



QUEENSLAND  
**ombudsman**

## **Response of the Queensland Ombudsman**

to the Discussion Paper dated 29 January 2008  
and titled

**“Enhancing Open and Accountable Government –  
Review of the *Freedom of Information Act 1992*”**

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## Table of Contents

Chapter 6 – Purposes and principles of FOI .....	1
6.1 Preamble – why FOI?.....	1
6.2 Objects of the FOI Act .....	2
Chapter 7 – Exemption Provisions.....	7
7.1 Public interest test .....	7
7.2 Cabinet and Executive Council matters .....	8
7.3 Deliberative processes .....	8
7.4 Personal affairs .....	9
7.5 Commercial-in-confidence.....	10
7.6 Other exemption provisions.....	10
7.7 Conclusive certificates.....	11
Chapter 8 – Administration of FOI in Queensland .....	12
8.1 Public sector culture .....	12
8.3 Protection of privacy interests .....	14
8.5 FOI applications for access .....	14
8.7 FOI review process .....	15
Chapter 9 – Costs and time .....	18
9.1 Fees and charges.....	18
9.3 Voluminous and/or vexatious requests .....	19
Chapter 10 – Effectiveness and adequacy of data collection and reporting .....	21
Chapter 11 – Conclusion – a new beginning? .....	22

## Chapter 6 – Purposes and principles of FOI

### 6.1 Preamble – why FOI?

One would hope it is now beyond debate that there is a public right to information held by government. Government is delegated with the power to act on behalf of the public, and the information that it gathers and acquires in discharging that power is gathered and acquired on behalf of the public. After all, the public funds the institutions of government and the salaries of government officials.

There is a democratic imperative for open government and its correlative is that any interested member of the public should be entitled to information about any aspect of the performance of government, except to the extent that disclosure of information would prejudice the broader public interest. Any lingering belief that a department or other public agency "owns" the documents that it acquires or generates must be eradicated in order to promote a truly open approach to giving the public access to information which is held on its behalf.

I consider that the guiding principle that should be followed when considering any request for access to government information is that disclosure should be given unless, on balance, it would cause substantial harm to the public interest. Rather than starting the process by looking for an exemption provision that will apply to the information that is sought (even if that information is innocuous or uncontroversial), agencies should be encouraged to disclose information (even if technically it qualifies for exemption) if its disclosure would not harm the public interest. The New Zealand *Official Information Act 1982* operates on this principle – official information is to be made available unless there is a good reason for withholding it (as determined by specified criteria). It has been widely accepted that the New Zealand Act has outperformed its Australian counterparts in achieving an increased level of open government.

It is without question that FOI contributes to a healthier democracy. The central principle that citizens in a representative democracy have the right to seek to participate in, and influence, the processes of government decision-making and policy formulation is meaningless unless those citizens can obtain access to the information that will assist them to exercise that right. Therein lies the importance of FOI legislation.

I agree that a more contextual interpretation of the FOI Act is needed. In order to acknowledge the important role that the FOI Act plays in promoting and supporting a healthy, open and accountable democracy, in which the public is given every opportunity to participate in government decision-making, I support the insertion into the Act of a Preamble. The Preamble should make clear that access to government information is a right and that the FOI Act is intended as a legislative support to the overriding principle of openness in government. I note the recommendations that the Australian Law Reform Commission made in 1995<sup>1</sup> regarding the insertion into the Commonwealth FOI Act of a Preamble. Similarly, I consider that the Queensland Act should contain a Preamble that explains that:

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<sup>1</sup> Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC), *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No. 77, ARC Report No. 40, November 1995

- access to information held by the government is a public right essential to the freedom of communication that is inherent in Queensland's system of representative democratic government;
- this right of access will enable the community to participate in the processes of government and will enhance government accountability;
- the right recognises that information held by government is a public resource;
- the right of access to one's own personal information also serves to protect individuals' privacy;
- the Act should not displace less formal procedures for access to information but should be regarded as a legislative "last resort".

## **6.2 Objects of the FOI Act**

### Better governance and openness

I note that my predecessor as Information Commissioner, Mr Fred Albietz, recommended to LCARC in a submission in May 1999<sup>2</sup> that the objects clause of the FOI Act be amended to make express mention of the public participation object of FOI legislation. That amendment has not been made. I, too, consider that enhancing the public's ability to participate in government policy formulation and decision-making is an important object of FOI legislation and should be included in the objects clause. In addition, I have no difficulty with further expanding the objects clause to include better public administration and improved decision-making, nor with acknowledging "openness" as a specific aim of the Act. All are recognised benefits of an effective and accepted FOI regime.

### Open and shut

Consistent with the comments I have made in section 6.1, I consider that government agencies should approach requests for access to information by deciding whether disclosure of the information could reasonably be expected to cause substantial harm or prejudice to the public interest. It follows that it is not appropriate for agencies to take the view that any document that is created by an agency is to be regarded as confidential, unless otherwise categorised. To do so simply promulgates an attitude of secrecy rather than openness. In my experience, very little information held by government is truly confidential in nature. A great majority is innocuous and uncontroversial and, as such, should not be subject to an automatic presumption of confidentiality.

### Administrative Access

Section 14 of the Act clearly urges agencies to be as open as possible, and not to regard the requirements of the FOI Act as expressing the full extent of their responsibilities with respect to open government. In my time as Information Commissioner, I encouraged agencies, wherever possible, to implement administrative access policies to cover the administrative release of information. Ideally, the FOI Act should be used as a last resort to obtain access to government information. Wherever possible, agencies should release information quickly and informally, with attendant savings in the costs and resources that are often needed to process FOI applications. On-line disclosure of information, through agency

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<sup>2</sup> Office of the Information Commissioner Queensland, "Review of the *Freedom of Information Act 1992*", Submission to the Legal, Constitutional and Administrative Review Committee, 14 May 1999

websites, should be used wherever frequently requested categories of information are identified by an agency.

As regards the making of a decision to release information administratively, I consider that that power should rest with primary FOI decision-makers, in the same way that those officers currently have responsibility for making initial decisions in response to FOI access applications. Those officers usually are the best placed in an agency to identify patterns in access requests and to recognise any potential issues arising from the giving of administrative access, as opposed to giving access under the FOI Act.

As regards legal protection in situations where information has been released administratively, it may be possible simply to extend s.102 of the Act to apply to access, whether or not granted under the FOI Act, and, if the latter, whether or not access has been given in response to a specific request from a member of the community. However, it may be necessary then to consider whether this protection would be too broad, and ought not to apply to cases where, for example, an agency publishes information in wilful or reckless disregard of a binding obligation of confidence.

#### Document

I do not see any need to change the definition of "document" as contained in the Act. I think that the current definition adequately covers the various ways and forms in which information may be held by an agency. I can see no advantage in changing the Act to provide for persons to apply for access to public records rather than documents. In fact, the definition of "public record" contained in the *Public Records Act 2002* may contemplate a narrower interpretation of information intended to be captured. Information is only regarded as a record under the Public Records Act if it is created or received by an entity in the transaction of business or the conduct of affairs and *provides evidence of the business or affairs*. Whether or not a document provides such evidence may be open to different interpretations, and I think that the use of such words in an FOI Act definition would unnecessarily complicate the issue.

The purpose of the FOI Act is to capture all documents (within the defined meaning of that word) that fall within the terms of an access application and that exist in the possession or under the control of the responsive agency on the day that the application is received. It is a straightforward test to apply. If, on the day that an access application is received, a responsive document exists in the possession or under the control of the relevant agency, it is caught by the application.

What I do consider essential is the need for agencies to implement protocols regarding document naming, storage and archiving, and to educate their staff about the applicable provisions contained in the Public Records Act (and relevant agency record retention and disposal schedules made under that Act) in order to maximise the efficiency with which documents falling within the scope of an FOI access application can be identified and located. From my experience as Ombudsman and, previously, as Information Commissioner, it is my opinion that one of the most significant problems in agencies is a lack of knowledge at all levels of the agency's obligations with respect to the retention and disposal of documents, and the various standards and best practice guidelines relating to storing, archiving and retrieval of documents.

As to the specific issue raised by the Panel regarding drafts of documents, I have noted the memorandum prepared by Queensland State Archives titled "Drafts as

Public records"<sup>3</sup>. In my experience, there is no uniformity of approach among agencies regarding the retention or destruction of draft documents. Yet many FOI access applications will specifically request access to drafts or notated versions of documents. It seems that applicants are particularly interested in seeing any changes or notations that have been made to documents before a final version is produced. I agree with the approach set down by the State Archivist namely, that drafts should be retained if there is a business reason for doing so, and if the draft records alterations of significance.

I am aware that, on many occasions, staff of the Office of the Information Commissioner received files from agencies that contained multiple copies of the same documents and multiple copies of drafts and re-drafts. Many of those drafts contained nothing more than typographical or grammatical amendments and added nothing to an applicant's understanding of the history of the document. Had the State Archivist's guidelines been followed, such documents would properly have been destroyed. Again, however, the key to implementing a uniform approach to this issue across government lies in preparing adequate organisational record-keeping procedures, and educating staff about the importance of those procedures.

I note the Swedish approach to identifying ephemeral material and the requirement to register official documents. While I do not consider that a formal registration process is warranted in Queensland (and would require a significant level of resourcing to implement and maintain) the process that Sweden undertakes in identifying what should be registered as an official document should be the same as that followed in Queensland in terms of what drafts should be captured and retained.

#### Bodies to which the Act applies

##### *(a) The private sector*

As a general rule, I support the view expressed in the ALRC report<sup>4</sup> to the effect that the democratic openness and accountability required of the public sector under the FOI Act should not be required of the private sector, and that the FOI Act should not be extended to apply generally to private sector bodies.

However, I am concerned that, in some situations, there is an inequality between information access as it applies to publicly resourced activities, such as health and education, and their private counterparts. There is clearly an inequity of treatment between private hospital patients and public hospital patients in respect of information access. The same is true of private school students and public school students.

It may be appropriate, as a first step, to give consideration to extending information access rights to particular areas of private sector service provision where there is likely to be clear demand for, and demonstrable public benefit flowing from, access to information.

But, as far as these types of cases are concerned, I agree with the ALRC report recommendation to the effect that, rather than amending the FOI Act, if there is a need for greater disclosure of particular information in a specific area of the private

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<sup>3</sup> Queensland State Archives, *Administrative Access*, Paper prepared for the FOI Independent Review Panel, 20 November 2007

<sup>4</sup> Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC), *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No. 77, ARC Report No. 40, November 1995

sector, the legislation regulating that industry should be amended, or new legislation introduced, to require greater disclosure of that information.

(b) *Contracting out*

In his 1997/98 Annual Report<sup>5</sup>, Commissioner Albietz noted the escalating trend in other jurisdictions of governments seeking to contract out the performance/delivery of government services and discussed how FOI legislation should accommodate this trend.

In the intervening 10 years, the trend has continued, including in Queensland, but no amendments have been made to the Act to respond to it.

As was noted in the ALRC report, the issue of governments contracting with private sector bodies to provide services to the community raises significant regulatory and accountability issues.

*What appears to be happening is that administrative law is being pushed out of the public sphere by re-labelling public activities. ... This re-labelling is done by the expedient of using the mechanism of contract to fulfil public purposes. The rhetoric of contract, in particular "freedom of contract", is then employed to insulate the government from scrutiny. When this freedom is combined with the use of contract for the ordering and control of public resources, the synthesis becomes dangerous.*<sup>6</sup>

It is clear that accountability should not be lost because information relating to the provision of a service is in the possession of a private sector body and not a government agency. To avoid this problem, I favour an amendment to the FOI Act so as to deem documents in the possession of the contractor, that relate directly to the performance of the contractor's contractual obligations, to be in the possession of the government agency, and therefore accessible under the FOI Act by application to the government agency, subject to the current exemption provisions. Of course, the success of this approach would be dependent on all such contracts imposing obligations on the contractors to create appropriate records and to provide them to the government agency, with periodic auditing of the contractor's adherence to its record-keeping obligations. Any such amendment to the FOI Act must be co-ordinated with corresponding adjustments to the standard conditions of contract employed by all agencies which are subject to the FOI Act.

This approach sits comfortably with s.7 of the FOI Act which defines "document of an agency" to mean a document in the possession or under the control of an agency, including a document to which the agency is entitled to access. Further, this approach does not impose onerous administrative or processing obligations on contractors which might result if a contractor was deemed to be an agency for the purposes of the FOI Act.

(c) *Government-owned corporations (GOCs)*

The issue of GOCs and the extent to their activities should be subject to the FOI Act, has been debated for many years. Commissioner Albietz first raised the issue in his 1994/95 Annual Report when the program of exclusions of GOCs from the FOI Act

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<sup>5</sup> Office of the Information Commissioner Queensland, Annual Report 1997-98, page 21

<sup>6</sup> Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC), *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No. 77, ARC Report No. 40, November 1995

was first introduced. He discussed it further in his 1995/96, and 1996/97 Annual Reports, the latter discussion following the introduction of s.11B of the FOI Act which applies to local government-owned corporations (LGOs).

In my first Annual Report as Information Commissioner<sup>7</sup>, I criticised the wording of s.11A of the FOI Act and observed that it effectively skewed the playing field in favour of GOCs by conferring on them a much greater scope of exclusion from the Act than is afforded to private sector business operators. The wording of s.11A not only excludes from the application of the Act documents in the hands of a GOC, but also documents relating to the GOC held by other government agencies (such as a regulatory authority) or Ministers. Documents about a private sector business that are held by a government agency or Minister are not excluded from the application of the Act.<sup>8</sup>

I consider that all GOCs should be subject to the FOI Act. I am strongly of the view that private entities that carry out public functions using public funds are accountable to the public for the way in which they perform those services and spend those funds, and should be subject to all the usual accountability measures, including the application of the FOI Act, and scrutiny by the Crime and Misconduct Commission, the Ombudsman and the Auditor-General. The commercial interests of GOCs are adequately protected by the exemptions available to agencies which are subject to the FOI Act. For example, documents that relate to their competitive commercial activities may qualify for exemption under s.45(1)(c) of the FOI Act.

As far as I can understand the position in other states, there does not appear to be a particular problem posed by GOCs vis-à-vis the FOI Act. It would seem that GOCs generally do not receive a specific exemption for commercial-type activities, but rely on the general exemptions contained in the respective FOI Acts.

To give effect to that position, s.11A and Schedule 2 of the FOI Act would need to be repealed (and any consequential amendments made to complementary legislation).

In terms of defining which bodies exercise government functions and should therefore be subject to the FOI Act, I support the analysis set out in ALRC Report 77<sup>9</sup> which identified government control as the most important characteristic. If the body is controlled by the government and spends public funds, then I consider it should be subject to the FOI Act. Government control will be established if the government has an ownership interest in the body of at least 50%. In the case of a body corporate, the government has a controlling interest if it is able to:

- control (whether directly or through its ownership interest in other bodies) the composition of the board of directors;
- cast (or control casting of) more than one half of the maximum number of votes that might be cast at a general meeting of the body;
- control more than one half of the issued share capital of the body.

If the government does not have a controlling interest in the body, then it should not be subject to the FOI Act.

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<sup>7</sup> Office of the Information Commissioner Queensland, Annual Report 2001-02

<sup>8</sup> Office of the Information Commissioner Queensland, Annual Report 2001-02, page 27

<sup>9</sup> Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC), *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No. 77, ARC Report No. 40, November 1995

## Chapter 7 – Exemption Provisions

### 7.1 Public interest test

The recognition that information received or created by government is held for the benefit of the public underpins the public interest balancing test.

I consider that all exemption provisions contained in the FOI Act should be subject to a public interest override. I think that confusion arises in the application of public interest balancing tests in the FOI Act, firstly, because not all provisions contain a public interest balancing test, and secondly, because not all the tests are worded the same. For example, while most exemption provisions that incorporate a public interest balancing test use the phrase "*unless its disclosure would, on balance, be in the public interest*", s.41 incorporates a reverse of that standard test and uses the phrase "*... if its disclosure ... would, on balance, be contrary to the public interest*".

Amendments to s.39 and s.48 of the FOI Act, as enacted by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994*, incorporated into the exemption in ss.39(2) and 48(1) a differently worded formulation of a public interest balancing test - "*unless disclosure is required by a compelling reason in the public interest*". There was no cogent explanation given for incorporating this stricter test.

I support the inclusion of a general public interest override that applies to all exemption provisions to ensure that documents are released, whether or not they technically qualify for exemption, if their disclosure would not, on balance, cause substantial harm to the public interest.

Rick Snell and Paula Walker in their paper *Designing for access rather than fighting for Freedom of Information*<sup>10</sup> state:

*The question should be asked: "what are the consequences of releasing this information and will the disclosure of information cause substantial harm?" The focus of agencies and FOI officers deciding on FOI applications should be based on a presumption of openness. If this proposal were adopted public authorities would have to commence such decisions by assessing the effect of disclosing, rather than withholding the information.*

While a detailed definition of public interest is not possible, I consider that there would be merit in including a provision similar to s.59A of the New South Wales FOI Act, which sets out matters that are *not* to be considered in determining the balance of the public interest (for example, the criteria from *Re Howard and Treasurer of Commonwealth of Australia* (1985) 3 AAR 169, which have since been rejected by the High Court).

In discussing some of the other exemption provisions contained in the Act, I will comment upon them as they are currently drafted. Of course, if a public interest

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<sup>10</sup> Submission to the Parliamentary Legal, Constitutional and Administrative Review Committee on the Freedom of Information Act, 1999, page 9

override test were to be adopted, most of the exemption provisions would need to be re-drafted to take account of that.

## 7.2 Cabinet and Executive Council matters

The controversy surrounding the current wording of s.36 and s.37 of the FOI Act has been widely discussed and is well documented. Both Commissioner Albietz and I took every opportunity, in nearly every Annual Report we each published since the provisions were amended in 1993 and 1995, to criticise their overly broad scope. In my view, their reach is so wide that they cannot be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional concepts of collective Ministerial responsibility to such an extent that I consider them to be directly opposed to the achievement of the objects of the FOI Act, namely, the promotion of openness and government accountability.

I refer the Panel to the comments I made in my 2001-2002 Annual Report as Information Commissioner<sup>11</sup>. As I explained there, I support the introduction of an exemption provision similar to that contained in the Commonwealth FOI Act. The Commonwealth Cabinet exemption does not give blanket exemption to documents submitted to Cabinet unless they were prepared for the purpose of submission to Cabinet. Under that regime, only documents that disclose the individual submissions or opinions of Ministers, or the nature and content of their collective deliberations, require blanket protection from disclosure in accordance with the convention of collective ministerial responsibility. Other documents should be individually assessed according to whether or not disclosure of their contents would, on balance, cause substantial harm to the public interest.

As to s.37 of the FOI Act, I support its repeal for the reasons that Commissioner Albietz set out in his 1994-1995 Annual Report<sup>12</sup>. As Commissioner Albietz observed, any matter of perceived importance or political sensitivity which must be submitted to Governor-in-Council will invariably be considered by Cabinet or a Cabinet committee or sub-committee before hand, so that exemption will be available when necessary. In my time as Information Commissioner, I cannot recall an instance where an agency made a claim for exemption solely under s.37. In every case s.36 was also relied upon. In any event, documents submitted to Executive Council would ordinarily fall within s.41(1)(a) of the FOI Act even if they weren't exempt under s.36.

Accordingly, in the interests of having as few exemptions as possible and simplifying the Act, I propose that s.37 be repealed.

## 7.3 Deliberative processes

In my experience as Information Commissioner, s.41(1) was probably the most over-used exemption provision in the FOI Act. Agencies routinely relied upon it to claim exemption over all types of internal discussion papers and memoranda, the great majority of which were purely procedural or administrative in nature or otherwise innocuous.

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<sup>11</sup> pages 25-26

<sup>12</sup> paragraphs 3.45 – 3.49

However, although it is tempting to support a narrowing of the application of s.41(1) so that it applies only to deliberative material associated with policy formulation, I consider, on balance, that such an amendment would make the provision difficult to administer (on the basis that it would often be difficult to distinguish such material from other deliberative documents) without necessarily increasing the level of disclosure by agencies.

The provision as it is currently drafted, should operate satisfactorily as long as agency decision-makers understand the meaning of "deliberative processes" and properly apply the public interest balancing test that is contained in s.41. A proper consideration of the public interest balancing test should provide a sufficient safeguard against s.41 being claimed for innocuous material. Perhaps it would be appropriate to give consideration to inserting a definition of "deliberative processes", based upon the discussion of that term in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588.

#### **7.4 Personal affairs**

I recommend that steps be taken to harmonise the concept of "personal affairs" in the FOI Act, with the concept of "personal information" that is used in Information Standard 42 (and in all other Privacy Acts that have already been enacted in Australia), and to make clearer the relationship between FOI and privacy. The use of consistent terminology will become even more important if the Queensland Parliament enacts a Privacy Act.

I support amending s.44(1) of the FOI Act to closely reflect the intent of s.41 of the Commonwealth FOI Act. That is, the term "personal information" should be used, using the definition that corresponds with that used in IS 42. The test should be whether disclosure would involve the unreasonable disclosure of personal information about any person. Information the disclosure of which would breach IS 42 would be exempt, subject to the public interest override that I have recommended be inserted into the Act to cover all exemption provisions.

However, as to the question of workplace information about government employees, I see no reason for moving away from the principles established by the line of decisions issued by the Information Commissioner's Office. That is, information that merely concerns the performance by government employees of their employment duties is properly characterised as information concerning their employment affairs and not their personal affairs. Some employment-generated information will be properly regarded as personal information, mostly in the area of human resources (e.g. leave, pay, health details etc) but if the information is about the performance of employment duties, I can see no reason for altering its characterisation. The same characterisation test is validly applied to all employment-related information held by government agencies, whether or not it involves public servants.

If public servants and politicians are provided with government-funded equipment, then I consider that information that is gathered by the government about the use of that equipment, or that is required to be provided to the government by the user as part of the contract of use, is disclosable under the FOI Act and should not be regarded as being information that is private in nature. Such equipment is provided to public servants and Ministers by reason of their employment by the people of Queensland who pay for the equipment. As such, a high level of accountability to the

public attaches to the use of the equipment. The primary reason such equipment is provided is for employment purposes, though in most cases, supplementary private use is also permitted. Where issues arise out of the private use of government equipment, I consider that the overriding principle of accountability to the public of Queensland for the use of publicly-funded equipment means that there is a strong public interest favouring disclosure that, except in exceptional circumstances, would override any privacy concerns.

## 7.5 Commercial-in-confidence

As regards the issue of whether s.45(1)(a) and (b) should be subject to a public interest test, I reiterate my view expressed above, that all exemption provisions should be subject to a public interest override.

Similarly to the Commonwealth experience, I consider s.45(1)(c) to be over-used and misunderstood. Both agencies and third party companies consulted about disclosure of commercial-type information routinely claim that such information is "commercial-in-confidence" without having any real understanding of the meaning of that term, or how the exemption under s.45(1)(c) operates. It often appeared to me that some agencies based their decision to exempt matter under s.45 largely or solely on the fact that that the relevant third party objected to disclosure, regardless of whether there was any basis for a reasonable expectation of an adverse effect. Further, agencies and third party participants often made claims for exemption under s.45(1)(c) over whole classes of documents, without ever considering the effect of disclosure of each individual document or part of a document, and whether such disclosure could reasonably be expected to have the required adverse effect.

But while I consider s.45(1)(c) is over-used and misunderstood, I do not consider that an amendment to that provision is needed in order to more appropriately balance the competing interests of disclosure of information that is in the public interest, and the protection of legitimate business interests. If applied appropriately by agencies, s.45(1)(c) should not prevent the disclosure of information about commercial or business affairs that should be available for public scrutiny.

While I held the position of Information Commissioner, the Office produced a series of Information Sheets that were designed to educate agencies, applicants and third parties about the most commonly used exemption provisions and how they operate. I consider that adherence to those guidelines by agencies when assessing a possible claim under s.45 should ensure a proper application of the provision. At that time, the Office also provided training to agencies on the use of those exemptions.

## 7.6 Other exemption provisions

I draw the panel's attention to the numerous suggestions for amendment of exemption provisions that were contained in Commissioner Albietz's submission to LCARC dated 14 May 1999<sup>13</sup>. Many of those suggestions were never implemented but remain relevant and necessary, particularly in the case of:

- s.42(1)(e);
- s.45(3);

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<sup>13</sup> pages 16-28

- s.46(2);
- s.47(2);
- s.50(b).

In addition, I submit that s.47A (relating to investment incentive schemes) should be repealed. This provision was inserted by the Beattie Government in response to my decision in *Re Seeney and Department of State Development; Berri Limited (Third Party)* (2004) 6 QAR 354. For the reasons I gave in that decision, there is no justification for giving a blanket exemption to information relating to investment incentive schemes. Such information must always be analysed on a case-by-case basis. In some cases, it is already in the public domain in one form or another (for example, in the publicly available financial accounts of Berri Limited) or has aged to such an extent as to retain no commercial sensitivity. But in any event, the overriding consideration in such cases is that it is public funds that are being spent and the public therefore has a strong interest in scrutinising how those funds are being spent and whether the investment represents value for money. Yet I note that s.47A contains no public interest balancing test.

## **7.7 Conclusive certificates**

I support the abolition of conclusive certificates. While I am not aware of any instances in Queensland where such provisions have been misused or invoked inappropriately, I do not believe it is appropriate for Ministers to have the power to override the relevant tribunal's jurisdiction (as independent arbiter) to review documents in issue and to make a decision about whether or not those documents qualify for exemption.

## Chapter 8 – Administration of FOI in Queensland

### 8.1 Public sector culture

#### Achieving cultural change

In order to achieve a truly successful FOI regime in Queensland, it is first necessary to overcome the agency culture that operates in favour of secrecy and information protection. It is pointless to reform the FOI Act so as to make it one of the most liberal and progressive in the world if decision-makers in agencies (or, more commonly, those senior managers to whom they report) have a basic distrust of FOI and are hostile towards its objectives. The goal of cultural change can only be achieved with strong leadership - by leaders at the most senior levels demonstrating a commitment towards open and transparent government and an understanding and acceptance of the philosophy of FOI. It is important that officials who hold information and power within the executive branch of government recognise that they do so on behalf of the people of Queensland, and tailor their management practices with respect to government information accordingly.

In the Commonwealth sphere, as far back as 1985, Cabinet issued directions that agencies should not refuse access to non-contentious material only because there were technical grounds of exemption available under the Commonwealth FOI Act. I have already noted above, the success of the New Zealand regime, which operates on the basis that information is to be made available unless there is a good reason for withholding it.

On the other hand, my experience as Information Commissioner led me to the view that it was the practice of some Queensland agencies to claim certain exemptions (for example, Cabinet and legal professional privilege) whenever available, regardless of individual circumstances or considerations. As I have noted above, the Cabinet exemption provision is in need of immediate amendment. As the Panel itself has noted at page 80 of its report, the very existence of this "bolt-hole" sends the wrong message to public servants about the desirability of openness. It is difficult to envisage cultural change occurring in those circumstances.

In his submission to LCARC<sup>14</sup>, Commissioner Albietz supported implementation in Queensland of the ALRC's recommendations for the improved administration of the Commonwealth Act:

*The Review considers that the cultural changes that will result from improved appreciation of the philosophy and purpose of the FOI Act would be more likely to occur if senior officers were given tangible incentives to pay greater attention to, and to improve, an agency's FOI practices and performance. Linking good public information, communication and FOI practices to performance appraisal would be likely to influence the attitude towards information access of the officers whose attitudes often influence those of the entire staff of an agency – the senior officers. The review recommends that performance agreements of all senior officers should be required to impose a responsibility to ensure*

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<sup>14</sup> in May 1999 at paragraph A34

*the efficient and effective handling of access to government-held information, including FOI requests in the agency. Commitment to good information management and FOI practices should also be expressed in an agency's corporate plan.*

Although it has never been implemented in Queensland, I remain of the view that the performance appraisal idea has merit and would go some way towards forcing a cultural shift within agencies. In addition to that proposal, I support many of the others discussed in the Discussion Paper at pp100-102, specifically:

- circulation by the Premier of a memorandum directing agencies not to claim exemption over technically exempt material unless there is good reason;
- elevating the status of FOI decision-makers, including appointment at an appropriate mid to senior level, and providing appropriate training, resources and support;
- actively promote awareness of FOI within the agency and train staff on their obligations under the Act, particularly in the area of records management, retention and disposal.

I also support the introduction of an FOI Monitor role (as recommended by LCARC in 2001) (I will discuss this proposed role in more detail below). The role would entail responsibility for (among other things) auditing an agency's compliance with the Act in terms of individual requests, as well as reviewing the agency's document management and processing procedures.

#### Information policy

I have no doubt that access rights are "stuck in a time warp" in respect of information and communication technologies. There has been exponential growth of electronic forms of communication in the past five to ten years. Few FOI laws have directly addressed any issues arising from it.

To my mind, the challenges arising out of electronic forms of communication and associated record-keeping issues concerning their storage, retention, disposal and retrieval in terms of the FOI Act are deserving of special attention. To give meaningful and informed consideration to the various issues, I recommend the formation of a specialist committee, comprising a selection of agency FOI decision-makers, IT officers and document management specialists, including the State Archivist, and chaired by the head of whichever agency has the FOI Monitor role.

The Committee would be tasked with the job of identifying the relevant issues concerning the treatment of electronic data under the FOI Act and proposing suitable strategies for dealing with it. Based on the Committee's recommendations, its chairperson would issue to agencies appropriate directions or guidelines regarding the handling and disclosure of electronic data under the FOI Act. There should be periodic meetings of the Committee, and periodic reviews of the directions/guidelines, so as to keep pace with emerging technology issues.

I also urge the issuing of a direction that, in line with LCARC's 2001 recommendation, every agency conduct an audit to assess current standards of records management (both paper and non-paper). Clear sector-wide protocols and standards on information management should be developed that better reflect the practical reality of how government creates, retains and disposes of, its information.

### **8.3 Protection of privacy interests**

I have already discussed in section 7.4 my view that the FOI Act should be amended to introduce the concept of "personal information" (as opposed to personal affairs) so as to bring it into line with IS 42.

In the event that the Queensland Parliament enacts privacy legislation, I have indicated to the Department of Justice and Attorney-General that I am not opposed to its recommendation (as contained in its Discussion Paper dated 4 October 2007) that the Ombudsman's Office take on a complaint resolution/oversight role as regards privacy. With the allocation of additional resources, I consider that the Ombudsman's Office would be well-suited to discharge the role. It has the necessary independence and an established profile and reputation in the community as a complaint resolution/watchdog body.

As I understand it, the proposed privacy role for the Ombudsman's Office would be restricted to:

- complaints and own motion investigations;
- administrative improvement;
- promoting awareness of the privacy regime;
- advocacy; and
- promoting best practice.

Of course, if the government were ultimately to decide that the oversight body should have power to make binding orders, then the role would be unsuitable for the Ombudsman's Office. It would not be appropriate to revise the Ombudsman's powers to make binding orders in relation to administrative actions generally, or privacy alone.

An alternative would be to combine the responsibility for privacy and FOI oversight/complaint handling within the one body, whether that body was my Office or a refocussed Office of the Information Commissioner. I note that a similar scheme has been proposed in Western Australia - namely, the Office of Privacy and Information Commissioner. We understand the legislation gives the option for the Ombudsman to hold those offices. Combining the two responsibilities would have the benefit of recognising the important connection between FOI and privacy.

### **8.5 FOI applications for access**

I support the introduction of on-line FOI access applications, with associated provision for electronic payment of the application fee. I can see no reason, in the current age of internet supremacy, when virtually every type of application for government services can be made, and paid for, on-line, why FOI access applications should be treated any differently.

I agree wholeheartedly with the Commonwealth Ombudsman's observations that the success of an FOI scheme depends heavily upon the way in which the responding agency administers the processing of applications. In my experience, the agencies that experienced the least number of problems in the administration of the Act were those where the FOI officer or team:

- was senior, experienced and committed to FOI;

- had established a set of processing procedures and guidelines which were followed in every case; and
- kept open the lines of communication with the applicant and endeavoured to assist the applicant to achieve his or her goal.

Of course, much depends on whether the agency's FOI unit is adequately resourced, and how many applications they receive in terms of building FOI experience. Problems were usually encountered in larger agencies which did not have a dedicated FOI officer, but instead allocated FOI processing duties to an officer whose primary responsibilities lay elsewhere.

I consider that the guidelines set out by the Commonwealth Ombudsman in his 2006 report all make good administrative sense and it would be beneficial if Queensland agencies were to adopt them as best practice. As mentioned above, I also think that the FOI monitor (which I will discuss below) should be given the role of reviewing agencies' processing practices and procedures and making recommendations for improvement.

## **8.7 FOI review process**

### Internal review

An option worth considering is to make internal review optional rather than mandatory, leaving it up to the applicant to decide whether or not they wish to pursue their application further with the agency, or to proceed straight to external review. My experience of internal review decisions was that many internal reviewers did not make a genuine attempt to re-consider the issues afresh, but simply rubber-stamped the initial decision. If an applicant feels that, perhaps judging from his or her experience in dealing with the agency to date, little is to be gained by applying for internal review (other than further delaying the progress of their application), then they may prefer bypassing that stage.

I also agree with Rick Snell's observation that it may lead to an improvement in the quality of agencies' initial decisions, and may encourage them to pay greater attention to the accuracy of all aspects of their decisions, if there is a greater possibility that the decision will end up before an external review tribunal. It may also lead to primary decision-making responsibilities being given to officers at a more senior level.

### External review

In my submission to LCARC<sup>15</sup>, I explained why I was in favour of the establishment of a merits review tribunal in Queensland, similar to the Commonwealth AAT. I note that the Government recently announced (on 12 March 2008) that it intends to establish a civil and administrative review tribunal, and has formed an independent panel of experts to advise the Government on how best to implement the tribunal. The Office of the Information Commissioner is identified in material accompanying the announcement as one of the bodies whose determinative powers may be transferred to the new tribunal. I support that proposal. I am in favour of stream-lining administrative appeal rights in Queensland and vesting such rights within one body,

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<sup>15</sup> dated 26 October 2007 in response to the Committee's Supplementary Issues Paper on "The Accessibility of Administrative Justice" (17 August 2007)

made up of tribunal members with relevant expertise in the various areas of jurisdiction.

As the Panel has noted, tribunals such as VCAT have proved that tribunal procedures are able to be used successfully to hear FOI appeals. Today, tribunals are established with a view to being fast, cheap, relatively informal and more specialised than a court-based review system.

#### FOI Monitor/oversight role

If the Information Commissioner's Office is to continue to exist, but its determinative powers are removed, then it could perform solely an oversight/FOI Monitor role, and focus on the administration of the Act. (As mentioned above, it may also be an option to give it the same oversight/monitoring role in respect of privacy.) While I was Information Commissioner, I made an Assistant Commissioner responsible for providing information and assistance. The Office provided training to agency decision-makers and co-ordinated the preparation of information sheets for applicants and detailed practice guidelines for decision-makers. As far as I am aware, the Information Commissioner's Office no longer carries out this responsibility. Although the Department of Justice and Attorney-General provides training sessions for FOI decision-makers from time to time, no agency is currently discharging this important advice and awareness role.

Another reason that I favour giving the external review power under the FOI Act to a civil and administrative review tribunal, is the unavoidable tension that exists when a body responsible for formulating guidelines on the administration of legislation also has determinative powers. When the Information Commissioner's Office was first given responsibility for providing an advice and awareness role, we were careful to refer to it as "information and assistance" rather than advice, and to inform applicants and agencies that we were unable to give advice about specific cases. As the ALRC noted in its report (in recommending that determinative powers remain with the Commonwealth AAT but that a federal Information Commissioner be established to take on an advice and awareness role), providing advice to parties to a review could give rise to a conflict of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers.

I would envisage the FOI Monitor/oversight role as encompassing the following types of functions:

- to provide independent advice and assistance – for example, by preparing guidelines, information sheets and case studies, keeping an online repository of FOI cases and providing training to agency decision-makers, so to assist applicants and decision-makers to understand and correctly apply the provisions of the Act;
- to publicise and promote the Act;
- to collect FOI statistics from agencies and prepare an annual report;
- to audit the performance of agencies and their compliance with the requirements of the Act,
- to identify, and report on, problems arising in the administration of the Act and in the legislation itself, and to provide legislative policy advice on the FOI Act;
- to provide a central point of contact and central resource for agencies and members of the public;
- to act as a facilitator between applicants, agencies and third parties;

- to facilitate the resolution of disputes among applicants, agencies and third parties.

This role could be discharged by a restructured Office of the Information Commissioner or, subject to appropriate additional funding, by the Ombudsman's Office.

### **Other considerations**

As to which body should have jurisdiction to investigate complaints made about FOI administration by agencies, that function could be performed by the Ombudsman's Office, as currently occurs in the Commonwealth sphere and in NSW, or by a restructured Information Commissioner's Office. If my Office were to be given that role, it would need appropriate additional funding. It would also necessitate my Office being given exempt status under the FOI Act as it would not be workable for a body that is subject to the FOI Act to be the complaint resolution body for complaints made under the Act.

As I mentioned above with respect to privacy, my Office is well-equipped to take on the complaint investigation role and the oversight role, which fit nicely within the established dual role of the Ombudsman, which is to investigate complaints about government maladministration and to make recommendations for the improvement of administrative processes and procedures. My Office has the necessary independence and an established profile and reputation in the community as a complaint resolution body and a growing profile in the public sector as a provider of advice and training on good decision-making.

## Chapter 9 – Costs and time

### 9.1 Fees and charges

The issues surrounding the questions of what amount of fees and charges should be levied in association with the administering of an FOI regime, and how they should be levied, are complex ones. As the Panel has noted, there are many different charging schemes operating around Australia and the world. I note that no Australian jurisdiction has adopted a no fees and charges regime. The question then is whether the current regime can be improved upon or whether another scheme would be fairer and more efficient.

Given that the Ombudsman's Office receives only a relatively small number of FOI access applications each year, and not usually for voluminous amounts of documents, many of the difficult issues surrounding the application of Queensland's charging regime in recent years have not come to the attention of my Office. As such, I do not feel that I am best-equipped to make detailed recommendations for reform of the charging regime. I will leave that to the larger agencies who, because of the sheer volume of applications received and numbers of documents involved, have practical ideas for improvement or amendment of the scheme.

I would, however, take this opportunity to make some general observations and recommendations about the charging regime, based upon my experience as Information Commissioner:

- overall, the current regime is too complicated and user-unfriendly;
- there should either be no application fee payable at all, or an application fee should be payable for all applications (personal and non-personal). The resolution of disputes about the meaning of "personal affairs" in order to determine whether or not an application fee is payable is time-consuming and a waste of resources, and can lead to a deterioration in relations with the applicant before the processing of an application has even begun;
- it is virtually impossible to determine the likely processing charges payable before making an application;
- both appeal rights and time limits need to be simplified;
- agencies do not apply the charging regime consistently and I am aware of situations where agencies underestimate the time spent on processing an application so as to avoid the administration and possible disputes associated with imposing charges;
- the introduction of a flat fee scaled by volume has merit as it means that an applicant does not pay for time spent in searching for documents where an agency's record-keeping practices may be deficient, or where an FOI decision-maker is inexperienced and takes additional time to make a decision and to prepare reasons for that decision.

### 9.3 Voluminous and/or vexatious requests

As has been observed, a certain number of applicants display difficult, time-consuming behaviour and are variously described as vexatious or unreasonable. In virtually every review of FOI legislation that has been conducted around the world, the issue of how to deal with such applicants is raised and discussed, with varying proposals put forward as solutions. It is certainly not a problem unique to Queensland.

In my time as Information Commissioner, there was a small number of applicants who took up a disproportionate amount of the Office's resources, either through making multiple applications, or voluminous applications, or by refusing to negotiate or to make any concessions whatsoever during the course of their review, and thereby requiring written reasons for decision to be given in order to finalise each of their applications.

The difficulty in declaring an applicant vexatious or unreasonable has always been that it requires an examination of an applicant's motive for making an application. This is contrary to the well-established principle that there is no test of standing to gain access to documents under the FOI Act, and the motives of a particular applicant for seeking access to documents are to be disregarded (except to the extent that they may be relevant to the application of legal tests imposed by some exemption provisions). I agree with the comments made by Deputy Ombudsman Chris Wheeler of the NSW Ombudsman's Office<sup>16</sup> where he said that, of the three key grounds that are usually used by courts to determine whether or not an applicant is vexatious (motive, conduct and content), it is far easier to demonstrate that the conduct and content criteria have been met.

I note that the UK Information Commissioner has expressed the view that, while he accepts that the overall scheme of the UK Act takes no notice of the identity or motive of the requester, the Commissioner considers that both are valid considerations in deciding whether a request is vexatious.<sup>17</sup>

The problem is to try to identify a strategy for dealing with unreasonable users (who, I reiterate, make up only a very small proportion of overall users of the Act) that doesn't impact upon the important design principles of the Act that operate for the benefit of reasonable users of the FOI Act.

While I am mindful of the difficulties associated with making a declaration that an applicant is vexatious (and I have some lingering theoretical/philosophical concerns about the inclusion of such a power within an FOI regime) having seen the deleterious effect that difficult and unreasonable applicant behaviour can have on agencies, their resources, and upon the morale of officers who deal with them, I support the inclusion in the Act of a power to declare an applicant vexatious. I consider that the power should be exercisable by an agency at first instance, with a right of appeal to whichever body exercises the external review function under the Act.

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<sup>16</sup> Wheeler, C "Dealing with repeat applications", AIAL Forum No. 54, September 2007, page 74

<sup>17</sup> Information Commissioner's Office, Freedom of Information Act Awareness Guidance No.22: Vexatious and repeated requests", United Kingdom p.2

As to the form the provision should take, while I accept that s.96A has not been widely used since its inclusion in the Act in 2005, I consider its basic structure is sound. However, I support expanding the existing criteria under s.96A(4) to include the following criteria used by the UK Information Commissioner, namely:

- the application clearly does not have any serious purpose or value;
- it is designed to cause disruption or annoyance;
- it can otherwise fairly be characterised as obsessive or manifestly unreasonable.

I don't consider that any criteria regarding the size of the application, or the agency resources needed to process it should be included as criteria for a vexatious test, (except, perhaps, as evidence to establish any of the listed criteria) because that situation can be adequately dealt with under s.29. I see no need to amend the current s.29. In my experience, when agencies rely upon s.29, they usually include in their reasons in support of the decision, estimates of the number of pages involved, and the days to process the application.

## **Chapter 10 – Effectiveness and adequacy of data collection and reporting**

In response to the questions posed by the Panel in this section, I would simply state my agreement that the s.108 reports and their contents need to be reviewed to ensure accuracy and consistency across all agencies. I suspect that the statistics collected from some agencies are substantially inaccurate and it is clear that many of them have no usefulness.

As mentioned above in section 8.7, an agency (whether it be the Office of the Information Commissioner or my Office) should be responsible for:

- identifying what information should be collected;
- conducting accuracy and compliance audits;
- analysing the data; and
- publishing appropriate reports, including an agency performance table.

## **Chapter 11 – Conclusion – a new beginning?**

While I can understand the Panel's desire to signal a new era in FOI in Queensland by changing the name of the Act, a name change will be seen as window dressing unless the main deficiencies in the Act are addressed – for example, the Cabinet exemption provision.

Overall, I tend to think that the perceived symbolic benefits of changing the name of the Act would not outweigh the associated costs and administrative requirements. I also think there is significant value in retaining the universally known concept of "FOI".