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17 September 2010

Ms Vicky Dunne MLA
The Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit,
Canberra City, ACT 2601

Inquiry into *Freedom of Information Act 1989*

1. Civil Liberties Australia welcomes the ACT Assembly's inquiry into the operation of the *Freedom of Information Act 1989.* Since the inception of the Act much has changed in society, including the ability for the community to participate in debate in a range of new medium and become aware of issues with technology enabling far better access to information. Also, the past 21 years has provided the opportunity as to how well the intent of the Act has translated into outcomes.

2. Other jurisdictions have also introduced or updated their requirements for access to information held by governments and their agencies, with these changes providing an opportunity for the Committee to introduce better practice within the ACT.

3. Across jurisdictions, what appears to be a common theme is the frustrating of the intent of the various Freedom of Information (FoI) laws by officials and governments to keep information confidential merely because it may cause embarrassment or engender public debate contrary to the desires of officials and others.

4. Also, there has in more recent times an obsession with secrecy and misapplying the intent of laws regarding national security to justify not releasing information that has a nebulous or nonexistent linkage to national security.

5. FoI should be about improving our democracy by ensuring open, transparent and accountable government and the Committee is encouraged to review the current legislation to better achieve that outcome.

Human Rights Act 2004

6. Since the FoI Act was introduced the Assembly has also introduced the *Human Rights Act 2004* (HR Act). The HR Act has amongst its provisions the encouragement of citizens to take part in public affairs. The ability to participate is founded on informed debate which, at its core, is the availability to access information to enable open and informed debate.

7. There should be a presumption that information should be available, especially when an agency of government is pursuing a public campaign to fashion community views. This does not always happen.

8. In January 2010 ACT Policing made comment on the prevalence of drugs as a major cause of road deaths in the ACT in 2009; this was reported upon in Canberra's media. This could be seen as an extension of and in support of ACT Policing's campaign to introduce random roadside drug testing in the Territory. The commentary was stated to draw on details held by police on Territory road deaths in 2009.

9. CLA sought to obtain under FOI the information on which ACT Policing made its assessment on 11 January 2010.

10. In releasing the information on 26 March 2010, ACT Policing only released part of the information and relied on Section 41(1)[1] to deny other data. In its application of Section 41(1), ACT Policing effectively only issued information relating to matters that had been determined by the Coroner. In effect, details of a significant number of road death incidents were not released.

11. The effect of the ACT Policing decision was to deny any scrutiny and validation of the claims made in the public arena by police in support of the proposition that drugs and alcohol were the primary causes of road death. Clearly, when ACT Policing were conducting a campaign on road deaths causes, with a view to fashioning public opinion, it should also provide its data to ensure that any consideration and debate is informed and is in context. The effect of denying the release of data on matters not determined by the Coroner had the effect of stifling debate and ensuring that the assertions were unchallengeable. The corollary of the outcome of releasing data should have been if it was unsuitable for release to the public because matters had not been determined by the Coroner then it should have been unsuitable for use by ACT Policing for the same reason.

12. The denial of documents was not pursued with the Tribunal as the delay in consideration by police of the FoI request had effectively ensured that the matter was not topical nor news worthy when partial details were made available. Clearly, the HR Act objectives were not considered in the context of this FoI request.

13. **Accordingly, CLA recommends that**

   a. **the Committee may wish to consider how the *Human Rights Act 2004* should interact with the *Freedom of Information Act 1989*; and**
   b. **what requirements should exist to ensure how information, available to government officials, should be used if it is not to be made available to the public on matters of public debate and discussion.**

WHO OWNS THE INFORMATION?

14. In the reviewing matters associated with freedom of information, one of the issues that the Committee should consider is 'who owns the information?'. There is a presumption that the Territory owns all the information collected in the course of undertaking Territory business and activities and that the current FOI Act governs that information.

15. However, in the above example the release of information by ACT Policing was actually undertaken by the Australian Federal Police (AFP) with reference to Commonwealth legislation. While Commonwealth and Territory legislation provisions are similar there should be no difference in the day to day release of information. However, over time, legislative requirements can drift apart and the requirements of the Territory's Human Rights Act (or any future legislative provisions) may also result in different considerations and outcomes. The current purchasing agreement on policing services does not address ownership of information collected by the AFP in the course of exercising its functions under the agreement. As noted in the annual reports of ACT Policing, the AFP considers it does not have to conform to some ACT legislative provisions[2], including the Territory's FOI Act.

[1] *Freedom of Information Act 1982* (Cth)

[2] See ACT Policing Annual Report 2008-09 – Section C.3 Public Interest Disclosure and Section C.4 Freedom of Information

16. There is no explicit legislative requirement that information obtained by persons and organisations acting under Territory legislation being required to abide also by the Territory's freedom of information provisions. In the case of ACT Policing it is pertinent to note that forms, reports etc completed by members of the public are headed Australian Federal Police not ACT Policing. By inference the data is provided to the AFP and not ACT Policing!

17. **It is recommended that the Committee consider legislative provisions that:**

   a. **Deem information obtained by the Australian Federal Police obtained in the capacity of ACT Policing or obtained in exercising provisions, functions or discretions afforded to the Australian Federal Police under Territory law, be deemed to be the property of the ACT Government; and**
   b. **Deem that information obtained by persons or organisations through the exercise of provisions, functions or discretions afforded under Territory law be deemed to be the property of the ACT Government.**

EXEMPT DOCUMENTS – INTERNAL WORKING DOCUMENTS

18. CLA is of the view that the exemption provision in section 36 of the FoI Act needs to be significantly narrowed in its scope. CLA's experience is that the government departments that are not committed to the objectives of the FoI Act all too frequently rely on section 36 as a "catchall provision" to prevent disclosure.

19. To properly exempt a document under section 36, a decision maker must satisfy a two-limbed test. First, the decision maker needs to first show that a document is an "internal working document". Given the breadth of the definition "internal working document", this limb of section 36 is almost always satisfied. Assuming that a document is an internal working document, the decision maker then needs to consider whether release of the document is "contrary to the public interest". It is this second limb of the test which is most problematic.

20. Decision makers frequently deem the release of material to be contrary to the public interest on the basis that: (a) its release might cause public servants to communicate in a less candid and frank manner; or (b) its release might be misleading or confusing.

<u>Frank and candid communication</u>

21. The legitimacy of this rationale has been the subject of conflicting jurisprudence. Its acceptance can be traced to the decisions of the Federal Court in *Re Wallace and the Director of Public Prosecutions* [2003] AATA 119 and *Re Terrill and the Department of Transport and Regional Services* [2003] AATA 52, although its legitimacy has been criticised in a number of significant decisions, including *Re McCarthy and Australian Telecommunications Commission* (1987) 13 ALD 1 and *Re Fallon Group Pty Ltd and Federal Commissioner of Taxation* (1995) 31 ATR 1164.

22. CLA notes that there is no empirical evidence supporting the contention that public servants who are acting in an objective and good faith basis will be less inclined to frankly and candidly discuss their work with their colleagues simply because they might be subject to scrutiny under the FoI Act.

23. The 'frankness and candour' argument is inconsistent with the objectives of the Act and the Government's newly proclaimed commitment to open and transparent Government.

24. It is obvious that, in the development of policy, multiple competing viewpoints will be advanced and discussed within the bureaucracy before a final settled position is reached. It is axiomatic that as part of this process a number of proposals, considerations and viewpoints will be considered but ultimately rejected. Indeed, it would be a cause of concern to many if such a rigorous process was not followed in the development of policy.

25. If public servants engage in the policy development process in an objective fashion and in good faith, it is difficult to see how the possibility of scrutiny could cause them to act in a less candid and fearless fashion. Given that it is to be expected that competing views and considerations will be canvassed during the policy formulation process, what harm can be caused in shedding light on this process? Surely it is in the public interest for citizens to have access to documents which show that policy has been developed in a rigorous fashion and all possible options have been properly considered by Government. The abuse of section 36 prevents policy development from occurring in an accountable fashion, with the result being that the public are deprived of the documents and material which, if released, would enable them to have confidence that the policy has been the subject of a thorough and development rigorous process.

26. CLA respectfully suggest that reasonable people would not be concerned that Government might have considered or entertained policies which, if adopted, might prove unpopular, so long as they were satisfied that the Government has been prudent in exploring and assessing all options. Moreover, controversial decisions, such as considering whether or not to allow the construction of a mosque in a particular area, expand the scope of sex education in schools, or permitting medicinal marijuana, would be less controversial if the citizenry could be satisfied that, whatever the decision might be, government has acted fairly and genuinely considered all relevant material before it. Yet it is exactly those types of controversial decisions which are most likely to cause consternation amongst the public which would be most likely to attract an exemption on public interest grounds.

27. It is a rudimentary characteristic of human nature that we only keep secret those things which would tend to cause us shame, embarrassment or damage. These same character traits are apposite when considering why decision makers deem the release of controversial documents to be contrary the public interest on the basis that it might inhibit frank or candid discussion. Certainly public servants will be less inclined to discuss matters frankly and candidly when they know they have approached a matter in an incompetent or incomplete manner, or have contrived to reach a certain outcome without acting in a balanced and objective manner. It may well be that public servants who invoke this basis for exempting documents or material from release are acting more to protect their own interest than the public interest.

28. Ultimately, public servants who have acted in good faith and in a professional manner should have nothing to fear from the scrutiny of their work which accompanies the release of documents under the FoI Act – the release of documents should only serve to vindicate their efforts and professionalism. It is only those who have something to hide who fear the scrutiny that follows from the release of documents.

29. Finally, and importantly, it needs to be remembered that even if the disclosure of a document might cause public servants to communicate in a frank and candid manner, it also might not. Documents should not be kept secret on the basis of an abstract possibility that this might occur.

Misleading and confusing

30. Documents are often exempted on the basis that their release might "cause unnecessary confusion and debate": see, for example, *Dunne and Barden v ACT Department of Education & Training* [2007] ACTAAT 26.

31. CLA submits that this ground for exempting documents is dangerous and inconsistent with the right to freedom of expression and the right to seek, receive and impart information and ideas of all kinds, as protected in section 16 of the *Human Rights Act 2004.*

32. It is extremely arrogant, if not downright dangerous to a healthy democracy, for public servants to presume to know which debate is necessary and which is unnecessary. No doubt public servants equate "unnecessary debate" with debate on matters which could cause embarrassment or discomfort for themselves. In a society which values the right to free expression as an important human right, it is questionable whether there can even be such a thing as "unnecessary debate".

33. **Accordingly, CLA recommends that section 36 of the FoI Act be amended to specify that the disclosure of a document is not contrary to the public interest only on the ground that:**

a. **its release might cause public servants to communicate in a less frank and candid manner;**
b. **its release might lead to confusion or unnecessary debate.**

EXEMPTION ON THE BASIS OF LEGAL PROFESSIONAL PRIVILEGE – SECTION 42

34. Section 42 of the FoI Act enables government to keep secret documents that it could claim legal professional privilege over in legal proceedings.

35. This provision is often used as a basis for decision makers to exempt documents that, if released, would cause no detriment to the proper working of government. All too often decision makers forget that just because they can claim the privilege, they are under no obligation to do so.

36. The rationales underpinning legal professional privilege become far more tenuous when invoked by government departments and agencies. As a general democratic principle, government should always act in an open and transparent manner. It is always in the public interest that information about government affairs and actions be in the public domain, even when this involves the publication of material that might embarrass a government. Such is the essence of a transparent democracy. As Mason J (as he then was) noted in relation to a Freedom of Information matter:

> …it can scarcely be a relevant determinant to the government that publication of material concerning its actions will merely expose it to public criticism and action. It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to the government when the only vice of that information is that it enables the public to discuss, review and criticise government action (*Commonwealth v John Fairfax and Son Ltd* (1980) 32 ALR 485).

37. The notion that privilege is necessary to promote the confidential disclosure of damaging material to a solicitor is not applicable to government because if they were genuinely committed to acting in an open transparent manner, as they should be, they would not be disposed to hiding or concealing information that may cause embarrassment in the first place. Neither would they feel compelled to keep such information confidential. They should therefore feel no need to only disclose embarrassing information under the cloak of confidentiality embodied in legal professional privilege, as they should be doing this regardless.

38. The idea that government agencies should not have private and confidential interests was articulated by Finn J in *Hughes Aircraft v Air Services Australia* (1997) 76 FCR 151 when discussing the Crown's obligations as a model litigant:

> As with any agency of government – and I do not mean by this that it is thereby within "the shield of the Crown" – it has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve… There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least insofar as this is consistent with its obligation to serve the public interest (or interests) for which it has been created…

39. It follows that, if government agencies should not ordinarily have confidential private interests, then one of the principle rationales for the privilege, being the protection of private interests through the confidential nature of the privilege, ceases to apply. The justification for extending the privilege to government departments and agencies therefore becomes far more tenuous.

40. CLA queries what public interest is served in exempting the release of documents under this section, particularly when litigation relevant to a request is finalised. CLA submits that there is no public interest in government agencies keeping secret their understanding of the law and legal issues in relation to a given matter based on legal advice they may have received. If citizens are to act within the law, or the very least not attract adverse treatment from government officials charged with enforcing the law, then surely they will benefit from knowing the government's understanding as to what the law is. Similarly, if government agencies are under a mistaken understanding of the law, then by having that understanding being publicly ascertainable, it is far morel likely that the agencies will be assisted in correcting their understanding from the debate that would follow.

41. **Accordingly, CLA recommends that:**

a. **As a general rule, government agencies should not enjoy what is currently known as the "advice" aspect of legal professional privilege;**

b. **Section 42 of the Freedom of Information Act be amended to provide that:**

   i. **it does not apply to the "advice" aspect of legal professional privilege; and**

   ii. **if material is privileged because it was prepared for litigation, then section 42 doesn't apply once the relevant litigation is complete.**

PAPER RECORDS IN THE ELECTRONIC ERA

42. An issue that the Committee should also be aware of relates to the availability of records. CLA is aware of an instance where emails constituted advice from the Department of Territory and Municipal Services (TAMS) to the Department of Education and Training (DET). DET incorporated that advice into the formulation of developing a position on the matter. Under the FoI request, DET released a range of documents, including some of the advice from TAMS. A follow-up FoI request to TAMS on the matter resulted in advice "*... that an officer of Roads ACT was the recipient of an email. This officer is no longer working in the ACT Government and it appears the email he received was never placed on a file"*. This response failed to address the email chain that followed nor that those emails were not retained nor that the advice provided in the emails was relied upon by DET in its considerations.

43. At issue is the increasing use of emails as a major means of communication and the systems and processes that should exist to capture and retain the content of such emails. Clearly, TAMS is still captive of the old paper based tradition of paper records and files even when the primary communication is becoming more electronic in its nature. Of concern to CLA is the process where emails and other records are held as part of the 'personal' drive/email folders of individuals and not the department. As illustrated in this instance, the departure of an employee will result in the records held on the member's drive and email folders being 'lost' to the department and the community. Clearly the principle needs to be reinforced that documents do not need to be on an official file of an agency to constitute documents of that agency.

44. For any positive and effective application of FoI there needs to be an effective mechanism to capture records that are subject to FoI requirements. As methods of communication continue to rapidly progress into electronic forms, there is a need to ensure that record capture methods also

progress simply, ideally automatically and completely. The retention of the vestiges of the paper era are proving to be inappropriate and, for the purposes of FoI, inaccurate of the official record.

45. It is also pertinent that the Australian Federal Police do not have a Records Management Plan in the form required by Territory Legislation and it manages ACT Policing records in accordance with the AFP's own internal requirements[3].

46. **It is recommended that the Committee, as part of this inquiry, make comment and recommendations on the form and accuracy of record keeping for the purposes of the *FoI Act 1989*.**

TIMELINESS OF INFORMATION

47. As noted in the earlier ACT Policing example, there was a delay of some 10 weeks between the request and release of information under the FoI Act. ACT Policing handled the request in a 'serial' fashion in that it determined whether the exemption sought by CLA for fees and charges would be granted before then considering the request. This approach has the effect of delaying any processing of a FoI request for many weeks and, in the minds of the Agency, the 'clock' only started after the determination was made; this is contrary to the guidelines issued by the Department of Prime Minister and Cabinet on processing procedures[4]. Effectively a 30 day process was extended to 75 days.

48. The process followed by ACT Policing effectively ensured that any information released would be well past the point when the matter had any topical value in a debate/discussion within the community and when the matter was beyond media interest. This is disingenuous when ACT Policing initiated the debate and its action effectively stifled discussion.

49. Invariably there are other examples where individuals and the media are subject to such delaying tactics to ensure that the momentum for discussion and debate is lost to the public and that the campaign by an agency or government is left unchallenged or subject to a lesser debate than should have occurred in an open and transparent democracy.

PUBLIC DISCUSSIONS

50. In 2008 government agencies sought public submissions on discussion papers that had been released for community consultation viz:

a. *Reforms to Court Jurisdiction, Committal Process and the Election for Judge Alone Trials* – Department of Justice and Community Safety; and
b. *Review of Alcohol and Drug Driving Laws* – Department of Territory and Municipal Services.

51. TAMS sought and published all submissions it received on its website as they were received, making them available for the subsequent debate that occurred in public and in the Assembly.

52. Conversely, JACS chose not to publish any submission made even though it had sought permission to make each submission made public. As the Committee would be aware, the matters subject to the JACS Discussion Paper have been the subject of widespread community, professional and media comment and have resulted in the passage of a number of legislation changes and Acts through the Assembly.

53. CLA sought access to the submission and was initially advised that they would be available, only to be subsequently advised that they would not be released. CLA made a formal FOI request on

[3] See ACT Policing Annual Report 2008-09 – Section C.16 Territory Records
[4] See http://www.dpmc.gov.au/foi/docs/FOI_principles_procedures.pdf para 6.12

7 November 2008 for all submissions and subsequent papers. The FoI request was finalised with the department on 9 June 2009.

54. JACS initially did not respond to the FoI request within the statutory period. CLA contacted the Chief Executive on 16 December 2008 and noted that JACS were statutorily deemed to have denied the request. However, CLA also indicated a willingness to negotiate the matter without invoking the statutory referral to the Tribunal. While JACS responded and released documents on 17 December 2008, it also exempted a range of documents and pages, including a decision to exempt the release of a listing of documents being exempted under Section 25(3).

55. CLA subsequently sought a review of the decision maker's decision on 13 January 2009. Following a further representation by CLA on 24 February 2009 on the progress of the review, an undertaking was made by the Chief Executive to respond in two parts with finalisation scheduled for 10 March 2009. Despite CLA efforts to obtain a status report on progress, by 24 April 2009 no information was forthcoming and the matter was also referred to the Ombudsman. JACS finally advised of the review outcome on 9 June 2009.

56. Of significance during this process was the ongoing active consideration by Government of a range of legislative amendments or new legislation directly related to the issues raised in the public discussion paper. The approach of JACS, prima facie, appeared to be aimed at frustrating the ability of stakeholders to be aware of comments and views held by others on matters of significance to the community; a stifling of any informed debate. The response to the FoI request clearly was shoddy, unprofessional and untimely. This matter was resolved, albeit, unsatisfactorily some twelve months after submissions were lodged on the discussion paper.

57. The outcome could not be any starker when compared with the TAMS approach to the release of papers. The subsequent community debate on drug driving and associated matters was informed and inclusive.

58. **CLA recommends that legislative provisions be enhanced to ensure that community involvement and debate be enhanced by the timely release of information.**

SUMMARY

59. CLA welcomes the Assembly's interest in ensuring that the current provisions of the Freedom of Information Act 1989 remain relevant and appropriate for the future. Advances in technology, the communities' accessibility to information and new mediums for debate and information sharing, all require that the Act continues to be relevant and responsive to the needs of the community.

Yours sincerely,

L Williamson

Lance Williamson
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