THE TRANSMISSION OF THE PUBLIC VALUE OF TRANSPARENCY THROUGH EXTERNAL REVIEW

Julie Kinross*

The integrity branch of government

In the 2004 National Lecture Series, the Hon James Spigelman AC, CJ of NSW expressed his views about the function of integrity institutions. This was that their function was, including judicial review by courts, 'to ensure that the community-wide expectation of how governments should operate in practice was realized'. Integrity, in addition to 'legality', encompasses two other characteristics:

- 'maintenance of fidelity to the public purposes for the pursuit of which an institution is created', and
- 'the application of the public values, including procedural values, which the institution is expected to obey'.[1]

The *Right to Information Act 2009* (Qld) and the *Information Privacy Act 2009* (Qld) recognise a number of public values, including open government and transparency. Queensland public sector agencies are expected to obey these public values.

Analysis of the role of the Office of the Information Commissioner (the Office)

The Integrity Commissioners

In Queensland, the Information Commissioner is one of five Integrity Commissioners; the others are the Ombudsman, the Auditor General, the Chair of the Crime and Misconduct Commission and the Integrity Commissioner. The Integrity Commissioners, together with the Queensland Civil and Administrative Tribunal (QCAT) and the courts have the function of ensuring 'that the community-wide expectation of how governments should operate in practice is realized'. While the statutory functions of each integrity commissioner limit each commissioner's ability to the first two of Justice Spigelman's characteristics, all of the integrity commissioners cooperate on the third characteristic, in promoting the public values that support quality public administration, the values which agencies are expected to obey.

Right to Information (RTI) reforms for executive government and the Office

The Independent Freedom of Information (FOI) Review Panel, chaired by Dr David Solomon, found that the implementation of FOI legislation in Queensland over a 16 year period had been ineffective. One of the major barriers to effective implementation was identified as the public sector culture of secrecy. Reform recommendations encompassed changes which would combat the culture and its workings.

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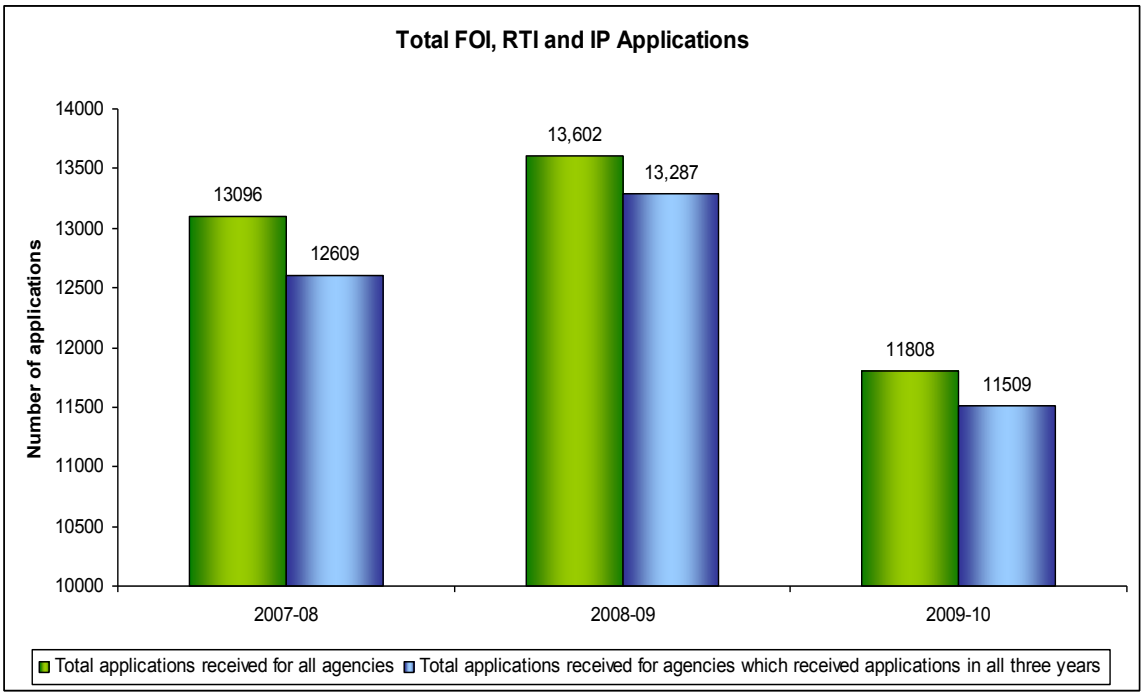
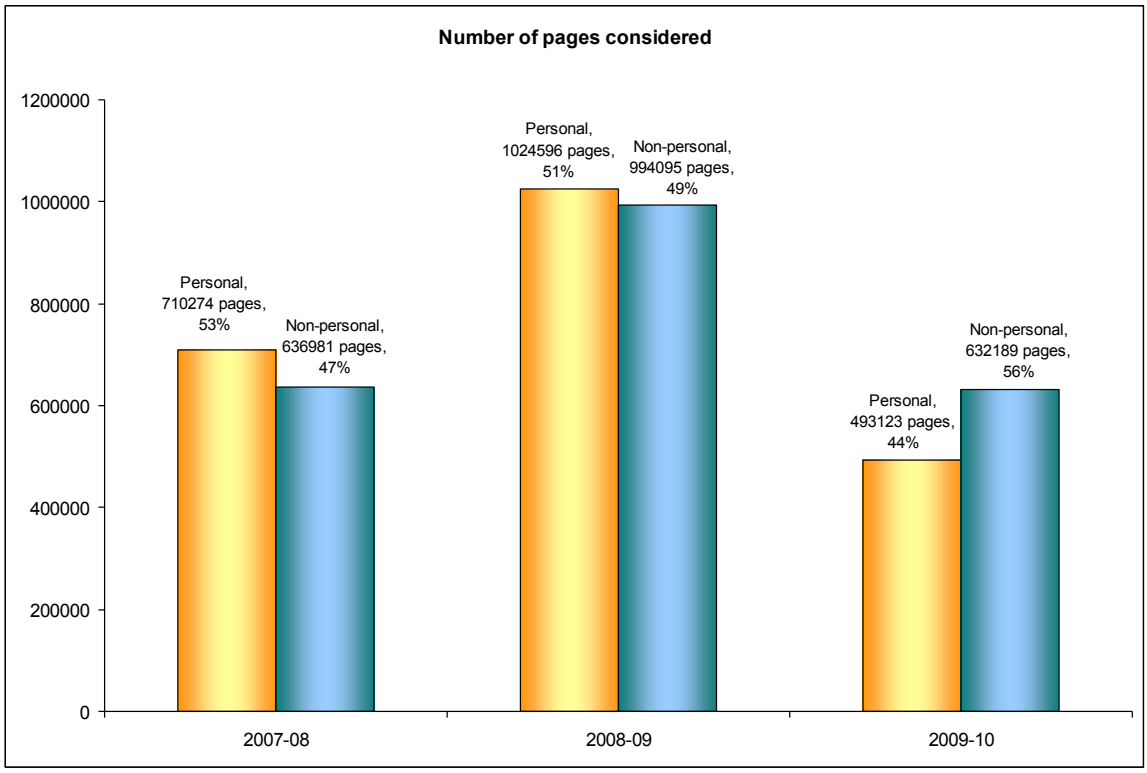
* *Julie Kinross is Queensland Information Commissioner. This paper was presented at the 2012 AIAL National Conference, Adelaide, South Australia, 20 July 2012.*

From 1992 until the Right to Information reforms, the Information Commissioner had the single statutory function of external review. The important lesson to be drawn from the Queensland experience is that external review and supervision by the courts alone are incapable of addressing the public sector cultural norms which worked to defeat the 'community-wide expectation of how governments should operate in practice'.

That is why the Independent FOI Panel recommended significant changes for executive government and several new powers for the Office. The changes recommended for executive government were aimed at making FOI applications a last resort.



The bar graph on the presentation slide shows the numbers of FOI applications received by public sector agencies in the two years before the reforms took effect and for one year under the new legislation. Government sources indicate that the figures for the 2010-2011 year, which are yet to be published are similar to the 09-10 year, suggesting that the decrease is continuing.



Similarly, the number of folios processed under formal access applications has decreased and there has been a change in the pattern of personal v non-personal information being processed. More non-personal information is now being processed under RTI than was previously the case. This suggests that agencies are releasing more personal information administratively than before.

What can be noted overall is a pleasing drop in the number of FOI applications made across the system and the work involved in processing them, particularly when the growth in the population of Queensland and the increase in government service delivery is taken into account. The reduction in the number of formal access applications reduces the cost to government, assuming that administrative release processes are more economical. The reduced numbers are perhaps a measure of the effectiveness of the reform package.

Changes to the role of the Office include new powers to:

- audit agency compliance;
- monitor and review agency practice;
- issue guidelines which are, in effect, binding on agencies; and
- the power to issue guidelines on the interpretation of the legislation in the *Marbury* sense of saying what the law means.

These new statutory functions are aimed squarely at fostering the public value of transparency and a more open public sector culture. They enable the Office to provide clarity around good practice and provide the tools to encourage it. It is of course the Government's and the public sector's responsibility to make it happen and the Office's role to monitor and support.

The external review function

The statutory function which is the subject of this paper is the *quasi judicial* role of external review, also referred to as independent merits review of agency decisions about information access applications. The Information Commissioner is empowered to make any decision an agency can make in the course of handling an application. Information Commissioner decisions can be appealed to QCAT's appeal tribunal, comprising judicial members, or judicially reviewed by the Supreme Court. No statutory restriction on review via ouster clauses was attempted in the RTI legislation.

In accordance with Thomas J's judgment in *Cairns Port Authority v Albietz*, the Information Commissioner submits to the jurisdiction of the appeals tribunal or Court. Participation in those proceedings does not ordinarily go beyond submissions on the proper construction of the Act, the manner in which the powers conferred on it were to be exercised, or supplementary submissions necessary to overcome disadvantage to another party by reason of lack of access to the documents in question.[2]

Both QCAT and the Supreme Court are bound in these proceedings by the approach of the High Court which has recognized that:

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[3]

The Office therefore has an important role in delivering certainty and finality to the merits of agency decisions. Through its decision making role, the Office provides guidance on how to apply the various provisions in the legislation but, more particularly, it provides guidance through its decisions on ascribing value or weight to various public interests and the balancing of those interests.

External review and integrity branch characteristics

The role of the Office of the Information Commissioner straddles two of Spigelman's three characteristics. The Office does not have a role in ensuring that public sector agencies deliver on the public purposes usually expressed in their enabling legislation. The Office does have a concern with legality and in the application of public values, particularly open government and transparency.

Legality

Some might think that legality is the sole province of the courts. The Office's concern with 'legality' concerns jurisdictional error. Generally, the Office has a statutory function to provide agencies with guidance on the interpretation of the legislation. The Office in turn is guided by authoritative precedents. Specifically, the legislation enables the Office to determine certain jurisdictional facts.

In his address to the 2010 AGS Administrative Law Symposium on issues arising from the *Kirk* decision, Justice Spigelman referred to a line of authorities which drew a clear distinction between a decision 'under' the Act and a decision 'under or purporting to be under' the Act[4]. He expressed the view that the introduction of the word 'purported' by way of an amendment to the longstanding reference to 'decision' in the legislation under consideration in *Kirk* appeared to be an intention to extend the provision so as to cover jurisdictional error.

Distinct from Queensland's *FOI Act*, which for 16 years empowered the Office to review agencies' decisions, the *Right to Information* and *Information Privacy* legislation includes

'purported' actions and such decisions are reviewable by the Office. For example, a decision that an application purportedly made under the legislation cannot be dealt with because the entity or documents is not one to which the legislation applies, is a reviewable decision. Rather than use 'purported decision' in the sense of the legislation considered in *Kirk* where the legislature sought to restrict review for jurisdictional error, the Queensland legislature has sought to clarify that the Office does have such a power.

Such decision making power concerning jurisdictional error is an avenue for supporting the transmission of the value of transparency. We have found agencies that have such a will to be secretive that they simply assume they are not covered by the legislation and agencies that fiercely contest the idea that the legislation might apply to them. Whether something is in or out of jurisdiction is akin to the fact of being 'on or off the couch' and agencies can be afforded guidance through external review.

In Justice Spigelman's words, the Office has a role in ensuring that the powers under the *Right to Information* and *Information Privacy Acts* are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised.

The Office also has a role in determining an error within the jurisdiction; the reasonableness or appropriateness of the decisions made in the exercise of such powers; and the power to decide whether it would be adverse to the public interest to disclose information. It is through this role that Justice Spigelman's third characteristic, that of the application of the public value of transparency can be illustrated in the Office's review of agency decisions, in particular in the application of the public interest test.

The transmission of the public value of transparency through external review

Many of the leading decisions of the Office were made in the 1990s. Many retain their authority under the *Right to Information* and *Information Privacy* legislation. This demonstrates the consistency and certainty in applying the legislation, which Office decisions have provided to the public sector since 1992. Whether or not the public's conception of the value of transparency has changed is another question.

As the *Right to Information Act* and the *Information Privacy Act* completely re-wrote the FOI legislation to make a resistant bureaucracy obey, it is reasonable to ask whether the new legislation has affected outcomes. Is the public value of transparency being transmitted any differently?

Design features of the RTI Act

The public interest test

The Independent FOI Panel found a number of problems with the public interest test in the old *FOI Act*. One problem was that the way the exemptions in the Act were structured meant that the public interest test was usually not applied or was applied to suit the agency norms concerning transparency. Section 38 of the *FOI Act* reproduced here, illustrates the point.

> **38 Matter affecting relations with other governments**
>
> Matter is exempt matter if its disclosure could reasonably be expected to-
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> (a) cause damage to relations between the State and another government; or

(b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;

unless its disclosure would, on balance, be in the public interest.

The structure of the section leads decision makers through the steps of deciding whether a document could be characterised according to the description. In the case of section 38, the decision maker decides if a document concerns inter-governmental relations, then decides if disclosure could prejudice the relations. If relations could be prejudiced, the decision maker takes the further step of deciding whether its disclosure would be in the public interest. In practice, however, because of the presumption that all documents were closed, it would often be assumed that it would never be in the public interest to release a document concerning inter-governmental relations, whether or not those relations might be prejudiced.

This meant that if a document concerned an audit undertaken by the agency, the document would automatically be deemed exempt without considering whether disclosure of the information would prejudice auditing procedures and without applying a public interest test. There was a generally understood and accepted (by the bureaucracy) consensus that audit documents never had to be released.

Simplicity and certainty

Similarly, if a document concerned the business, commercial or financial affairs of an entity, the document would be deemed to be exempt without considering whether disclosure would prejudice those affairs and without applying a public interest test. These are but two examples of the consensus that had been arrived at by the closed culture of the public sector. Where strong consensus has formed in relation to classes of documents, in part because the public interest test has never been appropriately applied, these classes of documents are more likely to be affected by the proper application of the public interest test and the circumstances in which agencies fight most bitterly to keep the same documents 'exempt'. For them not be held 'exempt' heralds an era of potential complexity and uncertainty.

It had become the accepted custom in agencies and in private entities that all audit documents and all documents concerning business affairs of an entity were exempt from disclosure under FOI. These are examples of when agencies are in breach of the rules.

To ensure the public interest test was applied and applied transparently, a number of devices were employed in the *Right to Information Act 2009* (Qld). Parliament decided that there were twelve categories of documents the disclosure of which would always be contrary to the public interest. These categories became strict exemptions where a public interest test did not apply. These categories include information created for the consideration of the Cabinet or the Executive Council.

The types of disputes that come for determination by the Office concerning the strict exemptions are usually about whether the document is the type of document the exemption intends to capture. The new legislation by and large confirms the accepted customs in agencies around these categories of documents but with the exception of the re-worded Cabinet exemption to make it clear that the wheeling of documents into the Cabinet room would not in and of itself make documents exempt under the Cabinet exemption. These are examples where agencies are allowed on the couch and generally do remain on the couch. The most common disputes are similar to those under the *FOI Act*: being the legal professional privilege exemption, the breach of confidence exemption and the law enforcement or public safety information exemption.

All other exemptions in the old *FOI Act* now appear as factors favouring that non-disclosure be taken into account in applying a public interest test. If it is relevant for an agency to consider whether, on balance, disclosure of information would be contrary to the public interest, the agency must undertake prescribed steps. The starting point for applying the public interest test is that all documents are open to the public. They can only be withheld if it would be contrary to the public interest to disclose them.

Two steps in the public interest test involve identifying irrelevant factors and then consciously disregarding them. Otherwise the test is essentially identifying factors favouring disclosure and factors favouring non-disclosure and weighing those factors.

In my view it is the non-exclusive list of irrelevant factors to be considered in the legislation that is having a powerful effect in changing the practice of decision makers. This list includes:

(i) embarrassment to the government or a loss of confidence in the government;

(ii) the applicant misinterpreting or misunderstanding the document;

(iii) mischievous conduct by the applicant; and

(iv) the seniority of the person who created the document.

These are of course the factors that public servants have long argued should be taken into account and reflect the drivers behind and the potency of the culture of secrecy. I have often heard Secretaries or Directors-General say that they will never do anything to embarrass their Minister; however, this is actually what they can be required to do when such information is requested. The listing of the factors is a compelling statement by the Parliament that these drivers of secrecy are not to influence decisions to release information. It is the 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.

The irrelevant factors go to the heart of why the FOI legislation did not work in practice. On external review, it is the role of the Office to ensure that the value of transparency, as prescribed by the Parliament, is put into practice by agencies.

We see about 420 requests for external review each year. Among these very few agency decisions list any of the irrelevant factors. While the irrelevant factors are generally not reflected in written decisions, the explicit naming of irrelevant factors in the legislation has had a large normative impact on the thinking of public servants and a direct impact on the quality of the weighing exercise in applying the public interest test. The listing of the factors in legislation arms the Right to Information practitioners with confidence to assert this position to senior executives and senior executives have become increasingly aware that these factors cannot influence whether or not information is disclosed. The naming of the factors also gives RTI practitioners the confidence to identify relevant public interest factors and to weigh the factors unimpeded by the anxiety of what their agency will think or by the unspoken pressure that can be applied. It is, of course, not a complete answer, but that is the purpose of external review, for those who choose to exercise their rights.

Have the legislative devices, including Parliament's working definition of transparency, affected decision outcomes?

In many cases the outcomes for applicants have remained the same. There have been some notable differences where cultural norms had developed around certain categories of documents.

Case study: Courier Mail and Department of Health Qld Info Cmr 22 February 2011 Unreported

The Courier Mail applied to the Department of Health for access to documents relating to particular hospital emergency departments that reviewed deaths in emergency in a specified time period. The applicant did not seek access to any identifying information in the documents, either patient names or doctors' names. The application was made after, in the words of the Courier Mail, 'The department had been damaged for several months by a series of embarrassing revelations based on so-called "clinical incident data", detailing mix-ups with newborn babies, patients being wrongly medicated and "league tables" of errors at hospitals'.

The Department refused access on a number of grounds.

The Courier Mail sought external review. It also RTI'd the processing of its RTI application. By RTI'ing its RTI application the Courier Mail found its emergency death review access application had led to the discussion amongst senior bureaucrats about their concern that clinical incident data could be released under RTI. The senior bureaucrats requested advice on whether certain exemptions under the *RTI Act* could be applied to prevent 'discovery' of such information. In reporting on the documents it received under the RTI of its RTI application, the Courier Mail likened the response of the Department's executive to the wheeling of documents into Cabinet to hide them.

On external review Queensland Health submitted that disclosing any information in the documents would prejudice the confidentiality of the death review process and would reduce the willingness of clinicians to participate meaningfully. The Department had had indications from clinicians that varied between refusing to cooperate with the clinical review to not meaningfully participating, essentially to protect themselves from civil suit. It was a circumstance where the health workforce's cultural norm was, in Spigelman's words, 'different to the community-wide expectation of how governments should operate in practice*'.*

The Right to Information Commissioner decided that as long as the essential interests were protected, that is, the confidentiality of health consumers and the anonymity of individual doctors, then the documents sought could be disclosed. This decision was supported by the AMA but continued to be challenged by Queensland Health.

The Department, possibly to placate an angry workforce, exercised its legal right to seek a stay of the decision pending an appeal. This drew further opprobrium from the Courier Mail and the AMA.

However QCAT refused to grant a stay on the RTI Commissioner's decision and Queensland Health was required to release the documents without the patient and doctor identifying information.

This case illustrates the leadership challenge for senior public servants in applying the *Right to Information Act* as the Act no longer permits the presumption that 'all documents are closed' to apply in circumstances where strong erroneous cultural norms have developed over time about certain categories of documents. In this case it was the clinical incident documents which health practitioners had come to believe were covered by qualified privilege.

It has been recognised for well over a decade that there is a public interest in qualified privilege for medical practitioners, a privilege which encourages health professionals to participate in effective safety and quality programs, by providing for the confidentiality of some information generated by those programs. The Queensland Government decided that

documents covered by qualified privilege would be defined so that doctors could be guaranteed anonymity in return for their full participation in defined quality assurance processes. In so limiting the circumstances in which qualified privilege would apply, the Queensland Government like all other state governments limited the consequential reduction in access to information to defined categories of information. For documents to be exempt under the *Right to Information Act*, they must have been created for and under a committee declared to be an approved quality assurance committee under the *Health Services Act 1991*. This qualified privilege was effectively extended to documents created for a root cause analysis of a prescribed reportable event.

The protection afforded by qualified privilege is a limited one. It is essentially designed to prevent the identification of a health practitioner to protect him/her from any possible legal action. The Parliament has limited it to find an appropriate balance with the community's access rights. In this matter Queensland's health practitioners overlooked the fact that RTI gave them the same protection as qualified privilege by protecting their names and patients' names. They strongly objected to the balance the Parliament had found between qualified privilege and the community's right to information.

Why was feeling so high in Queensland Health despite RTI providing them with the protections they were seeking?

The answer lies in what health practitioners and Queensland Health thought about the accuracy of the Courier Mail's reporting about the health system and the damage it was doing to the public's confidence in the health system. Queensland Health was of the view that the Courier Mail obtained clinical incident data and misreported it, either because the reporters did not understand the meaning of the clinical incident reports or because the reporters were deliberately spinning the information to create negative 'gotcha' stories. Queensland Health was concerned about the impact of such reports on the community's confidence in the health system. Having seen both the documents and the media reports, there is some validity in Queensland Health's concerns. This is why health practitioners continue to call for an amendment to the *Right to Information Act*.

It is the combination of the legislative devices detailed above that now precludes Queensland Health from withholding clinical incident data: the presumption that all documents are open; the restructuring of the exemption provisions; and making explicit that mischievous conduct by an applicant is an irrelevant factor. This case study shows how the new legislative devices can provide a serious challenge to very strongly established norms relating to certain categories of documents. It illustrates the important role that independent merits review can play in challenging long existing cultural norms by objectively applying the law in specific circumstances. The guidance provided to agencies can assist CEOs and the Senior Executive Service in the significant leadership task that they have in shifting workforces from a culture in which all documents are closed to a culture in which all documents are open. The case study also shows how the media plays an active role in influencing agency cultures.

Endnotes

1 JJ Spigelman 'The Integrity Branch of Government '(2004) 78 *Australian Law Journal* 724.
2 *Cairns Port Authority v Albietz* [1995] 2 Qd R 470, 470 per Thomas J.
3 *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135, 153 per Gleeson CJ, Gummow, Kirby and Hayne JJ citing *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 36 per Brennan J.
4 *Darling Casino Ltd v NSW Casino Control Authority* 919970 191 CLR 602 at 635; *Ex parte Hebburn Limited; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 144.