



13 November 2013

RTI and Privacy Review
Department of Justice and Attorney-General
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Dear Sir or Madam

Re Review of Right to Information and Privacy Laws Discussion Paper 2013

I write in relation to the above Discussion Paper and provide the following comments for your consideration.

“Push Model” approach – Page 7

The Discussion Paper asks the questions, “Is the Act’s primary object still relevant?” and “Is the ‘push model’ appropriate and effective?” In considering these questions a number of factors are relevant and should be taken into account. At the outset it is important to recall the observation of the great 19th Century defender of the rights of the individual, John Stuart Mill, who “...*saw the ability of citizens to obtain information about the actions of government as a critical guarantee of liberty. Should this right be threatened, the citizen would then be vulnerable to the self-serving threats of despotic government. The right to be informed was not something which could be dispensed with at the whim of governments.*”¹ Since the common law does not provide citizens with the right to demand government information,² legislation is necessary to facilitate such access. This is not to say that public access to government information should not be subject to appropriate checks and balances. Clearly, there are public interest grounds for maintaining the confidentiality of certain types of information, e.g., national security and personal privacy.³ But the point is that these public interest grounds need to be reasonable and clearly delineated as well as have general public acceptance and endorsement.⁴

Subject to the appropriate caveats, ready public access to government information is necessary in a healthy democratic society to ensure and maintain public trust and confidence in the institutions of the State.⁵ Trust is essential to the ongoing durability and sustainability of democratic and social institutions, “... *through its ability to*

¹ Funnell, W. 2001, *Government by Fiat: The Retreat from Responsibility*, UNSW Press, Sydney, p. 121

² Ibid, p. 171

³ This point was also recognised by the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, G. E. Fitzgerald (Chairman), 1989, p. 124

⁴ Funnell 2001, p. 126. It is noted that the current RTI legislation includes guidance for RTI decision makers regarding the factors for deciding the public interest.

⁵ Ibid, pp. 79, 80, 125

*promote the cooperation upon which a stable, productive society – indeed a society’s very existence – depends.”*⁶

In democratic societies public trust and ready access to government information go hand in hand. As has been noted, “... *Regular, undistorted communication between parties delivering governance and those receiving it is essential to a trust relationship, if for no other reason than to reduce the anxieties of each party and to allow the principals to reaffirm their confidence in their agents.*”⁷ Furthermore, “... *Democratic discourse is meaningless without access to the information which will enable the deliberation and reflection that are essential to accountability. Without a continuous movement of information between the governors and the governed the hard-fought-for democratic principle of informed consent is a nonsense. Irrespective of the level of trust which may be present for political institutions, there will always be the need for some means to verify that the trust bestowed has been honoured.*”⁸

Thus, in democratic societies ready access to government information is essential if public trust and confidence in the institutions of the state are to continue.⁹ In the absence of such access, trust may erode: “*When information is not made available, trust becomes the first casualty, for refusal to provide information on actions encourages the perception that there is something to hide. Secrecy is the denial of trust, not its affirmation... Trust between the governed and those who govern depends upon openness: of motives, actions and consequences... When applied to democratic government, secrecy presents a significant danger to the governed, and to the continued legitimacy of the system of government.*”¹⁰

Government reluctance to make information readily available and accessible – without good defensible reasons¹¹ – can easily give rise to perceptions of government secrecy. Not only can government secrecy – or the perception of secrecy – contribute to a decline in public trust but it can correspondingly increase the need for, and hence costs of, compliance monitoring of citizens by government.¹² Funnell (2001) has remarked, “...*trust can have a marked impact on market transaction costs – increased trust can reduce the costs necessary to monitor and, if necessary, sanction the behaviour of unfaithful parties.*”¹³ Similarly, Alford (2002) considers voluntary cooperation and compliance to be a valuable resource which should be encouraged since it reduces the need for costly enforcement measures.¹⁴ Freiberg (2010) likewise notes, “*In the regulatory context trust is crucial because it lowers the transaction costs of a wide range of relationships, be they social, economic or political.*”¹⁵ As heightened public trust facilitates an effective and cooperative society, so decreased trust can play out in ways including an increased reluctance by some individuals or groups to cooperate and comply with the rules and expectations “... *upon which a*

⁶ Ibid, p. 78. Also, Freiberg, A. 2010, *The Tools of Regulation*, Federation Press, Sydney, pp. 13-16

⁷ Funnell 2001, p. 124

⁸ Ibid, p. 124

⁹ Ibid, pp. 78, 124

¹⁰ Ibid, pp. 124-125

¹¹ Ibid, p. 126

¹² Ibid, pp. 85, 125, 126, 149

¹³ Ibid, p. 85

¹⁴ Alford, J. 2002, “Defining the Client in the Public Sector: A Social Exchange Perspective”, *Public Administration Review*, 62(3), p. 343

¹⁵ Freiberg 2010, p. 14

*stable, productive society depends.*¹⁶ In such a situation the state would need to flex and perhaps strengthen its coercive powers to restore and maintain societal cooperation and compliance. As Freiberg (2010) notes, “...where trust is insufficient, enforcement is required.”¹⁷ Accordingly, a direct inverse relationship may be perceived between the level of public trust and the costs to government of monitoring and ensuring societal compliance (i.e., as public trust and confidence declines so the costs to the state of monitoring and ensuring compliance potentially increases). Thus, public trust in the institutions of the state is necessary to ensure a healthy, functioning democracy and ready public access to government information plays an essential role in facilitating that trust.

Not only can the lack of ready public access to government information heighten suspicions about government intentions and lead to a decline in public trust, it can also create and foster the conditions for inappropriate, unethical or illegal activity by politicians and officials. In Queensland, this was highlighted most powerfully by the Fitzgerald Inquiry of the late 1980s. In this respect Fitzgerald commented, “*Without information, there can be no accountability. It follows that in an atmosphere of secrecy or inadequate information, corruption flourishes. Wherever secrecy exists, there will be people who are prepared to manipulate it...Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament. 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.*”¹⁸ As democratic societies are premised on the notion of “informed consent,”¹⁹ ready public access to government information is vital to facilitate and maintain such consent and ensure the conditions are right for the scrutiny, transparency and accountability of government and officials.

In view of the aforementioned observations and concerns, there is strong justification for retaining the current “push model” and “pro-disclosure bias” approach under the RTI legislation. The benefit of the current approach is that it acts to enable and promote public trust and confidence in the institutions of the state. It also operates as a disincentive to any potential illegal or unethical activity by government or officials by providing the opportunity for any such behaviour to be exposed. Indeed, maintaining the current approach is consistent with the Attorney-General’s statement in his foreword to the Discussion Paper that the Government “...is fully committed to making as much information as possible available to the community.” Retaining the “push model” and “pro-disclosure bias” approach is the best means for realising this policy objective. In fact, any action to remove the current approach from the Act could subvert this policy objective and impede it being achieved. I would also suggest that retaining the current approach would align with the Government’s 20 percent red tape reduction program. Given that any decline of public trust in democratic and social institutions can potentially increase the costs to government in terms of monitoring and enforcing compliance, any move that avoids the need for such increased costs should be welcome as part of this program.

¹⁶ Funnell 2001, p. 78

¹⁷ Freiberg 2010, p. 15

¹⁸ Fitzgerald 1989, pp. 124, 126

¹⁹ Funnell 2001, pp. 124, 149

Information about successful public service applicants – Pages 28-29

The Discussion Paper queries whether the current RTI legislative provisions are sufficient to deal with access applications for information about successful applicants to public service positions. The Discussion Paper suggests that it may be confronting and even distressing for a successful applicant to be approached by an agency decision maker for consultation purposes and advised that someone is seeking information about them. The Discussion Paper further suggests that under current arrangements an application can be made for documents about a co-worker where there has been a history of harassment or bullying.

I again refer to the Attorney-General's foreword to the Discussion Paper where he stated that the Government is committed to being "... *the most open and accountable in the nation.*" The Government's objective will be best achieved by retaining the current RTI arrangements for public sector appointments to ensure the adoption of best practice in terms of selection procedures and outcomes. Retaining the current arrangement will also provide the opportunity for ineffective or dubious processes and appointments to be exposed. As to the particular concerns raised by the Discussion Paper, if the selection process has been robust and in accordance with official requirements then there should be no concern about the defensibility of the selection process or the appointment. Provided that the necessary protections are in place (e.g., personal address details etc of the appointee are not disclosed), it is entirely appropriate for information such as referee reports and the selection panel's final report to be subject to the light of public scrutiny so as to provide assurance that the most meritorious candidates are being selected for appointment. However, if the relevant RTI provisions were amended to preclude appointment matters from such public scrutiny it could easily encourage the "... *perception that there is something to hide.*"²⁰ An outcome like this would not be in the public interest since it could diminish the legitimacy of, and public confidence in, the public service appointment process. Although consideration could be given to increasing the penalties for misuse of public service appointment information obtained under the RTI – thus addressing any potential issues relating to harassment and bullying as raised by the Discussion Paper – the current RTI approach should be retained to ensure that the integrity and credibility of the public service appointment process, as well as public trust and confidence in that process, is maintained.

I trust that the above comments and observations will assist you in your deliberations.

Yours faithfully

Don Willis

²⁰ Ibid, p. 125