

Submission to Inquiry into the *Freedom of Information Act 1989*

Flynn Primary School Parents and Citizens Association Inc.

We make this submission on the basis of our experience of the current freedom of information (FOI) system in the ACT.

In our experience, there are some things the current system does well. Privacy is well protected. With a few exceptions, the ACT Government has taken a sensible and generous approach in not charging application of processing fees for FOI requests. The government should be commended on both points.

There are also areas in which there is substantial room for improvement. We strongly support the position proposed in the terms of reference for this inquiry: the default position should be that documents are available unless a compelling reason to the contrary can be established.

We advocate a greater move towards participative democracy through making available the documents of governance—without the need for someone to make an FOI request. Specifically, we suggest that the government should improve the wide release of the information used as a basis of government decisions, including online access and availability. This would improve transparency and foster community participation and bypass many of the concerns around FOI.

Either way, the government should improve FOI processes in line with the following recommendations:

- educate communities on how to access the FOI process for matters of public interest
- publish the results of FOI applications on the Internet
- provide more detail in the schedules accompanying the FOI response
- require an honest response to an FOI request
- reduce the scope of exemptions under ‘public interest’
- limit the scope of cabinet-in-confidence exemptions to a very limited set of cabinet documents and have the exemption expire at the end of each term of government.

RECOMMENDATIONS

1. Educate the community in how to access government information and FOI processes

An FOI request is needed when normal information processes have failed—the government of the day has already failed to release information that the public knows exists and is required for participative democracy. Educated communities know how to access that information, but what of the community that does not know how to use the FOI process to full advantage? Better communication and education is needed to ensure that communities are not left out of processes due to a lack of knowledge.

2. Publish documents released through FOI to the Internet

The optimum scenario is that documents are available on the Internet before an FOI request. This alone would remove the wasted duplication of effort seen when agencies need to respond to very similar FOI requests. It would also improve the standard of debate if all stakeholders were given equal access to documents. Obviously, this would not apply to FOI requests for personal information about individuals (for example, health records), but it would apply to matters of public interest (for example, school closures).

3. Provide more detail in the schedule

The schedule listing the documents to be released (and those withheld) would benefit from more detail. Some fairly basic details could easily be included as mandatory:

- the date of creation/latest modification of documents
- titles or names of documents
- full description of the content and purpose of a document if it is being withheld.

The FOI Act is currently not specific enough to ensure that this information is provided (alternatively, some public servants have not complied with the Act when preparing schedules for FOI requests). Change in this area would avoid the situation of documents being listed by a number (e.g. file 1234567), and then declared exempt—with no indication of what the documents are, their purpose, or even how many pages the file contains. The internal review process should not have to be used to obtain this information.

4. Requirement for clarity and honesty

Sadly, it seems that public servants need to be required to be honest and open to scrutiny when responding to FOI requests. Failings in this area include:

- declaring a document to be exempt because the information was ‘not verified or used’, even though it was ‘part of the early deliberative processes of the agency’
- failing to provide, or even list, all relevant documents.

The experience of the school closures and other processes over the past four years, proves that the current FOI Act, or related legislation is ineffective in ensuring clarity and honesty. One option is to impose, through the FOI Act, the same legal requirement to tell the truth as is required in Court—and with equivalent penalties for failing to do so.

The failings of the legislation do not reflect on all public servants who, on the most part can be expected to be honest and helpful.

5. Limit exemptions and define the ‘public interest’

The scope for withholding documents from release is currently far too broad and open to abuse by governments seeking to keep documents out of the public domain just because they are politically embarrassing.

This intentional suppression of information does nothing to reassure the public that contentious decisions are being made in the public interest.

We hope that this inquiry can achieve more in terms of improving governance. The terms of reference for this inquiry refer to the review of Queensland's FOI laws. We support most of the recommendations regarding factors that should be weighed in determining the public interest (pages 152 to 154).

The recommendations that are most relevant to our experience are that documents should be released if they:

- promote open discussion of public affairs
- reveal illegal, unlawful, inappropriate, unfair or the like conduct, or that public servants/government have acted maliciously or in bad faith
- reveal the reasons for a decision
- reveal the reasoning behind a decision and the context for it
- show the information used is incorrect, gratuitous, subjective, incomplete, out-of-date or misleading.

Significantly, the Queensland review proposed that the following should not influence whether a document is released or not:

- the document might embarrass the government
- the FOI applicant [or the public] might misinterpret or misunderstand the document
- the applicant might behave mischievously if they see the document
- the author of the document is a senior person.

We are in full support of these points including the full release of documents around school closures and other key governance decisions that are now having profound effects on ACT communities. These include increased financial burden on families, increased environmental costs and a lack of confidence in the process of government.

In regards to the Queensland review, our reservation is the recommendation that a document can be withheld because it 'might reveal the deliberative process of the agency'. In other words, the review suggests that a document shouldn't be released because the public might be able to work out what the government was thinking or doing.

This would have to be one of the most abused and misused reasons provided for withholding documents, in our experience. It is far too broad and, in a town the size of Canberra, all it does is foster mistrust, as truth about such matters quickly leaks into the community. It serves only to avoid accountability. If such a provision is to be maintained, it needs to be limited and the 'deliberative process' significantly limited by a carefully worded definition.

An argument that public servants will not write things down if exemptions like this are lifted is not valid. Our experience is that some already don't, so it couldn't make things any worse in those cases. However, most do follow good processes, and they have nothing to fear, and indeed have everything to gain, from keeping a paper trail. In actuality, a competent, apolitical

public servant should feel safe because their work is of a high standard of professionalism and it is well-documented as such.

The ACT is such a small jurisdiction: there is really no justification for applying a national-security level of secrecy to most matters of public interest.

6. Limit the scope of cabinet-in-confidence exemptions

There is much need for public debate about the scope of cabinet-in-confidence exemptions. Cabinet-in-confidence limits participative democracy and fosters mistrust of the government process.

Other than direct Cabinet documents—such as direct records of Cabinet meetings—there is a question about the need to withhold deliberative documents that could reveal the deliberations of Cabinet. If information is used by Cabinet to make a decision that affects the public, why shouldn't the public be able to access the same information? If early policy options are investigated, why shouldn't the public know what those options are and why they were adopted or tossed aside? Concerns about disrupting agency processes are easily overcome by releasing the documents soon after Cabinet has made its decision.

It might be in the political interests of a government that these documents are never released, but it would almost certainly be in the public's interest—and better access to this type of information would contribute to a higher standard of debate.

The Queensland review made this very point, suggesting also that the cabinet-in-confidence exemption could expire when a decision is made or, at least, at the end of each term of government. For example, why should the community have to wait until 2016 to see the Costello Review, given its key role in school closures and a host of other deleterious budget initiatives?

7. Case study: school closures

It will come as no surprise to this committee that one recent issue relating to Flynn P&C is the 2006 school closures. As part of that process, about 20,000 pages of documents were listed as part of various FOI requests made by three other parties (with duplicate requests being in addition to this). The number of dead trees from this alone justifies publishing public-interest FOI releases onto the Internet.

While the government might use the sheer volume of folios to say 'look, we are transparent', in reality, anything that could have helped schools understand what was going on was suppressed—firstly declared exempt, then resisted through internal review, resisted through an appeal, and finally kept hidden from view through an entirely inappropriate use of a conclusive certificate during an appeal to the Administrative Appeals Tribunal over the matter. The intention of FOI laws—to ensure a freedom to information—was well and truly thwarted.

This is not a trivial matter. Four years after the event, thousands of documents and part documents that could show why specific schools were listed and later closed still have not been made available. And these are crucial documents—they show the various options considered, the financial implications, the reasoning for favouring one school over another, the influence of land values, the misuse of students outcomes data, comparative costings for schools, targets for financial savings, the costs of upgrades, the social issues around certain schools (which closed anyway), the need to close certain schools if options in other regions were adopted, projections of excess capacity in regions, the reasons behind the timing of closure—in fact, they contain the information behind the propaganda the Minister used to push his school closures agenda. It extends far beyond the Costello Review. The secrecy substantially impeded the community's capacity to lobby effectively to keep their schools open, generating some of the community's anger and suspicion about secret reasons and back-room deals over which schools closed.

The reasons for withholding information included:

- *This document is a deliberative document that contains information that relies on particular assumptions that could lead to confusion and/or ill-informed debate.*
- *Release of the information might have the tendency to confuse the public*
- *... the information is, in part, in draft form, and was not a definitive position.*
- *It is not in the public interest to disclose information which concerns high-level advice that was never acted upon. Disclosure would create the misleading impression that certain policies were adopted that were in fact not adopted.*
- *This document contains handwritten notes taken by a senior officer in the department ...*
- *Disclosure would be contrary to the public interest, as it would cause unnecessary debate and confusion in the community*
- *It is not in the public interest to reveal Executive deliberations which were a precursor to Towards 2020 proposals.*
- *It is not in the public interest to release documents closely associated with the development of a submission to the Executive*
- *These notes canvass various options, some of which have not been followed ...*

Most of these are exactly the types of reasons the Queensland review said should not be used to withhold documents. The public was interested in the information withheld using these excuses; making it available would have improved the capacity of school communities to participate in the consultation process.

The lack of access to information sabotaged any claims the government might make about an open and transparent process. Having now seen some of the exempted documents (through court action), we can say that they should not have been withheld from the community. In fact, our ignorance of much of the information in the withheld documents made our consultation virtually meaningless. Unfortunately, we cannot disclose the contents of these documents because the government made us to sign an undertaking to not reveal their contents.

In line with the findings of the Queensland Review, the ACT Government should fully release to the public the documents related to school closures. These documents are not only in the

public interest but are vital to the future of communities, ACT finances, the environment, and the Assembly processes that are still being affected by those decisions. It is a matter of trust.

8. Conclusions

The attitude to information in some government departments means that a strong and effective FOI Act is needed to make sure that relevant information is widely available. The current Act does not serve the public interest nearly as well as it could, being too broad and lacking crucial definitions. We strongly recommend a move towards a default of Available Information.

The ACT Government has an opportunity to take national leadership and enact the most effective and useful FOI laws in Australia. As part of this the ACT Government can improve transparency and restore confidence in government by making openly available to the public the information behind decisions about schools, hospitals, roads, rates and rubbish. In an ideal world, this would improve the quality of such decisions, to the benefit of the public and the government of the day.