Gail Easton

From: David Solomon
Sent: Friday, 11 November 2011 9:27 AM
To: Legal Affairs Police Corrective Services and Emerg Svc Committee
Subject: Submission

Hon Dean Wells MP
Chair
Legal affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
Brisbane.

Dear Mr Wells

Re: Right to Information (Government-related Entities) amendment Bill 2011

Thank you for your invitation to make a submission to the Committee concerning the above-mentioned Bill.

As Mr Jarrod Bleijie MP indicated when he introduced the Bill, it seeks to adopt recommendations made in June 1008 by the Panel that I chaired that reviewed the former Freedom of Information Act.

The reasons for our recommendations are contained in Chapter 7 of our report, from page 78 to page 89. I believe our reasoning is still valid and our recommendations appropriate and I commend them to the Committee.

Yours sincerely,

Dr David Solomon AM

7 Ambit of the Act

7.1 Government Business Enterprises

Government Business Enterprise (GBE) is a term used, particularly by the Commonwealth Government, to describe a variety of government-owned business entities. It is used here to include what in Queensland are described as Government Owned Corporations (GOCs) and some statutory authorities and incorporated entities created by government as business enterprises. GBEs are treated in four different ways under the existing Queensland freedom of information legislation. Some are treated simply as agencies and are covered by the Act in the same way as other agencies. Some are excluded from coverage by the Act, in relation to various (identified) activities, under s. 11(1) of the Act – for example, the Queensland Treasury Corporation is excluded "in relation to its borrowing, liability and asset management related functions" (s. 11(1)(m)). Some, under s. 11A, have some of their documents excluded from coverage by the Act. These are documents received or brought into existence while carrying out "commercial activities" or any community service obligation prescribed by regulation. The five entities covered by this exclusion are listed in Schedule 2 to the Act and include, for example, Queensland Rail and the Queensland Investment Corporation. Another group of GBEs is totally excluded from FOI because they are company GOCs or other incorporated entities that owe their existence to the Commonwealth Corporations Law. As a consequence of this, each is not a body that is a public authority for the purposes of the FOI Act.[160]

A submission by John Doyle, an FOI consultant with *The Courier-Mail*, reveals that the Information Commissioner agrees that company GOCs are not covered by FOI. *The Courier-Mail* had sought access to documents of Queensland Racing Limited. After this was refused it sought external review, and the Information Commissioner, in a letter expressing a "preliminary view" said Queensland Racing Limited did not fall within the definition of public authority because it was established under the Corporations Act, which was a Federal rather than a Queensland Act.[161]

Some of the GBEs that are listed in sections 11 and 11A (and therefore partly excluded from its operations) are also incorporated under the *Corporations Act* and hence not covered by the Act at all, but the Act has not been amended to remove them.

The Government's policy is to have all GOCs become company GOCs.[162] When this happens they would all fall completely outside the scope of FOI. However the Government's response to the Panel's discussion paper suggests that the total exclusion of company GOCs from FOI may be an unintended consequence of its corporatisation program. The Government response said —

> While the FOI Act defines "public authority" broadly, the issue raised by the Panel at p. 64 of the Discussion Paper relating to the application of the Act to public authorities which have been created under the *Corporations Act 2001* –

[160] The FOI Independent Review Panel discussion paper analysed this development at p. 64.
[161] John Doyle submission to the FOI Independent Review Panel discussion paper, pp. 5-6.
[162] Bligh, A.M., Government Owned Corporations Amendment Bill, Second Reading speech, Parliamentary Debates, 31 October 2006, p. 295.

> and not under a Queensland enactment – is noted. The Government's intention is that generally, bodies established on Government initiative and for a public purpose should fall within the ambit of the FOI Act, unless expressly excluded by the Act.[163]

If that is so, there may be at least two relatively simple ways of correcting the problem and bringing company GOCs back within the reach of FOI. This could be achieved by extending the definition of "public authority" in s. 9 of the present Act to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another state or territory. Alternatively, as bodies "supported directly or indirectly by government funds or other assistance or over which government is in a position to exercise control" (section 9(1)(c)(i)(A)) the Government could declare them by regulation to be public authorities for the purposes of the Act.

It is desirable to consider what kind of access should be allowed to the documents of GOCs if they are to be open to FOI: whether one of the two kinds already available under s. 11 or 11A, as mentioned above, or some other form of access. The method of exclusion chosen in ss. 11 and 11A has considerable implications for the material that is protected from disclosure under FOI.

The Government submission in response to the Panel's discussion paper makes the claim —

> GOCs are generally subject to the FOI Act. In general terms, it is the documents held by those entities which were received or brought into existence by the GOC in carrying out its commercial activities or prescribed community service obligations that are excluded from the operation of the FOI Act. The precise scope of commercial activities will vary from case to case ...[164]

This assertion does not explain why there are two different provisions covering GBEs. Some GBEs, listed in s. 11(1) of the Act, are excluded from the Act in relation to various identified functions. The GBEs and the nature of their exclusions identified in the section are –

> (m) Queensland Treasury Corporation in relation to its borrowing, liability and asset management related functions; or
> (n) Queensland Treasury Holdings Pty Ltd ACN 011 027 295, its wholly owned subsidiaries, and the entities controlled by the subsidiaries, in relation to their competitive commercial activities; or ...
> (r) Queensland Events Corporation Pty Ltd ACN 010 814 310, its wholly owned subsidiaries, and the entities controlled by the subsidiaries, in relation to their competitive commercial activities; or

[163] Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 11.
[164] Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 12.

(s) Gold Coast Events Co Pty Ltd ACN 010 949 649, its wholly owned subsidiaries, and the entities controlled by the subsidiaries, in relation to their competitive commercial activities; or
(t) Gold Coast Motor Events Co in relation to its competitive commercial activities ...[165]

On the other hand, s. 11A is an exclusion but operates as an extremely complex class exemption that does not, on its face, explain its effect. The section says –

11A Application of Act to GOCs

This Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.

Schedule 2 lists five GOCs or groups of GOCs, the first of which says–

GOC	Application provision
Queensland Rail, or a port authority (within the meaning of the *Transport Infrastructure Act 1994)*, that is a GOC.	*Transport Infrastructure Act 1994,* section 486[166]

The *Transport Infrastructure Act 1994*, s. 486 is in these terms –

486 Application of Freedom of Information Act and Judicial Review Act

(1) The *Freedom of Information Act 1992* does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities.
(2) The *Judicial Review Act 1991* does not apply to a decision of a transport GOC made in carrying out its excluded activities.
(3) A regulation may declare the activities of a transport GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis.
(4) In this section –

commercial activities means activities conducted on a commercial basis.

community service obligations has the same meaning as in the *Government Owned Corporations Act 1993*.

excluded activities means –

(a) commercial activities; or

(b) community service obligations prescribed under a regulation.

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[165] *Freedom of Information Act 1992*, s.11(1); The bodies identified in (n), (r) and (s) are clearly company GOCs, and now fall outside the Act.
[166] *Freedom of Information Act 1992*, Schedule 2.

> ***transport GOC*** means a GOC whose functions relate mainly to transport.[167]

Effectively, it is for the government to decide whether any particular activity of a transport GOC is a commercial activity or involves a community service obligation and that as a consequence any documents in relation to those matters is excluded from FOI. It must be noted, however, that it is no contribution to freedom of information, or understanding, for an exclusion to require anyone to sift through so many twists and legislative turns to discover whether or not a document might be exempt – and of course the material quoted above is not the end of it: there remain such regulations as may or may not have declared or prescribed activities to be beyond the bounds of FOI.

It is of even more significance that these documents are excluded/exempted whether they are in the hands of the GOC or any other agency. This is an important difference between the documents of GOCs covered by s. 11 and those covered by s. 11A. As LCARC expressed it in its report —

> Currently, ss 11A and 11B operate as a *documents based* exclusion. As such, the prescribed GOCs and LGOCs receive more favourable treatment than their private sector competitors. This is because FOI immunity "travels" with these entities' documents wherever they go. In contrast, documents created by, or concerning, any private corporations or citizen which are in the possession or control of an agency are subject to the Act and are capable of being accessed under the Act subject to the applications of the exemptions provisions.
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> The current document-based exclusion (which appears to be unique in Australia) is inappropriate given that it affords GOCs more favourable treatment than their private sector competitors – and indeed government-owned commercial entities mentioned in s 11(1) and the FOI Regulations.
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> ...
>
> The committee believes that a more appropriate manner of dealing with GOCs and LGOCs would be to repeal s. 11A, s. 11B and schedule 2 and to separately list the relevant bodies in s. 11(1) in respect of documents regarding their "competitive commercial activities", a term already defined in s. 7. (The phrase "its commercial activities" is inappropriate as, to the extent that the GOC has no competitor, there is no justification for separate treatment.)[168]

LCARC also recommended that the exclusion covering the documents of GOCs and LGOCs concerning community service obligations (CSOs) be removed. It pointed out that in a general sense CSOs fulfil government social or community objectives; are unprofitable and so are government-funded; and would not be performed by the private sector. It said the Government's ability to prescribe by regulation CSOs regarding which information is not to be disclosed appears to go further than exclusion provisions concerning GOC information in other Australian jurisdictions.[169]

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[167] *Transport Infrastructure Act 1994*, s.486.
[168] LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 249.
[169] LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 250.

The Panel's discussion paper listed the following brief arguments from the ALRC/ARC report for and against extending the FOI Act to cover GBEs –

In favour of FOI coverage:

- private sector accountability mechanisms and market forces do not displace the need for public accountability of GBEs due to:
    - GBEs expenditure of considerable public money, which suggests that they should therefore be publicly accountable for the use of that money;
    - GBEs are accountable to Ministers financially and strategically and the public has a democratic interest in their workings;
    - traditional private sector corporate reporting, accounting and audit requirements do not provide public accountability and potential for a just result to be achieved in individual circumstances, unlike FOI and other administrative law mechanisms which do have the potential to provide such results and benefits; and
    - the competitive environment does not facilitate a fair and just provision of goods and services. Although private remedies exist, their cost makes them prohibitive for most people, whereas administrative law remedies are by and large cheaper and therefore more accessible, and likely to lead to better accountability and decision-making ...
- GBEs should be subject to FOI to promote transparency of their operations. Such transparency is particularly important given GBEs privileged position in relation to access to capital, cost of capital, and taxation, and other regulatory privileges as compared to the private sector.
- GBEs that carry out regulatory functions should be subject to the same controls as other regulatory government bodies. As such, the FOI Act should apply to a GBE's public functions or service delivery, especially where those functions are carried out in a "less competitive or monopoly market''.

Arguments against extending the FOI Act to GBEs:

- the objectives of the FOI Act are irrelevant to GBEs because GBEs operate in a commercially competitive environment;
- there is sufficient accountability provided through private sector regulatory mechanisms. For example, in a genuinely competitive market, market mechanisms ensure a high quality of administration thus removing the need for the accountability provided by the FOI Act; and
- there is a need to protect the commercial interests of the GBE from additional administrative and financial burdens and to put them on a level playing field with their private sector competitors. A level playing field

> can best be achieved by removing regulatory intrusions into the affairs of GBEs, which do not apply to the private sector.[170]

The discussion paper then said —

> The ALRC/ARC Report noted that whether a completely level playing field was achievable (in relation to the private sector and GBEs) was debateable. At the end of the day GBEs were not private sector bodies though they might resemble them in many respects. It agreed that GBEs were subject to a wide range of accountability mechanisms, but said the FOI Act enhanced democratic accountability by allowing public examination of government policy and decision-making and increasing participation in that decision-making. However it considered there were questions about the degree and type of accountability that should be required and the best way to achieve it, and whether GBEs had multiple functions. Generally it considered GBEs should be subject to the FOI Act. However the greater the extent to which a GBE's commercial activities were carried out in a competitive market, the less the justification for applying the FOI Act. Those that were engaged predominantly in commercial activities in a competitive market should not be subject to the Act.[171]

The Panel's discussion paper also doubted the "level playing fields" argument. It said —

> Nor is it necessarily correct to assume that corporatising GOCs creates a level (commercial) playing field. While a GOC may fall under the regulatory umbrellas erected by the Australian Competition and Consumer Commission and/or the Australian Securities and Investment Commission, they will not have to satisfy the requirements of the Australian Stock Exchange (in relation to continuous disclosure, in particular) as will most of their commercial competitors. And owing to their ability to tap government funding, they will not be subject to the discipline that commercial lenders might impose on non-GOC corporations. Additionally, documents provided by GOCs to the State are protected against disclosure under FOI, where in many cases the documents that their commercial competitors provide may not be.
>
> The fact that GOCs have to satisfy strict legislative requirements about the way they conduct their businesses and report regularly to Ministers provides a limited degree of accountability. But in the absence of FOI and other administrative law remedies, GOCs are largely protected in their dealings with citizens/customers. Although GOCs are being insulated from this accountability, the shareholding Ministers and the Government remain politically accountable for their activities, even though they may have a blinkered view of what the GOCs are doing.[172]

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[170] Gregorczuk, H., "Freedom of Information: Government Owned Corporations, Contractors and Cabinet Exemptions", Research Bulletin No 5/99, Queensland Parliamentary Library, Brisbane, May 1999, pp. 16 – 17 (hereinafter referred to as Gregorczuk).
[171] FOI Independent Review Panel discussion paper, pp. 65-66 (footnote omitted).
[172] FOI Independent Review Panel discussion paper, pp. 66-67.

The Panel's discussion paper asked three questions directly concerning GOCs. They were —

> *Should Government Owned Corporations (however constituted) be exempt from provisions of the Act covering agencies and, if so, to what extent?*
>
> *If world's best practice in FOI law is that FOI should extend to "any body that is exercising government functions" should any attempt be made to define what are "government functions" at a time when the responsibility for many such functions is being devolved to the private sector or GOCs?*
>
> *Should people be able to access their personal information held by organisations like GOCs that are ultimately controlled by government and, if so, to what extent?* [173]

Respondents included Australia's Right to Know (RTK). It submitted —

> Public agencies owned by the taxpayer carrying out public functions must be open to the QLD FOI Act, given the considerable expenditure of public money, their accountability to Ministers and ultimately, the public. Importantly, GOCs are normally involved in public functions or service delivery often in a less competitive or monopoly market and therefore need to be accountable on performance and administration. Any GOC failings present significant political problems for the relevant Minister and Government and a vigorous FOI regime reduces the temptation for secrecy.[174]

The Leader of the Opposition, Lawrence Springborg, said —

> Government owned corporations are just that: they are owned by the Government and, therefore, it is Queenslanders who are the shareholders through the shareholding Ministers. Therefore, FOI laws should have as their core an expectation that GOCs release information.
>
> Given that many GOCs are in competing commercial environments however, the State Opposition accepts that commercial-in-confidence provisions will need to apply.[175]

The Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. said GOCs —

> were constituted to continue to provide public utility services in the face of encroaching privatisation of public resources. GOC shareholders are ministers of state who are also elected representatives of the people. GOCs are fully

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[173] FOI Independent Review Panel discussion paper, p. 67.
[174] Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 9.
[175] Lawrence Springborg submission to the FOI Independent Review Panel discussion paper, p. 3.

> government-funded public entities and should be accountable to the public for any decisions their government-funded directors, employees and shareholders make, and GOCs should be subject to the Act.[176]

Rockhampton City Council said —

> If Government owned corporations are truly competing in an open marketplace then they should be treated like private sector entities, however if they are a monopoly then FOI should apply as it does to other Government agencies.[177]

Megan Carter submitted that GOCs should be covered by FOI in respect of publication requirements (statements of affairs), all personal information and all other information apart from that where disclosure would damage their competitive commercial activities.[178]

The Roman Catholic Archdiocese of Brisbane said —

> Government Owned Corporations (GOC) that clearly fall within the ambit of a ministerial portfolio as an essential service and with Government endorsed/influenced appointments to their Boards of Governance should be held accountable for their actions to the community at large and subject to a Code of Conduct as applies to other public officials bound by the FOI Act's terms and provisions. In these circumstances, the following needs to apply:
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> 1. Those covered by this extension of the FOI Act should be granted the same legal protections and support that currently apply to the Government's own Departments and Agencies.
>
> 2. The same exemption provisions that apply under the provisions of the Act should apply also to those service providers covered by the Act.
>
> 3. The extension of the FOI Act must specifically state the extent to which they are bound by the provisions of the FOI Act (e.g., only in regard to the essential services or public utilities that they are providing on behalf of the Government).
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> 4. The cost recovery mechanism that applies currently under the FOI Act could apply to them in relation to what charges they can apply to applicants for information and further extended to allow them to claim back from the Government the difference between allowable charges and full recovery.[179]

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[176] Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 9.
[177] Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 5.
[178] Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 6.
[179] Roman Catholic Archdiocese of Brisbane submission to the FOI Independent Review Panel discussion paper, p. 4.

The Panel is required by its Terms of Reference to look specifically at "the operation of section 11 and section 11A (bodies to which the FOI Act does not apply)" and to do so in the context of considering the "purposes and principles of freedom of information". The Panel can discern no principle for the distinction currently drawn in the Act between GOCs that are excluded for certain purposes, and other GOCs some of whose documents are excluded.

The Queensland Ombudsman wrote —

> I consider that all GOCs should be subject to the FOI Act. I am strongly of the view that private entities that carry out public functions using public funds are accountable to the public for the way in which they perform those services and spend those funds, and should be subject to all the usual accountability measures, including the application of the FOI Act, and scrutiny by the Crime and Misconduct Commission, the Ombudsman and the Auditor-General. The commercial interests of GOCs are adequately protected by the exemptions available to agencies which are subject to the FOI Act. For example, documents that relate to their competitive commercial activities may qualify for exemption under s.45(1)(c) of the FOI Act.
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> As far as I can understand the position in other states, there does not appear to be a particular problem posed by GOCs vis-à-vis the FOI Act. It would seem that GOCs generally do not receive a specific exemption for commercial-type activities, but rely on the general exemptions contained in the respective FOI Acts.
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> To give effect to that position, s.11A and Schedule 2 of the FOI Act would need to be repealed (and any consequential amendments made to complementary legislation).
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> In terms of defining which bodies exercise government functions and should therefore be subject to the FOI Act, I support the analysis set out in ALRC Report 77[180] which identified government control as the most important characteristic. If the body is controlled by the government and spends public funds, then I consider it should be subject to the FOI Act. Government control will be established if the government has an ownership interest in the body of at least 50%. In the case of a body corporate, the government has a controlling interest if it is able to:
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> - control (whether directly of through its ownership interest in other bodies) the composition of the board of directors;
> - cast (or control casting of) more than one half of the maximum number of votes that might be cast at a general meeting of the body;
> - control more than one half of the issued share capital of the body.
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> If the government does not have a controlling interest in the body, then it should not be subject to the FOI Act.[181]

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[180] ALRC/ARC Report, pp. 209-216.

[181] Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 6.

The Panel did not receive any submissions from GBEs in response to the questions asked in its discussion paper. It then wrote to 19 GBEs drawing the issues to their attention and asking if they wished to respond. As mentioned above, the Government's response to the discussion paper suggests that in corporatising GOCs under the *Corporations Act* it was not the Government's intention to take them out of the ambit of FOI.[182]

By late-May replies had been received from six GOCs – Port of Townsville, Queensland Rail, Ports Corporation of Queensland, Energex, Tarong Energy and SunWater. All but Port of Townsville and SunWater are company GOCs and therefore outside FOI at present. While Port of Townsville is covered by s. 11A, it indicated it will become a company GOC on 1 July 2008. Port of Townsville submitted it should be exempt from the FOI Act as most of its documentation was exempt under that Act and it was subject to the Commonwealth *Privacy Act 1988* in relation to personal information.[183] Queensland Rail said it accepted it should not be completely exempt from FOI and said it did not use its exemptions under the Act lightly. It said the current provisions that allowed government to exempt specific functions of a GOC was an effective way for Government to ensure that any government functions carried on by GOCs were subject to the Act.[184] Ports Corporation of Queensland was against extending FOI to GOCs.[185] Energex said it was generally satisfied with the current legislative regime for FOI. It considered "public authority" in s. 9 of the Act could be more broadly defined to confirm that the Act applied to company GOCs, and considered it did fall within the definition of "public authority".[186] Tarong Energy agreed with the Government submission and did not want any changes to the regime covering GOCs.[187] However, SunWater was supportive of the application of FOI to GOCs. It considered "government functions" should be clearly defined and limited "so that there is no need to argue about the commercial functions of organisations such as GOCs that have both elements as part of a general business".[188]

None of the GOCs that replied attempted to counter the argument detailed in the discussion paper that the application of the exclusions in the Act meant that they were not on a "level playing field" with private enterprise, but rather had a more privileged position.

It is likely that under the proposals being developed by the Australian Law Reform Commission all GOCs will be subject to the provisions of the *Privacy Act* (as most probably are already) and hence be required to make personal information available. This in effect is the answer to the third of the questions raised by the Panel and quoted above. It means the application of FOI to GOCs need only be concerned with governance issues.

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[182] Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 5.
[183] Port of Townsville letter to the FOI Independent Review Panel, 28 March 2008.
[184] Queensland Rail letter to the FOI Independent Review Panel, 31 March 2008.
[185] Ports Corporation of Queensland letter to the FOI Independent Review Panel, 2 April 2008.
[186] Energex letter to the FOI Independent Review Panel, 3 April 2008.
[187] Tarong Energy letter to the FOI Independent Review Panel, 30 April 2008.
[188] SunWater letter to the FOI Independent Review Panel, 12 May 2008.

In the past, the government has been persuaded to have the FOI Act amended to put some or most of their activities outside the reach of FOI. Some have been included, individually, as being excluded under s. 11(1) in relation to specified activities, normally their "competitive commercial activities". Others have gained exemption under s. 11A with a documents-based exclusion. As LCARC noted in its 2001 report —

> The current document-based ... is inappropriate given that it affords GOCs more favourable treatment than their private sector competitors – and indeed government-owned commercial entities mentioned in s 11(1) and the FOI Regulations.[189]

This favourable treatment is a far cry from the "level playing field" argument that has been used to defend the creation of the s. 11A exclusion.

The various GBEs have, over the years since the original *Freedom of Information Act* was passed in Queensland, managed to obtain legislative intervention so as to insulate themselves from FOI, in a way that parallels the expansion of the Cabinet exemption. Both the exclusions and the exemption need to be wound back to improve accountability and promote the openness that FOI was meant to foster and encourage.

The Panel considers, as a matter of principle, that all GBEs should be treated the same way in relation to FOI. It believes they should be entitled to have their "competitive commercial activities" protected from disclosure, but not those activities where they face no competition from the private sector. Nor should their activities in relation to their community service obligations be excluded/exempt from disclosure. In fact it should be a requirement by government that matters relating to CSOs should be subject to FOI directly when they are the responsibility of GBEs, through legislative deeming provisions, and indirectly, through contractual arrangements with the relevant agency, when CSOs are performed by a private sector organisation.

The Panel also considers that this exclusion for GBEs for their "competitive commercial activities" should be subject to a public interest test, of the kind described in chapter 9. This would bring into any determination of public interest those issues commonly described as "commercial in confidence", but the various harms that come within that business rubric would not necessarily be determinative of the outcome of any particular application for disclosure. The public interest test should be introduced as a practical way of recognising that GOCs and LGOCs are emanations of government, and that ultimately Ministers are accountable for their activities, even their competitive commercial activities. Completely excluding GBEs from FOI, or even just their competitive commercial activities, sends the wrong message to directors and managers of GOCs, concerning their ultimate responsibility to Government and to the Queensland people to whom the shareholding ministers are ultimately responsible.

The Panel considers that for the same reasons LGOCs should be treated in the same way as GOCs. There are additional reasons, however, why LGOCs should come within the purview of FOI. LGOCs are even less accountable than GOCs and they

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[189] LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 249.

can be created with fewer safeguards, simply through a resolution of the relevant local government body.

The Panel agrees with the reasoning that led the Electoral and Administrative Review Commission to conclude that it was in the public interest that all statutory authorities should be subject to FOI legislation. In the report in which it recommended the adoption of the FOI law, EARC said —

> Statutory authorities, whether engaged in commercially competitive activity or not, raise two preliminary issues. First, the statutory power conferred upon the relevant authority to engage in the relevant activity, is conferred by Parliament for a public purpose. It follows that there is always a public interest in ensuring that what is, and that what remains, the conferral of a statutory power is exercised in accordance with the basis upon which it was conferred. It follows further, that the exercise of the power should be subject to the same measure of openness and accountability as the exercise of all other public powers. FOI legislation is an important means of effecting those objectives. Second, irrespective of their current capital or corporate composition, statutory authorities owe their genesis to the State either in terms of original funding or the exaction of statutory charges. Again it follows, there is a public interest in ensuring that there is continuing accountability in respect of such funds, as for all State funds.[190]

RECOMMENDATIONS:

Recommendation 20

All bodies that are established or funded by the government or are carrying out functions on behalf of government, should be covered by FOI, unless it is in the public interest that they should not be covered.

Recommendation 21

Sections 11A and 11B and Schedule 2 should be repealed.

Recommendation 22

In section 11(1) subsections (m), (n), (r), (s) and (t) should be repealed.

Recommendation 23

As recommended in chapter 9, the harm factors included in the public interest test should include a reference to a possible prejudice to the competitive commercial activities of a Government Business Enterprise that could result from the release of information.

[190] Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, p. 117.

Recommendation 24

The definition of "public authority" in s. 9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.

7.2 Privately contracted government services

The Panel asked in its discussion paper —

> *Should there be special provisions in the Act (and, if necessary, in other legislation) to ensure that when government services are contracted out to corporations, partnerships or individuals, that the contractor should be required to provide information that would have been required under FOI if the services were being provided by an agency?*[191]

The discussion paper referred extensively to the way the ALRC/ARC Review dealt with this issue, including its comment, "The trend towards government contracting with private sector bodies to provide services to the community raises significant regulatory and accountability issues."

> Where an agency contracts with a private sector body to provide services to the public on behalf of government, public information access considerations arise because it is the public, not the contracting agency, that is the ultimate recipient of the service. It is in this situation that the traditional distinction between the public and private sectors becomes blurred ... (I)f any problems occur in relation to the provision of the service, it is members of the public who will be affected and whose ability to seek redress may be reduced by the fact that they are not party to the contract. It is in this situation that adequate access to information about the performance of the contract needs to be guaranteed. Contracting with private sector bodies for the provision of services directly to the public on behalf of government poses a potential threat to government accountability and openness provided by the FOI Act. It should not be possible to avoid that accountability and openness by contracting with the private sector for the provision of services. [192]

In a later report concerning contracting out, the ARC said —

> ... it is important that the gains in government accountability that have been achieved by the FOI Act should not be lost or diminished where services are contracted out. Normal commercial practices may not, of themselves, lead to contractors providing information voluntarily to members of the public upon request. Appropriate regimes can and should be developed which can protect

[191] FOI Independent Review Panel discussion paper, p. 67.
[192] ALRC/ARC Report, p. 199.