumstances, then generally those fees will be waived.

MARK HUMMERSTON: In terms of privacy, it’s a slightly different regime. The Office of the Privacy Commissioner provides its services free of charge. There are no fees – a person can make a complaint by email or by letter or an initial contact by telephone, and then if there’s matter to be investigated then all of that work is done by the office of free of charge.

GEORGE SMITH: And is there a website...?

MARK HUMMERSTON: Yes – www.privacy.gov.au.

GEORGE SMITH: That’s easy enough. If somebody’s not really sure – if someone rings you at your office or anybody in your office and says “I’m not too sure if this is the right place to come to...?”

MARK HUMMERSTON: In fact, my office operates a toll free telephone service on the mainland – anyone can ring up for the cost of a local call and ask about privacy law and we get about 21,000 calls a year through our centre. I must admit that I haven’t got my head around the technology of how that quite works in Norfolk yet, but we would be looking at how that can be achieved so that for the cost of a local call people could ring up and get advice over the phone from experts in privacy.

GEORGE SMITH: Not all 1800 numbers work from here, do they Peter?

PETER MAYWALD: No, but it can be arranged, George. As you know, we have quite a lot of hotlines already but it would probably be a different number from the mainland one. We already have about eight or ten in the front of the phone book on things like domestic violence, for example, and helplines for a range of things,

so I'm sure it can be arranged. But it is a slightly different process given that telecommunications is Norfolk Telecom from here, nor Australian Telstra.

MARK HUMMERSTON: We would certainly be looking to provide the same level of service that we provide anywhere else throughout Australia.

GEORGE SMITH: Great. So what happens next while you are here?

MARK HUMMERSTON: Well this is our second day here, and it has really been a starting point – I'm here from the Privacy Commission, Justin's here from Australian Government Solicitor with one of our colleagues from Attorney-General's – and we're here to really start the process, to try and provide information to various levels of government and to the community generally about how privacy works, how FOI works. At some point in time governments need to make decisions about whether the Acts are extended or not. We are here to commence a dialogue and answer questions, to be available and to provide information and that will be an ongoing process. Some of our colleagues – I think that Paul Bluck from the Ombudsman's Office will be here next week, and I do a lot of work with him – and potentially another representative from the Administrative Appeals Tribunal will be here next week also to continue that dialogue and discussion. Really what we want to do is give people as much information as they need, so that when it's time to make decisions, people can make decisions knowing what all of the issues might be. We're here just to help that process.

GEORGE SMITH: And it will go ahead, do you think?

PETER MAYWALD: Well we certainly hope so. As you would be aware, the current Chief Minister has invested a lot of time and effort in meetings with ministers in Australia. In fact, going right back to 2004 Norfolk Island Government has been pushing hard to improve the transparency and accountability measures, and is tremendously encouraged that there are now officers here from Australia commencing that consultation process with some tangible signs of things happening. It has been quite hard to maintain the momentum for a long time, and even since the Cabinet decisions, when our community expects things to happen quickly because in our very small system they can but it's a much more complicated process in Canberra. Inasmuch as I can speak on behalf of the government, they are very thrilled that this is now moving forward. I think there will still be some debate about the actual mechanisms used and how they might apply here and whether complex legal structures are as effective as perhaps some less formal administrative schemes which I know the Ombudsman is more inclined to move towards and what they have been recommending for small Pacific communities. But those decisions in principle are already taken by the Federal Cabinet, we support the direction and want to work with the Commonwealth on those. I know that the Chief Minister is particularly thrilled that

we are now seeing some real action on administrative review and administrative reform so hopefully that process will move forward.

As well as the consultation next week with the Ombudsman, there is a training programme. Paul Bluck is coming, and I have worked with Paul and have known him for years, but also Gabrielle Hurley from the Ombudsman is coming to run training programmes for managers on issues like good decision making, complaint handling and service delivery – things that we have probably needed for quite a while and where the managers will be basically trained to then train their staff. That will be in conjunction with next week's visit – again a very helpful thing that the Ombudsman has agreed to do and that will back up our complaint system. So I think that the progress is all in the direction of greater transparency and accountability and of cooperation between the governments, and we want to see it moving.

GEORGE SMITH: Thank you very much Mark, Justin and Peter for coming in this morning.

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