



NSW Legislative Council Hansard

Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 22 November 2006.

Second Reading

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [8.56 p.m.]: I move:

That this bill be now read a second time.

On 4 May 2000 I gave notice of the introduction of the Government (Open Market) Competition Bill in the Legislative Council. The bill was introduced and had its first and second readings on 9 May 2002. The Legislative Council debated the bill in June, August, and September 2002. The Legislative Council also debated amendments to the bill on 5 September, whereupon it passed and was forwarded by the Clerk of the Parliaments for presentation to the Legislative Assembly. Ms Clover Moore, MP, introduced the bill in the other place on 17 September 2002. On prorogation of the Parliament on 31 January 2003 the bill lapsed and proceeded no further.

The bill that was reintroduced in 2003 was almost identical to the original bill except for the definition of a public authority. The earlier definition listed types of entities such as the Government, statutory bodies representing the Crown, and so forth. In the Committee stage in 2002 I moved an amendment to change the definition to that used in the Ombudsman Act 1974, but was unsuccessful. That attempted amendment has been incorporated in the 2003 bill. Ms Clover Moore gave notice of motion for the bill in the Legislative Assembly on 7 May 2003 and introduced it in that House on 22 May 2003. On 3 July 2003 the Legislative Assembly referred the bill to the Public Accounts Committee for consideration and report. When that committee reported in October 2004 it made four recommendations, which are as follows:

RECOMMENDATION 1: That the Committee advises the Legislative Assembly of its view that Premier's Memorandum 2000-11 should be reinforced as the standard for compliance by agencies in relation to disclosure of government contract information.

RECOMMENDATION 2: That the Audit Office conduct a compliance review of Premier's Memorandum 2000-11, in its 2004-05 program as a means of establishing a baseline of agency compliance with the provisions of the Memorandum.

RECOMMENDATION 3: That the Committee advises the Legislative Assembly of its view that there are sufficient current checks and balances in place through agencies issuing grants to satisfy auditing conditions and address any breaches of funding agreements.

RECOMMENDATION 4: That the outcomes of the Grants Administration Review be referred to New South Wales' government agencies for consideration as a model for grants administration.

On 1 December 2005 the honourable member for Bligh, Ms Clover Moore, introduced this bill in the other place and it passed through that House on 26 October 2006. There were a number of amendments to the bill. What we have before us is the second print of the bill with those amendments.

I turn now to the substance of the bill. In her second reading speech on 1 December 2005 in the other place, Ms Moore said:

In New South Wales we already have voluntary guidelines, issued by the Premier's Department, referred to as the Premier's Memorandum 2000-11, for public agencies to disclose the terms of major contracts with the private sector. This bill takes the important step of legislating to make those guidelines mandatory and to give them the force of law. I note that the Auditor-General's report to Parliament recommends that. Locating the new legislative provisions within the Freedom of Information Act is consistent with the underlying philosophy that the public has a right to access information. It is also consistent with the approach taken in other jurisdictions. Members of the public have a right to request specific documents on demand, and the Government is obligated to comply unless it can be clearly demonstrated that it is against the public interest to release the information.

This bill further promotes the objectives of the Freedom of Information Act by putting additional obligations on government agencies to publish summaries of major contracts with the private sector—making them more accessible to the public, and facilitating individual requests for specific documents. The bill includes new "commercial in confidence" definitions, to limit the scope for exemptions and clarify the obligations of government agencies. Strengthening the existing freedom of information obligations and incorporating the existing administrative guidelines ensures that this approach is practical and workable for government, and complies with the Auditor-General's recommendations. While this bill proposes modest and achievable reforms,

at the same time it also represents a very significant move to improve public accountability and public confidence in the delivery of major infrastructure projects in New South Wales.

As I mentioned previously, in the course of the debate in the other place the Government proposed a number of amendments to the original bill, which were agreed to. The main changes to the bill as a result of these amendments were as follows. First, State-owned corporations are excluded from disclosure requirements. Under the original Premier's memorandum, disclosure by State-owned corporations was optional. The memorandum said it:

.... may be implemented by those State Owned Corporations that include the guidelines in their statements of corporate intent by way of agreement between their shareholding Ministers and boards.

The initial private member's bill extended disclosure requirements to all State-owned corporations but the Government removed this provision. The Government stated that it was not prepared to extend the mandatory disclosure provisions to State-owned corporations at this point in time. However, the Government said that it would actively encourage disclosure from State-owned corporations. One can only hope that when the new disclosure requirements have been introduced and are working for government departments, with the obvious public benefits, disclosure will be extended to State-owned corporations.

Secondly, rather than having just two main categories of contracts in the initial bill—under and over \$5 million—the amendments introduce a three-tier approach. The under or over \$5 million division is retained but contracts under \$5 million are broken down into two categories with different disclosure requirements. The contract must be published for contracts with a value of more than \$5 million, while "particulars", as specified in the bill, must be published for contracts under \$5 million. Thirdly, local government is included. A new provision was added to the bill to permit local government agencies to comply with these disclosure requirements through regulations. In my original bill local government was also included.

I have spoken in the House on more than 30 occasions about the need for governments—in particular, this Government—to be more open and accountable. In December 2001 I organised a forum on the issue of open government that was attended by speakers from as far afield as Canada and New Zealand. The European information commissioner, who is Irish, also attended. My State and Federal colleagues have introduced similar legislation. The Australian Democrats' commitment to openness and accountability is reflected in the Federal Freedom of Information (Open Government) Bill, introduced by the Australian Democrats. My State colleague in South Australia the Hon. Ian Gilfillan introduced a bill entitled Freedom of Information (Miscellaneous) Bill.

The main problems with all freedom of information [FOI] regimes can be categorised as: first, a persistent culture of secrecy; secondly, prohibitive charges; thirdly, excessive use of exemptions, especially commercial in confidence and Cabinet in confidence; and, fourthly, a lack of independent oversight. New Zealand has led the way with its approach to the provision of government information to the public. New Zealand introduced the Official Information Act in 1982. It was widened in 1987 and revised in 1998, but not amended. The Chief Ombudsman of New Zealand, Sir Brian Elwood, spoke at the open government forum in December 2001 and praised the success of the legislation. He said the usual Chicken Little concerns about the sky falling in were made when the legislation was introduced—business said that it would collapse, the Government was not supposed to survive, and so on. None of this happened, and apparently everything works well. When the bill was revisited in 1998 it was not amended, which is highly significant.

I have argued for a long time that the paradigm of the freedom of information legislation in this country is wrong. The presumption is for non-disclosure unless there is a reason to disclose. The New Zealand legislation turns this around so that information is made available unless there is a good reason under the Act to withhold it. Merely claiming commercial in confidence or Cabinet in confidence is not enough. As the years of the Carr and Lemma regimes dragged on, it became more apparent that less and less important information was seeing the light of day. Requests for information are routinely denied, usually with the pathetic cry that the information is commercial in confidence or that it is a Cabinet document.

Most recently I tried to obtain a report by Ron Christie, the erstwhile Chief Executive Officer of the Olympic Roads and Transport Authority. The report, entitled "Long term strategic plan for rail", was an examination of Sydney's future transport requirements. I asked the Minister for a copy of the report and was told that it was a Cabinet document. The report is public property and should be available to all. In recent years in this place I have seen calls for the contracts on the M2 Motorway, the M5 East, the Fox Studios development, Luna Park, Sydney Markets and, more recently, Beacon Hill High School, among many others. All requests to make contracts public are denied initially, and honourable members must often use Standing Order 52 to winkle out information. Many committees of inquiry have been established merely because we could not get information from the Government. An enormous amount of time has been wasted chasing information.

Robert Cianfrano is a constituent who has been challenging the FOI laws for many years. He has been trying to get information regarding the sale of public assets, in particular the Sydney Markets site at Flemington and the Beacon Hill High School site. The level of obfuscation, delay, buck-passing and time wasting by government

departments is staggering. Mr Cianfrano is forced regularly to challenge decisions not to release documents through the Administrative Appeals Tribunal. The Government fights these actions all the way, wasting taxpayers' money by hiding documents that should be publicly available as a matter of course.

On 16 November 2004 in this House I asked how much it had cost the Government to stop Mr Cianfrano getting the information he sought. The answer from the Premier's Department was that it did not pay the Crown Solicitor any fees for the work but the costs were covered by a "core legal services" arrangement between the two departments—once again, no answer and more obfuscation! Mr Cianfrano pursued the matter, and finally got documents showing the amount the Crown Solicitor had charged other agencies for his FOI requests. For the period from 1 July 2004 to 2 March 2006 the fees totalled \$210,929. That is staggering. It is a scandal and an outrage that so much money is being wasted trying to keep the Government's failings secret.

The most recent debacle regarding the FOI legislation involves the sale of Beacon Hill High School. Sue Covey, a member of the Save Beacon Hill High School Committee, spoke to me in 2003 about the closure of the school. On 21 December 2004 the House passed a motion under Standing Order 52 that documents relating to the closure of Beacon Hill High School be tabled. Sue Covey had made numerous FOI applications for the same documents dating as far back as 2003. She received a letter dated 18 September 2006 from the Director General of the Department of Education and Training, Dr Andrew Cappie-Wood, admitting that one document had not been provided under FOI and the Legislative Council resolution. This was a restructure proposal entitled "New Horizons: A Proposal to Restructure Secondary Education in the Northern Beaches District". It was an information document prepared by the department and released in early 2000.

The document, not surprisingly, recommended that Beacon Hill High School should not be closed. It was a beautifully produced, multi-coloured document—well laid out and containing graphic art images—that was obviously designed to be a public brief. It was obviously a well-developed, informative brochure intended for public distribution and involving high production costs. The non-disclosure of the document reveals the abject failure of FOI in New South Wales and the supposed document management systems about which I have asked a great many questions. It also demonstrates the Government's utter contempt for this House and the Parliament.

The document was an elaborate colour brochure—I have it in my hand. It was not a draft but a printed document designed to provide the public with information about the options. Not only did it disappear without a trace but it could not be found in response to a parliamentary resolution or under an FOI application. When the NSW Ombudsman examined the matter he merely said the closure process was not clear but, as the decision had been made to close the school, it was basically tough luck. That is the way FOI works in New South Wales, and it is totally unsatisfactory.

The document "New Horizons" only came to light when Sue Covey examined a development application, with it attached, for the Beacon Hill High School site that came before Warringah Council. In May 2000 a 29-page document was issued by the then director general, Ken Boston, called "The Northern Beaches District Strategy Analysis and Plan for Secondary Education". This plan did not include the retention of Beacon Hill High School. Basically, although a plan of analysis recommended retaining the school, when Parliament called for documents under Standing Order 52 the documents were not produced. If Parliament cannot succeed in getting papers, how can members of the public expect any guarantee of probity from the legislation? The legislation is fundamentally flawed. It works on the principle that secrecy is the baseline and any access to information is against the norm.

This bill, which discloses the Government contracts, is a small step towards open government in New South Wales. Clover Moore says she thinks it is a great step forward. I think people have to realise that there is still an immense amount of work to do. Simply putting up government contracts is not sufficient. Hopefully, in time the Government or, we can only hope, the Opposition, will realise that once the new regime is in place the sky will not fall in and that having documents available for the public actually engenders greater trust in the Government—something that is lacking in the present State of secrecy, which is New South Wales. Although this bill only makes modest progress, I commend it to the House.