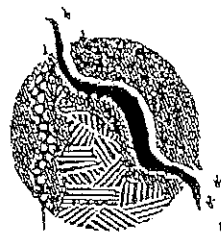


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Your ref:
Our ref: FOI Review submission (SOU)

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6 March 2008

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Dear Review Panel Members,

Freedom of Information Act Independent Review Panel - Discussion Paper

Thank you for the opportunity to comment on the *Freedom of Information Act (Qld) Review Discussion Paper*.

The Cape York Land Council (CYLC) is an Aboriginal Corporation serving the Aboriginal communities and traditional owners of Cape York Peninsula. Membership of CYLC is open to Aboriginal people whose traditional lands are on Cape York Peninsula. CYLC is also the Cape York Native title Representative Body for the purpose of the Native Title Act 1993 (Cth) (NTA).

Cape York Land Council notes that it does not have the time or resources to provide a full response to each of the questions raised in the Discussion Paper. It has therefore confined its comments in this submission to those questions that appear to have a particular relevance for the core operations of the Land Council. However, CYLC supports the broad focus of the review and looks forward with interest to the release of information about proposed changes to the FOI process, following assessment of the responses to the Discussion Paper.

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Is there a public "right" to information held by the government, information about the personal affairs of people and about the way government is conducted?

Cape York Land Council submits that there is such a "right", noting that such information may be relevant to ascertaining the existing and future rights of Indigenous people in Queensland (notably in relation to historical dealings with land in Queensland and the effects on native title rights and interests).

The "default" setting when any document is created by agencies is that it be regarded as "confidential". Is this still appropriate?

Cape York Land Council accepts that some information is and should remain confidential. However, we do not consider it appropriate that any document created by an agency should be automatically regarded as confidential.

Does the existence of the 30-year rule militate against the culture of openness that the freedom of information law is meant to encourage within government and other relevant agencies?

Should the period be reviewed in relation to Cabinet decisions and documents, and more generally for other public records? If so, to what extent should it be reduced?

Given that any change would have financial and administrative implications for Queensland Archives, should any change be phased in over a number of years?

The restricted access period of 30 years for Cabinet and Executive Council records has prevented Cape York Land Council accessing information that is clearly relevant to resolving issues in native title claims. Our experience is that there is no justifiable reason for imposing such a timeframe. We submit that alternative protections, other than a time period, could be incorporated into the legislation to ensure the non-disclosure of information which should for public interest reasons remain "secret".

Should agencies be encouraged to consider providing more information to people under administrative access schemes or otherwise than through FOI?

Should FOI officers be given more delegated power and discretion to release information requested under FOI other than through the FOI process?

Cape York Land Council submits that if the information is accessible, either under administrative access schemes, or through FOI, then appropriate advice should be made available to an applicant at an early stage so that the appropriate process can be pursued, and delegated power should be given to FOI officers to release such information. It is often difficult to

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identify the precise nature of the material containing the information sought, and thus the appropriate process, until a request for information is made.

Would there be any advantage in changing the Act to provide that a person may seek access to public records, rather than documents, or even to official information?

Should the Act specifically exclude "ephemeral" material?

Should it move towards the Swedish approach?

Cape York Land Council supports a move towards access to "official information" rather than "documents" but is concerned that the Swedish approach might prevent access to relevant information. The New Zealand approach appears preferable.

Should the private sector remain outside the reach of the FOI Act?

Should there be special provisions in the Act (and, if necessary, in other legislation) to ensure that when government services are contracted out to corporations, partnerships or individuals, that the contractor should be required to provide information that would have been required under FOI if the services were being provided by an agency?

Should Government Owned Corporations (however constituted) be exempt from provisions of the Act covering agencies and, if so, to what extent?

If world's best practice in FOI law is that FOI should extend to "any body that is exercising government functions" should any attempt be made to define what are "government functions" at a time when the responsibility for many such functions is being devolved to the private sector or GOCs?

Should people be able to access their personal information held by organisations like GOCs that are ultimately controlled by government and, if so, to what extent?

CYLC supports the view that the principles of transparency and accountability should apply to Government Owned Corporations and Government Business Enterprises, allowing for exemptions for commercial and competitive documents.

What principles should apply in determining whether bodies are covered by the Freedom of Information Act?

What principles should apply when consideration is given to excluding a body from coverage by the Act?

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Cape York Land Council submits that it would not be appropriate, for resource and commercial reasons, for all publicly funded organisations to be subject to FOI legislation - the appropriate situation is where a body provides services to the public on behalf of government.

If no harm would follow from the release of material that would fall within an exemption provision, should it be released?

Should exemption provisions be rewritten to ensure that FOI officers apply such public interest tests as they contain?

Should there be an over-riding public interest test covering all exemptions?

Is there a need to write additional legal protections to cover the release of material under FOI?

How can FOI officers be made more aware of the fact that they can release information that falls within an exempt category? What test should they apply if they consider exercising this discretion?

Cape York Land Council submits that it may be difficult to administer a system where an FOI officer is required to assess whether harm might follow the release of material that is otherwise exempt. However, the New Zealand approach of providing a number of conclusive reasons for withholding information, together with an obligation to consider the circumstances of a particular case which might render it desirable in the public interest to make the information available, appears to have merit.

What role should the "public interest" play in the determination of whether access should be granted to documents that would otherwise be exempt documents?

Should there be a public interest override covering all exemptions? Or, all but a few specified exemptions? How should the public interest test be expressed? To what extent should the notion of detriment or harm be involved in determining the balance of public interest? Should the timeliness of the release of the document be a factor in determining public interest? Should there be guidelines on the matters that need to be considered in determining the public interest?

Should these be provided by the Information Commissioner? Or should they be included in the Act as factors (some of which are not specified) that should be taken into account in determining what the public interest is in the particular case?

Cape York Land Council's experience of the operation of FOI in Queensland is that the public interest test is not adequately taken into account. As noted above, Cape York Land Council considers that the "public interest"

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should continue to play a role, but with its application clearly defined and guidelines provided on how a public interest test should be applied.

Cabinet matters: Should the exemption be reworded to ensure that those considering applications for access remain conscious of the fact that even if matter falls within the exemption, there remains a discretion for it to be released?

Should a class exemption for Cabinet matter be maintained? Should a public interest test be introduced? Should the exemption include a purposive element? Should there be a factual/statistical material exception? Should a Minister/Cabinet/Governor in Council be able to issue a conclusive certificate? Should there be a time limit on how long Cabinet matter can be exempt from FOI?

Should the exemption be based on a consequential approach, as in New Zealand?

As noted in the Discussion Paper, Cabinet and Executive Council exemptions are class exemptions which are not subject to the public interest balancing test, on the basis that there can be no public interest arguments that overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility. However, CYLC concurs with the view that the history of expansion of the cabinet matter exemption is related to a practice of taking documents into the Cabinet room for no purpose other than to avoid them being accessible through FOI.

CYLC supports the view that only documents brought into existence for the purpose of submission to Cabinet should qualify for the cabinet exemption. The Queensland approach of excluding any purposive element in terms of the reasons for which the documents submitted to Cabinet were created, the failure to include a "factual/statistical" exception to the exemption, the lack of a sunset clause and the "conclusive certificate" provision (which limits the powers of a reviewing body), should be replaced. CYLC endorses the New Zealand approach which sets out the grounds on which the withholding of information can be considered to outweigh other considerations which would render it desirable in the public interest to make the information available (for example, maintaining constitutional conventions which protect collective and individual ministerial responsibility, and maintaining the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty).

Executive Council matters: Should a class exemption for Executive Council matter be maintained?

Should there be a time limit on how long Executive Council matter can be exempt from FOI?

Should there be provision for a conclusive certificate?

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Cape York Land Council supports the recommendation by the ALRC/ARC that the Executive Council exemption be repealed, on the basis that any documents which warrant protection can be withheld under other provisions, such as personal information.

To what extent does FOI in Queensland recalibrate the basic informational settings between open/closed, secrecy/openness, privacy/disclosure, and spin/deliberative dialogue?

How can a State, characterised by a strong executive, honour the original intent of FOI and address its anxiety about the capacity to govern effectively in a hungry and geared information age?

In accepting that the administration of FOI operates beyond an application of primary legal obligations, how can bureaucratic and political interests be kept in balance?

Which of the administrative compliance behaviours described in Table 8.1 are practised in Queensland? - typically?, infrequently?

In considering the steps towards addressing administrative compliance shortfalls suggested by Snell and others (pp. 100 - 102) plus incentives and sanctions and any other general measures, how might Queensland drive a cultural change necessary to give effect to the legislative objects of the Freedom of Information Act 1992?

Cape York Land Council submits that there are now precedents from other jurisdictions which demonstrate that improvements to the Queensland system are possible, without risking the effective governance of the State.

Cape York Land Council has had negative experiences with the application of the FOI legislation in Queensland and suspects that the attitude of decision-makers and thus the operation of the legislation is directly affected by the failure of the leaders in the Queensland government to fully support the legislation in practical ways. We support the steps suggested by Snell and others, and agree that issues such as the attitude, training and resources of FOI officers are ultimately driven by leadership endorsement of the letter and intent of the legislation.

How can the application process be streamlined, made more efficient and user-friendly?

Should agencies adopt guidelines giving effect to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report?

Cape York Land Council supports the adoption of the guidelines referred to by the Commonwealth Ombudsman in his 2006 report.

Is the existing fees and charges regime in the Freedom of Information Act 1992 reasonable and balanced?

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What are the comparative merits of a flat fee scaled by volume and the current time-based charging model?

What alternatives exist to ensure consistency in the application of any fees and charges regime?

Cape York Land Council as a publicly funded organisation, similar in many ways to a "community" or not-for-profit organisation, submits that the grounds for waiver of charges should be clarified. Although Cape York Land Council meets the requirements in terms of not being carried on for the profit or gain of individual members, it has in the past experienced practical difficulties in responding to requests for "evidence of financial hardship" - whilst reference is made to a number of possible options for demonstrating financial hardship, an application for FOI (which was accompanied by copies of Cape York Land Council's rules showing no profits to members, plus a tax exempt certificate based on Cape York Land Council's charitable status) resulted in a request for production of further documents (certified copies of annual audited accounts, statements of revenue/earnings for the current and last financial year; statements of assets and liabilities for the current and last financial year, and bank statements from most recent accounting period). That information was difficult to put together at that time, based on the timing of our reporting requirements, and seemed unnecessary in light of the material already provided.

Are the existing time limits reasonable and consistent with the objectives of the Freedom of Information Act 1992?

Beyond amendments to the existing time limits, what initiatives exist which could improve early disclosure under the Act?

Cape York Land Council submits that the length of time associated with FOI applications is generally too long. For example, a recent FOI application made in August 2007 eventually led to provision of copies of a handful of documents in February 2008. A 6 month timeframe to obtain information of the kind sought, which essentially related to tenure dealings with specific parcels of land over a short time period and did not involve any review processes, seems excessive and has the potential to prejudice our ability to progress native title claims.

If you have any queries in relation to any points raised in this submission, please do not hesitate to contact Marita Stinton at mstinton@cylc.org.au.

Yours faithfully,
CAPE YORK LAND COUNCIL


ANN DANIEL
PRINCIPAL LEGAL OFFICER