



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

21 March 2012

Professor John McMillan
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 2999
Canberra ACT 2601

By email: consultation@oaic.gov.au

Dear Professor McMillan

Public sector information in Australia

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our Members are all involved in governance, corporate administration and compliance with the Corporations Act, with primary responsibility to develop and implement governance frameworks in public listed and public unlisted companies, as well as in private companies, government-owned corporations, not-for-profit organisations and other public sector agencies.

While CSA is cognisant that comments on the *Issues Paper 2 – Understanding the Value of Public Sector Information in Australia* recently closed, the comments we offer in this letter focus on the broader policy issue of defining the approach to public sector information (PSI).

Impact of public sector information disclosures on commercialised government entities

CSA recognises that the Office of the Australian Information Commission (OAIC) has demonstrated a commitment to developing efficient processes for public sector entities to communicate information to the public. The development of these lines of communication provides to the public insights into how government reports its actions and how forecasts are developed about national affairs. Adequate communication also informs the public of their entitlements and complaint options while simultaneously facilitating their participation in government decision-making processes.

The sharing of information by government with the community, therefore, is an important process to establish. CSA notes that there is substantial economic value to be had in disclosing PSI and that a settled and coherent approach to the accumulation and dissemination of PSI will provide certainty for many public sector entities in dealing with the wider public.

The process, however, also entails a delicate balancing act between the desire to disclose information to the public and the protection of information which is either confidential to individuals or commercially sensitive to various entities.

CSA is aware that in many instances, for example, under the 'freedom of information' regime, confidentiality features strongly in order to protect individuals from unnecessary public exposure. CSA strongly supports these measures. However, there is a lack of clarity as to the implications of applying these measures to public sector entities competing in the corporate sphere.

CSA notes that the Organisation for Economic Co-operation and Development (OECD) defines PSI as relating to information which is, among other descriptors, 'funded by government'. While theoretically this is an appropriate classification, the commercial reality is that this is a definition which could be broadly construed and PSI could include data from organisations such as NGOs that may receive government funding. The commercial sensitivities and realities of these types of organisations must be factored into the collection of information.

Similarly, commercialised government entities, such as government-owned corporations (GOCs), government business entities (GBEs), state-owned corporations (SOCs) and government trading enterprises (GTEs) which operate within commercially sensitive markets may also require information to be kept in confidence through their business dealings with the private sector. While the focus on greater openness is central to increasing the value of PSI, CSA believes it is also important to recognise the commercial-in-confidence conditions in which many GOCs, GBEs, SOCs and GTEs operate.

Commercialised government entities ought not be placed at a commercial disadvantage to their competitors in the private sector by virtue of being subject to the release of PSI that is commercially sensitive. There is the additional risk that the release of PSI could place public private partnerships (PPPs) in jeopardy, as companies partnering with commercialised government entities may find they have no protection for commercial-in-confidence matters. This may result in corporations being unwilling to participate in PPPs.

CSA recommends that commercialised government entities should have a limited exemption from PSI disclosures, where it is able to be demonstrated that a market competitor would gain a tactical or economic advantage from the disclosure of such information. CSA believes that there would be particular difficulty in imposing obligations on GOCs, GBEs, SOCs and GTEs to release commercial-in-confidence information that could harm the company which might include information concerning contracts with third parties (for example, tenders). The limited exemption may also need to be considered for some government departments and agencies that interact with third parties where similar commercial-in-confidence issues may arise.

Continuous disclosure

The PSI regime also requires a closer consideration of continuous disclosure for the public sector.

The concept of continuous disclosure is entrenched in the private sector, where there is a statutory obligation and a Listing Rule applicable to listed entities, requiring an entity that becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities to immediately notify the market of that information. The key to the continuous disclosure regime for private sector entities is materiality.

CSA has developed a position paper on the applicability of continuous disclosure to the public sector. While continuous disclosure in the private sector is a matter of notifying the market of events and developments that a reasonable person would expect to have a material effect on the value of a company's securities, it is more difficult to clarify a continuous disclosure obligation in the public sector. Furthermore, restrictions could well apply that need to be

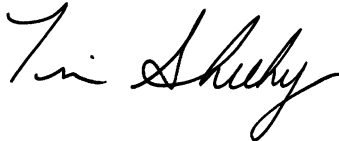
considered, such as the requirements of privacy legislation (the government agency might well not own the data), intellectual property rights and commercial-in-confidence information.

It is not a simple matter to apply a continuous disclosure regime to the public sector. There is concern that any decision to apply a continuous disclosure regime without consideration of the very real differences between the private and public sectors, as well as the absence of materiality and the need for equality of access to information to ensure an orderly market as the deciding factors, could see a disclosure regime imposed on public sector agencies that introduces an onerous compliance regime for little public benefit.

We have attached a copy of our position paper to this letter.

CSA has drawn on the expertise of the members of our national policy committee, the Public Sector Governance Committee in the development of both this letter and our position paper. We are more than happy to meet with you to discuss the issues highlighted in this letter.

Yours sincerely

A handwritten signature in black ink, reading "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy
CHIEF EXECUTIVE