QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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7 November, 2011

The Research Director
Legal Affairs, Police, Corrective Services
and Emergency Services Committee

By Email: lapcsesc@parliament.qld.gov.au

Dear Sir

Right to Information (Government-related entities) Amendment Bill 2011

Thank you for the opportunity to make a submission in relation to the above Bill.

The Council supports the proposed legislation.

We observe that this bill was introduced on 8 September 2011. That it is absolutely necessary was confirmed by the decision of Justice Applegarth in *Davis v City North Infrastructure Pty Ltd.*[1]

That Decision concerned whether or not City North Infrastructure Pty Ltd was a public authority for the purposes of the *Right to Information Act.*

As His Honour Justice Applegarth notes in paragraphs 1 and 2, the Defendant was a company incorporated under the *Corporations Act*:

1. To manage the procurement of the Airport Link and Northern Busway Project;
2. Later to oversee the Contract management of the Airport Roundabout Project; and
3. Wholly owned by the State of Queensland with individual shareholders holding their shares on trust for the State.[2]

His Honour went on at paragraphs 26 – 28 of his Judgement to note that the Government had accepted a recommendation of the Solomon review that entities such as this should be subject to the *Right to Information Act.*

[1] [2011] QSC 285.
[2] At paragraphs 1 and 2.

However, as His Honour found, the *Right to Information Act* does not in fact reflect the Government's stated policy on this topic.

There are reasons of principle and practice which demand that any entity receiving government funding, or under the control of the government, should be subject to the *Right to Information Act.*

Should the *Right to Information Act* not apply to private providers of formerly government-provided services, it would reduce the capacity of citizens to seek redress, because the amount of information available about the performance of those functions would be significantly reduced.

In *Commonwealth v John Fairfax& Sons Ltd (1980)* 147 CLR 39 at 52, Mason J said:

> Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

The Council endorses the view that there is a clear link between access to information and the capacity of citizens to secure the fundamental rights as found in documents such as the Universal Declaration of Human Rights.[3] In particular it is clear that if citizens are to be in a position to participate fully in a democracy it is necessary that they have access to the knowledge and information to do so.[4] The Council's view is that a representative democracy necessitates an informed citizenry. For this reason freedom of information must be granted to the maximum extent possible.

In addition, when services are being delivered by a government which is democratically elected, the citizens are entitled to know whether or not their monies are in fact being properly spent.

Secondly, the New South Wales Independent Commission Against Corruption has noted that contracting out creates increased or changed opportunities for corruption in the contracting process.[5]

The Council is surprised to see that when it enacted the *Right to Information Act*, the Government did not follow its policy position as stated to the Solomon review at paragraph 7.1 and restated in the Government's response to that Committee's recommendations.

We note that the Solomon Review concluded as follows:

- The Panel considers, as a matter of principle, that all GBEs should be treated the same in relation to FOI. It believes that they should be entitled to have their previous commercial activities protected from disclosure, but not those activities where they face no competition from the private sector. Nor should

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[3] Alasdair Roberts Structural Pluralism and the Right to Information (2001) 51 University of Toronto Law Journal 243 at 256.

[4] Snell & Langston "Who Needs FOI When Market Mechanisms Will Deliver Accountability on Demand?" A Critical Evaluation of the Relationship between Freedom of Information and Government Business Enterprise 3 Flinders Journal of Law Reform 215 at 229 – 230.

[5] New South Wales Independent Commission Against Corruption, *Contracting for Services – A Probity Perspective*, 1995 3-4.

> their activities in relation to 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.[6]

The Government adopted the recommendation of the review panel on this topic.

It is our view that the current Bill addresses the issue.

It may be objected that GBEs have commercially sensitive information. The protection of commercially sensitive information is, in the Council's view, more than adequately covered by the exemptions contained in the legislation. In fact, it is our view that those exemptions are too extensive. In those circumstances, we would reject any argument that the exemptions contained in the current *Right to Information Act* are not an adequate protection of commercially sensitive information that may be held by GBEs.

The Senate Finance and Public Administration Committee in its *Contracting out of government services second report* observed that "only relatively small parts of contractual arrangements will be generally commercially confidential." In fact, the evidence to that Committee was that confidentiality provisions are inserted into the contracts more often at the request of the public service than the private sector.

The Australian Council of Auditors-General, in its '*Statement of Principles: Commercial Confidentiality and the Public Interest'* (November 1997), referred to the need to make a distinction between confidentiality during the process of tendering and the final document.

As Seddon says:[7]

> One of the claims made in favour of the contractualisation of government is that the very process of planning and drafting a contract enhances accountability because it forces government agencies to specify with some precision what was previously unspecified or at best the subject of perhaps vague public service guidelines or directions ... It is therefore odd that the terms of the contract are hidden and the very benefits claimed for contracting out cannot be assessed.

Mr Seddon concurs with the Senate Committee when he observes "most of the information in government contracts is mundane and in no way sensitive."

That this is the case would appear to be supported by the American experience. The Council of Auditors-General noted that in California once a finalised agreement has been reached, the final agreement is able to be released publicly. We see no reason why a similar principle could not be applied here.

The Council endorses the views of Chris Finn[8] that:

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[6] It should be noted the Council does not agree entirely with the exclusion of commercial activities of GBEs from supervision under the *Right to Information Act.* See our submission to the Independent Review Panel located on our website at www.qccl.org.au

[7] *Commercial in Confidence and Government Contracts* 11 Public Law Review 255

[8] Quoted in Rick Snell *Commercial in Confidence – Time for a Rethink?* 102 Freedom of Information Review 67 at 69

> Commercial information is overprotected from disclosure under contemporary FOI legislation. This overprotection is evident quite apart from democratic arguments that the "public right to know" may override established commercial interest. Viewed solely in economic terms, the existing levels of protection for business information appear hard to justify. FOI legislation should be redrawn so that business information is only protected where its release will cause demonstrable harm to the competitive process itself. It should not be sufficient to justify exemption, as is currently the case, either that the material is of a commercial nature or that its release will cause some harm to the individual enterprise.

We call upon the Parliament to make haste in passing this important piece of legislation which will do no more than implement previously-declared government policy.

Yours faithfully

Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
11 November 2011