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3 March 2008

Dr David Solomon AM  
Freedom of Information Review  
GPO Box 5236  
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Dear Dr Solomon,

I refer to your letter of 30 January 2008 addressed to The Most Reverend John Bathersby DD Archbishop of Brisbane. Archbishop Bathersby has asked me to respond to the matters raised in the recent discussion paper dealing with the extent to which the Freedom of Information Act 1992 (FOI Act) provides an effective framework for access to documents held by government.

In this regard, the Church's stance on a range of issues is based on Catholic social teachings. Some years ago Pope John XXIII in his encyclical *Mater and Magistra* #20,21 advocated that: "...the State, whose purpose is the realization of the common good in the temporal order ...should safeguard the rights of all citizens, but especially the weaker, such as workers, women and children...and ensure ..the dignity of the human being is not violated either in body or spirit...."

In accordance with such teachings, the Church supports individual rights and responsibilities.

Therefore, proposed changes to the FOI Act, insofar as it can be demonstrated they clearly contribute to the enhancement of human dignity, respect for the individual, and, accountability for one's actions, can be supported.

At the same time, such change must keep to a minimum the bureaucratic impact of associated legal and/or policy changes; and, avoid administrative prescriptions that will impede flexible administration by those bound by legislative changes to the FOI Act.

The reality faced by not for profit organisations, including Church organisations providing social services to those in need within our community, while financially supported in part by Government, is that they find themselves in an unenviable position. They are committed to their social actions based on a Christian ethos but face an ever increasing need to re-allocate resources away from the provision of such needed support services to administrative overheads that characterise the complexities of today's work environment (for example, meeting the community's expectations of good corporate governance; and managing the complexities associated with accounting for the dispersal of government moneys; public disclosure; litigation; and, lean budgets).

If a proposed change to the FOI Act extends the reach of the Act's provisions to the non-government and Church sectors it will need to take into account associated implementation challenges. The preferred way forward is one that supports individual rights but also makes



use of current practices and minimises the introduction of any additional administrative burden.

For your panel's consideration, attached is a brief commentary on these matters under seven (7) broad headings.

We also note that, in the near future, further information/discussion sessions are planned.

Yours faithfully



**GEORGE KERYK**  
Director Workplace Relations

Cc: Most Rev John A. Bathersby DD  
Moderator  
Chancellor  
Executive Director Archdiocesan Services  
Executive Director Centacare



Attachment

**Submission on proposed FOI Act changes****1. Underlying Principles**

As a general principle, information on government decision making and actions should be made available to citizens living in a democracy unless it can be demonstrated clearly that such disclosure would not be in the public interest or would result in personal harm to an innocent or third party.

The preamble to any FOI Act should be written in such a way that the Act is seen in a positive context giving force to values such as human dignity and respect for the individual, transparency and accountability. The pursuit of such values should be seen as an opportunity to improve rather than threaten democratic processes.

**2. "Open Government"**

In supporting openness and accountability, the concept of "Open Government" deserves to be reinforced within the public administration sector. To reinforce this psyche in the public sector, a reduction from the current 30-year rule seems warranted. Making available cabinet decisions and documents after a period of time that equates to two subsequent terms of government (i.e., 6 or 8 years) appears reasonable.

If this approach was coupled with accepted criteria that limited what information should be exempt despite it being taken to Cabinet then the parties involved in such decision making processes would be encouraged to make more considered decisions. They would know that, potentially, their actions and/or decisions could be open to scrutiny during their current work life and/or time in public office.

If this new approach was enacted in a prospective rather than a retrospective manner, the accompanying financial and administrative implications for Queensland Archives would appear surmountable.

**3. Administration**

The ability of people to access information by administrative means rather than by requesting formal FOI action appears a sensible option. The New Zealand approach of providing access to "official information" meaning any information held by various authorities subject to a number of exceptions appears a good model to follow. The exclusion of "ephemeral material" as outlined in the Swedish approach on page 61 of the discussion paper also warrants consideration.

As members of the public expect their requests to be dealt with in a fair and responsible manner, a number of complementary measures should enhance the reliability of these administrative processes – in the first instance, the acceptance of a common Code of Conduct that provides the necessary frame of reference for public servants to act with honesty and integrity.

In the event of a failure by a department/agency to behave properly in complying with an individual's request for information under the FOI Act, the legislation also must reinforce the



individual's right of review via an independent body such as the Ombudsman's Office. The powers of the Ombudsman could be strengthened including their powers to recommend. "Penalties" in the form of public disclosure to Parliament or the waiving of a complainant's costs incurred in seeking information should be encouraged if a department/agency or their designated officers breach their respective obligations under the FOI Act. Such practices would provide the impetus needed for departments/agencies to achieve the desired levels of proficiency and professionalism in dealing with FOI Act requests.

If a matter requires a legal determination as to whether a request should/could be met – the Information Commissioner could be required to undertake this function in addition to his office's ongoing educative/information role about the implementation of FOI Act laws. As a consequence, the administration of the FOI Act should be the province of the Information Commissioner - a statutory appointment with legislated authority from Parliament and responsible to Parliament and not the Government of the day - the Office could be co-located with the Ombudsman's Office, share corporate services and possess the tenure and similar legal protections afforded to such staff.

These various strategies should be relatively cost efficient and would obviate the need to establish and maintain a separate, independent, administrative bureaucracy.

#### **4. Extension of FOI Act to other than Government Departments/Agencies**

Government Owned Corporations (GOC) that clearly fall within the ambit of a ministerial portfolio as an essential service and with Government endorsed/influenced appointments to their Boards of Governance should be held accountable for their actions to the community at large and subject to a Code of Conduct as applies to other public officials bound by the FOI Act's terms and provisions. In these circumstances, the following needs to apply:

1. Those covered by this extension of the FOI Act should be granted the same legal protections and support that apply currently to the Government's own Departments and Agencies.
2. The same exemption provisions that apply under the provisions of the Act should apply also to those service providers covered by the Act.
3. The extension of the FOI Act must specifically state the extent to which they are bound by the provisions of the FOI Act (e.g., only in regard to the essential services or public utilities that they are providing on behalf of the Government).
4. The cost recovery mechanism that applies currently under the FOI Act also could apply to them in relation to what charges they can apply to applicants for information and further extended to allow them to claim back from the Government the difference between allowable charges and full recovery.

On the other hand, to assist the Government in meeting its obligations to the community at large, a range of government sponsored services or functions also are contracted out on a tender of "fee for service" basis. These arrangements vary enormously and to include them in an extension of the FOI Act's provisions would be impractical on a number of grounds including:

- a) Whilst compliant with civil laws, independent contractors such as Church, Not-for Profit, and Community organisations vary considerably in size and scope and are bound by their own independent legal operating structures (e.g., sole trader, private company, incorporated association or public company) and associated reporting relationships;

- b) The values underpinning the behaviour of such organizations may well be similar but will not be the same as Government's;
- c) To assume such bodies are an extension of Government is too simplistic particularly as the Church and similar bodies perform a variety of other roles within society. The public advocacy nature of some of these bodies, on occasion, may be quite contrary to Government intent; and,
- d) There is no obligation (nor provision through available funding) to account for the handling of imposed public sector management "control" mechanisms (e.g., Ombudsman) that currently exists in the public sector.

## **5. Personal information**

"Personal Information" should refer to any information that is held about an individual. The New Zealand approach is favoured whereby individuals seek "personal information" about themselves and do so under the provisions of a Privacy Act rather than an FOI Act.

For example, Church, Not-for Profit, and Community organisations comply with civil laws and as needs be, the Federal Government's Privacy Act provisions. At present, Church organizations are required to promote and make available their privacy policy to members of the public. This policy is based on the National Privacy Principles (NPPs) and enables individuals access to personal information subject to certain exceptions as outlined in NPP6 and to make amendments to that information or to attach a statement from them when the organization is unwilling to amend that personal information record.

Consideration could be given to the introduction of a complementary Privacy Act in Queensland so that members of the public affected by these service providers could access their personal information.

To ensure consistency in the administration of a Privacy Act and an FOI Act a complementary Privacy Commissioner's role is favoured that would collaborate closely with the Information Commissioner and operate in a similar manner (e.g., answerable to Parliament and not the Government of the day; educate and inform users; resolve contentious issues on their subject area; and, report annually to Parliament by way of an Annual Report).

## **6. Operational issues of a policy nature including exemptions**

In general, material currently declared exempt including "commercial in confidence" matters under the FOI Act should be the exception rather than the norm. Information should be released provided there is "no harm" to an innocent or third party not directly involved in the material to be released and provided the release of the material is in the "public interest".

A public interest and/or a no harm "test" should apply to all exemptions as listed in pages 87 & 88 of the discussion paper.

Guidelines will need to be issued to clarify what factors are relevant when determining "public interest" and the "no harm" tests apply to material declared exempt under the Act. A S.42A matter relating to national or state security and a S. 43 matter affecting legal proceedings could be exempted from the Act and should be explained also in such guidelines. Given the potential for changes over time as a result of information technology, record keeping and case law, the Information Commissioner's Office should be well placed to prepare these guidelines rather than incorporate such information in the FOI Act's provisions.

Neither Cabinet nor Executive Council matters should have a class exemption. Associated factual/statistical material also should not be exempted from disclosure. Like other government decisions and actions a public interest and a no harm test should apply. An Agency or Minister wanting to deny access to information under s. 22 should make formal application to the Freedom of Information Commissioner who would rule on the matter. In the alternative, they could be allowed to make their decision on the understanding that it is subject to review/appeal.

Where a Cabinet or Executive Council or a "commercial in confidence" matter is made exempt from the FOI Act that exemption should only remain in place for the lifetime of two parliamentary terms (e.g. 6 or 8 years) and then the exemption provisions should no longer apply.

The need for a "conclusive certificate" provision is a moot point. The Information Commissioner could monitor the use of conclusive certificates and in the annual report to Parliament should report on its use.

## **7. Application/review process**

The Act should enable those seeking access to information to do so in writing or on-line and the guidelines set out by the Commonwealth Ombudsman as outlined on pages 130/131 of the discussion paper, if adopted, would aid in making the FOI application process more user-friendly. In responding to a request, the existing time limits as outlined in pages 144/5 of the discussion paper appear reasonable. However, the applicant also should be provided with an estimate of when the agency believes the information could be provided to the applicant.

In recouping costs Queensland charges within the public sector should be consistent with those charges and methods used to determine such charges in other Australian jurisdictions with the following caveats:

- I. Fees and charges should always be based on making access to FOI affordable rather than unaffordable;
- II. Those people who are pensioner or on fixed incomes and can produce evidence of that should be charged a percentage of normal charges (e.g. 50%); and,
- III. Where it can be shown that an applicant's financial situation is such that they cannot afford even a minimum charge the responsible officer should have the delegation to waive any fees.

In principle, making an internal review mandatory before an external review is sought is favoured. Wherever possible, decisions should initially be reviewed as close as possible to the original decision maker. The Ombudsman's office could undertake external reviews.

The Information Commissioner should be able to determine an application "vexatious" and, if it is not, a time frame within which the request should be actioned. Where a Department officer is of the view an application is vexatious then an application should be made to the Information Commissioner for a ruling and providing, at the same time, the reasons why the request should be treated as vexatious. Journalists exempt from this provision should be required to pay for full cost recovery of any voluminous request.