



Professor Anne Twomey
Professor of Constitutional Law

17 May 2019

Mr David Tune
Functional and Efficiency Review
National Archives of Australia
review@naa.gov.au

Dear Sir,

I would like to make a submission to your Functional and Efficiency Review of the National Archives.

I have long been a user of the National Archives of Australia as well as national archives in many other countries, including the United Kingdom and New Zealand. Many years ago the National Archives was an excellent institution. Requests for access to files were dealt with efficiently and if you ordered documents on the day, there were many delivery runs and they would appear within the next hour or two.

In recent years the National Archives has been starved of funds and its priorities have shifted away from servicing research to servicing people looking into their family trees. While the latter function no doubt is popular, its value for the nation is limited in comparison to the work of historians and other academics in revealing Australia's history to its people and scrutinising the actions of governments. Prompt delivery of documents is a thing of the past. Files have to be ordered at least five business days in advance. The delays in processing requests for the opening of files that are in the open access period are excessive. Finally, there is a culture of excessive secrecy that involves the redaction of files, the removal of folios or the closing of files for no rational or legally permitted reason. This is a tragic degradation of what was once a very fine institution. Your review is timely and reform is essential.

In my view the priorities for change should include the following:

Ordering of documents

The current system is completely unsatisfactory. Any properly run institution, such as the State Library of New South Wales, allows documents or books to be ordered from the catalogue at the press of a button and for the person requesting the item to identify when he or she wishes to view them. If I wish to view documents at the National Archives, I have to fill in a long form (which is extremely difficult to find on the cluttered web-site) and then attach a list which identifies each file not only by its barcode, but the item title, series number, control number, location and access status. All of this latter information is pointless, because they only use the barcode number and if you get it wrong, the wrong file comes (which I have found out by experience). No one checks against the name of the file or other details. But you nonetheless have to write out all these details from the online catalogue, insert them in your own document, then attach that document to the order form, and submit it five business days in advance. It is the most inefficient system



imaginable. Instead, one should simply be able to request each item from its page on record search and have it available in the search room the following day, or whatever later day you nominate.

Opening of documents

Priority should be given to the opening of files for persons undertaking genuine research, especially where a deadline exists (eg for thesis submission, or for the submission of a book manuscript or article). While the claim is frequently made that nearly all requests are processed in the 90 day period, priority seems to be given to the low-hanging fruit – i.e. requests for genealogical information. Requests for the opening of files that reveal governmental action take far too long to be processed. This is largely because of the delay in other agencies providing 'advice' on what should be released. The worst blockage point is DFAT, followed by PM&C.

One approach would be to say that if the agency has not provided advice within 90 days, then the file will be released in its entirety, subject to the NAA's own vetting. This would concentrate minds in the bureaucracy. Another approach would be to include in the performance indicators of senior public servants their success in clearing such requests in a timely manner. If graduate trainees were required to spend time clearing the backlog, it would be a valuable training tool, as reading historic files would give them a better understanding of history, policy and procedure. We often complain about the loss of corporate memory – this would be one way to restore some of it. As it is, processing advice on these files is the lowest priority on any public servant's list and the files are left for years to rot in corners of offices. This is not an acceptable outcome.

I am still waiting for decisions to be made on some files I requested to be opened in January 2012. At the end of 2012 I complained to the Ombudsman about the delay of over a year and the fact that the Archives refused to take any action to prioritise the request. I have attached that complaint to this submission just to show you the level of frustration felt and the fact that complaints and requests for expedition achieve nothing. Little did I know then that some of these files would still be awaiting consideration 7 years later. Needless to say the book I was writing, for which I needed the material, was published before a number of the files were opened. Unfortunately the Ombudsman did not have jurisdiction to deal with the matter, which is another failing. All one can do to try to achieve some accountability is spend inordinate amounts of money to go to the AAT to bring legal proceedings – the application fee alone is more than \$900. This gives the Archives impunity to delay as much as it likes because the cost of litigating is beyond the resources of most.

I also have two other requests from October 2012 outstanding being M4799 20/3 (Barcode 60169197) regarding Sir John Kerr and the 'events of 1975' (as it is coyly described) and M4526/6 (Barcode 8368837) regarding Buckingham Palace. Both are still listed as 'withheld pending advice'. Neither file is within the AA1984/609 or M4513 series of Palace letters that are the subject of the *Hocking* litigation. It beggars belief that files on the 1975 crisis are still being sat on for no apparent reason other than lethargy at this stage. Either we have a functional archival body that provides access to primary records concerning pivotal issues in Australia's history, or we do not. At the moment, we do not.

I am not the only person who has faced this problem – numerous academics have shared with me experiences of finally receiving access to files years after they had already published the work for which the research was intended. One person left a message on my phone saying that he had been a PhD student but had to abandon his PhD because



of his inability to access the documents he needed. Even a former Cabinet Secretary complained to me about the delay in getting access to the Cabinet Notebooks that he had written himself which were now in the open access period. Because he had written them, he knew that there was not any secret material in them that needed deletion, but nonetheless, they were withheld pending advice.

One consequence of both the reality and the expectation of inordinate delay is that few research students are game to commence a thesis that is dependent upon archival research, and few supervisors encourage such work because of the risk that it will not be able to be completed before the submission date. This not only results in the degradation of scholarly output on Australia's history and government, but it also has the long term effect of degrading the primary research skills of researchers and academics in this country.

I understand that there are some applicants who have made an excessive amount of requests – four applicants have apparently made 12,728 requests in total and 18 persons have between 100 and 999 applications. I think it is perfectly reasonable that a researcher should have priority given to the first, say 40 requests, in a year, and after that all requests will be placed on a slower track. Researchers should be given the opportunity to choose which requests have the highest priority and get processed most quickly, and which ones are of lesser importance. Such a triaging approach would be perfectly reasonable.

Denying access to material that is in the open access period

I accept that in some cases it will be necessary to deny access to material that is in the open access period, but there also needs to be a presumption in favour of openness and not a culture of secrecy that protects material lest something that embarrasses the government is let out.

I can only assume that the decisions to deny access are made by junior officers who apply rules literally without any understanding of their purpose or any flexibility to make a rational decision, as this is how the system appears to work in practice. For example, some years ago I was denied access to a document because it would damage Australia's security and threaten its sovereignty. As I couldn't imagine what document would be capable of doing this, I initiated an internal appeal to see what would happen. On this rare occasion, I was granted access. The document simply mentioned that someone thought the claim of another country to part of Antarctica was dubious. It had nothing to do with Australia's security or sovereignty or even Australia's territory in Antarctica, yet someone had mechanically denied access to the entirety of the document simply because the word sovereignty was mentioned. This is indicative of how the whole system operates, or more accurately, fails to operate.

More recently, I was commissioned by the Commonwealth Parliamentary Library to write a paper on parliamentary disqualification for holding an office of profit under the Crown. The purpose was to warn current parliamentarians and future candidates of how this disqualification provision in s 44 of the Constitution has operated and may operate in the future. Being an assiduous academic, I researched the history of its application. There were, surprisingly, many files in the National Archives dealing with s 44 disqualification. Some, from World War II and before were already open and I gained valuable material from them (eg re candidates who hold offices in the armed forces or worked in hospitals). But those from the 1950s-1980s had not yet been opened.



I applied from them and was either denied access to the files in their entirety, or they were 'open with exception', meaning that the substantive material was removed, leaving only the administrative material that was of no use. Attached at Appendix B is an indicative list. The reason given was that these files (as had the ones from the 1940s and before) contained legal advices which were privileged. Section 33(2) of the *Archives Act* provides that a document is exempt if it is the subject of legal professional privilege and its disclosure would be contrary to the public interest. In this case it clearly *is* in the public interest for election candidates to know about s 44. This was the reason the Commonwealth Parliamentary Library had asked me to write the paper. But the Archives denied access because it 'could prejudice the legal position of the Commonwealth in the event of future legal proceedings' and due to 'ongoing sensitivities'.

It didn't seem to matter that the relevant parties were dead, the relevant offices no longer existed, no proceedings could now be brought with respect to the matters concerned and the legal professional privilege no longer had any application or utility. Nor did it matter that legal advices litter previously released NAA files, or that the Attorney-General's Department has published volumes of legal opinions by Attorneys-General and Solicitors-General without there being any concern that such opinions could 'prejudice the legal position of the Commonwealth in the event of future legal proceedings'.

This is because it is manifestly the case that old legal opinions on s 44 of the Constitution cannot have taken into account the High Court's recent jurisprudence on the section and that the Commonwealth's position would necessarily have to be different from that taken in the 1950s. This should surely be obvious to any person. Anyone, that is, except the people who decide to deny access to documents in the National Archives. The excuse is ludicrous and sends out a clear message that access is really being denied due to 'ongoing sensitivities', which appears to be code for the avoidance of potential embarrassment for the Government. This is not a ground for refusing access to documents.

Interestingly, when I raised this issue with a Government Minister, he said he was astonished and could see no reason why opinions on s 44 from the 1950s to 1980s should not be released. The same view was taken by a Shadow Minister. It therefore appears likely that the culture of secrecy that pervades the Archives and public service advisers goes even beyond that expected or desired by the politicians themselves.

Finally, may I say that I am not hostile to the National Archives, despite these complaints. I want it to be better funded, more effective and to better serve the nation. Anything you can do to achieve this will be greatly appreciated.

If you would like any further information, please contact me at:
anne.twomey@sydney.edu.au.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law



Appendix A Complaint to Ombudsman re delay in access to documents in 2012

Email to John McMillan, Ombudsman, December 2012.

Dear John,

I would like to make a complaint concerning access to documents at the National Archives. These documents are over 30 years old and fall within the 'not yet examined' category. They are therefore documents that I have a right to gain access to, subject to any exemptions. I asked for them to be examined and opened in January 2012 (i.e. almost 12 months ago). The documents concerned some South Pacific Islands, so they were sent off to DFAT for examination. When I tried to see them while in Canberra in October and November, I was told that they were still not accessible as they had not yet been examined and approved for access. At that stage, I got cross and complained. My complaint received the following response:

National Archives of Australia

National Reference Service

UPDATE ON STATUS OF YOUR REFERENCE INQUIRY: [NAA1000017838](#)

[Dear Ms Twomey](#)

[I regret the delay in getting back to you.](#)

[As requested, I contacted the concerned section to check if they are able to expedite your applications for access submitted in January 2012.](#)

[I regret to inform you that they are unable to prioritise your request.](#)

[Kind regards](#)

[Yours sincerely](#)

This response was sent on 3 December 2012. In my view, if the Commonwealth Government is serious about giving access to documents under FOI or under the Archives Act, then it must act within a reasonable time to make sure that the documents requested are made accessible. Having to wait over 12 months for access (and heaven knows how much longer it will be) is completely unreasonable and unwarranted. As for saying that they can't 'expedite' a request that they have been sitting on for 11 months, that is simply outrageous. While I appreciate that DFAT has many more important priorities than my request, if the Government is serious about access to government information, then it has to resource it so that its commitments are implemented in a reasonable fashion. At the moment, its commitments are not being implemented in a reasonable fashion - indeed, not at all. As I believe that this is a serious and substantive issue concerning access to information, I draw it to your attention, not only to 'expedite' access to the documents that I seek, but also in an attempt to resolve the systemic issue.

The list of the documents I seek is set out below.

Yours sincerely,

Anne Twomey

Professor of Constitutional Law

Faculty of Law

University of Sydney, NSW, 2006

Australia



1389518 A1838 338/1 PART 56 CLOSED

Title South Pacific - Condominium territories - Vanuatu - Administration, general

1389515 A1838 338/1 PART 54 CLOSED

Title South Pacific - Condominium territories - Vanuatu - Administration, general

1389516 A1838 338/1 PART 55 CLOSED

Title South Pacific - Condominium territories - Vanuatu - Administration, general

1389525 A1838 338/1 PART 58 CLOSED

Title South Pacific - Condominium territories - Vanuatu - Administration, general

1389519 A1838 338/1 PART 57 CLOSED

Title South Pacific - Condominium territories - Vanuatu - Administration, general

1389514 A1838 338/1 PART 53 CLOSED

Title South Pacific - Condominium territories - Vanuatu - Administration, general

6930325 A7452 A291 NYE

Title Vanuatu

4379670 A4250 1982/2157 NYE

Title Vanuatu - policy and general

1497137 A1838 314/2 PART 7 CLOSED

Title Western Samoa - Political developments

1497140 A1838 314/2 PART 8 NYE

Title Western Samoa - Political developments

1497141 A1838 314/2 PART 9 CLOSED

Title Western Samoa - Political developments

1497142 A1838 314/2 PART 10 CLOSED

Title Western Samoa - Political developments

4379759 A4250 1983/229 NYE

Title Western Samoa - policy part 5

4364536 A4250 1982/2093 NYE

Title Western Samoa policy part 4

30714628 A9737 1991/70959 PART 1 NYE

Title Western Samoa - political and general



Appendix B – list of decisions re the s 44 files¹

1. A432 1963/3281 Barcode 1175260 – Constitution s 44 – Office of profit under the Crown – Membership of Australian Wheat Board, Fremantle Harbour Trust and other authorities, 1963. Ordered 8/2/18. Decision: 11 September 2018: Item closed.
2. A432 GC1987/5201 Barcode 7230680 – Office of profit under the Crown – Disqualification of member of State Parliament for holding Commonwealth appointment, 1987. Ordered 8/2/18. Decision: 11 September 2018: Item closed.
3. A432 1958/3103 Barcode 7800994 – Constitution Review Committee – Constitution s 44 and 45 – office of profit, 1957-8. Ordered 8/2/18. Decision: 11 September 2018: Item open with exception (Folios 1-13 have been wholly exempted from public access).
4. A432 1953/3132 Barcode 7803482 – Constitution, s 44 – necessity for officers of State Banks to resign before contesting federal elections, 1953. Ordered 8/2/18. Decision: 11 September 2018: Item open with exception (Folios 3-17 have been wholly exempted from public access).
5. A432 1966/3303 Barcode 7853948 – Constitution, s 44(i) – eligibility of Irish citizen to stand for Parliament, 1966. Ordered 8/2/18. Decision: 11 September 2018: Item closed.
6. A432 1969/3189 Barcode 30981205 – Constitution, s 44(iv), 45(iii) – Elected member of Legislative Council of the Northern Territory, 1969-1970. Ordered 8/2/18. Decision: 11 September 2018: Open with exception (Folios 1-30 have been wholly exempted from public access).
7. A432 1964/3270 Barcode 1185197 – Constitution, ss 44, 45, 62, 64, 66 – Appointment of Assistant, Honorary and Associate Ministers, Ministers without portfolio and Parliamentary Undersecretaries, 1958. Ordered 8/2/18. Decision: 11 September 2018: Item closed.
8. A432 1970/3418 Barcode 9580964 – Constitution s 44: fees paid to MPs who are members of Commonwealth Immigration Advisory Council, 1970-1. Ordered 8/2/18. Decision: 11 September 2018: Item closed.

¹ This is a list I prepared in September 2018. Since then some additional s 44 files have been opened with exception or denied, but I haven't taken the time to update it further.