Information Commissioner's presentation
Queensland Government Lawyers Conference
5 May 2011

Introduction

Some of you will work as government lawyers in speciality areas including contract law, others of you will occupy generalist positions. Some of you will be compliance specialists or administrative law experts. What most of you have is an understanding of the distinct purpose of the various laws which impose obligations on government agencies and the interrelationship between those laws, including between the *Right to Information Act*, the *Privacy Act*, and the *Public Records Act.*

Last year at this conference I indicated that every government business process was affected by the RTI reforms including the way in which the government procures, forms contracts, redistributes resources, allocates priorities, sets prices, delivers its services, develops policy, makes decisions and engages with the community.

This year I have been asked to address:

- Specific rules for contractors to QG agencies
- Specific rules about privacy complaints, internal review procedures and mediation
- the 'public interest test' for determining whether or not information should be released.

I won't have time to address the fourth topic concerning the access applications involving both personal and non-personal information. There is a guideline on our website addressing this topic and I will make myself available at morning tea if anyone wishes to engage on this topic.

The RTI reforms requires each business process owner to review how transparent (open to scrutiny), accessible (equitable entrée and treatment) and responsive (open to business) their services are. This includes contracting. The right to privacy on the other hand recognises personal autonomy with respect to control over the

information government collects to be effective and human dignity, no better highlighted than by the recent Defence Academy scandal.

From a government perspective poor privacy protection can cause unnecessary harm and distress to individuals and damage public confidence in government. This can make future information gathering and dealings with the public more difficult. Privacy requires each business process owner to review their information handling practices. As government lawyers, you have an interest in what active steps each business process owner is taking to ensure compliance with the laws, as a preventative step.

Specific rules for contractors to Queensland government agencies

Last year I also mentioned that one of the common motivations for government in introducing FOI or RTI reforms is that public scrutiny acts as a barrier against misconduct. This is the reason the government decided, as a part of its integrity reforms, to review the conditions under which contracts must be published. The Queensland Government Procurement Office has recently issued Cabinet approved revised State Procurement Policy and guidelines on Contract Disclosure, to assist agencies comply with the requirements of the integrity reforms and the RTI reforms.

The guidelines apply to budget sector agencies, large statutory bodies, GOCs and Special Purpose Vehicles. Under the policy the affected agencies must publish basic details of all awarded contracts and standing offer arrangements of $10000 and over, and to publish additional contract details of contracts and standing offer arrangements of $10M and over.

The guideline explains, with my annotations, its relationship to the *Right to Information Act 2009* as follows:

> *Queensland Government's Right to Information framework contains a presumption that all documents, including contracts, are open to the public unless there are compelling reasons for non-disclosure. In the interests of openness and accountability, it is desirable*

that business with government agencies be conducted in a way that will allow public scrutiny. (My addition: This means as a matter of practice confidentiality clauses should not be considered for use unless a decision has been made and recorded as to its necessity.)

While the integrity reforms have introduced particular disclosure requirements for certain contracts, this does not change the overriding requirement that business be conducted in as open a manner as possible to permit public scrutiny.

In most cases the decision about what contract information should be published is straightforward. (My addition: I wonder how many of you agree with that statement. In my view procurement processes and contracts should be designed in such a way to permit the publishing of the whole contract wherever possible.) *However, it is inevitable that there will be situations in which affected agencies must apply professional judgement about the administrative release of information.* (My addition: particularly where agencies have not invested in the front end of the procurement process, design features which enable publication in full. Contract specifications can be written to ensure commercial-in-confidence information forms an attachment, and where the decision is made at contract formation time, that the information is not for public release and the basis for that decision. The adoption of these practices means the judgement about administrative release can be made quickly. The adoption would also mean that the objective of the Act, that information be accessed under the RTI legislation as a last resort, can be realised.)

Publication of contract details pursuant to clause 9.2 and Schedule E of the State Procurement Policy is based on the proactive release of information without applications under the RTI Act being necessary. In this sense, affected agencies should refer to the RTI Act to assist in

> *making decisions about publication. This approach allows consistency across government through the application of a consistent disclosure framework. In complex cases, affected agencies may wish to consult the person in their agency responsible for making decisions under the RTI Act or the agency's legal advisors, for advice.*

So the ball is with you.

In relation to deciding access to documents, the RTI Act states that it is the Parliament's intention that if an access application is made to an agency or Minister for a document, the agency or Minister should decide to give access to the document unless giving access would, on balance, be contrary to the public interest. The Act sets out the types of information that would, on balance, be contrary to the public interest (exempt information) and otherwise, factors an agency might take into consideration when deciding whether disclosure would, on balance, be contrary to the public interest. While the exemptions and public interest and public harm factors are set out, the Act also states that it is the Parliament's intention that the RTI Act should be administered with a pro-disclosure bias and an agency or Minister may give access to a document even if this Act provides that access to the document may be refused.

There is one absolute exemption most relevant to contracts and which gives the agency discretion not to disclose. The exemption concerns information which would found an action for a breach of confidence. Three widespread practices prior to the introduction of the RTI Act were the (i) automatic inclusion of confidentiality clauses in contracts either through the use of templates; (ii) cautious lawyers managing all and any risk and (iii) the use of confidentiality clauses to deliberately frustrate the public's access to information under the FOI laws. These approaches are now completely inappropriate.

There has only been one decision made under the RTI Act concerning breach of confidence in the matter of *Flavell and DPC*. The facts did not involve a contract.

Other than the absolute exemptions, the RTI Act recognises various factors that favour disclosure in the public interest and factors that favour non disclosure either because of the public interest or public interest harm. Those most relevant to contracts include

- the public interest harm of substantial adverse effect on financial or property interests of the State or an agency and
- the factors favouring non-disclosure: prejudice to the private, business, professional, commercial or financial affairs of entities; the right to privacy; prejudice to secrets, business affairs, or research of an agency or person; prejudice to the competitive commercial affairs of an agency.

The most relevant public interest factors in favour of disclosure includes oversight of the expenditure of public funds, the promotion of open discussion of public affairs and enhance government accountability.

I don't think any decisions have been made under the RTI Act concerning these factors in a contractual context.

In the absence of guidance from RTI decisions, decisions under the FOI Act can still provide insight into the application of the public interest test in certain circumstances.

For example the matter of *Sexton Trading Co and South Coast Regional Health Authority 1995* provided guidance on pricing information. The matter in issue related to prices quoted by the successful tenderer for a standing offer arrangement for the supply to the respondent of curtains and blinds. That decision accepted that pricing information has a degree of commercial sensitivity for suppliers of goods and services operating in a competitive market. The degree of commercial sensitivity may be greater or lesser according to: the nature and detail of the pricing information, whether it is current or merely historical, the nature and custom of the particular market and a variety of other circumstances which may affect its sensitivity in any particular case. Speaking generally, the total price at which a supplier is prepared to offer particular items would be considered less sensitive than details of the supplier's pricing structure e.g. detailed descriptions of the component elements of a tender price. It will be interesting to see how the expectation

expressed in the State Procurement Policy, of conducting business with government in a transparent way that maximises public scrutiny will change practices and weigh upon the public interest factors such as commercial sensitivity in future decisions.

In *Wanless Wastecorp Pty Ltd and Caboolture Shire Council (2003)* the third party claimed that the overall structure and format of its tender submission gave it a commercial value, such that the tender submission as a whole qualified for exemption under the FOI Act. The Information Commissioner decided there was no particular innovation in the way in which the tender had been formatted to give it a commercial value with the meaning of the exemption. Otherwise in the decision in weighing the public interest factors, the Information Commissioner commented that tenderers are not accountable to the public for the content of their tenders but the agency is accountable to the public regarding decision they make decisions to award contracts for the performance of services to be undertaken for the benefit of the public and which are to be paid for from funds raised by imposts on the public.

In the circumstances it was decided that the disclosure of the unit rates would not shed light on any matters relevant to the steps taken by the Department to ensure compliance with the principle of competitive neutrality and disclosure of the unit rates would not enhance the accountability of the Department in its decision making.

It was also considered by the Information Commissioner that in the assessment of the tenders, variations between unit rates for particulars could not have had significance in the evaluation of the tenders and that the total tendered price was the key determinant in evaluation of the tenders.

In that matter, the Information Commissioner placed some significance on the fact that the third party took no steps to request protection from disclosure of any information contained in its tender submission on the basis that it was commercially sensitive, in circumstances where the agency had drawn tenderers' attention to the operation of the FOI Act and requested that all tenderers endorse any confidential or commercially sensitive information. This seems to me to be good practice which could be built upon by requiring that

such information to be provided in an attachment to facilitate administrative release. There have been other matters where the Information Commissioner has taken a similar approach e.g. *Macrossan and Amiet and Queensland Health and Ors*, a 2002 decision.

Specific rules for contractors under the Information Privacy Act
Queensland government agencies are required to follow the privacy principles in the Information Privacy Act. These include the Information Privacy Principles, the National Privacy Principles, which apply only to Queensland Health, the overseas transfer rules and the contracted service provider rules.

Information Privacy Principle 4 and National Privacy Principle 4 both oblige an agency which gives personal information to a contractor to ensure the contractor protects it, but the obligation to *follow* the privacy principles applies **only** to government agencies - in the first instance.

The 'contracted service provider' rules in Chapter 2, Part 4 of the Act require agencies to 'take reasonable steps' to bind contractors to the privacy principles in certain circumstances; to make them,- for the purposes of protecting the privacy of the personal information they will deal with - a de facto government agency.

The obligation will only arise where:

- the contractor is providing a service on behalf of the agency, whether it is being provided **to** the agency or to another party on the agency's behalf, and

- personal information will move between the contractor and the agency.

The obligation will **never** arise where the contractor is another agency or an employee of the agency.

Although I have used the term 'contractor', the obligations in Chapter 2, Part 4 are quite broad; they apply to a 'service arrangement' which

does not have to be a formal contract. All it requires is that there is an agreement between the parties.

If the criteria are met – agreement, provision of a service, and transfer of personal information – the agency must take reasonable steps to make the contractor subject to the privacy principles as if they were an agency.

Meeting this obligation is important for three reasons:

1) Taking the reasonable steps is a privacy principle and agencies are required to comply with the privacy principles. Failure to do so means the agency is breaching the Information Privacy Act, which can result in compliance action and leave the agency vulnerable to privacy complaints.

2) Failing to take the reasonable steps means that the agency becomes responsible for the actions of the contractor. If the contractor deals with personal information in a way inconsistent with the privacy principles, the agency is responsible for any action of the contractor as if the contractor had been bound to the Act. Put simply, if the contractor breaches, the agency pays. The converse of this is that if the contractor is bound to the Act and they commit a breach – the contractor - rather than the agency - is liable for that breach.

3) There is a gap in the national privacy legislation coverage. The Commonwealth Privacy Act covers businesses which have an annual turnover of $3M or more. Many government contractors fall into this category and so their activities would be normally governed by the *Privacy Act 1988 (Cth)*. The gap appears when the contractor signs a contract with State government. Once that happens, the performance of the contract becomes exempt from the Commonwealth Privacy Act. If the Queensland government agency doesn't bind the contractor to the Queensland Information Privacy Act, and given that they are exempt from the Commonwealth Act for the purposes of the State contract, there are no privacy protections in place. This represents a significant risk for Queensland citizens whose

We have a guideline on our website to assist agencies in applying Chapter 2, Part 4 and determining when it will apply.

Specific rules about privacy complaints, internal review procedures and mediation

A privacy complaint is different to a complaint about an agency's general privacy practices. It can only be made by an individual about their own personal information, and the individual must believe that their personal information has been handled in a way that is not consistent with the privacy principles. A complaint cannot be made about a privacy breach which affects someone else, and the action complained about must have happened after 1 December 2009 (or after 1 July 2010 if a complaint is being made about the actions of a local government).

The Information Privacy Act actually has very little to say about how an agency is to deal with a privacy complaint. All it says is that the complaint must be made to the agency using the agency's complaint handling process; the IP Act leaves it up to each agency to determine *how* they handle privacy complaints.

However, over the past 16 months of dealing with privacy complaints we have noted a number of features associated with the complaint, although the numbers of complaints are too small to generalise across agencies.

1) The focus of privacy complainants is not so much obtaining the 'right finding' of a privacy breach; rather it is about addressing their situation. As such, it is as important for the agency to manage the complainant's emotions, expectations and perceptions as it is with managing the fact-finding process.

   This is typically illustrated by one of the earliest complaints made to the Office. The subject matter concerned an employee who had accessed their work database without authorisation to obtain the complainant's information. The employee had

allegedly then disclosed that information to a third party who used it to harass the complainant.

The agency quite appropriately saw this as a Code of Conduct breach and they instigated an investigation. As these things can do, the investigation took several months. The agency told the complainant that they could not begin to address the privacy complaint until the Code of Conduct investigation was concluded.

The complainant was not interested in the outcome of the investigation. They were interested in the effect the disclosure had on their life. Unfortunately, the message they were getting from the agency was that it didn't care about that. It is perhaps not surprising that this complaint came to us.

2) It is important for the agency to be responsive in responding to the complaint. Time is critical in privacy complaints. Under the IP Act, the agency has 45 business days – nine working weeks – in which to deal with the privacy complaint. This is a minimum period. Even if the agency responds to the privacy complaint immediately, the complainant must wait the 45 business days before they can escalate their complaint to the next level.

   Nine working weeks can pass very slowly for a complainant but it can go by very quickly for an agency, and once it has passed, it is the complainant who exercises the option to escalate the complaint from the agency to my Office. The complainant can also refrain from the escalating the complaint. If the agency needs more time to deal with the complaint, the agency can ask the complainant to give them that time; if they trust the agency's processes, if the agency has been responsive in dealing with their complaint, they may agree.

3) To create that trust and to keep it, the agency must engage with the complainant. Often, agencies are so concerned with making sure they have rigorous, consistent and transparent processes, that they can end up treating the complainant as a witness in their own story. A consistent message which we hear from privacy complaints is the powerlessness the complainant feels

4) The failure to be responsive to privacy complaints is generally as a result of poor practices, rather than deliberate action. Many agencies are simply unused to their administrative actions being challenged and they are not prepared for this event. Again I will illustrate this point with an early complaint involving an agency which when the letter of complaint came in had no employee or even one area in the agency with dedicated responsibility to deal with it. The letter bounced from in-tray to in-tray. The result of this shuffle was that nine weeks later, the complainant had not even had an acknowledgement letter from the agency. Again not surprisingly, the complainant brought their complaint to us.

Once a complaint comes to the Office and has been accepted, our role is to conciliate the complaint, to attempt to find a resolution between the agency and the individual. If this is not possible, then the individual has the option to take the complaint to Queensland Civil and Administrative Tribunal or QCAT. For privacy complaints, the only body with the power to make a final determination as to whether or not there has been a breach of privacy is QCAT. We are an interesting amalgam as QCAT gatekeepers and its de facto mediation arm in this area. And to date, after 18 months of privacy complaints, only one has progressed to QCAT.

There is more specific information about how we deal with privacy complaints on our website.

Thank you for the opportunity to address you today on these particular topics.