Freedom of Information in Queensland

An Analysis of the Electoral and Administrative Review Commission's Report on Freedom of Information

Introduction

Currently in Queensland there is no general right of access to government information, except where such a right is specifically granted by legislation. Indeed, government agencies may be under a positive duty not to disclose information (consider the discussion in the Commission's Issues Paper on *Protection of Whistleblowers* (90/110) at paras 3.3-3.21). However, it is always possible for government agencies, at their own discretion, to disclose information which is not otherwise subject to legislative, contractual or judicial restraint. Further, provided a court action has commenced, it is possible to obtain information held by government agencies through discovery or by subpoena. However, government agencies may nonetheless claim that such information is 'privileged', or, again, there may be legislation which specifically prohibits the disclosure of the information. Conversely, no legislation exists in Queensland to generally protect information privacy. Citizens do not have a right of access to information held by government agencies which relates to their personal affairs, nor do they have a right to amend any errors or inaccuracies which may exist in such information.

The Electoral and Administrative Review Commission

The Electoral and Administrative Review Commission (the Commission) was established by the *Electoral and Administrative Review Act* 1989 (Qld) (the Act). The Commission's object is to provide reports to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier (s.2.13 of the Act), with a view to achieving and maintaining:

(a) efficiency in the operation of the Parliament; and

(b) honesty, impartiality and efficiency in —

(i) elections;

(ii) public administration of the State;

(iii) local authority administration.

[s.2.9(1) of the Act]

On 18 December 1990, the Commission presented to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Parliament and the Premier, the Commission's *Report on Freedom of Information* (R6/90) (the FoI Report).

The Parliamentary Committee for Electoral and Administrative Review is an all party committee of the Legislative Assembly of Queensland whose function, among others, is to examine reports of the Commission and to report to the Legislative Assembly on any matter appearing in or arising out of any such report (s.5.8(1)(c) of the Act).

On 22 December 1990, the Parliamentary Committee called for public submissions on the Commission's FoI Report. Submissions were required to be forwarded to the Parliamentary Committee by 14 February 1991. It is anticipated that the Parliamentary Committee will report to the Legislative Assembly on the Commission's FoI Report later this year. Thereafter, depending on the Government's view of the Commission's Report, and its view of the Parliamentary Committee's Report, and, indeed, of its own timetable, FoI legislation could then be enacted.*

The Commission's FoI Report

Need for FoI legislation

Almost unanimous support for the introduction of FoI legislation in Queensland was expressed in the submissions received by the Commission. This support came from individuals, Queensland government departments, statutory bodies, local authorities, professional associations, academics, unions, research organisations, public interest groups, community service groups, newspapers and political parties. Not unexpectedly, however, an opinion that was often repeated was that while FoI legislation was a good idea in principle, it was unnecessary in respect of particular bodies. Separately, the Commission addressed the concerns expressed by such submissions when considering the bodies which ought to be covered by FoI legislation (see Chapter 8 of the FoI Report).

In the light of the widespread support for FoI legislation in the submissions, the Commission chose not to labour the arguments for giving citizens access to government information. However, the tone of the Commission's Report, and the draft Bill appended to the Report, is clearly set by the following observation made by the Commission:

> . . . the Commission considers that information is the grist of government processes. The fairness of decisions made by government, and their accuracy, merit and acceptability, ultimately depend on the effective participation by those who will be affected by them. Further, when access to information is denied to the public it is thereby denied its right to exercise control over government. FoI legislation is crucial if access to information is to be obtained, and thereby participation in the processes, and control of, government is to be achieved.
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> [para. 3.36 of the FoI Report]

Users of FoI legislation

Like the FoI legislation of other Australian jurisdictions, the Commission has recommended that Queensland's FoI legislation should not require an examination of the motive or reason for exercising the rights conferred by FoI legislation. Further, the rights conferred by FoI legislation are not restricted by reference to residency or legal capacity. Conversely, the Commission considered it was inappropriate to draft specific FoI legislation for the particular needs of potential FoI users, such as Torres Strait Islanders (paras 3.41-3.42 of the FoI Report), or for particular bodies which would otherwise be covered, such as local government authorities (paras 8.133-8.136 of the FoI Report).

* The Parliamentary Committee's Report was tabled on 18 April 1991. See Recent Developments in this issue, p.21.

Retrospective operation

First, the Commission has recommended that FoI legislation should confer a right of access to, and amendment of, all documents containing information relating to the personal affairs of an applicant, irrespective of the age of the document (para. 4.65(a) of the FoI Report; and cl. 5(1) of the draft Bill). That is, FoI legislation will be of unlimited retrospective operation in respect of personal affairs documents. Second, the Commission has recommended that FoI legislation should confer a right of access to all other documents, provided they were brought into existence not earlier than five years before the commencement of FoI legislation (para. 4.65(b) of the FoI Report; and cl. 5(2) of the draft Bill). That is, FoI legislation will be of limited retrospective operation in respect of those documents. Finally, the Commission has recommended that in respect of non-personal affairs documents, access to such documents should be provided irrespective of their age when such access is reasonably necessary to enable a proper understanding of a document to which a person has or may lawfully obtain access, whether under FoI legislation or otherwise (para. 4.65(3) of the FoI Report; and cl. 5(3) of the draft Bill).

Archives

The Commission acknowledged that FoI legislation would impinge on the activities of the Queensland State Archives. The Commission considered that any rights conferred by FoI legislation should sit comfortably with any rights of access to the archives of the State. However, the Commission also acknowledged that existing archives resources, particularly in respect of storage space for archival documents, personnel and funding, were severely constrained. The Commission concluded:

> . . . that a review of existing archives legislation and the administrative practices and resources of the Queensland State Archives is necessary. Such a review has not been encompassed by the Commission's review of FoI legislation as it is necessarily more widely focused, being concerned as it should be with the public interest in accessing government information, and, also the public interest in preserving the archival documents of Queensland.
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> [para. 5.41 of the FoI Report]

The Commission undertook to complete a separate review of these several matters relating to archives (para. 5.42 of the FoI Report). The Commission noted that, having regard to its commitments, it might not be possible for the Commission to commence that review until mid-1991. It is anticipated that the Commission will publicly announce its timetable for a review of archives legislation and administration in Queensland in the near future.

Commencement of FoI legislation

The Commission has recommended that FoI legislation commence in respect of government agencies (other than local government authorities) three months after FoI legislation receives the Royal Assent, with the requirement to publish statements about structure and functions to be met within 12 months of FoI legislation receiving the Royal Assent. In respect of local government authorities, FoI legislation should commence nine months after the legislation receives the Royal Assent, with the requirement to publish to be met within 18 months of the date of the Royal Assent (para. 6.27 of the FoI Report; cls. 2 and 11 of the draft Bill).

Exempt documents

The FoI legislation which the Commission has recommended contains an objects clause (cl. 3 of the draft Bill) which states two basic objectives. They are, that in a free and democratic society:

(1) the public interest is served by public participation in, and the accountability of, government; and
(2) members of the community should have access to information held by government in relation to their personal affairs, and should be able to amend that information when it contains errors or inaccuracies.

The objects clause also acknowledges that there is a public interest in non-disclosure of certain government information where disclosure would be prejudicial to essential public interests or the private or business affairs of individuals.

Chapter 7 of the Commission's Report contains a lengthy analysis of the exemptions which FoI legislation should contain, and those exemptions which FoI legislation should not contain. Those exemptions are, of course, intended to strike the appropriate balance between the public interest in disclosure, and the public interest in non-disclosure.

Briefly, the Commission has recommended that FoI legislation exempt from disclosure matter:

(a) relating to Cabinet and Executive Council;
(b) relating to investigations by the Parliamentary Commissioner or audits by the Auditor-General;
(c) affecting inter-governmental relations;
(d) concerning certain operations of government agencies;
(e) relating to the deliberative processes of government agencies;
(f) relating to law enforcement and public safety;
(g) subject to legal professional privilege;
(h) relating to the personal affairs of a person, other than the applicant;
(j) which is a private donation to a public library;
(k) relating to the trade secrets and business affairs of a person or government agency, other than the applicant;
(l) communicated in confidence;
(m) relating to the economy;
(n) concerning the financial and property interests of government agencies;
(o) the disclosure of which would constitute a contempt of court or infringement of Parliament;
(p) which relates to adoption procedures;
(q) the disclosure of which is unwarranted; and
(r) the disclosure of which is premature.

While the exemptions are meant to demarcate areas of permitted secrecy, they are permissive in that government agencies have a discretion to release a document or matter that could otherwise be withheld as exempt. The exemptions therefore do not constitute a prohibition on the disclosure of documents which contain exempt matter (cls. 3(4) and 20(1) of the draft Bill).

Separately, the Commission has recommended that where matter is exempt it should be deleted to the extent that it is possible to do so without altering the character and sense of a relevant document (paras 7.23, 7.26 and 7.337(u) of the FoI Report; and cls. 8(1) and 24 of the draft Bill).

Finally, the Commission has recommended reverse-FoI procedures, conclusive certificates and neither con-

firms nor denies features in relation to Cabinet and Executive Council and law enforcement and public safety (paras 7.336(w) and (x) of the FoI Report; and cls. 27, 28(3), 29(3) and 34(3) of the draft Bill).

Bodies covered by FoI legislation

The approach recommended by the Commission is that, unless specifically stated to be exempt from the legislation, FoI legislation should apply to all persons or bodies created or established by government for a public purpose, as well as specific persons or bodies to which government provides funding or over which government may exercise control, with any residual need for secrecy in relation to those persons or bodies protected by the application of the exemptions contained in FoI legislation (para. 8.149(a) of the FoI Report).

As contemplated by the Commission, specific persons or bodies, or certain functions of specific persons or bodies, should have restrictions placed upon access to their documents in order to allow them to properly perform their functions. To otherwise expose those persons or bodies to full scrutiny through FoI legislation might seriously prejudice the attainment of their primary objectives and would not, therefore, be in the public interest. The Commission has recommended the exemption of only a small number of bodies from FoI legislation. Those bodies are:

(a) the Governor;
(b) the Legislative Assembly, a member of the Legislative Assembly, a Committee of the Legislative Assembly or a member of such a committee;
(c) the Parliamentary Service Commission;
(d) the courts and judges in respect of the exercise of their judicial functions;
(e) Commissions of Inquiry or a Royal Commission (other than the Parliamentary Commissioner), at least up until the time that their final reports have either been tabled in the Legislative Assembly, or presented to the Government and seven sitting days have elapsed; and
(f) the Information Commissioner (para. 8.150 of the FoI Report; and cl. 9 of the draft Bill).

Significantly, however, the Commission has recommended that local government authorities should be covered by FoI legislation (para. 8.141(y) of the FoI Report; and cl. 8(1) of the draft Bill). The Commission concluded that:

> . . . in order to ensure that local government is fairer, more effective and more accountable, its constituents should be given the means to inform themselves about, and hence evaluate the priority of, the actions of local government.
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> [para. 8.131 of the FoI Report]

Concomitant with that recommendation, the Commission considered that primacy should be given to FoI legislation as a separate instrument by which members of the public may inform themselves and evaluate the priority of government actions. Accordingly, the aims of FoI legislation in respect of local government authorities should not be expressed in the *Local Government Act* 1936 (Qld). Conversely, the Commission considered that a single piece of FoI legislation which was applicable to all government persons and bodies would nonetheless be sensitive to the particular needs of local government authorities (para. 8.136 of the FoI Report).

Finally, the Commission considered that any future claim for exemption to FoI legislation should receive thorough public and parliamentary scrutiny. Accordingly, the Commission recommended that FoI legislation should not provide for a regulation-making power which would allow for the automatic exemption of government agencies from the operation of FoI legislation (paras 8.144 and 8.148(aa) of the FoI Report).

Personal affairs information

The Commission acknowledged the unanimous support expressed in the submissions for a right of access to, and the amendment of, documents containing information which relates to the personal affairs of a person (para. 9.3 of the FoI Report). The Commission in turn recommended that FoI legislation confer a right of access to documents containing information which relates to the personal affairs of a person, and a right to amend information relating to the personal affairs of the applicant which is incomplete, incorrect, out of date or misleading (para. 9.39(a) of the FoI Report).

However, the Commission recommended that access to documents containing information relating to the personal affairs of an applicant should be treated as an element of the general right of access to documents, and should not, therefore, receive separate legislative treatment (paras 9.19 and 9.39(b) of the FoI Report). This is an approach which accords with the FoI legislation of other Australian jurisdictions.

In contrast to the FoI legislation of other Australian jurisdictions, the FoI legislation which the Commission has recommended contains two additional mechanisms designed to protect the privacy of individuals. First, the Commission has recommended that FoI legislation should contain a provision which requires a person to establish her/his identity in respect of documents to which access is sought on the basis that they relate to her/his personal affairs (paras 9.32-33 and 9.39(3) of the FoI Report; and cl. 96 of the draft Bill). Second, FoI legislation should contain an offence provision for a person who, in order to gain access to a document containing matter relating to the personal affairs of another person, knowingly deceives or misleads a person in the exercise of their powers or the performance of their functions under FoI legislation (paras 9.34 and 9.39(f) of the FoI Report; and cl. 97 of the draft Bill).

Documents or information

The Commission considered that, save in respect of information held in computers but not otherwise available in documentary form, FoI legislation could adequately meet its professed aims if it was expressed as conferring the right of access to documents only. In respect of information held in a computer, but not otherwise available in a documentary form, the Commission considered that FoI legislation should confer a right of access to such information if government agencies, subject to the general provisions of FoI legislation, could create a document containing information of that kind (paras 10.18-10.22 of the FoI Report; and cls. 8(1), 14 and 22 of the draft Bill).

External review

While the departures from the FoI model of the other Australian jurisdictions which have been discussed thus far can properly be described as matters of degree, the external review mechanism recommended by the Commission can properly be regarded as a departure in substance. The Commission has recommended that an

independent office, to be known as the Office of the Information Commissioner, be established to perform the external review function of FoI legislation (para. 17.55(b) of the FoI Report; and cl. 52 of the draft Bill).

The Information Commissioner would be appointed by the Governor-in-Council upon an address by the Legislative Assembly. The requirement for a parliamentary debate is designed to ensure the appointment of an Information Commissioner of sufficient stature and independence from the Executive, and who would command the respect of all parties in the Legislative Assembly. The Information Commissioner would proceed like an Ombudsman but, rather than merely having powers of recommendation, would have determinative powers upon review. Generally, the Information Commissioner would proceed in an informal and non-confrontational style, and would retain a general power to regulate a review, thus ensuring the maximum degree of flexibility and expedition (generally see Chapter 17 of the FoI Report; and Part V of the draft Bill).

By way of observation, the role of the judiciary in the operation of the FoI legislation of other Australian jurisdictions is often regarded as ensuring that FoI legislation operates properly. Lest it be thought otherwise, the judiciary retains a role in the operation of FoI legislation in Queensland. Decisions of the Information Commissioner would be subject to judicial review, both under the scheme proposed by the Commission in its *Report on Judicial Review of Decisions and Actions* (R5/90), and under the current system of obtaining judicial review, by way of prerogative writ, in Queensland (para. 17.44 of the FoI Report). Further, references may be made to the Supreme Court to resolve questions of law (cl. 88 of the draft Bill).

Charges for FoI legislation

The Commission has recommended that the charging regime for FoI legislation should comprise the following:

(i) no application fee should be payable, irrespective of the character of information sought;
(ii) no charges of any kind should be levied in respect of documents containing information which relates to the personal affairs of a person;
(iii) in respect of documents containing information which does not relate to the personal affairs of a person, a sliding scale of photocopying charges should apply. the first 50 pages should be supplied free of charge, the next 150 pages should be supplied at a charge of $1.00 per page, and thereafter a charge of $2.00 per page should be levied;
(iv) if information is not available in a discrete documentary form, but a written document could be produced by the use of relevant equipment, a reasonable charge should be levied at the discretion of the relevant agency having regard to the actual cost incurred by the agency ion producing the document and the public interest in allowing access to government information;
(v) in respect of information which is not in a documentary form, a reasonable charge should be levied by the agency having regard to the actual cost incurred by the agency in supplying the information and the public interest in allowing access to government information; and
(vi) there should not be a cap on the charges which may be levied under FoI legislation nor should FoI legislation provide for the waiver or reduction of charges; and
(vii) no charge for the making of an application for internal review, or external review (paras 18.73(a)-(i) of the FoI Report; and cl. 21 of the draft Bill).

Separately, the Commission has recommended various mechanisms which are designed as a counterbalance to the recommended charging regime. First, where it is apparent that an application seeks only a certain type of information, an agency may, with the agreement of the applicant, treat the application as a request for that type of information only. This allows an agency to subdivide a request and encourages consultation between an agency and an applicant as to the precise nature of the applicant's request (para. 18.23 of the FoI Report; and cl. 19(3) of the draft Bill). This represents a new feature to FoI legislation, and reflects the approach articulated by Deputy President Hall in *Re Anderson* (1986) 4 AAR 414 at 416-21. Second, where a request is made which covers all documents related to a specific subject matter, the agency or Minister dealing with the request may refuse to grant access to the documents if satisfied that the work involved would substantially and unreasonably divert the resources of the agency (para. 18.73(d) of the FoI Report; and cl. 20(2) of the draft Bill). Finally, an agency may refuse to grant access to documents without having to identify the documents in question or the exemption provisions under which those documents are claimed to be exempt where it is apparent that all the documents relating to a request received by an agency are exempt (para. 18.25 of the FoI Report; and cl. 20(3) of the draft Bill).

Publication of information and documents

The Commission has recommended that, like the FoI legislation of other Australian jurisdictions, FoI legislation in Queensland should require government agencies to publish information regarding their operations and functions (Part II of the draft Bill).

Separately, the Commission has recommended that a Register of Cabinet Decisions should be maintained by the Secretary of Cabinet. Information relating to the terms of all decisions made by Cabinet, the reference number assigned to each such decision and the date on which each decision was made, would be entered on the Register at the discretion of the Premier (paras 19.20(b) of the FoI Report; and cl. 12 of the draft Bill). The Commission considered that the Register would ensure that the public is kept informed of matters that have gone before Cabinet and the decisions taken in relation to those matters. It would thus enhance the opportunities for members of the public to become better informed and more involved in public affairs, and issues relating to the formulation of government policy (para. 19.18 of the FoI Report).

The administration of FoI legislation

The Commission has recommended that the Attorney-General's Department administer FoI legislation (para. 20.37(a) of the FoI Report). As part of the implementation of FoI legislation, the Commission has recommended that an FoI Implementation Unit be established as soon as possible. That unit should draw on the experience of other Australian jurisdictions in the performance of its functions (paras 20.25 and 20.37(b) of the FoI Report).

The Commission recognised that the effectiveness of FoI legislation would ultimately depend on whether adequate resources were provided to government agencies to enable them to inform the public of the existence of FoI legislation, and to meet any resultant demand for information. Accordingly, the Commission has recommended that government ensure agencies have sufficient resources and staff to enable them to meet their obligations under FoI legislation (para. 20.37(c) of the FoI Report).

Finally, the commission has recommended that, in order to monitor its effectiveness, a review of the operation of FoI legislation be undertaken two years after its commencement (para. 20.37(d) of the FoI Report).

Conclusion

Opinions will, of course, differ about the merit of the FoI legislation which the Commission has recommended for Queensland. There will be those in government who will express concern that matters previously kept secret will no longer be so. Conversely, there will be those outside government who will express concern that citizens will not have an unrestricted right of access to all information held by government.

Such an impasse demonstrates the difficulty in striking the balance between opening up the processes of government to democratic participation and control while keeping secret those matters which might otherwise erode the democratic process itself. The Commission has recommended legislation which is the result of extensive public participation, mindful of the experience of the Australian jurisdictions which have enacted FoI legislation and which should otherwise ensure that neither of the opinions described above prevail over the other to the detriment of the public interest.

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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

RICKETSON and ROYAL WOMEN'S HOSPITAL
(No. 89/025618)
Decided: 6 December 1989 by Deputy President Judge Hanlon.
Disclosure of the remuneration package of the respondent's Chief Executive unreasonable — claims for exemption under ss.33, 34 and 35.

Ricketson, a journalist, sought access to the remuneration package of the Chief Executive of the Royal Women's Hospital, Mr Henry.

Reliance was placed by the hospital on ss 33, 34 and 35 in refusing access to the document, although the Tribunal only dealt with s.33 at any length in its decision, stating that its findings in respect of s.33 would dispose of the other exemption provisions relied upon by the respondent.

Section 33 of the Act exempts from disclosure a document disclosure of which would involve 'the unreasonable disclosure of information relating to the personal affairs of any person'.

Without examining the issue in any detail, the Tribunal was satisfied that information relating to a person's income is information which relates to his or her personal affairs.

In determining whether disclosure would be unreasonable, the Tribunal stated that the issue involved 'a consideration as to whether or not the public interest involved in the disclosure of the information outweighs the claims to privacy on the part of the person in the situation that Mr Henry is in'.

In formulating the test of unreasonableness in this way, the Tribunal concluded that remuneration packages of executive officers such as Mr Henry were matters of 'legitimate public interest and legitimate disclosure' and that given the information was sought by the applicant in pursuit of the public interest disclosure would not be unreasonable.

The decision of the respondent was therefore set aside and an order to disclose the document was granted.

[P.V.]

WRIGHT and DEPARTMENT OF CONSERVATION FORESTS AND LANDS
(No. 89/261)
Decided: 7 December 1989 by Deputy President Judge Hanlon.
Departmental briefing papers and ministerial correspondence relating to proposed mining project negotiations — claim for exemption under s.30.

Concern about the successful resurrection of the 'frankness and candour' argument has to date centred around several recent decisions of the Commonwealth Administrative Appeals Tribunal (see, for example, J. Waterford 'Old fears find new lease of life at Tribunal' ((1990) 27 *FoI Review* 28). In *Wright* Judge Hanlon appeared to endorse the use of the frankness and candour argument upholding a claim for exemption by the Department under s.30. His Honour's apparent endorsement of the argument appeared without any meaningful examination of the legislative history of the *FoI Act*.

Wright, a journalist, sought access to departmental correspondence and briefings to the Minister on the siting of the dam for what was known as the Benambra mining project and correspondence between Ministers relating to the project. The only exemption provision relied upon by the Department was the deliberative processes exemption, s.30. The applicant contended that the proposed siting of the dam raised a number of important environmental issues and that the possibility of pollution of nearby rivers was of sufficient public interest to justify disclosure.

Noting that the documents concerned a subject of some sensitivity, the Tribunal observed publication of the documents would not be in the public interest as,

> it would tend to be destructive of the system by which our State is governed by an executive made up of ministers, the Crown, who are members of our