

CRIME AND MISCONDUCT COMMISSION

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FOI Independent Review Panel
GPO Box 5236
BRISBANE Qld 4001

Dear Panel

RE: Review of the *Freedom of Information Act 1992* - Submission

I refer to the meeting Assistant Commissioner Lambrides and I had last year with you during which we had the opportunity to bring to your attention particular difficulties experienced by the Crime and Misconduct Commission (CMC) prior to the amendments to the *Freedom of Information Act 1992* (FOI Act) in 2005. Those amendments included the creation of a new exemption provision unique to the CMC: s 42(3A). That provision provides:

(3A) Matter is also exempt matter if it consists of information obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in the performance of the prescribed functions of the prescribed crime body.

Under section 42(5) of the FOI Act, the CMC is a *prescribed crime body* and its crime and misconduct functions are *prescribed functions*. Section 42(3B) of the FOI Act provides an exception to the above exemption in relation to a particular applicant if the matter consists of information about the applicant and the investigation has been finalised.

The CMC does not suggest that its operations generally should not be subject to scrutiny under the FOI Act, however, it does consider that information concerning its crime and misconduct functions should be exempt from access under the FOI Act, except where the information relates to the particular applicant for access and when the investigation is completed.

The catalyst for the amendment in 2005 was an application received by the CMC from a journalist requesting access to all documents relating to complaints received by the CMC with a security classification of "Highly Protected" which had been finalised within a given time period. "Highly Protected" is the highest security classification used by the CMC and is reserved for its most sensitive matters, and files so classified are treated with strict confidentiality (including restrictions on access and copying) within the CMC. The CMC would have been unable to resist access to much of the information appearing in those files and that would result in the CMC's capacity to carry out its statutory functions being seriously undermined.

One of the CMC's key functions is the investigation of allegations of official misconduct against public officers. The FOI Act affords no specific exemption for information that might adversely affect those officers in respect of their employment affairs, even in circumstances where an investigation resulted in allegations being unsubstantiated. This may be contrasted with an investigation by the Queensland Police Service of allegations of a breach of the law by a private citizen which are not substantiated. In that case, access could be refused to information to an applicant (other than the person the subject of the investigation) on the ground that the matter concerns the personal affairs of another person. The present "personal affairs" exemption (s 44(1) of the FOI Act) does not ordinarily apply to a public officer's employment affairs.

It would be apparent that access to documents by third parties, particularly in circumstances where the allegations against an officer are not substantiated, has the potential to cause serious damage to reputations and undermine public confidence in the CMC.

To be effective in carrying out its statutory obligations, the CMC relies on the voluntary assistance of those officers. The fact that the CMC could not reasonably rely on any particular exemption provision to resist access to its documents will result in a general reluctance by public officers to assist the CMC in its investigations knowing that information provided may end up in the public domain as a result of an FOI application. While the CMC has coercive powers to compel compliance, and information obtained in the exercise of these powers is presently exempted under s 42(1A) and s 50(b)(ii) of the FOI Act, powers of this nature are exercised with due discernment and not routinely.

An insight into how Parliament intended the CMC to deal generally with information in its possession may be obtained by examining restrictions in the *Crime and Misconduct Act 2001* (CM Act) on the use that can be made of information obtained by the CMC. It is an offence for information to be used by the CMC or its officers except for the purposes of the CMC or the CM Act (see, for example, ss 60, 62, 146J, 202, 213 and 342).

Significantly, the CM Act provides in s 213(4) that the CMC and its officers cannot be obliged by a court to produce information or give evidence about CMC activities, except in limited circumstances. It seems incongruous that the CMC could not ordinarily be compelled to produce in court information held by it, yet such information could potentially be accessed by anyone under the FOI Act.

To enable the CMC to fulfil its statutory responsibilities under the CM Act and maintain public confidence in it, the CMC respectfully urges the panel to maintain the above exemption provisions in its recommendations to government.

Yours sincerely



ROBERT NEEDHAM

Chairperson