RECOMMENDATIONS

Right to Information Act 2009 **Schedule 3 - Exemption Provision at section 7 - Information subject to legal professional privilege currently states**: *"Information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege*."

No 1: It is recommended that Section 7 be amended to include the following additional wording: "*except when such information aids in the furtherance of a fraud or crime.*"

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Right to Information Act 2009 **Schedule 3 Exemption Section 2 Cabinet information brought into existence on or after commencement states:**
(1) Information is exempt information for 10 years after its relevant date if —

(a) it has been brought into existence for the consideration of Cabinet; or
(b) its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations; or
(c) it has been brought into existence in the course of the State's budgetary processes.

No 2: It is recommended that Section 2 be amended to include the following additional provision: "(d) *in respect of (a), (b) and (c) such information does not aid in the furtherance of a fraud or crime.*"

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Right to Information Act 2009 **Schedule 3 Exemption Section 3 - Executive Council Information:**

No 3: It is recommended that Section 3 be amended to include the following additional provision: *"(h) in respect of (a) to (g) such information does not aid in the furtherance of a fraud or crime.*"

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Background

1. Next to specific whistleblower related legislation, and associated legislation like the *Crime and Corruption Act 2001, Public Sector Ethics Act 1994*, *Criminal Code 1899* (Qld), *Judicial Review Act 1991* and the *Public Records Act 2002,* Whistleblowers Action Group Queensland ("**QWAG**") takes a very special and keen interest in the *Right to Information Act 2009* just as it did when its progenitor, the *Freedom of Information Act 1992*, was first enacted into law as a vital part of the "Fitzgerald Reform Processes" in the early 90's.

2. In the interconnected acts associated with most whistleblowers when making their public interest disclosures to a proper authority in the first instance, and then having to survive the inevitable backlash of a reprisal from overt and covert quarters within whole of government afterwards, the matters of the preservation of and access to relevant public records are vitally important.

3. Public records themselves and best practice recordkeeping are not just the life blood of all properly functioning democracies, but are equally so for the proper functioning and survival of all whistleblowers. This is because their contents may be anything from quite embarrassing to compellingly incriminating (if not even exculpatory of wrongdoing). Therefore, in a setting where certain parties may have acted dishonestly and unethically in public office, the propensity to rid themselves of these adverse records can become an overwhelming necessity out of self-interest, instead of these probative records remaining in existence out of respect for the public interest and for future usage as evidence.

4. Regrettably, QWAG knows only too well that it is not uncommon in 'post-Fitzgerald Queensland' to learn of harrowing cases from its members' experiences still occurring across whole of government, nearly three decades after the Fitzgerald Commission of Inquiry closed its doors, where:

    a. public records have been deliberately destroyed to prevent their now usage as evidence in pending/impending judicial proceedings;
    b. public records (i.e. in the form of either a book, document or thing) have been wilfully tampered with by those in the system whose duty, *inter alia*, was to protect such public records from harm of any sort;
    c. public records known to exist at a particular time suddenly to disappear without trace;
    d. their content (as in undertakings etc) reveal actual contradictory conduct;
    e. public entities refusing to cooperate with police investigating conduct concerning the destruction of documents by such entities by denying police interviews with their staff;
    f. police failing to refer such actions by public entities (i.e. in Point e) to the CJC/CMC/CCC; and
    g. the notion of "the State of Queensland" protecting the doctrine of the separation of powers and acting as "the model litigant" is more honoured in its breach than in respecting all associated legal/constitutional/administration requirements.

5. Clearly, however, all those aforesaid pieces of legislation outlined in Point 1, in their various ways, have an interdependency, one on another, for the overall good governance purpose of achieving and maintaining openness and accountability in government by the rule of law.

6. It can therefore follow that a breach of one Act may lead or tend to lead to an automatic or suspected breach in another. For example, improper recordkeeping under the *Public Records Act 2002* may lead to offences pursuant to the *Right to Information Act 2009* and the *Criminal Code 1899* (Qld) associated with the protection of evidence (as in being defined as "public records"). Unavoidably, this all concerns or leads to processes concerning 'the administration of justice' per se involving either pending, impending and reasonably foreseeable proceedings/hearings which, by law[1], only need be "a realistic possibility" in the future of occurring in which the public record might be required.

7. Such a proceeding/hearing in this sphere of legal/administrative activity regarding access to public records, may be taken under oath or affirmation before the Right to Information Commissioner for relevant parties under section 104 of the *Right to Information Act 2009*, which relevantly says:

> "***The information commissioner may administer an oath or affirmation to a person required under section 103 to attend before the commissioner and may examine the person on oath or affirmation***."

8. It is not a relevant consideration for the purposes of this review regarding the rarity of such hearings occurring pursuant to section 103, with witnesses compelled to attend and hand over documents, and whether or not the Right to Information Commissioner decides to take evidence under oath or affirmation. QWAG is well aware of this rarity through its own research. Rather, the key point is that **this authority exists at law.** As a matter of law, it **may not be ignored** at the convenience of the moment by parties involved, otherwise serious matters concerning breach of trust and obstruction of justice may easily arise[2].

9. Consequently, a highly relevant consideration in respect of the best practice handling of **public records** held by **any** government entity are vital factors regarding:

    a. their continuing authenticity;
    b. their creation, receipt, disposal and retention; and
    c. their storage and retrieval

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[1] ***R v Ensbey; ex parte A-G (Qld)*** [2004] QCA 335. His Honour Davies JA in ***R v Ensbey*** relevantly said: *"…Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence.* ***There does not have to be something going on in this courtroom for someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence****."* (Bold and underlining added)

[2] Deane J in ***A v Hayden*** (1984) CLR 532 said: *"...**neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorise illegality."***

10. In QWAG's opinion, these factors must be a constant consideration by whole of government entities. This is because **all** public records, in varying degrees under the right to information regimes are, as a *'realistic possibility'*, reasonably and foreseeably open to enjoy a legal protective status. That is, in their various forms of being "...*any book, document or thing*" which "*is or may be required*" in evidence in a future proceedings - let alone one that is already on foot - they must be preserved until no longer required. Public records must be handled in this comprehensive legal framework because individual rights enjoyed by all rely on that treatment, as well as underpinning enforceable demands associated with due process in the administration of justice (e.g. discovery/disclosure Rules of the Supreme Court).

11. A central demand in this process is that the proper preservation of public records by any government and State entity of the day and ordinary public official must always be mindful of the public interest when considering their fate. This is reflected in Retention/Disposal Schedules pursuant to the *Public Records At 2002* as well, and unless complied with, an offence may be committed.[3]

12. QWAG's mission is not just to protect actual and would-be whistleblowers from harm in their actual exercise or putative desire to make public interest disclosures. Its related mission is to ensure that public confidence is maintained (and restored when a breakdown occurs) in our democratic institutions by ensuring those institutions, such as the Crime and Corruption Commission, Office of the Information Commissioner, Office of the Queensland Auditor *et al*, do what the law and the people expect of them.

13. Blowing the whistle on corruption is an inherently dangerous activity at many different levels. It is not a benign activity in anyone's life or career. This is because conduct in public office by high ranking public officials, which may be illegal or unethical, needs to be exposed and stopped, especially given the overarching presence of accountability processes now generally in place in 21st century systems of public sector governance. If and when the disclosure is substantiated, the alleged wrongdoer may face very serious consequences and if, as may happen, the alleged wrongdoer holds a senior position in government or wield considerable power and influence, reprisals against the whistleblower almost always follow.

14. In this context, the content of relevant public records can be at the epicentre of power and justice to either incriminate, justify or protect.

15. Consequently, in the interests of maintaining open and accountable government by the rule of law, it is essential that would-be whistleblowers can see **the signposts in law** which safeguard their course of justice once they decide to lodge their public interest disclosure. This is especially so if and when they know about serious corruption but are too afraid to act because of the known adverse impact blowing the whistle has had on others who have gone before them.

[3] http://www.archives.qld.gov.au/Recordkeeping/GRKDownloads/Documents/GeneralDisposalSchedule.pdf

16. QWAG holds a vast reservoir of experience. It is open to be drawn on in good faith. Taking lessons from documented experience of its members, QWAG believes that the opportunity is now ripe for a so-called better and more complete "signpost" - as in a definition - to be introduced into this Act. This is particularly the case in the wake of the recent relevant finding of the 2012-13 **Queensland Child Protection Commission of Inquiry**[4] into Terms of Reference 3(e) [a.k.a. "***The Heiner Affair/the Lindeberg Public Interest Disclosures***"]. Commissioner Tim Carmody SC found in his 1 July 2013 Report that the Queensland Executive had committed a *prima facie* crime under section 129 of the *Criminal Code 1899* (Qld) - **destroying evidence** - regarding its 5 March 1990 decision to destroy the Heiner Inquiry documents.[5]

17. Accordingly, after such a serious relevant finding by an independent tribunal set up under the *Commissions of Inquiry Act 1950* being found, and now in the knowledge of community at large, QWAG respectfully suggests that our recommendations in this review are more than warranted because they go some considerable way to remedying *'a mischief at law*' as some might wish to present it.

18. In the documented public history of the particular whistleblower's journey to justice, the records amply show his efforts in obtaining access to certain Cabinet and related documents (i.e. Crown Law advice) under freedom of information legislation at particular times being thwarted over a considerable period. *'Mischief at law*' or not, this delay ought never have happened.

19. QWAG submits such a history must never be repeated for everyone's sake, especially should a similar occurrence ever arise again of serious wrongdoing transpiring inside the Cabinet Room, and another person (i.e. the would-be whistleblower) then not being prepared to turn a blind eye.

RELEVANT MATTERS ASSOCIATED WITH THE RECOMMENDATIONS

20. To illustrate why QWAG believes that its recommendations are warranted, we refer to an existing authority on exemption claims involving Cabinet, Executive Council and legal professional privilege still cited on occasions when applying the relevant provisions of the *Right to Information Act 2009*. The case is (Application s190/94) ***Kevin Lindeberg and Department of Families, Youth and Community Care***, Decision No 97008.[6] QWAG invites attention to page 8 Point 25: (Quote)

> ***"****Where an exemption provision in the FOI Act contains a public interest balancing test, evidence that disclosure of matter in issue would expose a crime or fraud would be likely to give rise to one or more public interest considerations favouring disclosure of the matter in issue, notwithstanding that it is claimed by an agency to be exempt*

[4] http://www.childprotectioninquiry.qld.gov.au/

[5] http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/202627/3e-Report-FINAL-for-web.pdf See pp86 and 89

[6] https://www.oic.qld.gov.au/__data/assets/pdf_file/0017/7361/1994_S0190_Lindeberg_30_05_1997.pdf

> *under that exemption provision. However, as I have explained at paragraph 13 above, neither s.36(1) nor s.37(1) incorporates a public interest balancing test. I can see nothing in the terms of those provisions which would justify the implication of a public interest exception.* ***Even if the documents in issue were to contain evidence of a crime or fraud (and I do not suggest that they do), I would still be obliged to find that they satisfy the relevant tests for exemption laid down by Parliament in the terms of s.37 of the FOI Act."***

21. QWAG strongly contests the soundness of this interpretation regarding the comprehensive strength of 'exempt material' associated with Cabinet, Executive Council and legal advice adopted by then Information Commissioner Fred Albietz, and still relied on.

22. The legal framework in which people live and function harmoniously in democracies especially regarding the conduct of their governments is the presence of public trust. The public need to have trust in all the components of 'whole of governments', that they will always act lawfully and never engage in criminality, let alone to engage in systemic cover-ups afterwards, especially inside the Cabinet.

23. Equally, QWAG suggests that it is an affront to common decency and integrity in government to believe that conduct regarding frauds and crime involving government (if and when it exists) can be extracted and declared exempt from what 'the public interest test' means, let alone to believe that public confidence in government would remain undisturbed if it were indeed true at law and widely known.

24. History shows that while laws and codes of conduct may exist, illegality in public office still happens. Worse still, concerted efforts to cover-up such illegality by various ways and means still happen. This is because power tends to always corrupt. This scenario gives rise to the phenomenon of whistleblowing. QWAG submits that this phenomenon's proper purpose is overwhelmingly to return the activities of government to be **within** the law and ethical boundaries so that public trust in public office is maintained and/or restored. It is therefore both reasonable and safe to say that whistleblowers, overwhelmingly, act in the public interest.

25. Because of section 104 of the *Right to Information Act 2009*, the wide definition of "judicial proceedings" under section 119 of Chapter 16 of the *Criminal Code 1899* (Qld) concerning **Offences relating to the administration of justice** clearly captures a proceeding/hearing before the Right to Information Commissioner, because he/she is authorised at law to take evidence on oath or affirmation.

26. Section 119 of the *Criminal Code 1899* (Qld) relevantly says:

> *"In this chapter— judicial proceeding includes* ***any proceeding*** *had or taken in or before any court, tribunal or* ***person, in which evidence may be taken on oath."*** (Bold and underlining added)

27. It is, however, the authorisation itself which matters, not whether it actually occurs at a hearing (**See Point 8**). In other words, the **foreseeability factor** of a potential hearing, and being placed under oath flowing from section 104's authorisation, becomes highly relevant. This factor cannot be reasonably denied or ignored by anyone who enters the process of seeking access to public records under the *Right to Information Act 2009*.

28. QWAG is aware of obligations on parties to be honest in their dealings when giving information to the Information Commissioner, or to a member of the staff of the OIC (e.g. the Right to Information Commission and Information Privacy Commissioner) pursuant to section 177 of the *Right to Information Act 2009.* Notwithstanding this however, QWAG respectfully submits that associated penalties under Chapter 16 of the *Criminal Code 1899* (Qld) pertaining to the access process - which may be defined as being a "judicial proceedings" - would appear to come into play when and/or because of the right of the Information Commissioner to invoke his/her powers to take evidence on oath or affirmation.

29. It must reasonably follow that the existence of this range of powers for parties involved in access applications means that they ought to be always aware of them (let alone knowing anyway, as a matter of legal/general principle, that ignorance of the law is no excuse). This is particularly the case when handling public records of a "*realistically possible*" future proceeding/hearing capable of being executed under section 104 of the *Right to Information Act 2009.*

30. QWAG submits that associated breaches of the law may arise if and when the expected honest conduct of elected/appointed public officials, including Ministers of the Crown, and others (i.e. ordinary applicants) knowingly falls short of what is properly expected. For example, certain conduct may relevantly fall under Chapter 16 of the *Criminal Code 1899* (Qld) in respect of:
    a. section 123 - perjury;
    b. section 121 - official corruption not judicial but relating to offences;
    c. section 126 - fabricating evidence;
    d. section 127 - corruption of witness;
    e. section 128 - deceiving witnesses;
    f. section 129 - damaging evidence with intent;
    g. section 130 - preventing witnesses from attending;
    h. section 132 - conspiring to defeat justice; and
    i. section 140 - attempting to pervert justice.

31. QWAG holds firmly to the opinion that the extensive exemption provisions pertaining to Cabinet, Executive Council and obtained legal advice (i.e. from the Office of Crown Law, Office of the Solicitor-General, Office of the Director of Public Prosecutions or counsel from the Private Bar) and departmental submissions created for a 'Cabinet purpose" in either the (original) *Freedom of Information Act 1992* (as relevantly amended in 1995) or the current *Right to Information Act 2009,* **were never absolute**. It is perfectly plain that they were never intended to apply to acts of commission and/or omission or related acts of aiding and abetting by another (i.e. through legal advice and/or departmental submissions) involving

frauds or crimes concerning decisions by Executive Government, and to thus escape scrutiny by legislated exemption rights from public interest test considerations.

32. Such a proposition, if it were a **total/absolute** exemption, would be patently outrageous. It is profoundly anti-democratic and contrary to fundamental precepts generally associated with the rule of law and specifically pertaining to the lawful functioning of Cabinet and Executive Council[7], especially regarding equality before the law. Were it to be so (i.e. for Parliament to enact a statutory exemption wall around would-be lawbreaking in Cabinet to protect a full investigation into existing evidence pertaining to alleged breaches of the criminal code), QWAG submits that it would also be strongly open to argue that this would be an indicator of complete moral breakdown of a society at large and of a governance system in particular.

33. To repeat, these provisions **were never intended** to be a protective shield to turn the Cabinet Room into the perfect place to deliberate, plan and commit criminality of any sort. The reality is that exemption provisions were ***ONLY*** introduced to permit full, frank, robust and **confidential** debate inside Cabinet by Ministers of the Crown in order that the best decision outcomes might be arrived at after taking into account a full range of lawful options.

34. Accordingly, QWAG respectfully submits that the view taken in ***Kevin Lindeberg and Department of Families, Youth and Community Care***, Decision No 97008 (See Point 15) regarding the scope of the exemptions was and remains profoundly misconceived, but if valid, creates a very serious mischief requiring a remedy. QWAG submits that the necessary remedy may be best and safely expressed by the Attorney-General adopting QWAG's suggested recommendations which will, by their written presence in legislation, add greatly to public confidence in the legality of government activities/decisions, especially inside the Cabinet.

35. Regarding the issue of legal professional privilege, there is no doubt that any claim of legal professional privilege being inviolable to challenge regarding access beyond the purview of solicitor and client is flawed. It occurs when the particular legal advice does or tends to aid and/or abet in the furtherance of a fraud or crime. If and when that important feature is proven, the legal advice at issue becomes accessible beyond the solicitor and client.

36. Ample case law abounds in this regard such as ***R V Cox & Railton*** (1884) 14 QBD 153; ***Grant v Downs*** (1976) 135 CLR 674; ***Waterford v Commonwealth*** (1987) 163 CLR 54; ***Attorney-General (NT) v Kearney*** (1985) 158 CLR 500; ***O'Rourke v Darbishire*** [1920] AC 581; ***Attorney-General (NT)*** *v Maurice* (1986) 161 CLR 475; ***Goldberg v Ng*** (1995) 185 CLR 83; and most recently ***AWB Limited v Honourable Terence Rhoderic Hudson Cole*** *(No 5)* [2006] FCA 1234.

37. Consequently, QWAG respectfully submits that, by amending the wording in accordance with its Recommendation No 1 to read "..."***except when such information aids in the***

[7] ***F.A.I. Insurances Ltd v Winneke*** *(1982) 151 CLR 342 at 4;* and Deane J in ***A v Hayden*** (1984) CLR 532 said: "...***neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorise illegality***".

furtherance of a fraud or crime", the definition shall more properly represent **all** limits associated with the term "legal professional privilege" as the law is currently practised in all jurisdictions across the Commonwealth of Australia in the 21st century.

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ATTACHMENTS

Section 2 Cabinet information brought into existence on or after commencement

(1) Information is exempt information for 10 years after its relevant date if—

(a) it has been brought into existence for the consideration of Cabinet; or

(b) its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations; or

(c) it has been brought into existence in the course of the State's budgetary processes.

(2) Subsection (1) does not apply to—

(a) information brought into existence before the commencement of this section; or

(b) information officially published by decision of Cabinet.

(3) Without limiting subsection (1), the following documents are taken to be documents comprised exclusively of exempt information under subsection (1)—

(a) Cabinet submissions;

(b) Cabinet briefing notes;

(c) Cabinet agendas;

(d) notes of discussions in Cabinet;

(e) Cabinet minutes;

(f) Cabinet decisions;

(g) a draft of a document mentioned in any of paragraphs (a) to (f).

(4) A report of factual or statistical information attached to a document mentioned in subsection (3) is exempt information under subsection (1) only if—

(a) its disclosure would have an effect mentioned in subsection (1)(b); or

(b) it was brought into existence for the consideration of Cabinet or for the State's budgetary processes.

(5) In this section—

Cabinet includes a Cabinet committee or subcommittee. consideration includes—

(a) discussion, deliberation, noting (with or without discussion) or decision; and

(b) consideration for any purpose, including, for example, for information or to make a decision.

draft includes a preliminary or working draft.

relevant date, for information, means—

(a) for information considered by Cabinet—the date the information was most recently considered by Cabinet; or

(b) for other information—the date the information was brought into existence.

Section 3 Executive Council information

(1) Information is exempt information if—

(a) it has been submitted to Executive Council; or

(b) it was brought into existence for submission to Executive Council and is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or

(c) it was brought into existence for briefing, or the use of, the Governor, a Minister or a chief executive in relation to information—

(i) submitted to Executive Council; or

(ii) that is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or

(d) it is, or forms part of, an official record of Executive Council; or

(e) its disclosure would involve the disclosure of any consideration of Executive Council or could otherwise prejudice the confidentiality of Executive Council considerations or operations; or

(f) it is a draft of matter mentioned in any of paragraphs (a) to (e); or

(g) it is a copy of or extract from, or part of a copy of or extract from, information mentioned in any of paragraphs (a) to (f).

(2) Subsection (1) does not apply to information officially published by decision of the Governor in Council.

(3) In this section—

chief executive means a chief executive of a unit of the public sector.

consideration includes—

(a) discussion, deliberation, noting (with or without discussion) or decision;

(b) consideration for any purpose, including, for example, for information or to make a decision.

draft includes a preliminary or working draft.

official record, of Executive Council, includes an official record of information submitted to Executive Council.

submit information to Executive Council includes bring the information to Executive Council, irrespective of the purpose of submitting the information to Executive Council, the nature of the information or the way in which Executive Council deals with the information.

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