

Freedom of Information Public Seminar

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“What the reports should recommend”

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Good Afternoon,

I would like thank Dr David Solomon for the kind invitation to speak today. I also compliment the review panel and its superb and exhaustive work in producing the most significant report on FOI reform in decades in Australia.

More importantly, I want to commend the Queensland Premier Anna Bligh for having the courage and commitment to establish a review panel that creates a momentum for reform by its very existence.

I do not use the term courage lightly. FOI reform by any politician is an incredibly brave and confronting process as the competing forces of secrecy and accountability are at the heart of politics and government in a democracy.

Freedom of Information has been around since 1766 because of recognition, even centuries ago that most, if not all politicians eventually see and believe their political interests as synonymous with the public interest. Inevitably, a government seeks to hide its mistakes and errors to protect its political support and reputation. Similarly, public servants also opt for secrecy rather than face the harsh light of scrutiny where a politician's instinct is to blame the release of information rather than accept their failings.

Take the example of the Golden Casket agency in Queensland.

On December 24, 2001, I reported for The Courier Mail that the Queensland Government-owned Golden Casket has been caught out deceiving needy overseas villagers into thinking they have won a fortune.

In one case, a remote Pakistani village began planning a new school after receiving advertising material resembling a cheque with the incorrect claim: “Congratulations, you have won the first division prize of \$9 million.”

An outraged Australian tourist wrote to the Queensland Office of Gaming Regulation,

saying the gimmick had ``damaged Australia's reputation in the area".
``When (the lottery material) was received by a man who works very hard to sustain a Christian-oriented charity school, there was great excitement," the letter to the Queensland gambling regulator said.
But after ``properly" translating it, he found it only pretended to be ``worth a great deal of money".''

Documents obtained under Freedom of Information show Golden Casket was asked to explain its overseas sales scheme which involved mail order agents selling and promoting lottery entries overseas for the Golden Casket. Following the public exposure, Golden Casket said the promotional material will be altered.

What we don't and can't know is whether similar dodgy deals are still underway. The response of the government to the story was exempt the agency from FOI with the Freedom of Information and Other Legislation Amendment Act 2005.

Yet politicians still claim to support Freedom of Information even as agencies doing dodgy deals to Pakistani farmers are protected by secrecy. Few politicians however, have been as hypocritical, with such terrible consequences, as the former Premier of Queensland Peter Beattie.

The extent of the former politician's failings on open and accountable government illustrate why strong FOI laws are necessary to protect citizens from abuse by politicians.

In July 1998, shortly after taking office, Mr Beattie vowed his ministers would not be able to stop FOI searches by tabling politically sensitive documents at cabinet meetings.

Beattie's commitment was so strong he introduced a private member's bill into state parliament outlawing the practice of taking documents to cabinet to shield them from public view.

He promised that his new government would push to amend the FOI Act so cabinet documents were not protected unless they pertained directly to a cabinet decision.

Commendable sentiment but never translated into reality and indeed, Beattie happily adopted the cover-up -- a fact revealed by the Dr Death inquiry.

The report by respected lawyer Geoff Davies QC found that the Queensland cabinet, including Beattie and former health minister Gordon Nuttall, had a ``culture of concealment" in which hospital waiting lists and other material were hidden.

Davies found that the conduct of the present cabinet and its Coalition predecessor in hiding documents relevant to the health of thousands of Queenslanders was ``inexcusable and an abuse of the Freedom of Information Act".

He also found that successive state governments had followed a practice of concealment and suppression of elective surgery waiting lists and measured quality reports.

“This in turn, encouraged a similar practice by Queensland Health staff,” he said. “In my view it is an irresistible conclusion that there is a history of a culture of concealment within and pertaining to Queensland Health.”

Secretive government not only permits poor policy to flourish and flawed allocation of taxpayer resources but logically, given the findings of Commissioner Davies, can be directly responsible for appalling and life-threatening failures by government.

A cult of secrecy was not confined to Queensland Health. A 2007 audit of press freedom by the Coalition of Free Speech found:

- "A continuing culture of secrecy is evident in some areas of government." The experience of the members of RTK is that this culture continues to pervade many layers and areas of government, including in Queensland. FOI decision makers are resistant to making information publicly available, because of an emphasis on the short-term political consequences of doing so, rather than the long-term policy objective of open accountable government. Rudimentary and flawed notions that release of information could be harmful, because the information will not be understood, or will be misinterpreted, or taken out of context, remain pervasive.

It is no surprise, given the Coalition’s audit findings, that secrecy among politicians is by no means confined to Queensland. The Commonwealth Government also has an appalling record.

One simple example of the value of Freedom of Information to open and accountable government and the secrecy of politicians from the Commonwealth arena also touches on the health area.

In early February 2003, working as The Australian’s FOI editor, I obtained health department documents showing bulk billing rates were in free-fall, with rates dropping by as much as 1 per cent a month and bureaucrats unable to predict how far the decline would go. This contradicted the Prime Minister's statement to parliament two months earlier when he said: “Any suggestion that bulk billing has disappeared or is disappearing, given the rates of bulk billing in Australia at the present time, is factually incorrect.”

Within days, then federal health minister Kay Patterson announced reform plans and bulk billing became a key election issue. Now bulk billing figures continue to improve with the government routinely releasing updates on the same information I had to obtain through Freedom of Information.

Similarly, last year working as the Seven Network's FOI editor, we revealed Treasury had no involvement in the \$10 billion Murray Darling package. We revealed flawed ammunition and weapons being used by ADF personnel in Afghanistan and Iraq and we revealed the public line from the Commonwealth Treasurer on housing affordability was at odds with Treasury's own analysis.

I note that none of these stories came to public light because of political honesty.

However, I want to stress that improved FOI laws do not present a reason for fear among the bureaucracy. Instead, I believe good FOI laws improve the public service's ability to provide full, frank and fearless advice as it is only in an environment of guaranteed secrecy that a politician's sweetheart deals and vote saving can flourish and such advice can not only be ignored but can affect a career.

While the National Party brutally criticised the Commonwealth Auditor General for releasing a report on the widely-rorted regional partnerships scheme during the election campaign, can anyone seriously argue that voters did not have a right to know that funds were approved before applications and in the face of contrary advice from public servants.

I think the Queensland public service should be guided by the sentiments expressed by Marie Shroff, New Zealand's Privacy Commissioner, who served for 16 years as Cabinet Secretary, whose views noted in the discussion paper warrant reiteration.

Shroff states:

"Even at the hardest end of FOI – access to Cabinet documents – the benefits are clear. If I, as a civil servant, write a Cabinet paper which I expect to be sought for public release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I will put in more detail than might formerly have been the case: I might quote from sources rather than summarising them, especially when unpalatable advice might be needed; and I might clearly identify legal advice and separate it from policy advice to allow for possible legal protection under legal professional privilege. I will record carefully the reasons for my particular recommendations – although this will largely be to ensure that my reputation as a professional and neutral public servant will be enhanced if the advice is released. I will avoid the temptation to make cute remarks. I will often have robust face-to-face discussions with my Minister on the way towards a final piece of advice or a Cabinet paper."

The point made by Shroff directly contradicts abiding arguments against documents disclosure that somehow if documents produced by public servants are held to the light of public scrutiny then public servants will cease to perform their duties. This thesis is massively flawed given lawyers, journalists, teachers, plumbers and shopkeepers and many other occupations and professions are all rightly judged on performance. The public has a right to judge the quality of advice given to politicians and whether politicians have acted responsibly in relation to that advice – this is an essential public interest overwhelming more important than flawed arguments of candour arising from the tired Howard re case from 1985.

Public servants should be aware that underpinning the concept of Freedom of Information is a philosophy crucial to the effective democracy and society's respect and support for the political system and government.

As the politician responsible for introducing FOI in 1982, PM Malcolm Fraser noted in 1976:

“If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?”

It was a point also addressed by Justice McHugh in the Australian High Court in *Australian Capital Television Pty Ltd v. The Commonwealth* who made the following observations:

“If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performance of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgement as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation. As the Supreme Court of the United States pointed out in Buckley v. Valeo, the ability of the people to make informed choices among candidates for political office is fundamental because the identify of those who are elected will shape the nation's destiny”.

The High Court in its judgement in the case of *Commonwealth v. John Fairfax & Sons Ltd*, added additional weight to the right to know as noted by Mason J. when he said:

“But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. 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.”

Despite these views, FOI across Australia has proved a failure and this challenge, along with other constraints on the media, prompted the establishment of the Australia Right to Know last year – a coalition of Australia's largest media organisations.

In 2007 RTK commissioned an independent audit into freedom of speech in Australia. The audit was chaired by Ms Irene Moss AO. As part of its review, the audit considered the extent to which State and Federal laws limit public access to information held by Government bodies. The audit found in relation to FOI laws that:

- "A continuing culture of secrecy is evident in some areas of government." The experience of the members of RTK is that this culture continues to pervade many layers and areas of government, including in Queensland. FOI decisionmakers are resistant to making information publicly available, because of an emphasis on the short-term political consequences of doing so, rather than the long-term policy objective of open accountable government. Rudimentary and flawed notions that release of information could be harmful, because the information will not be understood, or will be misinterpreted, or taken out of context, remain pervasive.
- "Political intervention, or the significance that may be attached to political considerations in the course of decision-making, gives rise to a perception that in some cases these factors outweigh the public interest in disclosure. The comments made above apply to this finding.
- "The laws in most instances do not require a pro-disclosure bias in making decisions on access. Often technical legal considerations override the objectives and the spirit and intention of legislation."

The fact that Australia – one of the world's oldest democracies – has been ranked as only 35th in relation to press freedom around the world is a disgrace.

While I do not speak on behalf of the Coalition, I have had a close involvement in drafting its response to the discussion paper and would now like to foreshadow some of the views contained in our submission.

The Coalition believes the history of the Queensland FOI Act, introduced following recommendations of the Fitzgerald Report, shows the progressive tightening of disclosure, higher costs and an increase in exempt organisations. Following the enactment of the FOI Act on August 5, 1992, the 1993 and 1995 amendments dramatically increased the scope of the Cabinet exemption. Further amendments to the Act in 1994 and 1997, reduced the scope of FOI in relation to government-owned corporations with agencies allowed to recover some costs for FOI administration following the 2001 amendment to the Act. Other amendments to the Act in 2004 and 2005, once again, reduced further the scope of the FOI Act to improve transparency and open government.

Every amendment has fostered a culture of contempt for FOI within Queensland Government and there can be little surprise that agencies adopted an anti-disclosure ethos.

The Coalition believes that since the introduction of FOI legislation in Queensland, the scope and efficiency of the Act has been progressively reduced almost inevitably to protect the government's political interests and conceal public service failings and

incompetence. This momentum has occurred despite the overwhelming evidence proffered in the report on the importance of FOI to open and transparent government and the importance of the rights of citizens to access to information.

The Coalition believes the the Queensland Act is overly complex. It has 18 exemptions which contain overlapping and unnecessary exemptions, particularly in relation to internal Government documents. A single test – protecting only **essential public interests** - could be applied to all of those documents, thereby greatly simplifying the operation of the Queensland Act.

The Coalition believes that the public interest should be clarified to exclude expressly generalised notions of public interest, such as the interest in the candour of communications and other factors identified in *Re Howard*.

Several exemption provisions in the QLD FOI Act are not subject to an express public interest test and should be. The Coalition recognises that the subject matter of certain documents will, of its nature, suggest that disclosure would likely be contrary to the public interest – such as matters of state security or advice subject to legal professional privilege.

However the very broad exemptions for documents submitted to or prepared for Cabinet and the Executive Council should require the decision maker to give weight to the public interest in giving access to these categories of documents. The Coalition submits that Cabinet and Executive Council documents should not be given a "halo" of secrecy, but instead be included in a single exemption for internal government documents, which includes a public interest test.

Naturally, as the journalist who has had the most conclusive certificates issues against FOI requests in Australia's history, I am also pleased, although not surprised, the Coalition also supports removal of the certificate from the Queensland Act. Suffice to say, any law that removes the ability to examine the public interest in release and just looks at the public interest against release is a disgrace in a democracy.

Another issues addressed in the discussion paper related to fees and charges.

The Coalition of Free Speech believes Agencies can and do charge exorbitant costs thwarting any realistic option for payment for media companies.

This thwarting of the media's duty to scrutinise government is despite the fact that from the Fitzgerald Inquiry into corruption through to the Dr Death hospitals commission, the media have been and remain the single most important external body to government to exposing failings, corruption and misadministration by government.

The media, while motivated by commercial reasons, performs a role in essential public interest through its scrutiny of the government without fear or favour and at no cost to the public purse.

I believe there should be a recognition of the essential public interest in the media's performance of its watchdog role.

The Coalition's view is the cost of providing information about government to inform the public should be borne by the government, particularly as media organisations invest significant funds in training and employing journalists using FOI. Media organisations often receive little benefit from the investigations that produce no result.

Agencies also need to develop and maintain effective record keeping practices and ensure appropriate staff training which would enhance openness and accountability and also reduce the cost of FOI.

The Coalition accepts abuse of FOI legislation can lead to frivolous, vexatious, repetitious or voluminous requests and supports measures to reduce the impact of these requests on effective administration. However, the decision to decide any applicant has engaged in such a manner should be reviewable by an appropriate court or tribunal. commercial-in-confidence and GOCs.

Can I turn to one of the glaring failures of the Queensland FOI Act in the diminished scrutiny through commercial in confidence claims against release of information. This failure comes as all Australian governments have significantly increased the extent of contracting and consultancies used in the public sector.

The Coalition believes as a bare minimum, ALRC/ARC recommendations in this area should be implemented. Those recommendations included:

- Requiring agencies to include provisions in contracts requirements that contractors record and provide adequate information to the agency and to allow parliamentary scrutiny as well as public information access rights.
- Complaint procedures should be adequate and not lost or diminished as a result of a service being provided by a contractor rather than the government.
- Contractor's documents that directly relate to the performance of contractual obligations be deemed to be in the possession of the relevant agency.

The Coalition supports the ARC view that that the Act should require contractors to provide documents to the agency when an FOI request was made. In addition, all contractors should be advised they were within the scope of FOI legislation and that any documents produced as a result of a consultancy fall within the scope of the FOI Act. An essential public interest test should apply in this area and the onus for proving release should not occur should be with the agency and the contractor.

Similarly, the Coalition believes GOCs (Government Owned Corporation) are public agencies owned by the taxpayer carrying out public functions and must therefore be open to the FOI Act.

Importantly, GOC are normally involved in public functions or service delivery often in a less competitive or monopoly market and therefore need to be accountable on performance and administration. Any GOC failings present significant political problems for the relevant minister and government with a vigorous FOI regime reducing the temptation for secrecy.

Finally, the discussion paper also addresses the issues of the review of FOI decisions.

Unfortunately, while internal review is cost effective and relatively quick, agencies are placed in position of conflict-of-interest in considering whether their initial decision was flawed. The more political sensitive the subject matter of the request, the less likely an agency is to substantially change its decision although some less relevant documents may be released as in an attempt to appear fair and balanced.

Applicants should have the option of bypassing internal review and proceeding directly to external review. Agencies need to place more emphasis on getting the decision right in the first instance.

The Coalition supports the retention of a review capacity for the Information Commissioner in Queensland. However, applicants should have an alternate option of appealing directly to a Queensland Administrative Tribunal.

While Information Commissioners do have the capacity to assist with external review, there needs to be a check and balance against any potential failings of the Commissioner, particularly as the appointment of the Commissioner remains, unfortunately, in the power of the executive government. A hearing in an independent tribunal will allow applicants to directly hold public servants accountable for FOI decision in a public forum. The value of the AAT in the Federal jurisdiction in improving FOI through decisions has been significant in recent years.

Ends