

1 February 2008

BY EMAIL ONLY

Secretary
FOI Independent Review Panel
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Dear Sir

**DISCUSSION PAPER – REVIEW OF THE FREEDOM OF INFORMATION
ACT 1992**

I suggest further consideration should be given to the bald assertion quoted with apparent approval from Brown, S, 'Freedom of Information' AIAL Forum No. 25, p. 6 at p.9 at page 87 of the Discussion Paper, namely, that parties cannot contract out of FOI simply by agreeing that their contractual documents will not be released. In practice, they can so.

Brown's assertion is strictly correct because of the residuary discretion to disclose exempt documentary matter. But it is easy for an outside party and agency to agree that their contract or other matter is 'private' or 'secret', involves a communication made in confidence, and is not trivial tittle tattle, and for the information in fact to be capable of explicit description, such that an injunction would issue to protect it – thus making out a claim for exemption under s.46 of the Act.

There is little to be gained, it is submitted, in a revision designed to limit the scope of s.45 of the Act (if thought desirable) unless s.46 is addressed. Otherwise, contractual measures will undoubtedly come to outflank a new, restricted s.45.

The heart of the matter is whether, when and how, agencies may assume contractual obligations of confidence or ought to be relieved of obligations that would arise in equity concerning information surreptitiously gained, or received for some limited purpose. There must be consideration of front end arrangements, when the information is received and the conditions on which it is received; the back end of decision making when the access application is received raising the question whether a disclosure may cause harm outweighing public interest involves issues that are too hard for decision-makers to resolve.

In relation to cabinet matter it is suggested that the decision-making should be by the sponsoring minister in relation to the matter involved. No reform of the means of delegation to public servants or their supposed independence will work – disclosure of this matter involves political accountability and belongs with politicians.

Yours sincerely

Kevin Johnson