



Office of the
Information Commissioner

Freedom of information for Western Australia

Our Ref: 07/005/01
Your Ref: BGC

7 October 2015

Hon R McSweeney MLC
Chair
Standing Committee on Legislation
Parliament House
PERTH WA 6000

Dear Madam Chair

INQUIRY INTO BELL GROUP COMPANIES (FINALISATION OF MATTERS AND DISTRIBUTION OF PROCEEDS) BILL 2015

I refer to your letter of 23 September 2015 inviting the Information Commissioner to provide a written submission on the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (the Bill)*.

You have noted, in particular, that clause 71 of the Bill provides that the *Freedom of Information Act 1992 (WA) (the FOI Act)* has effect as if the WA Bell Companies Administrator Authority (**the Authority**) were mentioned in Schedule 2 to the FOI Act. As set out below, the effect of this is that the Authority will be exempt from the operation of the FOI Act.

At the outset I note that the question of whether the Authority should be exempt from the FOI Act is properly one to be decided by Government and, ultimately, Parliament. I am, however, grateful for the opportunity to provide my views.

The Bill

I understand from the Second Reading speech in the Legislative Council that the mechanisms by which the Bill will achieve its intended aim to finalise matters associated with the Bell Group companies and distribute proceeds, is as follows:

- (a) *upon the Bill coming into force, the assets of the Bell Group companies registered in Western Australia will transfer to the WA Bell Companies Administrator Authority established by the Bill to collect and deal with property and assets of the Bell Group companies. This Authority will be headed by an Administrator appointed by the Minister, who will hold the assets in a fund;*
- (b) *creditors will be invited to make submissions to the Authority;*
- (c) *taking into account those submissions, and the various relevant agreements and other matters set out in the Bill, the Authority will make recommendations*

to the Minister about appropriate payments to be made to creditors of the Bell Group, and appropriate reward to be paid to creditors who indemnified the liquidators for the costs of the Bell litigation;

- (d) the Governor on the advice of cabinet may then, by instrument in writing, determine amounts to be paid to creditors and the Minister will provide the determination of the Governor to the Authority;*
- (e) the Authority will then distribute the funds; report to Parliament, and wind up; and*
- (f) the distribution process is limited to 12 months, and any assets not distributed in 12 months will be forfeited to the State.*

I also note that the Authority has absolute discretion with regard to its recommendations and that there are no appeal provisions in the Bill.

The FOI Act

The objects of the FOI Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.

The FOI Act gives every person a general right of access to the documents of State and local government agencies (other than an exempt agency) subject to and in accordance with the FOI Act. That right of access is subject to a range of exemptions - set out in clauses 1 to 15 of Schedule 1 to the FOI Act - which are designed to protect significant public interests that compete with the public interest in the openness and accountability of government and its agencies.

Schedule 2 to the FOI Act contains a list of exempt agencies. Accordingly, the right of access under the FOI Act does not apply to documents in the possession or under the control of an exempt agency. Therefore, the effect of clause 71 of the Bill is that the right of access under the FOI Act will not apply to documents in the possession or under the control of the Authority.

In general, and in keeping with the objects and intent of the FOI Act, the Information Commissioner considers that government agencies supported by taxpayers' money should be as open and accountable as possible. Generally, the Information Commissioner does not support proposals to create any further exemptions from the operation of the FOI Act, unless a real need has been identified and it is apparent that the protections presently provided by the exemption provisions in Schedule 1 to the FOI Act are not sufficient or are inadequate for that purpose.

Having reviewed the Bill, the explanatory memoranda and the second reading speech in the Legislative Council for the Bill available at <http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=98C335B0054E256C48257E3C0030F5F4>, the basis for making the Authority exempt from the operation of the FOI Act is not clear to me. Further, it is not apparent to me that

there is a real need for the Authority to be exempt from the FOI Act or that the protections provided by the exemptions in the FOI Act are not sufficient or adequate.

In the event the Authority was subject to the access provisions of the FOI Act and the Authority was not inclined to disclose certain documents that may be sought, there appears to me to be sufficient protection from disclosure within the exemptions in Schedule 1 to the FOI Act. For example, clauses 1, 4 and 6 of Schedule 1 would provide exemptions from disclosure where:

1. disclosure would reveal the deliberations or decisions of Cabinet or the Governor in Executive Council;
2. disclosure could reasonably be expected to have an adverse effect on the commercial or financial affairs of third parties and disclosure of that information would not, on balance, be in the public interest; or
3. disclosure of the deliberative processes of the Authority, the Government, a Minister or another agency would, on balance, be contrary to the public interest.

Thank you for the opportunity to provide the Standing Committee on Legislation with my comments. I would be pleased to make myself available to appear before the Committee or otherwise discuss my submission with the Committee.

I have no objection to my submission being made public.

Yours faithfully



Su Lloyd
A/INFORMATION COMMISSIONER