LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE FOR THE CHIEF MINISTER'S PORTFOLIO
(INCORPORATING THE PUBLIC ACCOUNTS COMMITTEE)

REPORT ON

DRAFT PRINCIPLES AND GUIDELINES FOR THE TREATMENT OF COMMERCIAL INFORMATION HELD BY ACT GOVERNMENT AGENCIES

Portfolio Committee Report No 2
October 1998

RESOLUTION OF APPOINTMENT

The Standing Committee for the Chief Minister’s Portfolio was appointed by the Legislative Assembly on 28 April 1998 to examine any matter under the responsibility of the Chief Minister’s portfolio. The Assembly also resolved that the committee perform the duties of a public accounts committee, specifically:

(a) to examine:

- (i) the accounts of the receipts and expenditure of the Australian Capital Territory;
- (ii) the financial affairs of authorities of the Australian Capital Territory; and
- (iii) all reports of the Auditor-General which have been laid before the Assembly;

(b) to report to the Assembly, with such comments as it thinks fit, on any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and

(c) to inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question.

MEMBERSHIP OF THE COMMITTEE

Mr Ted Quinlan MLA Committee Chair

Mr Trevor Kaine MLA Deputy Committee Chair

Mr Greg Cornwell MLA

Secretary: Bill Symington

1. INTRODUCTION

1.1. On 24 September 1998 the Assembly resolved that:

> The Standing Committee for the Chief Minister's Portfolio inquire into and report on by the last sitting day in 1998, the paper entitled *Draft Principles and Guidelines for the Treatment of Commercial Information held by ACT Government Agencies*

Background

1.2. The issue of the availability of documents classified by the Government as commercial-in-confidence has been raised on a number of occasions in previous Assemblies.

1.3. The Select Committee on Estimates 1997-98, in its December 1997 report on the Annual and Financial Reports for the Year 1996-97, noted a readiness by Ministers and officers to claim that the provision of information sought by the committee would be subject to the constraints of commercial-in-confidence where there was a contractual situation between the government and the private sector.[1]

1.4. That committee expressed concern that the Assembly can be denied the opportunity to assess the worth of contractual arrangements in these circumstances, although it noted it had the power to send for papers and records.

1.5. The Standing Committee on Public Accounts (PAC) in its December 1997 report on the Industry Assistance Program and the Business Incentive Scheme addressed the issue of commercial-in-confidence. That committee emphasised that confidentiality of material relevant to the inquiry, but also relevant to the commercial operations of private companies, would be respected. Although the department concerned was given the opportunity to provide information on a confidential basis, it would not do so without the agreement of the companies concerned and this agreement was not forthcoming.[2]

1.6. The PAC considered the non-disclosure of such information raised an important matter of principle in relation to the role and function of the committee in discharging its responsibility to the Assembly. The committee recognised the sensitivity of confidential company information but asserted that where that information is the basis for receiving public assistance the

[1] page 13
[2] pp 9-11

committee was entitled to assess it in order to determine the benefit to the ACT.

1.7. Most recently, the Chair of this committee raised with the Chief Minister during a public hearing of the Select Committee on Estimates 1998-99 on the Business Incentive Scheme the possibility of setting up some process whereby, in the interests of maintaining public accountability, the Assembly could access commercial-in-confidence material. There was an informal understanding that this committee would pursue the matter.[3]

1.8. In its subsequent consideration of the issue this committee formed an interim position that Members of the Assembly cannot be expected to forego the right to comment on, or debate, matters which are classified as commercial-in-confidence where there is a clear public interest need that the issues be publicly scrutinised.

1.9. Nevertheless, the committee accepted that public exposure of detailed arrangements could be detrimental to the government's position in future negotiations. These views were put to the Chief Minister with the request that a review be implemented aimed at maximising the flow of information to the Assembly while protecting those few matters which must be covered by the commercial-in-confidence shield.[4]

1.10. The Chief Minister responded by advising that draft guidelines and principles for the treatment of commercial-in-confidence information were being reviewed and would be referred to the committee for some feedback.[5]

2. DRAFT GUIDELINES AND PRINCIPLES (THE PAPER)

General

2.1. The Paper (Attachment 1) enunciates guidelines for dealing with issues of confidentiality and commercial-in-confidence and in establishing appropriate balance between government accountability, the public interest and the rights of individuals and businesses which claim confidentiality for information provided to government.

2.2. The Paper is intended to establish a procedure for officers of the ACT public service in dealing with confidential information. With regard to the disclosure of such information, the procedures are complementary to those in

[3] transcript of the hearings, p209
[4] letter to the Chief Minister dated 18 August 1998
[5] letter from the Chief Minister dated 4 September 1998

the Participation in Public Inquiries Handbook which applies to officers of the ACT public service. The proposed procedures also link to the requirements of the *Freedom of Information Act 1989* (relevant extracts of which are appended to Attachment 1), the *Privacy Act 1988* and the *Public Interest Disclosure Act 1994.*

2.3. The key principles of the Paper, guidelines, what constitutes commercial information, disclosure and consultation are spelt out in detail in Attachment 1 and, for the most part, the Paper is unexceptional in setting out the relevant guidelines. It follows that the committee has no difficulty in accepting the broad thrust of the draft guidelines as they apply to public disclosure of information and as a reasonable exposition of what is expected of officials in serving the interests of the wider community.

2.4. In essence, the draft guidelines cover disclosure of information at two levels. At one level, the guidelines address the disclosure of information, when requested, to the wider community. As mentioned, the committee has no difficulty in endorsing these guidelines as appropriate to the circumstances which are likely to arise in relation to requests by the general public for access to information about individuals and companies which is held by government.

2.5. However, the committee considers the indicative confidentiality clause attached to the Paper (page 16) which is intended to set the parameters of the Territory's agreement with commercial bodies on the extent of confidentiality is exclusive rather than inclusive in its proposed application. The committee considers this clause should be inverted to provide for public disclosure of information unless circumstances specific to the particular request prevent this.

2.6. The committee notes that the draft guidelines do not address the question of confidentiality protection for the Territory's future bargaining position through disclosure of material relative to the Territory's commercial relationships. The committee considers this is a matter which should be covered in the draft guidelines for public disclosure of information.

2.7. The second level of disclosure concerns information provided to the Assembly or its committees and, at this level, the committee has reservations about the appropriateness of the draft guidelines. These reservations are now discussed.

Right of the Assembly or its committees to call for confidential information

2.8. The draft guidelines recognise that confidential information provided to the Assembly or its committees may be required to be disclosed by these bodies (Attachment 1, page 5). The paper also notes that the disclosure of confidential information to the Assembly or its committees may be subject to Ministerial claims of public interest immunity (Attachment 1, page 8).

2.9. The draft guidelines give rise to two issues so far as disclosure to (and possibly by) the Assembly or its committees is concerned. These issues are:

(i) the powers of the Assembly and its committees; and

(ii) public interest immunity - in essence, the extent to which it is recognised by the Assembly

Assembly and committee powers

2.10. The Assembly and its committees have certain powers in relation to accessing papers and requiring individuals to attend the Assembly or its committees.

2.11. Standing Order 239 provides that a committee shall have the power to send for persons, papers and records. Standing Order 255 provides that witnesses, not being Members (of the Assembly), may be ordered to attend before the Assembly by summons under the hand of the Clerk of the Assembly, or before a committee of the Assembly under the hand of the secretary of the committee.

2.12. Standing Order 241 provides *inter alia* that evidence taken by any committee and documents presented to the committee shall be strictly confidential and shall not be published or divulged until the committee reports.

2.13. Standing Order 242 provides, *inter alia*, for a committee to authorise the publication of submissions, exhibits and oral evidence. This standing order also provides that any evidence taken or documents received *in camera* or on a confidential basis by a committee remains strictly confidential unless its publication is authorised by the committee or the Assembly.

2.14. Related Standing Order 243 provides for a committee to authorise the publication of any evidence given before it and any document presented to it.

2.15. In practice, committees effectively "send" for persons and papers whenever an inquiry requires government input. This is done through a formal request to the relevant Minister for assistance by means of a government (departmental) submission, the attendance of officials at a committee public hearing, private committee briefings by officials or a combination of these. It is usual for Ministers to cooperate in facilitating requests for such assistance.

2.16. The committee is not aware that any committee has found it necessary to have formal recourse to Standing Order 239 in order to access papers held by the government or to ensure the attendance of officials.

Public interest immunity

2.17. Public interest immunity formerly known as "Crown privilege" or "executive privilege" refers to a claim of the executive government to be immune from being required to present certain documents or information to the courts or to the Parliament.

2.18. The courts have determined the law of privilege in respect of the courts, but only the Parliament can determine whether it admits the existence of such a privilege in relation to documents or information required by the Parliament, or whether it will insist upon production of documents and information which it requires.[6]

2.19. The Constitution (Section 49) confers on the House of Representatives the power to summons the production of documents and the Senate has affirmed that it possesses the same powers.[7] The Senate has acknowledged there is some information held by government which ought not to be disclosed. Nevertheless the Senate has not conceded that claims of public interest immunity are anything more than claims, and not established prerogatives, and has made clear that it reserves the right to determine whether any particular claim will be accepted.[8]

Principal issues arising

2.20. The issues before the committee in this section of the Paper are:

(i) prejudice to commercial interests through the disclosure of confidential commercial information to a committee; and

(ii) whether the Assembly or a committee should automatically recognise an executive claim of public interest immunity as a reason for non-disclosure of information to a committee.

[6] Odger’s Australian Senate Practice, 8th Edition, p 30
[7] ibid, p452
[8] ibid

Consideration of the issues

(i) Prejudice to commercial interests through the disclosure of confidential commercial information to a committee

2.21. The committee considers that in the majority of cases there is no reason why commercial information which can be disclosed to the government on a confidential basis cannot be disclosed to an Assembly committee also on a confidential basis.

2.22. The question which committees should pose in determining whether confidential commercial information is treated as *in camera* evidence rather than public evidence centres on the potential damage to public and commercial interests that may result from the publication of the information. In this regard, the committee notes that the commercial-in-confidence principle is effectively about possible damage to commercial interests through the publication of information, not against its provision to a committee.

2.23. There is, therefore, a clear distinction between disclosure of information to a committee and its publication by a committee.

2.24. The committee observes that the government as whole, including departments and agencies, is responsible for the terms of contracts, prices accepted and compliance with the terms of contracts. The administration of these matters is, however, left to departments and agencies thus providing insulation from political influences.

2.25. Ministers are ultimately responsible for the activities of departments and agencies and are accountable to the Assembly for them. However, the committee considers that the Assembly and its committees have both the right and the responsibility, where relevant, to inquire into the terms of contracts, the prices accepted and the compliance of contractors with the terms of contracts and to question Ministers, departments and agencies on these matters.

(ii) Recognition of an executive claim of public interest immunity

2.26. The committee considers that the powers of the Assembly and its committees to summons the provision of papers and records and to summons the attendance of persons is absolute.

2.27. Precedent also suggests that the Assembly should not concede that an Executive claim of public interest immunity is anything more than a claim and is not an established prerogative.

2.28. The committee considers it would be inappropriate for the Assembly to accord a blanket recognition to executive claims of public interest immunity which is implied in the draft guidelines. The committee accepts there may be certain commercial information held by government which ought not to be disclosed but, on the whole, the committee would expect that this would apply only in exceptional circumstances.

2.29. Should a committee request for the disclosure of information on a confidential basis be met with an executive claim of public interest immunity, the committee considers the Minister should be required to provide the committee with a *prima facie* justification for such a claim.

2.30. Should a committee not accept a claim for public interest immunity and the information being sought continued to be withheld, the committee could report to the Assembly its reasons for not accepting a claim of public interest immunity. It would then be for the Assembly to determine what further action might be taken on the matter.

2.31. The Assembly and the committee concerned would, no doubt, have in mind that ultimately the situation would probably be resolved politically. In other words, the Assembly or a committee could potentially exact a political penalty from the Minister. The non-production of material could attract public concern from a perception that the Minister was avoiding legitimate scrutiny.

In camera evidence

2.32. The Paper includes a section dealing specifically with Assembly committee requests for information (page 9) and notes that the capacity for committees to take *in camera* evidence means the requirements of government accountability can be balanced against any public interest in confidentiality or any adverse impact of publication of commercial information on private sector business.

2.33. The Paper proposes that this committee could develop a protocol for all committees in dealing with *in camera* evidence for commercially sensitive information.

2.34. The committee considers that the issue of a protocol should be a matter for consideration by the Standing Committee on Administration and Procedure in the context of its broader responsibility for review of the standing orders, the operations of the Assembly and committee procedure. It does, however, make the following observations.

Committee powers

2.35. As noted above, Standing Order 243 provides a committee with the power to authorise the publication of any evidence given to it and any document presented to it. Standing Order 242 provides *inter alia* that any evidence taken or documents received i*n camera* or on a confidential basis by a committee will remain strictly confidential unless its publication is authorised by a resolution of the committee or the Assembly.

2.36. The critical issue is whether the Assembly can, or should, be bound by a protocol on *in camera* evidence designed to ensure that commercially sensitive information provided to committees is not subsequently made public by the Assembly or a committee.

2.37. The committee considers a protocol could derogate from the power of the Assembly and its committees to authorise the publication of evidence as they see fit. It could reasonably be expected that any resolution of a committee, or the Assembly, to authorise publication of *in camera* evidence, which might include commercially sensitive information, would give due consideration to the interests of all persons and parties involved and that the resolution would recognise an overriding public interest in disclosure.

2.38. The committee is not aware of any circumstance where an Assembly committee, or the Assembly itself, has authorised the publication of *in camera* evidence.

2.39. The committee Presumes that committees generally avoid taking evidence *in camera* because of the inherent limitations in the use of such evidence.

2.40. If there were to be a protocol, it would need to be framed so as to ensure that the justification for officials to provide evidence *in camera* would be appropriate to the circumstances of a particular committee inquiry. In other words, there would need to be assurance that the *in camera* facility did not provide opportunity for officials to avoid giving evidence in public hearings where this is justified by circumstances.

Partial disclosure

2.41. The Paper acknowledges (page 9) that the terms of government contracts would generally be open to public scrutiny although there may be circumstances where disclosure of the full contract is contrary to the public interest. The Paper sets out information which would normally be included in a public disclosure of a contract summary.

2.42. The committee accepts the draft guidelines as they apply in this section as reasonable and appropriate except that it considers that any penalty clause(s) forming part of a contract should be included in disclosable information. As drafted, there is no provision for disclosure of penalty clauses.

3. CONCLUSIONS

3.1. The committee has no difficulty in endorsing the draft general guidelines
as they relate to the public disclosure of commercial information to the broader community. As framed, these guidelines establish an appropriate balance between government accountability, the public interest and the rights of individuals and businesses which claim confidentiality for information provided to government.

3.2. The committee notes that the draft guidelines do not address the question of confidentiality protection for the Territory's future bargaining position through disclosure of material relative to the Territory's commercial relationships. The committee considers this aspect should be covered in the draft guidelines for public disclosure of information.

3.3. As mentioned in paragraph 2.5 above, the committee considers the indicative confidentiality clause at page 16 of the Paper should be redrafted to provide for disclosure unless specific circumstances prevent this. The committee also considers that in respect to partial disclosure of contract details, information about penalty clauses should also be included in the information which would be disclosed.

3.4. The committee has reservations about the draft guidelines as they apply to the disclosure of information to the Assembly or its committees and, in particular, to Ministerial claims of public interest immunity as a condition under which disclosure may be made.

3.5. With regard to the proposal that this committee develop an *in camera* protocol for evidence taken by committees, the committee sees that as a matter for consideration as appropriate by the Standing Committee on Administration and Procedure.

3.6. More generally, the committee offers the view that the guidelines, in whatever form they are eventually circulated, are unlikely to address the issues arising from disclosure of commercial information *in toto*. To a greater or lesser extent subjective assessments will be made as to what should be disclosed and to whom.

3.7. With regard to disclosure of information to the Assembly or its committees, the realistic position is that a basis for disclosure will depend upon Ministers and the government acting in good faith. The committee, therefore, expresses the hope that goodwill will prevail in dealing with committee requests for disclosure.

4. RECOMMENDATIONS

4.1. The committee recommends:

(1) that the Chief Minister take note of the committee's comments in this report on the draft guidelines and in particular:

> **(i) amend the indicative confidentiality clause in attachment B of the draft guidelines (page 16) to provide for public disclosure of information unless circumstances specific to the particular request prevent this; and**
>
> **(ii) amend the draft guidelines as they apply to partial disclosure (page 9 of the draft guidelines) to include any penalty clause(s) which form part of a contract;**

(2) the Assembly invite the Standing Committee on Administration and Procedure to develop an amendment to the standing orders to provide that:

> **(i) where a committee request for the disclosure of information on a confidential basis is met with an executive claim of public interest immunity, the Minister concerned be required to provide for the committee's consideration a *prima facie* justification for such a claim; and**
>
> **(ii) where the committee does not accept a claim for public interest immunity and the information being sought continues to be withheld, the committee shall report to the Assembly with its reasons for not accepting a claim of public interest immunity; and**

(3) **the Assembly invite the Standing Committee on Administration and Procedure to consider the proposal contained in the draft guidelines for development of a protocol setting out the circumstances where *in camera* hearings for commercially sensitive information would be likely to be appropriate.**

Ted Quinlan MLA
Chair

ATTACHMENT 1

Attachment 1 is not available in electronic format. Please contact the Committee Office on (02) 6205 0127 if you would like a copy of it.