legalwise SEMINARS

June, 2014: Government Law Paper

Managing Information: To Release or Not

- Public Interest and the Office of the Australian Information Commissioner (OAIC)
- Equitable action for breach of confidence: *Commonwealth v Fairfax*
- Recent case law
- *Rights to Information Act 2009 (Qld):* procedure and policy aspects
- Factors favouring disclosure
- What information is exempt?
- How to apply the exemptions

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Information is the new currency, and this Government is fully committed to making as much information as possible available to the community. The Open Data Revolution, which allows *more public access to Government information collected in all regions, in all kinds of formats, for all kinds of reasons,1* is just one example of the Government's approach to information sharing.

We are committed to crafting a new integrity system for the state as we move towards making the government the most open and accountable in the nation. We want to make government processes clear,straightforward and accountable.
The Hon The attorney General and Minister for Justice Jarrod Bleijie –Ministers Forward - Department of Justice and Attorney-General, *Review of the Right to Information Act 2009 and Chapter Three of the Information Privacy Act 2009, Discussion paper, August 2013.*

Justice Kirby in *Kioa and West* noted the 'expanded notion of procedural fairness in Australia'. The natural justice hearing rule

under *the Administrative Decisions (Judicial Review) Act* 1977 (Cth) can be seen to include:

- **A duty to make enquiries;**
- **A duty to consider the legitimate expectations of an applicant as a result of a holding out by the Executive;**
- **The need for rational/logical probative evidence**.(Pilgrim T*, Privacy Law Reform: Challenges and Opportunities,* AIAL Forum, No.69, July 2012, p47)

Right to Information is integral to an applicant to establish his cause and the facts as to be able to present probative evidence.

Introduction

The *Right to Information Act* 2009 (Qld) ("RTI Act") provides that all Government information should be generally available to the public, favouring a "pro-disclosure" bias[1], "unless, on balance, it is contrary to the public interest to give the access (or allow the amendment)".[2] As such, it is prudent for employees of Queensland Public Service agencies and certain Government Owned Corporations,[3] or more particularly "public authorities"[4], to assume that the written information they prepare and the advice they give within the Department, to other Departments, or to the public, will be subject to release under Right to Information (RTI) Legislation.

In 2007 the Queensland Government conducted a comprehensive review [5] of Freedom of Information legislation based on a fundamental

[1] *Right to Information Act* 2009 (Qld) ss 29(3), 44(4).
[2] Section 3 of the *Right to Information Act* 2009 and Section 3(b) of the *Information Privacy Act 2009*.
[3] Department of Justice and Attorney-General, *Review of the Right to Information Act 2009 and Chapter Three of the Information Privacy Act 2009, Discussion paper, August 2013:* "Eleven entities fall within the definition of a "Government Owned Corporation." Some are specifically excluded from the operation of the RTI Act and the IP Act for all their functions, except so far as they relate to community service obligations.. Some have no community service obligations and so applications for access to documents cannot be made to these GOC's"
[4] Lane W and Dickens E, *State Owned Corporations and the Reach of the RTI Act (Qld)- Davis v City North Infrastructure Pty Ltd [2011] QSC 285*: Essentially, "public authority" refers to an entity which is either "established for a public purposes by an act" s16(1)(a)(i) or "established by Government under an act for a public purpose, whether or not the public purpose is stated in the Act" s16(1)(a)(ii). In either case, "Act" means an Act of the Queensland parliament (*Acts Interpretation Act 1954*(Qld) s6).
[5] The FOI Independent Review Panel's Report- *The Right to Information – Reviewing Queensland's Freedom of Information Act (Solomon Report),* June 2008

re-appraisal of core elements and concepts of the then current Freedom of Information Act(the Solomon Report)[6]. The review resulted in the Government moving towards a 'push' legislative model that sought a culture of 'pro-disclosure' in the public interest.

This paper will focus on the recent amendments to the Queensland *Right to Information Act*, outlining the current legislation governing the release of Departmental information. It is outside of the realms of this discussion to traverse the positions at both a Commonwealth and Queensland jurisdictional level, and as such, I will focus predominantly on the Queensland legislation. A common trend of a public interest test flows from the Commonwealth *Freedom of Information Amendment (Reform) Act* 2010.

The Public Interest Test

The term 'public interest' has served a specific function in FOI legislation - in particular, in relation to the operation of FOI exemptions, where it has acted as a mechanism for balancing relevant interests for and against disclosure in respect of the kind of documents to which the exemption relates. Also, in Queensland RTI legislation provides external review bodies with a 'public interest override' so that, in addition to the usual exercise of merits review, the appeal body can consider whether or not the public interest requires access to an exempt document.[48] This means that in addition to its normal 'merits review' jurisdiction, the review body enjoys a power to determine whether or not the public interest requires access to an exempt document.

In a broader sense, of course, the term 'public interest' has been employed in various areas of law - for instance, in the law concerning breach of confidence where certain 'public interest' defences may apply. The term is also commonly used in legislation - most commonly where a statute confers a regulatory function on a body or official, stipulating that the function must be exercised, or a decision made, based on, or having regard to, the 'public interest.'[42]

Generally speaking, the term is not used in the sense of meaning particular private or individual interests. As Tamberlin J noted in *McKinnon v Secretary, Department of Treasury,*[43] the term is

[6] Lane W and Dickens E, *'Reforming FOI - Time For A New Model?'* (2010) Australian Institute of Administrative Law Forum 13, 2.

generally used to signify the interests of the public, the society or the nation - in other words, to incorporate an ideal relating to the overall or greater good of society. However, rather than being one homogenous concept, the term is multi-faceted, requiring a decision-maker to evaluate and weigh various facets of the public interest. In a broader sense, of course, the term 'public interest' has been employed in various areas of law - for instance, in the law concerning breach of confidence where certain 'public interest' defences may apply. The term is also commonly used in legislation - most commonly where a statute confers a regulatory function on a body or official, stipulating that the function must be exercised, or a decision made, based on, or having regard to, the 'public interest.'[42] [1] Lane W and Dickens E, *'Reforming FOI - Time For A New Model?'* (2010) Australian Institute of Administrative Law Forum 13, 2.

In the Commonwealth Jurisdiction

The *Freedom of Information Amendment (Reform) Act 2010* (Cth) implements three significant changes to the public interest test. A single public interest test applies to each of the conditional exemptions, and states factors that must be taken into account (where relevant or applicable) and factors that should not be taken into account when assessing public interest. These new provisions impact directly on the capacity of agencies to rely on some of the factors previously available for the purpose of refusing a request for documents to be released.

Reform to the Commonwealth Public Interest Test was, in part, a response to the Court's findings in *Re Howard and the Treasurer.*[7] The Court in that case found that five factors must be considered in circumstances where there was a reservation of documents from public viewing.[8]

The combined effect of sections 11B and 47C of the amended Commonwealth *Freedom of Information Act* 1982 operate to eliminate

[7] (1985) 7 ALD 659.
[8] Simon Murray (2012*) 'Freedom of Information Report: Does the new Public Interest Test for Conditionally Exempt Documents Signal the Death of the "Howard Factors"'* University of Tasmania Law Review 31(1) at, 58.

two of the Howard exemption factors[9] in their entirety. Additionally, Part 6 of the current Commonwealth guidelines (issued by the Information Commissioner in March 2011) states three of the Howard factors are now rendered irrelevant considerations by s11B(4) of the Act. Those being, the high seniority of the author of the document in the agency to which the request for access to the document was made, misinterpretation or misunderstanding of a document, and confusion or unnecessary debate following disclosure.

Therefore, the factors that a Court, or the Government must take into account are laid out at Section 11B (3) of the Act, stating:

> *Factors favouring access to the document in the public interest include whether access to the document would do any of the following:*
>
> *(a) promote the objects of the Act (including all the matters set out in sections 3 and 3A);*
>
> *(b) inform debate on a matter of public importance;*
>
> *(c) promote effective oversight of public expenditure;*
>
> *(d) allow a person to access his or her own personal information.*

In the Queensland Jurisdiction

Queensland, in line with the Commonwealth provisions, has favoured a legislative model which provides for a "pro-disclosure" bias, as stated in s44 of the RTI Act. This of course, is provided disclosure will not be contrary to the public interest as required by Schedule 4 of the Act with

[9] See note 8

establishes the Public Interest Test as a stand-alone exemption from the general principles of disclosure. Therefore, a decision maker should approach a request pursuant to the Right to Information Act, with the general view that all information shall be disclosed, providing the documents do not fall into one of the exceptions, or are deemed to be contrary to the public interest. [10]

The Cabinet exemption in s36 of the previous *Freedom of Information Act* was retained in an amended form by ensuring that it contains a purposive element (that is, a connection between the creation of a document and its submission to Cabinet). In this regard, a narrower Cabinet-based exemption was promulgated. A new stand-alone exemption for specific Ministerial documents including "incoming Minister briefing books and Parliamentary Question Time and Estimates briefing books"[11] was adopted.

Schedule 4 of the RTI Act contains 4 Parts, which are lists of public interest factors. Part 1 lists factors irrelevant to deciding the public interest; Part 2 lists factors favouring disclosure in the public interest; Part 3 lists factors favouring non-disclosure in the public interest, and Part 4 lists factors favouring non-disclosure in the public interest because of the public interest harm in disclosure. There is a significant amount of overlap between some of the Part 3 and 4 factors, and it is not clear how they work together.

Section 49 of the RTI Act explains how the public interest test is to be applied. It is essentially a process where relevant public interest factors in Parts 1 to 4 must be identified, compared and weighed up so that a decision can be made whether release of the information in question is contrary to the public interest. Section 49 of the RTI Act makes clear that the balancing process is not a neutral one. Where the competing factors are equal, access must be given.

Applying the public interest test can be difficult to explain to applicants.

Section 49 of the RTI Act, sets out the process to be adopted in applying the Public Interest Test exemption. The process is quite complex,

[10] Lane W and Dickens E*, Reforming FOI - Time For A New Model?* (2010) Australian Institute of Administrative Law Forum 13, 2.
[11] *Right to Information Act* 2009 (Qld), s.48, Schedule 3, Exempt Information, ss 1-4

requiring the decision maker to go through a series of specified steps to ensure that regard is had to a series of factors set out in Sch 4, Pts 1 to 4 of the RTI Act.[12] In general terms, the specific steps which a decision maker must take in applying the Public Interest Test are summarised as follows:

(a) **Irrelevant considerations –** the decision maker must identify any factor that is irrelevant to deciding whether, on balance, disclosure of the information would be contrary to the public interest, including the factors set out in Sch 4, pt 1 of the RTI Act.

(b) **Factors favouring disclosure** – The decision maker must then identify any factor favouring disclosure that is relevant to the particular information. This includes (but is not limited to) the 19 factors mentioned in Sch 4, Pt 2 of the RTI Act.

(c) **Factors favouring non-disclosure** – The decision maker is then required to identify any relevant factors favouring non-disclosure. This includes (but is not limited to) the 22 factors prescribed in Sch 4, Pt 3 of the RTI Act and the 10 factors prescribed in Sch 3, Pt 3 of the RTI Act. These factors may include:

- *Information that has a commercial value which would be destroyed or diminished if released (eg matters relating to trade secrets and business);*
- *Information which could reasonably be expected to prejudice the competitive commercial activities of an agency; and*

[12] Lane W and Dickens E, *Reforming FOI - Time For A New Model?* (2010) Australian Institute of Administrative Law Forum 13, 6

- *Information on the business, professional, commercial or financial affairs of a government agency or another person which would have an adverse effect on those affairs if released;*
- *Matters affecting financial or property interests of the State;*
- *Information that could reasonably be expected to prejudice a deliberative process of Government;*
- *The voluminous documents required under the application would substantially and unreasonably divert the resources of the Agency from their use by the Agency in the performance of its functions;*[13]

Unless, in each case, *the disclosure of the information would, on balance, be in the public interest*.

Importantly, the Act expressly states, at s48[14] that the factors favouring non-disclosure contained within s47 and Sch 3 are to be construed narrowly in order to assist the "bias towards disclosure", with these additional measures deemed necessary by the Executive to effect this requirement. Chief among these is the inclusion of offence and disciplinary-related provisions. Section 175 of the RTI Act establishes an offence in circumstances where a person gives a direction to a RTI decision maker which directs the decision maker to make a decision that the decision maker considers should not be made under the RTI Act. The offence attracts a fine of $10,000.

Right of Refusal of an Application

[13] *Right to Information Act 2009* (Qld) s41(a).

[14] *Right to Information Act 2009* (Qld) s 48(1) **Exempt information**
If an access application is made to an agency or Minister for a document, the agency or Minister must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.

Part 4 of the Act contains the power for Departments to place road blocks in the releasing of the information upon receiving a request pursuant to the Act. Part 4 of the Queensland RTI Act traverses the numerous ways in which a Department may outright refuse an application, without having regard to the factors favouring non-disclosure prescribed by the Act. These include, refusal of an application for applying for the same documents[15] and refusal where the resources to deal with an application would substantially and unreasonably divert resources of an Agency.[16]

It is the latter of these two that attracts the most use in the application of the *Right to Information Act 2009* (Qld).

To advise on non-disclosure requires a "balance" of the preceding legislative rules. As an example, in my practice I am appointed as a Probity Auditor or Advisor to assist Government agencies or "public authorities", and Government Owned Corporations, to oversee the conduct and transparency of significant procurement by public tender.

Recently, I advised on an RTI application where the applicant sought access to all commercially confidential information that pertained to other individual tenderers, specific tenderer details (names, addresses, and particulars as to the proposal) and documents that dealt with the pricing and costing of tenders. I advised this was not to be released, as disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or afford a competitor a competitive

[15] *Right to Information Act 2009* (Qld) s43.
[16] *Right to Information Act 2009* (Qld) s41.

advantage[17]. I noted also that such disclosure may cause detriment to the competitive commercial activities of the Department.

The unusual RTI request received, referred to all documents during a 27 year period. The Act provides for "an Agency, or Minister to refuse to deal with an access application […] if carried out [it would], substantially and unreasonably divert the resources of the Agency from their use by the Agency in the performance of its functions.[18] Furthermore, the terms of the RTI Request received, was in my opinion, extremely broad.

Such a voluminous and broad request was dealt with in *The Act Company Pty Ltd v CenITex* [212] VCAT 1523, where a request was refused as it was accepted by the court that the requests were for an extensive period, in this particular case, 33 months, as well as the terms of the request being very broad. Similarly, these issues were discussed in *Re Seal and Queensland Public Service[19], w*here the Information Commissioner appropriately refused a request for information in a 5 year time period.

The RTI Act provides that an Agency may refuse access to information where the documents and/or information requested is reasonably available to the applicant by another means, such as the public record or by operation of another Act. [20] In this instance much of the information was available on a Government register. In my opinion, that public record, and no more, was an appropriate level of disclosure.

[17] *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards and Sons (Third Party*) (2003) 6 QAR, 242, p 2 of 4
[18] *Right to Information Act 2009* (Qld) s41(a).
[19] Unreported, 29 June 2007, No. 2005 FO619 available as to 30 April 2014 at http://www.oic.qld.gov.au/_data/assets/pdf_file/0012/7050/2005-FO619-Dec-26-06-07.pdf
[20] *Right to Information Act 2009* (Qld) s53 (b).

This allowed the Department to refuse access to information of what previous tenderers, companies and/or individuals, were awarded in this particular tender.

To Release or Not to Release-Applying the exemptions

Agencies do not need to apply a public interest test if information is exempt. This is because Parliament has already decided that it would be contrary to the public interest to release documents which comprise such information.63 Although agencies and Ministers may refuse access to exempt information, it is clear that they may also release it.(ss48 and 48(3))

The then Information Commissioner stated in December 2012:

> The starting point for applying the public interest test is that all documents are open to the public…..the test is essentially identifying factors favouring disclosure and factors favouring non-disclosure and weighing those factors.

Against the instincts of public servants the prior "drivers of secrecy" are not to influence decisions to release information. "It is Parliament's express view that the public value of transparency overrides the day to day concerns of public servants to protect the government, their Minister and themselves from public criticism".[21]

Continuing Reluctance to Release

It is my professional experience that agencies and public authorities remain reluctant to release information. The Information Commissioner in the last reported year received 533 External Reviews, and finalised 458. An external review is sought by an applicant as an appeal against the agency's paucity of release, if aggrieved, under S.85. Prior to that an applicant can apply for an internal agency review, under s.82. Such

[21] AIAL Forum No.71,Kinross J, *The Transmission of the Public Value of Transparency Through External Review*, , December 2012, at p 16

application must be in writing within 20 business days after the written notice of the agency's decision.[22]

It could take well over twelve months and numerous submissions by the appellant to the Office of the Commissioner before exhausting the avenue of an external review. The agency under review will use its full legal resources to resist at each step, in my experience.

Release of Information at Common Law

Equitable Breach of Confidence

The confidentiality of information is also protected by the common law. Equity exercises its jurisdiction over the confidentiality of information, with courts recognising that the court of equity has an original, inherent and independent jurisdiction to prevent the violation of a confidence. [23]

Schedule 3, Section 8(1) of the RTI Act states that information is exempt if its disclosure would found an action for a breach of confidence. The general law is the foundation.

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[22] ***reviewable decision*** means any of the following decisions in relation to an access application—
(a) a decision that an access application is outside the scope of this Act under section 32(1)(b);
(b) a decision that an access application does not comply with all relevant application requirements under section 33(5);
(c) a decision—
(i) to disclose a document contrary to the views of a relevant third party obtained under section 37; or
(ii) to disclose a document if an agency or Minister should have taken, but has not taken, steps to obtain the views of a relevant third party under section 37;
Schedule 6- *Right to Information Act* 2009
(d) a decision refusing to deal with an application under chapter 3, part 4;
(e) a decision refusing access to a document under section 47;
(f) a decision deferring access to a document under section 72;
(g) a decision about whether a processing charge or access charge is payable in relation to access to a document (including a decision not to waive charges);
(h) a decision giving access to documents subject to the deletion of information under section 73, 74 or 75;
(i) a decision giving access to documents in a form different to the form applied for by the applicant, unless access in the form applied for would involve an infringement of the copyright of a person other than the State;
(j) a deemed decision.
review under this Act means internal review or external review.

[23] *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39 per Mason J at 50-52.

The leading statement as to what a plaintiff must prove to establish a breach of confidence in respect of Government information is as stated by Lord Widgery CJ in *Attorney General v Johnathan Cape Pty Ltd*[24]:

(a) That such publication would be a breach of confidence;

(b) That the public interest requires that the publication be restrained, and

(c) That there are no other facts of the public interest contradictory of and more compelling than that relied upon.

Moreover, the Court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need. [25]

Commonwealth of Australia v John Fairfax and Sons[26]

The leading case regarding Governmental information is *Commonwealth of Australia v John Fairfax & Sons*[27], where the Government obtained an injunction restraining the defendants from publishing excerpts from a book. The book contained information regarding Australian defence strategies and other documents that related to the Australian Position in the 'East Timor crisis'. Mason J, presiding over the matter stated "it is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss, view and criticise Government action. Accordingly, the Court will determine the

[24] [1976] 1 QB 752.
[25] *Attorney General v Johnathan Cape Ltd* [1976] 1 QB 752 at 770-771. Approved in *Commonwealth of Australia v John Fairfax Sons Ltd* (1980) 147 CLR 39 at 52 Per Mason J.
[26] (1980) 147 CLR.
[27] (1980) 147 CLR.

Government's claim to confidentiality by reference to the public interest. Unless the disclosure is likely to injure the public interest, it will not be protected."[28]

Need for detriment in Government Information

The High Court has indicated, at least in the case of Governmental information that detriment is an important element to consider in an action for breach of confidence.[29] There must be detriment to the public interest that outweighs the interest of individual free speech.

Legal professional privilege

Often legal professional privilege may be claimed to refuse release. First reflect as to whether the "advice" being refused release meets the relevant test at law. Although privilege may attach to the communications by internal legal counsellors of agencies, recommendations that have been made in relation to that advice are not necessarily covered by privilege. These recommendations may 'be an activity of the corporation', and not a transmission of the advice from one officer of the corporation to another.[30] Even if the internal communications contain the legal advice, if there is any further discussion as to the advice this will not be protected by privilege and may arguably need to be disclosed.[31]

In *Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*[32] an internal memorandum discussing the termination of a contract was held

[28] *Commonwealth of Australia v John Fairfax Sons Ltd* (1980) 147 CLR 39 at 52
[29] *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39 per Mason J at 51-52.
[30] *Komacha v Orange City Council* (unreported, Supreme Court of New South Wales, 30 August 1979).
[31] *Brambles Holdings Ltd v Trade Practices Commission [No 3]* (1981) 58 FKR 452, per Franki J.
[32] [2000] FCA 1131 at 12.

not to be privileged, even though it referred to advice received by solicitors. Depending on the nature of the internal communications, this principle may be applicable. Such recommendations as were made may be "an activity of the corporation" and are disclosable.

To overcome an agency's stand on the "contrary to public interest test"

The examples following of the relevant law may be a reference.

Incorrect Application of Section 49 RTI Act Exemption (Public Policy)

Agencies may assert several factors favouring nondisclosure in Schedule 4 Parts 3 and 4 RTI Act. However, the Applicant must challenge during the external review that a number of these factors have been incorrectly applied. For example:

(a) Business Affairs

1. Pursuant to the Information Commissioner's comments in *Kalinga Wooloowin Residents Association Inc v Department of Employment, Economic Development and Innovation*[33] the business affairs of the agency will not be adversely affected by disclosure of the documents in question.

[33] Decision of Information Commissioner, 19 December 2011, Application 310542.

2. The Information Commissioner notes in *Kalinga*, referring to a previous decision in *Cannon and Australian Quality Egg Farms*[34], that for Schedule 4, Part 4, Factor 7 RTI Act to be applicable:

> The required adverse effect will almost invariably be pecuniary in nature, and that in most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing *competitive harm* to the relevant entity (emphasis added)

3. The 'relevant entity' in *Kalinga* was a government-owned entity. The Information Commissioner in *Kalinga* commented, in relation to the 'business affairs' exemption:

> CNI (City North Infrastructure Pty Ltd) as a government - owned, taxpayer - funded entity entrusted with delivering significant public infrastructure, is a monopoly provider (and cannot be said to operate in a commercially competitive environment) […] could not be said to be susceptible to competitive harm.[35]

(b) Commercial Value

4. Factor 7 of Schedule 4, Part 4, is often relied upon by agencies as a relevant factor favouring non-disclosure; refers to nondisclosure being favoured because of 'public interest harm' in disclosing information with 'commercial value'.

5. 'Commercial value' is defined as information that is valuable for the purposes of carrying on the 'commercial activity' of the relevant entity,

[34] (1994) 1 QAR 491 at paras 82-84.
[35] *Kalinga Wooloowin Residents Association Inc v Department of Employment, Economic Development and Innovation, City North Infrastructure Pty Ltd (Third Party)* at p 2 of 3.

in the sense that it is important to the profitability or viability of a continuing business operation.[36]

6. Commercial value was further defined in *Re Cannon and Australian Quality Egg Farms Ltd*[37] as information which a genuine, arms-length buyer would be prepared to purchase from the entity in question – that is, information whose market value would be destroyed or diminished if it could be obtained under Right to Information legislation. As you are the the legal representative, question this.

(c) Confidential Information

7. Agencies rely upon Factor 8 of Schedule 4, Part 4 RTI Act. This factor favours nondisclosure of information of a confidential nature communicated in confidence. Ask if the information sought by its in nature would meet the common law requirements of confidentiality?

8. Seddon[38] outlines the requirement for information to be regarded as commercial in confidence at common law:
   i) Specific information must be identified: a government body cannot take a blanket approach that everything in a contract is confidential: *Amway Corporation v Eurway International*[39]
   ii) There must be a reason the information is confidential;[40] as stated by Mason J in *John Fairfax,*[41] 'Unless disclosure is likely to injure the public interest, it will not be protected'

[36] *Re Cannon and Australian Quality Egg Farms* (1994) 1 QAR 491 – a case interpreting the old s 45(1)(b) *Freedom of Information Act 1992* (Qld), see also *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards and Sons (Third Party*) (2003) 6 QAR, 242

[37] See note 36, at para 54-55.
[38] Seddon N, '*Government Contracts: Federal, State and Local'* (4th ed) 2009 The Federation Press: Sydney.
[39] [1974] RPC 82 at 86-87.

A new factor favouring disclosure

The public interest factors listed in the schedules are not exhaustive and agencies may rely on public interest factors not listed in the RTI Act. Several factors favouring non-disclosure protect private commercial business, but the public interest in informed consumers is not expressly recognised, even though it can be argued that a pre-condition of effective competition is an informed market. Factors which support informed consumer choices (and drive effective and competitive markets) could be included in Part 2 (factors favouring disclosure in the public interest). The Information Commissioner has already found this to be a factor in a series of decisions.

Agencies can be reminded of other legal precepts which apply.

Breach of duty of Good Faith

A duty on governments to act honestly and in good faith was recognised by Finn J in *GEC Marconi Systems v BHP Information Technology*[42]and subsequently confirmed by Hansen J in *Kellogg Brown & Root v Australian Aerospace*[43].

Procedural Fairness

In *Kioa v West* [44] Brennan J suggested that in "…the ordinary case where no problem of confidentiality arises an opportunity should be given to *deal with adverse information that is credible, relevant and significant to the decision to be made*".

Mason J asserted that:

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[40] Finn P, '*Confidentiality and the Public Interest*' 58 (1984) ALJ 497 at 505, citing Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 55 ALJR 45.
[41] *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 55 ALJR 45.
[42] [2003] FCA 50.
[43] [2007] VSC 200, citing *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. and *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FLR 151.
[44] (1985) 159 CLR550 per Brennan J at 628-629

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

Legitimate Expectations

There is a legitimate expectation that documents ought to be released in accordance with the overriding statutory intent of the RTI Act. In *Teoh*[45] Mason CJ and Deane J said:

> …ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention (and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

Conclusion

The Queensland Government has under consideration both an IP Act and RTI Act discussion paper following a Government hosted Open

[45] *MIEA v Teoh (1995)* 183 CLR 273,291

Government Policy Forum on 13 August 2013. Submissions closed on 15 November 2013.The Government's response is still anticipated. The reviews are mandated as each statute must be reviewed no later than two years after their commencement.

The RTI discussion paper notes that the public interest test is complex and confusing for both decision makers and applicants.[46]

There are greater "pull" forces present now than when the Solomon Report was released. Burrill and Clarke correctly draw attention to the fact that documents held by private contractors engaged by Government focussing on contestability opportunities to partner with the private sector in improved service delivery, is at odds with accountability, as the detriment to "business interests" exemption will arguably frustrate members of the public. It will be argued that the public will not be able to request documents held by contractors as to why problems arose in relation to the service delivery.[47]

The public have a "legitimate expectation" of access to documents which affect them by the provision of the services of Government, and Parliament needs to strengthen the ambit of release to embrace the private sector which seeks the opportunity to partner with Government. The decision by the Office of the Information Commissioner in *Kalinga* [48]is strong guidance. Equally the public service need to focus first on the "bias towards disclosure".

Lindsey Alford

[46] Burrill M and Clarke H, *Rethinking right to information and privacy regulation in Queensland*, (2013) 10(2) PRIVLB 22, October, p 2

[47] See note 46 at 1

[48] *Kalinga Wooloowin Residents Association Inc v Department of Employment, Economic Development and Innovation, City North Infrastructure Pty Ltd (Third Party)* at p 2 of 3

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