Submission to the Queensland RTI Act review

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Secrecy is the high-octane fuel that power runs on. It has always been so. One of the many negative inheritances from our British history has been the obsession with official secrecy. Over time this fixation has poisoned the wells of democracy, and remains to this day a worrying fixture of public and private sector life in Australia."
William de Maria

This submission will be very brief. I didn't become aware of the review until this week and have had little time to prepare. I have written asking for an extension, but I am going away on leave tomorrow and won't hear before the deadline.

If an extension is granted I will provide a more detailed submission.

I would ask that the process from here should include public hearings and that anyone who has been involved in RTI during the period of this RTI legislation should be invited to participate. In fact, those individuals and institutions should have been contacted and made aware of this review.

I am a frequent user of RTI, as well as of similar laws in other states and federally.

RTI is in trouble and getting worse. Fewer documents are being released, redactions are increasing, costs are increasing and time frames are rarely met.

The primary problem is the cultural attitude towards non-disclosure is growing worse. This probably tracks the worsening problem of corporate influence over agencies and governments and a deregulatory hysteria in which a corporatized polis and society do not see themselves as subject to the rule of public interest and public good, but business rules, profit first and secrecy.

There is a deep level of disdain for the public in the current system.

I worked briefly in the public service and during orientation was told that the public interest – which we were all obligated to work for under the Public Service Act was the interest of the government of the day.

That attitude toward public interest appears to now dominate consideration of the public interest in RTI requests. Similarly, corporate interests are regularly conflated with public interest, particularly large developments. This conflation is true not only of public servants but the Information Commissioner as well.

The culture of non-disclosure is exacerbated by a culture of political interference. I have done several RTIs (through the North Queensland Conservation Council) relating to Adani and the expansion of the Port at Abbot Point.

Under the previous government, we received a large number of documents that called into question the viability of Adani and its proposed developments. When the new government came in we submitted a similar RTI and received almost nothing. I have had similar experiences with FOI as well, where politically sensitive or sensitised matters see a shutting down of transparency and hiding behind several of the provisions in the RTI Act – supported by the IC – unfortunately.

The cultural problems also relate to farming out of services, public private partnerships and privatisation generally. It is extraordinary that in steps such as these where corporate interests become inextricably entwined with government there is significantly less accountability than when government held these functions alone. The effect of corporate influence over government, regulation and even science is now backed by numerous peer reviewed studies and is simply inescapable – and obvious. Corporations act in their own interest and that interest is not the public interest.

I will discuss this more below looking at the commercial in confidence provisions.

How to change the culture?

This takes time, but there need to be incentives to disclose and penalties for failure to do so. I haven't looked at enforcement of the requirements on public servants to disclose, but I assume it is underfunded and that charges or prosecutions are rare.

RTI officers should not be part of the departments for which they work but independently funded, perhaps by Office of the Information Commissioner. They should have access to all files held within the department and can verify the searches conducted by departmental officials.

Regular audits of RTI searches, documents found and documents released should be conducted to develop a best practice culture. Departments and agencies should be rated for their disclosure regime as well as for the openness with which they respond to RTI requests.

While I'm aware that political interference occurs subtly, I also know that it occurs. A word to a DG by a Minister or advisor filters through the agency in ways that have no particular tracks. An independent RTI officer and regular audits may help minimise the influence of political interference.

The cost structure for RTIs should be amended so that agencies can charge for search and recovery time but not review time. The largest amounts for many RTIs are the charges imposed for redacting and removing documents.

The two biggest problems within the RTI Act itself are the commercial in confidence provision and deliberative documents.

These are two giant walls behind which departments and agencies hide.

Commercial in Confidence

No reform of an Australian FoI Act can be taken seriously these days unless it curtails the ever-widening ambit of business exemptions. William de Maria

The issue of how to deal with commercial information is critical to accountability. In an era of privatisation, increasing corporate investment and partnerships in government, corporate funding of elections and the revolving door between government and corporations, the RTI Act needs radical reform of its current provisions relating to commercial information.

There should only be one provision relating to commercial information.

The current test – a five part test that is based on the test for a breach of confidence – is utterly inappropriate to the task. It is based on purely contractual relations between parties and the expectations of the parties. Of course industry expects and wants confidentiality. Government, however, are not required to provide it. The relationship between business and government cannot be seen as a contractual one – in doing so the public interest is by definition excluded because the public is not a party to the contract.

The first part of a new test should be that commercial in confidence only applies to trade secrets.

Trade secrets should only be withheld to the extent that they are not already protected by intellectual property or other rights.

The assumptions of the parties regarding confidentiality are irrelevant. If materials are being provided as part of a financial exchange, grant, or subsidy, then all material that isn't a trade secret should be published without RTI.

It would be a travesty if partnerships with industry are subject to less oversight than the operations of government itself. It is in these relationships that we are experiencing the greatest risks to democracy and the highest levels of corruption.

For example, an RTI submitted by Friends of the Earth, refused to disclose any information from any contracts between the University of Queensland and various private interests on the basis of commercial in confidence.

These partnerships involve money, in-kind contributions, publication issues, decision-making, intellectual property etc for the development of commercial products (that in theory are regulated by the government that is party to the contracts). In this case, many products are derived from new technologies, with largely unknown risks.

While trade secrets may be involved, so is a set of circumstances that are ripe for corruption, bias and putting commercial interests ahead of the public interest. Exactly the circumstances that most benefit from disclosure.

Documents relating to public-private partnerships should be fully disclosed except trade secrets.

If documents are provided to government as part of a regulatory approval process, such as a development, then only trade secrets should be exempt.

If documents are provided voluntarily outside of any legislative or statutory process, then confidentiality can be asserted for materials that are legitimately confidential and for which release would impose an ascertainable detriment.

If these rules are applied equally then no disadvantage occurs.

Deliberative Documents

The other great wall behind which documents are withheld is this catch all exemption, which bluntly is illogical and contradicts the purpose and spirit of the RTI Act. Why exempt deliberative materials?

This is exactly what the public should be seeing, understanding and allowed to participate in – the decision making processes of government including the disputes, differences, ideas, fact that make the process of governance so complex. Why are governments afraid to have these materials seen? Of course there are differences. The phony homogeneity of contemporary political discourse fools no one.

Even when a decision has not been made – although I've seen some interesting intellectual contortions in justifying non-disclosure on that basis – release of these materials invites the public to participate in decisions that matter to them.

The argument I hear against this is that public servants will be less willing to have these honest, fearless debates, to take unpopular positions. But this argument ultimately is based on a culture that is flawed, that punishes those who dare contest whatever orthodoxy is demanded.

If decisions are made without frank and fearless advice, then disclosure will reveal this, will demonstrate a level of autocracy in decision-making that is completely unacceptable.

The current rules treat the public as idiots unable to think or participate. Of course we will use the arguments that serve our purpose best – just as government does now. So what? This is healthy debate not fake news.

This provision should simply be abolished.

Public interest test

The move to make many (it should be all) RTI provisions conditional on disclosure being against the public interest was a welcome change to the RTI Act.

It has failed utterly to fulfil its promise. I have done dozens of RTIs/FOIs and it is indeed a rare beast when the public interest results in disclosure of documents. It is rare too to see the Information Commissioner overturn such decisions.

To watch the notion of public interest swamped in illogic, free market extremist/trickle down type arguments and more basically a culture of non-disclosure is incredibly depressing.

I have encountered several times, for example, the logic that large developments involving significant finance and significant government involvement will benefit the whole public, therefore it is in the public interest to be denied access. Even if the evidence supported the view that bigger developments serve a more important public purpose, which it doesn't, the overriding reality of large developments is that they are undertaken by financially powerful and influential companies and corporations. As I will discuss below, the relationship of powerful corporate interests is one of the riskiest and most prone to corruption. It is this type of relationship that demands the greatest level of disclosure and accountability.

At a basic level it is very very difficult to imagine an argument that justifies withholding documents because it's against the public interest – and yet it happens over and over.

The RTI Act recognises that disclosure is good, even if at times uncomfortable. Recognises that accountability is a necessary quality of a healthy democracy, that transparency improves government – often when government doesn't want to be improved.

How then do so many RTIs founder on the public interest? What has happened to so corrupt a basic – and pretty simple – principle?

The public interest is not a private interest. If disclosure threatens an agreement or a development, then that is not against the public interest. This is critical. The notion that the threats to business are a threat to the public interest should never be an acceptable basis for non-disclosure. If an investment collapses because business isn't prepared for information to be public, then so be it - this is a cultural change that must occur. The public wants good investments, good infrastructure – and not all development, no matter the numbers bandied about – is good.

Ironically, the test isn't bad – it is the implementation, analysis and balancing that is so blatantly biased against disclosure. This needs change or the RTI Act will become one more fig leaf in what is now a full body suit worn by government to avoid accountability.

Jeremy Tager
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