

Submission to the Review of the Freedom of Information Act 1992 by David Fagan, Editor of The Courier-Mail

The brief history of FOI in Queensland is best summarised by two disparate quotes:

Then Attorney-General Dean Wells introduced the legislation in 1992 with these words: "This is an important piece of legislation which will change the whole culture of government in this state . . . the previously operating assumption that information that is held by government is secret unless there is some overwhelmingly good reason to the contrary is now to be replaced and is to be substituted with the assumption that information held by the government is available unless there is some overwhelmingly good reason to the contrary. It is the most important exercise in accountability that a government can take".

Thirteen years later, Michael Clare, a Queensland public servant responsible for preparing documents for Cabinet told the Davies inquiry into Queensland Health that he had personal knowledge of his department abusing the Cabinet process to avoid "embarrassing" material coming into the public arena.

"I recall being advised . . . that an FOI application had been lodged by either the then Opposition or The Courier-Mail and that a Cabinet submission would need to be prepared in order to prevent the public release of certain information relating to surgery waiting lists in public hospitals. I have a clear recollection of going to some trouble to obtain **the use of a fridge trolley in order to deliver and subsequently retrieve from the Cabinet room in the Executive Building a number of boxes of documents associated with the Cabinet submission.**"

Mr Clare gave evidence to the inquiry that the process became streamlined during the course of the Beattie Government when legislation was changed so that documents no longer had to be physically taken to Cabinet to be exempt from release.

The original FOI legislation in Queensland was cutting edge. It gave the public potential access to a vast array of material which could inform their decision making about the political process while keeping intact the legitimate protections ministers and officers of government might require to do their jobs in the public interest.

Those exemptions broadly covered threats to law and order, the release of commercial information which might hurt the public's economic interests and material that might restrict public servants from frank exchanges in future

deliberative processes. In addition, there was the Cabinet exemption which allowed a document to be exempt if it had been prepared for AND taken to Cabinet.

As a journalist, I was one of its first and most ferocious users but saw its ability to uncover information quickly wound back. I have had documents suppressed by ministerial conclusive certificates, been tied up for years by third parties not wanting the public to know the subsidised price they pay for public resources and have had documents physically taken to a remote Cabinet meeting to put them out of my reach.

Now, as editor of The Courier-Mail (Queensland's major provider of news and information and a regular and frustrated user of the FOI Act), I contend that all of those exemptions have taken stronger force since the weighty promises of Dean Wells in 1992.

This is a period in which the public, served by government, has become accustomed to dealing with vast quantities of new material. The internet has generated an information explosion - yet politicians continue to legislate to thwart their constituents' right to information.

Indeed, the amount of material the state assembles on the individual has grown while the individual's ability to access information collected on his/her behalf by the state has diminished.

This submission takes a journalist's perspective on FOI. It is underpinned by the journalist's belief that access to information empowers individuals, allows them to make better decisions and, therefore, places a brake on poor or inefficient government. This is a strong economic reason for FOI to be reinforced. Transparent decision making is better decision making and allows better use of public resources.

FOI has been weakened across the board but the public interest is most diminished by two important changes:

1. The increased outsourcing of government functions immediately triggers the commercial exemptions to information that should be available to the public. Operations conducted by state-owned agencies deemed to be commercial are out of the reach of FOI applications if the government of the day so wishes. This now includes the supply of energy, most transport services and an increasing array of health and education services.
2. The amendment and subsequent abuse of the Cabinet exemption means the government of the day can and does routinely take material to Cabinet to prevent its release. Politicians choose to portray this as applicants (usually the media and mainly The Courier-Mail) trying to penetrate the confidentiality of Cabinet, a principle held sacred by its members. In fact, most likely it is an attempt to stifle the release of material which may embarrassingly demonstrate failure of public policy.

Of these diminutions, the abuse of the Cabinet exemption is most insidious.

The Cabinet exemption allowed under the original Queensland FOI Act is based on the principle that the Cabinet is the most sensitive area of administration. It is the "high council" of government at which members are bound to solidarity and confidentiality. The important decisions of state - the very decisions that the public has the most need to understand - all go to Cabinet.

The original consideration of FOI in Queensland (Electoral and Administrative Review Commission 90/R6 1990 para .19.20C recommended that the confidentiality of Cabinet be offset by maintenance of a Cabinet register which would see publication of

- a. details of the terms of all decisions made by the Cabinet after the commencement of the FOI Act;
- b. the reference number assigned to each decision;
- c. the date on which each decision was made.

This was a perfectly sensible indicator to the public of the current business of the government but it did not survive drafting of the Act. EARC unsuccessfully renewed its call for this provision in its Review of Government Media and Information Services 93/R1 1993 para 3.164.

Cabinet government is now at the centre of public administration yet it is the means by which government most often stops the public finding out about its actions. This is an abuse of the institution of Cabinet.

While ministers and public servants will regularly deny access to material on the basis of the Cabinet exemption, they regularly choose to breach it themselves.

Material that goes to Cabinet regularly comes into the public domain.

Ministers can and will announce decisions after Cabinet meetings sometimes because of their public importance.

Ministers can and will release decisions of Cabinet to draw attention to their own achievements or the achievements of the government.

Ministers can and will unofficially release or "leak" Cabinet material to make a political point or to embarrass an opponent.

In these circumstances, it is hard to justify the sanctity of the Cabinet system as a means of thwarting the public's access to information.

The Courier-Mail has regular experience of this. Some published examples include:

May 2001: FOI application to the Public Service Commissioner on the appointment of the Commissioner of Children and Young People. Outcome: Part refused due to Cabinet exemption.

December 2003: FOI application to State Development Department on infrastructure development. Outcome: 417 documents exempt due to Cabinet provisions.

January 2004: FOI application to Department of Natural Resource on a north Queensland development. Outcome: Rejected due to Cabinet provisions.

July 2004: FOI application to Department of Justice and Attorney-General on communication involving the Land and Resources Tribunal. Outcome: Rejected due to Cabinet provisions.

August 2004: FOI application to Treasury on application of ambulance levy. Outcome: Total exemption due to Cabinet provisions.

May 2005: FOI application to Premier and Cabinet on appointment of Commissioner of Children and Young People. Outcome: Total exemption due to Cabinet provisions.

All of these matters were of some public interest but were thwarted due to misuse of the Cabinet provisions.

The shortcomings of FOI identified in the discussion paper issued by the independent review panel lead to some obvious conclusions but the most important, in the view of this submission, are to reverse the cultural inclination to secrecy by immediately repairing the flawed Cabinet provisions.

Hence, our recommendations are:

1. FOI, as described by Dean Wells, represents a cultural shift in government. The culture must be demonstrated from the top. The Courier-Mail welcomes the decision of the Premier Anna Bligh to properly examine the application of the act and expresses hope that this is the beginning of a renewed interest in accountable - and therefore efficient - government under which the public will have greater access to information.
2. The application of the act needs to encourage release. Exemptions - if necessary - should be seen simply as exemptions, not as outright prohibitions on release of information.
3. The amendments that allow abuse of the Cabinet provision should be unwound and the closed nature of Cabinet should be offset by the

introduction of a Cabinet register which would offer a valuable guide to the important business of state.

4. The commercial exemptions should allow for corporatised bodies and even private businesses to be required to release information about activities normally the business of government.
5. The cost regime should recognise the very significant productivity gains achieved from modern information technology. It should also recognised the increased quality of public administration that will arise from transparent deliberation and decision making.
6. The decision process needs to allow for greater mediation even before the internal review phase. This is of benefit to both applicants and decision makers, allowing applicants to refine their search and decision makers to identify vexatious applications.
7. Decision-making should be insulated from political offices. While the public might rightly expect ministers to be aware of embarrassing material being released by their departments, they would equally expect that they not be involved in suppressing it.



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