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FOI Independent Review Panel
Brisbane
By email

Dear Chair and Members,

This submission addresses just 3 matters:

- The interaction of FOI with good public records management
- The Cabinet and Executive Council exemption, and
- The deliberative processes exemption.

FOI and Public Records Management generally

Here I address some of the discussion points raised in Chapter 6 of your Issues Paper, and your very last question about the title of any new Act.

My answer to many of the questions you pose early in Chapter 6 is ‘of course’. In a modern democracy, we do not ‘owe allegiance’ to those who rule us by claimed divine right. Instead we the people are the source of power and those who, in one sense, govern us are, in another sense, our servants. The term ‘public servant’ should not only apply to those who are employed in government agencies, but also to members of parliament and the Ministers who lead the government. The government does not gather information in its own interest, it gathers it in the public interest, so that it can make the best decisions in the public interest.

So of course FOI should be governed by the test stated by the High Court in *Fairfax* for confidential information in equity – *all* information should be disclosed unless disclosure will injure the public interest. Furthermore, the public interest should be assessed against the standards of a modern democracy, not those of the authoritarian governments of the nineteenth century and much of the twentieth century. The FOI Act should not be any more restrictive than the principle of confidence in equity, or the principles governing public interest immunity, discovery of documents, or the answering of interrogatories, in civil litigation – *and* governments should not be able to keep documents secret by claiming copyright in them, as they did in *Fairfax*! I recommend that you keep these principles in mind as you give instructions on the drafting of a new Act, and ensure that nothing in the Act is more restrictive than any of them. If the government would have to reveal something to a citizen who was suing them, or would have no cause of action against a public servant who had leaked it, they should reveal it to all of us as a matter of course. *Of course* FOI contributes to a healthier democracy, and *of course* the Objects section of the Act should include a reference to the fact that FOI actually assists better government decision-making!

The question that perturbs me is the one in par 6.2.3 where you claim that the ‘default setting’ when a document is created by an agency is that it is regarded as confidential. If this is so as a matter of practice, it means that public servants have not managed to read the Act correctly in its 15½ years on the statute book. Surely ss 4, 21 and 22 make it clear that the proper default setting *at law* is that a document is available to anyone on application, unless an exemption applies? If this is not clear already, I really don’t know how it can be made any clearer – do we have to replace ‘plain English’ statutory drafting with ‘For Dummies’ drafting? All that can be done here is better training courses, and for the government send a signal to the public service that it is serious about FOI by making it clear that FOI, with minimal exemptions, is *here to stay*.

As to the last point in your Issues Paper, I submit that *if* there is to continue to be a separate Act dealing with *access* to public records, the name should remain Freedom of Information Act. It may be true that over the years some cynicism has developed about the concept, and that it is referred to as freedom *from* information, but this is not the fault of the short title, it is the fault of successive governments that have shown public servants by example that, any time they lose a challenge to their right to withhold information, they will have the Act amended to increase bureaucrats’ rights and diminish the people’s rights. The remedy is not to change the short title, the remedy is

(i) to toughen the Act up, so as to make the object even more obvious than it is at present, and
(ii) for the government to make it clear that it is never again going to ask the legislature to water the Act down. To repeat the point above, the government’s slogan should be ‘FOI – here to stay!’

However, I submit that the better way ahead for the new century is to see public records management and FOI as two sides of the same coin. You have discussed recent advances in this area in section 8.2 of the Issues Paper, and I can only submit that Queensland ought to follow international best practice in this area. I suggest that the best statutory basis would probably be to have everything covered in a Public Records Act, which ensures that public records are kept in the most efficient way possible, and that *automatically, as part of the same process*, all records that are not exempt are made available to the public on the World Wide Web. [The converse of this is that public servants will have to be *very* careful to ensure that personal and business-in-confidence records are not put on a generally-accessible server! Rigorous and indeed onerous cross-checking processes will be necessary, but this should not be used as an excuse for claiming exemptions where none is relevant.] The fact of existence, though not the contents, of exempt records should also be made available, as agencies should do at present in response to a request, or as a litigant does in response to a notice for discovery.

The above approach would mean that no ‘application’ process should be necessary except for persons wanting to check records relating to themselves or wanting to challenge a claim of exempt status. The normal application process would be to Google. Instead of a low-level FOI Officer, each agency should have a Public Records Officer at Senior Executive Service level, charged both with the management of an ED&RM system and with ensuring that that system had FOI principles built into it,

The Cabinet and Executive Council exemptions

I am going to submit below that these exemptions should be modified to the point of near-abolition – but first it is necessary to say something about the general notion of Cabinet confidentiality and the collective responsibility of Ministers for Cabinet decisions. As I understand it, those who defend the Cabinet papers exemption have given up arguing that these things must be secret because it is advice to the ‘Crown’, and justify it on either of the grounds of ‘collective responsibility’ or the need for ‘frank and fearless advice’. I discuss collective responsibility here, and the ‘frank and fearless’ cliché in the next section.

Most texts by constitutional lawyers or political scientists solemnly recite that responsible government has 3 sub-principles – the need for the government to have majority support in parliament, individual responsibility of Ministers for the conduct of their departments, and the collective responsibility of all Ministers to support cabinet decisions. In respect of the third principle, we are being ruled too much by history. Its virtues and vices can be assessed much better if we call it what it is – the principle of *pretence* of cabinet unanimity.

As Gay and Russell show in their comprehensive (but insufficiently-questioning) research paper for the UK Parliament, at <http://www.parliament.uk/commons/lib/research/rp2004/rp04-082.pdf>, the pretence of unanimity may have been a truly constitutional principle in the days when the Cabinet Ministers were slowly stealing power from the monarch, because otherwise the monarch would have been able to take power back by using ‘divide and rule’ tactics against the Ministers. These days there is no such threat from the Crown. The principle may still be one of constitutional necessity in matters of defence and foreign affairs – you can’t afford to let other nations know that your counsels are divided – but in other areas it is nothing but a sensible maxim of intra-party management. Prime Ministers and Premiers insist that everyone must pretend that all decisions were unanimous because it makes it easier to stay in power. When Lord Melbourne famously said “what are we to say? Is it better to make our corn dearer, or cheaper, or to make the price steady? I don’t care *which*: but we had better all tell the same story” he was not appealing to high constitutional principles or to the common good of the nation, he was trying to save his party from defeat by Peel. To pretend to agree (which would involve some Ministers telling lies) would, he hoped, increase their chance of success at the approaching general election. To turn this into a ‘constitutional’ principle is like turning any random exhortation by John Howard to his party in 2007 into a constitutional principle. In fact Melbourne, like Howard, *lost* the ensuing general election. That is, what is often quoted as some sort of proof of the antiquity of a supposed ‘constitutional’ principle was in fact a late-in-the-game tactical manoeuvre of someone staring electoral defeat in the face.

Despite the general unthinking acceptance that this is a ‘constitutional’ principle, there are other dissenters apart from me. In the UK, Rodney Brazier has met the patronizing claim by Prime Minister Callaghan that

Any departure from the convention of non-disclosure would be more likely to whet appetites than to satisfy them

with the comment:

That phrase encapsulates the regrettable view adopted by civil servants and Ministers down the decades that secrecy is the norm, information and explanation the exception. (*Constitutional Practice*, 1998, pp 122-3)

In New Zealand, Michael Joseph has remarked that ‘Cabinet unanimity is a rule of pragmatic politics, not a constitutional convention’ (*Constitutional and Administrative Law in New Zealand*, p 285). Indeed, English practice has showed that it is a most flexible ‘convention’ – when the governing party sees more advantage in admitting division than in covering it up, the members will enter an ‘agreement to differ’ – see the Gay and Powell paper cited above. Also in the UK, Alan Clark got away with criticising Cabinet decisions a couple of times and Mrs Thatcher did not sack him. All of this confirms that the ‘principle’ is for the convenience of governing parties, not for the promotion of truly responsible government. To call it one of the principles of responsible government is a propagandistic inversion of the real meaning of the phrase, like calling a communist dictatorship a ‘peoples’ republic’. Responsible government means that the Ministers are responsible to the parliament and, through parliament, to the people who have elected them and who may choose to un-elect them at the next election. The principle of pretended unanimity is a way of trying to *avoid* accountability to the people – Ministers are declaring that their responsibility to the party leader and to each other, and to avoid electoral loss, is stronger than their responsibility to tell the truth to the people.

In light of the above deconstruction of the principle of pretended unanimity, I submit that the following rules should be part of an FOI or Public Records Act:

1. That Cabinet decisions (and submissions to cabinet – see below under ‘deliberative process’) should be exempt from FOI only where they fall under another exemption, such as defence, personal information, commercial in confidence, etc. There should be no ‘Cabinet documents’ exception *per se* – unless there is *another* reason for secrecy, we should be entitled to know what our most senior *servants* in Cabinet have decided on our behalf as soon as they have decided it. At present, a decision made by Cabinet may be announced the next day or it may be kept secret for 30 years. Sometimes the fact that the Cabinet has considered an issue and decided to do nothing is kept secret for 30 years, and your Chair reveals it in the *Courier-Mail* 30 years later.. This is just absurd. Even in the *Crossman Diaries case* the Attorney-General did not argue that the mere fact that Cabinet decisions had been made was subject to any obligation of secrecy – his concern was simply that individual views and differences of opinion would be revealed. This, I presume, was because there were no arguments in favour of the more total secrecy that would not be embarrassing to present to a court.

2. That it should be clear that a Minister is subject to no obligation except the moral obligation of party loyalty. If an Alan Clark wants to criticise the party’s decision it should be a political decision of the party leader or the caucus whether to sack the dissentient from Cabinet or not, and indeed whether to sack the rebel from the *party* or not. If an Australian Richard Crossman wants to publish his diaries, and is no longer restrained by loyalty to the party or its leader, then he (or she) should be legally free to do so as long as it does not reveal other exempt information. Since the convention of pretended unanimity is merely for the convenience of politicians, and contradicts the public’s right to know the truth, politicians should be free to breach it. This

should be made clear in FOI law, and expressed so that the principle will carry across into ‘equity of confidence’ cases.

3. That, however, *some* concession should be made to Ministers’ perfectly understandable desire to preserve the appearance of unanimity. I feel attracted to the idea that even dissent in Cabinet should be out in the open – in a world of adults, a Ministry should have enough of a sense of common purpose to be able to be candid about the fact of occasional disagreement, and if candour about dissent resulted in governments falling more frequently, democratic government would still survive (as it has in fact done in Italy even with their history of short-lived governments). But perhaps we should concede governing parties one of their traditional obsessions. I therefore submit that any part of a cabinet record that discloses, without permission of the Cabinet or Premier, the fact of *dissent* in a meeting should be exempt for a reasonable time – say, until the government has fallen or 3 parliamentary terms. Here I am giving a narrow meaning to dissent. I mean dissent pursued to the end, to the vote if a vote was taken. There is no reason why we the people should not know that various arguments were put – all that should be kept secret is the fact that some Ministers were not persuaded as the discussion continued, and were in the end overruled. For political reasons, a Minister should be allowed to say ‘I took a submission to Cabinet but was persuaded to change my mind’, even if we suspect that s/he was ‘rolled’. It should be easy enough for the Cabinet secretaries to produce records that reveal everything except the final position of dissenters, and that some of them were overruled rather than persuaded. This is as much of a concession as we need to make to the traditional obsession with pretended unanimity. As a corollary of that, anyone *except* a Minister who discloses dissent, as narrowly defined here, within that time period should continue to be subject to criminal sanctions.

4. Similarly, there should be no Executive Council exception – but, as with Cabinet records, Council records may of course be exempt on other grounds. Since the Executive Council is simply a place for Cabinet decisions to be rubber-stamped (after, depending on the personality of the Governor, more or less cross-examination as to whether procedures have been followed correctly) there is no room for the nineteenth-century view that the Governor is exercising the sacred royal prerogative, and that it is not for mere mortals to know what is being decided and why.

Alternatively, if the Panel is persuaded by some of the specious reasoning in favour of the continuance of a Cabinet exemption, I submit that the 30-year limit should be drastically reduced. In the *Crossman Diaries case*, even though Lord Widgery, wrongly in my view, accepted the argument that a former Minister’s obligation to his colleagues was not simply moral but legal, he held that publication after 10 years did no harm to the public interest. As you have noted in your Issues Paper, other states now have shorter periods than 30 years. You might consider a limit of 6 years (2 terms) or even 2 years (short enough so that decisions made early in the term of a parliament will have to be revealed before the next election). But I repeat, there is no justification for a general Cabinet secrecy rule except in so far as it applies to the fact that some Ministers remained opposed to a decision to the bitter end.

Deliberative process exemption

In my submission, this is another one that should be scrapped almost completely. Pericles is reported to have claimed that one of the virtues of the Athenians was that ‘instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any *wise* action at all.’ The wider the discussion, the wiser the decision is likely to be. To provide that some advice obtained, or consultations engaged in, for the purposes of the deliberative process can be kept secret means that any flaws in the advice cannot be exposed to scrutiny by the collective intelligence of the community.

The rhetoric that we always read about both this exemption and the Cabinet exemption (and which you have repeated in your Issues Paper) is that it allows for advisers to submit ‘frank and fearless’ advice to Ministers. It’s an odd kind of frankness when the advice is kept hidden, and an odd kind of fearlessness when both the nature of the advice and the name of the adviser are kept secret from anyone who might be opposed to it. I always wonder in what way this ‘frank and fearless’ advice will be different from the advice that the same people would give, knowing it could be read by all the world. I can only assume that the point of the exemption is to allow, indeed encourage, advisers to give advice that is, at best, controversial and, at worst, contrary to the public interest. Why should this sort of advice be kept secret? To take an example of outrageous advice, supposing that someone were to advise that any person with even a fraction of Jewish ancestry should be ineligible to be a university lecturer, I would want to know the identity of that person so that I could hound them from their current position and from holding any further public office. I think that is a perfectly reasonable demand. Descending to the merely controversial, suppose that an options paper on a western bypass lists as one option the widening of Moggill Rd, Brookfield Rd and Gap Creek Rd to 8 lanes (about the best route, in my view, though perhaps 8 lanes aren’t necessary!) the options paper should not be kept secret. The people of Brookfield will campaign against it, and the emotional tone of their campaign might go over the top – but people who have to commute or transship goods between the Ipswich area and Chermside and points north might think it is a great idea. Yes, it would provide a test of character for the politicians, to see whether they could eventually make a decision that is in the best interest of the majority – but that is what they are there for.

The above reference to emotional campaigns reflects another supposed ground for the deliberative process exemption, that ‘premature’ disclosure of things merely being contemplated by the government can be misleading and will promote unnecessary anxiety. This is to assume that the public are all hysterical eight-year-olds. The exemption is all the more ridiculous when one considers the frequency with which governments *deliberately* float ideas to gauge the public response, as with the rumoured abolition of some carers’ payments over the last few days. The response proves, indeed, that *some journalists* do have the minds of hysterical or stupid eight-year-olds – what seems to have been *proposed* by a department as an option was reported as a government *decision* – but it tested the waters and the government has heard the response. This should apply to options and advice – whether the government wants to float it or to keep it secret, it should *all* be in the open. The press *should* have enough maturity to report the options as options, not decisions, but if they do not the remedy is to give ‘smart drugs’ to dopey cub reporters and tranquillisers to the hysterical ones, *not* to make the information exempt from FOI. I suppose that if a topic is so controversial that disclosing the names of staff or consultants who

wrote the options paper is likely to result in rocks or worse being thrown through their windows, there is a case for the publication of their *names* to be suppressed, at least for a period long enough for passions to die down.

In case it is not clear from what I have said under the previous heading, I submit that this approach should apply even to Cabinet submissions, and preliminary advice related to cabinet submissions. It seems to be thought that it is a terrible thing for the public to know that a Minister has taken a submission to Cabinet and had it rejected, but see again my comments above – if the unanimity principle is watered down as I have suggested the Cabinet papers could reveal that the submission was rejected, but still leave open the possibility that the Minister was persuaded to change his/her mind. No great disgrace there!

When the FOI Act 1992 was enacted, it was hailed as being possibly the best in the world. Since then, we have seen the cabinet exemption grow so as to make a mockery of the whole Act. If you can persuade the Government to adopt my submissions, we may again have the best FOI legislation in the world.

Respectfully

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