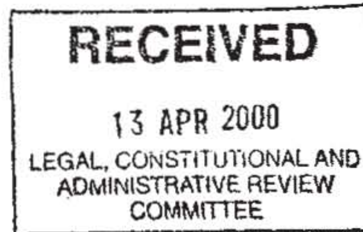
Our Reference: foilcarc.doc
Your Reference:
Contact name: Jane Macdonnell
Contact Telephone: (07) 323 90150
Facsimile: (07) 323 93474
Email: jane_macdonnell@justice.qld.gov.au



Submission No 150

13 April 2000

Mr Gary Fenlon MLA
Chair
Legal Constitutional and Administrative review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Fenlon

Re: Review of *Freedom Of Information Act 1992 (Qld)*

Thank you for your letter of 23 February 2000 forwarding a copy of your Committee's Discussion Paper No.1 on freedom of information in Queensland.

I have attached a submission from this Department on the discussion points canvassed in that Paper. The submission does not purport to represent the views of the Attorney-General, Minister for Justice and Minister for The Arts or of the Government.

Yours sincerely

Jane Macdonnell
Director-General

STATE LAW BUILDING
50 ANN STREET
BRISBANE Q 4000
GPO BOX 149 Q 4001
PHONE: (07) 3239 3520
FAX: (07) 3221 2534

QUEENSLAND GOVERNMENT

SUBMISSION
DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL

FREEDOM OF INFORMATION IN QUEENSLAND
DISCUSSION PAPER NO. 1
LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

Discussion points 2-6

The discussion does not reflect the increasing calls for privacy controls accompanying the growth in electronically held data and the extent to which both individuals and wider economic interests can be adversely affected by the failure to afford adequate privacy. To the extent that the discussion may lead to a conclusion that explicit recognition of competing interests be removed from the introductory provisions of the *Freedom of Information Act 1992* ("the Act"), that conclusion may require further consideration in the context of privacy legislation. Governments collect a great deal of data on individuals who are likely to disagree with such information being characterised as a "public resource".

Discussion point 7

If the Information Commissioner is of the view that some agencies are secretive, that situation could be addressed through an educative and interactive approach with those agencies and, as a last resort, through the Commissioner's annual report to Parliament. Without such an approach, it is unlikely that a statutory change would achieve a cultural change. This issue would appear to merit consideration in the current review of the Office of the Information Commissioner.

Statistics for 1998/99 show that access was refused to less than 10% of documents considered by State government agencies (and to part of around 7% of the remainder). Given the amount of personal information held by agencies and the high proportion of applications to the Queensland Police Service, Department of Families, Youth and Community Care, Department of Employment, Training and Industrial Relations, Work Cover Queensland and the Royal Brisbane Hospital, this result does not appear untoward.

Discussion point 8

If the objective is to reduce the number of exemptions, such mooted disclosure is unlikely to make any difference in light of the fact that much of the information to which access is refused involves personal affairs. Similarly, if the objective is to reduce the necessity to make applications for information, it is not likely to significantly do so in light of the amount of personal information involved in applications.

Further, even where information is published, applications are received for source documents. For example, details and costs of overseas travel are published in annual reports but access to all related documents has been sought.

It would not be practicable for agencies to publish at large (in paper or electronic form) the volume of documents covered by applications. The wider premise that government could operate on a daily basis with complete access to all documents (or even more widely to all information) is unsustainable having regard to the nature and volumes of documents/information and to the extent of enquiries with which it would have to deal.

Discussion points 9-10

As the media frequently refers to information or documents obtained under freedom of information laws, it is questionable how greater (more effective) exposure of the existence of the laws could be achieved.

Discussion point 11

While there can be no objection in principle to executives being responsible for any performance issues under their control, thought would need to be given to how efficiency and effectiveness on this issue would be judged. There is an implicit assumption of change which may not be able to be met if exemptions continue in their current form and are being correctly applied in agencies.

Discussion point 12

"Freedom of information" is arguably a broader term than "access to information" so all that may be gained is an unnecessary difference in terminology with other jurisdictions.

Discussion point 13

"Fundamental legislative principles" are concerned with the rights and liberties of individuals, and the institution of Parliament. The *Freedom of Information Act 1992*, by sections 6 and 44(2), in effect recognises that individuals should be given access to information regarding their own personal affairs. Therefore, it is unlikely that anything would be gained by extending the matters to which regard is to be had under section 4 of the *Legislative Standards Act 1992* in this respect.

However, if privacy is accepted as a fundamental right of individuals, Parliament may wish to cite it as a matter to which regard is to be had in the drafting and making of legislation. It is difficult to see what other amendment in relation to access to information could be made to the *Legislative Standards Act 1992* other than a restatement of the need to balance competing interests - which need is already reflected in sections 4 to 6 of the *Freedom of Information Act 1992*.

Discussion point 14

Further to the comments on discussion point 13, it may be timely to consider the interaction between the current "personal affairs" exemption and privacy. Comments are made in this regard in response to discussion point 69.

Discussion point 15

The issues canvassed in the preceding paragraphs regarding the "personal affairs" exemption, if regarded as deficiencies, could be addressed by either widening the exemption to cover any personal particulars or making the release of any personal particulars which do not constitute "personal affairs" subject to a public interest test.

Discussion point 16-17

There is a risk that in achieving ease of drafting and of interpretation of a harm test that the exemption threshold will prove to be too high in particular cases. Already there is a judicial finding (*State of Queensland v Albietz [1996] 1 Qd R 215*) that even if a person wanted information for no other purpose than to harass or abuse (taxation) officials, the information

would have to be disclosed because purpose cannot be taken into account. The test of "reasonably expected to endanger a person's life or safety" would not exempt from disclosure the fact of employment of a particular person, even if that person reasonably feared harassment from the applicant, in the absence of some history of violence between the two persons.

The harm test in relation to people is in contrast to the test of "prejudice [to] the well being of the habitat of animals or plants". The amendment proposed by the Information Commissioner in relation to section 42(1)(c) is supported except inclusion of the word "serious" may require further consideration.

Accountability is frequently referred to in discourse on access to government information and its importance is acknowledged. However, there is also a public interest in government and public administration being efficient and effective in dealing with issues before it. This interest would be impeded if the public sector were to operate in an environment in which tests for exemption were too stringent. For this reason, harm tests of varying degree from "prejudice" (understood to mean impairment) to "substantial harm" are appropriate for the different exemptions. If uniformity of the test is perceived to be desirable, a wide variety of scenarios based on the experience of agencies in administering the Act would merit consideration under any proposed new harm test to ensure that change did not deliver theoretical neatness but unintended outcomes.

Discussion point 18

On the assumption that the questions asked are intended to encompass exemptions found in Division 2 of the Act, harm would have to be shown to flow from disclosure of matter dealt with by Cabinet, Executive Council, the courts, royal commissions and Parliament. In effect, this would result in either members (Ministers) or employees of executive government deciding whether harm of the specified standard would be caused by disclosure. In respect of some of the non-executive arms of government, this is likely to be seen to transgress the doctrine of separation of powers.

There are also exemptions which are not subject to harm tests because harm was probably reasonably assumed to flow from disclosure, thereby obviating the need for a harm test to be applied on a case by case basis. The harm which would be caused by the disclosure of trade secrets is presumed. By way of other examples, the identity of a confidential source of information in relation to the enforcement or administration of the law is exempted (unless disclosure would be in the public interest). Making access to an informant's identity dependent on a case by case assessment was probably presumed to harm the public interest by reducing the willingness of persons to provide information for law enforcement and administration purposes. Similarly, the willingness of another government or one of its agencies to disclose information of a confidential nature was probably presumed to be adversely affected if access to the information were to be decided on a case by case basis.

Further, the issues reflected in the discussion points have a degree of interdependence. To illustrate, the exemption relating to deliberative processes would need to be maintained in a sufficiently robust form if the exemption in relation to consideration by Cabinet or Executive Council is to be meaningful. Otherwise, access to preparatory work on policy matters could reveal the substance, and perhaps the detail, of considerations by Cabinet or Executive Council.

Discussion point 19

The issues raised in response to discussion point 18 regarding the other arms of government apply in the consideration of a public interest test to certain exemptions. Similarly, there appears to be no useful purpose in making exemptions such as those listed in section 42(1) subject to a public interest test on a case by case basis when such classes of matter would have attracted exemption from disclosure out of public interest considerations.

Discussion point 20

Attempts to define the "public interest" run the risk of unforeseeability of a particular combination of circumstances in which either exemption or disclosure may be desirable but prevented by operation of the definition. Further, the public interest test balances factors in favour of exemption with those in favour of disclosure. There is arguably little basis for excluding a factor from such a balancing exercise - in contrast to the situation in statutes in which criteria for the exercise of a power must be defined.

Discussion point 21

Guidelines would be helpful provided that they are not so prescriptive as to defeat the objective of having a balancing test instead of a more rigid statutory approach.

Discussion point 22

As some of the documents which may be exempted under the sections containing such provisions are not seen by Departmental officers, the only person in a position to deal with such an application is the relevant Minister. If confidentiality is to be preserved, then the certificate would have to operate conclusively. No information regarding any exemptions under section 36(3) was provided to the Department of Justice and Attorney-General for inclusion in the report to the Legislative Assembly under section 108 of the Act.

Page 20 of the Discussion Paper invited submissions as to any amendments to the list of bodies excluded from the Act by section 11(1). This Department and the Courts would be opposed to removal of sub-sections (e) and (f), which excludes the judicial functions of courts, judicial officers and court staff from the operation of the Act.

Discussion point 23

(a) As any regulation is subject to Parliamentary scrutiny and disallowance, the outcome is unlikely to be different whether an exclusion is made by amendment to the Act or by a regulation pursuant to it. The advantage of a regulation is the capacity of both the executive and Parliament to deal with a matter quickly. This would be necessary if information was being sought (with a real prospect of it being released) and its release would be objectionable to the public.

(b) It is desirable that the entire statutory law on a particular matter be accessible from one statute.

Discussion point 24

It is difficult to think of an example which would not come within section 9 upon the commencement of the government providing funding or acquiring the power to exercise control.

Discussion point 29

There may be arguments that disclosure of information, which is ensured by the creation of a statutory right of access, would be in the public interest in limited and specified circumstances – for example, some disclosure by journalists was recently suggested in an article published in *The Sydney Morning Herald* on 23 March 2000. (Copy attached to this submission.)

Discussion point 30

An alternative may be for documents and information required by the Government pursuant to contracts to be accessible through the Act.

Discussion point 31

It may be helpful to consider how often the Information Commissioner has allowed access to documents which agencies had exempted under these provisions in forming a view as to the necessity for amendment.

Discussion point 32

To the extent that the Information Commissioner decides individual requests for review but does not otherwise seek to address any systemic problems, the public investment in the freedom of information scheme is not maximised. If there are incorrect statutory interpretations or misuse of the exemptions, it is unlikely that such issues would be resolved by the (necessary) retention of the exemptions with some amendments.

Discussion point 33

It is impractical to contemplate access to information other than information in documentary form.

Discussion point 34

It is not evident why any amendment is necessary. No example is given of raw or unprocessed data which might be sought and which would not be subject to existing exemptions in any event.

Discussion points 35-36

This agency receives and uses a large number of paper records and could not make them available electronically without a very significant investment in further technology.

Discussion point 37

Costs are a very significant issue and a balance needs to be struck having regard to the relatively small number of people who make applications and the cost to the community. However, provided that an agency makes arrangements to use its own staff to search files with its professional advisers, the cost of these requests may not exceed the costs of many other requests which may involve a large volume of documents or archived documents.

Discussion point 38

Internal review as a prerequisite to external review serves the useful purposes ascribed to it by the Information Commissioner.

Discussion points 39-44

The review of the Information Commissioner's office approved by the Parliament should produce information of relevance to many of these issues.

Discussion point 45

The necessity for the power of entry has not been demonstrated and, as a matter of principle, the Information Commissioner should not have the power to punish for contempt. Any penalties should be imposed by a court after due hearing.

Discussion point 46

Such power would effectively allow one individual, the Information Commissioner, to make decisions on matters based on his or her view of the public interest and, to that extent, abrogate the power of Parliament. The practical result would be that information is available if the Commissioner thinks that it should be available.

Discussion point 48

In light of moves to "user pays" since enactment of this Act, it is difficult to justify not recovering the real costs of providing non-personal information - particularly where it is sought for commercial reasons. The current fee structure means that the community generally is subsidising those accessing information for commercial purposes.

Discussion point 49

A uniform fee would be inappropriate if what is contemplated is the imposition of the current $30 fee for personal applications. A flat fee for personal applications, and charges better reflecting cost for non-personal applications, would be preferable.

Discussion point 50

It would be possible to impose an initial fee and to devise a scale of charges reflecting time spent, but subject to various ceilings reflecting the number of documents located. The number of documents could be categorised – for example, 1-100, 101-200 etc. Recently, this Department processed an application from a journalist which necessitated many weeks of work within the agency, resulted in the identification of 6,000 documents as meeting the request, consultation with 69 people under section 51 of the Act, the copying of the documents so that personal affairs information could be deleted on the copies and then the recopying of those documents for inspection. All this for a fee of $30. An appropriate charging regime would encourage refinement of applications for information.

Discussion point 52

A capacity to waive fees on the grounds of hardship could be justified if an application fee were to be made for personal information and the applicant could demonstrate hardship. Consideration would need to be given to the appropriateness of waiver of fees for persons making repeated applications for the same or similar information (if that issue is not resolved by other recommendations to be made by the Committee).

Discussion points 53-54

Arguments against fees may not recognise that the significant costs of the regime have to be met. That there is a public interest in information being publicly accessible is not a conclusive answer to the question as to whether more of the costs should be borne by those using the regime. Non-personal information could be viewed as a publicly owned resource for which some of the costs of access, including costs of adjudication on disputed decisions regarding access, should be sought. Filing (application) fees are charged by courts for judicial adjudications and while those fees represent only a small proportion of the real cost, it is regarded as appropriate that court users bear some of the cost. It is difficult to see why a distinction should be made because the adjudication (internal and external reviews) is carried out by non-judicial officers. A charge for a review could be refunded in cases where the original decision was varied.

Any waiver of fees for reviews should be based on the same principles as any waiver of application fees. In the case of a deemed refusal, either the original fee could cover the decision of the Information Commissioner or the agency involved could be liable for the fee of the Information Commissioner.

Discussion point 55

(a) Deletion of the word "only", without any other amendment to the relevant sub-section, may not result in a widening of the factors which can be taken into account. Other factors which might be considered are the extent of consultation under section 51 which would be required. For example, the number of potential documents may be relatively small but consultation with third parties would be necessary with a very large number of people under section 51 of the Act.

(b) The role of the Information Commissioner in decision-making under the Act should be consistent. Refusals to provide access on any of the grounds in section 28 of the Act are subject to review.

(c) This would be expected to occur now. To the extent that there is evidence that such consultation does not occur, statutory amendment may be desirable. In consideration of appropriate charging for applications, the extent of the assistance having to be provided to applicants in defining the information that they seek could be taken into account.

Discussion point 56

There is good reason for retaining the exemption. It is hard to justify the cost of identifying, locating and collating all documents to which no access would ultimately be given. As an example, an application may be made for access to all personnel records or to all records showing the home addresses of staff. It would be a waste of public resources to gather all the documents covered by the application and list them on a schedule to be accompanied by a letter advising that access would not be given as all of the documents contained matter which was exempt under section 44(1) of the Act.

The fact that cases properly attracting a refusal under section 28(3) of the Act are rare does not lead logically to a conclusion that the section is otiose. In its absence, the Act could be used to create work and put pressure on an agency, (purposes contrary to the public interest but the Act does not allow consideration of purpose), with applications for information which is exempt. The agency would be obliged to devote resources to the work outlined in the previous paragraph in respect of each application. In particular agencies which do have a great deal of exempt information like health or education (personal affairs), or police (law enforcement or public safety) could be adversely affected.

An examination of statistics provided by agencies reveals that only one decision was made under section 28(3) by a government department in 1998/99 and none in the previous reporting year. However, the exemption was heavily used by a small number of local governments and statutory bodies in those two years. To the extent that the Act does not allow the Information Commissioner to investigate such aberrations in the use of refusals/exemptions, there is a deficiency. That deficiency is not best addressed by the removal of a legitimate ground of refusal/ exemption.

While the identification of the applicable exemption and the reasons for its application may appear to be unobjectionable, it is possible that any such requirement may reveal information which debases the reason for having a particular ground of exemption. For example, if a person was seeking to locate someone who might be employed in the public service in Queensland, an application might be made to each agency for employment particulars of persons named in the application. All of the names bar one may be fictitious. If the person sought to be tracked down was employed by an agency, a refusal under section 28(3) by all agencies would not reveal the fact that the person was employed by an agency. However, if more information had to be given under section 28(3), it becomes more likely that an agency will respond to the application to the effect that it has no documents in relation to the fictitious persons and will rely on the personal affairs exemption in relation to the employee. In this way, an applicant may be able to track down someone who wishes to keep their whereabouts unknown from that person. (It is acknowledged that if agencies would not currently resort to section 28(3), and section 51 consultation does not result in a way of exempting the information without revealing its existence, the same unfortunate result could occur now.)

An exemption related to section 28(3) of the Act is section 35 in so far as both sections (for different reasons) do not require the identification of individual documents. Section 35 allows a Minister to give written notice that he or she neither confirms or denies the existence of documents in which matter attracts the Cabinet, Executive Council, law enforcement or public safety exemptions. The section is intended to ensure that confidentiality is not destroyed by revelation of the existence of the sought documents. However, resort to section 35 has been regarded by some agencies as still disclosing that there are documents of the sought description. It would be possible to address this concern in any redrafting of section 28(3) so the objectives of both of these sections were assured.

Discussion points 57-58

Such a power of refusal is desirable. The alternative to refusal is a charging regime which reflects the full cost of the provision of the information with the estimated cost being payable upfront and if the actual cost exceeds the estimated cost, the balance being payable before access is given. Either way, the Act would need to define the circumstances in which the refusal or charge could be made. The simpler approach of the UK is preferred to the proposal of the Information Commissioner – which appears to be incapable of application if an applicant does not seek external review of the agency's decisions.

Discussion point 59

It is not known what use is made of the report prepared by this Department under section 108 of the Act. (The last report tabled was for 1997/98 and not 1996/97 as was submitted by the Information Commissioner). The onerousness to agencies of compiling the requisite information would be alleviated by a computer system which records such information in respect of each application. Such a system would be capable of producing reports of any data necessary to assist both agency management of its functions under the Act and external assessment of the operations of the Act. This Department will review the system developed

by Queensland Treasury for its usefulness in that regard. However, this Department would require resources to pursue a more proactive role in the sector wide administration of the Act. As the Information Commissioner has observed, no agency is given a statutory responsibility and resources to support and assess compliance with the Act. Such a role could be performed by the Office of the Information Commissioner or this Department.

Discussion point 60

No. The Act covers documents irrespective of their age and these documents are not expected to ever be retrievable electronically. Time consuming searches are unavoidable. Further, the predicted paperless office has not eventuated. While some agencies may have computerised records management systems, those records are based on files and rarely individual documents. There is also a direct relationship between capacity to process any work within particular timeframes and the amount of resources available. It is likely that agencies could meet shorter timeframes only with more resources and therefore greater costs to the community.

Discussion point 61

On balance the answer is probably "yes" to cover situations in which it is not possible to identify either the need for consultation, or the persons with whom consultation must be conducted, until after the documents have been located and examined.

Discussion point 62

Yes to both questions. In practice, extensions are sought and given in most cases.

Discussion point 63

No because of the harm that could be caused to anyone or any interest if access were given to matter which should have been exempted. An alternative sanction for unreasonable delay would be reporting under section 108 (and perhaps agencies' annual reports) on the timeliness of decisions and reasons for delays in respect of which extensions were not agreed with the applicant.

Discussion point 64

Such an amendment is unobjectionable but would not change processing times if they are as prompt as possible with available resources.

Discussion point 65

It would be reasonable to expect this to occur now. However, if that has been found to not be the case, an amendment merits further consideration, as does the role to be played by the Information Commissioner if there is not agreement by the agency as to the urgency. (The examples given in the Discussion Paper may not be apposite in so far as government agencies rather than applicants would be responsible for dealing with the imminent threats.)

Discussion point 66

Yes. Agencies should be able to deal with relevant records in a reasonable time rather than having to keep them available at short notice for inspection.

Discussion point 67

Yes, but only in cases involving large volumes of documents and exempt matter.

Discussion point 68

There appears to be no compelling reason for change.

Discussion point 69

Yes. There have been issues regarding information which staff regard as affecting their right to privacy. It is accepted that accountability requires that certain information regarding staff, (for example, the identity of a decision-maker in a matter), should be disclosed. However, interpretations of "personal affairs" which may be appropriate in one context to meet accountability considerations, may result in unreasonable intrusions on privacy in another context. To illustrate, information concerning the identity and position of a decision-maker should be disclosed in the absence of any reasonable basis for fearing a threat to the person's safety. However, information involving the names of all staff along with their positions (and perhaps even work locations or other business contact details, or even salaries) extends beyond what is easily characterised as necessary for accountability purposes and such information is of commercial value.

It is difficult to see why in the above case personal details of persons employed in the public sector should be available when such information on persons employed in the private sector would not be so available. However, there is a risk that the current "personal affairs" exemption may have that result if each item of information sought (for example, name) is not in itself regarded as constituting "personal affairs" having regard to case law which may have developed in a very different context. The "public interest" test in section 44(1) of the Act would not assist because it operates only to allow the release of information involving "personal affairs" and not to exempt from release personal particulars even in circumstances in which the public interest may be served by exemption. An example of where the release may not be regarded as in the public interest would be an application by an employer in the private sector for the names of staff employed in particular types of positions or with particular qualifications, perhaps gained at public expense, for the purposes of targeted recruitment.

Further, community objections were recently raised following media reports of a proposal by a company to combine publicly available information on real property with photographs of individual properties for commercial purposes. There are implications for freedom of information legislation in that the legislation has no regard to the purpose for which information is sought and once data is released, it can be used or sold for purposes to which those affected would object.

The issue is not about unreasonably protecting public servants acting in the course of their official duties but ensuring that their privacy is not subject to intrusion as a mere incidence of their employment in the public sector.

The Victorian case in which the names of the nurses on duty were disclosed raises the issue as to whether disclosure is justifiable simply because they were on duty that night. It was not a question of seeking to identify a person in relation to a decision or action taken in the course of their duties. If the applicant had sought the names of the nurses because he wanted to seek social contact, the names would have been disclosed. Such disclosure could not be characterised as being in the public interest.

The solution is to widen the scope of personal information which is exempt but allow disclosure in the public interest, or to make any disclosure of personal particulars subject to a public interest test.

It has been submitted by the Information Commissioner that section 44 would usually exempt a reference of any significance to members of the public acting in a private capacity. However, the extent of that privacy protection, where section 48 of the Act does not apply, depends on interpretations of "personal affairs" and may not afford protection in all cases in which it might be expected. For example, victims of crime may find that their names would not be exempted from disclosure if such information were sought in relation to all payments of compensation to victims of crime. As noted elsewhere in the Discussion Paper, there is no prohibition on the use to which information obtained under the Act can then be put.

Discussion point 70

The problem with the public interest test in relation to section 44 is that it does not come into play unless the information first satisfies the (non-statutory) definitions of "personal affairs". A record of evidence given in open court may not be so regarded. Even if it is so regarded, it is not clear that consideration would be given to the purpose for which the information is sought in application of the public interest test given the repeated statements that purpose is irrelevant under the Act. In any event, an accused, acquitted or convicted person may say that the evidence is needed for a civil proceeding, retrial or appeal. Further, such a person may claim that the evidence relates to his or her personal affairs and that that fact must be taken into account under section 6 of the Act.

Discussion point 71

"Personal affairs" could be replaced with a wider concept of personal information so that all personal particulars and affairs are exempt unless disclosure is in the public interest. The likely purpose to which such information would be put should be one of the factors weighed up in deciding whether disclosure of the sought information was in the public interest.

Discussion point 72

Much of what has been previously said in this submission in relation to section 44 is intended to show that there is no appropriate delineation of information reasonably required to be disclosed for public accountability purposes from information, commonly regarded as personal, whose disclosure cannot be justified on that basis. Adoption of the suggested broader concept than "personal affairs" as the basis for exemption, with the existing overriding public interest test (of which accountability for official actions was a determining factor and likely purpose was one factor in its absence) would resolve some of the concern reflected in this term of reference to the Committee.

However, on the facts of the Victorian case, referred to in the Discussion Paper, the names of the nurses on duty could still be released for legal purposes. Such purpose would be more credible where a legal practitioner was involved in the request. If there were no such involvement and no statutory capacity to release the information conditionally, then the public interest may not be served by the release of the information. Convicted persons may seek information after their legal rights have been exhausted. Some may genuinely but mistakenly hope to reopen appeals or to obtain pardons. Others may seek information for mischievous or unlawful purposes. When regard is had to reasonable privacy concerns of persons in the Victorian nurses' position, it is not difficult to see why it may be appropriate for information to be given to an agent but not the person. If the applicant in that case were not legally represented and were in prison, what attempts (and by whom) might be made to contact the

staff members? The community may not regard it as reasonable that the nurses should be placed in that position simply because they happened to be employed in the public sector.

All laws are capable of being broken. Issues raised regarding the imposition and enforcement of conditions need to be seen in that context and are capable of resolution within that context. The impossibility of achieving a perfect solution should not deter efforts to seek an improvement to the status quo.

Discussion point 73

The existence of a special relationship could be a factor either in favour of exemption or release. If section 44 were broadened by adoption of a wider definition than "personal affairs", even the name of an employee may remain exempt if application were made by a family member or former spouse and objection to the release of the information were made by the employee. However, if the information related to a person who was incapable of applying for it (for example, through a decision-making impairment), its release to a duly appointed guardian would be expected to be in the public interest. (The guardian could rely on rights conferred by other legislation to obtain access to the information.) Sub section 44(2) makes clear that an application can be made on behalf of a person for information concerning the personal affairs of that person. Consent would be implied if a professional person such as a solicitor or doctor sought information on a person's behalf.

The issue of an applicant being at liberty to distribute information widely, or use it or sell it for commercial purposes, merits re-examination of the scope of "personal affairs" and recognition that likely use is a factor to which regard could be had in weighing up the public interest.

Discussion points 74-75

Yes. Given its role in conducting external reviews, the Information Commissioner may be best placed to undertake most of such statutory responsibilities. It would be more costly to establish a new entity and Queensland's situation is different from that considered by ALRC/ARC in that it has the independent office of Information Commissioner. However, it would compromise the external review function of the Information Commissioner if that office were to provide advice to agencies or applicants on individual applications. Agencies can obtain that information from government legal sources or through a network of officers engaged on administration of the Act, including those so employed in this Department. Applicants would have to seek advice, other than on procedural issues and their rights of review, from other sources.

If the Information Commissioner were not to take on the envisaged statutory role, this Department would be willing to do so subject to resolution of resource issues. (Closure of the Freedom of Information Branch was approved by Government as a savings option in 1996.)

Asking rude questions of the inquisition

McGuinness

Journalists should come out of the shadows and face the same scrutiny as those they report on.

THERE has been the usual amount of tut-tutting from the usual suspects about the orgy of slavering media prurience in the matter of a billionaire, his wife of many years, his young mistress, and the tattling nanny. But, as always, the primary reason for the reporting of this matter is that it has aroused enormous public interest — though it can hardly be claimed to be in the public interest — and it sells papers, lifts ratings.

You can hardly expect the media to deny the public what it wants to hear — the media, including the sanctimonious drivellers in the ABC, are driven by two major motives — audience appeal and the desire of their own personnel to shine in the public eye, and especially in the eyes of their colleagues. It has long been obvious that the public gets the newspapers it deserves.

The reason why London tabloids are so bad is simple — this rubbish sells. Same with television. Thus any editor is driven to carry it. The Australian public's tastes are not quite as grubby and nasty as those of the British, so our papers are better.

There has been a difference in coverage between the groups. Though much of the demonisation of Rupert Murdoch and his empire is nonsense, there has been a remarkable difference in kind and degree between its coverage of the affair of their leader with a much younger woman, followed by his divorce and remarriage, and of the most recent kerfuffle.

Perhaps it is just that the News Ltd writers are so frustrated at their own silence and gutlessness in reporting the former that they are expressing it all in reporting the latter. Not that there has been an absence of underground humour in the News Ltd buildings — jokes like, "who could have thought that a little blue pill could bring down a mighty media empire?"

It has not of course — yet. But a couple of Chinese-American/Australian siblings could change the future picture for News Corporation quite dramatically. So could a heart attack.

There is one notable common element in all these exercises in public prurience. They bring out the fundamental assumption of all journalists, broadcasters, and commentators. This is that there is no such thing as a right to privacy for anyone who is in any sense a public, powerful or rich figure — except for them.

The truth is that, apart from a few examples of high-profile figures, usually the equivalent of media stars but sometimes editors (of other papers), or executives, the face of journalism in this country is unknown.

If a non-journalist is found in the wrong bed, his or her privacy is at an end — phone numbers will be ferreted out, pictures of houses if not actual addresses published, their past raked over, scurrilous gossip invented and/or reported, their incomes and wealth either reported or estimated, their former employers or their behaviour to their employees dragged out, details of illegitimate children published. Nothing is spared.

But what about the journalists who report all this?

Journalists are not saints. They have their affairs, their break-ups, their personal bitching against a former partner, their hates and their dishonesties. Too high a proportion of the Canberra press gallery is compromised by their personal relationships with other journalists, with political staffers, with bureaucrats, and often enough with politicians.

Often enough the press gallery seems to have, as its major recreation, playing musical beds. But journalists are public figures who try to influence events in Canberra and elsewhere, who have their own prejudices and ideological leanings, their own axes to grind. As well as their own residual loyalties to people and parties. And of course, the press gallery is not alone.

It is time that we knew more about them. For a start, the names and at least the suburb of residence, including home telephone numbers, mobiles, and job descriptions ought to be available to any member of the public who wants to know. How many people have any idea even of the organisational structures of a newspaper, let alone those who fill each and every position?

If politicians have to keep registers of their assets and of any gifts or considerations, so should journalists. The public is entitled to know their salaries and other entitlements, including expense accounts, just as it is entitled to know as much about politicians. If a politician and his wife who invite a journalist friend who happens to be in the same foreign city to dinner with a couple of interesting friends must, if asked, reveal this publicly, and have it reported, why not journalists? We have to keep diaries for tax purposes when on overseas assignment — why not make them available on request to anyone who asks?

The birth, marriage(s), infidelities, education, experience, employment history, affairs, financial status, party affiliations, illnesses, mental health, drug habits, even the regular social milieu of every journalist or regular contributor is something which is relevant to any social, political or personal issue to which they address themselves, especially when the media is in the middle of one of its periodic fits of morality. Too often there is a subtext to apparently casual remarks by an influential columnist which is understood only by those who know the gossip about his or her sexual history or personal loyalties.

Freedom-of-information principles should apply just as much to the Fourth Estate as to the other estates. There has been some informal commencement of this by an ex-journalist and ex-political staffer, Stephen Mayne, who has begun on his Web site (www.crikey.com.au) to publish lists of journalists who are former political staffers, public relations officers, etc.

He has also shown the naivete of most journalists by listing "lilywhites" — journalists who have never had a real job and who know nothing about working life in private industry, public institutions, or the bureaucracy. But at least it is a start. If journalists are to benefit from "shield" laws to protect their sources, they should lose the protection of the defamation laws with respect to their own history and behaviour.

And of course by writing this I am risking retaliation, derision and abuse — it is already apparent in the occasional snide comment or attempted denigration. Go ahead. I won't sue — except perhaps in case of deliberate and malicious falsehood.

— Padraic P. McGuinness
ppmcg@ozemail.com.au