

ENHANCING OPEN AND ACCOUNTABLE GOVERNMENT

Submission to the Review of the *Freedom of Information Act 1992* by John Doyle, FOI consultant to The Courier-Mail

Comments on the discussion paper

The methodology, as outlined in the discussion paper, indicated that surveys were sent to a selection of State Government agencies seeking specific information from those agencies about a sample of freedom of information access requests with which they had dealt.¹

It is presumed that responses from these agencies would have included information outlining their experiences in dealing with the media and, perhaps commented on their difficulties in using various amounts of effort and resources.

What these agencies probably did not provide was information on the amount of effort and resources committed by an applicant in dealing with some agencies.

The views expressed in this submission support the notion that information in the hands of government should be treated as a public right. Agencies should adopt the practice of providing a service to the public by allowing ready access to information. The provision of information should be based on a philosophy of what the public demands and not on what government thinks it should have.

The comments contained in this submission will touch on a number of issues, including some of the questions raised for discussion and experience as both an agency decision maker and later as an applicant.

Purposes and principles of FOI (6.1 of Discussion Paper)

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

If FOI is about a right to know and Judicial Review (JR) is about a right to know why, then Queenslanders would have a right to question why the vast majority of amendments to both FOI and JR legislation have resulted in their right to information continually being diminished.

In dealing with FOI applications the principle that should apply is that information is readily available to the public unless there is a compelling reason to prevent its disclosure. However, there is no clear evidence that more non-personal information is being made available to the community either through or outside of the constraints of FOI.

¹ Discussion Paper p 18

In effect, the perception is that government agencies continue to control access to information and such information is generally only available by utilising FOI or other legislation. It should not take some government crisis, as in the case of recent events involving Queensland Health, for the public to become aware that mismanagement is occurring.

Whilst there is a public "right" to apply for access to information held by government there is generally no basic right to information as such.

Furthermore, the costs of administering openness and transparency should not be treated as a financial liability or disincentive but as an investment in Queensland's proper public administration.

Objects of the FOI Act (6.2)

The lack of "Openness" and the default setting of "confidential" are issues that need resolution.

The keepers of information, including both public servants and police are all constrained by legislation that prohibits the disclosure of information unless certain guidelines are followed. On the surface, these constraints appear reasonable. A government will argue that policies and rules are provided for the guidance of both staff and the public. But there is little evidence to indicate this approach supports whistleblowers or the community in general.

Given the propensity of departmental heads to investigate and prosecute alleged breaches of these guidelines, there is little encouragement for staff to provide information, particularly to the media. In reality there has been an increasing trend for most departmental staff to refer even the simplest inquiry to their media liaison officers.

Frequently, these media officers will not provide the information and refer the inquirer to FOI. Conversely, inquiries to FOI offices have resulted in return contact from media officers instead of an FOI officer. Rather than being open and accountable, departments appear to be more concerned with information management and pre-empting negative media reports.

Administrative Access (6.2.5)

The benefits of otherwise of administrative access to information were dealt with in some depth by the Office of Information Commissioner in 2003². They indicated that there were many "long-running access schemes in some agencies, based on statutory requirements, which predate the FOI Act and allow access, free or at a cost, to certain types of information"³

The introduction of administrative access schemes by departments has effectively reduced the number of FOI applications. However, it should not be assumed that these schemes were introduced solely to benefit applicants.

² Voice – News from the Office of the Information Commissioner. Issue 3, September 2003

³ Ibid

Many were introduced or continued to limit applicants from gaining access to information concerning their personal affairs which, under FOI, would be freely available ie at no cost. For instance, the Health Department was concerned about providing free access to copies of x-rays, etc. The Queensland Police Service was concerned about providing free copies of "mug shots" to prisoners, criminal records, and traffic accident or crime reports.

There can be benefits to the public. Following the publication in *The Courier-Mail*⁴ of a sample FOI application to Queensland Transport (QT) on how to obtain details of the history of a motor vehicle, QT introduced a scheme where the information could be provided administratively outside of FOI.

The FOI Discussion paper raises the questions whether agencies should be encouraged to provide more information through administrative schemes; have more delegated power and discretion to release outside of FOI, and to have further legal protection.⁵

These questions should be examined in conjunction with section 22 of the FOI Act where people seeking access to information through FOI may have their applications refused if the information is available elsewhere.

From a government perspective easier access through administrative schemes is a practical controlling method that also provides a form of remuneration which otherwise may not have been available. On the other hand the use of section 22 by FOI officers can hinder or impede an applicant.

Whilst an application should be finalised within 45 days this is the exception rather than the rule. Allowing for notices on the preliminary assessment of charges, negotiations regarding the costs and the scope of the application, consultations, etc it is not uncommon for months to pass before a decision is made. On occasions, decisions provided to *The Courier-Mail* contained advice that access to some documents had been refused as the information sought was available through another scheme. In this instance the applicant was required to pay the full costs for processing the application even though some of the requested information was not provided.

If administrative schemes are to be encouraged then they need to be properly managed and applicants given clear early advice regarding the availability of documents as is done by some agencies.

Publication schemes (6.2.6)

Despite the former Premier requiring that all departments publish Statement of Affairs on their web sites it remains a challenge, with respect to some agencies, to find the current version, let alone any reference to FOI.

Frequently, the only information available regarding FOI applications is contained in the Statement of Affairs (SOA). Being unable to locate this information can only hinder an applicant.

⁴ The Courier-Mail 8 July 2004

⁵ Discussion Paper p 56

The current legislation requires a SOA be published annually. Many departments publish them in September to coincide with the introduction of the legislation. If the purpose of a SOA is simply to comply with the legislation then publishing yearly is adequate. However, its purpose should not be compared to an Annual Report which reports on the past – and months after the event.

The information contained in a SOA should remain current and reflect the status of a department or agency; published and updated on a departmental website; available for inspection at a government establishment – either on a computer or by printing a current edition.

Including an extract of a SOA in an Annual Report is completely inadequate. Agencies complain about having to trawl through copious amounts of information to deal with an application but have no misgivings that the public are required to trawl through their websites trying to find a SOA or information on FOI – often only to find a “bits and pieces” effort hidden in an annual report the size of which discourages downloading.

A number of agencies and local authorities have not published a SOA for some years or failed to keep them updated. An application by *The Courier-Mail* to the Queensland Anti-discrimination Commission resulted in the application and cheque for \$34.40 being returned with a request for an additional payment of 0.85c⁶ (Unbeknown to the applicant the government had recently gazetted a fee increase)

At the time the SOA of the Anti-discrimination Commission indicated the fee was \$32.50. A request for a current SOA resulted in an updated version being provided still incorrectly stating the fee was \$32.50.

The Courier-Mail paid the additional 0.85c and subsequently was provided with a preliminary assessment notice for \$8,507.20 to process the application. It was decided not to proceed with the application although the Commission, in contradiction of the intent of FOI, had advised that if the purpose of the application was provided they could be more helpful.

It is disappointing that following increases in FOI charges, government websites, including that of the Justice Department, are tardy in updating the information.

With respect to what information an agency should publish, section 18(2)(d) requires that a SOA must contain “a description of the various kinds of documents that are usually held by the agency”.

Agencies appear to adopt different interpretations of the word “kinds”. Some provide reasonably detailed descriptions whilst others take a minimalist approach. In any event, the information generally does not provide sufficient information to adequately assist applicants.

There is a need for more specific information to be published, including information regarding databases, contractual arrangements, indices,

⁶ Qld Anti-discrimination Commission Ref. No. F/0055

statistics and research. A publications scheme would be more desirable and given that most agencies now have some form of computerised records management system should form the basis of a SOA.

Bodies to which the Act applies (6.3.2)

The issues raised in the FOI discussion paper have centred on concerns that the government is developing initiatives with the private sector, outside of the constraints of FOI and other legislation. As indicated, the Crime and Misconduct Commissioner expressed concern in his annual report of what appears to be a growing trend to convert some public agencies to Government-owned corporations. Further the intention to convert statutory GOCs to corporate GOCs will mean that the CMC will not have power to investigate these agencies.⁷

(Ironically, whilst the CMC is concerned about their investigative functions, FOI amendments have virtually eliminated the opportunity to scrutinize the CMC. Other than allowances for persons who are directly involved, the effectiveness, accountability and the means to review CMC matters is limited to what reports they, or the government, choose to make public.)

The question whether an entity is a GOC, a public authority, another body or even subject to FOI becomes somewhat questionable with respect to Queensland Racing Limited.

In response to an application from *The Courier-Mail* Queensland Racing advised that:

...on 1 July 2006, the Queensland Thoroughbred Racing Board ceased as the continuing control body for thoroughbred racing, and Queensland Racing Limited (QRL) commenced as the new control body for thoroughbred racing.

In view of the above, I advise that the Act (FOI) does not apply to the QRL, and as such, I am unable to provide you with the requested information.^{8 9}

An external review was sought from the Information Commissioner¹⁰. The preliminary view of the IC was –

.....it is my preliminary view that:

- QRL is not an agency for the purpose of the FOI Act as it does not come within the definition of public authority as defined by sections 9(1)(a)(i) or 9(1)a(ii) of the FOI Act;

⁷ FOI Discussion paper p 64

⁸ Letter dated 30 August 2006 from Queensland Racing

⁹ A request had been made for a copy of QR's Statement of Affairs

¹⁰ Letter dated 9 March 2007 from the Information Commissioner

- As QRL is not an agency for the purposes of the FOI Act, the Information Commissioner does not have jurisdiction to conduct an external review of Mr RG Bentley's decision.

Part of the reasoning of the Information Commissioner was that:

- in order to determine whether QRL was 'established under an enactment' for the purposes of section 9(1)(a)(ii) of the FOI Act, it is necessary to determine whether QRL was established 'directly below' or 'beneath' a Queensland Act;
- QRL was established directly below or beneath the Corporations Act, which is a Federal rather than a Queensland Act; and
- QRL is not 'established under an enactment' for the purposes of section 9(1)(a)(ii).

An examination of the Parliamentary Hansard (Qld) found no indication in the debates or explanatory notes that Queensland Racing Limited would be established outside of the public scrutiny of FOI.

Public Interest Tests (7.1)

The FOI discussion paper, in referring to the ALRC Report indicates that:

This lack of definition can mean the public interest is difficult for agencies, applicants and the AAT to ascertain. Despite this, the Review does not consider that any attempt should be made to define the public interest in the FOI Act. The public interest will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility.¹¹

The concept of the public interest has also been considered by the High Court. In *O'Sullivan v Farrer* (1989) 168 CLR 210, Justices Mason, Brennan, Dawson and Gaudron considered at 216 that: -

....the expression "in the public interest", when used in a statute, classically imports a discretionary value judgement to be made by reference to undefined factual matters...

Clearly, endeavouring to define a public interest test when it is closely associated with discretionary judgement is not appropriate. The end result would be another complicated link in a reasons statement.

The inclusion of a public interest test with respect to all exemptions is reasonable. If FOI in Queensland is to reflect open and accountable government, exemptions should be drafted to indicate that the exemption provision can only apply if it is proven release of the information is not in the public interest. The onus should be on the agency to justify their argument whether it is based either on a public interest or a harm test.

¹¹ FOI Discussion paper p77

There may be scope to include a reference in legislation to matters that are not to be considered in any test.

Currently, the exemption provisions not associated with a public interest test allow an FOI decision maker to claim an exemption whether reasonable or otherwise. Further, there is no obligation on a decision maker to set out reasons on a failure to exercise their discretion as provided under sections 14 and 28.

Personal affairs (7.4)

The suggestion that the term “personal affairs” in s.44 of the Act be replaced by “personal information” is not supported.

Early decision by the Information Commissioner (Qld) clearly identified that work related matters – be that of a public servant or member of the public – do not ordinarily concern a person’s “personal affairs”.

There are numerous instances where work related matters are a matter of public interest. Recent events in the Health Department should be subject to public scrutiny and agencies already have sufficient opportunity to exempt matter.

The Information Commissioner in a recent letter¹² to *The Courier-Mail* relating to an internal investigation expressed the view that all matter was exempt under s.40(c). There was no claim that the work related matter concerned the personal affairs of the individuals involved.

Unfortunately, in an attempt to not disclose information regarding the training records of a number of fire officers, the Department of Emergency Services claimed their identities were exempt from release as they related to their business affairs. A subsequent review by *The Courier-Mail* resulted in the matter being overturned. How often the inappropriate use of the “business affairs” exemption was used prior to the Department being challenged over its use remains unknown.

The Public Sector Culture (8.1) (and the FOI process)

One of the major hurdles in enhancing open and accountable government revolves around a change in culture by government officers. The enthusiasm for openness and accountability that was initially displayed when FOI was introduced in 1992 has significantly diminished. Dealing with FOI should be a simple process – applications are made and then decisions are made. It is the escalating political and managerial interference in the middle of the process that hinders the system.

The information outlined below provides some examples.

An article published in *The Courier-Mail* on 4 September 2006 outlines the author’s disquiet over the changing face of FOI and the public sector culture in dealing with FOI matters.

¹² Letter from Information Commissioner dated 1 October 2007 Reference 210087

FOI stripped and beaten

...Fred Albietz, a former information commissioner, predicted in his 1994 Annual Report: "My primary concern is that the FOI Act is in danger of dying the death of a thousand cuts."

He has proven to be right.

Admittedly, Queenslanders can generally still gain access to information about themselves, but trying to get any facts from government bureaucracies relating to the management and administration of Queensland is another matter.

Since FOI was introduced in 1992, previous information commissioners have all warned about the weakening of FIO legislation and the effect of excessive secrecy on Queenslanders. When they have made decisions contrary to Government expectations, damage control is swift and the legislation is amended. In other cases the Government has amended legislation retrospectively to prevent release of documents.

The Fitzgerald Report in 1989 recommended the introduction of FOI and warned Queenslanders: 'Information is the linchpin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.'

Continuing changes to the FOI Act have allowed the much touted policy of openness, accountability and transparency of Queensland Government to be further eroded.

In essence, Queensland is in danger of returning to a time similar to when Joh Bjelke-Petersen controlled Government information and 'fed the chooks' tidbits of propaganda.

FOI in itself does not allow the community the right to access all documents of Government – it simply allows them to apply. But apart from the FOI Act and its myriad of exemption provisions that are used to hide and refuse access to information, it is in other Acts of Parliament that much has been done to make further restrictions on access to information.

The Auditor-General's Office, having refused access to documents, admitted the *Financial Audit and Administration Act* had been amended to prevent a recurrence where *The Courier-Mail* gained access to documents in 2001.

It's ironic the office of the Auditor-General, which exists to keep departments accountable, does not want the community to determine if and how that accountability is being achieved; even admitting that gaining access to information from its own department was not warranted.

Exemptions given to the Crime and Misconduct Tribunal are so far reaching it is virtually impossible to obtain details of any investigations undertaken by the CMC. These changes have proven handy – particularly if investigations concern councillors and members of parliament.

Again, these amendments were not in isolation, with the Government never missing an opportunity to diminish the effectiveness of FOI. When amendments were made to the *Coal Mining Safety and Health Act* in 1999, a provision was included that information provided to investigators under compulsion was exempt under the FOI Act. Thus restricting the community's right to examine many investigations, including those involving police and public servants.

Bureaucrats who make decisions on applications should act on the principle that all information is available to the community unless there are proper reasons to justify restricting access. Unfortunately, there is a trend for some bureaucrats to take the opposite approach.

Before the introduction of processing charges in 2001 many decisions makers displayed an enthusiasm to talk with applicants. It was a way of focusing on the needs of the applicant but also provided the opportunity to narrow or limit the scope of the application – with a resulting decrease in workload. Consultations with third parties who could reasonably be adversely affected by the release of documents were undertaken only as a last resort.

Rather than taking a practical approach, some agencies have now engaged in a game of tactics. The objective is to discourage the applicant by maximising costs and extending the processing time. One strategy is to include all conceivable documents that could come within the terms of the application, advise of the need to consult with all involved and claim that they will have to spend considerable time and effort in processing the application.

Agencies can now charge for all manner of things – including searching for documents, processing the application, consulting third parties, deleting information. The irony is that the applicant has to pay the agency to do this and also to write the argument as to why they cannot have the information.

It is not unusual for an estimate of charges, often in the thousands of dollars, to be presented to the applicant. On the basis of this scant information, applicants are invited to provide grounds to challenge the assessment. It's a simple message – pay up or go away.

Apart from exorbitant fees and charges, agencies all have different ways of dealing with applications. A recent application to Queensland Racing was returned, complete with the unbanked cheque for the application fee.

They argued that FOI legislation no longer applied to them because of the effect of the change of name to Queensland Racing Limited. It does not seem that long ago that Queensland Racing was the subject of an extensive, and expensive, public inquiry. Now they don't even want to come under the scrutiny of FOI.

The Queensland Police Service has demanded an upfront total payment in excess of \$1500 – rather than asking for a deposit as the law provides, and contrary to an opinion from the Department of Justice.

In the early days of FOI, information was released within the spirit of the legislation. That is no longer the case.

(John Doyle, a former superintendent in charge of Queensland Police FOI, is a consultant to *The Courier-Mail's* editorial department.)

The submission¹³ by David Fagan, Editor of *The Courier-Mail* refers to evidence adduced at the Davies Inquiry where a senior public servant acknowledged taking documents to the Cabinet room in order to prevent the release of embarrassing information.

These revelations only tended to confirm what was already evident. That Queensland Health was, and still is, reluctant to provide access to information.

In 1993, the former state member for Indooroopilly, Denver Beanland, said in Parliament: ¹⁴

Earlier this year, the availability of information from the Health Department was questioned—an area in which the Government has been caused grave embarrassment. A newspaper article of 28 January this year was entitled “Health Department quarantines FOI material”. We know that it did, because when one newspaper asked a series of questions about hospital operations, it identified 352 pages of information on how hospitals were coping in south-east Queensland. But the department denied access to every word of every document. There is not a more plain example of how this Government will go to any length to hide contentious and damaging information through FOI.

The newspaper article stated—

“But the department denied access to every word of every document, claiming that any disclosure would be ‘contrary to the public interest’.” What a farce! Of course, it would be to the benefit of the public interest. It would be contrary to the interests of the Labor Government, which would be terribly embarrassed. The Attorney-General would be embarrassed, and so would the Minister for Health, who has been embarrassed during question time every day.

¹³ Submission to the Review of FOI by David Fagan, Editor of *The Courier-Mail* dated March 7, 2008

¹⁴ Queensland Parliamentary Debates (Hansard) 4 March 1993 page 2107

Apart from the information gleaned at the Davies Inquiry, Queensland Health in response to a FOI application by *The Courier-Mail* confirmed that there was a process of "damage control" in place which was even formalised in a written policy¹⁵.

In effect, any significant applicant, including those from the media, Opposition and unions would fall within this category.

Part of Queensland Health's procedure (as at 6 October 2005) indicated:

Throughout the processing of an FOI application subject to this communication process, the following Queensland Health officers (or officers acting in their positions) will be notified of all substantive steps:

Senior Policy Advisor, Minister's Office
Senior Media Advisor, Minister's Office
Executive Manager, Executive Services, Office of the Director-General
Senior Departmental Liaison Officer, Office of the Director-General
Executive Director, Public Affairs
A/Director, Public Affairs
Director, Legal and Administrative Law Unit.

Upon receipt of a sensitive FOI application –

A drop copy of the application will be forwarded to the above offices by the administrative Office ALT as soon as possible after they are received (i.e. within 2 working days)

When/if an application goes to decision –

- One week prior to the decision being sent to the applicant, all officers on the above list should be notified. The email should briefly explain the decision and clearly indicate the date it will be sent to the applicant. The email should also state that any issues/concerns should be raised with the relevant ALT officer, prior to the decision date.
- On the same day the above email is sent, a copy of all relevant documents (copies onto mauve paper double-sided if possible), with deletions highlighted, if applicable) should be forwarded to the SDLO. The above email should inform the officers that, should they require access to documents, a copy has been provided to the SDLO for this purpose.
- If no contact is made by any of the officers emailed about the application, prior to the decision date, the decision may be sent out with a quick follow-up email to those officers reminding them that the decision is being sent.

¹⁵ Decision letter from Queensland Health dated 6 October 2005

It is unfortunate that the same kind of efficiencies were not applied to processing the relevant application which was lodged on 22 February 2005 and remaining unfinalised until 6 October 2005.

A similar application to the Queensland Police Service confirmed that procedures were in place to forward copies of "sensitive" applications to the office of the Minister for Police and Corrective Services.

An internal review of the QPS decision was sought to identify other documents, including emails. The QPS advised that any relevant emails had been archived and to search for them would be "at a cost of approximately \$537,600".¹⁶

Overview by the Department of Premier and Cabinet

Similarly, the management of FOI was "overseen" by the Premier's Department.

In an email¹⁷ to all CEO's, then Director-General, Dr Leo Keliher said:

FOI requests –

The Department of the Premier and Cabinet has recently received a number of FOI requests that are broad and ill defined or obviously a fishing expedition as a precursor to further applications (eg a request for the titles of all Departmental files). There is the possibility because of the vagueness or breadth of the requests that exempt material could be inadvertently released.

While applications must be dealt with on their individual merits, I wish to draw this trend to your attention. It would seem timely for the Directors-General to examine recent and current FOI applications to determine whether this trend is apparent in your agencies. It will also provide you with an opportunity to ensure that applicants are being consulted regarding the scope of their requests to ensure that agencies' resources are not unduly diverted. Recent amendments to the FOI Act facilitate this approach.

Whilst the government might take the view that this form of overview was justified and appropriate, a decision-maker on the other hand might view it as another form of interference.

Overview by the Office of the Premier.

Following another challenge by *The Courier-Mail* regarding the sufficiency of search, the Information Commissioner sought a response from the Office of the Premier.

¹⁶ Letter from Queensland Police Service dated 13 January 2005

¹⁷ Email from Dr Leo Keliher, Director-General, Department of Premier and Cabinet dated 23 July 2002.

The application had sought copies of documents relating to advice, policies or other notes concerning copies of FOI applications or related documents being provided to the Office of the Premier.

In a Statutory Declaration, Mr Robert Whiddon, Office of the Premier declared in part:¹⁸

Specific process for informal consultation.

If discussions are held about the imminent release of documents under FOI between this office and other offices or within this office, those discussions are not of a nature or level of formality that they would necessitate the transmission of written correspondence, memos or other legacy documents that might indicate the detail of the discussions. The nature of those discussions is not to affect the provision of information in accordance with the FOI Act or established practices of transparency and accountability, but to allow staff in this office to be aware that there may be further personal, public or media events which will require comment or response as a result of the applicant receiving and interpreting the data.

It has become reasonable to expect that FOI applications from political or media applicants may require further responses in the public domain. Planning for these eventualities is a normal function of any Ministerial office.

The specific process would involve a Ministerial staff member contacting a staff member from the Office of the Premier to discuss the issues covered by the FOI application. Alternatively, a Ministerial staff member may choose to show the documents to a staff member in the Office of the Premier as part of the discussion. There would be no reason in these circumstances for the Office of the Premier to retain those documents of another agency and the nature of the consultation would not constitute any transfer or formal consultation that might affect the provision of those documents to an applicant.

Instruction or Recommendations

Documents are not held concerning instructions recommendations, advice, guidelines or procedures given to Ministers. Agencies would be responsible for administering their own procedural instructions in accordance with the Freedom of Information Act 1992, so agency or CEO related documents would be held by agencies.

No instructions are given prior to the release of documents during a normal application process. Any sighting of documents intended for release occurs purely as described and not to affect the outcome of the FOI release process.

¹⁸ Statutory Declaration by Robert Whiddon, Office of the Premier dated 18 January 2005

This information is inconsistent with an article published in *The Courier-Mail* on 2 September 2004 concerning an application to the Department of Primary Industries:

FOI reveals land report cover-up

.... On August 27, Mr Beattie put out a press release, entitled "State Government release reaffirms vegetation research flawed", to pre-empt the Opposition's examination of FOI documents dispatched that day but not received until August 31.

It was at least the third time Mr Beattie had opted to publicly release his interpretation of FOI documents – which would not otherwise have been released – before they had been received by the Opposition or the media.¹⁹

Despite the views expressed by Dr Keliher, in practice the process involved in making FOI applications and dealing with FOI managers can be a frustrating experience.

Dealing with departments

With respect to an application made to Queensland Treasury, a preliminary assessment of charges amounting to \$3401.70 was provided to *The Courier-Mail*.

After some dealings with Treasury it was acknowledged that a "great deal of it consists of Cabinet and Ministerial briefing paper, etc". Given the high costs involved assistance was sought from Treasury to reduce the costs.

In an email from Queensland Treasury to *The Courier-Mail*, the FOI Manager advised:

Unfortunately I am not able to assist you further other than providing advice about the scope should you wish it. I am not required to do anymore until the charges are accepted as this would defeat the whole purpose of the charges regime under the Act.²⁰

Following mediation by staff of the Office of the Information Commissioner, documents that would have been refused under the cabinet exemption were excluded. The assessment of charges was reduced to \$1449 but the application was not proceeded with as it was apparent no meaningful documents would be released.

¹⁹ Extract from article in *The Courier-Mail* entitled FOI reveals land report cover-up, dated 2 September 2004.

²⁰ Email from Queensland Treasury to *The Courier-Mail* dated 9 November 2004

Dealing with the cabinet exemption

It is somewhat misleading for an agency to require a deposit and a final payment for documents that it will not (nor ever intend) to release. Even though a decision maker has the discretion to not claim the exemption provisions, the government has made it clear that cabinet documents are not to be released.

An FOI decision maker should not only act independently. They should be seen to be so acting without undue interference from their management. The refusal of government agencies to release documents concerning cabinet or executive council has become such a blatant and regular occurrence the community could be forgiven for presuming that there is no other alternative.

As previously indicated, a decision maker has discretion whether to apply the exemption provisions. However, none appear to be too willing to exercise that discretion. The *Judicial Review Act* outlines a list of provisions for dealing with the decision making process, including a clause that a decision should not be made at the behest of someone.

Nevertheless, the views of government to refuse access to cabinet documents are abundantly clear without the need for any written instructions.

Following a decision of the former Information Commissioner, Fred Albietz, the former Premier, Wayne Goss, in referring to amendments to s.36 said in parliament:

The necessity for that amendment was due to the fact that the person who works for Mr Albietz and who carries out this particular role undertook a dubious and ambitious interpretation of the legislation.....

....you cannot expect Cabinet Ministers, departments, jurors or anyone attending other deliberations to give frank and robust advice, if the very advice, contribution and discussion is subject to second-guessing by a medium-level public servant. This is not something that any Cabinet in the Westminster system would tolerate and it is not something that this Cabinet will tolerate.²¹

Allowing the public to form their own conclusions

Apart from the cabinet exemption, FOI legislation contains many exemptions that allow information to remain hidden from the community.

Following the introduction of the Ambulance Levy, *The Courier-Mail* made an application to Queensland Treasury seeking access to associated reports, reviews and information on revenue collected.

Access to the documents was totally refused on the basis of the cabinet (s.36) and deliberative processes (s.41) exemptions.

²¹ Queensland Parliamentary Debates- Hansard 15 November 1995 page 1083

Part of the decision of Treasury is as follows²²:

Public Interest Test

In the public interest balancing test for Section 41(1) of the Act it is necessary for me to consider whether disclosure of the prima facie exempt matter would, on balance, be in the public interest.

Public Interest Considerations in Favour of Disclosure

Applicants under Freedom of Information have a right to access documents held by Queensland.

An open and accountable government is enhanced by the provision of access to documents held by government agencies.

Public Interest Considerations in Favour of Non-Disclosure

Release of this material would cause disruption to the Community Ambulance Cover. The release of this information could be misinterpreted and undermine the government's objectives and functions.

I have determined that the disclosure of this matter would not, on balance, be in the public interest.

Evidently, there is a belief that the community is not able to form their own conclusions.

Information Policy (8.2)

FOI is not really about providing access to information. It is about providing access to documents that exist.

The exception being s.30(1)(e) where an agency could create a written document to provide the information requested.

In particular, agencies can, if they so desire, generate all manner of statistics from the information held in their databases but the FOI Act cannot force them to answer questions.

It is somewhat incongruous that crime statistics are closely guarded by the Minister and the Queensland Police Service. Unless there is some perceived "good news" information on crime statistics they are released each November.

The Annual Crime Statistical Review is only broken down into to broad geographical areas (police districts) and provides no specific data that could be used for proper analysis by the public. For instance, there is no breakdown by

²² Letter from Queensland Treasury dated 6 August 2004 – Reference HEY404

police division, suburb or locality yet all this information is readily available on the police computer system.

After a successful internal review having been initially refused access, the QPS provided *The Courier-Mail* with a copy of a summary of crime statistics for the period June to September, 2006.

The story was subsequently reported in Hansard by the Minister for Police as follows:

What the *Courier-Mail* did is FOI some crime statistics and use those crime statistics to build a story for yesterday's paper. The story was not inaccurate; it said that sexual assaults in the north Brisbane region had increased in the last few months of last year – and that is accurate and we all know that.....

So that is the story in the *Courier-Mail*. They had FOI'd and talked about statistics in the north Brisbane region. What I detailed and tabled in parliament yesterday was the whole statewide picture of crime statistics. If we look at the statewide picture, we actually see a reduction in sexual assaults of one per cent. I said yesterday that we really do have to be careful about how we interpret crime statistics. I acknowledged that. The police would prefer that we did not analyse crime statistics in small time frames like three months or even six months. They would prefer that we looked at crime statistics over at least 12 months, or even four years, because we would see different spikes and different patterns of crime around the state over different periods. So these short time frames are not necessarily a very good way of studying crime trends. That is why when we release the annual crime statistics in November each year, which are the 12-month statistics, I also put out graphs covering a four-year period.²³

The following observations can be made –

Details of *The Courier-Mail's* application were provided to the Minister in advance and she was ready to table to table in Parliament additional crime statistics for the period July 2006 to December 2006.

The Parliamentary website, including the Tables Office, provides no apparent evidence to indicate additional crime statistics have been tabled – other than with the annual report.

The perception is given that neither the public nor the media are able to interpret data.

It is clear that the Minister and the QPS does not want to provide better access to crime statistics – particularly in the short to medium term.

Subsequent applications to the QPS for access to crime statistics have not been successful.

²³ Queensland Parliamentary Debates – Hansard 7 March 2007 page 702

Clearly, easier access to data held by government agencies would enhance open and accountable government.

Overseas examples

In developing their computer system, staff from the QPS visited overseas police establishments, including the Hampshire Constabulary (UK).

The Hampshire police website has been developed to not only provide crime statistics on a regular basis but also maintains a Disclosure Log of FOI applications and the information released.

Crime statistics and performance indicators for the month of February 2008 are available at the following site –

<http://www.hampshire.police.uk/Internet/rightinfo/foi/informationclasses/performancefigures.htm>

Other information on crime and disorder in local areas is also available.

Fee and Charges (9.1)

The current system of fees and charges does little to support accountability. There is no evidence to support the view that it contributes, to any great extent, to offsetting the costs of managing FOI. In effect, applicants for non-personal information can be seen to be supporting applicants for personal information.

As previously indicated, the fee structure appears to be used as a form of dissuasion.

The requirement under section 35D of the FOI Act to provide a preliminary assessment to applicants is frequently unhelpful.

Two recent responses provided to *The Courier-Mail* were as follows:

Item	Time	Rate	Total
Processing Charges (activities include – searching/retrieving documents, examining documents, extracting relevant copies, external/internal consultations, drafting decision letter	129 hrs	\$5.40 per 15 minutes of part thereof	\$2786.40
Total processing Assessment			\$2786.40

The other matter was for the amount of \$1976.40

No other information was initially provided.

On the basis of this scant information *The Courier-Mail* was invited to challenge that the charges have been wrongly assessed. The onus being on the applicant to provide details to support the view they have been overcharged.

The process is so skewed it is virtually impossible to mount a successful challenge leaving the applicant second guessing on how to reduce the charges. Of course, even if the fees were paid it is only to process the application – not to provide copies of documents.

There does not appear to be any requirement for an agency to specify with any detail of the searches undertaken to locate the documents.

Section 6 of the FOI Regulations requires that no charges be incurred if documents are not filed where they ought to be located. However, an applicant has no knowledge of the agencies records or retrieval system. In effect, an applicant can be paying to support an inadequate system.

Pay in advance!

As previously indicated, some agencies continue to apply various interpretations to the legislation. A letter from the Queensland Police Service, dated 4 August 2006, specifically required upfront payment of \$748.80 (the amount having been reduced following negotiation) to process an application. *The Courier-Mail* agreed to pay the processing charges but as no deposit was requested none was paid.

The QPS declined to deal with the application and the matter was dealt with by the Information Commissioner as a deemed refusal.²⁴

The Information Commissioner found that the application could not be treated as a deemed withdrawal and there was no provision in the FOI legislation to require full payment prior to processing an application.

A Statement of Reasons under the *Judicial Review Act* was sought from the QPS. That statement could not identify any legal basis to require full payment in advance of any decision being made.

Comments

This submission has attempted to highlight, by way of specific examples, the difficulties in utilising FOI in Queensland. It is not meant to imply that all agencies are uncooperative or difficult to deal with.

Many FOI managers were not exposed to the initial impact and openness of FOI. It could be suggested that they have now become somewhat acclimatised to the present culture.

Reform of FOI can only be achieved by a change to legislation and a change of attitude.

The various recommendations in this submission are supportive of those put forward by David Fagan, Editor of *The Courier-Mail*.

²⁴ Letter from Information Commissioner dated 28 September 2007 Reference 210063