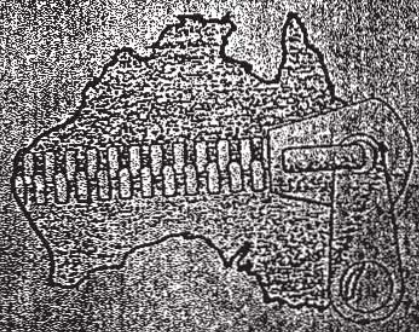
Received from Dr de Maria for public hearing 12/5/00 (not tabled during hearing)

Submission No 167

OH FREEDOM!



Evidence of Dr William De Maria
Centre for Public Administration
The University of Queensland
12 May 2000

Queensland Legislative Assembly
Legal, Constitutional and Administrative Review Committee
Review of the *Freedom of Information Act 1992* (Qld).

Introduction

I would like to thank the committee for the invitation it has extended to me today to assist in this the first real review of the Queensland *Freedom of Information Act*. I am sure members of the committee fully recognise the gravity of the task at hand. Here today you are on the peoples business; to consider whether the current FOI scheme aids and abets the hallowed processes of democracy. That has to be your only question. It is a difficult question for government. Woodrow Wilson, the 28th President of the USA once said that "Freedom has never come from government. Freedom has always come from the subjects of government..."[1]

You have received 110 submissions in the first round. The majority of these are from organised interests in the community, stakeholders if you like. Without taking anything away from these organisational presentations, it is absolutely imperative that the voice of ordinary Queenslanders, the "subjects of government", remains firm and heard in this process[2]. People, more then ever need, seek, indeed demand accountable, responsive and transparent government. You could be part of that. Or you could conduct yourself in such a way that you let the people down.

By that I mean this. Your Discussion Paper No. 1 is a very good document. It is a carefully researched and clearly presented summary of most of the major issues facing modern governments when they review or enact FOI statutes. I would like to acknowledge the highly professional work of your research director Kerryn Newton and her Secretariat staff in this important project. But I have a feeling that this is as good as it is going to get. To respond to some of the far-reaching calls for FOI reform, you as a committee will have to make some pretty courageous recommendations. And be there to argue, explain, support and above all protect those positions from the opponents of openness as your proposals take the rocky road to legislative reform.

I say this because the Queensland FOI Act, is, in my view a mediocre statute. Unlike some of the organisational submissions received by the committee, which proclaim the Act is working OK, or perhaps may need just a bit of re-dialing, I believe the Act needs a major re-alignment. If I am right about this then the committee has a long road to walk.

To very briefly summarise my view of the Act I would make these points:

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[1] Speech to the New York Press Club, 9 September 1912.

[2] That was not the case in May 1995, when the government, smarting from community outrage at the decision it took on 23 March to further tighten up the cabinet document exemption, decided to secretly review the FOI Act through an inter-departmental committee chaired by the Attorney Generals Department.

- One of the many negative inheritances from our British history has been the obsession with official secrecy.[1] Through the generations that obsession has poisoned the wells of democracy. That fixation is still very much a part of public life in Australia[2], and some would say particularly in Queensland. When you take the long historical view of official secrecy, the Queensland FOI Act is an important but small step on the road to openness.[3] The question now is of course, what is the next step?

- The Act has a 1980s feel to it. It was conceived in the latter part of that decade as a response to an unusual level of *mobilised* dissatisfaction about the way government does business. Now, in 2000, we have government doing very different business. A government of service-deliverers is now mutating into a government of traders. The FOI Act has not kept up with this development.

- Conceived in the late 1980s, born in the early 1990s, the Queensland FOI Act reflected the profile of official power present at the time. In the deliberative process managed by the Electoral and Administrative Review Commission in the lead up to the Act a quiet yet herculean battle took place between vested bureaucratic, judicial and political interests and the people about the extent and the nature of the freedoms to be put into the Act. Some say the Act is a compromise between these interests. I am not one of these people. The Act has the influence of officials all over it.

I have been asked to specifically address the committee on five matters:

- **Commercial in Confidence**
- **Oversight of administration of the FOI Act**
- **Information Commissioner model**
- **Proactive FOI (and the parallel issue of techno-access)**
- **The general approach to exemptions.**

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[1] The United Kingdom is one of the last western countries to implement freedom of information legislation. As I write the UK bill is in the House of Lords, having reached one of its final stages before Royal Assent. The bill, despite some last minute improvements, is still the subject of a good deal of criticism for being so narrowly cast. For a good running critique of the bill see UK Campaign for the Freedom of Information (www.cfoi.org. uk).

[2] See G. Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond,* (Melbourne University Press, Melbourne, 2000).

[3] It is sobering to note that the platform of "open government" was used only for the first time in Australia in the 1972 Federal election campaign.

Before I move to the major part of my evidence I would just like to mention some innovations occurring overseas as an example of what can be done when governments have a passion for freedom of information.

- On 26 April 2000 the Welsh Cabinet minutes were published, and posted on the internet[1], six weeks after the cabinet meeting took place. Compare this to the disgraceful behaviour of the Queensland Government in November 1993 and March 1995, when they turned the s36 Cabinet documents exemption into a capacious vacuum cleaner, immorally sucking documents out of the public arena.

- A large number of briefing papers to ministers are regularly published in New Zealand under its world beater FOI legislation, the *Official Information Act.*[2] Compare this to the 7800 deliberative process exemptions claimed under the Queensland FOI Act in 1996-97[3].

- Under Ireland"s *Freedom of Information Act* factual and statistical material, as well as scientific and technical advice and performance and efficiency studies that form part of the determination of government policy *cannot* be withheld under the deliberative processes exemption[4].

- The Governor of Florida announced in March 1999 new rules which require the governor's office to give notice of, and to open, the meetings between the Governor and the House Speaker, the Senate President, or between the Governor and at least three legislators.[5]

- A bill will go before the Florida Legislature this year that would make public corruption investigation records available after three years.[6] Compare this to the Queensland Act where class exemptions exist with respect to: the parliamentary judges commissions of inquiry (s

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[1] The Welsh Cabinet minutes can be found at www.assembly.wales.gov.uk/cabinet/minutes/130300.html. According to the Assembly, "the minutes are published unedited except for any references to information received in confidence from individuals, companies, the UK and foreign governments and the other devolved administrations" [Scottish and Northern Ireland Assemblies] .

[2] See Judith Aitkin's comments in A. McDonald & G. Terrill (eds), *Open Government, Freedom of Information and Privacy* (Macmillan, London, 1998).

[3] Queensland Department of Justice, *Freedom of Information Annual Report,* Appendix F.

[4] S.20 *Freedom of Information (IRE).* A similar provision is to be found in proposals published by the Scotish Cabinet on 25 November 1999. See *An Open Scotland,* published by the Scottish Executive and found at www.scotland.gov.uk/library2/doc07/opsc-00.htm

[5] Brechner Centre for Freedom of Information, *The Brechner Report*, Vol.23, No. 3, March 1999

[6] Important records and evidence of recent official inquiries in Queensland still remain outside the public reach. I have in mind the confidential report of the Carter Inquiry into ward 10B Townsville Hospital, **certain parts of fitzgerald – check, and basil stafford – check wit Therese at CJC**

11(1)(c)); the Fitzgerald Commission (s11(1)(h)); and commissions of inquiry (s11(1)(i)).

Commercial-in-Confidence (CIC)

- Senator John Hogg (ALP QLD), on the Senate Estimates Committee, wants information on accommodation for AusAID funded overseas students.
- The forthcoming 2000 Olympics is costing the Australian taxpayer heaps. What is in the host city contract?
- Eleven people died in privatised prisons in Victoria in 1997. How did they die?
- The Beattie Government cuts a deal with Virgin Airlines. What was in the deal?
- The water privatisation contract in South Australia runs for 20 years. What is in it?
- The Federal Government's Job Network involves one of the largest government outsourcing contracts in the world. What is in the contract?
- In 1993 the Kennett Government announced that it would outsource all non-emergency ambulance services in Victoria. What was the nature of that arrangement?
- Under a 20 year contract the private company Australian Health Care will run the Latrobe Valley Regional Hospital. What is the nature of this arrangement?

These examples (and there are many more to be had), have one thing in common. All attempts to answer the questions have been blocked by a single excuse "commercial-in-confidence". These matters have been put beyond the reach of the public, with the Orwellian excuse that it is not in our "interest" to know these things.

The CIC blockade in FOI Acts in Australia represents the third hit that FOI Acts have had to sustain over their separate histories. The first was the over-usage of the "deliberative process" exemption. The second (and Queensland and Victoria are famous for this one) was the abuse of the "cabinet papers" exemption. Unless amendments unglove commercial-in-confidence this third hit could be the king hit that finally destroys (diminishing) public confidence in FOI. Why? Three reasons.

First the exemption is used excessively. We are not talking about a rarely used blockade here. In 1997 the CIC exemption was used by FOI administrators in Queensland 21,242 times[1]. In the same period Victorian FOI administrators used

[1] W. De Maria, "Revealing State Secrets", *Courier Mail*, 12 April 1999, p.13; W. De Maria, "Democracy in Eclipse", *Courier Mail*, 5 January 2000, p.11. Statistics from Queensland Department of Justice, *Freedom of Information Act, Annual Report*, 1996-96, Appendix F.

the CIC exemption 242 times. What we have in Queensland at present is an administrative practice that has been allowed to get to plague proportions.

Secondly the exemption, because of its nature, can disrupt the democratic process more so then say the embargo on release of personal information to second parties, because the CIC exemption blocks our fundamental right to know government (our) business.

Thirdly it has now been demonstrated that the administration of the CIC exemption is usually accompanied by some pretty gross ethical conduct. Two examples come to mind. The first concerns the tendered-out Victorian ambulance service that I spoke of earlier. The tendering process is now the subject of a royal commission. My point goes back to earlier attempts to put the tender process on the public record. The Victorian Government refused saying it wanted to have individual negotiations with each company and thereby come to separate agreements. Publicising these agreements, it argued, would give the parties knowledge of their competitors tenders. However when the Victorian Civil and Administrative Tribunal ordered the release of the tender documents it was found that all the companies got exactly the same contract, and were paid the same amount[1]. Official lying for the sake of a deal!

The second example of how the CIC acts as a magnet for official wrongdoing (over and above the basic wrong of refusing access to the information in the first place I might add) comes from the debacle of privatising the Port Macquarie Base Hospital. Access to a report comparing the running costs of this hospital with seven other hospitals in NSW was denied using the CIC exemption. The NSW Health Department and Healthcare of Australia (a Mayne-Nickless subsidiary) each claimed that the other objected to the release of the contracts. Clearly someone was lying.

Commercial-in-Confidence and the GOC Exemptions: Locating the Public Interest

Picture if you will Robert Gordon Menzies rising to his feet on that fate-charged night of 3 September 1939 and announcing...that the Argentine ant had been discovered in Melbourne. No he did not do that (well not at that time anyway). What Menzies did was to announce that Australia was at war with Germany. It seems obvious that Menzies was acting in the public interest by telling the people that war had started. Perhaps it could have gone the other way. Menzies may have received advice that it was in the public interest *not* for the people to know that Australia was at war. Such an announcement, he could have been advised would have created widespread panic, a run on bank deposits, and a massive

[1] ABC Radio, *Background Briefing*, "Shrinking Democracy", 1 November 1998.

exodus to the countryside. "No, better stick to the Argentine ant story Mr Prime Minister", he may well have been advised.

This little story takes to implausible conclusion a view that the definition of the public interest is a contestable terrain of broken lances and overturned gun carriages. It has and is fought over from the smallest tribunal to the highest court in the land. Politicians pepper their speeches with it, regulatory authorities try and protect it, and newspapers spin the message of moral outrage in their editorials when they think it has been injured.

But what is it? I'm afraid I'm a bit of an agnostic when it comes to believing in a *definable* public interest. I'm not at the atheist stage yet because while I don't really understand what "public" means, I am a little more confident in understanding what "interest" means. That's why I can understand putting chlorine in the public's drinking water is against their "interest" in health and wellbeing. But when you leave those grand unities (we *all* drink water), the aforementioned battles start. Where, for example is the public interest in the mandatory sentencing debate? There are many, (as one would expect in our atomised society) and that's the problem. So many, that public interest(s) becomes a campaign banner, not a unifying moral beacon.

If it is not definable at the micro-level then it is *assumable*. People in positions of power are allowed to assume the public interest, and often do so in ways that give us no recourse to appeal. Once these assumptions are made it is very difficult for us to argue against them.

The **Virgin Airlines Case** is a good practical example of the assumption of the public interest. On the 15th March this year the Premier, Peter Beattie, made a ministerial statement in the Legislative Assembly about his government's success in securing Brisbane as an Australian base for the British airline company Virgin. He referred in very broad detail to the nature of the five year deal struck between the Queensland Government and Virgin Airlines. The Premier went no further with the facts. He explained:

> If we were to release the full details if every aspect [of the deal] that I already described to the House this morning, it would cost Queensland taxpayers millions. The reason that it would cost Queensland taxpayers millions is this: every time the Queensland Government sought to encourage another firm to locate here, the terms and conditions of the Virgin deal would be used as a benchmark. It would remove our ability to negotiate. It would remove this State's competitive and commercial ability to attract more businesses here and more jobs. I know that from time to time there are those who will have their criticisms of it, but this is about a modern government doing business in a modern, competitive world. It would cost – and I stress this – millions of dollars to taxpayers if we revealed all of those details because every other firm would use that as

a starting base for negotiations.[1]

Because no one outside the contract has asked for it, being refused[2], and then appealed, we do not know whether the Premier's refusal to release the details of the deal was legal or not.

A recent decision of the Western Australian Information Commissioner[3] involving Elle Macpherson, would indicate that the Premier's refusal to publicise the Virgin contract may have been wrong at law, and a challenge to the decision, had it occurred, may well have been successful.

The Queensland Information Commissioner (ICQ) has decided a number of CIC appeals in the last few years in which he too, like his Western Australian colleague, has recognised that the CIC exemption claim should not be made lightly.[4] In 1995 he refused an application from the well known North Queensland developer Keith Williams to keep secret correspondence between his company Cardwell Properties and Ministers of the Crown and various

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[1] Queensland Legislative Assembly, *Hansard,* 15 March 2000, p. 339.

[2] The Auditor-General is currently investigating the Virgin deal, so I presume he has a copy of the contract.

[3] In *West Australian Newspapers Limited and Western Australian Tourism Commission* (D0101998, 28 April 1998). In November 1996 the Western Australian Tourism Commission (WATC) contracted with the international Australian celebrity Elle Macpherson to appear in a campaign to bring more tourists to Western Australia. The arrangement was to include WATCs sponsorship of a yacht that would be manned by the Elle Racing Team and would compete in the prestigious Whitbread Round the World Race. The West Australian newspaper sought details of the contract and related documentation under the WA FOI Act. The newspaper was refused most of its request and after an internal review took the matter to the Western Australian Information Commission for external review. By the time the matter had reached this level of appeal 55 documents were in contention. WATC argued against the release of these documents on a number of grounds. Of interest here is the CIC exemption. Clauses 4(2) & (3) of the WA FOI Act say;

> 2) Matter is exempt matter if its disclosure –
> a) would reveal information (other than trade secrets) that has a commercial value to a person; and
> b) or could reasonably be expected to destroy or diminish that commercial value.
>
> 3) Matter is exempt matter if its disclosure –
> a) would reveal information ...about the business, professional, commercial or financial affairs of a person; and;
> b) and could reasonably expect to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the government or to an agency.

WATC failed to convince the Information Commissioner that scenarios envisaged in Clause 4 (2) (b) and Clause 4 (3) (b) would flow if the contract material was released. Accordingly she ordered the release of all of the 55 documents with some blackouts for personal information.

[4] See for example: *Re Cannon and Australian Quality Eggs Farm* (1994) 1 QAR 491; *Re B and Brisbane North Regional Authority* (1994) 1 QAR 279; *Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority* (1995) 3 QAR 132; *Re Queensland Gridiron Football League Inc and Department of Tourism, Sport and Racing* (1994) 2 QAR 230; *Dalrymple Shire Council and Department of Main Roads,* decision no. 98010, 28 September 1998.

departments over Williams' proposed Oyster Point development.[1] In that decision the ICQ said:

> ...public interest considerations favouring disclosure of the documents in issue are of such weight that disclosure "would, on balance, be in the public interest". This is because legislative restrictions imposed upon development...reflect a public interest in regulating land use and to that end, government agencies and officials...act on behalf of the people of Queensland. Accordingly there is a public interest in enhancing the accountability of government agencies whose functions are connected with large scale developments (like this one) which are likely to have a substantial social, economic and environmental on a region.[2]

It seems that the wording of the CIC exemption in the Queensland FOI Act, along with the string of CIC cases that I have mentioned, provide mechanisms strong enough to stop governments avoiding their accountability obligations. If that is the case why is the exemption invoked so frequently?

As the government-as-trader emerges it will place more emphasis on CIC to keep its dealings out of the public arena. The growth in CIC exemptions is also to do with the fact that the appeal process is slow and over-legalistic. So when the Premier says to the *Courier Mail* that they cant have the Virgin contract the newspaper then must decide whether an appeal fight that could take years is consistent with their brief to provide contemporary news. There are very few what could be called freedom of information public policy appeals. Only 4 journalists got as far as the ICQ in 1998-99. Similarly only 6 citizen or lobby groups went that far.[3]

Recommendation A

Short Advice

When public officials (elected or non-elected) advise (in for example an answer to a parliamentary question, or official correspondence) that government information is to be withheld and cite the CIC exemption, the requester (or an interested party, eg media) may apply to the Information Commissioner for a non-enforceable *short advice* on whether there is a *prima facie* reason for withholding the information. This advice must be tendered by the Information Commissioner within three days of receiving the request to do so[4]. If this recommendation

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[1] *Re Cardwell Properties and Department of the Premier, Economic and Trade Development,* (1995) 2 QAR 671.

[2] Ibid, p. 673.

[3] Queensland Information Commissioner, *Annual Report*, 1998-99, p. 15.

[4] This recommendation is similar to the one recently put forward by the Public Accounts and Estimates Committee of the Victorian Parliament. In its report *Commercial in Confidence and the Public Interest* (Victorian Government Printer, Melbourne, March 2000).

ever gets beyond the howl of predictable protest, and works, it could be expanded to all other access disputes.

Recommendation B

All government contracts should contain a standard clause which states that the contents of contracts are subject to legal requirements concerning legal disclosure and are *prima facie* public.[1]

Recommendation C

All documents generated for the purpose of winning government contract, including official advises and technical assessments, are also subject to legal requirements concerning legal disclosure and are *prima facie* public.[2]This recommendation extends to unsuccessful and withdrawn tenders.

Recommendation D

Government contracts that include confidentiality clauses should be submitted to the Information Commission for review. The ICQ is only empowered to consider submissions from the private contractor, who has the onus of proving that disclosure would *substantially* effect economic interests.

Recommendation E

Where information is approved by the ICQ to be kept confidential, a minimum time shall be set, after which the information is made public.[3]

There are two other points about the **Virgin Airline Case** that cry out for comment. The point of departure is the government's view that we the people should not know what was in the deal. But what about accountability you ask? One defense from the government side is that there is sufficient accountability in the public regulation of business, as implemented by, among others, the

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Recommendation 5.9

a) Where information is withheld from a joint standing parliamentary committee ...the reasoning behind the decision must be provided in writing by the relevant minister to the committee.
b) A procedure should be put in place with the Ombudsman so that where a parliamentary committee finds the minister's reasoning inadequate, it may refer the matter to the Ombudsman who shall provide independent advice.

[1] This recommendation is the same as 5.11 from the Victorian Public Accounts and Estimates Committee (see above). For what contract information should be disclosed see recommendation 6.3.

[2] Ibid, recommendation partly modeled on recommendation 6.1.

[3] Ibid, recommendation modeled on recommendation 6.13.

Australian Securities and Investment Commission. In other words if Virgin gets out of line, the argument goes, there are sufficient powers to deal with that. Not so says the High Court. The *Hughes* decision of 3 May 2000 and the *Wakim* decision of last year have cast serious doubt on the enforcement of Corporations Law in Australia. Darryl Williams, the Federal Attorney General, and Joe Hockey, the Minister for Financial Services and Regulation has called for urgent legislative action.[1] In the meantime any future corporate wrongdoing by Virgin may go unchallenged because of this serious problem we have now of administering business law in Australia.

Another argument made by government when they defend their CIC decisions is that companies like Virgin must report to the Australian Securities and Investment Commission. If Virgin does not list on the Australian Stock Exchange then these reporting requirements are so minimal that they would not meet he requirements of public accountability. The problems in corporations law are all the more reason why all financial dealings between government and the private sector must be in the public domain.

For how else are we to judge whether the business decisions of government are the correct ones? Two questions that come to mind are:

- Was the government told by Virgin that soon after the secret deal was signed Virgin would be starting legal action all over Australia to stop small businesses using the Virgin label[2]?

- Does the government's financial sponsorship of Virgin impact on future allocations for welfare services (as an example)?

We may never know the answers to these questions.

If the CIC exemption craze wasn't bad enough, we now have to deal with a ***class CIC exemption*** as a result of a 1994 amendment to the FOI Act[3]. Listed Government Owned Corporations have always had their commercial information beyond the reach of the FOI Act. The 1994 amendment puts *all* their information (commercial or otherwise) beyond the Act. Unless the government does a radical policy change we can expect more GOCs to be spawned and quickly scurry to the shelter of s11A.

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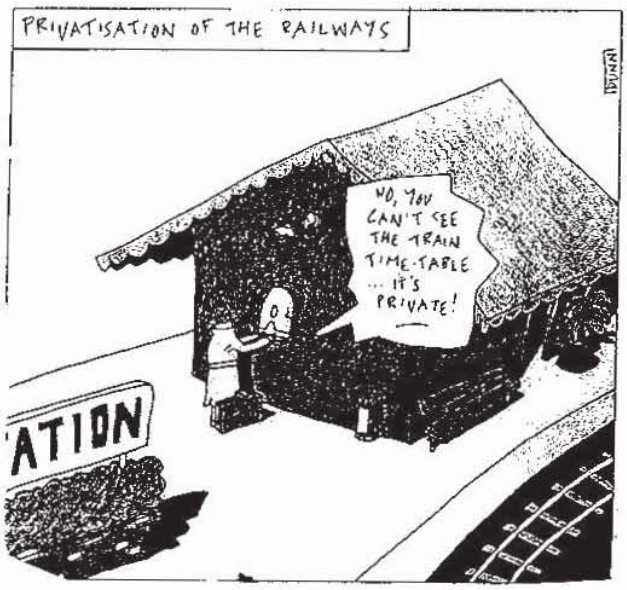
[1] Joint press release from Attorney General, and Minister for Financial Services and Regulation, 3 May 2000. See also *Australian*, 4 may 2000, p.2, and editorial.

[2] It is reported that Australian (I don't know how many in Queensland) businesses are being told by the international law firm Coudert Brothers to disconnect their phones, hand over stationery for destruction and pay the legal bills accrued in generating these demands. See *Weekend Australian*, 6-7 May 2000, p. 5.

[3] S.11a of the Queensland FOI Act was inserted by the *Queensland Investment Amendment Act 1994*.

Recommendation F

The ICQ's submission to the FOI Review makes a strong case against this practice of blanket commercial exemptions[1], as he has done in his previous annual reports.[2] I commend his arguments to the committee with the recommendation that *all* class CIC exemptions be repealed.



Oversight of the FOI Act and the Information Commissioner Model

> The Parliamentary Committee [for Electoral and Administrative Review recommends] ... that the decision to use an Information Commissioner rather than a tribunal for hearing of appeals is a matter which requires the closest scrutiny.[3]

This 1991 recommendation from the predecessor of the current Legal, Constitutional and Review Committee has never, to my knowledge, been considered. There are three questions I wish to highlight here:

- Should the debate on an administrative appeals tribunal for Queensland be re-opened?
- Parliamentary oversight of the FOI Act

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[1] Information Commissioner Queensland, Submission to the Legal, Constitutional and Administrative Review Committee's Review of the Queensland Freedom of Information Act, pp. 31-34.
[2] See for example paras. 3.63, 3.66, 3.67, 1994-95 *Annual Report;* para 3.15, 1996-97 *Annual Report.*
[3] Parliamentary Committee for Electoral and Administrative Review, *Freedom of Information for Queensland,* Queensland Legislative Assembly, April 1991, p.36.

- Improvements to the Information Commissioner model.

An AAT for Queensland?

Not much has been said about this concept since it was considered by the Electoral and Administrative Review Commission in the early 1990s. Given the major restructuring of Commonwealth administrative appeal mechanisms,[1] the time may be right for another look at this model of reviewing administrative decisions (which includes FOI reviews).

Recommendation G

The Committee take up the recommendation of its predecessor and evaluate the suitability of a single administrative appeals tribunal for Queensland. In so doing the Committee consider the Victorian Civil and Administrative Review Tribunal.

Parliamentary Oversight of the FOI Act.

It seems obvious that parliament's scrutiny of the FOI Act is virtually non-existent in practice. The present situation is that the Information Commissioner presents his annual report to the Speaker of the Legislative Assembly. This way the House receives the report. This is usually the end of the matter. Parliament has the unquestioned power to take more of a supervisory interest with respect to FOI.

Recommendation H

The Legal, Constitutional and Administrative Review Committee seek from the Legislative Assembly a five year standing brief to develop a higher level of parliamentary oversight of the Office of the Information Commissioner. (This assumes a s61 appointment is made next time, ensuring that the ICQ and the Queensland Ombudsman are separated.) It is further recommended that in developing a model of accountability for the ICQ that the committee take into account developments in the relationship between the Criminal Justice Commission and its

[1] On 3 February 1998 the Attorney-General announced that the Government proposed to amalgamate the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Immigration Review Tribunal (now the Migration Review Tribunal) and the Refugee Review Tribunal to create a single review body to be called the Administrative Review Tribunal. Since that announcement the internal review processes of the Department of Immigration and Multicultural Affairs and the Immigration Review Tribunal have merged to form the Migration Review Tribunal with effect from 1 June 1999. It is expected that the Administrative Review Tribunal will commence operations in February 2001.

parliamentary supervisor, the Parliamentary Criminal Justice Committee.

Information Commissioner Model.

This model was sold to the Queensland people (via endorsements by the Electoral and Administrative Review Commission[1] and the Parliamentary Committee for Electoral and Administrative Review[2]), on the basis that it was speedier and more efficient then courts or an administrative tribunal.[3] Yet seven years operating and the Information Commissioner is still assuring parliament he is getting on top of the appeal backlog![4]

The Information Commissioner model exists also in:

- Ireland
- Canada (non-binding rulings)
- Western Australia
- United Kingdom (Data Protection Commission to be known as Information Commissioner).
- Hungary (a Parliamentary Commissioner for Data Protection and Freedom of Information was established on 30 June 1995. It appears this office has no appeal functions).

The Queensland model is the only one that combines the role of Ombudsman and Information Commissioner[5]. I think that there are major problems because of this. I am on record for being critical of the Office of Ombudsman[6]. Part of my concern is to do with a tradition of conservatism that I believe operates in the work culture there. Other commentators have picked up and being critical of the Ombudsman's shyness about proactive action and the limited use of own motion investigations[7]. I suspect the current review of the Office will have to respond to additional problems about authoritarianism and low morale[8].

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[1] Electoral and Administrative Review Commission, *Freedom of Information,* 18 December 1990.
[2] Parliamentary Committee for Electoral and Administrative Review, *Freedom of Information for Queensland,* 18 April 1991.
[3] Ibid, point 3.11.5.
[4] Queensland Information Commissioner, *Annual Report,* 1998-99, covering letter to Speaker.
[5] S 61(2) of the Queensland FOI Act allows for a separately appointed information commissioner. Other jurisdiction (Tasmania and South Australia) provide IC type powers to their ombudsman without a separate position.
[6] W. De Maria, "Watchdogs and the Chihuahua Fantasy", *Courier Mail,* 3 May 1999, p.11.
[7] K. Wiltshire, *Report of the Strategic Review of the Queensland Ombudsman,* 24 April 1998, p. v. See also Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Review of the Report of the Strategic Review of the Queensland Ombudsman,* Report No. 14, July 1999, point 3.1.
[8] This review is being carried out Consultancy Bureau and its results are due shortly.

The fact that legally speaking the Ombudsman *is* the Information Commissioner but practically speaking he is not, gives us this weird animal, like Siamese twins with a single head. This must produce a great deal of confusion[1]. For example Ombudsman in other states and the Commonwealth have from time to time conducted special reports into the administration of the relevant FOI Acts[2]. Under the current Siamese arrangement this would be impossible, for it would be the Ombudsman reporting on himself. If I am right about my criticisms of the Office of Ombudsman then these criticisms can be pointed at the ICQ too.

One detects the same culture of conservatism in the administrative spirit of the ICQ. His Western Australian colleague seems to be a far more pro-active animal. She has for example started information audits on selected departments[3]. There are about the same number of staff (approximately 12 FTEs) in both the offices of the ICQ and the ICWA.

In his submission to the Committee the ICQ was right to express concern about the absence of "any central coordinating body charged with statutory responsibility to oversee the general administration of the FOI Act".[4]

Recommendation I

The Committee gives serious consideration to the separation of the Ombudsman and the Information Commission. The Office of the Information Commissioner to maintain its independence but be part of the Attorney Generals portfolio. The ICQ be given responsibility to oversight the FOI Act, to conduct audits similar to those carried out in Western Australia, to be responsible for ongoing training, to do information research, and to report to the Legal, Constitutional and Administrative Review Committee.

Other Models

A) Information Commissioner – Information Tribunal

This model is going into place in the United Kingdom. I would think seriously about this model for Queensland, but I would add the *cessation of all internal*

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[1] In his submission to the Committee the ICQ mentions that he does not respond to people who contact his office looking for various FOI facts, but refers them (to whom I wonder?). He is worried about a role conflict between disseminator and adjudicator of facts. The point is that people don't know this when they make contact.

[2] See for example Commonwealth Ombudsman, *Report on Investigation of Administration of Freedom of Information in Commonwealth Agencies,* June 1999.

[3] Last year she audited: the Ministry of the Premier and Cabinet, Ministry of Planning, WA Police Service, Ministry of Justice, and the Royal Perth Hospital. See Western Australian Information Commissioner, *Annual Report,* 1998-99.

[4] Queensland Information Commissioner, Submission to Legal, Constitutional and Administrative Review Committee review of Queensland FOI Act, p. 122.

reviews in departments.[1] FOI internal reviews would go straight to the Information Commissioner. ICQ's *non-binding* decisions would be reviewable by an information tribunal that would answer to parliament via the Legal, Constitutional and Administrative Review Committee.

It seems to me that there is too much internal reviewing going on across the Queensland public sector. This model is clearly management's choice; it is cheap, and above all, controllable. To my mind this is a model of decision review that is essentially flawed. The internal reviewer is a player in the same organisational milieu as the FOI officer who made the primary decision. One can understand, without condoning, a FOI officer getting the public interest test on allegedly exempt material mixed up with what is in the interests of the organisation. But the situation becomes intolerable when the internal reviewer follows the same path. The internal reviewer is more senior in the agency then the FOI officer. It stands to reason that he or she would have an even keener understanding of the concept of *organisational interest.* To put it squarely, many people simply do not trust internal review.[2]

B) Internal Review - Information Commissioner
Maintain internal review and give IC separation from Ombudsman. IC reports to and takes broad policy directions from Legal, Constitutional and Administrative Review Committee.

C) Internal Review – District Court
The massive USA freedom of information system runs on this model, so do the FOI systems in France and the Netherlands. It could not be anymore legalistic then the current practices of the ICQ

Recommendation J

The Committee looks carefully at these models (noting the preference for Model A) with a view to settling on one that transfers all FOI reviews of first instance to an external forum, and separates the ICQ from the Ombudsman.

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[1] Space prohibits me from properly arguing my case here. For further discussion see W. De Maria, *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia* (Wakefield Press, Adelaide, 1999).
[2] The dual Australian Law Reform Commission and Administrative Review Council Report *Open Government: A Review of the Federal Freedom of Information Act 1982*, offers some support for this proposal when it recommended that internal review should not be a precondition of an appeal to the Administrative Appeals Tribunal (p. 170).

Proactive FOI[1]

There is something profoundly undemocratic about citizens having to *ask* for official information; more so when the asking involves drawn out, formal and complicated processes. At present agencies can release information outside the Act.[2] It is a discretionary power, and as one would expect, given the culture of secrecy, rarely used with respect to policy material.

We need outside-the-Act *mandatory* release of official information. The discussion paper mentions the compulsory release provisions in the British Colombia *Freedom of Information and Protection of Privacy Act with respect to* material that informs the public of significant environmental and safety issues.[3] The news that a toxic leak has polluted parts of Kakadu National Park, came to us last week, one month after it happened. This is the sought of disclosure that would have been made instantly had mandatory *public* reporting provisions being in place.

Some examples from United Kingdom are:

- The Department of Trade and Industry published the economic analysis behind its competition white paper.

- The National Environment Research Council places a summary of key decisions taken by the Council, including background arguments, on its website within two working days of a Council meeting.

- The Ministry of Defence has published information on UK holdings of fissile material and has clarified the scale of the UK's operational nuclear stockpile, numbers of weapons deployed on Trident submarines and the cost of nuclear programs. All this material was previously highly classified.

- The Ministry of Defence has published information on British operations in Kosovo and Iraq.

- Reports of the Inspector of Prisons on individual prisons are published within six weeks of receipt by the Home Secretary.[4]

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[1] In the committee's discussion document this is referred to as "reversing the FOI concept". As this has a technical meaning in the Act, referring to the requirement to seek second party views on information release, I will use the term "proactive FOI".

[2] S 14 Queensland FOI Act.

[3] Discussion Paper No. 1, op cit, p, 13.

[4] Home Office (UK), *Freedom of Information: Consultation on Draft Legislation*, May 1999, p. 2.

Under the mid-1999 provisions for the UK *Freedom of Information Bill* mandatory disclosure was to be extended to include such things as:

- Schools to explain how they apply their admission criteria
- Police Forces to give out information about the conduct of inquiries (provided such does not compromise law enforcement)
- Health authorities to provide details about how they allocate resources between different areas
- Hospitals to publish how they prioritise waiting lists.[1]

These very important open government policies, it should be noted are coming out of the home of official secrecy.

With the internet and other communication technologies, the technicalities of making agency material available have been solved. The only thing that stands in the way is government policy.

Recommendation K

The Committee recommend the introduction of mandatory disclosure into the FOI Act.

Mandatory Disclosure and Requested Disclosure Data Banks

A web and e-mail based mandatory disclosure program could radically reduce the scope of the FOI Act. The Act would be the statutory gate through which contentious material would be released if it passed the public interest test. Either way the people will need more information as to what is held by agencies. I envisage an **Official Information Centre** similar to, but an expanded version of, the US Federal Information Center.

The Official Information Centre would hold electronic and paper based document banks showing *in detail* agency holdings. Each document would show whether it could be obtained under the mandatory disclosure program or the requested disclosure program. If access is under the former, the person simply puts in an electronic order. If access is under the latter, the application for the material is made electronically. Electronic search and order facilities would be available at the Official Information Centre and municipal and shire libraries. The Official Information Centre would be a sub-program of the Information Commissioner.

[1] Ibid, p. 3. The UK FOI Bill was being debated when this submission was being written. It is not known whether these provisions carried through to the Act.

Recommendation L

The Committee consider an Official Information Centre in the terms described above.

General Approach to Exemptions

My last recommendation is probably the most radical of all. I am advocating the deletion of *all* exemptions and exclusions within the Act. These would be replaced by a single *public harm test.* If the release of a requested document (as opposed to an ordered document under the recommended mandatory disclosure program) would, in the agency's view cause social harm, then the application is simply refused. The agency does not need to attempt to justify how refusal is consistent with an existing exemption. What it must do however is *precisely* state:

- What social harm would the release of the document cause?
- How real is the possibility of harm?
- To whom or to what, would the envisaged harm occur.?
- What factors it took into account in determining the above three.

Applicants would then have the same choice as they have now; accept the ruling or appeal it.

The current practice of justifying non-disclosure by applying the definition of exemptions to the material in question is, I submit, wrong on a number of scores:

- The specific codification of exemptions in the Act, the mere listing of them, gives them an *apriori* legitimacy. For example s38 allows non-disclosure if the requested material contains details of government-government dealings. Before the fact, that is before the decision to non-disclose is made, and subsequently tested on appeal, a presumption is alive that government-government dealings ought not be disclosed. No debate, no analysis, it is simply embraced as a presumption. If that is a strong presumption then it is relatively easy to block the material from release. Some FOI Acts (NSW, WA, SA) locate their exemptions in rear-located schedules. This gives some symbolic support to the idea that the purpose of the Acts is access not access/exemption.[1] That does not go far enough as far as I am concerned.

[1] Australian Law Reform Commission, Report No. 77 & Administrative Review Council, Report No. 40, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Canberra, 1995, p. 94.

- FOI administrators will tend to hedge their bets by citing as many exemptions as possible. I came across this a lot when I heard Commonwealth FOI appeals whilst a member of the Administrative Appeals Tribunal. The ICQ has also expressed his criticisms of this practice. He calls it the "scatter gun approach". It can be quite intimidating for a FOI applicant to receive a rejection citing numerous exempt provisions in the Act.

- FOI administrators supplant the concept of *public interest* with inappropriate criteria that masquerades as legitimate considerations.[1] It is common for the following excuses for non-disclosure to be given:

  - disclose would embarrass the government
  - disclosure would cause a loss of confidence in the government
  - disclosure would confuse the public
  - disclosure would cause unnecessary concern and panic

If enacted this suggestion would replace articulated exemptions with a single harm test, hence returning *public interest to the centre* of FOI.

Recommendation M

The Committee give serious consideration to deleting Part 3 Division 2 of the Queensland FOI Act and replacing it with a three-pronged harm test as outlined above.

Scope of the Act

I will briefly make a final point with reference to the scope of the Act. I have already stated my views about whole agency exemptions. The point I wish to make here concerns relating the Act to the concept of *public purpose*. If an organisation has a public purpose then it should be within the scope of the Act. For example education of students is a public purpose. Universities and the state school system are within the scope of the Act (admittedly because they are public institutions). Yet private schools are not. As a interim consideration the Committee could consider bringing within the scope of the Act any organisation that uses public funds. I would argue that this could eventually be extended to cover all public purpose organisations.

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[1] I refer the reader back to my earlier discussion of the public interest. The phase is not (cannot be?) judicially defined. (See *R v Trade Practices Tribunal: ex parte Tasmanian Brewers Ltd* (19710 123 CLR 361. This makes it easier to replace legitimate criteria for subjectively ascertaining it with illegitimate ones.

List of Recommendations

Recommendation A

When public officials (elected or non-elected) advise (in for example an answer to a parliamentary question, or official correspondence) that government information is to be withheld and cite the CIC exemption, the requester (or an interested party, eg media) may apply to the Information Commissioner for a non-enforceable *short advice* on whether there is a *prima facie* reason for withholding the information. This advice must be tendered by the Information Commissioner within three days of receiving the request to do so. If this recommendation ever gets beyond the howl of predictable protest, and works, it could be expanded to all other access disputes.

Recommendation B

All government contracts should contain a standard clause which states that the contents of contracts are subject to legal requirements concerning legal disclosure and are *prima facie* public.

Recommendation C

All documents generated for the purpose of winning government contract, including official advises and technical assessments, are also subject to legal requirements concerning legal disclosure and are *prima facie* public. This recommendation extends to unsuccessful and withdrawn tenders.

Recommendation D

Government contracts that include confidentiality clauses should be submitted to the Information Commission for review. The ICQ is only empowered to consider submissions from the private contractor, who has the onus of proving that disclosure would substantially effect economic interests.

Recommendation E

Where information is approved by the ICQ to be kept confidential, a minimum time shall be set, after which the information is made public.

Recommendation F

The ICQ's submission to the FOI Review makes a strong case against this practice of blanket commercial exemptions, as he has done in his previous annual reports. I commend his arguments to the committee with the recommendation that *all* class CIC exemptions be repealed.

Recommendation G

The Committee take up the recommendation of its predecessor and evaluate the suitability of a single administrative appeals tribunal for Queensland. In so doing the Committee consider the Victorian Civil and Administrative Review Tribunal.

Recommendation H

The Legal, Constitutional and Administrative Review Committee seek from the Legislative Assembly a five year standing brief to develop a higher level of parliamentary oversight of the Office of the Information Commissioner. (This assumes a s 61 appointment is made next time, ensuring that the ICQ and the Queensland Ombudsman are separated.) It is further recommended that in developing a model of accountability for the ICQ that the committee take into account developments in the relationship between the Criminal Justice Commission and its parliamentary supervisor, the Parliamentary Criminal Justice Committee.

Recommendation I

The Committee give serious consideration to the separation of the Ombudsman and the Information Commissioner. The Office of the Information Commissioner to maintain its independence but be part of the Attorney-General's portfolio responsibilities. The re-positioned ICQ would oversight the FOI Act, conduct audits similar to those carried out in Western Australian, engage in FOI research, be responsible for ongoing training, and report to the Legal, Constitutional and Administrative Review Committee.

Recommendation J

The Committee looks carefully at these models (noting the preference for Model A) with a view to settling on one that transfers all FOI reviews of first instance to an external forum, and separates the ICQ from the Ombudsman.
Recommendation K

The Committee recommend the introduction of mandatory disclosure into the FOI Act.

Recommendation L

The Committee consider an Official Information Centre in the terms described above.

Recommendation M

The Committee give serious consideration to deleting Part 3 Division 2 of the Queensland FOI Act and replacing it with a three-pronged harm test as outlined above.