MEDIA RELEASE

by
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WHISTLEBLOWER CHALLENGES VALIDITY OF CCC'S CLEARANCE OF ENERGY MINISTER MARK BAILEY

Queensland whistleblower at the centre of the long-running Heiner Affair, Kevin Lindeberg, has strongly criticised the 22 September 2017 clearance[1] by the Crime and Corruption Commission (CCC) and State Archivist regarding Energy Minister Mark Bailey's handling of work emails on his private server. He has suggested that the CCC's reasoning is profoundly flawed because it now places "*public records*" required as evidence in pending or impending judicial proceedings and vital in best practice public sector recordkeeping at unacceptable risk.

Minister Bailey disposed of emails generated on his private server shortly after a right to information access application by *The Australian* had been lodged. After a complaint by the Opposition to the CCC, 1199 records were recovered and defined as "*public records*" of which 660 required prior authorisation by the State Archivist under the *Public Records Act 2002* in order to lawfully dispose of them.

The CCC found that the Minister's conduct had breached the *Ministerial Handbook* and *Ministerial Information Security Policy* but reasoned as the public records were recovered and not permanently disposed of that there was no basis to pursue criminal conduct against the Minister, as well as on examining their content, the CCC could not find any criminal conduct in them.

CCC Chair, Mr Alan MacSporran QC, simply described the Minister's conduct as foolish.

(Now deceased) Ms Rolah McCabe, 2002 landmark British American Tobacco destruction of evidence/negligence smoking related cancer case

Corrupt NSW Detective Roger Rogerson

"The CCC's exculpatory reasoning that these '*public records*' had been subsequently relocated in the face of the unlawful initiating disposal act, is both astounding and contemptuous of the Queensland Court of Appeal's 2004 binding ruling in Pastor Ensbey's case and of the recordkeeping principles established in the civil 2002 Rolah McCabe case. In *Ensbey*,[2] the relevant item of evidence which was attempted to be disposed of was recovered and even tendered into evidence in the court case which found him guilty of the serious crime of destroying evidence some 6 years before the actual court case commenced, "Mr Lindeberg said. "The correct

[1] http://www.ccc.qld.gov.au/news-and-media/ccc-media-releases/no-criminal-action-relating-to-mark-baileys-email-account-22-september-2017

[2] https://www.sclqld.org.au/caselaw/QCA/2004/335

motivation for the police charging and successfully prosecuting him was his initial attempt at the time to defeat justice irrespective of the fact that the guillotined item was recovered and still readable afterwards".

"I am sure that Pastor Ensbey would have been very happy to just be called foolish, but instead, the authorities threw the book at him, and had him branded a criminal for life by the court. The double standards at play are stark, outrageous and unacceptable."

Lindeberg said the courts found that Pastor Ensbey was expected to know that the item might be required in evidence in a realistically possible future judicial proceedings because of its contextual evidentiary value.

He said in the case of Minister Bailey the fact that his received/created emails were always "*public records*", consistency at law must apply to reasonably expect that he, as a responsible Minister of the Crown, should know (along with other Ministers or public officials also who may create/receive public records in their public positions) that their records may be required in a future right to information access application.

"The *Ministerial Handbook* clearly warns all Queensland Ministers that their created/received records may be accessed under the *Right to Information Act* 2009 as well as Judicial Review, and be subject to demands under the *Crime and Corruption Act 2001* and *Criminal Code 1899*," Lindeberg said, "but now, in one extraordinary grand gesture, the CCC has declared that unless sought-after public records contain corrupt conduct, their retention can be voided without penalty".

"This is unadulterated, dangerous nonsense of the first order because not all RTI applications are about corrupt conduct but mostly about civil matters and individual rights".

Lindeberg said that it was not for the CCC to declare what, when and why the community or the media may seek access to particular public records.

"It is the sworn duty of the CCC, Information Commissioner and State Archivist to impartially protect and ensure the integrity of RTI processes so that the full scope of access to public records under the *Right to Information Act 2009* can be freely exercised without interference by anyone, including conduct which might be claimed to have been done out of ignorance."

He said that the CCC had, of great concern, overlooked the relevant definition of "judicial proceedings" under section 119 of the *Criminal Code 1899* (Qld) in this matter which may have otherwise triggered relevant Code offences under its Chapter 16 regarding offences against the administration of (civil/criminal) justice such as destroying evidence, attempting to defeat justice and conspiracies to pervert the course of justice.

"These are all very serious criminal offences if proven, and are within the CCC's purview".

Lindeberg said in the 1992 landmark criminal case against corrupt NSW police detective Roger Rogerson,[3] the High Court held that an act which only had just a tendency to interfere with judicial proceedings even when not on foot, was sufficient to find a party guilty of an offence of attempting to defeat justice. In *Ensbey*, the Queensland Court of Appeal ruled that the relevant judicial proceedings did not have to be on foot at the time the 'interference' act occurred for an offence of destroying evidence to be found.

"This CCC clearance flies in the face of case law, law and principles of public sector accountability. Section 119 defines a judicial proceedings as any proceedings in or before a court, tribunal or "person" in which evidence may be taken on oath. Under section 104 of the *Right to Information Act 2009*, the Information Commissioner is authorised to take evidence on oath," he said. "When appraising public records for disposal, the State Archivist must consider their legal/administrative value, and plainly the Minister's records possessed those values at the time and foreseeably so too".

"All this has the similar ugly echoes of the unresolved Heiner affair about it," Lindeberg said. "In that scandal, the State Archivist and CJC were involved from the outset regarding the disposal of public records by the entire 5 March 1990 Queensland Cabinet, not just one Minister. The 1993 CJC clearance included the absurd claim

[3] https://jade.io/article/67685

that the State Archivist only had to consider "historical" value of *'public records'* not their "legal" or "administrative" values when conducting appraisals, and even when the Heiner Inquiry documents were known to be required for court. Understandably, the world archives community, eminent retired judges and QCs rejected such palpable nonsense but the CJC still held fast to its flawed clearance for years and years in an alleged systemic cover-up".

Lindeberg said that the CCC clearance of Minister Bailey may therefore be seen as seriously undermining proper respect for the administration of justice, trust in public office and best practice public recordkeeping.

"It should be independently reviewed as to how and why such a flawed clearance could have ever been reached in the face of such compelling evidence, law, best practice recordkeeping and court precedent, " Lindeberg said, "But sadly, trust and public confidence in government, respect for the rule of law and individual rights are once again being undermined by the all-powerful CCC with everyone too cowered to dare say the glaringly obvious: this Emperor is wearing no clothes".

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