STRIKING THE RIGHT BALANCE: FOI AND THE CONTEMPORARY WORLD OF GOVERNMENT PRACTICE

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Thirty years or so following the initial enactment of freedom of information (FOI) legislation in Australia, there was an emerging consensus that the original model was in need of a major overhaul.

The initiative for change was taken by the Queensland Government in 2007 with the establishment of the FOI Independent Review Panel, which was charged with undertaking a comprehensive examination of Queensland's FOI legislation. The Panel's report, *The Right to Information — Reviewing Queensland's Freedom of Information Act*, provided a fundamental reappraisal of the core concepts of FOI and urged a more proactive approach to the release of government information. The subsequent enactment of the *Right to Information Act 2009* (Qld) (in tandem with the *Information Privacy Act 2009* (Qld)) epitomised the emergence of 'FOI Mark II' in Australia with its shift from the old 'pull' model to a new 'push' model. Similar legislative reforms were subsequently enacted by the Commonwealth and in New South Wales, Tasmania and, to a lesser extent, Victoria.

Despite these reforms, challenges implicit in striking the right balance between the goal of greater access and the need to ensure protection of key interests remain. This article examines some of the challenges — in particular, those stemming from an evolved government landscape epitomised by corporatisation, public–private infrastructure development and government-led investment and incentive projects as well as challenges resulting from changes in the workplace environment of government officials and personnel — in particular, those resulting from advances in information technology.

Many of these challenges are ones that have been considered in the past, such as corporatisation. Others, specifically those challenges that have been triggered by changing practices in the workplace, are likely to continue to present challenges as rapid technological advancement drives further change to workplace practices.

The challenge for FOI will be to consider the scope and capacity of FOI frameworks, including the FOI Mark II model, to deal with these challenges. This article considers the extent to which current FOI regimes provide an adequate response to these challenges.

Background

The introduction of FOI in Australia marked a fundamental shift in thinking about government-held information and official secrecy. The traditional perception that governments 'owned' official information[1] had begun to give way in the face of an increasing

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acceptance of the view that governments hold information on behalf of their citizens and should therefore ensure that individuals have adequate means of accessing it — a view consistent with liberal democratic values of transparency and accountability.

Yet, in the years following its inception, FOI began to face a number of challenges. Some derived from criticisms about its waning effectiveness as a means of enhancing open and transparent government. For instance, studies described a propensity by some agencies to develop an 'FOI resistant culture' by the adoption of strategies designed to thwart FOI requests perceived as likely to result in adverse publicity for the agency or portfolio Minister.[2] In a related way, perceptions arose that the 'conclusive certificate' mechanism was being overused, thus proving another instance of negative FOI practice.[3]

However, challenges of a different nature also emerged. Many derived from what can be described as a fundamental alteration of the government landscape. This was evident, for instance, in the extension of government outsourcing into traditional or 'core' government functions. Activities such as operating prisons or providing social welfare services were being placed in the hands of private service providers. In fact, outsourcing gave rise to patterns of FOI use not necessarily consistent with FOI's underlying philosophy — for example, FOI became a useful tool for business organisations seeking to access commercial information held by government agencies about their rivals, such as in the area of government tendering.[4]

As well as outsourcing, it also became more common for governments to discharge their functions by creating autonomous corporatised entities designed, for instance, to pursue government business activities, to manage and deliver public utilities (water, gas and electricity) or to act as management vehicles for administering public–private infrastructure projects.[5]

Practices such as outsourcing and corporatisation diminish the reach of FOI. In the absence of specific legislative or contractual arrangements,[6] documents held solely by private sector entities in outsourced arrangements with government are not generally accessible under FOI.[7] In the case of corporatised government entities, it became common practice legislatively to shield them from FOI if they were not otherwise beyond its reach due to the manner of their creation. The prevailing view was that commercially related activities conducted by such entities were inconsistent with the idea of FOI.

As a result of these challenges, and in the 30 years or so following the initial enactment of Australian FOI legislation, a consensus began to emerge that the original FOI model was in need of a major overhaul. The initiative for reform was taken by the Queensland Government in 2007 with the establishment of the FOI Independent Review Panel, charged with undertaking a comprehensive examination of that state's FOI legislation. The panel's report, *The Right to Information — Reviewing Queensland's Freedom of Information Act* (the Solomon report) constituted a fundamental reappraisal of the core concepts of FOI in the context of the emerging and broader debate about the need for governments to adopt a more proactive approach to the release of government information.

The subsequent enactment of the *Right to Information Act 2009* (Qld) (RTI Act (Qld)), in tandem with the *Information Privacy Act 2009* (Qld) (IP Act (Qld)) epitomised 'FOI Mark II' with its shift from the old 'pull' model of Australian FOI legislation to a new 'push' model. Similar reforms were legislated in New South Wales with the introduction of the *Government Information (Public Access) Act* (GIPA Act (NSW)); in Tasmania with the *Right to Information Act 2009* (Tas) (RTI Act (Tas)) and at the Commonwealth level with amendments in 2010 to the *Freedom of Information Act 1982* (Cth) (FOI Act (Cth)).

Despite the changes wrought by these reforms, challenges remain. Many of them are due to the ever-shifting nature of the government landscape, referred to earlier. The corporatisation of government entities and government ventures involving private sector partnerships and outsourcing have reached new levels — for example, by government agencies specifically establishing corporate vehicles to carry out specific projects but chairing these corporate vehicles with persons employed by or elected to the authorising agency. Under these arrangements, a new series of questions has been raised not in relation to whether these entities themselves are subject to FOI regimes but in relation to whether documents of these entities, when in the hands of agency employees or representatives, come within the ambit of FOI regimes.

Other challenges have arisen due to evolving workplace practices, especially concerning the way agencies and government officials go about their daily operations. Rapid advances in digital technology have significantly altered the workplace environment — as evidenced, for instance, in the increased use of smart phones, social media devices and flexible work arrangements.

Against this background, it is once again appropriate to consider whether existing FOI regimes, including those modelled along the FOI Mark II framework, are capable of dealing with these changes and challenges. In other words, are existing FOI regimes capable of appropriately meeting these challenges? In order to highlight this question, the article selects some key developments in FOI case law. The developments chosen for attention are those concerning the reach of FOI in areas involving corporatisation, changed and evolving workplace practices (the use of email, smart phones and other social media devices) and big data analytics.

Corporatised government entities as vehicles for government functions

FOI is built on liberal democratic values of government transparency and accountability — in other words, FOI is about access to government information. Although consideration is sometimes given as to whether FOI should be extended to the private sector,[8] the right of access in current Australian FOI statutes remains confined to documents which government agencies and ministers hold or have a right to access. This right of access is usually expressed in formal terms as a right of access to 'documents of an agency' and 'official documents of a Minister'.[9]

At its most basic, this essentially means documents held by government departments, statutory authorities and bodies established by government (usually by statute) for public purposes. More particularly, FOI regimes may use various legislative formulae to define which entities are subject to FOI. At one end of the spectrum is the 'exclusive listing approach', where the statute expressly and exclusively lists the particular entities.[10] At the other end is the 'criteria-based approach', which involves the application of a statutory term to the entity in question.[11]

In jurisdictions which adopt a criteria-based approach, difficult and contentious issues can arise, especially given the increasing practice of governments to deploy autonomous corporatised entities to engage, for instance, in government business or commercial operations or to manage public–private ventures.[12]

This is well illustrated in the case of the RTI Act (Qld), where, despite adoption of key Solomon report recommendations extending the right of access in the new regime to 'government owned corporations',[13] certain corporations established by the government as special purpose vehicles to pursue public–private ventures were determined by the

Queensland Supreme Court in *Davis v City North Infrastructure*[14] (*Davis*) to be immune from the application of the RTI Act (Qld).

By way of explanation, the right of access to documents in the RTI Act (Qld) is expressed to include those held by held by a 'public authority'. In accordance with the criteria-based approach enshrined in the RTI Act (Qld), the term 'public authority' is then defined as an entity either 'established for a public purpose by an Act' or 'established by government under an Act for a public purpose'.

In *Davis*, the respondent company (CNI) was created under the auspices of the Office of the Coordinator General of Queensland as one of a number of special purpose vehicles (SPVs) to manage major government infrastructure projects. In order for it to be subject to the RTI Act (Qld), it was necessary to show that it was 'established under an Act' (a Queensland statute).[15]

However, as the Supreme Court ruled,[16] whilst its existence was planned, enabled and organised by officials acting in accordance with Queensland legislation, CNI was not, in fact, established under a Queensland statute; it was incorporated and registered under a Commonwealth statute — the *Corporations Act 2001* (Cth). It therefore fell outside the FOI regime established by the RTI Act (Qld).

What made the ruling in *Davis* somewhat contentious was the fact that the evidence revealed that, in the lead-up to the enactment of the RTI Act (Qld), the Queensland Government had expressly accepted a Solomon report recommendation to extend the right of access to government business organisations and to remove an immunity they previously enjoyed under the repealed *Freedom of Information Act 1992* (Qld).[17] However, as a close examination of the final text of the statute revealed, only a qualified version of the recommendation was adopted.

Although 'government owned corporations' (GOCs) were now expressly subject to the regime, this extension applied only to those particular entities specifically defined and prepared for incorporation under the *Government Owned Corporations Act 1993* (Qld) as GOCs — that is, irrespective of the fact that such entities were ultimately incorporated under the *Corporations Act 2001* (Cth). In other words, although GOCs were subject to the RTI Act (Qld), CNI was not a GOC because the *Government Owned Corporations Act 1993* (Qld) had not been utilised to establish it, the government preferring instead to bypass this process in proceeding directly to incorporate it under the *Corporations Act 2001* (Cth).[18]

New models and arrangements for corporatisation and public–private ventures

As stated earlier, the FOI right of access is confined to documents which are held by government agencies or ministers or which they are legally entitled to access. For the most part, FOI statutes refer to documents in the 'possession' of or 'held' by government.

The legislative language used to denote possession may vary between jurisdictions, but it ultimately means both actual (physical) as well as constructive possession. Some FOI statutes expressly require government agencies to take contractual measures to ensure that they are in possession of certain documents held by private sector entities with which they have dealings.[19]

The concept of possession has given rise to a number of difficulties in the context of government agency dealings with private sector entities or organisations not themselves directly subject to FOI. Emerging case law exhibits various approaches taken in determining whether or not the FOI right of access extends to entities not otherwise directly subject to the

legislation. These approaches include by way of contract law, the law of principal and agent, and principles relating to corporate personality.

As detailed earlier, the corporatisation of government entities and government ventures involving private sector partnerships and even outsourcing have reached new levels, with government agencies specifically establishing corporate vehicles to carry out specific projects and chairing these corporate vehicles with persons employed by or elected to the authorising agency. Under these arrangements, while the broader issue of whether these entities should themselves be subject to FOI regimes remains relevant, the difficulties in bringing these entities into the FOI regime have triggered a new series of questions about whether documents of these entities, when in the hands of agency employees or representatives, come within the ambit of FOI regimes.

These questions have been considered to date in Queensland in several decisions of the Queensland Office of the Information Commission (QOIC) through legal frameworks including contract law, the law of principal and agent, and principles relating to corporate personality.

The first real consideration of this 'secondary' round of issues arose in the context of the law concerning principal and agent in the decision of the QOIC in *Maurice Blackburn Lawyers and Department of Transport and Main Roads; City North Infrastructure Pty Ltd (Third Party)*.[20]

In that case, the applicant sought RTI Act (Qld) access from the Department of Transport and Main Roads to documents referred to in a deed providing for the construction of state infrastructure projects. The deed was entered into between the Department (an 'agency' under the RTI Act (Qld) determined as representing the State of Queensland) and a separate entity, City North Infrastructure Pty Ltd (CNI) — a wholly owned and funded state government company established to manage the projects on behalf of the state and provide ongoing management services concerning contracts awarded for the projects. Clauses in the deed provided for the state to appoint a person as its representative for any purpose under the deed and for such person to act at all times as the agent of the state and subject to the direction of the state. Pursuant to these provisions, the Chief Executive Officer (CEO) of CNI was appointed as the state's representative.

On the basis of this arrangement, it was determined that the CEO of CNI was an agent of the state for the purposes of the deed — with the consequence that any documents brought into existence by the agent in that capacity belonged to the state as principal. In other words, the state, as principal, had a present legal entitlement to documents received by the CEO as agent when the CEO was fulfilling his responsibilities as the state's representative under the deed. Accordingly, and even though such documents might be physically held by CNI, it was determined that the agency (the Department) had a present legal entitlement to the relevant documents.

The issue arose in a different context in the decision of the QOIC in *Queensland Newspapers Pty Ltd and Ipswich City Council*.[21] This case concerned the relationship between Ipswich City Council — an 'agency' within the meaning of s 14 of the RTI Act (Qld) and therefore subject to the RTI Act (Qld) — and Ipswich City Properties Pty Ltd (ICP) — a council-owned company incorporated under the *Corporations Act 2001* (Cth). The council was the sole beneficial shareholder of ICP, and all of ICP's directors were elected council representatives or senior council employees.

The arrangements between the council and ICP were such that ICP leased premises from the council and established and maintained a separate document management system.

Therefore, in these circumstances, the documents could not be said to be in the actual 'physical possession' of council and therefore subject to the RTI Act (Qld). The only legal basis then under which ICP documents would be subject to the RTI Act (Qld) would be if ICP documents could be said to be in the possession of the council by some other means of possession, including through council officers who were members of the ICP or by the application of several legal principals.

The applicant requested access from the council to documents relating to the overseas travel arrangements of ICP directors. Access to some of the requested documents was rejected, in reliance on ss 47(3)(a) and 52(1)(a) of the RTI Act (Qld) — that is, on the basis that no such documents existed or could be found in the council's information management and storage system. The basis of this response was that, whilst ICP might hold such documents, ICP was a separate legal entity from the council, operating from separate licensed premises, with its own separate information management and storage systems and a separate server for documents such as emails.

Given that the council was the sole beneficial shareholder of ICP and that all of ICP's directors were elected council representatives or senior council employees, the applicant argued that ICP was, alternatively, 'under the control of' the council or the agent or alter ego of the council and that this was sufficient to establish that the council did have a present legal entitlement to the requested documents.

On external review, the QOIC first concluded (at [37] and [64]) that there was nothing in ICP's constitution or the applicable law (in particular, the *Corporations Act 2001* (Cth)) which gave the council a direct right of access to ICP documents. Secondly, the QOIC concluded (at [27]) that the possibility that the council, as sole shareholder, may be able to take possession of ICP documents by way of a shareholder resolution was not immediate enough to constitute a present legal entitlement to the documents as explained in *Re Price and Nominal Defendant*.[22]

That left for consideration the applicant's principal and broader argument that the factual circumstances warranted a 'piercing or lifting of the corporate veil' separating the council from ICP so as to allow a conclusion that council did, in fact, have a present legal entitlement to the documents. Again, the applicant pointed to the fact that the council was the sole beneficial shareholder of ICP and that all of ICP's directors were elected council representatives or senior council employees.

However, this argument was rejected. As the QOIC observed, an examination of relevant authorities demonstrates that 'piercing the corporate veil' is regarded as a significant step in the face of long-settled principles of corporate law concerning the concept of corporate personhood. Moreover, the relevant case law revealed considerable judicial uncertainty concerning the exact circumstances considered appropriate to warrant 'lifting the veil' or to similarly justify invoking the 'alter ego' concept.

In those circumstances, the absence of any judicial or authoritative tribunal decisions dealing with 'lifting the veil' in a context that was sufficiently similar to the fact situation here was particularly telling. Accordingly, the QOIC felt bound to observe the 'notion of corporate personhood' for ICP, with the result that ICP documents could not be regarded as council documents.

Finally, the applicant sought to complement their 'alter ego / piercing the veil' argument with the assertion that this would produce a just and fair result, given that the RTI Act (Qld) refers to taking account of factors favouring disclosure in the public interest. However, as the QOIC explained, public interest factors are only relevant in determining whether 'a document of an

agency' should be released. They have no bearing on the threshold issue of whether or not a requested document is, in fact, 'a document of an agency'.

The end result in this decision was that a body which was established by the council and drew its membership from the council was considered to be outside the scope of the RTI Act (Qld). Therefore, in the circumstances, a body established and controlled by a government agency under the current RTI Act (Qld) is considered to be an entity to which the accountability framework established under the RTI Act (Qld) does not apply. Furthermore, in the absence of legislative amendment, and while judicial uncertainty remains in many of these areas, this will continue to be the current position in respect of an entity such as ICP.

Changes in the workplace environment: smart phones and flexible work arrangements

The changing nature of the workplace environment and, in particular, the way in which work is undertaken is posing questions and presenting challenges for FOI. In a similar way in which the creation and use of emails 15 to 20 years ago changed the manner in which work was undertaken and subsequently required legal conceptual and definitional change to concepts such as 'document', the use of smart phones and the integration of these technologies into daily working and personal life is requiring a reconsideration of what is considered to be work-related information and personal information.

Likewise, the pressure to meet deadlines and work out of office hours combined with the push towards flexible working arrangements has also triggered an increasing reliance on personal email systems and servers and has triggered concerns about the capacity of this reliance and these arrangements to capture an agency's corporate knowledge. But, in an FOI context, the next logical concern is the capacity of FOI to apply to documents created and stored under these arrangements.

The other key challenge for FOI in this area is that the technological advances that are driving the changes are rapid and intense, and they are likely, in the future, to continue at a level of intensity and impact not yet considered. Therefore, the challenge for FOI in this context is whether it has the capacity to deal with these challenges not only now but also in the future.

Against this background, there have been several recent decisions from the QOIC in Queensland where issues such as these have been considered.

Smart phones and the public–private divide

In two recent decisions, the QOIC considered the issue of whether documents, in the form of photographs and other documents, which were 'personal mementos' and captured by public officials in a personal capacity, should be disclosed, in the public interest, because these images where captured and stored on agency-funded ICT infrastructure.

While these decisions confirm that there is no doubt that these documents were subject to the RTI Act (Qld), the real question was whether the public interest, as reflected in the exemptions established under the RTI Act (Qld), required the release of these documents.

These two decisions both concerned similar factual circumstances and involved the Ipswich City Council and the issue of whether documents (in the form of photos and other documents) taken on council-issued smart phones and subsequently stored on council ICT infrastructure should be disclosed.

In *Queensland Newspapers Pty Ltd and Ipswich City Council*[23] and *Queensland Newspapers Pty Ltd and Ipswich City Council; Third Party*[24] (collectively, the Decisions), the applicant applied to Ipswich City Council seeking access under the RTI Act (Qld) to photographs and other documents relating to the mayor's and other councillors' overseas travel to London and continental Europe in 2012 funded by a company which council owned and effectively operated and controlled.

The council located several documents responsive to each of the applications. As the responsive documents had been, in some manner, either captured or stored and/or circulated on council ICT infrastructure, there was no issue as to whether the documents were documents of council and in this capacity subject to the RTI Act (Qld). The key issue was whether the documents triggered any of the exemptions established under the RTI Act (Qld) and should be released.

On both applications, the applicant made submissions that the release of the documents was in the public interest on the basis that disclosure:

(a) would assist in enhancing council's accountability, enable ratepayers to scrutinise the spending of public funds and cross-reference with other available information about the trip in question; and

(b) would assist in boosting transparency of an elected official by providing the public [with] information about how money is being spent by a [ratepayer] funded company.

The applicant also argued that the position of mayor had a large overlap between personal time and work time; and that the mayor was essentially 'never off duty' and therefore the photographs were taken in an official or work capacity and could not be considered as 'personal' or 'private information'. Further, the applicant also argued that any privacy attaching to the documents, specifically the photographs, was reduced, as the photographs were emailed between councillors using council email addresses.

To counter these submissions, the council made a number of submissions over the course of the external review processes, including that:

(a) although there was no question that the photos were documents of the council and therefore subject to the RTI Act (Qld) and responsive to both the applications, the photographs were mementos taken during the personal spare time of the mayor whilst on the trip and therefore were not taken in an official or work related capacity;
(b) public sector policies, including those of the council, expressly authorise their representatives and employees to use public sector ICT-related infrastructure or devices for limited personal use;
(c) although the mayor and councillors were public officials, these officers still had an expectation of privacy surrounding non-work or non-official activities even when details of these activities had been captured and stored on council ICT infrastructure; and
(d) given that the photographs were non-official photos, there was no public interest, including accountability and transparency related public interest, in the disclosure of the photographs. Furthermore, in the absence of public interest factors supporting non-disclosure, there was an insufficient basis to disclose the personal information of the mayor and councillors in the documents and photos.

In determining these external review processes, the QOIC decided that the public interest, through the application of the Public Interest Test Exemption established under s 49 and sch 4 of the RTI Act (Qld), favoured the non-disclosure of the documents and photos.

In making this determination, the QOIC:

(a) found that the photographs conveyed no or very limited information capable of addressing the submissions and questions of the applicant. It was considered, on the face of the photographs, that they were unlikely to facilitate the type of public oversight, debate and enlightenment envisaged by the applicant. Whilst the disclosure of the photographs could be said to further the public interest concerning the accountability and transparency of the council, informed public debate or effective oversight of the expenditure of public funds, it could only do so in a limited capacity and therefore the QOIC afforded a low weight to the public interest in considering the factors favouring non-disclosure;
(b) on consideration of the images in the photographs themselves, held that the photographs were unable to identify anything to suggest that they recorded activities subject to the overlap of personal and work activities in the manner suggested by the applicant;
(c) held that the material in the photographs was sufficient to support a finding that the photographs were personal mementos and that the photos were not work-related or connected to the official duties and responsibilities of the mayor or councillors; and
(d) recognised that there were policies and procedures in operation at the council which enabled officers and representatives to have access to council ICT infrastructure and services for limited personal use. In this instance, it was satisfied that the transmission of the documents and photographs using council email addresses fell within the limited personal/private use permitted by the relevant policy and code.

The final decision of the QOIC in both of these matters was that the public interest protecting the release of personal information and privacy outweighed any public interest factors favouring disclosure identified by the applicant; therefore, it upheld the council's decision not to release the photographs.

While it can be said that the previous approach to the issue of whether the personal information of public officials and public sector officers and employees can be disclosed has been found to be very much in favour of the position that such information can be disclosed, these decisions from the QOIC indicate a softening of this position and recognition that these officers can have personal information and privacy related concerns that can be protected.

In our view, this slight change in position will become more and more significant as devices such as smart phones, be they work or personal devices, become more and more integrated into life and work and the distinction between these two spheres becomes increasingly blurred.

Flexible work arrangements and other matters

As detailed previously, issues such as the 24-hour workplace and the pressure to meet deadlines and work out of office hours combined with the push towards flexible working arrangements has also triggered an increasing reliance on personal email systems and servers and has triggered concerns about the capacity of this reliance and these arrangements to capture an agency's corporate knowledge. In an FOI context, the next logical concern is the capacity of FOI to apply to documents created and stored under these arrangements.

In this context, FOI legislation generally provides for access to documents in the possession or under the control of an agency officer which relate to the officer's 'official capacity.' As the case law illustrates, this has given rise to a number of questions — some relating to whether

a document in the possession or under the control of an agency official is a document that is held 'in the officer's official capacity'.

Considering these issues requires an examination of s 12(b) of the RTI Act (Qld). Section 12(b) of the RTI Act (Qld) is the second leg of the inclusive definition of what is meant by a document of an agency that is 'in the possession or under the control of' an agency. It provides that it will include a document in the possession or under the control of an agency officer provided it relates to officer's 'official capacity'. Section 12 of the RTI Act (Qld) provides:

> **12 Meaning of document of an agency**
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> In this Act, document, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency, and includes —
>
> (a) a document to which the agency is entitled to access; and
>
> (b) a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.

In light of the broad rulings that a document in the (physical) 'possession' of the agency or 'under the control of'[25] an agency will constitute a 'document of the agency', it is not immediately clear what s 12(b) of the RTI Act (Qld) adds, unless it is meant to include agency-related documents which are offsite or not physically located in the agency but which are, nonetheless, in the possession or control of an agency officer 'in the officer's official capacity'.

At the very least, questions of interpretation remain as to whether a document in the possession or under the control of an agency official is a document that is held 'in the officer's official capacity'.

In *Tol & The University of Queensland*,[26] it was determined that entries on a website which was maintained by an agency officer (including during agency working hours) were not documents held by the officer in his 'official capacity' in terms of s 12(1)(b) of the RTI Act (Qld) and were therefore not documents 'in the possession or under the control of the agency'. It was not disputed that the University of Queensland (UQ) was an 'agency' for the purposes of s 14 of the RTI Act (Qld) and that it was in possession of documents relating to the first part of the applicant's RTI request.

However, the second part of the applicant's request sought access to entries on a website set up to discuss the science of global warming. The website had been established and was maintained by a UQ staff member in his capacity as a member of a group called Skeptical Science Forum (SkS Forum). The staff member (the 'officer of the agency') was an academic employed by UQ in its Global Change Institute and, in his UQ profile, he identified himself publicly in both capacities. The applicant argued that the SkS Forum website entries were therefore documents held by an officer of the agency 'in the officer's official capacity' because the academic, in maintaining the website, did so, partly during work hours, by presenting himself as an employee or officer of UQ.

However, the Acting Assistant Information Commissioner ruled that the website entries did not comprise documents received or created by the officer acting in his 'official capacity' within the meaning of s 12 of the RTI Act (Qld). They were therefore not 'documents of an agency' such that there was no right of access to them under the IP Act (Qld) or RTI Act (Qld). The decision was based on determining the following facts:

(i) UQ did not create or maintain the SkS Forum or the website;
(ii) income from donations to the site did not enter UQ's bank account;
(iii) the website did not bear the UQ logo; and
(iv) the officer's claim of copyright over the website was not disputed by UQ.

In other words, the officer's involvement with the website and forum was in his personal capacity. It was also accepted that university academic staff frequently work outside of usual business hours and collaborate on projects with other academics. On that basis, the fact that the officer maintained the website during working hours did not, in itself, mean that he did this on behalf of UQ.

Older cases from other jurisdictions may provide some additional guidance concerning the ambit of s 12(b) of the RTI Act (Qld). However, caution is necessary, bearing in mind existing rulings on s 12 of the RTI Act (Qld) concerning the separate wording 'in the possession of' and 'under the control of', especially rulings which establish that 'in the possession of' an agency means simple physical possession by the agency.

The decision in *Re Mann and Capital Territory Health Commission (No 2)*,[27] concerning the FOI Act (Cth), stated, for instance, that documents in the possession of agency employees, even if they are physically kept within the agency, are not 'documents of an agency' if they do not relate to the performance of the agency's functions.

Also, in *Re Healy and Australian National University*,[28] the Administrative Appeals Tribunal held that, if the requested documents were not created by officers of an agency as part of their official duties, they were not 'documents of an agency'. And in *Re Horesh and Ministry of Education*[29] it was held that notes of a meeting, taken on behalf of a school principal by another person, did not constitute a document 'in the possession of' the ministry insofar as the existence and purpose of the notes was personal to the principal — that is, they were not brought into existence for any administrative purpose and were not physically located on the school premises. This case was followed in *Re Hoser and Victoria Police (No 2)*,[30] where it was held that a taped conversation recorded by a police officer to protect himself against the possibility of subsequent allegations being made against him was a document held by the police officer personally and did not enter Victoria Police records.

Where then does this leave s 12(1)(b) of the RTI Act (Qld) in considering whether emails and other documents created or circulated using personal ICT infrastructure such as personal smart phones, email accounts and computers?

On one view, it could be said that any document in the possession or under the control of an officer in an official capacity will comprise a document of the agency subject to the operation of the RTI Act (Qld) even if the document in question is held or stored on non-agency, private ICT infrastructure such as a personal email account or hard drive. The basis of this position is that the personal email account or hard drive would be said to be under the 'control' of the relevant officer.

The decision of the Western Australian Information Commissioner in *Re Swift and Shire of Busselton*,[31] considering similar definitional provisions as that prescribed under s 12 of the RTI Act (Qld), found as follows:

> I do not accept that the definition 'documents of an agency' in the FOI Act requires both possession by an officer of an agency, in his or her official capacity as such an officer, as well as control of those documents by the agency. Rather, in my view, the definition plainly states that a document of an agency includes a document that is in the possession or under the control of an officer of the agency in his or her official capacity. it is the act of possession of a document or the power of control over a

> document by an officer acting in an official capacity, which brings a document within the purview of the FOI Act.
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> ... as far as the FOI Act is concerned, I do not consider that the deciding factor is where a document might be held or filed by an elected member ... In my view, the question involves determining the capacity in which documents are held by elected officials.

Further support for this position is found in the Western Australian Information Commission decision in *Re Leighton and Shire of Kalamunda*,[32] which dealt with facts very similar to those in this review. In this decision, the Information Commissioner was satisfied that emails received by an elected councillor in the performance by the councillor of his official duties would be documents subject to the operation of the *Freedom of Information Act 1992* (WA) (FOI Act (WA)), regardless of the fact that they had been received via a private email address.

While this position may be sustainable while the person in question is an employee or is still an officer of the relevant agency, this position may be difficult to continue to be sustained where the officer or employee in question is no longer connected to the agency. Equally, it will be difficult to assert this position where the email account or server or other ICT-related infrastructure is not under the control of the employee or officer in question.

In these circumstances, while the RTI Act (Qld) and other similar FOI regimes will be able to deal with a situation where the email account or other ICT-related infrastructure is under the control of the relevant employee or officer, it will be difficult where the officer or employee is no longer engaged or associated with the relevant agency.

Big data, big data analytics and information as an asset

One final example of the future challenges for FOI is presented by the increased use by government of 'big data' and 'big data analytics' and the increasing recognition that the information and data held by governments is an asset and in this capacity has financial value.

While there has been considerable discussion of big data and big data analytics in the context of Australia's various information privacy regimes, there has been little or no consideration of what challenges these mechanisms present to FOI.

We consider that there are several challenges presented by these mechanisms, including the following:

(a) Assuming that big data and analytic analysis results are considered to be public records and are retained by agencies, how would FOI deal with an application to access this information and data, given the size and volume of this kind of data?
(b) Could standard FOI procedural processes deal with an FOI application or this kind of information?
(c) Should the data and information be proactively released under 'open government' style initiatives?
(d) Who should bear the cost of such a process, especially if the data was being accessed for commercial purposes?
(e) Would it be necessary to introduce a measure in FOI to ensure that applicants seeking access for commercial purposes be subject to a varied regime?

Overall, these are just some of the few issues that big data and big data analytics present to FOI. To date, there has been little or no discussion about these mechanisms in an FOI context, but, again, these mechanisms present issues that will need to be considered in any

modernisation process or review that is to be applied, even if the end result of such consideration is that no amendments to existing regimes are required.

Conclusions

In this article, we have sought to raise several issues concerning the capacity of FOI to deal with a changed and ever-evolving government operational landscape. The authors' consideration of these issues is by no means exhaustive, and a range of further issues and changes, adopting this theme, could have equally been raised.

What is clear from this preliminary review of this issue is that FOI appears to have continuing issues in dealing with practices such as corporatisation. These appear to be issues where legislative change will be required in order to change the current FOI schemes to apply to these types of entities and processes.

On the other hand, it appears that, at least in the context of the RTI Act (Qld), there is a level of flexibility incorporated into the statute which allows issues generated by changes to agency work practices to be considered and dealt with under the RTI Act (Qld) processes in most circumstances.

Looking forward, however, the key challenge for FOI will be to ensure that this flexibility remains to allow FOI to deal with further change and evolution in these areas into the future.

Endnotes

1 *Osland v Secretary, Department of Justice* [2008] HCA 37, [60] (Kirby J).

2 Described initially in a Canadian study — see A Roberts, 'Administrative Discretion and the Access to Information Act: "Internal Law" and Open Government' (2002) 42 *Canadian Public Administration* 174. Roberts provided an account of what he described as 'contentious issues management' in government agencies in Canada. Similar practices in Australia were described in a report by the Commonwealth Ombudsman, which examined practices in 22 government agencies: Commonwealth Ombudsman, *Scrutinising Government, Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 02/2006 (March 2006) [7.2]. See also the NSW Ombudsman, *Annual Report 2001–2002*, p 73, which referred to 'differential handling' of FOI requests. Similar concerns were also expressed in Queensland Public Hospitals Commission of Inquiry, *Report of the Commission of Inquiry into Bundaberg Hospital* (1996), which criticised FOI practices by Queensland Department of Health officials said to be specifically designed to thwart FOI disclosure of documents recording surgery waiting times in public hospitals. See generally the discussion in R Snell, 'Contentious Issues Management — The Dry Rot in FOI Practice?' (2002) *FOI Review* 62.

3 Although now removed from most Australian FOI statutes, the mechanism remains in the *Freedom of Information Act 1982* (Vic) (FOI Act (Vic)) ss 28(4), 29A(2); *Freedom of Information Act 1992* (WA) (FOI Act (WA)) ss 36–38; *Information Act* (NT) ss 59–62; *Freedom of Information Act 1982* (ACT) (FOI Act (ACT)) s 37A(2).

4 This was well illustrated, for instance, by the decision in *Re Wanless Wastecorp and Caboolture Shire Council* (2003) 6 QAR 242.

5 For an early account of the modern beginnings of 'contractualisation' of public administration, see M Freedland, 'Government by Contract and Public Law' [1994] *Public Law* 86.

6 See, for instance, *Freedom of Information Act 1982* (Cth) (FOI Act (Cth)) s 6C; *Government Information (Public Access) Act* (NSW) (GIPA Act (NSW)) s 121. The issue was initially highlighted in a joint ALRC/ARC report in 1995, which recommended that governments should make adequate provision for access rights when a government service is contracted out. The report considered a number of options, ranging from the wholesale extension of FOI legislation to the private sector to mechanisms for ensuring information access rights are inserted in contracts between the government agency and the service provider. See Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* Report No 40 (1995), rec 99.

7 Generally speaking, the FOI right of access is limited to documents in the possession of government. In the absence of specific legislative or contractual arrangements, documents physically held by a private service provider relevant to the performance of government agency function might still be accessible from the agency where the relevant FOI legislation provides a sufficiently extended meaning of 'possession'.

8 From time to time, consideration has been given to whether or not FOI should be extended to the private sector. See, for example, Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77, ARC Report No 40 (1995) Ch 2. See also Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Freedom of Information in Queensland*, Discussion Paper No 1 (2000) p 4.
9 See, for instance, FOI Act (Cth), s 15. In some jurisdictions, several pieces of legislation may need to be consulted to determine the issue, as has been the case in New Zealand under the *Official Information Act 1982* (NZ) (NZOIA) and the *Local Government Official Information and Meetings Act 1987* (NZ).
10 FOI Act (Cth); NZ OIA; Canadian *Access to Information Act*, RSC 1985, c A-1.
11 See, for example, RTI Act (Qld) ss14–16.
12 See, for example, *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285; *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376; *Re Orr and Bond University* (1998) 4 QAR 129; *Re Barker and World Firefighters Games, Brisbane* (2001) 6 QAR 151.
13 RTI Act (Qld) s14(d). See also *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285; *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376; *Re Orr and Bond University* (1998) 4 QAR 129; *Re Barker and World Firefighters Games, Brisbane* (2001) 6 QAR 151.
14 [2011] QSC 285.
15 The right of access established by s 23 of the RTI Act (Qld) encompasses documents held by a 'public authority' (s 14) where (for present purposes) 'public authority' means an entity either 'established for a public purpose by an Act' (s 16(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' (s 16(1)(a)(ii)).
16 The Supreme Court in *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285 affirmed the correctness of the decision by the Queensland Civil and Administrative Tribunal (QCAT) in *City North Infrastructure Pty Ltd v Information Commissioner* [2010] QCATA 60, which, in turn, had overturned the decision of the Information Commissioner in *Re Davis v City North Infrastructure Pty Ltd* (Decision No 220004, Office of the Information Commissioner, 31 March 2010) that CNI was 'established *under an Act*' (s 16(1)(a)(ii)) because its formation required the Treasurer's consent under s 44 of the *Financial Administration and Audit Act 1977* (Qld).
17 For a detailed account, see W Lane, 'State-owned Corporations and the Reach of the RTI Act (Qld) — *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285' (2011) 31 *Queensland Lawyer* 239.
18 For a detailed account, see Lane, ibid.
19 See, for example, GIPA Act (NSW) s 121.
20 [2014] QICmr 6 (25 February 2014).
21 [2015] QICmr 12 (26 November 2015).
22 (1999) 5 QAR 80.
23 [2016] QICmr 13.
24 [2015] QICmr 12.
25 See, for example, *Re Price and Nominal Defendant* (1999) 5 QAR 80; *Office of the Premier v The Herald and Weekly Times Ltd* [2013] VSCA 79, [63], [71].
26 [2015] QICmr 4.
27 (1983) 5 ALN N261.
28 Unreported, AAT, 23 May 1985.
29 (1986) 1 VAR 143.
30 (1990) 4 VAR 259.
31 [2003] WAlCmr 7.
32 [2009] WAICmr 1.