

Auditor-General of Queensland

No 7

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Our ref: 00-3242 (2)
P Brahman 3405 1199

25 September 2007

Ms J Copley
Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House, George Street
BRISBANE QLD 4000

SCRUTINY OF
01 OCT 2007
LEGISLATION COMMITTEE

Dear Ms Copley

I refer to the Chair's letter of 23 August 2007 seeking submissions about four supplementary issues to the Committee's inquiry into the *Accessibility of Administrative Justice*.

Please find attached my submission to the Committee's inquiry.

In view of the previous interest by the Public Accounts Committee in the issue of commercial-in-confidence material and my relationship with that Committee, I seek the approval of your Committee to provide a copy of my submission to the Public Accounts Committee for its information.

If you would like to discuss this submission further, please contact me or have one of your officers contact Mr P Brahman, Assistant Auditor-General, on 3405 1199.

Yours faithfully



Glenn Poole
Auditor-General

RECEIVED
1 OCT 2007
LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE



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**Submission to the Legal, Administrative and Constitutional Review Committee
"The Accessibility of Administrative Justice"**

BACKGROUND

1. QAO receives a low volume of Freedom of Information (FOI) applications and has not had any significant involvement in judicial review. In relation to the issue of access to administrative justice, I receive correspondence from the public and other community organisations expressing their concerns or drawing my attention to matters they perceive require investigation about government agencies and their activities. Those issues within my mandate are investigated and are included in a report to Parliament where the audit discloses a matter which I consider to be significant.
2. Consequently, no comments have been offered in relation to Issue 1 – Appeals from administrative decisions, Issue 2 – Availability of information about administrative justice and Issue 3 – Proportional dispute resolution.
3. Regarding Issue 4 on the publication of details regarding contracts entered into by public sector agencies, in April 2002, the previous Auditor-General provided a submission to the Public Accounts Committee's inquiry into commercial-in-confidence arrangements. Parts of this submission were quoted by the Public Accounts Committee in their *Report No 61 Commercial-in-Confidence Arrangements*.
4. The following comments are provided for consideration by the Committee as part of this inquiry.

ISSUE 4 – PUBLICATION OF DETAILS REGARDING CONTRACTS ENTERED INTO BY PUBLIC SECTOR ENTITIES

5. A fundamental component in maintaining the confidence of the public in Government service delivery is transparency of arrangements. Commercial-in-confidence clauses restrict access to certain information. Instances where commercial-in-confidence clauses have been used include where it is considered that disclosure may adversely affect an organisation's competitive strategy, or for incentive schemes, where there is concern the public will be disadvantaged by the disclosure of this information. However a balance is required between these principles to ensure that public trust and confidence is not jeopardised.
6. In determining the information that should be released to the public and what should remain commercial-in-confidence, the benefit to the community of being provided with this information versus the benefit to the administration of the specific program in not disclosing this information, should be evaluated. These matters should be resolved through disclosure in the public interest unless there are compelling reasons not to do so. As a minimum standard, sufficient information should be disclosed as a basis for Parliamentary scrutiny.
7. Information should be made public unless there are justifiable reasons in the public interest for withholding such information. Adherence to minimum standards of disclosure could promote greater accountability, transparency and public trust in the process and the outcomes achieved and inherently in the State's public sector institutions. Minimum standards of disclosure could be set down in a policy to be issued by the Government which would be binding on Government entities entering into contracts and agreements with the private sector.
8. Sufficient guidance should be issued to support such a policy. This guidance should incorporate criteria allowing Government entities to make informed, consistent and transparent judgements about the circumstances for use of commercial-in-confidence clauses.



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9. An issue for consideration is the timing of the disclosure of information. In some instances the value of maintaining confidentiality erodes with the passage of time. Information which may need to be treated as confidential during certain transactions may be able to be released publicly once the transaction has been completed or after a period of time has elapsed.
10. Appropriate levels of disclosure could be achieved through use of the *Financial Management Standard 1997* to require publication, for example in the entity's annual report and on its website, of details of contracts entered into by Government entities with private providers which contain commercial-in-confidence clauses.
11. The reasons for information being deemed as commercial-in-confidence and not disclosed publicly (for example, to protect intellectual property rights or competitive advantage) should be documented. Any requirements for disclosure of commercial-in-confidence information or justification for the use of commercial-in-confidence clauses in contracts involving the public sector should be consistent with existing legal obligations.
12. For the Parliament and the public to be assured that commercial-in-confidence clauses are being used by Government entities only where necessary without unjustifiable diminution of transparency and accountability, the decision making process must be open to scrutiny by the Parliament and public. Contracts could make provision for access to contract-related information by the Parliament and its committees as is the case in the Commonwealth Government.

CONCLUSION

13. In summary, consideration should be given by the Committee whether it is in the public interest for the Government to issue a policy on commercial-in-confidence matters, balancing the need for transparency, accountability and the public interest with commercial imperatives. In the context of existing legislation (for example, FOI), this policy should be predicated on the basis that conflicts between commercial imperatives and transparency and accountability should be resolved in the public interest.
14. Such a policy could include or be supported by clear and appropriate guidelines to assist officers in the discharge of their obligations when dealing with commercial-in-confidence matters. This should include criteria for the appropriate classification of information as commercial-in-confidence.
15. Consideration should be given to the disclosure of contracts with commercial-in-confidence clauses in the annual reports and websites of Government entities, possibly through amendment to the *Financial Management Standard*. This should include -
 - disclosure of all contracts entered into by Government entities with private providers, regardless of value, which contain commercial-in-confidence clauses, and
 - where commercial-in-confidence clauses are used, the accountable officer or equivalent document the reasons for non-disclosure.