

11 November 2011

Research Director
Legal Affairs, Police, Corrective Services
And Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000

Email address to: lapcsesc@parliament.qld.gov.au

Dear Sir/Madam

Submission – Right to Information (Government-related Entities) Amendment Bill 2011

Thank you for your request for submissions in relation to the above Bill, currently tabled before Parliament. This Bill seeks to amend the Right to Information Act 2009 (RTI Act) by enlarging the scope of the legislation to cover corporations supported directly or indirectly by government funds or other assistance (the Amendment).

We submit that:

1. The Right to Information Act 2009 adequately deals with the ability to apply RTI to entities as the government sees fit without further amendment;
2. The form of words used in the Bill is so broad that it will expand the class of entities included within the scope of RTI legislation to an uncertain level;
3. The entire formulation of the RTI Act is framed around the legislation's application to government entities. If it was proposed to include non-GOC corporate entities, consideration would be needed to revisit the whole Act to ensure that it provides a suitable balance between confidential information and right to information as well as the ability for the corporatised entity to unambiguously determine what information is subject to the Act and what is pure corporate information that might not be subject to the Act; and
4. Advantage to counter-parties dealing with the State agencies in particular commercial deals. The current formulation of section 8 of Schedule 3 of the RTI Act regarding confidential information does not preclude counter-party from obtaining commercial information under RTI unless the very narrow test of that disclosure would found an action for breach of confidence. This gives an advantage to commercial counter parties in any type of commercial negotiations.

Submission 1: The Right to Information Act 2009 adequately deals with the ability to apply RTI to entities.

The Bill seeks to amend the Right to Information Act 2009 (RTI Act) by enlarging the scope of the legislation to cover corporations supported directly or indirectly by government funds or other assistance. This proposed amendment adopts the words of section 16(1)(c) of the RTI Act:

16 Meaning of public authority

1. In this Act, public authority means any of the following entities – Note: Under the Acts Interpretation Act 1954, section 36 – entity includes a person and an unincorporated body.
 - (a) an entity—
 - i. established for a public purpose by an Act; or
 - ii. established by government under an Act for a public purpose, whether or not the public purpose is stated in the Act;
 - (b) an entity created by the Governor in Council or a Minister;
 - (c) another entity declared by regulation to be a public authority for this Act, being an entity—
 - i. supported directly or indirectly by government funds or other assistance or over which government is in a position to exercise control; or
 - ii. established under an Act; or
 - iii. given public functions under an Act;

What the Amendment seeks to do is make mandatory what government can already do by regulation under the existing legislation. This would, inherently, reduce the government's flexibility in managing its affairs under the Act.

Submission 2: The form of words used in the Bill is so broad that it may be uncertain.

At the present time, the RTI Act defines the entities that are subject to its provisions narrowly. This ensures that both the entities so affected and the government understand what class of entities is subject to RTI. Where appropriate, the government can regulate to include additional entities that it wishes to subject to RTI.

The breadth of the definition of "control" proposed by the Amendment may lead to uncertainty in its application. Would the control test include situations where the State was a principal client of an entity, such that the entity would be unviable if the State moved its business elsewhere? Would this potentially capture pure commercial entities where the government may have indirect controls? How will this affect charities where the government might provide government funds or other assistance and exert control through the funding mechanism?

For the reasons stated above, the Amendment brings uncertainty and a lack of clarity to the existing legislation.

Submission 3: The entire formulation of the RTI Act is framed around application to government entities not corporate ones.

The Amendment as drafted is designed to capture corporate entities that may or may not be owned by the State. While this Amendment simply reflects something that the State could already regulate, it is the experience of CNI that the RTI Act is largely reflective of a focus on government agencies rather than corporate ones. If the amendment widens the scope to include a larger range of corporations than was previously contemplated, then consideration should be given to revisiting the whole Act to ensure that it provides a suitable balance between:

1. Confidential information and right to information; and
2. The ability to unambiguously determine what information is subject to the Act and what is pure corporate information that might not be subject to the Act.

At the present time, once an entity is subject to the RTI Act, any information not exempt under the provisions of the Act may be requested by any member of the public and, subject to appeal rights, must be revealed. For a corporation this might include matters of corporate governance, documents that normally would be treated as internally confidential, intellectual property of the corporation (especially in terms of documents and the like) and similar matters. While the schedules to the RTI Act presently include significant exemptions for government agencies, it is not apparent that similar exemptions apply for corporations.

Examples include the exemption for cabinet matters, briefing Ministers, Sovereign communications, national or state security information and most of the part 3 schedule 4 to the RTI Act. Indeed, the only exemptions that might seem to easily apply to a corporatised entity are clauses 6, 7 and 8 in Schedule 3 of the RTI Act. This would lead to the presumption that everything that does not fall into these categories would be subject to RTI unless it was not in the public interest using those tests established in Part 4 of Schedule 4 of the RTI Act. The public interest tests are largely focused on government related issues and not corporate ones.

For a corporation, it is normal that the deliberations of its board are kept confidential. Board members are typically required to meet onerous confidentiality requirements. There is no provision in the RTI Act that provides such material is exempt unless it can be shown that an action could be founded for breach of confidentiality by its disclosure. Unfortunately, this exemption is narrow - merely disclosing something due to a statutory requirement does not itself found an action for breach of confidentiality. Typically, the corporation would need to show that it owned a duty of confidentiality to a third party before this protection could be enlivened.

The current formulation of section 8 of Schedule 3 of the RTI Act regarding confidential information is a very narrow test requiring that the particular disclosure would found an action for breach of confidence. In our dealings with the Office of the Information Commissioner, it appears that the test applied is that if a document is created by or held in any public authority, it is not confidential under the terms of the RTI Act even if marked confidential or commercial in confidence unless the State could be sued by a third party to preserve confidentiality.

Submission 4: Advantage to counter-parties

During CNI's management of the \$5.4 Billion Airport Link, Northern Busway and Airport Roundabout Upgrade projects we have identified a practice by purely commercial entities in their use of RTI to seek to gain commercial advantage over the State.


When disagreements arise between the parties to a commercial dealing, the normal practice is that each side is entitled to keep confidential its material, subject only to the rules of discovery which come into play only when court proceedings have been commenced. Under the RTI Act, it is allowable for counter-parties to seek access to commercially sensitive and/or disputational material under the RTI Act without commencing proceedings. Unfortunately, the reverse is not true – the counter-party is under no obligation to supply information to the State. Should the legislation be widened to capture entities like CNI, the State could be disadvantaged in managing contract disputes, negotiations and the like.

Quite simply, maintaining a degree of commercial confidentiality is important in major projects as significant sums of public money is involved and the public expect the best commercial outcomes.

We note that the first reading speech cited a number of pieces of 'information' that CNI allegedly failed to provide an organisation of community members known as the KWRA as a basis for this change. While CNI is not subject to the RTI Act, it has a strong focus on community engagement and answering questions regarding the project from the community. Indeed, since the inception of KWRA, CNI has answered hundreds of questions put to it by the KWRA and provided significant volumes of supporting documentation. This is in addition to the thousands of pages of contract and associated material on CNI's website to which CNI provides open access to the community. However, CNI must manage the access to this material and apply commercial rules of confidentiality to sensitive documents. We believe that each of the KWRA's questions have been answered appropriately and thoroughly.

If you have any questions regarding the above, please call Adrian Breau on 3237 7400.

Yours sincerely



David Lynch
Chief Executive Officer

CITY NORTH INFRASTRUCTURE PTY LTD

Delivering Airport Link, the Northern Busway (Windsor to Kedron) and the Airport Roundabout Upgrade