

Lawrence Springborg MP
 Leader of the Opposition
 Leader of The Nationals



7 March 2008

Dr. David Solomon AM
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 Freedom of Information Independent Review Panel
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Dear David

Although not the most exciting topic for many, *Freedom of Information* is the community's microscope to keep the government accountable for the decisions it makes on our behalf and the expenditure it makes with our taxes.

FOI is fundamental to government accountability and perhaps the most effective way the community, the media and the Opposition can find out what is really going on within the Government.

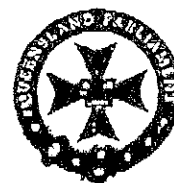
The imperative for effective *FOI* laws is redoubled given that the current rules of the State Parliament do not require a Minister's answer to be relevant to the question asked; legislation has been passed by the State Government to make it legal for Ministers to actually lie while being questioned before parliamentary committees; and monetary grants to private businesses are no longer subjected to scrutiny as they fall under the Cabinet exemption rule.

The State Opposition wishes your review panel well in its deliberations but notes that previous government-sanctioned committees have also made recommendations with the most fundamental of those, relating to Cabinet exemptions, still not having been implemented.

Indeed the *Parliamentary Legal Constitutional and Administrative Review Committee* devoted almost two and half years (March 1999 to December 2001) taking submissions, travelling the state, making recommendations and even drafting legislation. This committee was dominated by Government MPs, three of whom now sit at the Cabinet table, yet the most crucial recommendations relating to Cabinet secrecy remain unimplemented.

Establishing reviews and committees to look at *Freedom of Information* laws appears to have been a political tool aimed, not at achieving more accountable government, but at giving the impression that something was being done to address public and political pressure about secrecy.

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For example, the first *FOI* decision by the current Premier when she took office was not to establish your review panel, but rather it was to take to Cabinet a set of documents which I had lodged an *FOI* application for and which were not part of a Cabinet submission. The Premier's reported justification that "*they were never meant for the Opposition's consumption*", highlights a culture problem within government at the highest levels.

Subsequent to that comment, the Premier established your panel with an accompanying statement about her commitment to transparency and *FOI* reform.

To ensure that the recommendations of your panel are not permanently lost or forever delayed, I recommend that your panel present a draft Bill with your final report and that you further recommend in your report that the Bill be introduced to State Parliament at the nearest sitting and further recommend that the Bill be debated within a set period of time.

Obviously ample time would need to be given for the Government, Opposition and community to study the Bill. But unless a clear timeframe is established for its recommendations to be debated and voted upon in the State Parliament, you may find that the bulk of the work of your panel is wasted and consigned to being merely a footnote, in a future review of *FOI* laws, about past recommendations still not enacted or at least debated.

It is not the purpose of this submission to emphasise the importance of *FOI* or to engage in explanation about how Cabinet exemptions, commercial-in-confidence exemptions and Government Owned Corporation's (GOCs) exemptions are being abused. Those arguments are already established and are a given. So too is the well established position of the State Opposition on these matters which need not be repeated here for they are almost entirely consistent with the *FOI* principles, laid down in the panel's discussion paper, adopted by the *United Nations*.

Many of the issues raised in the panel's discussion paper, such as whether the Cabinet 30-year rule should be reduced in time frame, are not issues upon which the State Opposition has a firm policy and would be better guided by reviewing the submissions made and recommendations of the panel.

However there are key principles and issues that must be addressed and cemented in our State's *FOI* laws.

It is the view of the State Opposition that the success of *Freedom of Information* laws is underpinned by a necessary culture change that must run through all levels of government.

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If a Premier or Minister, by openly flouting the scope of Cabinet exemptions, is failing to demonstrate a genuine commitment to openness and accountability, then their actions will inevitably hinder the development of a culture, amongst their staff and departmental bureaucracies, to embrace open and accountable government.

I have outlined below the policies adopted by the State Opposition critical to *Freedom of Information* law reform and, therefore, critical to open and accountable government. The necessity for these policies is self-evident.

1. *[State Opposition policy] Allow the Parliament, not the Government, to appoint an independent Information Commissioner.*

Independence must not only be a reality, but it must be seen to be a reality. As the *Fitzgerald Report* highlighted, in relation to special appointments, the State Opposition should always be consulted prior to an appointment so that any personal and political connections of an appointee can be raised and discussed.

The personal and/or past political involvement of a possible appointee should never preclude that person from appointment or lead to an automatic assumption that the person cannot be impartial and professional. But failure to consult and failure to address any issues of concern, can lead to a perception, real or otherwise, that the independence of the appointee is not guaranteed. This doesn't serve public confidence, government credibility or the appointee's professional standing.

Sometimes it is not the actual appointment that is flawed, but rather the process which is.

2. *[State Opposition policy] Extend Freedom of Information laws so that they apply to Government owned corporations.*

Government owned corporations are just that: they are owned by the Government and, therefore, it is Queenslanders who are the shareholders through the shareholding Ministers. Therefore, FOI laws should have as their core an expectation that GOCs release information.

Given that many GOCs are in competing commercial environments however, the State Opposition accepts that commercial-in-confidence provisions will need to apply.

3. *[State Opposition policy] Amend FOI laws to stop the abuse of existing exemptions regarding commercial and deliberative processes; and*

4. *[State Opposition policy] Put an end to Cabinet Ministers being able to take documents to Cabinet to prevent them from being made public. The Information Commissioner will be able to determine whether, in his/her view, information was taken to Cabinet simply to prevent it from being made public or whether it was legitimately part of a Cabinet deliberative process.*

Under this process, the Government will retain first right of appeal; but if the Commissioner decides the information was not a legitimate part of a Cabinet submission or Cabinet deliberations, then the material will be released so long as the Commissioner is of the view it does not breach commercial or personal confidentiality.

In recent years Queenslanders have seen everything from fuel receipts to hospital waiting lists taken to Cabinet for the express purpose of avoiding their release under *Freedom of Information* laws. These clearly are not a legitimate part of the Cabinet deliberative process.

5. *[State Opposition policy] Set benchmarks by which Government Departments and Government owned corporations must commence posting material to publicly accessible websites.*

With technology having advanced considerably since *FOI* laws were first introduced in the 1990s, the time has come for Governments to routinely post all decisions and material (that is not genuinely personal, commercially confidential or a security threat) on to the internet.

This process is already being adopted in government jurisdictions throughout the western world. In the main, this will ultimately render most *FOI* requests and the costs of accessing and processing the requests, redundant as information will be freely available.

This is also essential to driving a culture change within government.

In addition to the issues flagged in the review panel's discussion paper, the State Opposition believes some other issues should be considered as a part of the *FOI* review which are outlined below.

- *Should FOI officers be subjected to the threat of fine or discipline when deliberately hindering or failing to do their duties?*

On occasion there has been a clear suspicion that *FOI* officers, particularly within the Premier's or Ministerial offices, have deliberately not conducted searches of documents, or deliberately denied the existence of documents, as a part of their attempts to delay the release of information.

For example, on one occasion the *Office of the Leader of the Opposition* lodged an *FOI* request with the *Office of the Premier* for documents surrounding the alleged inappropriate conduct of a Cabinet Minister.

The immediate response from the Premier's *FOI* officer was that there was exactly zero documents in existence. An internal review was requested and three documents were located. The matter was then referred to the *Information Commissioner* for external review and suddenly 24 documents were uncovered in the Premier's office.

The net result being: there were 27 documents in actual existence despite the initial search from the Premier's Office that resulted in a claim that there were zero documents.

It would appear the *FOI* officer was either particularly inept or particularly deliberate in using the various appeals mechanisms to delay the release of information which it could be reasonably expected the *FOI* officer knew had existed all along.

It is of course difficult to prove that the *FOI* officer deliberately failed to do their job properly, but it does raise the question that if there was a threat of penalty or discipline, would that help ensure *FOI* officers conducted their task in the spirit of the Act? It also raises the question whether it should be left to a politically appointed staff member to process *FOI* applications within the *Office of the Premier* or Ministerial offices, or should it be a public servant with greater independence?

- *Should there be a Code of Conduct or other guidelines governing the involvement of Ministerial Offices with FOI requests lodged with a Department?*

On occasion the *Office of the Leader for the Opposition* has questioned the degree to which political involvement can influence the processing of *FOI* requests within Departments.

The panel's discussion paper, quoting Snell on the British model, indicates that the "prevailing view seems to be that letting the Minister's office know what requests for information have been made is not the offence, but forwarding the request to the Minister's office to be decided or influenced certainly is".

That maybe acceptable in theory, but in reality in Queensland (and the *Office of the Leader of the Opposition* can provide examples if the panel wishes) if a Minister's office is alerted to a potentially embarrassing *FOI* request, the Minister's office will simply ensure incriminating documents are taken to Cabinet to avoid their release. In these cases, rather than the Minister's

office influencing the *FOI* officer, it is in fact the *FOI* officer who has influenced the Minister's office into 'hiding' documents in Cabinet, lest they be released.

This raises the issue that if the Cabinet-exemption laws cannot be effectively tightened, then there needs to be tougher guidelines on how much communication exists between a Department and a Ministers office when processing applications.

The issue of placing the political imperatives of a Minister ahead of the timeliness of making a decision has been highlighted, by way of example, in cases my office has had when dealing with *FOIs* lodged with the *Queensland Police Service*.

It is one thing for the *Office of the Police Commissioner* to provide the Minister with a list of *FOI* requests, including from the *Office of the Leader of the Opposition*. But it is quite another when the Police Commissioner is able to advise the Minister of the *FOI* decision ahead of advising the applicant (the Leader of the Opposition) and also provides the Minister's office with a brief on potential issues that may arise once the documents are released to the Leader of the Opposition.

This indicates very clearly that a decision has been made but that the applicant will not be informed of that decision until after the Minister has first been informed and furnished with a summary of potential political issues that may arise. The clear conclusion in this case is that the interests of the Minister have been placed ahead of the interests of the applicant and therefore ahead of the timely processing of an *FOI* request.

It again highlights the need for clear and consistent guidelines and principles for departmental officers processing *FOI* requests and their interaction with Ministerial offices.

- *The State Opposition would support the waiving and discounting of fees, particularly where applications have not been processed within prescribed periods.*

When the State Government introduced amendments to the *Freedom of Information Act* in 2001 it exorbitantly raised fees for *FOI* applications. Its publicly stated justification was to stop, what it called, fishing exercises. In reality it was aimed at deterring applicants from pursuing government decisions and processes which were questionable.

By adopting the State Opposition's policy (listed above in relation to posting material to the internet) the need for so-called fishing exercises is substantially reduced as most documentation is in the public domain and easily accessible via the internet.

Not only does this reduce processing costs, but it should also reduce *FOI* processing times and the resourcing issues currently impacting on processing times.

In conclusion, I also wish follow-up on a letter I wrote to you relating to changes to the *Public Records Act 2002* currently before the State Parliament (curiously contained on the second last page of the *Professional Engineers and Other Legislation Amendment Bill 2008*) which seeks to broaden the definition of what is Cabinet matter and also amends those sections dealing with *restricted access period*.

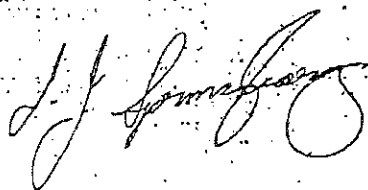
In your response to me, dated 29 February 2008, you stated that those amendments 'do not appear to have any impact on *FOI*'.

That section of the Bill before State Parliament, while not amending the *FOI Act* per se, does in fact contain two specific mentions of *FOI* which would seem rather meaningless if the Bill, as both you and the government claim, has no impact on *FOI*.

It is my view that those sections of any Bill impacting on *FOI* (particularly those that actually acknowledge their relevance to *FOI*), no matter how major or minor that impact is, should not be passed until such time as your panel has reported. This, if nothing else, should be adopted as a matter of precaution. You would be aware that the current State Government has, in the past, introduced and passed legislation that retrospectively impacted on *Freedom of Information*.

Should you, the review panel or its secretariat require further information or clarification of the issues I have raised, please feel free to contact my office.

Yours sincerely



LAWRENCE SPRINGBORG
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Leader of the Queensland Coalition

