



Our ref: 1810057

19 March 2024

The Hon Catherine Holmes AC SC
Reviewer
Independent CCC Publication Review
By email only: CCCReportingReview@justice.qld.gov.au

Dear Ms Holmes

Independent review into Crime and Corruption Commission's reporting on the performance of its corruption functions

The Office of the Information Commissioner (**OIC**) welcomes the opportunity to make a submission to you on this review.

OIC is an independent statutory body that reports to the Queensland Parliament. The Information Commissioner is an officer of parliament charged with functions under the *Right to Information Act 2009* (Qld) (**RTI Act**) and the *Information Privacy Act 2009* (Qld) (**IP Act**) to, respectively, facilitate greater and easier access to government held information and oversee safeguarding of personal information held by public sector agencies.

Our submission provides specific comment arising from our legislative context and general comment about balancing transparency and the right to privacy.

Specific comment on legislative context

Two rights under the *Human Rights Act 2019* (Qld) (**HR Act**) intersect with the RTI and IP Acts:

- the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds;¹ and
- the right not to have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with, and not to have one's reputation unlawfully attacked.²

The RTI Act establishes an enforceable right to access government held information³ and recognises the role of proactive and routine release of government information in enhancing government accountability and transparency. The RTI Act is premised on the basis that '*Parliament recognises that in a free and democratic society*':⁴

- '*there should be open discussion of public affairs*'
- '*information in the government's possession or under the government's control is a public resource*'
- '*the community should be kept informed of government operations, including, in particular, the rules and practice followed by government in its dealings with members of the community*'
- '*openness in government enhances the accountability of government...*' (and) '*increases the participation of members of the community in democratic processes leading to better informed decision-making*'

¹ HR Act, section 21.

² HR Act, section 25.

³ Section 23 of the RTI Act.

⁴ Preamble to the RTI Act, clauses 1(a) to (e), (h) and 2.

- ‘right to information legislation is only 1 of a number of measures that should be adopted by government to increase the flow of information in the government’s possession or under the government’s control to the community’; and
- ‘...(g)overnment information will be released administratively as a matter of course, unless there is a good reason not to, with applications (for information under the RTI Act) being necessary only as a last resort.’

The right to access information under the RTI Act is subject to certain limitations, including grounds to refuse access on the basis of it being exempt information. The RTI Act characterises certain information as *exempt* because the disclosure of it is considered to be contrary to the public interest.⁵ Generally, information ‘*obtained, used, or prepared*’ for an investigation by the CCC⁶ is exempt information.⁷ However, the exemption cannot apply in a narrow range of circumstances – specifically, when the investigation is finalised *and* the information is about the person seeking access.⁸ The latter circumstance necessary to stop the application of the exemption – that the information be about the person seeking access – means that usually there is no possibility for politicians, journalists, and other uninvolved but interested members of the community to access information about an investigation into suspected corrupt conduct by the CCC via the RTI Act.

Despite the RTI Act providing certain grounds on which access to information may be refused, it also provides for an agency (such as the CCC) to give access to information even where there is a ground to refuse to do so.⁹ In our experience, agencies may be reluctant to give access to information where a ground to refuse access is established. Consequently, the scope and operation of this exemption means that, in many cases, the ability for the community to access information about an investigation into suspected corrupt conducted by the CCC¹⁰ is limited and, in turn, accountability and transparency in these processes is similarly limited.

Given this, and noting the overarching public interest in promoting openness and transparency, we would support alternative, credible means for sharing information with the public about CCC investigations.

The OIC recognises that the publication of a report about an investigation into allegations of corruption can result in the release of very sensitive personal information and that decisions to release this type of information should be taken very carefully. It is acknowledged that the CCC must comply with procedural fairness requirements¹¹ prior to publishing a report which proposes to make an adverse comment about a person. The OIC considers that these requirements would be enhanced if the CCC were also required to publish on its website a policy which identifies the relevant considerations it has in determining to issue a public report and whether any particular person is to be named in the report or whether they should be deidentified. Such a requirement could be similar to the obligation in section 35B of the CC Act requiring the publication of how the CCC deals with and investigates allegations of corruption.

⁵ Section 48(2) of the RTI Act sets out that Parliament has decided that disclosure of information of this type would, on balance, be contrary to the public interest.

⁶ Or another agency in the performance of the CCC’s prescribed functions.

⁷ And access may be refused on this basis, under section 47(3)(a) and 49 and schedule 3, section 10(4) of the RTI Act.

⁸ Most commonly, information is ‘about’ the subject of the allegations. Sometimes, depending on the nature of the information, it may also be about other individuals (for example, CCTV footage featuring a particular individual may be about that individual).

⁹ Noting that section 4 of the RTI Act explicitly states that the RTI Act is not intended to prevent or discourage other publication or access to information if this can be done properly or is permitted by law. Section 47(2)(b) of the RTI Act. Section 105(2) of the RTI Act sets out that the Information Commissioner has no such discretion to do so in an external review.

¹⁰ Or another agency performing the CCC’s functions.

¹¹ Section 71A of the *Crime and Corruption Act 2001* (Qld) (CC Act).

General comments on balancing accountability against privacy

This review also provides a good opportunity to consider the significant role played by the CCC as an integrity agency in maintaining public confidence in public administration and decision making. Key to this are the accountability and transparency of the CCC in relation to its activities, specifically as it relates to its investigations of corruption. These are matters that had their genesis in the Fitzgerald Commission of inquiry (which noted the recurring theme of the need to strike a balance between competing considerations of privacy and the free flow of information within a democratic society)¹² and have been repeated in subsequent inquiries and reviews such as the Coaldrake review of culture and accountability in the Queensland public service.¹³

A key theme of the Coaldrake Report is that open decision making, undertaken in such a way that allows for public scrutiny, will foster greater trust in the government. Scrutiny is achieved not only through the public's direct access to information, but also through the discussion of matters of public interest through public reporting including investigative journalism and academic commentary.

In our experience, many applications under the RTI Act arise out of circumstances where the applicant has made (or is otherwise aware of a complaint) and considers that there is a lack of clarity around the decisions made and the reasons for those decisions. There is often a desire to better understand the way that a complaint has been handled by an agency, particularly in the case where a decision was made that a complaint was not substantiated, or not to take any (or limited) action on the matter. A lack of transparency in these cases can lead the public to consider that a genuine complaint of suspected corruption has not been dealt with as such, or even lead the public to have concerns about a matter being intentionally covered up. This in turn leads to a decline in public confidence and trust in government generally.

The CCC is charged with the crucial role of uncovering and investigating corrupt conduct in order to continuously improve the integrity of, and reduce corruption in, the public sector. The CCC has an *'overriding responsibility to promote public confidence:*

- *in the integrity of unit of public administration, and*
- *if corruption does happen within a unit of public administration, in the way it is dealt with.'*¹⁴

Transparency and accountability in respect to CCC investigations advances similar notions of fair, full and publicly accessible reporting of significant matters as the principle of open justice does in respect of judicial proceedings. Openness about the details underpinning the CCC's corruption investigations, including where an investigation has not resulted in criminal or corruption charges, will enable the community to scrutinise the CCC's exercise of powers and ensure the public has faith that the CCC is discharging its important anti-corruption function in overseeing public administration.

We note that the CCC annual report¹⁵ includes general, statistical information about its corruption investigations—including the number of complaints received, the number of people charged with criminal offences, the number of recommendations for disciplinary action and the number of corruption prevention recommendations made. While such reporting advances CCC accountability in general terms, it may not be sufficient to advance the level of transparency and accountability the public is increasingly demanding. We also note that

¹² Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct 1989, page 357.

¹³ Professor Peter Coaldrake AO, *'Let the sunshine in. Review of culture and accountability in the Queensland public sector'*, Final Report, 28 June 2022, (**Coaldrake Report**).

¹⁴ Section 34(d) of the CC Act.

¹⁵ In compliance with the detailed requirements set out in the *Annual report requirements for Queensland Government agencies*.

detailed information about the complaints and reasons for not commencing criminal or corruption charges following an investigation are not explained in the CCC's annual report. These limitations impact the public's ability to scrutinise the CCC's decision making and issues regarding the integrity of the public sector more broadly.

In our view, transparency and accountability is just as relevant in respect to matters where the CCC decides that prosecution proceedings or disciplinary action should be considered as it is to matters where it decides that it should not. In both circumstances, openness enables the public to understand the reasons for, and scrutinise, the decision. This engenders public confidence in both the integrity of units of public administration and the way that corruption is identified and dealt with by the CCC.

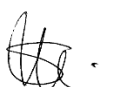
Finally, we would observe that the CCC has certain coercive powers including an abrogation of the privilege against self-incrimination when conducting investigations into suspected corruption.¹⁶ There is an obvious risk that reporting information obtained through these special powers could have disproportionate impacts on an individual's rights, and should be carefully considered and balanced against the public interest in accountability and transparency, when determining what, if any, reporting powers the CCC should have in relation to its corruption investigations.

Conclusion

In conclusion, we do consider it important that greater legislative certainty is provided to advance greater transparency and accountability, but with sufficient safeguards to protect individual rights such as the right to privacy.

If the reviewer has any questions or requires further information in relation to this submission, please do not hesitate to contact us by emailing administration@oic.qld.gov.au or telephoning 3234 7373.

Yours sincerely



Stephanie Winson
Information Commissioner (acting)



Paxton Booth
Privacy Commissioner



Anna Rickard
Right to Information Commissioner (acting)

¹⁶ Sections 88C, 188(3), 192(2)(b) of the CC Act.