

The Secretariat
Freedom of Information
Independent Review Panel
Level 9, 239 George Street
BRISBANE QLD 4001

By Delivery and Email: enquiries@foireview.qld.gov.au

Dear Madam and Sirs

The Queensland Council for Civil Liberties (“the QCCL”) is a voluntary organisation committed to the implementation of the Universal Declaration of Rights in Queensland.

As a purely voluntary organisation the Council is not always able to address all the issues that it would like and those issues that it can address as fully as it would like. The result of this is that this submission does not cover all of the issues raised in the discussion paper.

This submission was prepared by the president, Michael Cope, executive member Andrew Sinclair, Barrister-at-Law, and executive member Louisa Pink, Solicitor.

1. Basic Rationale

1.1 The New Zealand model

The Council has long been tempted by the attractions of the New Zealand model of Freedom of Information legislation.

The Council has now come to the view that the New Zealand model ought to be applied in Queensland in preference to the existing model.

The key features of the New Zealand model to have rendered it superior to that in Australia are summarised by Rick Snell.¹ They are:

- (a) The New Zealand Act covers information not documents;
- (b) It creates rights of process rather than of access to official information;

¹ The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand 28 FLR 575 at 577-578.

- (c) Its dispute resolution enforcement mechanisms are relatively inexpensive, accessible and speedy;
- (d) It requires a decision on access to be made on a time and information specific basis;
- (e) Its starting principle is disclosure;
- (f) Exemptions from release of information are based not on whether or not a document falls within a certain category but on the consequences of release.

We are cognisant of the views of the Legal Constitutional and Administrative Review Committee (“LCARC”) ² that a change to the New Zealand model was not justified in Queensland because:

- (a) The Queensland legislation differs for example from the Commonwealth legislation in that it already tends to focus on the harm; and
- (b) There are in effect certain categories of matter, the release of which is inherently harmful.

Whilst we concede the Queensland FOI Act does incorporate harm and public interest issues more satisfactorily than say the Commonwealth legislation, in our view the New Zealand model does so more satisfactorily and there is in our view no category of document which is inherently harmful. The proposition is in our submission absurd. The release of each document should in our submission be assessed against harm criteria and in our view the New Zealand model does that in a fashion which is superior to the Queensland model.

1.2 Information is vital to Democracy

We start with the premise that public information does not belong to Government; it belongs to the public on whose behalf government is conducted.

It is clear that to protect individual liberty we should have the freest possible flow of information between government and the people.

In the last ten years in Britain we have created a new legislative framework requiring openness and transparency in the state's relationships with the public. The Freedom of Information Act has been a landmark piece of legislation, enshrining for the first time in our laws the public's right to access information.

Freedom of Information (FoI) can be inconvenient, at times frustrating and indeed embarrassing for governments. But Freedom of Information is the right course because government belongs to the people, not the politicians.

UK Prime Minister Gordon Brown - “Speech on Liberty” 25 October 2007. www.pm.gov.uk.

² Legal and Constitutional Review Committee “Freedom of Information in Queensland” Report No. 32 December 2001 at page 182 (“ the LCARC report”)

“(I) it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

Accordingly, the court will determine the government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.”

Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39, at 52 per Mason J

“Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.”

Parliamentary Legal, Constitutional and Administrative Review Committee, “Freedom of Information in Queensland”, Discussion Paper 1, 9 February 2000, p. 4.

The Council endorses the views quoted above that there is a clear link between access to information and the capacity of citizens to secure the fundamental rights as found in documents such as the Universal Declaration of Human Rights.³ In particular it is clear that if citizens are to be in a position to participate fully in a democracy it is necessary that they have access to the knowledge and information to do so.⁴ The Council’s view is that a representative democracy necessitates an informed citizenry. For this reason freedom of information must be granted to the maximum extent possible.

In the circumstances then, from the Council’s point of view, whenever this committee has any choice in its recommendations in relation to issues that are not specifically addressed by the Council it should take the view that the Council supports that option which tends to favour maximum disclosure.

2. Purposes and principles of FOI – Chapter 6

Is there a public right to information held by the government, information about the personal affairs of people and about the way government is conducted?

³ Alasdair Roberts *Structural Pluralism and the Right to Information* (2001) 51 *University of Toronto Law Journal* 243 at 256.

⁴ Snell & Langston “Who Needs FOI When Market Mechanisms Will Deliver Accountability on Demand?” A Critical Evaluation of the Relationship between Freedom of Information and Government Business Enterprise 3 *Flinders Journal of Law Reform* 215 at 229 – 230.

Yes to each of these. The information was created by public servants paid for by the people, answerable to a Parliament elected by the people. The information was created for us, by our employees. It's our information. We own it. Of course we should know about it.

Should disclosure of information be guided by the same (or a similar) test the High Court proposed in 1980, that is “by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected”?

Yes. That should be the guiding and indeed only criteria for non-disclosure. The Act should strongly presume the greater public good in disclosure and leave the Executive to satisfy a heavy onus that the public interest is better served by non-disclosure.

Does FOI contribute to a healthier democracy and enhance its practice?

In Queensland, the Executive has turned the FOI Act into the lowest common denominator for accountability. In doing so it has undermined public confidence in the system of Parliamentary democracy.

Should the FOI Act contain a Preamble placing the Act in this context of its function of supporting the system of representative, democratic government?

Yes. The right of an individual to access information created by the Act is the mechanism by which the public interest in the public having access to public information is secured.

Should the Objects section of the Act be expanded to include better public administration and other benefits such as improved quality of government decision-making?

Yes, the Act should focus on the serving of those public interest grounds identified by the Legal and Constitutional Administrative Review Committee (“LCARC”) and others namely

- effective participation in government
- increasing accountability
- understand the decision-making process
- create a culture of openness and transparency
- improve the quality of decision-making
- greater public confidence in government.

rather than the ‘rights’ of an applicant to a document.

Should the Objects section acknowledge “openness” specifically as an aim of the Act and as a contribution towards more accountable government?

Yes. It should also place the onus on the Executive to consider the purposes and objects of the Act in all decision making activities.

The “default” setting when any document is created by agencies is

that it be regarded as "confidential". Is this still appropriate?

No. All information (and documents containing them) should be presumed to be in the public interest for release. If there is good reason for a document to be 'confidential', that assessment should be put in an 'open' document before the claim is made.

Does the existence of the 30-year rule militate against the culture of openness that the freedom of information law/s meant to encourage within government and other relevant agencies?

Yes. It would be remarkable if the public interest continued to be served by non-disclosure for so long a period. It is more than 2 terms of the Executive.

Should the period be reviewed in relation to Cabinet decisions and documents, and more generally for other public records?

Both.

If so, to what extent should it be reduced?

To the maximum extent that it can be – in conformity with the view that openness is in the public interest and any superior public interest in non-disclosure would generally pass fairly quickly. 5 years is suggested as a maximum for Cabinet documents (subject to the rider that most Cabinet documents should not be exempt ever.)

Given that any change would have financial and administrative implications for Queensland Archives, should any change be phased in over a number of years?

No. The initiative should be seized and Queensland Archive funded and resourced as necessary. The phase in period would only lead to greater confusion and the erosion of public confidence in the reforms.

Should agencies be encouraged to consider providing more information to people under administrative access schemes or otherwise than through FOT?

Yes. It should be embedded as a KPI for a Department that the Director-General is obliged to demonstrate and the Minister to show at Estimates. Any scheme should be Whole-Of-Government to avoid confusion and erosion of the measures.

Should FOI officers be given more delegated power and discretion to release information requested under FOI other than through the FOI process?

Yes. If information defaults to 'open' and if claims for the public interest in non-disclosure are made in an 'open' document relating to material sought to be withheld at the time they are created then the FOI officer could simply release it as it is requested with huge savings in time to respond and labour required doing so. At present, inordinate time and effort is wasted asking all and sundry if some innocuous document should be withheld.

Is further legal protection required for information provided other than through FOI?

Yes. The protections in the Act should apply to all information released by an FOI Officer to a request in writing.

Should agencies be required to include more information in their statements of affairs, and if so what?

Yes. A list or index of all information (not documents) held by the Department broken down by category. Given that this knowledge would be essential for running the budget of any organisation (I.e. What is each sub-unit working on?), it would be a very low burden on a well run Department. The index itself would be a valuable contribution to open government by showing the public what the Department was doing.

Should they be required to keep these genuinely up-to-date (revised, if necessary, every week/month)?

The obligation should be continuous with the information to be kept up-to-date as soon as is reasonably practicable.

Is the statement of affairs the best format for publication of this information?

Whatever the format, the Internet is the best medium for distribution. It's fast, very cheap for the information seeker and provider and allows anonymous access to information.

Should the Minister exercise, or should the Information Commissioner be given, the power to require the publication by agencies of additional information?

The Minister runs their own Department now. That should remain their responsibility with the Information Commissioner empowered to report in their annual report on suggestions made to various Ministers and any responses received.

Would there be any advantage in the creation of an Information Standard to provide more specific guidance to agencies about what information they should publish? Or should this be done by regulation?

No. It would just provide more confusion and not send a clear signal that the Act requires all information released. Creating another layer of interpretation would add nothing to that aim.

The obligation should be to publish a list of all information held by the Department. Requests could then be made for information from this index either under FOI or administrative request. Any document requested or supplied more than a certain number of times per year should be linked directly to the website index.

Should the Objects clause include reference to factors that are used to balance against a right to access information?

No. It is not about rights in an individual. It is about the rights of the public to know that it can know whatever it wants to about it's own

information unless there is some harm caused to the public from that publication that overcomes that high hurdle.

Would this be better achieved with a formula such as that adopted in the New Zealand Official Information Act, s.4(c)?

Yes. Although Section c) should commence “To withhold ~~protect~~ official information **only** to the extent ... etc.

Should this section be redrafted to emphasise the object in subsection (1)?

Yes.

Would there be any advantage in changing the Act to provide that a person may seek access to public records, rather than documents, or even to official information?

Yes. This is a critical part of the success of the NZ model – a focus on providing information rather than documents.

Should the Act specifically exclude “ephemeral” material?

No. However only the most recent draft should be 'official information' unless the changes between versions of drafts are in themselves 'official information'.

Should it move towards the Swedish approach?

Broadly speaking yes though without losing the simplicity inherent in default openness and the NZ model's concentration on information rather than documents.

Should the private sector remain outside the reach of the FOI Act?

This issue is the subject of extensive discussion, most notably in the Administrative Review Council's report to the Minister for Justice, Government Business Enterprise and Commonwealth Administrative Law Report No. 38.

However, we would start by making the historical point that the so called “contracting state” is not new. In many respects it is something of a return to the state of affairs prior to the 19th century. When you consider the pre 19th century experience the need to ensure that accountability mechanisms remain strong and effective is very clear. For example, the dockyards and service providers to the Royal Navy were so notoriously corrupt and inefficient it is startling that Admiral Nelson managed to put to sea let alone win the Battle of Trafalgar.

The New South Wales Independent Commission against corruption has previously noted that contracting out creates increased or changed opportunities for corruption in the contracting process.⁵

⁵ New South Wales, Independent Commission against Corruption. *Contracting for Services: A Probity Perspective* 1995 pp3-4.

For this reason there need to be steps taken to ensure that this process is opened up to examination.

In our discussion in this submission of the Commercial In Confidence exemption we identify a number of the difficulties with the argument that market mechanisms are an adequate substitute for administrative law accountability mechanisms. We would add to the points made there the following:

1. This approach assumes a passive citizenry. The Council seeks to promote an active citizenry.
2. The effect of the contracting out of government service is to blur the distinction between the public and the private. Generally speaking we subject the exercise of power having socially significant consequences to democratic norms. The decision to transfer some of these functions from the public sector to the private sector does not make them any less significant.

The usual argument proffered against the need for accountability mechanism beyond the market is that a person dissatisfied with a service provider can go elsewhere. This argument is addressed in relation to the commercial in confidence exemption. A further criticism of this argument is that in fact a dissatisfied user of the service provider may not in fact wish to change providers but may simply be seeking a redress for a past wrong. An effect of the Freedom of Information laws not applying to private providers of formerly government provided services could be to reduce the capacity of citizens to seek redress.⁶

Alastair Roberts⁷ identifies the two factors which justify the application of FOI legislation in the private sector. They are:

1. The need as this submission has emphasised, for public accountability. Transfer of these functions from the public sector to the private sector without the imposition of the FOI legislation will inevitably reduce the capacity of the citizenry to hold the government accountable for the performance of these functions because the level of information which was formerly available to them will be reduced.
2. The basic rights which individuals have within a community impose correlative duties on the other members of the community. Roberts gives us the classic example of the privatisation of prisons. When the state determines to deprive a person of their liberty they are subject to a duty to ensure that the citizens so detained are treated properly. Those citizens of course do not have the capacity to take their business elsewhere.

In summary, if as this paper argues, the principle purpose of FOI legislation is to foster public interest in an active citizenry and the accountability of government by the free exchange of information, then in so far as it appears inevitable that the transfer of public functions to the private sector will lead to a reduction in the amount of information presently available through the application of FOI to

⁶ Snell & Langston Op cit at pages 218, 220, 230-231.

⁷ Op cit page 262 and following.

government, the FOI legislation must and should be extended to the private sector.

3. Chapter 7 Exemption Provisions

3.1 The New Zealand model

As we pointed out at the start of this submission under the New Zealand legislation exemptions from release of information are based not on whether or not a document falls within a certain category but on the consequences of release.

As Snell⁸ notes whilst the exemption provisions contained in the legislation in Australia are purportedly designed to balance the need for access with the need to protect sensitive information “a by product of this balancing act has been the prima facie right of an applicant to information has often been replaced in practise by an agency presumption that it has the right to claim an exemption.”

By focussing the justification for disclosure on the consequences of disclosure, the New Zealand legislation requires public servants to justify their decision. This will reduce in our view the practice of simply searching for an exemption to justify not releasing the documents.

3.2 Degree of Harm

In our view it is important that the legislation specifies quite clearly the level of harmful consequence to justify a refusal to release a document. It is in our view insufficient for the state to demonstrate that some harmful consequence will flow from the release of the information. In our view the legislation should specify, as in the case of New Zealand⁹, that it must be a “serious or real and substantial risk to a protected interest, a risk that might well eventuate.”

In its 2001 report the LCARC rejected the need for a general policy increasing the level of harm expressed in the exemptions in the Queensland Act.¹⁰ We submit that if the committee adopts the New Zealand model it should ensure that the legislation requires the same level of harm as has been held to be the case in New Zealand.

If the committee does not adopt the New Zealand model then it is our view in the interests of facilitating maximum disclosure that it should be made clear that the level of harm required by the existing Queensland provisions is at least that of the New Zealand model.

3.3 Public Interest Tests

In the Council’s view the Information Commissioner should be given an overriding discretion to release exempt documents where

⁸ The Kiwi Paradox page 591.

⁹ *Commissioner of Police v. Ombudsman* [1988] 1 NZLR 385 at 391.

¹⁰ Op cit page 184.

the Commissioner is of the opinion the public interest requires that it should be so.

The Council notes that the Australian Law Reform Commission¹¹ and the LCARC¹² rejected such a proposal. The ALRC/ARC argued that most exemptions incorporate public interest consideration and in those circumstances to give the review making body a discretion to release exempt documents would be to allow it to effectively override the balancing process inherent in the exemptions. It goes on to suggest that it is sufficient to exhort agencies not to claim the exemption. In the Council's submission such an exhortation is not sufficient.

Section 28 of the *Queensland Freedom of Information Act* ("the FOI Act") allows agencies to release exempt documents. The Council can see no reason why this discretion should not be given to the reviewing body. In its view such a step would tend to in fact reinforce public interest consideration under the Act and not narrow them.¹³ The Council would support the Victorian model where the overriding discretion does not apply to exemptions for Cabinet documents and those containing personal information.

The concept of public interest is notoriously difficult. The Council agrees with the recommendation of the ALRC/ARC that the Information Commission should publish guidelines as to what should constitute the public interest. Those guidelines should list factors that should or should not be considered when applying the public interest test. In the Council's submission the factors to be considered as making it in the public interest to disclose a document would include:

- Whether the document would disclose the reasons for decision'
- Whether the information in the document is already public
- Whether the information would reveal environmental or health risks or measure relating to public health and safety
- Whether the information would contribute to the maintenance of social peace and order
- Whether the information would contribute to the administration of justice and particularly the enforcement of the criminal law
- Whether the information is the applicant's personal information
- Whether the information is likely to contribute to positive and informed public debate on important issues or matters of serious interest
- Whether it would reveal significant reasoning and other useful contextual information behind government decisions which have affected or will have a significant effect on people
- Whether it shows the pathways by which a decision has been arrived at

¹¹ Report No. 77 – Open Government ALRC Canberra 1995 ("referred to as the ALRC/ARC") – paragraph 8.5

¹² LCARC Report op cit page 181 - 3

¹³ Lye J and Moe T "Prospects for Review of FOI: Can the Commonwealth Regain the Initiative" in *Administrative Law: Are the States overtaking the Commonwealth?* AIAL Canberra 1994 at page 150

- Is it likely to make a significant positive contribution to government accountability
- If it would allow or assist inquiry into possible deficiencies in the conduct or administration of a public agency or by public officials
- Whether it evidences or is likely to identify that an agency has or its staff have engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith
- Whether the information was incorrect or the document contains information that is gratuitous, unfairly subjective or irrelevant or the like
- Whether the document shows the information provided to or by the government's incomplete, incorrect, out of date or misleading¹⁴

The Council considers the following factors ought not to be considered in determining that the release of information is in the public interest:

- The seniority of the persons involved in the communications or the matter of the subject of the document
- That disclosure would confuse the public or if there is any possibility that the public might not readily understand any tentative or optional quality of the information
- That disclosure would cause a loss of confidence in the government
- That disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason¹⁵

The Council takes the view that the Queensland FOI Act should be amended to provide, as the New South Wales FOI Act does, that for the purposes of determining whether the release of a document would be contrary to the public interest it is irrelevant that disclosure may cause embarrassment to the government.¹⁶

In addition, the Act should be amended to provide that decision makers must set out in their statement of reasons for a decision what factors they considered as being relevant to the public interest and what factors they considered as being irrelevant in arriving at their decision.

Finally, the legislation should require the decision makers to explicitly weigh any harm alleged to flow from disclosure against any harm which may flow from non-disclosure.

If the legislation is written on the New Zealand model there should be no need to create an exemption which allows for the release of

¹⁴ Snell & Sheridan – A Few Significant Steps towards Open Government 1995 FOI Review 90.

¹⁵ Ibid

¹⁶ see also the LCARC report op cit page 185

documents when it is found that the release of which will cause no harm. However, the Council is of the view that it might encourage release if the immunity contained in section 102 was extended to any officer exercising the delegation under section 33 who releases a document under than under the FOI Act provided the document would not have been exempt had it been requested under the FOI Act.¹⁷

3.4 Cabinet and Executive Council Matters

In the Council's submission the present content of section 36 is entirely without justification. The consequences of that exemption were starkly revealed by the Public Hospital Commission of Inquiry Report.

In that report Justice Davies found in relation to the use of the cabinet documents exemption to hide hospital waiting lists that, "The conduct of cabinet, in successive governments, ... was inexcusable and an abuse of the Freedom of Information Act. It involves a blatant exercise of secreting information from public gaze for no other reason than the disclosure of information might be embarrassing to the government". – Paragraph 6.559.

The outcome of the Public Hospitals Commission of Inquiry demonstrates clearly the point made by the Western Australian Commission on Government that

"the heavy veiled secrecy under which cabinet operates does not always serve the public interest and the current accountability mechanisms need to be supplemented without materially affecting the proper functioning of cabinet and its role within our system of responsible government"¹⁸

Snell¹⁹ demonstrates starkly the difference between the operation of New Zealand cabinet documents exemption and that provided for in the Australian legislation. It should be noted in this regard that of course the Queensland exemption for cabinet documents is the broadest in Australia and has the most limiting impact on the effectiveness of the Act.

In another article²⁰ Snell observes that the argument in favour of the cabinet document exemption rests on the assumption that the cabinet system is, and ought to be, immutable. This is clearly not so. The present system of government can and should adapt to the changes demanded by modern requirements of accountability.

We observe that the Welsh Cabinet now publishes the Minutes Papers and Agendas of its meetings with certain exemptions. We invite you to visit www.wales.gov.uk/cabinet where the Minutes of the Cabinet can be read and the exemptions are listed.

¹⁷ ALRC/ARC Op cit paragraph 4.20

¹⁸ Quoted in Snell Ibid Page 594

¹⁹ The Kiwi paradox Op cit pages 592-598

²⁰ Back to the Drawing Board – Preliminary Musings on Redesigning Australian Freedom of Information 85 FOI Review 2 at page 5.

Finally, if this committee does not recommend the adoption of the New Zealand system, then the Council repeats its submission to the LCARC dated 28 May 1999, that section 36:

Should be repealed and replaced with one that reflects the view of the Legal and Constitutional Committee of Victoria in 1989.

That committee concluded that the only documents which should be protected are those which, if disclosed would undermine the unity of cabinet. On the basis of this principle the committee considered that the cabinet documents exemption should only extend to:

1. Documents recording cabinet decisions;
2. Documents submitted by a Minister to cabinet for its consideration but only if:
 - a) the documents were brought into existence for the purpose of submission to cabinet; and
 - b) were prepared by the Minister or on the Minister's behalf at his or her express direction.

The Council says that in addition the exemption should only apply to documents containing opinions or advice as is the case in Tasmania. Cabinet documents containing only factual information should be disclosed unless to do so would disclose a deliberation or decision of cabinet that has not been officially published.

3.5 Deliberative Processes

We share the view that this is an exemption quite often claimed as a coverall when there is nothing else to rely upon. We concur entirely with the comment of Ms Patterson in the discussion paper that if members of the public are to make a meaningful contribution to political debate they need to have access to the material upon which decisions are made.

In line with the general approach recommended in this submission, we are of the view that the exemption should be recast to focus on the harm that might flow from the release of documents. The focus should be on assessing whether or not the release of the document will cause some harm to the policy development process.

3.6 Commercial In Confidence

It is often said that in the context of competitive tendering contracting arrangements, there is no need for administrative law style accountability arrangements because the process of the market will ensure accountability. In our view whilst there is some merit in that proposition it does not tell the whole story. There are two problems with that view. The first is a simple problem of market failure such as where there are in fact only a small number of competitors. This is a very real concern in the case of big infrastructure projects. In such projects the large sums of money

involved mean the payoffs from corruption are like to be large and hence the temptation proportionately greater. But in those large infrastructure projects, the number of competitors is usually very small, maybe 2 or 3.

Even in the case of smaller markets where the number of competitors may indeed be large, governments have to have regard to issues which are not encapsulated in market signals. That is why we have a democracy. While efficiency is no doubt an important aim it is not in a democracy an end in its own right. Other issues including fairness come into play.

In addition, when services are being delivered by a government which is democratically elected, the citizens are entitled to know whether or not their monies are in fact being properly spent.

In the Council's view, the present exemption in relation to business affairs or commercial in confidence information is far too wide. It needs to be narrowed considerably.

The Senate Finance and Public Administration Committee in its *Contracting out of government services second report* observed that "only relatively small parts of contractual arrangements will be generally commercially confidential." In fact, the evidence to that Committee was that confidentiality provisions are inserted into the contracts more often at the request of the public service than the private sector.

The Australian Council Auditors-General in its *Statement of Principles: Commercial Confidentiality and the Public Interest* November 1997 referred to the need to make a distinction between confidentiality during the process of tendering and the final document.

As Seddon says²¹:

One of the claims made in favour of the contractualisation of government is that the very process of planning and drafting a contract enhances accountability because it forces government agencies to specify with some precision what was previously unspecified or at best the subject of perhaps vague public service guidelines or directions ... It is therefore odd that the terms of the contract are hidden and the very benefits claimed for contracting out cannot be assessed.

Mr Seddon concurs with the Senate Committee when he observes "most of the information in government contracts is mundane and in no way sensitive."

That this is the case would appear to be supported by the American experience. The Council of Auditors-General noted that in California once a finalised agreement has been reached, the final

²¹ *Commercial in Confidence and Government Contracts* 11 Public Law Review 255

agreement is able to be released publicly. We see no reason why a similar principle could not be applied here.

The Council endorses the views of Chris Finn²² that:

“Commercial information is overprotected from disclosure under contemporary FOI legislation. This overprotection is evident quite apart from democratic arguments that the “public right to know” may override established commercial interest. Viewed solely in economic terms, the existing levels of protection for business information appear hard to justify. FOI legislation should be redrawn so that business information is only protected where its release will cause demonstrable harm to the competitive process itself. It should not be sufficient to justify exemption, as is currently the case, either that the material is of a commercial nature or that its release will cause some harm to the individual enterprise.”

At the very least, the FOI Act ought to be amended to provide that to justify a nondisclosure, as Moira Paterson²³ says there must be some risk of harm to the financial affairs of the government agency. That must be a harm which outweighs the democratic interest in government accountability.

In the case of information supplied voluntarily in confidence, a similar test needs to be applied. It needs to be demonstrated that disclosure information will cause harm to the position of the confidant or prejudice to the future supply of information and that there is no countervailing public interest in disclosure.

If a consequences focussed approach to the section is adopted then there should be no need to make specific provision for the exemption to expire after the passage of time because the passage of time inevitably will reduce the harmful consequences of any release.

3.7 Other Exemption Provisions

As is the case with other exemptions our view is that these exemptions should be recast along the lines of the New Zealand model.

We note the comments of the ALRC/ARC in its report that the exemption for documents affecting the economy of the state are superfluous and should be repealed. We would endorse that view.

3.8 Conclusive Certificates

The original justification for conclusive certificates was that they represented an additional safeguard. The Council takes the view that the existence of conclusive certificates is inconsistent with the

²² Quoted in Rick Snell *Commercial in Confidence – Time for a Rethink?* 102 Freedom of Information Review 67 at 69

²³ *Commercial in Confidence & Public Accountability: Achieving a new balance in the contract state* (2004) 32 ABLR 315 at 327

fundamental precepts of the FOI Act. In particular such certificates are usually used to preclude the release of highly sensitive information which is exactly the sort of information which the FOI Act should allow access to.

It is to be noted that in the early years of the Commonwealth legislation there was some use for certificates. Between 1982 and 30 June 1986 55 conclusive certificates were issued of which 14 were reviewed by the AAT. By the mid-nineties their use in the Commonwealth sphere had declined considerably.

The LCARC in its report²⁴ indicates that at that time there had only been two instances in Queensland of the use of conclusive certificates.

It is the Council's submission that Jane Lye and Tim Moe²⁵ were correct when they said that:

“time has proven that the substantive exemption provisions without the added strength of certificates are in fact more than adequate to the task of the exemption of even the most sensitive documents”

We agree with Lye and Moe that conclusive certificates have outlived whatever usefulness they may once have had and should be removed from the Act completely. This is even more the case if the Act is restructured to follow the New Zealand model with its focus on consequences.

4. Administration of FOI in Queensland – Chapter 8

4.1 Public sector culture

How can a State, characterised by a strong executive, honour the original intent of FOI and address its anxiety about the capacity to govern effectively in a hungry and geared information age?

Our executive is described as ‘strong’ because of the power delivered to it in Queensland through the structure of our unicameral Parliament. It is therefore self evident that the executive in this State should responsibly use that power by ensuring it is sufficiently accountable in terms of performance and decision making, including through FOI. A ‘strong’ executive should demonstrate that power not by unscrupulously taking advantage of the structure of Parliament to remain in government as long as possible but through its proven record of performance. The public availability of government information does make governments vulnerable to criticism, however, a government that is confident in the integrity of its actions and processes should not shy away from such scrutiny and accountability.

²⁴ Op cit at page 189.

²⁵ Op cit at page 151.

If Premier Bligh and her Cabinet is genuinely committed to the original intent of FOI, she should provide the sort of leadership and intent reflected in US Attorney-General Janet Reno's Memorandum and reportedly endorsed by President Clinton ("Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a [FOI] requester unless it need be"). That single act will achieve the most significant improvement to FOI implementation in Queensland through the inevitable shift in public sector culture inexorably accompanying such a genuine directive.

The unavoidable consequence of that simple action is that the Premier and her government will face closer and more substantial scrutiny of the administration of government in Queensland. On occasion this will require admissions that government has failed or fallen short in carrying out its responsibilities. An increasingly discerning public will recognize the strength required to answer to and address such situations.

In accepting that the administration of FOI operates beyond an application of primary legal obligations, how can bureaucratic and political interests be kept in balance?

It is resistance to accountability through FOI at a political level that engenders a culture of avoidance at a bureaucratic level and therefore creates competing interests between the public service and politicians. An authentic commitment from the highest level of Government in Queensland to the letter and spirit of FOI referred to above would narrow the gap between bureaucratic and political interests in the administration of FOI legislation.

The greatest value that the bureaucracy can provide, along with exceptional service, is frank and fearless advice to its political decision makers. There is no question that the giving of "frank and fearless advice" is often a casualty of FOI in an environment where politicians do not want a record of being provided with information or advice that is likely to attract controversy and criticism. An environment in which the executive provides real leadership on disclosure through FOI and truly accepts its responsibility to be accountable through that process would allow the bureaucracy to best serve the public of Queensland by providing candid advice without fear of political retribution on that advice, and subsequent political decisions, being publicly scrutinized.

In considering the steps towards addressing administrative compliance shortfalls suggested by Snell and others (pp. 100 - 102) plus incentives and sanctions and any other general measures, how might Queensland drive a cultural change necessary to give effect to the legislative objects of the Freedom of Information Act 1992?

Through true commitment to FOI at a political level. Once that is in place the quality and value of FOI services, with all the mechanisms described by Snell to achieve that outcome, including granting appropriate funding and priority to FOI services will automatically flow.

4.2 Information policy

The Council supports the development and adoption of all policies within government which facilitate timely, comprehensive and free access to public information held by our government.

Can the outcomes desired for FOI, and those of information policy, benefit from the inclusion of FOI considerations (with advancing ICT impacts and corporate governance notions in records management), in development of a whole of government information policy framework that sets strategic directions and a new model of ICT governance?

Seamless government and the sharing of common accurate information sets are valuable objectives within government and for the delivery of services to the public by the government. In this context a whole of government information policy framework incorporating FOI considerations would be supported to the extent that the policy delivers practical improvements to access to information by the public.

Are records management protocols and standards accessible, widely known and understood, consistent, and reflective of the practical realities of government activity – particularly on questions of retention, storage and release of electronic (non-paper) information? What is done well? What can be done better?

The Council supports the LCARC Report recommendation of the conduct of an audit to assess the current standard of records management in Queensland agencies. Once the results of the audit are evaluated each agency should be required to address deficiencies identified, particularly in aspects of record management which do not positively facilitate operation of the FOI regime.

How can the volume and status of drafts and emails be better managed with the advent of ICT, in both better meeting expectations and achieving reasonable outcomes for all under FOI?

There is a clear need for an effective whole of government policy to be adopted (with necessary refinements within each agency to meet a variety of challenges) which, for example:

- defines the category of documents/media holding information to be the subject of the policy

- provides guidance on the character of drafts required to be preserved, and
- sets out processes for the appropriate capture, storage and management of the information covered by the policy within each agency.

To the extent that this is achieved through Electronic Document and Records Management Systems (EDRMS), public sector agencies yet to implement such systems should be subject to a timeframe for implementation.

How can requirements in handling raw data and metadata under FOI be improved in balancing the public interest? Should applicants be able to obtain raw data in the possession of an agency? Should there be any obligation on an agency to process data to provide the particular information that an applicant is seeking?

Data held by the Government should be made available to the public wherever possible, in a form which is meaningful, free of charge and in a way that does not breach privacy principles. Government departments typically gather information in a way which is unintelligible outside their operational environment. This is antithetical to transparency and effectively frustrates critical analysis of systemic issues making the public reliant on limited data officially released by government.

What can be done sector-wide to achieve e-FOI where ICT enables electronic lodgement, payment and access methods yielding time and cost savings?

The introduction of a regime in all government agencies facilitating electronic lodgement of FOI requests, including electronic payments to the extent that they do not compromise privacy principles, is supported. Wherever government records are held and accessible electronically they should be required to be produced electronically within a limited timeframe given the ready accessibility of the electronic material to the agency in question.

Should FOI move towards a “push model” of proactive disclosure before individual FOI requests? If so, how and to what extent, can ICT open up “routine disclosure” and “active dissemination” pre-FOI?

A government truly committed to openness and accountability would embrace such a pro-active approach and apply it to the broadest category of information, such as systemic public policies, publications, data and information.

4.3 Protection of privacy interests

In the event that new privacy legislation was enacted, what mechanisms should be developed to ensure consistency of

administration and decision making as between privacy and FOI legislation?

In its submission the Council has argued that the focus of FOI legislation is not so much the right of individual access but the public interest in the free release of information so that citizens can participate actively in the democratic process and hold government accountable.

Applying that principle to this issue, we would submit that it would be entirely appropriate to remove those provisions dealing with access to personal information and the correction of errors to the *Privacy Act* leaving the FOI Act to deal with public interest issues. In fact, such a rearrangement as seems to have occurred in New Zealand may aid in focussing attention of decision makers under the FOI Act on the public interest nature of the process and not on the position of the individual seeking access to the information.

If this approach were adopted it would also facilitate change of the test in section 44 to remove the requirement that the disclosure “would on balance be in the public interest” to one where a document is exempt “if its disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person.” In our view this test is a far more flexible and desirable test.²⁶

4.4 FOI applications for access

Should agencies adopt guidelines giving effect to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report?

The Council sees merit in the guidance list provided by the Commonwealth Ombudsman in 2006 being incorporated into guidelines for Queensland government agencies.

4.5 FOI applications for amendment

Should applicants be able to use the FOI Act to request amendment of personal information irrespective of how they became aware of the document containing the information?

Yes

Should the requirements of the FOI Act and any privacy legislation be harmonised to ensure the same conditions apply in relation to the amendment of personal information in official documents under both schemes?

Yes

4.6 FOI Review Processes

²⁶ See the discussion in the LCARC report Op cit at pages 213-214

The Council's view is that on balance internal review should remain. It does allow departments to correct mistakes and can be faster even in the Queensland based model with the Ombudsman or Information Commission conducting external reviews. This assessment of the usefulness of internal review is supported by the LCARC report²⁷ where it is demonstrated that internal review resulted in a variation of the original decision in approximately 1/3 of the cases. Having taken into account the matters raised by the LCARC²⁸ the Council at this stage would not support removing internal review as a prerequisite to external review.

On the question of external review the Council's general impression is that the model used in Queensland has been functioning well and we see no reason to adopt the tribunal model in Queensland.

In the Council's assessment, both on the basis of the experience of its members and on the review of all the relevant literature, one of the critical issues for the proper functioning of the FOI system is agency culture. It is our view that a statutory body separate from the Information Commissioner/Ombudsman should be established with the tasks of:

1. Collecting statistics;
2. Publicising the Act;
3. Providing training to agencies;
4. Auditing the performance of agencies;
5. Promoting community awareness.

5.1 Fees and Charges

The Council stands firmly in favour of the position that FOI must be a substantially government funded regime.

The LCARC in its discussion paper on the Accessibility of Administrative Justice lists four arguments in favour of applicants bearing the costs of FOI applications.

1. That FOI is a government service for which the user pay – this is a fundamental nonsense. FOI is no more a government service than elections are. It is part of the process of accountability and democracy.
2. Imposing charges would deter the use of FOI as an alternative to legal discovery or for voluminous, frivolous and repetitious requests – We are not aware of any evidence that FOI is used excessively as an alternative to legal discovery. The Council invites the Review to arrange for statistics on this issue to be produced. But in any event the Council remains steadfastly behind the fundamental principle of FOI that the purpose for which documents are requested should be irrelevant. Once the purpose for which the documents are requested becomes the subject of investigation, then in the Council's view that will be the end of FOI. Such a change also puts the emphasis on the applicant whereas we have argued that the focus of FOI should

²⁷ Ibid page 123.

²⁸ Ibid page 125 and 126.

be on the public interest in the release of information. Voluminous, frivolous and repetitious requests are now adequately dealt with in the legislation, particularly as a result of the amendments passed in 2005.

3. People who use FOI for commercial gain should not be subsidised by public funds – Once again we invite the Review to call for and produce statistics supporting the proposition that a substantial portion of the cost of FOI is being incurred for profit making purposes. In any event, once again, the Council is of the view that any change to the FOI regime which introduces the purpose of the applicant as a relevant factor is a slippery slope down the slide towards destroying the regime.
4. Imposing a cost regime will give applicants an incentive to be specific - Once again, in the Council's view this is adequately achieved by the regime which is already in place relating to voluminous requests.

The LCARC in its 1999 discussion paper on FOI produced some interesting statistics on the effect of changes in 2001 to increase the fees payable. The Council notes from this, a number of things:-

1. The statistics did not identify whether there has been a change to the number of people withdrawing their applications, following the giving of a cost estimate.
2. The change in fees certainly seems to have reduced applications for review.
3. The table on page 11 of the discussion paper seemed to support the case that the increase in fees caused a problem, particularly in the context of public interest applications.

We observe that the Review's discussion paper at page 142 endorses the latter 2 observations.

It is clear in the submission of the Council that a substantial alteration in the fees regime must result in reduced applications and hence reduced accountability. In this regard, we note the substantial paper of Mr Alistair Roberts²⁹ where the author makes the following telling observations:-

1. In Canada a substantial proportion of costs associated with the administration of FOI laws are associated with weaknesses in methods of records management or are driven by government's own demand for services in the system, i.e. by pressure from the government, to determine a basis upon which the information should be withheld. The submission of the Queensland Information Commissioner to the LCARC Inquiry³⁰ found similar problems in Queensland.
2. Public officials divert requests for information that would once have been handled informally into the FOI system. In the submission to the LCARC in its review of the *Freedom of*

²⁹ *Limited Access: Assessing the health of Canada's Freedom of Information Laws* April 1998 found at [HTTP://qsliver.queensu.ca/sps/](http://qsliver.queensu.ca/sps/)

³⁰ Op cit at page 166.

Information Act dated 28 May 1999, the Council suggested that one mechanism to reduce this would be to extend the immunity contained in Section 102 of the Act to any officer exercising a delegation under Section 33, who releases a document other than under the *FOI Act* provided the document would not have been exempt had it been requested under the *FOI Act*. That suggestion was not taken up by the government.

The Review's own paper indicates that the cost recovery is only a small proportion of the actual cost some 5%. In its 2001 report the LCARC reported that the cost of FOI in 1999/2001 was a mere \$7.5m. By way of contrast, the Council observes that the cost to the government of its means of propaganda such as advertising, publishing, printing, public relations, public affairs must be considerably more than \$7.5 million or the current costs of FOI. Of course, the difference is that in the former category the government controls the information and in the latter it does not.

In our view then there should be no change to the existing arrangements for fees and charges for FOI except perhaps to reduce them. Given that that is not likely to happen we would oppose any change to the regime that would increase the costs of FOI applications.

There should be no fee for internal or external reviews.

5.2 **Voluminous and/or Vexatious Requests**

In its submission to the LCARC Review dated 28 May 1999, the Council expressed its opposition to provisions allowing applicants to be deemed vexatious. The thrust of the submission on that occasion was to introduce provisions similar to those which were adopted by amendments made in 2005 to sections 29 and 29A and 29B of the Act. Like the LCARC the Council is opposed to the vexatious provision because:

1. Once again, it invites consideration of the motives of the applicant which in our view should never become a part of the freedom of information process. As we have commented elsewhere once that occurs, in the Council's view that will be the end of FOI and it goes against the case for FOI which rests on its critical part in the process of promoting the development of an active citizenry.
2. Vexatious is indeed a vague concept allowing a subjective assessment.
3. The existence of the provision may inhibit bona fide applicants.

In our view the appropriate focus of attempts to control vexatious applicants is the number and size of requests. This has been done adequately by the amendments referred to above. We would not support any further changes to the Act dealing with allegedly vexatious requests.

In the Council's view it would be appropriate for the Information Commissioner or, if it is established, the oversight body to publish

guidelines on the assessment of voluminous requests in which a number of factors may be taken into account including the number of pages, the number of days it will require to process and the cost, but we would oppose any amendments to the Act which have the effect of casting such a yardstick in stone. Other factors that would need to be taken into account in assessing voluminous requests include the size of the agency and the extent to which department has adopted or could adopt modern technological practices to facilitate the processing of the request.

We trust this submission will be of assistance to you in your deliberations. If we can be of further assistance to you please do not hesitate to contact Michael Cope on 3223 5939.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
20 March 2008