SUBMISSION TO THE EXPOSURE DRAFT *FREEDOM OF INFORMATION AMENDMENT (REFORM) BILL* 2009 AND *INFORMATION COMMISSIONER BILL* 2009.

1. Introduction

1.1 Freedom of Information objectives are only as effective as the public servants who apply them. Where authorities decide that they do not want to release particular information, for whatever reason, then they can easily create obstacles to delay or stop the application. Their justification appears to be ostensibly that the greater public good follows from not allowing access to materials that could support criticism of the activities of the authority. That is to say they can avoid disclosure purely in self interest arguing that self interest of a public authority equates to "public interest". If that is their view then it is misguided and flies in the face of the purpose of Freedom of Information legislation. Guidelines made under the Act appear not to be strictly followed in these circumstances.

1.2 Ultimately the issues are: just what is in the best interests of the public; how best to balance contradictory public interests; and, in my opinion, who should have authority to deal with public interest questions and what guidance is needed to assist them in the exercise of any discretion.

1.3 In my view, the new legislation should address these matters by spelling out: in detail what "in the public interest" means; who has authority to balance public interests; and when and how that discretion should be exercised.

1.4 The concept of "public interest" needs explanation not only in relation to conditionally exempt documents but also where remittance of fees and charges are considered under s 29, for example. Hence the lists of positive and negative public interests for conditional exemptions (s 11B) should be extended to other sections containing public interest clauses.

2. Possible Amendments to Assist FOI Officers with the Concept of 'Public Interest'

2.1 **Under s 4.** Possible additional amendments might be, for example, to define ***"public interest"*** generally or at least to include, *"information sought for academic and research purposes upon evidence of expertise or particular knowledge or interest of the applicant, where that research could contribute to improved governance or public benefit, including, but not limited to, more efficient use of public monies or public input to government inquiries or policy initiatives".*

2.2 A further amendment might be, *"any decision regarding 'the public interest' or balancing public interests must be made by a senior officer of the authority granted that power by the Minister, and with a working knowledge of current government policies and the legislation".*

2.3 **Under s 15(2)(b).** Also, for clarity, *"a document has been sufficiently identified for the purposes of this Act if an officer of the authority with knowledge of the internal workings and structure of the authority and exercising reasonable diligence and effort, could reasonably be expected to locate and ascertain the document in a reasonable time".*

2.4 **Under 11B(4)(a).** An addition to the term Commonwealth Government might be

"including statutory authorities, agencies and other government bodies" or similar.

3. A Case Study

3.1 An example where, in my opinion, the current legislative regimes have failed in this area, contrary to the clear objectives of the various Acts follows.

3.2 A few years ago newspaper articles purported to disclose a medical research misconduct case at a prominent university in which it was claimed that public monies were repaid by the University because it had apparently been established by an inquiry that experimental data had been falsified in order to get or keep funding.

3.3 That was of interest to me because I have some expertise in relevant areas and had made substantial professional submissions to government reviews of guidelines for scientific research misconduct; alternative reproductive technology including stem cell practice and research; and the use of genetic information. All three areas were relevant to the research project subject to inquiry.

3.4 Consequently I sought access to documents concerning the matter, initially from a relevant Commonwealth statutory authority and then from the University.

3.5 My argument was that the documents should be made available "in the public interest": first they related to public expenditure; secondly they related to contentious areas of particular current interest of government, for example stem cell research; and thirdly the matter was already partially in the public arena and misconduct was apparently established.

3.6 It was not surprising that all effort would be made to avoid disclosure, either: for fear of litigation; because those involved were known to the decision makers; because of possible detriment to the institution's or researchers' reputations; or because of individual views and hopes about potential benefits from stem cell research. Most people know someone who would benefit if the stem cell research rhetoric is realized. They may well argue that misconduct should be ignore for fear of halting progress. That ignores though the fact that false research is usually worse than no research as it can be regressive.

3.7 What appeared to be misinterpretation of the FOI Acts and guidelines to support non-disclosure, by those officers supposed to be applying the legislation, was concerning however.

3.8 I would like to see education and training requirements for FOI officers enacted in the legislation. In my view some level of independence from the disclosing authority should be ensured.

3.9 The request to the Authority ended up as a dispute over remittance of the application fee; the argument being that release of the documents for the research purpose disclosed was in the public interest.

3.10 Not surprisingly the request under the State legislation, to the University, was treated even less well. They argued from the beginning that the request was not valid because the

documents were not sufficiently identified. That was wrong. They then determined, again wrongly, that internal review was limited and a matter for the FOI officers. Least meritorious however, was their claim all along that they were trying to assist; a requirement under the State Act.

3.11 Eventually, after a number of communications with the authority and even more with the University and a number of wasted months, it was established that they could identify the matter after all, with no more details than in the newspaper articles, and hence the main requested documents (still arguing apparently that a request for the inquiry "file" containing "all documents" relating to an inquiry was invalid as not sufficiently identifying those documents).

3.12 No documents have yet been produced and the saga continues. What should have occurred is that the Authority should have identified the misconduct case from the identifying material in the newspaper articles provided, if not through funding records then possibly through its roles in overseeing research. That itself is "information". Then they could have determined if they had copies of the documents requested (grant application and reviewers' reports). The application fee should have been waived. The reasons for not doing so were established to be flawed, in my opinion.

3.13 The University had enough information from the outset to identify the matter. They would be deemed to know because of the inquiry and refund. They knew. The administrative staff involved demonstrated a lack of diligence and did not properly apply the State FOI Act, in my opinion. Whatever their motives, presumably in the interests of the University as they saw it, they should have placed public interest above institutional interest, in my view. Low and middle level administrative staff should not be the judges or arbiters of competing public interests.

3.14 I have other examples showing similar approaches by state government departments and authorities. The example provided makes the point effectively.

4. Possible Amendments to Address the Failures Identified in the Case Study

4.1 Establishment of the position of Information Commissioner is a significant improvement, in my view; particularly in the present context, when providing independent review.

4.2 However, there is the risk that the types of delaying and non-disclosure tactics alluded to above will increase. FOI officers will defer or avoid difficult, unwanted or otherwise sensitive requests on the grounds that easy review is available, hence avoiding work and decisions that might appear against the interests of agency, authority or third persons. It is unlikely that an internal review would go against the first instance officer in these circumstances. Many applicants might then abandon their request.

4.3 **Under s 55J(1).** Consequently I would like to see emphasis on the role of the FOI officer at first instance. Possibly the Information Commissioner should have powers to remit back to the FOI officer or principal officer (as the maker of the decision under review) with an order for immediate release of the requested materials; including unambiguous criticism of the decisions (publishable under s 55J(8)) of the authority; and orders for discharge of any costs and, where appropriate, for some level of compensation to the applicant for unnecessary delay, inefficiency, incompetence or lack of diligence.

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