

Department of Justice



**Review of the
Freedom of Information Act
1991**

Issues Identification Forum

Report

December 2008

1. Introduction

This report was prepared by PDF Management Services to summarise the discussion and highlight the key issues of concern to participants raised at an *Issues Identification Forum* conducted in Hobart on 10 December 2008.

The Forum launched the Tasmanian Freedom of Information (FOI) Review and brought together key people who respond to requests for information with people who routinely seek access to information using the FOI legislations (see Participant List Appendix A).

The purpose of the Forum was to commence the Review process by allowing the review team insight into participants' views about what is both right and wrong with Tasmania's current legislation.

2. Forum Program

The forum was introduced by Mr Dale Webster, Project Manager, Tasmanian FOI Review (see Program outline Appendix B).

Dr David Solomon AM, who recently completed a review of the Queensland FOI Legislation and Mr Rick Snell, Senior Lecturer in Law at the University of Tasmania were then invited to provide presentations on their experience with FOI.

From this starting point, a series of questions were put to forum participants to promote discussion and exploration of issues relevant to the Review.

The results of these Forum components are discussed in detail below.

3. Review Outline

Dale Webster outlined the approach to the Tasmanian FOI Review pointing out that Tasmania's is one of four FOI reviews currently underway nationally. The others include: Queensland, New South Wales and the Commonwealth.

The Tasmanian Review will start with Queensland as a base but will also make reference to both NSW and the Commonwealth reviews. The process will include:

- Working groups will assist in the drafting of a 'Directions Paper' through January/ February 2009
- Experts will critique the paper prior to public release (Expert Advisors: David Solomon, Rick Snell, Len Armsby, Ombudsman and Archives)
- 'Directions Paper' will be released for public comment around March/April 2009
- Draft Bill released for public comment in June/July 2009
- Bill considered by Parliament in Spring Session.

4. The Queensland FOI Review - Dr David Solomon AM

Dr Solomon began his career as a journalist in Canberra working as a political correspondent for several papers.

He is a barrister and author. He has written 11 books in the fields of politics, government and constitutional law. In 2000 he was awarded a Doctorate of Letters by the Australian National University. In 2006 he was appointed a Member of the Order of Australia in recognition of his service to journalism as a commentator on legal, political and constitutional law issues.

He has recently served as a member of the Judges Salaries and Allowances Tribunal and was a contributing editor with The Courier Mail.

Dr Solomon provided his observations on the review of the Queensland FOI Legislation. Key issues included:

- While the Terms of Reference of the review had started out as dealing with mainly Objects, Ambit, Exemptions and the effectiveness of processes (such as time and cost; voluminous requests and reporting). Consultation soon saw the issues expand to include for example, the release of government information outside of FOI. A roots and branch review was essential.
- Over the 15 years since the introduction of FOI Act in Queensland several changes had been made - some outside the spirit of the original intention and practices such as 'wheeling documents into Cabinet to avoid FOI' were actively discouraging openness and accountability. The political will required to make FOI work had been absent at times.
- Objects in the Queensland FOI legislation were less clear than Tasmanian FOI Act allowing for the proliferation of exemptions or exclusions including the use of Cabinet exemption.
- Reporting systems used multiple databases, which were disconnected.
- Charging fees was problematic and time- consuming.
- Systems were not in place to deal with email requests for FOI.
- Public interest test was largely left to the guess-work of FOI officers.
- The Information Commissioner role was not integrated with FOI functions – managed by Department of Justice and mostly concerned with training.

Conclusions of the review included:

- Government should provide information to the public as a general principle - with FOI as an option of last resort e.g. Cabinet material published on the internet as a matter of course.

-
- Using a back to basics approach – need a very good reason not to adhere to underlying FOI principles, e.g. Cabinet exemption okay where it applies to collective Ministerial responsibility. Individual Ministerial responsibility requires proportionate consideration, e.g. dealing with Ministerial Briefs. (Question Time Briefs and Estimates briefs may be covered by Parliamentary privilege.)
 - Personal Information should be accessible to the people it concerns without the need for FOI requests. Privacy Commissioner as deputy to Information Commissioner.
 - If material is not covered by a limited number of exemptions then apply public interest, that is, access to material should be unimpeded unless contrary to public interest.
 - FOI officers should be provided with definitions of public interest factors that they can take into account in making determinations.

Note: Participants were provided with a copy of the Queensland government's response to the Solomon Report on arrival at the Forum.

5. FOI in Tasmania - Mr. Rick Snell

Mr Rick Snell is a senior lecturer in law at the University of Tasmania. His research, ideas and teaching have been influential within Australia and internationally.

He has several research interests including government transparency, public sector governance, comparative administrative law (especially freedom of information and ombudsman) and the media.

Mr Snell is a member of the Tasmanian Administrative Review Advisory Council which advises the Tasmanian Attorney-General on Administrative Law matters. He was an elected and active member of the governing Council of the University of Tasmania from 2003-2006.

He was editor of the FoI Review for 10 years and is currently on the boards of Open Government and Comparative Media Law.

Mr Snell recommended that a root and branch review should be adopted in Tasmania. Creating something that moves from a paper based into an electronic system e.g. Mexico only accepts online applications.

Introduction of FOI in Tasmania was welcome but political will has also been a challenge. Good features of the Tasmanian legislation include:

- **Objects** - very clear, focus on accountability and participation in governance and increase the flow of information from government to the public.
- **Section 5** - extension of accountability to include non-departmental activity e.g. Government Business Enterprises, which need to be included.
- **Fees** – simple, no application fee, maximum charge. Need mechanisms for vexatious request or unreasonable demands (by academics!?) Fees approach has kept gamesmanship out and credibility high.
- **Local Government** – roll-out was very positive including reasonable lead time to implement. Staggered roll out enabled players to get organised.
- **FOI Unit** – this was great when in DPAC but was allowed to fold. A central function helps to monitor performance overall and refine how it works.
- **Ombudsman** – role in relation to FOI is clear and keeps the model administrative (see also New Zealand) rather than legal (as in NSW or the Commonwealth).
- **Cabinet** – provisions work well.
- **Administration** – processes work pretty well.

Currently a 'pull model' that is reactive rather than a 'push model' that is proactive.

6. Participant Views

Participant views were sought using a number of prompting questions. The larger group was divided into small groups comprising people with comparable functions in relation to the application of FOI legislation, namely FOI operatives from a mix of agencies; managers from a mix of agencies; and requesters of information.

The feedback from this process is summarised against each of the questions.

6.1 From your perspective in using the Freedom of Information Act, what are your key issues?

General

- Difficulty dealing with multi-agency requests
- Lack of trust from applicants that agency will release any embarrassing information leads to 'fishing' or widely scoped requests
- Interstate agencies not prepared to share documents in case Tasmania releases them under FOI
- Full and frank advice may be avoided where it is understood the material is accessible via FOI - leading to loss of documented corporate memory and reduced value of documents
- GBEs not wanting to produce reports if subject to FOI
- Police use FOI exemptions to deal with intelligence systems (IDM) requests – third party. Also difficult requests relating to internal investigations and accident investigations (sought by lawyers and insurers). Youth Justice Act prevents disclosures regarding youth.
- GBE may rely on third party involvement to invoke an exemption - but not always successful (Forestry). Forestry commercial information also includes data base - happy to print but not provide database.
- There is a perception that Ombudsman external review process is not enforceable on a Department (See S48 (7))
- Question the value of an Information Commissioner - Ombudsman could take on this role
- Protection from legal proceedings should be extended to other release of information
- Current approach is designed for 'one size fits all'. Need to differentiate two sets of users, regulars and incidental users (of 60 applicants, 1 is incidental) and encourage alternative processes for each
- Vexatious applicants – no provision to refuse
- Fees – favour an application fee.

Interpretation

- Applicants confused by different approaches from different agencies
- Uncertainty of release based on who is the decision maker
- What is the starting premise for considering a request - release with minimal exemptions versus release what is suitable?
- What is an internal working document? What is Ministerial advice?
- What are commercial dealings? (Inadequately defined at present.)
- How are children dealt with? Next of kin access to their children's information?
- Statements of reasons - does practice comply with legislation?

Timeframes

- 30 day time limit regardless of public holidays
- Spikes in demand - especially around 'juicy news'
- Third party consultation can impose a huge burden - time frames aren't sufficient and are contradictory
- 'Fishing' requests are problematic – the applicant casts a wide net to 'catch material' – better specification would simplify this
- Time required for some request is excessive for example voluminous requests
- Provision of schedules of documents can assist
- Communication with applicant to reframe request
- Maybe improved application form to narrow what is sought
- Education is needed for applicants.

Capacity

- FOI Guidelines are outdated (last publication 1993) and not available online
- Other staff (middle managers) may inhibit flow of information leading to potential internal conflict - too readily use exemptions
- Education is needed for other staff in agencies
- Poor record keeping practices including electronic message management
- Turnover of trained staff and limited networking
- Ombudsman's decisions provide guidance only - not legal precedent
- No opportunities to discuss lessons learned from Ombudsman decisions
- Introductory training but not ongoing or updated
- Training for FOI officers should cover administrative release – outside of FOI
- Dealing with adversarial relationships where refusals arise
- Lack of an FOI Unit
- Why authorised officers? Should it be broadened?

Local Government

- Main FOI requests in local government are from politicians, lawyers and property related (neighbourhood disputes)
- Workload issues, especially for small councils – don't know when request are coming or how many
- Information may be generated, handled or stored differently
- Complexity of process – for many an objective opinion of whether there is an exemption is unavailable
- Mayor as principal officer
- If info is exempt doesn't mean it can't be released
- Local government agenda and minutes of council meetings are publicly accessible. Items that can be taken to close council are limited.
- Reluctance to provide full and frank written advice may have an impact on quality decision making
- Consulting with third parties is 'virtually impossible'.

6.2 Which exemptions under the FOI Act do you think should be:

- **retained**
- **removed or altered**
- **added**

and why?

The suggestion was made that the intent of the legislation and the subsequent treatment of requests should be concerned with information rather than documents.

Third party material that is nothing to do with the request is excluded, not exempted. Excising information that is not in the scope of the request is not 'refusing' the request.

6.2.1 Retained

- All aspects should be retained. A broad comment was made and echoed widely amongst participants, that the current features of the FOI Act are fundamentally sound and that any suggestions are 'at the margins' - with a view to refinement rather than reform'.
- Cabinet exemption: - Advice to Ministers – Ministers need comprehensive advice - challenge what is public entitled to? But potentially open up to Cabinet? Clarify to put beyond doubt.
- Clarify what is covered by internal working documents to ensure proper decision making processes can be canvassed and documented without concern about the consequences of public disclosure
- Clarify personal information, personal affairs and employment information/affairs – define 'unreasonable disclosure'
- Clarify 'voluminous'
- Clarify law enforcement provisions.

6.2.2 Removed or altered

- Public interest is largely expressed in case law but may be handy to express in legislation – otherwise point to case law precedents.
- Public interest test for all exemptions set out in legislation
- Divorce 'commercial in confidence' from public interest
- Clarify 'trade secrets' and 'competitive advantage'
- Protect police intelligence information; statements e.g. family violence; law enforcement information when third parties don't have a real need e.g. available under disclosure

6.2.3 Added

- Overriding public interest test with relevant factors listed in the Act
- Create exemptions for matters of State security e.g. dignitary protection or pandemic management (to avoid unnecessary panic)
- Stronger and clearer exemption of information relating to commercial trading and commercial assets (without reference to public interest?)
- Exempt information in drafts or related to negotiations in train, at least until finalised
- Protect information from other states and territories
- Issues specific to local government e.g. discretionary property development applications.

6.3 What are your views in relation to the routine publishing of government information?

- There is a gap between management information collected by agencies and the types of information sought through FOI. FOI does not necessarily provide a useful guide to what information might be usefully released as a matter of routine.
- More routine releases of government information may reduce requests eg Forestry produces Corporate Social Responsibility Reports and the Department of Health and Human Services publishes a three-monthly report (*Health Progress Report*) that includes statistics like waiting lists.
- Such progress reports are good but may be difficult to locate.

6.4 What are your views in relation to access to private information without the need for FOI?

- Agency policies reflect right of access to personal records eg Wards of State have access to file
- Personal Information Protection Act 2004 puts access to personal information in FOI.

6.5 What are your views in relation to review mechanisms?

- More efficient process for reviewing exemptions. Reviews go to internal review then Ombudsman, which may result in a process exceeding 6 months.
- Agency practices are guided by internal or external review decisions.

7. Forum Conclusion

Dale Webster closed the Forum, reminding participants that the event had sought to launch the FOI review and commence the process of identifying issues relevant to the Review.

As such, the material contained in this Forum Report will be considered along with other submissions received from interested individuals and organisations.

Such submissions will be accepted until close of business on Friday 13 February 2009 and can be emailed to dale.webster@justice.tas.gov.au or posted to:

Dale Webster
Project Manager
FOI Act Review
GPO Box 825
Hobart, TAS 7000

The *Freedom of Information Act 1991* can be viewed at Tasmanian Legislation Online www.thelaw.tas.gov.au or by contacting the Review Office on (03) 6233 6315.

More information about the operation of the FOI Act can also be accessed at www.justice.tas.gov.au/legislationreview/foi_act_1991.

PDF Management Services Pty Ltd 

Post Office Box 92
GLENORCHY
Tasmania 7010

Phone: 03 6272 7009
Fax: 03 6272 7656
E-mail: pdf@pdfmanagement.com.au

Participant List

Participant	From
<i>Alger, Jenny</i>	Department of Infrastructure, Energy and Resources
<i>Armsby, Len</i>	Department of Justice
<i>Banks, David</i>	Hobart City Council
<i>Baxter, Tom</i>	University of Tasmania
<i>Bower, Ann</i>	Department of Health and Human Services
<i>Campbell, Jackie</i>	The Tasmania Prison Service
<i>Collidge, Steve</i>	Department of Police and Emergency Management
<i>Darch, Angela</i>	Department of Primary Industries and Water
<i>Dawson, Margot</i>	Attorney General's Office
<i>Deayton, Elaina</i>	Department of Police and Emergency Management
<i>DeLacey, Sonya</i>	Department of Infrastructure, Energy and Resources
<i>Dibley, Ged</i>	Facilitator – PDF Management Services
<i>Drielsma, Hans</i>	Forestry Tasmania
<i>Drinkell, Debra</i>	Archives Office of Tasmania
<i>Eickoff, Chris</i>	Department of Treasury and Finance
<i>Eldridge, Tim</i>	Department of Primary Industries and Water/DEDT
<i>Feehely, Jess</i>	Environmental Defenders Office
<i>Gillam, Liz</i>	Local Government Association Tasmania
<i>Green, Jo</i>	Department of Police and Emergency Management
<i>Grimsey, Matthew</i>	Huon Valley Council
<i>Haig, Alan</i>	Department of Primary Industries and Water
<i>Harris, Deb</i>	Department of Infrastructure, Energy and Resources
<i>Holland, Anna</i>	Glenorchy City Council
<i>Holmes, Tom</i>	Department of Infrastructure, Energy and Resources
<i>Horner, Anne</i>	Department of Health and Human Services
<i>Hyland, Jane</i>	Department of Treasury and Finance
<i>Johnston, Wayne</i>	Workplace Standards Tasmania
<i>McArdle, Ruth</i>	Archives Office of Tasmania
<i>McDonald, John</i>	Forestry Tasmania
<i>Mills, Louise</i>	Department of Premier and Cabinet
<i>Mitchell, Lorna</i>	Department of Infrastructure, Energy and Resources
<i>Moore, Wayne</i>	Department of Police and Emergency Management
<i>Morris, Tim</i>	Member of Parliament – Greens Party
<i>Munning, Rebecca</i>	Department of Police and Emergency Management
<i>Newson, Meaghan</i>	Forestry Tasmania
<i>Norton, Nicola</i>	Project Team
<i>Pearce, Ian</i>	Archives Office of Tasmania
<i>Philp, Greg</i>	Department of Treasury and Finance
<i>Richardson, Judy</i>	Department of Justice
<i>Snell, Rick</i>	Speaker - University of Tasmania
<i>Solomon, David</i>	Speaker
<i>Vickers, Catherine</i>	Department of Premier and Cabinet
<i>Voumard, Linda</i>	Department of Treasury and Finance
<i>Webster, Dale</i>	Project Manager
<i>Weidenbach, Sonia</i>	Project Team
<i>Wilson, Samantha</i>	Department of Environment, Parks, Heritage and the Arts
<i>Wolfe, Sheryl</i>	Forest Practices Authority

**Review of Freedom of Information Act 1991
Issues Identification Forum**

PROGRAM

Where:

When: 9:45 am - 2.00pm
Wednesday, 10 December 2008

FACILITATOR	Ged Dibley
9.30am	ARRIVE
9.45 – 10.00	<p>Introduction</p> <p>Dale Webster</p> <p>Welcome and objectives of session</p> <ul style="list-style-type: none"> • Launch review and outline process, including call for submissions • Set the scene – Qld initiative, Tas context • Commence identifying issues
10.00 – 10.25	<p>Dr David Solomon</p> <ul style="list-style-type: none"> • Queensland Reforms
10.20 - 10.45	<p>Mr Rick Snell</p> <ul style="list-style-type: none"> • Tasmanian Context
10.45 – 11.00	<p>Panel : Dale, David, Rick</p> <ul style="list-style-type: none"> • Questions
11.00 – 11.15	BREAK
11.15 – 12.15	<p>Key Issues</p> <p>From your perspective in using the Freedom of Information Act, what are your key issues?</p> <ul style="list-style-type: none"> • Answer the question in small groups as assigned • Each group feedback key issues and discuss
12.15 – 1.00	<p>Exemptions</p> <p>Which exemptions under the FOI Act do you think should be</p> <ul style="list-style-type: none"> – retained – removed or reduced – added <p>and why?</p> <ul style="list-style-type: none"> • Answer the question in small groups as assigned • Feedback for each category and discuss

1.00 – 1.25	<p>Access to information</p> <p>What are your views in relation to:</p> <ul style="list-style-type: none"> • Routine publishing of government information? • Access to private information without the need for FOI? • Review mechanisms? <ul style="list-style-type: none"> • Answer the questions in plenary and discuss • Any other issues?
1.25 - 1.30	<p>Next steps and wrap up</p> <p>Dale</p>
1.30	LUNCH
2.00pm	FINISH