

RECORD KEEPERS FORUM 29TH SEPTEMBER 2009

FOI History in Queensland

The then Deputy Premier Bill Gunn ordered a judicial inquiry headed by Tony Fitzgerald QC when the Premier of 18 years, Joh Bjelke-Petersen was out of the state pursuing his Joh for Canberra campaign. The inquiry was ordered in response to a series of articles on high level police corruption in *The Courier Mail* by reporter Phil Dickie and the *Four Corners* report by Chris Masters called "The Moonlight State".

During the Inquiry a Licensing Branch sergeant Harry Burgess implicated Jack Herbert and Assistant Commissioner Graeme Parker. Parker confessed and implicated police commissioner Sir Terry Lewis. Herbert was the bagman collecting bribes for Lewis who had been the bagman for former commissioner Frank Bischof. The inquiry led to the jailing of the police commissioner and government Ministers. Don "Shady" Lane and Brian Austin went to jail for misuse of allowances and expenses. The Minister for Everything Russ Hinze died before he was tried for accepting a bribe. Bjelke-Petersen was tried but acquitted due to a hung jury.

The identifying of corrupt individuals was an important outcome however Fitzgerald's lasting legacy was the blue print laid out in the Inquiry's report handed to the Government in 1989 to rebuild public confidence in our democratic institutions, particularly the police, the Parliament and the bureaucracy. The blue print for reform recommended the establishment of the Criminal Justice Commission. In doing so the report said that it is important to recognise that much more than just a crime commission was needed. The report said:

A Government can deliberately obscure the processes of public administration and hide or disguise its motives. If not discovered there are no constraints on the exercise of political power. The rejection of constraints is likely to add to power of the Government and its leader, and perhaps lead to an increased tendency to misuse power.

In this context it is easy to see the fundamental importance of proper record keeping by public servants so that the activities and decisions of government can be scrutinised by the public.

The Inquiry Report also recommended that the Electoral and Administrative Review Committee consider and make recommendations for electoral and administrative reform including the preparation and enactment of legislation on whistleblowing, freedom of information, administrative appeals, and judicial review of administrative decisions.

Senator Andrew Murray said

The ultimate check on public administration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.

Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.

Again the importance of proper record-keeping can be seen as a fundamental pre-requisite for a properly informed public which can hold the elected government to account. Importantly Fitzgerald saw that effective FOI laws were one of the accountability mechanisms necessary for a robust democracy. In 1990 the Electoral and Administrative Review Committee recommended the introduction of FOI laws and in 1992, Queensland had its own FOI laws. Since that time the Queensland Information Commissioner has been apart of Queensland's integrity and accountability framework and the Office works alongside the Integrity Commissioner, the Audit Office, the Ombudsman, the Electoral Commission and the Public Service Commissioner to maintain public confidence in Queensland's government institutions. Preventing a return to the past depends on each of us individually having constant vigilance. There is a role for each of us in the service of the public.

Recent History

In September 2007 within days of Premier Bligh becoming the Premier, Cabinet had approved the terms of reference for a broad

ranging review of FOI. An independent panel chaired by Dr David Solomon AM had been appointed. The independent panel delivered its final report in June 2008. The government responded in August 2008 by supporting most of the 141 recommendations.

Terms of reference

The independent panel was asked to assess whether the FOI laws were working effectively and what improvements could be made in the context of the Premier announcing to Parliament that the FOI legislation is one of the most important accountability mechanisms for a healthy democracy and that

“By establishing this independent review panel to comprehensively review our freedom of information laws, my government is demonstrating its ongoing commitment to open and accountable government.”

General findings

In answer to the question “has FOI in Queensland brought about a “major philosophical and cultural shift in the institutions of Government and the democratisation of information in the last 15 years?” The review said ‘no’. The review essentially found that FOI had become an administrative task for agencies and that this had weakened its capacity to be employed strategically and to bring about organisational change. Specifically the review found in relation to the legislation that serial amendments to the law had been contrary to the objective of the Act. As an example Dr Solomon thought the Cabinet exemption in the form it was in undermined the objectives of the Act. In relation to the administration of the law the Review found that the atmosphere did not encourage the fearless application of the law.

The review commented that the necessary pre-conditions to sustain freedom of information law and practice in the spirit of the original draft of the Act were

- a favourable policy momentum
- congruent political will (use e.g.)
- a supportive architecture including a **strategic information policy together with a governance framework** that has clearly articulated roles for all relevant agencies including the Public Service Commission, the Information Commissioner, Qld State Archives and the QG Chief Information Office. The architecture includes a **new Act** which has as a basis the

notion that information is to be pushed into the public space rather than pulled out of the government space.

The new Right to Information reforms have four basic tenets. Firstly all internal documents are considered open as a starting point. Secondly, there is to be maximum disclosure of information with information being pushed out into the public space, rather than pulled out by individuals. To support this the Act requires agencies to have publication schemes, and disclosure logs. Agencies also need administrative release which may one day be supported by ex-ante decision making and the push model. Secondly all personal information will be accessed under the new Information Privacy Act. Thirdly, RTI is to be considered a last resort. And fourthly, once RTI is engaged, there are two questions to be answered:

Does the request fall within the scope of a limited number of exemptions exemption? If it does, it is exempt. If it doesn't, access is to be provided unless disclosure on balance would be contrary to the public interest.

A new role for the Information Commissioner

Previously the Office of the Information Commissioner performed the single function of independently reviewing the FOI decisions made by government agencies and Ministers in a similar way to that of a Tribunal. Under the RTI and Information Privacy Acts, the Office will continue this role and have significantly enhanced functions. The Office will have a lead role in the improvement of public sector privacy and RTI administration in Queensland by

- Promoting understanding of and compliance with the privacy and RTI principles
- Providing best practice leadership and advice including advice on the interpretation of the legislation,
- Training and education
- Issuing guidelines
- Providing an enquiries service
- Conducting compliance audits and reviews and if appropriate report to Parliament
- comment on any issues relating to the administration of privacy in the public sector environment or legislative or

administrative changes that would improve the administration of the legislation

- Conciliating privacy complaints and approving waivers of the privacy principles.

Under the RTI legislation the Information Commissioner is to provide report cards to Parliament on the performance by agencies of their obligations under the RTI legislation.

What does this all mean for agencies?

The Premier aims to have the most open and accountable government in Australia. Open government will strengthen the democracy in which we all live, and assuming the community prefers to be government within representative democracy, open government will enable better public scrutiny. The RTI reforms are central to achieving this as they are intended to provide better and easier access to information for the community which in terms provides them with the capability to better scrutinise government.

The OECD has established that

From the public's point of view, an open government is one where businesses, NGOs and citizens can "know things" ie obtain relevant and understandable information; "get things" ie obtain services from and undertake transactions with the government; and "create things" ie take part in government decision making processes.¹

Reflecting on these things it becomes apparent that open government has the three dimensions identified by the OECD:

transparency, in other words being exposed to public scrutiny; accessibility to anyone, anytime, anywhere; and responsiveness to new ideas and demands. These dimensions sound familiar and simple but they present a major challenge to our systems and structures.²

To support agencies efforts in promoting open and accountable government there are incentives in the Right to Information Act for officers to act in the spirit of the law and to prevent decision makers from being overborne, including penalties for officers to give an oral or written direction to a person required to make a

¹ OECD Policy Brief. 2005. "Public Sector Modernisation: Open Government", p1

² Ibid., p2

decision under the RTI Act to make a decision the person believes is not the decision required to be made under the Act. It is also an offence to give a direction to an officer involved in an RTI application to act contrary to the requirements of the RTI Act

One of the aims of the Right to Information reforms is to reduce the need for RTI through proactive release. It is likely that your agency is actively developing an RTI plan led by an SES Information Champion to ensure it is compliant with the proposed new Act. The kinds of activities your agencies will currently be engaged in are:

1) By 1 July 2009 having developed a publications scheme which not only publishes the information required by the Statement of Affairs but that publishes other key information. An agency publications scheme will require a system of identifying suitable data as it comes available for release through the publications scheme, a way of storing it in the publications scheme so that it is accessible.

2) Developing a disclosure log which has the capacity for publishing the outcomes of RTI requests or other administrative requests for information that might be of broad interest to others.

3) Developing a system of administrative release which may be supported by procedures and guidelines to staff about which staff can authorise the release of what information when. The system of administrative release may be supported by ex-ante decision making where the creators of documents are required to identify whether or not the information can be made public on request. The design of the administrative release scheme is to ensure that RTI is used as a last resort.

4) Developing an information strategy that

(i) identifies the current demand for information and develops proactive release strategies based on customer need

(ii) identifies the information assets under the control of the agency (or other agencies) and how they can be strategically used to manage demand on agency services and galvanise communities to develop their own solutions to problems faced by the agency

(iii) identifies the information the community needs now to meet future challenges such as climate change

(iv) aligns information management and technology to support RTI and open government

5) Promoting better record keeping in agencies through training and leadership at all levels

6) Identifying efficiencies in record keeping practices that support timely access and distribution of information.

7) Ensuring FOI processes and systems are capable of meeting the new requirements and time frames and can capture the data necessary on RTI applications to be compliant with the new Act.

Because these activities will involve a number of different sections within an agency, the reform efforts should be led by a senior member of the agency's executive team.

Above everything else, the success of the changes proposed depend upon good record keeping practice. State Archives is one of the Office's key partners in promoting good record keeping practices in agencies. Good record keeping is a fundamental prerequisite to open, transparent and accountable government.