Submission to the Department of Justice and Attorney-General

Review of the Right to Information Act 2009

Discussion paper

August 15, 2013

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1. Preamble

1.1 Seven Network welcomes the review of the RTI Act and the Attorney General Jarrod Bleijie's commitment to ensure any review be "conducted to have to ensure the Act is achieving its objectives". Similarly, Premier Campbell Newman's promise at the Open Government Forum on August 13, 2013 to ensure Queensland RTI remains a national leader for freedom of information laws is also supported.

1.2 The media plays a crucial role in accessing, analysing and disseminating information about issues and events which affect our community. Media organisations and journalists have a particular concern in the proper and efficient administration of Freedom of Information law. A key issue is the observance of the spirit of the law by government agencies by making government information freely accessible to the public to the greatest extent possible, subject to limited and essential exceptions.

1.3 Seven Network notes that government information is owned by the public and its timely and efficient release will ensure open and accountable government and enhance representative democracy.

2. Executive Summary of Submission

2.1 There should not be any increased protection for information in communications between Ministers and Departments.

2.2 The object of the RTI Act should be amended to allow secrecy only on the basis of the protection of essential public interests.

2.3 The RTI Act should be broadened to include government owned corporations and contracted service providers.

2.4 The Act should also apply to other bodies like State Parliament and some exemptions should include public interest tests.

2.5 There should be no increase in fees or charges.

2.6 The review system should allow internal reviews to remain optional, allow internal and external reviews on sufficiency of search grounds and allow applicants the right to appeal directly to QCAT?

3. Communications between Ministers and Departments

3.1 The most significant issue raised by the August 2013 discussion paper involves communications between Ministers and Department. The paper notes that: "To enable Government to function effectively, it is important that Ministers and departmental staff…are able to communicate freely. The paper notes exemptions already exist for incoming government briefs and many documents prepared by departmental staff for consideration by Cabinet and other exemptions protect a range of communications in various circumstances. This submission addresses this area first before dealing sequentially with other issues requiring comment raised in the August submission paper.

3.2 The August 2013 discussion paper importantly notes: "Neither the Commonwealth Freedom of Information Act 1982 nor equivalent legislation in other jurisdictions has a more has a more specific exemption provision protecting communications between Ministers and Departments".

3.3 Communications between Ministers and Department are typically covered by the deliberative exemption. The RTI Act states under S49 that: "If an access application

is made to an agency or Minister for a document, the agency or Minister must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest" because of a range of factors under Schedule 4. Those factors include under Schedule 4, (20) "Disclosure of the information could reasonably be expected to prejudice a deliberative process of government".

3.4 The deliberative processes of an agency, a Minister or the Government are the thinking, reflecting, deliberating, consultation and recommendation that occur prior to a decision, or before or whilst undertaking a course of action. They are an agency's or Minister's thinking processes involving weighing up or evaluating competing arguments or considerations that may have a bearing on a course of action, decision or proposal (Re Waterford and Department of the Treasury (No.2) (DI8.I), frequently endorsed by the AAT and the courts since then). They are concerned with both policy-making processes and non-policy decision-making processes involved in agency, ministerial or governmental functions (Re Murtagh and Commissioner of Taxation (D27) and Re Reith and Attorney-General's Department (D 167) and Re Zacek and 24 As at 31 December 2002 Australian Postal Corporation (D524.2)).

The exemption applies to documents that contains opinion, advice or recommendation or consultation or deliberation that has been prepared or recorded or has taken place in the course of, or for the purposes of, the deliberative processes of the agency or Minister; (Re Booker and Department of Social Security (D258)) and those *processes* are carried out as part of the properly defined *functions* of the agency, Minister or government.

3.5 Consideration of increasing protection for information in communications between Ministers and Departments logically means either a blanket exemption of that information or a diminishment of the public interest test relative to that information normally classed as deliberative process in favour of secrecy. However, an exemption already exists in the RTI Act to protect deliberative documents unless it is in the public interest to release such information and this approach is typical of FOI legislation throughout Australia.

3.6 Any change towards greater secrecy by increasing protection for information in communications between Ministers and Departments would directly and inevitably damage the status of the RTI Act compared to other Australian jurisdictions in achieving the goal of open and transparent government. The recent review of Commonwealth FOI laws by former senior public servant Dr Allan Hawke, notes the deliberative exemption must have an application of the public interest test which weighs up factors for and against disclosure noting that "while the review acknowledges that adoption of these options would provide clarity and strengthen the protection of deliberative advice, it also recognises that they may be viewed as diluting the objects of the FOI reforms."

3.7 The August 2013 discussion paper's sole apparent reference to reasons why protection for information in communications between Ministers and Departments needs to be increased is that: "To enable Government to function effectively, it is important that Ministers and departmental staff…are able to communicate freely". It is likely then that this possible change to the Act relies on the view that release of communications between Ministers and Departments might inhibit frankness and candour by public servants.

3.8 This factor was first raised in *Re Howard and the Treasurer (Cth)* (1985) 3 AAR 169 (***Re Howard***), where the Tribunal found that disclosure which would inhibit the candour and frankness of future pre-decisional communications would be contrary to the public interest.

3.9 Other cases, exemplified by *Re Eccleston and Department of Family Services, Aboriginal and Islander Affairs* [1993] 1 QAR 60 (***Re Eccleston***), tend to reject the

traditional, formulaic approach to public interest considerations in *Re Howard*. The Appeal Panel in *Re Eccleston* considered the question to be whether any "tangible harm" would result from the release of the documents (at [68]). The New South Wales Court of Appeal cited these comments with approval In *Workcover Authority (NSW) v Law Society of New South Wales* (2006) 65 NSWLR 502, emphasising that the FOI legislation established a "general policy of disclosure", in recognition of the public interest in accessing official information to facilitate discussion, review and criticism of Government action. It is Seven Network's view that these decisions recognise the express object of the QLD RTI I Act that the public right of access to documents should be subject only to *essential* public interests and the interest in protecting the private or business affairs of members of the community. Arguments relevant to the importance of access being subject to essential public interests can also be found in *McKinnon v Department of Prime Minister and Cabinet* [2007] AATA 1969.

3.10 The Queensland Office of the Information Commissioner does not usually accept high office or the possibility of inhibiting candour and frankness as factors in favour of non-disclosure.[1] It is to be expected that Government officials will give candid and impartial advice, whether or not they believe that the advice will be accessible to the public. Public servants are bound by employment conditions and guidelines to provide candid and impartial advice. Most Government officials would be well aware that in performing public functions, their activities will be subject to a higher level of public scrutiny. The comments by Marie Shroff, New Zealand's Privacy Commissioner, who served for 16 years as Cabinet Secretary, warrant consideration. Ms Shroff notes:

> *"Even at the hardest end of FOI – access to Cabinet documents – the benefits are clear. If I, as a civil servant, write a Cabinet paper which I expect to be sought for public release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I will put in more detail than might formerly have been the case: I might quote from sources rather than summarising them, especially when unpalatable advice might be needed; and I might clearly identify legal advice and separate it from policy advice to allow for possible legal protection under legal professional privilege. I will record carefully the reasons for my particular recommendations – although this will largely be to ensure that my reputation as a professional and neutral public servant will be enhanced if the advice is released. I will avoid the temptation to make cute remarks. I will often have robust face-to-face discussions with my Minister on the way towards a final piece of advice or a Cabinet paper.*"[2]

3.11 It should also be noted that other factors raised in re Howard have been specifically excluded from consideration as irrelevant to the public interest. They are: "Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government. Disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document and the person who created the document containing the information was or is of high seniority within the agency".

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[1] Office of the Information Commissioner Queensland (2006) "FOI Concepts: Public Interest Balancing Tests" <http://www.oic.qld.gov.au/indexed/pdf/FOI_Concepts_-_Public_interest_balancing_tests_-_Ver_1.0_-_05-10-06.pdf> (27 February 2008).

[2] Marie Shroff "The *Official Information Act* and Privacy: New Zealand's story" Presentation to the FOI Live 2005 Conference, London 15 June 2005, 9 – 10.

3.12 The point made by Ms Shroff directly contradicts abiding arguments against document disclosure that if documents produced by public servants are held to the light of public scrutiny, then public servants will be less candid than otherwise, despite a duty to provide candid advice to Government. This thesis is flawed. Lawyers, journalists, teachers and many other occupations and professions are all rightly judged on performance. The public has a right to judge the quality of advice given to politicians and whether politicians have acted responsibly in relation to that advice – this is an essential public interest.

3.13 Greater protection for information in communications between Ministers and Departments would mean voters would be less informed. If policies are working and politicians have considered a range of carefully considered options when making decisions then the public can be confident in a government and the government would naturally enjoy political support. If policies are not working or advice is poorly researched, narrowly focused or wrong then the public has a right to know and the only motive for disclosure is to protect the political interests of the government before the public interest.

3.1 A tangible example in recent Queensland history where politics dominated a government's agenda before good public policy can be found with the so-called Dr Death inquiry in Queensland where respected lawyer Geoff Davies QC found that the Queensland cabinet, including Beattie and former health minister Gordon Nuttall, had a ``culture of concealment'' in which hospital waiting lists and other material were hidden. Davies found that the conduct of the present cabinet and its Coalition predecessor in hiding documents relevant to the health of thousands of Queenslanders was ``inexcusable and an abuse of the Freedom of Information Act''.

3.2 He also found that successive state governments had followed a practice of concealment and suppression of elective surgery waiting lists and measured quality reports. ``This in turn, encouraged a similar practice by Queensland Health staff,'' he said. ``In my view it is an irresistible conclusion that there is a history of a culture of concealment within and pertaining to Queensland Health.''

3.3 Secretive government not only permits poor policy to flourish and flawed allocation of taxpayer resources but logically, given the findings of Commissioner Davies, can be directly responsible for appalling and life-threatening failures by government. Access to deliberative documents not only ensures politicians make decisions in the best interest of the public, but further encourages senior public servants to provide well-researched and well thought-out advice knowing they could also be subjected to public scrutiny.

4. Objects of the Act – Push model strategies.

4.1 The discussion paper notes that the primary object of the RTI Act is to "give a right of access (and amendment) to information in the government's possession or under the government's control, unless, on balance it is contrary to the public interest to give the access (or allow the amendment).

4.2 The review should consider strengthening the object further by including the term "essential" before public interest in the objects. This would increase the emphasis on release of information and legal right of access to information in the RTI Act.

4.3 The push model is appropriate as governments should actively seek to release information to the public. However, governments are traditionally opposed to releasing information showing failures or problems in policy or administration

although this is precisely the information the public needs to gauge a government's performance. Equally, transparency ensures that politicians are obliged to acknowledge and fix problems or failures and RTI's role in this process is extraordinarily cheap compared to waste of taxpayer's funds that can occur from flawed policies or management.

5. Government owned corporations and contracted service providers

5.1 As a bare minimum, Australian Law Reform Commission (**ALRC**)/Administrative Review Council (**ARC**) recommendations should be implemented. Those recommendations included requirements that:

- agencies include provisions in contracts requiring that contractors record and provide adequate information to the agency and to allow Parliamentary scrutiny as well as public information access rights;
- complaint procedures be adequate and not lost or diminished as a result of a service being provided by a contractor rather than the Government; and
- contractors' documents that directly relate to the performance of contractual obligations be deemed to be in the possession of the relevant agency.

5.2 Seven Network contends that the QLD RTI Act should require contractors to provide documents to the agency when an FOI request is made. In addition, all contractors should be advised that they fall within the scope of RTI legislation and that any documents produced as a result of a consultancy fall within the scope of the QLD RTI Act. An essential public interest test should apply in this area and the onus for proving that release should not occur should be with the agency and the contractor.

5.3 Public agencies owned by the taxpayer carrying out public functions must be open to the QLD RTI Act, given the considerable expenditure of public money, their accountability to Ministers and ultimately, the public. Importantly, GOCs are normally involved in public functions or service delivery often in a less competitive or monopoly market and therefore need to be accountable on performance and administration. Any GOC failings present significant political problems for the relevant Minister and Government and a vigorous RTI regime reduces the temptation for secrecy about failures.

5.4 Seven Network contends that other bodies in receipt of government funding should fall within the scope of the QLD FOI Act. For example, significant public funding is provided to the private school sector in Queensland, yet parents of students in the private school system cannot access records through RTI laws which are available to parents in the public school system. Organisations in receipt of government funding need to be accountable for that funding, funding disbursements and related decisions, administration and management - not only to the Government but to citizens. Given the extent of public funding into the private sector, issues like teacher and school performance standards must be available to citizens.

5.5 As a general rule, any organisation receiving government funding and established by an Act of Parliament should be accessible under RTI laws.

6. Applying for access or amendment under the Acts

6.1 Queensland is the only jurisdiction in Australia to require a form to make an application. A right of legal access should not be constrained by the need for a specific application form and therefore an application should simply require the citing of the RTI Act, a valid address and retain evidence of identity requirements for

personal information. However, a non-mandatory application form is useful and should be provided and include information about the option of administrative access.

6.2 The current system of charges estimates works reasonably well and must remain so applicants know the cost of proceeding. Nor should charges estimates notices be constrained as some applications may require further narrowing of scope after costs are understood by the applicant. A right of review of amount of charge and basis for calculation is standard in information acts in Australia and should exist in Queensland. It is also important that provision of a schedule of documents be continued as the process assists the applicant in understanding RTI decision maker and ensures agencies are meticulous in documents search and retrieval.

6.3 This review should consider allowing a reduction of charges associated with processing on the basis the release of information is in the public interest.

6.4 The discussion paper also raises the issue of disclosure of the identity of applicants and third parties. There is no useful purpose served by disclosing the identity of applicants as identity is absolutely irrelevant to the key question of whether documents should be released in the public interest. However, it is conceivable that applicants might be deterred from exercising right to legal access because of identity release. For example, a non-government community body might want greater information about a given issue in order to better understand government policy or improve its capacity to further its goals. However, it may perceive that such actions might impact on the extent of government funding.

7. Refusing access to documents

7.1 The discussion paper raises the question of whether exempt information categories are satisfactory and appropriate. While the exemptions appear to generally work well, greater use of a public interest test can improve the operations of the Act as could inclusion of some currently exempt organisations from the Act.

7.2 Legal professional privilege should be subject to a public interest test as taxpayers have paid for the advice received by governments. However, a greater weight against disclosure could be applied so that as a matter of course legal advice would not be released except where ministers and/or departments have or are ignoring advice and have or are causing a significant damage to good government. Senior ministers ignored legal advice in relation to the Queensland Health Department payroll failures contribution to the extraordinary financial costs paid by taxpayers from what was a massive failure in management and policy.

7.3 The Act should include a public interest factor favouring disclosure regarding consumer protection and/or informed consumers. This factor would also have value in terms of third party consultations.

7.4 Members of Parliament and the Parliament itself should also be subject to the Freedom of Information Act given their salaries and expenses are paid for by the Queensland taxpayers. The administration of these funds should be subject to public scrutiny through the FOI Act in the same way as are funds allocated to other government departments. This has been recognized 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. “

7.5 In addition, more than a decade ago, the Australian Law Reform Commission report into the Commonwealth Freedom of Information Act recognized the inclusion of Members of Parliament and the Parliament and said parliamentary departments should be subject to the Freedom of Information 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.

7.6 The discussion paper also raises the issue of whether incoming government briefs should continue to be exempt from the RTI Act. While politicians and public servants support this view, it is at the expense of an informed electorate and a transparent democracy. Voters support politicians on the basis of various promises during an election campaign but may not know whether such promises will work in reality. Release of incoming briefs will allow voters to check promises against the reality of government and encourage politicians to advise on whether policies will work or need adjustment to ensure that taxpayer's funds are not wasted simply because of the political need to fulfill an election campaign promise even if a promise is costly, wasteful and does not achieve its stated goals. It is unacceptable that only after a new government is elected that voters find out that some promises or policies of the previous government never worked or were going to work. Ideally, the release of incoming government briefs would allow a newly elected government to reflect on its platform and, with courage and honesty, advise voters that the reality is some policies may have to be adjusted or even dropped because they are a waste of taxpayer funds and will not achieve there stated goals. Proper expenditure of taxpayers funds easily transcends any argument about dangers to public service professionalism or relationships with ministers from release of incoming government briefs.

8. Fees and charges

8.1 Costs and charges remain one of the major constraints to the effective use of RTI laws in Queensland. The discussion paper suggests a possible proposal to align fees with court documents or, at least, recover more costs given "only a small proportion of the actual costs spent by agencies in administering the legislation".

8.2 There should be recognition of the essential public interest in the media's performance of its watchdog role. Seven Network's view is that the cost of providing information about Government to inform the public should be borne by the Government, particularly as media organisations invest significant funds in training and employing journalists using FOI. Media organisations often receive little benefit from the investigations that produce no result.

8.3 Of equal importance is recognition that RTI represents a legal right of access to information in a democracy. A democratic right cannot and should not be constrained because of cost recovery. RTI plays a crucial role in Queensland in providing information that governments have not released and such information not only informs voters but leads to changes in policy and management once flaws are revealed ultimately stopping or at least abating waste of government funds. Given the value of this process, then the cost of administering RTI is relatively minor.

9. Reviews and appeals

9.1 An effective appeals system remains crucial to the operation of any information access laws. Internal reviews should remain optional as applicants are best placed to decide that an internal review application will simply waste time as the information sought is not likely to be released by the agency that has already refused access.

9.2 Similarly, an applicant must have the option of review on sufficiency of search grounds as agencies can overlook information or subsequently realise that information was within the scope of an application.

9.3 Applicants should have the right to appeal directly to QCAT after an internal review or unsuccessful appeal to the Information Commissioner. This right should not be constrained as QCAT was established, among other reasons, to deal with such appeals and provides a low-cost appeals alternative.

Ends