

The Office of the Information Commissioner (OIC) considers that where possible, in most cases the fact that a complaint has been made to the Crime and Corruption Commission (CCC) or that an investigation is occurring should not be disclosed. It may unfairly impugn a person's reputation and/or may compromise an investigation.

However, if changes are considered necessary it is important to ensure proportionate options are considered, and solutions are not unduly detrimental to openness, accountability and transparency of administrative decision-making processes. For example, previous options to resolve issues raised in the Discussion Paper have included changes to the *Right to Information Act 2009* (Qld) (RTI Act), which would substantially restrict the ability to provide reasons to explain all decisions made about access to documents.

In OIC's experience through external review of decisions about access to documents, the RTI Act is rarely used as a tool to obtain information to publicise complaints under the CCC Act. However, in the event this occurs, the RTI Act contains tools to refuse to deal with such applications without confirming the existence of such documents.

### **Open, transparent and accountable government**

The statutory role of the OIC and its functions are set out in the *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act). OIC's role includes assisting in achieving the goal of open and transparent government by promoting better and easier access to public sector information and improving the flow of information to the community. Through its functions, OIC supports the public sector's corporate governance and accountability framework.

There is increasing recognition in democratic countries across the world of the benefits of openness, transparency and accountability. Greater openness and transparency delivers a range of tangible benefits including greater public engagement, improved service delivery and restoring trust and confidence in government.<sup>1</sup> As noted by the OECD, trust in institutions including government continues to decline and only 40% of citizens trust their government.<sup>2</sup> The digital age poses particular challenges for government. Citizens increasingly expect 'easy access to all information, whether official records or not, in an age where information is available 24/7 from a myriad of sources'.<sup>3</sup>

Queensland's RTI Act recognises that government information is a public resource and that openness in government enhances the accountability of government. Federal, State and Territory governments have their own Freedom of Information or RTI legislation.

At a national level, the Australian Government recently committed to finalising membership of the Open Government Partnership (OGP) and public consultation was launched to develop an Australian Government National Action Plan for open government. The OGP is a voluntary, multi-stakeholder international initiative created to promote transparency,

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<sup>1</sup> Organisation for Economic Development (OECD), Open Government, <http://www.oecd.org/gov/open-government.htm>

<sup>2</sup> Organisation for Economic Development (OECD), Trust in Government, <http://www.oecd.org/gov/trust-in-government.htm>

<sup>3</sup> The digital reality – optimising government business in a digital world, Speech by Director-General David Fricker, National Archives of Australia viewed at <http://www.naa.gov.au/about-us/media/speeches/the-digital-reality.aspx>

empower citizens, fight corruption, and harness new technologies to strengthen governance.<sup>4</sup>

The RTI Act and IP Act provides a legal right to access documents in the possession or control of Queensland Government agencies subject to some limitations. The RTI Act represents a clear move from a “pull model” to a “push model”, emphasising proactive and routine release of information and maximum disclosure of non-personal information unless to do so would be contrary to the public interest.

Administrative release by agencies of government-held information is a central feature of the “push model” and fundamental to achieving the objectives of the RTI Act. Requested information should be released if at all possible without requiring a formal access application. Strategies and initiatives such as publication schemes, publishing data online, administrative access and disclosure logs are all part of providing the public with greater access to government-held information.

Parliament’s reasons for enacting this legislation, as set out in the Preamble, recognised that in a free and democratic society - there should be open discussion of public affairs and openness in government enhances the accountability of government. It was Parliament’s intention to emphasise and promote the right to government information; and to provide a right of access to information in the government’s possession or under the government’s control unless, on balance, it is contrary to the public interest<sup>5</sup> to provide the information.

A right to information law that strikes an appropriate balance between the right of access and limiting that right of access on public interest grounds is critical to both a robust, accountable government and an informed community.

#### Publicising allegations of corrupt conduct and open and transparent government

Disclosures about wrongdoing can help uncover corruption and other misuse of public resources. They are an important tool in ensuring that the public sector is accountable and uphold the highest standards of integrity. Transparency International Australia notes that ‘public access to official information, and open and transparent government more generally, are vital for preventing corruption taking hold – and for uncovering it when it does. Corruption thrives where the community and the media do not have access to official information about how government is functioning’.<sup>6</sup>

OIC notes that the issue of confidentiality of allegations of corrupt conduct has been the subject of previous consideration by various Parliamentary Committees and more recently by the Callinan and Aroney ‘*Review of the Crime and Misconduct Act 2001*’ (Callinan and

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<sup>4</sup><http://www.opengovpartnership.org/about>

<sup>5</sup> The term ‘public interest’ refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

<sup>6</sup> Transparency International Australia, Position Paper #5, January 2016 viewed at <http://transparency.org.au/index.php/our-work/open-government-rights-to-information/>

Aroney Review).<sup>7</sup> The Discussion Paper states that 'notwithstanding this prior consideration, an effective solution has not been implemented'.<sup>8</sup> As noted in the Discussion Paper<sup>9</sup>, the issue of confidentiality of complaints is a long standing and complex issue requiring the balancing of competing interests. OIC submits that Parliament, in enacting the RTI legislative framework in Queensland, was required to balance the competing interests of open and transparent government with limiting the right of access to information on public interests grounds. The RTI Act contains *exempt information provisions*<sup>10</sup> and *public interest factors* to be taken into account in deciding where the public interest lies. Exempt information provisions relate to information which Parliament has decided will always be contrary to the public interest to disclose, such as information that could compromise a law enforcement investigation.

For example, Schedule 3, section 10(4) of the RTI Act provides that information is exempt if it was obtained, used or prepared for an investigation by a prescribed crime body, or another agency, in performance of the prescribed functions of the prescribed crime body. A 'prescribed crime body' is defined in the RTI Act as the CCC.

The only exception to the CCC exempt information provision is where the investigation has been finalised and the information applied for is about the applicant. Generally, information will be 'about' the applicant where they are the subject of the relevant investigation'. If the exception applies, the agency decision-maker may still need to consider the other access limitations in the RTI Act – including other exempt information provisions and the public interest factors. Access to the information may be refused on a different basis once a CCC investigation about the applicant is finalised.

The RTI Act contains a range of mechanisms to ensure information is not inappropriately disclosed, including the ability in section 55 of the RTI Act and section 69 of the IP Act for agencies to refuse to deal with an application while they 'neither confirm nor deny' that they hold the particular information requested. This section can apply to information the subject of a CCC exemption. Such a mechanism is already contained in legislation. This provision can be used where the request for information is framed in such a way that any acknowledgement that relevant documents existed would have the same detrimental impact that a decision not to disclose the documents because they are exempt or contrary to the public interest would be intended to protect against. For example, where a media or political candidate requests an alleged complaint and to state documents exist would confirm complaint had been made where this information is not currently publically known and could be published.

Further, in *Tolone v Department of Police* (Unreported Queensland Information Commissioner, 9 October 2009) the applicant applied for access to documents relating to a complaint made to the Department regarding a criminal offence which allegedly occurred in

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<sup>7</sup> Crime and Corruption Commission Discussion Paper: Making Allegations of Corrupt Conduct Public: Is it in the Public Interest? P 3 viewed at <http://www.ccc.qld.gov.au/news-and-media/ccc-media-releases/ccc-to-examine-whether-publicising-allegations-of-corrupt-conduct-is-in-the-public-interest-1-june-2016>

<sup>8</sup> See Above

<sup>9</sup> Crime and Corruption Commission Queensland, 'Making allegations of corrupt conduct public: is it in the public interest?'

<sup>10</sup> Schedule 3 RTI Act, section 47(3)(a) RTI Act

Towooomba in 1975; and any corresponding admission made by the alleged offender, who was named by the applicant.

Based on the nature of the documents sought by the applicant, particularly the specific reference to other individuals by name, the Information Commissioner found that the Department was entitled to neither confirm nor deny the existence of the documents sought under section 55 of the RTI Act, because such documents would contain prescribed information and because confirmation of the existence or not of the document sought would, of itself, disclose exempt information. The prescribed information in this case, if it existed, would have comprised personal information the disclosure of which would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

As such, OIC considers that the RTI Act's right of access provides an appropriate and effective legislative framework to carefully consider information's complex sensitivities when determining whether disclosure would be contrary to the public interest.

Preventing disclosure of allegations of corrupt conduct will have a number of implications for how access applications by a complainant or any other person under the RTI Act can be handled, including on review and appeal.

The RTI Act provides that an applicant may apply for internal or external review of certain access decisions made by an agency and there is a limited right of appeal to the Queensland Civil and Administrative Tribunal (QCAT) against an external review decision made by OIC.

The RTI Act requires a decision maker to provide a statement of reasons for their decision whether to grant access to documents.<sup>11</sup> The statement of reasons is required to comply with the *Acts Interpretation Act 1954* (Qld) which sets out the information that is to be included in a statement of reasons.<sup>12</sup>

Providing applicants with reasons for refusal to release information is a fundamental principle underpinning the RTI Act and open and transparent government. OIC submits preventing publication of allegations of corrupt conduct will restrict or prevent the ability for decision makers under the RTI Act, including OIC, to provide reasons for refusing access to documents.

The Callinan and Aroney Review considered that 'providing reasons for an access decision would enable identification of the subject matter and the person who is the subject of an investigation'.

While the Callinan and Aroney Review contemplated a broad exemption from the requirement to give reasons for access decisions and did not seek to limit the exemption to specific circumstances such as matters concerning a CCC investigation, it is OIC's view that preventing publication of allegations of corrupt conduct will require changes to how applicants under the RTI Act are notified of decisions, including reasons for decisions, regarding refusal of access to documents. Decision makers and the OIC would be restricted from disclosing, that the reason for refusal is made pursuant to section 48 and Schedule 3

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<sup>11</sup> Sections 54 and 91 of the RTI Act

<sup>12</sup> Section 27B

(10)(4), being the CCC exemption provision. If OIC is unable to provide reasons for refusal of documents, applicants are more likely to pursue further review rights. OIC would also need to be provided with a discretion not to publish its decision in such circumstances.

At present, the appeal avenue from the OIC to QCAT is on a point of law. It is uncertain how a party could usefully avail itself of this course of appeal without OIC providing a written decision setting out its reasons. Further, QCAT would also be required to ensure a non-publication order is given to any appeal material and proceeding where the refusal is based on a CCC exemption. The other avenue under the *Judicial Review Act 1991* requires an agency to provide a statement of reasons with a review right before the Supreme Court.

Of significant concern to the OIC is the impact of any broad restrictions on informal resolution of external review applications. OIC currently resolves approximately 90% of applications informally, without a decision being necessary. However, if OIC officers cannot discuss the reasons for a preliminary view about the application of the legislation to the information in issue, it is not possible to effectively informally resolve a review. It is likely there would be a significant impact on resources required to resolve external review applications as informal resolution is more timely than resolution by decision.

Consideration of possible options and alternatives to prevent publication of allegations of corrupt conduct if considered, on balance, disclosure would be contrary to the public interest

1. Legislated confidentiality provisions prohibiting publication of allegations of corrupt conduct

OIC notes that some national and international jurisdictions have sought to restrict the ability of a person to publish allegations of corrupt conduct through confidentiality provisions. For example, Section 56 of the *Independent Commissioner Against Corruption Act 2012* (SA) makes it an offence to publish or cause to be published certain types of information, including information that suggests a person is, or has been, may be or may have been the subject of a complaint or report, except as authorised.

As noted in the Discussion Paper, the issue of legislative amendments prohibiting publication of allegations has previously been considered by various Parliamentary Committees and in the Callinan and Aroney Review. The Callinan and Aroney Review made a number of recommendations including that it be an offence *for any* person to disclose the fact of, or the identity of a person who is the subject of, a complaint to the CMC, subject to limited exceptions. (Recommendation 8).

The Callinan and Aroney Review further recommended amendments to the RTI Act to place restrictions on the requirement to give reasons for refusal to produce documents on any grounds (Recommendation 10). The rationale underpinning Recommendation 10 was that unless reasons were withheld for all access decision, 'it would still be possible for resourceful organisations to ascertain, by process of elimination, that a document has not been disclosed because it is related to a CMC complaint or investigation.'

While OIC accepts that where possible, the fact that a complaint has been made to the CMC, or that an investigation is occurring, should not be disclosed as it may unfairly impugn a person's reputation and/or may compromise an investigation, careful consideration needs to be given to enactment of provisions which seek to prevent publication of allegations of

corrupt conduct to ensure there are no unintended consequences for RTI and open and transparent government. As noted above, the RTI Act contains the appropriate tools to prevent inappropriate disclosure of information. For example, sections 55 of the RTI Act and section 69 of the IP Act contains provisions that allow an agency to respond to an access application by neither confirming nor denying the existence of the documents sought.

In response to the Callinan and Aroney Review, OIC submitted to the former Attorney-General that Recommendations 8 and 10 would have a range of impacts on RTI. For example, the requirement to give reasons is a fundamental principle underpinning the RTI and IP Act. Any departure from the requirement to give reasons for refusal to release information is at odds with open, transparent, and accountable government, one of the key commitments of the Government. Placing restrictions on the requirement to give reasons constitutes a crucial shift from open and accountable government and impacts on a process that is operating in every Australian jurisdiction and democratic country.

2. Restrict disclosure and dissemination of the reasons for refusal under the RTI Act when based on the CCC exemption.

#### Recommendation 10

As outlined previously, the RTI Act contains provisions that accept that certain information should not be released if it falls within a category of document that is exempt or if its disclosure on balance would be against the public interest. The RTI Act contains a range of mechanisms to ensure information is not inappropriately disclosed.

However, should the CCC's examination determine that publication of allegations of corrupt conduct is not in the public interest, an amendment to the RTI Act or another requirement restricting the applicant's, the OIC's, QCAT's and possibly Court's disclose and dissemination of reasons for refusal based on the CCC exemption could be considered as an additional protection to prevent publication.

OIC considers that limiting the dissemination, and publication of reasons in the specific circumstances allows the government to be open and accountable with the requirement to give reasons for any refusal of access and allows for that decision to be subject to scrutiny and appeal.

OIC considers this this proposal would merely be another protection that could be used. However, OIC is not aware of any evidence that RTI and IP access applications have been the avenue where the fact a CCC investigation is on foot is revealed for the first time.

There are only a limited number of access applications where the CCC exemption is used as the basis for refusal of access, comparing with the total number of access application dealt with by agencies where access to information is refused on a range of other grounds.

It is further noted that the majority of external review applicants who seek information over which a CCC exemption is claimed are the complainants. Accordingly, it is OIC's view that this proposal would merely be another protection that could be considered by the CCC and expect such instances to be infrequent.

OIC thanks the CCC for inviting OIC to provide a submission to the CCC's examination of whether publicising allegations of corrupt conduct is in the public interest.

OIC remains available to discuss any matters raised in this submission and to provide any assistance as required by the CCC.