

AUSTRALIA'S RIGHT TO KNOW

Response to the Report by the FOI Independent Review Panel The Right to Information Reviewing Queensland's Freedom of Information Act

INTRODUCTION

Australia's Right to Know (AARTK) is a coalition of 12 major media organisations formed in 2007 to address the troubling state of freedom of speech in Australia including increasing government secrecy.

ARTK strongly endorses the Queensland Government's recognition that access to government information is an essential right of every Australian and fundamental to openness, transparency and accountability in government. ARTK applauds the Government's decision to review and reform the Queensland Freedom of Information (FOI) regime.

In response to the review discussion paper: *Enhancing Open and Accountable Government*, ARTK provided a written submission. ARTK would now like to comment on the final report (the Solomon Report) provided by the Independent Review Panel to the Government.

The Solomon Report provides a welcome comprehensive rethink of Freedom of Information law and practice in Queensland. It returns to first principles, providing recommendations designed to create a system that is practical and effective in ensuring public information is accessible.

In particular, ARTK strongly supports the Panel's Recommendations to:

- introduce a single public interest test that states: "Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest." The test's starting presumption that access to information is to be provided is a very positive step towards openness;
- revise the method for assessing the public interest test;
- introduce a whole of government strategic information policy moving to a "push" model where government routinely and proactively releases information without the need for FOI applications;
- legislate that the Object of the Act is to provide the right of access to information held by government unless on balance it is contrary to the public interest and legislate "Reasons for enactment of Act" recognising inter alia; the value of freedom of information, importance of openness, accountability and public ownership of information;

- make bodies established or funded by government and certain documents relating to privately contracted government services and government-subsidised private sector bodies subject to FOI;
- abolish conclusive certificates;
- reduce time limits for supplying documents (45 days to 25 days) and introduce a range of measures including a Schedule of Relevant Documents that will practically reduce the time taken to provide documents;
- revise internal and external review processes; and
- improve and increase the powers of the Information Commissioner

ARTK urges the Government to accept these Recommendations.

However, there are several significant flaws within the Recommendations which if adopted would undermine the invaluable reform outlined by the Panel. They relate to:

- **Fees and charges.** ARTK welcomes the recommendation to abolish fees for decision making, retrieval and search by FOI officers. However, the recommended per folio charge would be a barrier to access. Lengthy documents, for example complex policy review and analysis documents would attract exorbitant fees. These are precisely the documents that need to be released to improve transparency, accountability and understanding of government;
- **Cabinet documents exemption.** Whilst the recommended new exemption for cabinet documents (Recommendation 32) is a considerable improvement on the current exemption, ARTK submits that a public interest test should be applied in determining whether cabinet documents should be released.

Where in extraordinary circumstances the public interest in releasing documents outweighs the potential harm to the collective responsibility of the Cabinet, the documents should be released.

Recommendation 33 is ambiguous in its treatment of extracts of factual/statistical documents contained in Cabinet documents and whole documents attached to Cabinet submissions. It is also opaque on dealing with factual/statistical documents produced for a dual purpose. The Recommendation should be clarified to remove the ambiguity and to ensure documents prepared for a dual purpose are not exempt.

- **Ministerial documents exemption;** Question time briefing notes, estimates briefing notes and incoming ministerial briefs, should not be subject to a FOI exemption.
- **Other exemptions:** The existing modified public interest test for matter relating to law enforcement or public safety and matter relating to national or State security should be retained in the legislation;
- **The ambit of the Act:** Section 11 should be reviewed to ensure the FOI regime applies to all appropriate aspects of government information including;

administrative details of the Parliament and Governor and systemic information about performance of students and schools.

This document will deal with each of these in detail.

FEES AND CHARGES – CHAPTER 14

Right to Know proposal

ARTK submits the cost of providing information to inform the public about government should be borne by the Government. Reform of Queensland's FOI regime should recognise the right to information as a democratic right. All charges and fees should be removed given the importance of open administration and information access to good government.

As the Australian Press Council stated in its submission to the Panel :

“Since the citizens pay taxes, they have in a sense already paid for the information that is sought through FOI, the media that publish information acquired by FOI are simply a vehicle for delivering that information to its ultimate customers.”

And as ARTK has stated, costs remain one of the major constraints to the media's effective use of FOI.

The Solomon Report noted the United States FOI model which recognises the value of access to information, where no charges apply to information in the public interest because it is:

“likely to contribute significantly to public understanding of the operations or activities of the government”.

The Solomon Report also referred to the 1990 Electoral and Administrative Review Commission (EARC) recommendation that Queensland should adopt an FOI law:

“Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.”

Under the new regime, the cost of administering FOI, which is already modest, will fall further with the recommended “push” management approach to information which will reduce applications and improve efficiency of the regime.

Given FOI's relatively low cost and the importance of an effective system, ARTK submits that the Government should reconsider an ethos it adopted when the legislation was first introduced in Queensland - to process non-personal FOI applications free of charge.

Background

We appreciate that the Panel recognises there should be no charge for search, retrieval or decision-making by FOI agency officers but the proposed sliding scale per folio would lead to exorbitant fees for applicants including the media, non-government organisations, academics and politicians. We are extremely concerned this would result in many applicants being unable to afford to use the Act, particularly for more complex matters.

Under the recommended charges structure, as soon as an applicant seeks more than hundred pages of any documents, costs will begin to soar beyond the capacity to pay.

Given their typical length, complex policy, data-based analysis, surveys, evaluations and reviews and internal audits will be among the applications too costly to pursue. These are precisely the documents needed to improve transparency, accountability and understanding of public policy.

Examples of lengthy applications that would be prohibitive in cost

ARTK provides two examples of the unwelcome result of the proposed changes – more are available however the crucial point is a flawed costs and charges approach can still ruin a reformed FOI Act despite any other welcome changes to the legislation.

An application was lodged with Queensland Health on February 26 2008 seeking information relating to: *“the extent and nature of any nursing shortages in the public health system and the impact of any such shortages on patient care and patient services”*.

After discussion with Queensland Health, the final scope of the request involved:

- “Nursing Vacancy Data – monthly reports for Statewide and each of the three Area Health Services for the last 12 months; and
- Weekly Service Status Reports for the month of February 2008 only.

This request allowed journalists to accurately assess nurse shortages, agency reporting and methodology and produce a comprehensive and informed news story on an issue of strong public interest. Queensland Health advised there were 1729 documents in scope with all documents to be released. The total charges for processing were \$290.60.

However under the new recommended charging system, this application would cost \$6,457.50.

Also in February 2008, an application was made to the Department of Education, Training and the Arts for information relating to a program trialling computers at a public high school. There were 662 documents in scope and the total charges were

advised to be \$397.60.

Under the new recommended regime, charges for the information would be \$1795.50.

Discussion: the recommended costs regime

The Panel acknowledges that given a raft of problems with the existing costing, including inconsistencies, complexity, confusion, delays and excessive estimates of costs, a new simpler approach to charging is needed. But a sound rationale for the recommended new approach is not provided.

The Panel does not suggest the charging regime seeks to recover costs, noting that:

“The amount of money involved in FOI charges is miniscule, at least so far as agencies are concerned....In 2002-2003, the total cost of administering FOI by Government departments and agencies was almost \$9.3 million, while the revenue from fees and charges was just over \$0.25 million.”

And with introduction of the new recommended “push” model of administration, there will be less applications with even less revenue collected.

But the Panel notes that:

“while the charging regime under FOI may not collect much revenue, it does present real problems for administrators and requesters.”

The Panel’s rationale for its recommendation revolves around the Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC) Review in 1995, the Legal, Constitutional and Administrative Review Committee (LCARC) report on “The Accessibility of Administrative Justice” in 2008 and a UK-based review by Frontier Economics.

The ALRC/ARC Report concluded that:

“although charging for access to information undoubtedly reduces its accessibility, some form of contribution from applicants is appropriate.”

In considering this, the Solomon Report acknowledges that charging reduces use of FOI by newspapers and non-government organisations, but provides no rationale for why there should be some form of contribution other than to deter vexatious applicants. On this point, the ARTK supports the introduction of vexatious applicant measures that will solve any existing problems with these applicants.

The UK Frontier Economics considered:

“a more targeted fee aimed at recovering the costs of dealing with persistent and experienced requestors. These types of requestors tend in the majority of cases to be requestors who require information for commercial use: either journalists or businesses wishing to gather information about procurement options in order to create a commercial database”.

However, this focus misses a major point. There is a clear distinction between commercial information, for example, information sought for a commercial database

and information, for example, on nursing shortages in the public health system which is sought in the public interest and is not relevant to a discussion regarding fees aimed at recovering costs.

In response to the UK report, the Panel concludes distinction should not be made on the basis of the motive of the person seeking the information but on the type of information which is sought. ARTK does not support this approach.

We are strongly of the view, neither the ALRC/ARC, the LCARC or the UK Review offer a philosophical justification for charging users seeking public policy or accountability related documents and no justification is provided for a sliding fee that penalizes applicants seeking more information.

CABINET DOCUMENTS EXEMPTION – CHAPTER 8

Right to Know proposal

ARTK submits that:

- a public interest test should be applied in determining whether cabinet documents should be released;
- Recommendation 33 should be clarified to remove the ambiguity between treatment of extracts from factual/statistical documents and whole factual/statistical documents; and
- Recommendation 33 should be clarified to ensure documents prepared for dual purposes are not exempt from FOI.

Background

Historically, the Queensland provision on Cabinet matter has been controversial and has been used by ministers to avoid FOI scrutiny for political reasons.

The Queensland FOI regime needs significant structural reform towards transparency to prevent this from happening again. While Cabinet documents may be released by governments, political popularity will always be a lure to secrecy.

ARTK welcomes Recommendation 49 to abolish conclusive certificates and Recommendation 34 for the proactive release of Cabinet material. These are positive steps towards more open government.

The Panel's conclusion that the Cabinet exemption not apply unless a stringent consequence test is satisfied, will go a long way to address the problems experienced in Queensland to date. While the exemption might retain aspects of a "class exemption" the class of documents which attract the exemption would be strictly limited to those the disclosure of which would have the consequence prescribed.

ARTK strongly agrees with the Panel's central proposition that the Cabinet documents exemption should only operate to protect documents the disclosure of which would have the consequence of revealing "any consideration or deliberation of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations".

In light of this, ARTK supports the key aspect of Recommendation 32 that “This exemption applies only to documents brought into existence for the purpose of submission to Cabinet.”

Public interest test

The Solomon Report notes the approach to Cabinet documents in New Zealand is different to the recommended approach for Queensland.

In New Zealand a public interest test is weighed against, among other factors, collective and individual ministerial responsibility.

The Solomon Report notes:

“In practice, the least secretive provisions are those of the New Zealand *Official Information Act*. This poses not a categorical but a consequential test – it must be shown by an official that withholding the document is necessary to maintain the interest claimed (for example, collective ministerial responsibility). And this harm-based assessment also involves a public interest test”.

ARTK argues that including in the Queensland legislation a public interest test in determining whether “Cabinet documents” should be released (as in the New Zealand legislation) would further support the objectives of the Act and protect against abuse of the Cabinet exemption.

For the reasons referred to by the Panel, without extraordinary circumstances, Australian decision makers are very unlikely to ever conclude that despite the fact that releasing a Cabinet document would cause the harm of compromising collective ministerial accountability would result, nevertheless it was in the public interest that documents be released.

ARTK however believes that the FOI law needs to provide for the extraordinary. Who could have foreseen the Dr Death events? If they were to recur and the Cabinet of the day was fully briefed on them but decided to keep information about the circumstances suppressed should decision makers not be required to consider where the public interest lay?

Recommendation 33

ARTK is concerned at two aspects of Recommendation 33.

First, ARTK is concerned that Recommendation 33 contains an ambiguity.

ARTK understands the Panel’s Recommendation that “An extract of factual/statistical material detailed within a Cabinet submission should be covered by the exemption” to mean that all of the content of Cabinet submission document (which obtains an extract) would be covered by the exemption; but if the same factual/statistical material is contained in other documents, those other documents would not attract the exemption.

On the other hand, if Recommendation 33 is read more broadly to mean that any factual/statistical material which is reproduced in a Cabinet submission attracts the exemption, the Recommendation itself is internally inconsistent. In that case where a

small amount of information was drawn from a report and put in the Cabinet submission the report itself would be exempt regardless of the purpose for which it was produced; but where the whole of a report attached to a Cabinet submission would not be exempt “unless disclosure would compromise collective responsibility of Cabinet requiring proof that any such attachment was prepared for the purpose of submission to Cabinet.”

Second, Recommendation 33 is opaque as to how documents which are produced for multiple purposes, only one of which relates to Cabinet, are to be considered.

For example it is common for Departments with service delivery functions to create planning documents to define services they will provide. For example Education Departments will plan school intakes, class numbers, school sizes and curriculum choices and Health Departments will plan clinical services and other health services.

In many such cases it will be obvious that a step in reaching final decisions will be Cabinet deliberation – and that one of the purposes to which service planning documents will be put will be to inform that deliberation. However in almost all cases the planning documents will also be produced for multiple other purposes: for example, to inform departmental decision making, to provide a framework for public or staff consultation and to guide implementation of service changes.

In such cases the disclosure of the documents of itself discloses nothing about Cabinet deliberations – the reader who is ignorant that the document was considered by Cabinet would learn nothing of Cabinet deliberations but much about the service and the reasons for the services in question. In such a case the fact that one of the purposes for which the document was produced was for submission to Cabinet does not lead to the conclusion that “disclosure would compromise collective responsibility of Cabinet”

To ensure the exemption only applies where, in the circumstances of the particular document, “disclosure would compromise collective responsibility of Cabinet” ARTK submits that the exemption should not apply unless it is proved that disclosure would compromise collective responsibility of Cabinet because any such attachment was prepared for a purpose of submission to Cabinet.

The ARTK understands and supports the importance of collective ministerial responsibility yet unless clarified Recommendation 33 might allow the Cabinet exemption to be wielded deep into agencies far removed from Cabinet’s deliberations.

30 year Time limit

The Solomon Report discusses the increasing trend to limit the period for which the Cabinet exemption might be claimed and notes that the justification for the exemption has largely evaporated after a decade or so. The Panel notes the “Cabinet “oyster” will be well and truly shucked after 10 years” as a result of political memoirs, media reports and work by historians.

Although the Solomon Report does not make a recommendation to reduce the current time limit, ARTK would argue the period should be limited to the end of the current parliamentary term. As noted by the Panel, “it could be argued that strictly speaking Cabinet’s accountability ceases with every new parliamentary election – Cabinet can only be responsible to the Parliament in which it holds office as the Government.”

MINISTERIAL DOCUMENTS EXEMPTION (CHAPTER 8)

Right To Know proposal

ARTK proposes that question time briefing notes, estimates briefing notes and incoming ministerial briefs, should not be exempt from FOI.

The FOI Act exists to improve accountability and transparency and new exemptions should not be created. When a FOI application is considered, the government will have the opportunity, like the public, to argue for exemption on the basis of the public interest.

Background

In reaching its Recommendation, the Panel relies on an incorrect conclusion that in virtually all jurisdictions, the ministerial documents proposed to be exempted are withheld from release.

In response to a FOI application earlier this year for the incoming briefing to the Treasurer, the Commonwealth Treasury granted some access to documents. Further documents were released on internal review with further documents expected to be released in the course of a current AAT appeal.

The Solomon Report characterised this release as an exercise of discretion by the Treasurer commenting:

“in 2008 when the Federal Treasurer decided to release under FOI much of the Red Book

The Panel’s characterisation of that decision as the exercise of Ministerial discretion is incorrect.

The information was released following application of public interest test by the decision maker within the Department with no discretion exercised by anyone. The Treasurer himself did not make the decision.

There has been no harm to the relationship of the Treasurer and the Treasury arising from the Treasury’s decision in that case demonstrating the fallacy in the Panel’s position.

In another example of release, the Commonwealth Department of Education, Employment and Workplace Relations has recently advised an applicant that following an internal review application, there would be a partial release of documents on the basis of the public interest in release. The documents include "in-confidence Question Time Briefs" relating to centralised wage fixing and other issues. This demonstrates that under Commonwealth FOI law question time briefs are accessible.

Denial of similar access by introducing a new exemption would be a backward step for any FOI reform in Queensland.

The Solomon Panel argues for the specific ministerial document exemptions on the basis that:

“a Minister cannot be responsible for his portfolio if he or she does not know what is happening within his or her department. Ministers need to be briefed about what their departments are doing, what problems exist and how they are being dealt with.”

But the arguments appear to confuse the issue of providing free and frank *information* to Ministers, (which is objective) and providing free and frank *advice* to Ministers, (which is subjective).

The Panel comments there would be a real governance problem if the FOI laws inhibited bureaucrats giving free and frank *information* to Ministers and concludes there is a risk of this, if either incoming or estimates briefs are available through FOI.

However, sound argument to support this conclusion is not provided.

The Panel appears to rely on a New Zealand study which was concerned about “some” negative effects from release of documents. It is debatably not legitimate to base this Recommendation on this study as it dealt with the content and form of *advice* as much as *information*.

The Panel also appears to rely on an argument that public servants will not provide free and frank *advice* if it might be released (a class exemption based on the *Re Howard* factors). Yet the Panel notes the question of whether free and frank *advice* might be inhibited by the release of documents is one the courts and senior officials are becoming less inclined to accept. The Report cites *McKinnon v The Secretary of Prime Minister and Cabinet* which questioned the “Howard factors”.

Parliamentary privilege exemption

As a basis for imposing an exemption on estimates briefing documents, the Panel comments that they are possibly covered by the parliamentary privilege exemption.

This suggestion is based on reasoning in a single decision on an interlocutory application by an Assistant Information Commissioner. While the Assistant Commissioner purported to rely on a Court of Appeal decision that decision does not support the reasoning.

The Court of Appeal held that notes made by a Senator for his use speaking in the Senate attracted privilege. This should be contrasted with notes made by officers of the Executive, which at some time after they are made may be read by a Minister. When the briefing notes are created, no Member of Parliament has created them to be used in the Parliament or decided that they will be used in the Parliament.

The contention that such documents currently enjoy a form of class immunity is incorrect and should be rejected.

OTHER EXEMPTIONS – SECTIONS 42 AND 42a –(CHAPTER 8)

Right To Know proposal

The existing “reasonable test” in sections 42 and 42 needs to be acknowledged as a modified public interest test and retained within the legislation.

Background

Recommendation 39 recommends that the exemptions contained in sections 42, 42A, 43, 46(1)(a) and 50 continue to apply with no public interest test.

ARTK does not dispute that section 43 (legal proceedings) and an amended s. 46 (in confidence) should continue to apply as exemptions with no public interest test. ARTK also supports the removal of section 47A from the Act and the recommendation to apply the public interest test to the whole of section 45.

However, ARTK does not agree with the Recommendation that sections 42 (law enforcement or public safety) and 42A (national or State Security) should continue as exemptions to the Act but with no public interest test.

ARTK contends a public interest test, albeit modified, currently exists for these sections and should be acknowledged in the legislation to ensure the test continues to apply to these two sections.

Section 42 states that:

“Matter is exempt matter if its disclosure could reasonably be expected to” with the section detailing relevant scenarios including “prejudice the investigation of the ... law, Endanger a person’s life” etc;

Section 42A states that:

“Matter is exempt matter if its disclosure could reasonably be expected to damage the security of the Commonwealth or a State”

Use of the term reasonable gives rise to what has been described as a modified public interest test increasing the standard to one of “reasonableness”.

Given the Parliament did not impose a blanket exemption for all information covered by these sections, they have been applied according to the modified public interest test.

For example, courts and tribunals have stated; Decision makers must have real and substantial grounds for the expectation that harm will occur for which, when looked at objectively, articulate and acceptable reasons exist (*Attorney-General’s Department v Cockcroft*¹; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*²) and must not rely on grounds which are merely speculative, imaginable or theoretically possible.

¹ (1986) 64 ALR 97 (D131)

²)1992) 108 ALR 13 (D294)

In relation to freedom of information appeals courts and tribunals have found that something which is *reasonably expected* requires *real and substantial grounds* when looked at objectively which are not irrational, absurd or ridiculous (*Attorney-General's Department v Cockcroft; Re Actors Equity Association of Australia and Australian Broadcasting Tribunal*) or fanciful, imaginary or contrived (*Re Clark v Australian National Parks & Wildlife Service*³).

Decision-makers are required to keep in mind that they are considering the reasonableness of the alleged effect, not the reasonableness of the claim of such an effect (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*).

The Solomon Report correctly acknowledges the existence of the modified public interest test stating:

“Subsection 1 does not contain a public interest test in one of the traditional forms. However, matter is exempt only if its disclosure “could reasonably be expected to” result in one or more of the listed prejudices or harms. The prejudices or harms are all of a kind that would rank highly as factors telling against disclosure if they were considered in a public interest test”.

AMBIT OF THE ACT - Section 11 (CHAPTER 7)

Right to Know proposal

The Act should be amended to ensure the administrative details of the Governor and Parliament (including the Speaker's office and Opposition Leader's office, ministerial offices and parliamentarian's electorate offices) by amendments to Section 11(1) sub-sections (a), (b) and (d) are subject to the Act and section 50 is amended to ensure such information is not precluded by this exemption.

Background

ARTK supports the Recommendations in Chapter 7 to make bodies established or funded by government and certain documents relating to privately contracted government services and government-subsidised private sector bodies subject to FOI.

However, the object of the Act is to provide access to information held by the Queensland government (section 4) and yet there are elements of the government which are excluded by virtue of section 11.

It appears from the January discussion paper and the Solomon Report, the Panel has not turned its mind to a number of the sub-sections of section 11. ARTK is of the view further consideration should be given to the ambit of the Act.

Members of Parliament and Parliament

In particular, given their salaries and expenses are paid for by the Queensland taxpayers, Members of Parliament and the Parliament itself should also be subject to FOI. The administration of these funds should be subject to public scrutiny through

³ (1991) 22 ALD 706 (D270)

the FOI Act in the same way as are funds allocated to other government departments.

This has been recognised in a number of overseas countries, including the United Kingdom where politicians are specifically included in the UK Freedom of Information Act. The UK law defines Houses of Parliament as:

“public authorities” and specifically includes them in their Act with Schedule 1 of the UK Act including in its definition of public authority, “Any government department, The House of Commons, The House of Lords, The Northern Ireland Assembly and The National Assembly for Wales. “

In addition, more than a decade ago, the ALRC report into the Commonwealth FOI Act recognized the inclusion of Members of Parliament and the Parliament and said parliamentary departments should be subject to the FOI legislation.

While in some cases the activities of Members of Parliament may be judged to be exempt from release on the basis of the same exemptions that apply to other government agencies covered by the Act, there are no good grounds to exempt them from the Act by way of a blanket exemption.

Section 50 of the Act currently exempts matter that would infringe the privileges of the Queensland, Commonwealth or State or Territory Parliament. We are concerned that this exemption acts to preclude release of information relating to Members of Parliament and the Parliament.

Similarly the administrative activities of the Governor, for example, staffing should be subject to FOI.