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COUNCIL**

**SUBMISSION**

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## **Australian Press Council Submission to the Independent Review of the *Freedom of Information Act 1992 (Qld)***

### **Executive Summary**

Freedom of Information in Queensland is in need of significant revision. Amendment to Freedom of Information must address three main areas of concern:

1. The excessive delays in processing and reviewing applications must be dramatically reduced.
2. The exorbitant fees imposed upon applicants seeking non-personal information must be brought down to modest amounts.
3. The proportion of documents to which access is granted must be increased. In order to achieve this, the scope of exemptions must be narrowed; when making decisions as to whether or not to release material under FoI, officers must be required to take into account the public interest in disclosing information for the purpose of facilitating accountability. The default position set down in the legislation should be a requirement that information must be released unless it meets very limited conditions that define disclosure as being “not in the public interest”.

In addition, the government should make freely accessible via the internet a wide range of material which facilitates public scrutiny of government policy and conduct.

## **Review of the *Freedom of Information Act 1992 (Qld)***

The Australian Press Council congratulates David Solomon and the members of the review panel on producing a thorough and insightful examination of Queensland's freedom of information scheme. The Discussion Paper recognizes the major flaws in the Freedom of Information process and offers practical options for their rectification.

There can be no doubt that Freedom of Information (FoI), when implemented in the spirit of openness, facilitates the process of democracy and ultimately leads to improvements in government services. The media, as the primary vehicles for the delivery of information to the public, have a crucial role to play in democratic openness. The media are perhaps the most prominent scrutineers of government conduct. FoI has the potential to be a valuable tool for the media in carrying out their role of maintaining government accountability. Thus far, however, FoI in Queensland has failed to provide meaningful assistance to the media in their task of conveying to the public information about government policies and process that they have a right to know about.

Many of the concerns of the media with regard to FoI are acknowledged in the discussion paper. The three major concerns that members of the media have with respect to FoI are:

- extensive delays between the time an application is lodged and the time at which information is received or the applicant is notified of a refusal;
- exorbitant costs associated with pursuing an application; and
- excessive denial of access to material on the grounds that it is exempt.

Each of these concerns is, by itself, enough to frustrate attempts to gain access to information via FoI, but together they prevent the effective use of FoI as a mechanism to facilitate accountability.

### **Delays**

One of the key reasons cited by journalists for not using FoI processes to gain information in relation to government is the length of time it takes to process applications. While state governments are often described as performing better than the federal government in this respect, the time taken to process FoI applications is still unreasonably excessive. Section 57 of the Queensland *Freedom of Information Act 1992* sets a thirty-day limit for the processing of applications, but extensions of time are available under section 57A. The actual time that runs before an applicant receives the requested material may be significantly longer than thirty days.

When the length of time taken to review a decision with respect of an application is added to this period, the total time between the initial application and the receipt of any material may be several months or even years. In the Queensland Information Commissioner's Annual Report for 2006-2007, 115 days is indicated as the median time in which to finalise an external review. Obviously, there was a proportion of applications which took far longer than this to be completed, including seven applications which had not been resolved after more than a year.<sup>1</sup>

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<sup>1</sup> Queensland Information Commissioner, *Annual Report, 2006-2007*, p. 18.

In one notorious example, an application lodged in 1993 received a response from the Queensland Treasurer only in 2005.<sup>2</sup> While this is an extreme example it does illustrate the failure of government agencies consistently to process applications promptly and efficiently.

In the context of many FoI applications, time is of the essence. If information necessary to enable an assessment of the correctness of a government decision is delayed, citizens may be denied the opportunity to seek a change in policy before it is fully implemented. In some instances this would amount to a denial of the right to democratic participation. This is particularly the case where the policy being considered involves a contractual obligation with a non-government entity. If the contract becomes binding before the citizenry have an opportunity to raise concerns, any change of policy will incur penalties and possibly expensive legal action. It is preferable if people have an opportunity to seek revision of policy at an early stage, before the government becomes locked-in to a particular course of action.

Journalists who seek information for the purpose of reporting on government policy or activity frequently find that any information that they acquire via the FoI process is received after such a lengthy delay that it is no longer newsworthy. A lengthy delay strips the information of its news value and defeats the purpose for which the FoI application was lodged.

Some journalists have also expressed frustration at the tendency of politicians to release information to the general public at the same time as, or even before, releasing it to the applicant, who may have expended a good deal of time and money pursuing the application and appeals. It is not clear whether this practice is motivated purely by malice or is a deliberate attempt to discourage journalists from using FoI. What is clear is that it robs the applicant of any benefit, whereas fellow journalists who have not expended a comparable amount of time or money are able to benefit from the use of the information released. A journalist thus obstructed once is unlikely to be enthusiastic about making further FoI applications, and publishers are understandably reluctant to fund appeals against refusals. It would be appropriate that the applicant be given 24 hours in which to examine and report upon information received through FoI before that information is released to the general public.

If the FoI process is to be of any utility to journalists it must be capable of yielding results within a timeframe that is much shorter and more predictable. The statutory period within which a response must be forwarded to the applicant should be shortened to fourteen days and the scope for extensions of time needs to be significantly reduced. Where information is released after the statutory period, the applicant's fee should be refunded. Most important, the information management practices of government agencies need to be streamlined in order to facilitate the faster processing of FoI applications.

## **Costs**

The costs incurred by media organisations that pursue FoI applications are prohibitive. Although the initial application fee is modest, additional charges are imposed for processing the application, including payment for locating documents and considering material in order to decide whether it should be released. When

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<sup>2</sup> *Report of the Independent Audit into the State of Free Speech in Australia*, October 2007, p. 131.

journalists or community groups are confronted with quoted amounts of several thousand, or even hundreds of thousands of dollars, for the processing of an FoI request, most will decide not to proceed with an application. This has given rise to speculation that the hefty payments demanded are imposed as a deliberate strategy to discourage FoI applications and thus protect governments from scrutiny.

Officials will often seek to justify the high fees charged on the premise that they are intended to offset the costs incurred by agencies in processing the applications. However, this argument fails to give weight to the role of FoI in ensuring accountability of government to the citizenry. Since the citizens pay taxes, they have in a sense already paid for the information that is sought through FoI, the media that publish information acquired by FoI are simply a vehicle for delivering that information to its ultimate consumers. While it may be appropriate to demand a modest fee to offset costs, it is not acceptable to make costs so high as to act as a disincentive to proceeding.

Critics of FoI have noted that there is a lack of consistency in the way in which fees are calculated. It has been suggested that one reason for the high amounts charged is that fees are based on the time spent searching and perusing files for the purpose of making a determination as to whether they may be released. Often, after paying the required fee, an applicant will only receive a modest amount of material (the balance being found to have been exempt), which may be redacted so that the bulk of information is blacked out. The 1995 ALRC report recommended that fees should be calculated according to the amount of information actually received by the applicant, and the Press Council endorses that proposal.<sup>3</sup> In addition to reducing any disincentive for an applicant to proceed with an application, this would also create an incentive for agencies to improve the efficiency of their records management procedures. For similar reasons, applicants should receive a discount or a waiver of fees where there is a delay in the finalisation of their application.

Much of the material sought from FoI by media organisations has significant potential to improve democratic accountability and for that reason should be regarded as being released in the public interest. For this reason, no significant fee should be payable for its release.<sup>4</sup>

Applicants will also typically be charged for the cost of photocopying documents. With the increasing number of documents now stored electronically, there are good reasons for supplying material to applicants in electronic form, or at least giving applicants the option to receive them in that form when practical. This would reduce the amount of processing time and the cost of conveying material to the applicant, and the fees payable should be reduced accordingly.

In addition to the costs of the application itself, applicants who are refused access to documents will be faced with the costs of review and appeal processes, including

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<sup>3</sup> “Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using.” ALRC, Report No. 77, recommendation 88.

<sup>4</sup> According to the *Independent Audit into Free Speech*: “fee reductions apply automatically in the U.S. to those who seek documents about the conduct of public functions and applications by journalists”, @ p. 137.

legal fees. According to section 95 of the Act, each participant in a review is liable for their own costs. The Press Council is of the view that, where a government agency is found to have refused access erroneously or unreasonably, the applicant's costs should be reimbursed.

## **Exemptions**

By far the biggest concern expressed by journalists and media organisations in relation to FoI is the broad scope of exemptions and the tendency of agencies to refuse access to material sought, particularly where that material is relevant to matters of government policy.

It is difficult to gauge the extent to which FoI applications from the media are refused on the grounds that material is exempt, since most available statistics do not distinguish between different types of applicant when citing the number of applications processed and the proportion of applications refused. However, anecdotal evidence from journalists suggests that, when material is sought in relation to government policy, the rate of refusal is excessively high. Refusals of access to members of the Opposition is also reported to be high, some observers suggesting that the Queensland government obstructed Opposition access to as many as 7,000 pages of documents in 2004 alone.<sup>5</sup> The high number of refusals where the applicant is seeking material in relation to government policy implies that the primary *raison d'être* for FoI – to improve government accountability – is not supported either by Ministers or by the public service. While there are grounds for narrowing the scope of exemptions as defined in the legislation, the extent of refusals of access appears to go well beyond what was originally intended by the legislation. Amendment to the exemptions will not yield significant improvement in the effectiveness of the Act unless Ministers and officials develop a commitment to the aims of FoI and to the principles of open government.

There are 18 different sections setting down exemptions in the Queensland Act. Many of the matters specified in the exemptions are the very matters which are relevant to government accountability: cabinet documents; matters relating to the economy; material relating to investigations by the Ombudsman; audits or performance reviews of government; and advice to government on matters of policy. This reflects the fundamental conflict that exists between the aims of open government and the natural tendency all governments have to discourage the disclosure of information that might result in embarrassment or criticism. The exemption for material that has been submitted to Cabinet represents the most egregious example of this tension, facilitating the removal of material from the scope of the FoI process apparently at the whim of the government.

The Press Council appreciates that certain material needs to remain confidential in order to enable the government to function effectively. However, the Council is of the view that the scope of the exemptions in the Queensland Act is far too broad. In particular, material should not be exempt from disclosure simply because it has been submitted for consideration by the Cabinet. In order for material to be exempt there should, at the very least, be a genuine concern that disclosure would present a threat

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<sup>5</sup> Stephen Lambie, *How open is Queensland Government? FoI in Action*, 2005.

to the public interest, and such a threat must be more than trivial. Just because a reason for exemption exists does not necessarily mean that the public interest in disclosure is defeated. In order to ensure that decision makers act within the spirit of open government, legislation should include provisions specifying that, in assessing whether to grant an application for access, the public interest in accountability must be considered. The final test should be whether, on balance, the public interest in withholding material outweighs the public interest in disclosing the material. If the answer is ‘no’ the material should be released. Failure to give due weight to the public interest in accountability should be considered a valid reason for review of FoI decisions.

The two exemptions that are perhaps most problematic are those in respect of cabinet documents and in respect of deliberative documents. These are the documents which members of the media and community groups are most interested in inspecting and are also the documents which governments and officials are most anxious to withhold from scrutiny. The reason for this conflict is clear: this is the material that gives greatest insight into why governments make the decisions they do, and provides the factual material, research and advice upon which decisions are founded. A resolution of this fundamental conflict between governments and others with regard to the accessibility of this material is essential to the development of a working FoI regime.

The Press Council concedes that some of this material is confidential in nature and it is appropriate to restrict access to it. However, it rejects the contention that all of this material should be subject to a blanket exemption from public scrutiny. Where the material does not reveal detail as to the internal dynamics of government, it should be in the public domain unless its disclosure would be likely to jeopardise the public interest in some tangible way. Similarly, material that is essentially factual in nature should be disclosed unless its disclosure would be likely to jeopardise the public interest or result in demonstrable harm to an individual or to a business interest. If governments have based policy decisions upon research or advice submitted to Ministers, that advice should be disclosed. More problematic is where governments have made a deliberate decision not to follow advice received. If the research or advice was speculative in nature, or prepared at an early stage in policy formulation in the absence of relevant facts it may not be appropriate to make it public, whereas advice prepared by a senior officer at an advanced stage of policy development may be considered extremely pertinent to the process of accountability. The final decision should be made on the basis of where the balance of public interest lies. But the material should not be considered wholly out of bounds unless serious negative consequences could be expected to arise from its publication.

As governments increase their reliance on private contractors to carry out government functions, there is an increasing tendency to deny FoI applications on the grounds that the relevant information is “commercial in confidence”, i.e. that the material has been provided in confidence, that the information has a commercial value, or that its disclosure may adversely impact upon the contractor’s business. Yet the disclosure of that information may be essential in enabling the public properly to assess the government’s performance and the wisdom of entering into a particular agreement. In some instances public safety or welfare could be compromised by the failure to publish the relevant information. Arguably, engaging into a contractual relationship with government should obligate the contractor to subject themselves to public scrutiny. The Press Council endorses the suggestion that the “commercial in confidence” exemption should only be available where disclosure would be highly

likely to cause demonstrable harm to the contractor; where the probable harm would be more than trivial; and where the public interest in maintaining the confidentiality of the information outweighs the public interest in disclosing the information to the public.

One of the questions posed in the discussion paper is whether confidentiality should be the “default position” when considering FoI requests. The Press Council is of the view that the default position should be that all documents are available for release to members of the public and the press unless there is an over-riding public interest in the material remaining confidential. If there is any doubt as to where the public interest lies the material should be made public.

Some analyses of FoI in Australia have expressed concern that decisions regarding access to material under FoI are subject to inappropriate political influence.<sup>6</sup> Given the natural tendency of Ministers to feel uncomfortable about the publication of material that might lead to public criticism or embarrassment, it is not appropriate that they be closely involved in the process of deciding whether or not to grant an FoI application. Even senior public servants may be anxious about the effect of disclosure upon their professional reputations when the material concerned relates to the competency or efficiency of government. It is important that the decision as to whether or not material is disclosed is made at arm’s length from the Minister and his political staff. Such decisions should be made by an independent officer, such as the Information Commissioner. That position must be afforded statutory protection so as to remove any threat of removal as a result of decisions that are contrary to the government’s wishes. As a necessary concomitant of the need for independence in making decisions regarding exemption, it is important that the power of Ministers to issue certificates under sections 36, 37, 42 or 42A is removed.

Another important mechanism that should be included in FoI legislation in order to limit the risk of undue political influence on FoI decisions is a clause which makes it an offence to refuse disclosure for an improper purpose. Improper reasons would include the concealing of incompetence, corruption, dishonesty or a conflict of interest.

### **The culture of openness**

Analysts and critics of FoI in Australia have observed that government agencies are often characterised by a culture of secrecy.<sup>7</sup> Similarly, it has been observed that when dealing with applications for access under FoI, agency lawyers have a tendency to “deny and defend”, taking an adversarial approach that is antithetical to the spirit of FoI.<sup>8</sup> While legislative amendments are necessary to improve the success of FoI, such amendments will ultimately fail to achieve improvements in FoI unless they are supported by fundamental shifts in the attitudes of government officers.

Three measures should be taken in order to promote changes in organisational culture within government agencies. First, FoI legislation should include an objects clause that emphasises that the aim of the legislation, in so far as it relates to the release of

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<sup>6</sup> *Report of the Independent Audit into the State of Free Speech in Australia* @ 104.

<sup>7</sup> *Report of the Independent Audit into the State of Free Speech in Australia* @ 103.

<sup>8</sup> NSW Ombudsman, as quoted in *Report of the Independent Audit into the State of Free Speech in Australia* @ 115.

public interest material, is to facilitate accountability in government and public participation in policy formulation. Secondly, it is necessary to institute thorough training of all officials, both as part of the induction of new recruits and as part of regular reinforcement to all staff, in the principles of open government. Thirdly, it is important that Ministers and senior officers periodically issue statements that confirm their own commitment to the aims of open government.

If governments are truly committed to the spirit of openness, all material that might assist in understanding policy decisions should be available for download on the government's own website without the necessity of engaging in processes which are often lengthy and expensive. In this approach the New Zealand government's practice of publishing Cabinet documents on the Internet might be taken as a model to emulate.<sup>9</sup> In addition to assisting members of the public in gaining a critical understanding of government processes, the free accessibility of such information relieves government officers of the task of processing FoI requests that seek its disclosure.

### **Strategies for improving the effectiveness of FoI**

There are a number of measures that could be taken in order to improve the effectiveness of FoI in facilitating public scrutiny and accountability of government. One of the most important factors affecting the timeliness and the cost of FoI applications is the efficiency of records management practices in government agencies. Outdated practices make the process of identifying and locating documents difficult and time consuming, while a reliance on paper records makes the task of producing copies and forwarding these to applicants more expensive. It is important that government agencies maintain databases that record details of documents, including descriptions of the content and keywords, in order to facilitate searching for and identification of material relating to an FoI application. Such databases could be made accessible to the public via the Internet, to enable applicants to ensure that FoI applications are as narrow and specific as possible. Wherever possible, documents should be kept in electronic form. This removes the requirement of photocopying and enables the forwarding of material to the applicant by email.

Once material has been released under FoI it should be easily accessible by all members of the public. Much of the material that is sought by journalists from government via FoI is material which relates to matters of public interest and should, therefore, be freely available. Such material should be available for download on the government's own websites.

An aspect of FoI processes that makes it difficult to assess their effectiveness is the inadequacy of available data in relation to FoI applications. Politicians who claim that FoI is working satisfactorily often cite the number of successful applications to support assertion. But the number of successful applications does not give an accurate indication of the effectiveness of FoI as a mechanism for enabling scrutiny and accountability, since the vast majority of FoI applications are made by private individuals seeking personal information pertaining to themselves. In order to make accurate and meaningful assessments as to the effectiveness of FoI, it is necessary to make a distinction between different classes of applicant, different categories of

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<sup>9</sup> See Snell, as quoted in the *Report of the Independent Audit into the State of Free Speech in Australia*, page 117.

information sought, and the purposes for which that information is sought. These categories then need to be correlated against the rates of refusal and the reasons for the refusal, including the categories of exemption cited. But this information is not freely available. To its credit, Queensland publishes some statistical information regarding applications in the Information Commissioner’s Annual Report and, to this extent, provides more information than some other jurisdictions. However, the data provided are not sufficiently detailed to enable a thorough assessment of the operation of FoI in Queensland. As a minimum, statistics should be published that indicate what proportion of applications seek non-personal information and the rate of refusal for such applications.

The Press Council is concerned about the suggestion that certain applicants might be declared vexatious and thereafter prevented from making FoI applications. We acknowledge that certain obsessive individuals may take up the time and resources of officials responsible for processing FoI requests. However, the ability to declare certain applicants vexatious may be abused so as to exclude those applicants who make frequent FoI applications for the purpose of scrutinising government. This could unfairly prevent community groups and concerned citizens, as well as journalists, from accessing material via FoI. Similarly, the ability to refuse applicants on the ground that they make “voluminous requests” or “unreasonably divert resources” may be abused to defeat valid applications.

## **Conclusion**

At this point in time Freedom of Information is of only limited utility to the media and members of the public seeking non-personal information. Instead, journalists will continue to rely on leaked documents, whistleblowers and off-the-record briefings in order to discover facts that shed a light on the conduct of government.

Freedom of Information holds out the promise of true democracy, by allowing the average citizen to know how and why governments make the decisions they do and to take part in those decisions. Unfortunately, that promise has yet to be fulfilled. Queensland’s FoI laws and processes must be completely overhauled before that can take place.

As a minimum, the following amendments should be made to the *Freedom of Information Act*:

1. The objects clause should be redrafted to give greater emphasis to the aims of open and accountable government and to reduce the emphasis given to exemptions to the obligation to disclose information.
2. The Act should state that, if there is any doubt as to whether or not material is exempt, the default position is that the material should be disclosed.
3. Those provisions that permit the issuing of conclusive or ministerial certificates should be removed.
4. Each provision which sets down an exemption should include a clause which requires the official deciding whether or not to release information to give equal weight to the public interest in disclosing information for the purpose of maintaining open and accountable government. This includes s.36(3), 37(3), 42(3), and 42A(4).

5. The Act should contain a clause that provides that where a refusal to disclose information is made for an improper purpose it is an offence.
6. The Act should provide that information released under FoI should thereafter be freely available for download from a government website unless that information is personal in nature.
7. Section 36(1)(a) of the Act, which makes documents exempt from disclosure if they have been submitted to Cabinet, should be repealed.