

FOI Independent Review Panel
GPO Box 5236
BRISBANE Q 4001

Dear Sir/ Madam

Re: SUBMISSION – FREEDOM OF INFORMATION REVIEW

I respectfully submit as follows for consideration by the Independent Expert Panel:

EXEMPTION OF “COMMERCIAL ACTIVITIES” UNDERTAKEN BY GOVERNMENT OWNED CORPORATIONS (GOC) FROM FOI

SUBMISSION 1:

- In simple terms, the Office of the Information Commissioner appears to adopt the approach that any activity undertaken by a commercial undertaking (in this case a GOC) is by definition a commercial activity.
- The logical effect of this approach is that e.g. a secretary at a GOC who takes in a cup of tea to her manager is engaged in a commercial activity.
- The effect of this approach is to effectively exclude all activities of the GOC from scrutiny under the Freedom of Information Act 1992.
- If the people, through their parliament, had wanted all operations of the GOC to be excluded from scrutiny under the Freedom on Information Act 1992, this would be specifically stated in the Act.
- In fact, the Act only refers to exclusion for “commercial activities”.
- This leads to the inescapable conclusion that the intent of the Act was for non-commercial activities of GOC’S to be covered by the Freedom of Information legislation.
- The above directly contradicts the approach of the Office of the Information Commissioner of excluding all activities of at least one GOC from coverage under Freedom of Information legislation.

- It is logical therefore to take a more narrow view of the meaning of “commercial activities”, than taken by the Office of the Information Commissioner.
- “Commercial activities” should extend to normal commercial activities e.g. negotiation of sales contracts, negotiation of construction contracts, etc.
- “Commercial activities” should not extend to e.g. all contents of GOC Board Risk Committee minutes, strategies for managing environmental issues, etc.

SUBMISSION 2:

- The Office of the Information Commissioner looks at GOC “commercial activities” in isolation rather than in context.
- The correct context is the Freedom of Information Act 1992 i.e. the term “commercial activities” is used within the Act, and needs to be defined in the context of the “freedom of information” intent of the Act.
- There is a need to apply the same test to the meaning of “Freedom of Information”, as is applied to the meaning of “commercial activities”.
- There is no need to look at dictionary definitions to know the meanings of “freedom” and “information” - the term “Freedom of Information” means what it says, i.e. freedom to actually access information.
- It is then necessary to balance any competing meanings of “Freedom of Information” and “commercial activities”.
- Again, this approach leads to the inescapable conclusion that the intent of freedom of information was to give freedom of information, and that a more narrow interpretation of “commercial activities” than has been adopted by the Office of the Information Commissioner, is an appropriate interpretation.
- This means that “commercial activities” should be confined to normal commercial activity such as contracts etc.

SUBMISSION 3:

- The interpretation of the legislation adopted by the Office of the Information Commissioner gives an individual absolutely no chance of gaining any information at any time of any activity performed by a GOC where this access to information is opposed by the GOC. Any activity will always be linked to a commercial objective of the GOC, and hence (according to the logic of the Office of the Information Commissioner) be excluded from freedom of information access.

- I refer to a specific example where the GOC submissions to the Office of the Information Commissioner covered the field i.e. all activities of the GOC were listed in greater or lesser detail and the Office of the Information Commissioner stated that: "The [GOC] also submits that the activities and functions of the [GOC] are activities conducted on a commercial basis as the objective of each of these activities is to return a profit and earn a commercial rate of return." The Office of the Information Commissioner accepted the GOC view that corporate objectives equate to commercial activity, and stated: "I am of the view that the provision of [materials] handling services is one of the activities the [GOC] performs in order to achieve its corporate objectives and to return a profit and as such, is a commercial activity."
- All activities of a GOC are connected with achieving its corporate objectives, or the activities would not be performed. The logic adopted by the Office of the Information Commissioner means that all GOC activity is a commercial activity. The Office of the Information Commissioner logic means that the GOC is exempt from the Freedom of Information Act, and this was not the intent of the Act.

SUBMISSION 4:

- If the Office of the Information Commissioner has ever upheld an application for Freedom of Information against a GOC, it demonstrates that there is a hole in the logic applied by the Office of the Information Commissioner when it refuses some FOI applications.
- If on the other hand the Office of the Information Commissioner has consistently refused to apply Freedom of Information legislation to GOC's, it means that the Office of the Information Commissioner has a formal or informal "hands off" policy with respect to application of the Freedom of Information legislation to GOC's.

SUBMISSION 5:

- The Office of the Information Commissioner appears to accept the GOC view that every single aspect of GOC Board Risk Committee minutes are a "commercial activity" and hence exempt from access under Freedom of Information legislation.
- This approach defies all logic. It means, for example, that if the GOC Board Risk Committee happened to discuss the latest football results and this discussion happened to be captured in the minutes, then it would be deemed by the Office of the Information Commissioner to be a commercial activity!
- The blanket exclusion adopted by the Office of the Information Commissioner is not logical and should be discarded.

- The Office of the Information Commissioner should examine the actual contents of that portion of the GOC Board Risk Committee minutes to which access has been sought, and make a clearly reasoned decision on whether those particular minutes are a “commercial activity”.

RETURN TO PRINCIPLES OF FOI:

SUBMISSION 6:

I respectfully submit that many of the foundation FOI principles and much of the logic of the Queensland Information Commissioner in FOI Decision No. 93002 are no longer applied by the Office of the Information Commissioner, and that the Office of the Information Commissioner should revert to these principles.

In Decision No 93002 the Information Commissioner had to balance “public interest” with “freedom of information”. Similarly, in more recent times, the Office of the Information Commissioner has had to balance “commercial activity” with “freedom of information”.

The difference is that in recent times, the Office of the Information Commissioner has denied Freedom of Information access on the grounds of “commercial activities” even where a reasonable person could conclude that this activity is not commercial. The foundation principles set out in FOI Decision No 93002 are no longer being applied so that the intent of FOI is achieved.

Some examples of the principles etc. from decision No 93002 are set out below.

I respectfully submit that Decision No 93002 strongly supports the submission that a balance needs to be struck between “commercial activity” and “freedom of information”, and that the term “commercial activity” should be given a narrow interpretation and not read to cover the field of GOC corporate objectives/ commercial activity.

I further submit that the Office of the Information Commissioner should review Queensland FOI Decision No 93002, and apply the principles and logic of that decision to all freedom of information applications.

SUBMISSION 7:

The notion that the public should be involved in government processes was foreshadowed explicitly in Attorney-General Dean Wells' second reading speech, when he said the Bill would "provide a greater opportunity for the public to participate in policy-making and government itself". It is difficult for anyone to participate in government if the government (in this case embodied

in a GOC) is making its decisions in secrecy, under the cloak of "commercial activities".

I respectfully submit that there was no intention for "commercial activity" to cover the field in the way in which it has been applied by the Office of the Information Commissioner.

SUBMISSION 8:

I also draw your attention to relevant comments by the Attorney-General, Mr. Dean Wells, in the second reading speech introducing the FOI Bill. Mr. Wells said that the access would allow greater public participation in policy-making ... he clearly then envisaged the public release of information which makes up the so-called deliberative process. Mr. Wells also said the "Bill replaces this presumption of secrecy with a presumption of openness". And in his accompanying media release, Mr. Wells said "opening the books to such an extent could be considered brave - it could even be considered foolhardy. But we believe the government exists to serve the people - the information held by the government for that purpose belongs to the people. We are prepared to wear the consequences".

I respectfully submit that the above strongly supports my submission that the intent of FOI was to "open the books" to the maximum extent possible, and that this supports the submission that GOC documentation is not exempt from FOI due to a wide reading of "commercial activity".

SUBMISSION 9:

The legislation itself, while not defining the public interest, says that such interest is served "by promoting open discussion of public affairs and enhancing government's accountability".

The Office of the Information Commissioner does not appear to recognise this requirement on government (in this case embodied in a GOC), and I respectfully submit that making the GOC documentation available would promote open discussion of public affairs and enhance the government's accountability.

SUBMISSION 10:

The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of impost or another) fund the institutions of government and the salaries of officials.

These considerations are reflected in the Attorney-General's second reading speech to the Queensland Legislative Assembly on the introduction of the

Freedom of Information Bill 12 (Parliamentary Debates [Hansard], 5 December 1991, at p.3850):

"In conclusion, this Bill will effect a major philosophical and cultural shift in the institutions of Government in this State. The assumption that information held by Government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by Government is available unless there are reasons to the contrary. The perception that Government is something remote from the citizen and entitled to keep its processes secret will be replaced by the perception that Government is merely the agent of its citizens, keeping no secrets other than those necessary to perform its functions as an agent. Information, which in a modern society is power, is being democratised. I commend the Bill to the House."

I respectfully submit that the above strongly supports my previous submissions that the terms "commercial activity" should be given a narrow interpretation, and that GOC Board Risk Committee Minutes should be available under FOI.

EVIDENTIARY REQUIREMENTS:

I am aware of one case where the Office of the Information Commissioner required the applicant to supply evidence in the form of sworn affidavits (i.e. legal input) or statutory declarations. I do not believe that the legislation was intended to be the sole preserve of either people with money or the legal fraternity. The Office of the Information Commissioner is the key resource that the individual, seeking government information on matters of public interest, has available to them. The typical individual applicant does not have the resources of a government, and I respectfully submit that the Office of the Information Commissioner should apply its sense of fair play to ensure that the little guy is able to present evidence in a more informal process when up against the big end of town.

Yours faithfully

A handwritten signature in black ink, appearing to read "Paul Tooker", written over a horizontal line.

PAUL TOOKER