

INDEPENDENT REVIEW PANEL

**ENHANCING OPEN AND
ACCOUNTABLE GOVERNMENT**

**REVIEW OF THE *FREEDOM OF
INFORMATION ACT 1992***

**QUEENSLAND GOVERNMENT
RESPONSE**

This document focuses solely on technical and administrative aspects of the Freedom of Information Act 1992 and is not intended to be a policy response by the Queensland Government.

March 2008

Foreword

The Queensland Government recognises the important role that the Freedom of Information Act 1992 (the FOI Act) has played in supporting open and transparent government and remains committed to ensuring that Queenslanders enjoy contemporary and relevant FOI laws. A robust FOI scheme fosters public sector accountability, encourages community participation in policy formulation, and promotes a healthy democracy.

Since its inception, the FOI Act has been complemented by a range of statutory and administrative measures that facilitate access to documents such as health and welfare records. In addition to these access schemes, the Government has considerably increased the amount and type of information available on the internet, for example, data provided by Information Queensland, land titles information, court records and a wide range of demographic, economic and social data compiled by the Office of Economic and Statistical Research.

Documents requested under the FOI Act over the past seven years have, on average, been disclosed to applicants in full and part at a rate which is generally consistent with access rates across Australia. This is a clear indication that the FOI Act provides healthy rates of access to government held information while protecting essential privacy, public safety and commercial interests.

The Government is keen to consider with an open mind measures that will improve the FOI Act. Any changes to the existing scheme will be given full consideration and balanced against the costs and resourcing impacts which invariably accompany significant reform.

The Government notes that the Panel has taken advantage of its broad terms of reference canvassing issues that extend beyond FOI such as information management, public records policy and administration, information architecture, use and re-use of Government information and publication schemes.

This submission provides factual matter and information as to the operation of the Queensland FOI regime for the benefit of the Panel and the community. Certain responses attempt to clarify issues raised in the Discussion Paper. The submission reflects the experience of State Government FOI administrators, who were consulted in the course of its preparation, and is further informed by the Department of Justice and Attorney-General's (DJAG) observations of the operation of the current regime as lead agency for FOI in Queensland.

The Government emphasises that it will give fresh consideration to any recommendation of the Panel that will improve the FOI Act and general public access to government held information.

The Government is committed to seeing that Queenslanders are served by appropriate FOI legislation, and that government officers meet the highest standards in its application.

Chapter 5 Taking stock

General Comments

Much of the observation and commentary contained in this section of the Discussion Paper is obviously general in nature, such as references to ‘Australian’ FOI models. Some observations are not strictly applicable to the Queensland FOI regime:

- p.41 – the Discussion Paper contains comments from academic commentator Rick Snell, who suggests that the ‘settings’ contained in the Australian FOI schemes were designed to ‘default towards secrecy’. This is not strictly accurate as regards the FOI Act. Section 21 of the FOI Act confers a general legally enforceable right of access, subject only to the exemptions and exclusions specified in the Act.
- p.42 – Exemptions – the Discussion Paper notes that ‘[i]n Australia, requesters have to demonstrate that documents are not covered by a particular exemption or that they satisfy a public interest test.’ Under the FOI Act, requesters or access applicants are not required to justify an access application, or to demonstrate any particular ‘standing’ in order to seek access to documents. Section 21 of the FOI Act confers a legally enforceable right of access - this means that it is up to an agency or Minister to establish that an exemption or exclusion applies: the agency or Minister ‘bears the onus of proof’. This key principle is enshrined in section 81 of the FOI Act, which provides that, in an external review under Part 5 of the FOI Act, the respondent agency or Minister¹ has the onus of establishing that the decision under review – generally a decision to withhold information on the basis of a statutory exemption – was justified. The review mechanisms within the Act therefore enable an applicant to require an agency to clearly establish any exemption claims.

Chapter 6 Purposes and principles of FOI

6.1 – Preamble – Why FOI?

Is there a public ‘right’ to information held by the government, information about the personal affairs of people and about the way government is conducted?

Should disclosure of information be guided by the same (or a similar) test the High Court proposed in 1980, that is ‘by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected’?

Does FOI contribute to a healthier democracy and enhance its practice?

Should the FOI Act contain a Preamble placing the Act in this context of its function of supporting the system of representative, democratic government?

As noted above, s.21 of the FOI Act confers a legally enforceable right of access to government held information. This general right of access is, in relation to the

¹ Use of the term ‘agency’ throughout this submission generally refers to both agency and Minister.

personal affairs information of an applicant, supplemented by the public interest presumptions favouring disclosure contained in s.6 of the FOI Act.

Twelve of the exemption provisions contained in the FOI Act contain public interest tests in some form.² Generally, the lack of a public interest balancing or harm test in an exemption provision reflects Parliament's recognition that disclosure of the specified information would be harmful and adverse to the public interest.

6.2 – Objects of the *Freedom of Information Act 1992*

6.2.1 Better governance

Should the Objects section of the Act be expanded to include better public administration and other benefits such as improved quality of government decision-making?

The Government has no objection to considering an expanded objects section within the FOI Act.

6.2.2 Openness

Should the Objects section acknowledge 'openness' specifically as an aim of the Act and as a contribution towards more accountable government?

Section 4 of the FOI Act (the Objects section) does currently recognise the public interest in public affairs being open to discussion, and the importance of government operations being known to the community. Section 4 relevantly provides:

- (1) The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*
- (2) Parliament recognises that, in a free and democratic society—*
 - (a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*
 - (b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community ...*

6.2.3 Open and shut

The 'default' setting when any document is created by agencies is that it be regarded as 'confidential'. Is this still appropriate?

Documents created by agencies are generally subject to the legally enforceable right of access set out in s.21 of the FOI Act, subject only to the exemptions and exclusions

² Section 42(2) of the FOI Act also contains a public interest balancing test. This provision moderates the exemptions contained in s.42(1), by providing that documents falling within s.42(1) are not exempt if they are of a certain type and their disclosure would be, on balance, in the public interest.

contained in the Act. Over the past seven years 89% of documents requested under the FOI Act have, on average, been disclosed to applicants in full and part.³

Section 46(1) of the Act contains two exemption provisions designed to protect confidential information. They only apply to a narrow range of documents. This is evidenced by the relatively limited number of times s.46(1) is invoked.⁴

Agencies are also required to adhere to Information Standard 18 – Information Security (IS18). IS18 is one of a series of Information Standards administered by the Queensland Government Chief Information Office, within the Department of Public Works. Information Standards set out mandatory information management requirements.⁵

IS 18 requires agencies to define and publish a clear set of guidelines for the classification of sensitive information handled, created or received in accordance with sensitivity, confidentiality of content and business importance based on their legislative, regulatory and contractual obligations. In order to achieve consistent classification of information across government, IS18 requires that classification occur in accordance with the Government Information Security Classification Framework (QGISCF).⁶ The QGISCF also specifies a scheme for the security classification of information and related controls which are in accordance with the Commonwealth Government Protective Security Manual (PSM).

The QGISCF scheme contains basic subsets of Public and Non-Public Information. Non-Public Information is further broken down into Unclassified and Security Classified Information. Security Classified Information is broken down into National (restricted to Top Secret) and Non-National (In-Confidence to Highly Protected) Information.

The QGISCF expressly notes that ‘UNCLASSIFIED is the most appropriate default classification’.⁷ Unclassified information is defined as:

Information that does not need special security controls and comprises the bulk of the information resources used within government. Such information may remain unlabelled or be marked UNCLASSIFIED (indicating that an assessment has been performed). Employees must have authorisation from the information owner to release UNCLASSIFIED material to the public (which is in effect changing the classification of the information). (Framework, p.7)

Most importantly, Section 1.1.3 of the QGISCF expressly states:

³ FOI Annual Reports 2005/06, p.7.

⁴ Section 46(1)(a) contains two discrete exemptions, sections 46(1)(a) and 46(1)(b). 0.6% of total pages considered under FOI in 2005/06 were exempted in full or part under these provisions: FOI Annual Report 2005/06.

⁵ Many of the standards and principles set out in the Information Standards are mandated by subordinate or primary legislative provisions, such as the *Financial Management Standard 1997* and the *Public Records Act 2002*.

⁶ Available at http://www.qgcio.qld.gov.au/02_infostand/downloads/qg_iscf.doc

⁷ QGISCF, p.16.

The Freedom of Information Act 1992 (Qld) supersedes this classification framework. The security classification of information does not have a material effect on assessment of information for FOI purposes...

Any classification of information as ‘confidential’ under the IS18 framework is therefore of little if any relevance in determining whether that information may be accessed by way of an FOI access application.

6.2.4 The 30-year rule

Does the existence of the 30-year rule militate against the culture of openness that the freedom of information law is meant to encourage within government and other relevant agencies?

Should the period be reviewed in relation to Cabinet decisions and documents, and more generally for other public records?

If so, to what extent should it be reduced?

Given that any change would have financial and administrative implications for Queensland Archives, should any change be phased in over a number of years?

This part of the Discussion Paper deals with issues relating to Restricted Access Periods as prescribed and governed by the *Public Records Act 2002*.

Section 16 of the *Public Records Act 2002* sets out restricted access periods which are aligned to the exemptions within the FOI Act. These periods range from zero to 100 years. Currently, 85% of records series held by Queensland State Archives (QSA) are available to the public on open access and only 7% of records series are subject to this 30 year closure period.

The 30 year rule or embargo period on the release of Cabinet papers and records is used in other Australian jurisdictions including the Commonwealth and Western Australia.

The Government notes that any change to the 30 year rule would have a number of consequential implications.⁸ If this period were to be reduced, due consideration would need to be given to protecting personal information contained in the documents (such as the names of prisoners and compensation victims) and compliance with other legislative prohibitions on disclosure. Transferring, storing and translating such data so that it is accessible to the public within a shorter period would have practical, financial and administrative implications. QSA in particular would bear considerable expense in preparing a large number of Cabinet documents for an earlier release. Any changes would need to be phased in and supported by additional funding. Government departments would need to proactively transfer permanent records to QSA’s Runcorn repositories so they can be catalogued and made available to the public. Alternatively, public authorities may need to establish reading rooms on site

⁸ The Discussion Paper refers generally to ‘Cabinet decisions and documents’. Material created by Executive Council and Ministers is also currently subject to the 30 year rule.

to enable the inspection of records as well as a searchable online catalogue of records and copying facilities and services.

The timeframe for phasing in such a change would depend on the extent of the reduction in access periods and the breadth and volume of the record series to be subject to earlier open access.

6.2.5 Administrative access

Should agencies be encouraged to consider providing more information to people under administrative access schemes or otherwise than through FOI?

Should FOI officers be given more delegated power and discretion to release information requested under FOI other than through the FOI process?

Is further legal protection required for information provided other than through FOI?

DJAG, as lead agency for FOI in Queensland, currently encourages agencies to formulate appropriate administrative access schemes, by way of training, and through the provision of information and assistance to agencies both directly and via the FOI Processing Guidelines published in 2007 (the FOI Guidelines). Release of documents or information outside FOI is, as is noted in the Discussion Paper, at the discretion of agency chief executive officers (CEOs), a discretion which may be delegated to any other officer (including FOI officers).

As the Panel notes in the Discussion Paper, the FOI Act is designed to provide a 'bedrock' of access rights. There already exists a range of administrative and alternative access schemes. For example, the *Public Records Act 2002* includes provision for access to public records subject to restricted access periods and records not subject to such restrictions may also be accessed through QSA.

FOI units within agencies with established administrative or alternative access schemes actively intercept and redirect potential FOI applications into those administrative/alternative access schemes where appropriate. For example, many individuals apply to DJAG seeking access to information that will enable them to lodge an application for criminal injuries compensation. Where appropriate, DJAG's FOI and Privacy Unit will refer these applications directly to the Office of the Director of Public Prosecutions, which operates a scheme for providing information sufficient to enable the making of a valid compensation application.

Anecdotal evidence suggests that disclosure of documents outside either the FOI process or an established administrative access scheme occurs on an ad hoc basis, with practices varying from agency to agency. In the absence of a clearly defined administrative access policy or alternative access arrangement – or in situations where an access application seeks documents both within and outside the terms of an administrative access arrangement – many FOI administrators prefer to rely upon the established access mechanism set out in the FOI Act, particularly given the clear statutory protections it affords. Members of the public seeking access to information often prefer to adhere to the FOI framework as opposed to discretionary, administrative or alternative methods of release, because of the existence of statutory time limits for agency response, the unconditional nature of release via FOI (as noted in the Discussion Paper), and the availability of clear statutory review rights.

6.2.6 Publication schemes

Should agencies be required to include more information in their statements of affairs, and if so what?

Statements of affairs are intended to inform the community of their rights of access and assist them to exercise those rights. A comprehensive statement of affairs could facilitate greater transparency in relation to information and records management practices of agencies and support open and accountable government. There is in practice little demand from the community for access to statements of affairs.

In any case, as the Panel notes, most agencies publish information well in excess of that required under s.18 of the FOI Act in a widely accessibly online format. An important initiative in this regard is Information Queensland, a four-year \$6.3 million Government program begun in 2006 and hosted by the Department for Natural Resources and Water. The key goals of the Information Queensland program are to:

- enable the discovery, viewing and download of public information to meet business, community and government needs; and
- achieve cross-agency efficiencies with better information sharing between all government agencies and stakeholders.⁹

A major project developed launched by Information Queensland is a publicly-available online information atlas, delivering expeditious access to Government-held spatial and statistical information.¹⁰

Information Standard 42 – Information Privacy (IS42) is an administrative scheme approved by Cabinet in 2001 and contains 11 Information Privacy Principles adopted from the Commonwealth *Privacy Act 1988*. The Information Privacy Principles regulate how personal information is collected, secured, used and disclosed by Queensland Government agencies. IS42 requires that all relevant agencies publish a Privacy Plan detailing:

- the types of personal information held by the agency;
- how individuals can access their own personal information that is held by the agency; and
- how the agency will meet its obligations under IS42.

Should they be required to keep these genuinely up-to-date (revised, if necessary, every week/month)?

Is the statement of affairs the best format for the publication of this information?

No comment.

⁹ Information Queensland Overview: <http://www.information.qld.gov.au/overview/>

¹⁰ Available at <http://gis.qld.gov.au/iqed/map/>

Should the Minister exercise, or should the Information Commissioner be given, the power to require the publication by agencies of additional information?

No comment, other than to note that as of 1 January 2008, the State Procurement Policy requires agencies to publish details of all awarded contracts and standing offer arrangements with a value of \$100,000 or more on the Queensland Government Chief Procurement Office website.¹¹

Would there be any advantage in the creation of an Information Standard to provide more specific guidance to agencies about what information they should publish? Or should this be done by regulation?

The Queensland Government Chief Information Office provides guidance to Queensland Government agencies in the acquisition, development, management, support and use of information sets, information systems, and technology infrastructure. This is provided through, amongst other things, Information Standards. These Standards were explained briefly above in response to question 6.2.3 'Open and shut'. They assist relevant Government agencies by setting policy obligations and defining and promoting best practice in the acquisition, development, management, support and use of the information systems and technology infrastructure which support Queensland Government business processes and service delivery.¹²

Clearly identifying what information has to be published by agencies would ensure consistency across government. However, Information Standards do not apply to all the government agencies covered by the FOI Act.

6.2.7 Negating access

Should the Objects clause include reference to factors that are used to balance against a right to access information?

Would this be better achieved with a formula such as that adopted in the New Zealand Official Information Act, s.4(c)?

FOI officers report that the articulation of competing interests, as contained in the current provision, is useful for explaining to applicants the limitations to access that may arise in a particular case, and in training scenarios.

6.2.8 Interpretation

Should [s.4(6)] be redrafted to emphasise the object in [section 4(1)]?

No comment.

6.3 – Ambit of the [FOI Act]

¹¹ State Procurement Policy, clause 3.9, available at http://www.qgm.qld.gov.au/policy2007/spp_operations.html

¹² See, for example, Information Standard 33 – Information Access and Pricing (IS33), which requires that '[g]overnment information must be made accessible, directly or indirectly, to citizens of Queensland and those doing business in Queensland at no more than the cost of provision and in a manner which provides reasonable access to the community ...' (IS33 Policy Statement, p.2, available at http://www.qgcio.qld.gov.au/02_infostand/standards.htm).

6.3.1 Document

Would there be any advantage in changing the Act to provide that a person may seek access to public records, rather than documents, or even to official information?

Should the Act specifically exclude 'ephemeral' material?

Should it move towards the Swedish approach?

The term 'public record' under the *Public Records Act 2002* is utilised in the consideration of the retention and disposal of records and is narrower in scope than the term 'document' as defined in the FOI Act when considering access to and amendment of information.

When considering the possible disclosure of documents, FOI decision-makers do not distinguish between ephemeral records or documents with short term temporary information value, and other documents that are required to be kept for longer periods under disposal schedules under the *Public Records Act 2002*.

An FOI decision-maker simply considers what documents, as broadly defined, fall within the scope of the access application – including any relevant ephemeral material.

6.3.2 Bodies to which the Act applies

Should the private sector remain outside the reach of the FOI Act?

No comment.

Should there be special provisions in the Act (and, if necessary, in other legislation) to ensure that when government services are contracted out to corporations, partnerships or individuals, that the contractor should be required to provide information that would have been required under FOI if the services were being provided by an agency?

The current 'reach' of the FOI Act in relation to external consultants and contracted service providers is governed by s.7 of the FOI Act, which provides that a 'document of any agency' (to which a person may be entitled to seek access under s.21 of the Act) means documents in an agency's possession or control, whether created in the agency or received from elsewhere, and includes a document the agency is entitled to access. Whether an agency is entitled to access documents created by an external service provider in performance of a retainer is generally to be determined by reference to the terms of the service provider's engagement. The Information Commissioner has summarised the current position as follows:

Working materials of outside consultants

A professional person or expert who is not employed by an agency but who is contracted to perform work for an agency, such as a psychologist or a management consultant, will usually provide the agency with a report or advice. That document will clearly be a document of the agency; the agency has physical possession of it plus legal ownership because it commissioned

and paid for the document. However, the contracted expert may have created documents to assist or enable the preparation of the report or advice given to the agency, such as rough notes and calculations, or tests carried out along the way to producing a final report or recommendation. Such documents usually remain the legal property of the contracted expert, and, if they do not come into the physical possession of the agency, would not be subject to the application of the FOI Act.

However, the legal position as to whether the agency is entitled to access to the working papers of the contracted expert could be affected by express or implied terms in the contract for services in a particular case.¹³

Should Government Owned Corporations (however constituted) be exempt from provisions of the Act covering agencies and, if so, to what extent?

In general terms, GOCs are subject to the FOI Act to varying degrees, with relevant exemptions and exclusions focussing on classes of documents held and types of activities pursued. The nature of a GOC's constitution (i.e. statutory or company) is not generally relevant in determining whether documents of a particular class it holds are excluded from the operation of the FOI Act. Examples of documents that the Information Commissioner has found were received or brought into existence by a GOC in performance of its commercial activities (and thus excluded from the operation of the FOI Act) include:

- A report prepared by external consultants in relation to an investigation into allegations of improper behaviour by senior officers in dealing with external contractors, suppliers and service providers (*Walsh (as agent for Queensland Newspapers Pty Ltd) and Ergon Energy Corporation Ltd* (2004) 6 QAR 419);
- documents relating to a bird and wildlife risk management programme for the Cairns International Airport (*QANTAS Airways Limited and Cairns Port Authority* (2005 F0268, 15 November 2005)); and
- documents concerning electrical infrastructure owned by a GOC (*Burtenshaw and Department of Natural Resources, Mines and Water; Dunn (Third Party)* (2004 F0553, 12 May 2006)).

While the FOI Act defines 'public authority' broadly, the issue raised by the Panel at p.64 of the Discussion Paper relating to the application of the Act to public authorities which have been created under the *Corporations Act 2001* – and not under a Queensland enactment – is noted. The Government's intention is that generally, bodies established on Government initiative and for a public purpose should fall within the ambit of the FOI Act, unless expressly excluded by the Act.

If world's best practice in FOI law is that FOI should extend to 'any body that is exercising government functions' should any attempt be made to define what are 'government functions' at a time when the responsibility for many such functions is being devolved to the private sector or GOCs?

¹³ Information Commissioner, *FOI Concepts*, 'Document of an agency and official document of a Minister', October 2006 (available at <http://www.oic.qld.gov.au/default.asp?p=13>).

Should people be able to access their personal information held by organisations like GOCs that are ultimately controlled by government and, if so, to what extent?

GOCs are generally subject to the FOI Act. In general terms, it is the documents held by those entities which were received or brought into existence by the GOC in carrying out its commercial activities or prescribed community service obligations that are excluded from the operation of the FOI Act. The precise scope of commercial activities will vary from case to case, however the Information Commissioner has found that human resources documents relating to the termination of an officer's employment were not excluded documents.¹⁴

Company GOCs are covered by the private sector provisions of the Commonwealth *Privacy Act 1988*, which contain rights regarding access to and amendment of personal information.

What principles should apply in determining whether bodies are covered by the [FOI Act]?

What principles should apply when consideration is given to excluding a body from coverage by the Act?

No comment.

Chapter 7 Exemption Provisions

If no harm would follow from the release of material that would fall within an exemption provision, should it be released?

The exemption provisions contained in the FOI Act generally reflect social harms as identified by Parliament (such as breach of personal privacy, prejudice to law enforcement or public safety, or disclosure of commercially valuable information). That is, the very fact documents or matter 'fall within an exemption provision' is itself a clear indicator that harm would follow were the document to be disclosed.

Agencies nevertheless retain a discretion under s.28 of the Act to disclose documents or matter that may otherwise be technically exempt, which may be exercised in appropriate circumstances where it is clear that no harm would flow from the disclosure of technically exempt matter. In practical terms, however, agencies note that it can take considerable effort to determine the likelihood that release of a document could cause harm (where, for example, the document concerns third parties). Additionally, agencies tend to take a cautious approach in contemplating discretionary disclosure of technically exempt matter, given that the likelihood and severity of any consequent 'harm' may only become apparent after a document is disclosed.

Should exemption provisions be rewritten to ensure that FOI officers apply such public interest tests as they contain?

Should there be an over-riding public interest test covering all exemptions?

¹⁴ *Hansen and Queensland Industry Development Corporation* (1995 S0049, 14 June 1996).

No comment.

Is there a need to write additional legal protections to cover the release of material under FOI?

How can FOI officers be made more aware of the fact that they can release information that falls within an exempt category? What test should they apply if they consider exercising this discretion?

The existence of the discretion is noted in various sources, including Information Commissioner decisions and publications, DJAG lead agency training materials and the FOI Guidelines published in 2007.

Decision-makers may exercise the discretion in appropriate circumstances. The very fact that documents or matter qualify for exemption under the FOI Act signals that disclosure is likely to be detrimental to a public or private interest as identified by Parliament.

7.1 – Public interest tests

What role should the ‘public interest’ play in the determination of whether access should be granted to documents that would otherwise be exempt documents?

Public interest tests currently appear in 12 exemption provisions, and in s.42(2) (the exception clause to the law enforcement and public safety exemptions contained in s.42(1)).

Should there be a public interest override covering all exemptions? Or, all but a few specified exemptions?

No comment.

How should the public interest test be expressed?

The FOI Act currently contains four different formulations of public interest tests:

- A public interest balancing test, where matter is exempt (under the relevant provision) unless disclosure would, on balance, be in the public interest [sections 38, 39(1), 40, 42AA, 44(1), 45(1)(c), 46(1)(b), 47, 49];
- A ‘compelling public interest’ test, where matter is exempt unless disclosure is required by a compelling reason in the public interest [sections 39(2) and 48];
- A ‘reverse’ public interest balancing test, in which the public interest features as a separate and additional criterion that must be established to successfully claim exemption [s.41(1) – ‘deliberative process’ - decision-makers must show that the technical elements of the exemption are made out, and that disclosure would, on balance, be *contrary* to the public interest]; and
- A public interest exception test, which provides that matter otherwise exempt under s.42(1) (matter relating to law enforcement or public safety) will not be

exempt if it meets one of several defined categories listed in s.42(2)(a)(i)-(v) and its disclosure would, on balance, be in the public interest [s.42(2)(b)].

To what extent should the notion of detriment or harm be involved in determining the balance of the public interest?

Should the timeliness of the release of the document be a factor in determining public interest?

Should there be guidelines on the matters that need to be considered in determining the public interest?

Should these be provided by the Information Commissioner? Or should they be included in the Act as factors (some of which are not specified) that should be taken into account in determining what the public interest is in the particular case?

As the Panel is aware, the concept of the ‘public interest’ is not defined in the Act, and nor is there any statutory prescription as to factors to be taken into account in evaluating the public interest (apart from the limited guidance contained in s.6 of the Act, and the objects stated in s.4).

Relevant factors to be considered in determining the balance of the public interest have been identified and enumerated by various decisions of the Information Commissioner (and the general law), and general guidance on the assessment of the public interest is contained in secondary materials such as information materials published by the Information Commissioner and the FOI Guidelines published by DJAG. Commonly accepted considerations favouring disclosure include:

- accountability;
- transparency;
- justice to an individual; and
- facilitating public participation in government.

Commonly accepted considerations favouring non-disclosure include:

- third party interests such as privacy of individuals and protection of commercially sensitive matter;
- fair treatment of individuals, including protecting an individual from disclosure of unsubstantiated allegations of impropriety or wrongdoing; and
- preserving the flow of information to law enforcement and regulatory agencies.

7.2 – Cabinet and Executive Council matters

Cabinet matter:

Should the exemption be reworded to ensure that those considering applications for access remain conscious of the fact that even if matter falls within the exemption, there remains discretion for it to be released?

Should a class exemption for Cabinet matter be maintained?

Should a public interest test be introduced?

Should the exemption include a purposive element?

Should there be a factual/statistical material exception?

Should a Minister/Cabinet/Governor in Council be able to issue a conclusive certificate?

Should there be a time limit on how long Cabinet matter can be exempt from FOI?

Should the exemption be based on a consequential approach, as in New Zealand?

Executive Council matter:

Should a class exemption for Executive Council matter be maintained?

Should there be a time limit on how long Executive Council matter can be exempt from FOI?

Should there be provision for a conclusive certificate?

As discussed elsewhere in this response, the FOI Act confers a discretion on FOI decision-makers to disclose documents that otherwise qualify for exemption from disclosure. For example, since September 2007, more than 500 pages of Cabinet exempt documents were disclosed in response to three requests. Two of these disclosures were made in response to FOI access applications. The third was in direct response to a media enquiry.

It should also be noted that although there is currently no time limit in the FOI Act on how long Cabinet or Executive Council matter can remain exempt, a limit is effectively provided by the *Public Records Act 2002*. Cabinet and Executive Council matter is subject to a restricted access period (RAP) of 30 years (which may be extended in particular instances) after which time it is publicly available. However, applicants can seek access to any public record that is subject to a RAP where the agency responsible for the record so authorizes access (see section 18(2) of the *Public Records Act 2002*).

7.3 – Deliberative processes

Should the exemption be narrowed, for example, by limiting it to deliberative material associated with policy formulation?

Should there be a time limit on the exemption for pre-decisional documents, linked to the implementation of any decision?

The term ‘deliberative process’ has been described by the Information Commissioner as:

...the pre-decisional thinking processes of an agency. The term refers to the processes of evaluating relevant evidence, arguments and options, for the purpose of making a decision related to the performance of an agency's functions. It includes contributions to the formulation of policy, or to the making of decisions under statutory powers.

Normally, deliberative processes occur toward the end stage of a larger process; once investigations have been carried out, facts established and

*information obtained from different sources. An agency then weighs all these inputs to make a decision.*¹⁵

Importantly s.41(1) incorporates a unique formulation of the public interest test, which requires a decision-maker to not only identify that matter comprises deliberative process matter, but to establish that disclosure of the matter would, on balance, be contrary to the public interest.

Section 41(1) is in practice a difficult exemption to establish, and the Information Commissioner does not frequently uphold its application on review.¹⁶ Significantly, the ‘Howard criteria’ – the Administrative Appeals Tribunal’s (AAT) list of five general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest¹⁷ – were either rejected or qualified by the Information Commissioner in a 1993 decision,¹⁸ and have carried little weight in Queensland since that time.

7.4 – Personal affairs

Should the term ‘personal affairs’ in s.44 of the Act be replaced by ‘personal information’?

The nature and status of Queensland’s information privacy regime, and its interaction with the FOI scheme, is an issue undergoing active policy consideration.

The phrase ‘personal information’, originating as it does in an information privacy context, is defined in very broad terms.¹⁹ The phrase ‘personal affairs’ is undefined in the FOI Act, but, as a consequence of decisions issued by the Information Commissioner, the concept is generally understood to refer only to the private aspects of a person’s life (and not, for example, to their employment or professional affairs). The Information Commissioner has identified a ‘well-accepted core meaning’ of the concept, which includes:

- family and marital relationships;
- health or ill-health;
- relationships with and emotional ties to other people; and

¹⁵ Information Commissioner, *FOI Concepts*, ‘Deliberative process’, October 2006 (available at <http://www.oic.qld.gov.au/default.asp?p=13>).

¹⁶ A review of the Information Commissioner’s reported and published decisions at www.oic.qld.gov.au indicates that of 60 reviews in which the application of s.41(1) was considered, it was only upheld (in whole or in part) in 15.

¹⁷ *Re Howard and Treasurer of the Commonwealth of Australia* (1985) 3 AAR 169. In summary, the principles are: the higher the rank of the authoring officer, the less likely disclosure is in the public interest; disclosure of discussion regarding policy development tends not to be in the public interest; disclosure inhibiting frankness and candour of ‘pre-decisional’ discussions is unlikely to be in the public interest; disclosure leading to confusion and unnecessary debate tends not to be in the public interest; disclosure which does not adequately explain a decision may be unfair to the decision-maker and prejudice the integrity of the decision-making process.

¹⁸ *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.

¹⁹ Information Standard 42 – Information Privacy defines ‘personal information’ as ‘information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.’

- domestic responsibilities or financial obligations.²⁰

In 1991 the Commonwealth Government changed ‘personal affairs’ in its *Freedom of Information Act 1982* to ‘personal information’ so as to create consistency between the Commonwealth FOI Act and the *Privacy Act 1988*. Replacing ‘personal affairs’ with ‘personal information’ in the Queensland FOI Act would, without any additional amendment, expand the scope of the exemption contained in s.44(1), by including a considerable range of information relating to public servants and officials that is not presently regarded as falling within the meaning of ‘personal affairs’, such as routine employment information, names as appearing in official documents, and work or business contact details.

The ‘personal affairs’ concept is generally well understood by FOI decision-makers.

A further consideration is the interaction between s. 44 of the FOI Act and the *Public Records Act 2002*. Section 44 of the FOI Act is directly cross-referenced in the Restricted Access Period (RAP) provisions of the *Public Records Act 2002*, and the *Public Records Act 2002* also refers to the concept of ‘personal affairs’, rather than ‘personal information’. Under section 16(4) of the *Public Records Act 2002* a RAP of up to 100 years can apply to public records containing matter affecting ‘personal affairs’.

Should the exemption reflect the provisions of Information Standard 42: Information Privacy, whether or not that becomes part of a new Privacy Act?

Amending s.44(1) so as to reflect Information Standard 42: Information Privacy (IS42) would, in practical terms, largely involve replacing the term ‘personal affairs’ with ‘personal information’, which has been discussed above.

IS42 currently adopts the broader term ‘personal information’ except insofar as IS42 provides for a right of access, which is limited to rights of access under the FOI Act and for which limited purposes the definition of ‘personal information’ is aligned to the FOI concept of ‘personal affairs’.²¹

To what extent should workplace information about government employees be protected by s. 44?

As noted above, decisions of the Information Commissioner have limited the concept of ‘personal affairs’ to information concerning the private aspects of a person’s life. Generally, this does not include information relating to an individual’s employment affairs, and accordingly, in broad terms, information which merely relates to the employment affairs or performance of government employees is not protected by s.44(1) of the FOI Act. The Information Commissioner has recognised that, in some circumstances, information concerning an individual’s employment affairs can also concern their personal affairs, and therefore be exempt from disclosure under s.44(1).

²⁰ See *Stewart and Department of Transport* (1993) 1 QAR 227, where the Information Commissioner reviewed relevant AAT and Federal Court decisions (among others) dealing with the equivalent concept in the Commonwealth *Freedom of Information Act 1982*.

²¹ Information privacy in Queensland Health is governed by Information Standard 42A (IS42A). Reference to access and amendment rights in IS42A were removed on the basis such rights are adequately catered for via the FOI Act and Queensland Health administrative access schemes.

Matter of this kind may include details of sick or personal leave, information revealing that an individual had unsuccessfully applied for a job or promotion,²² and allegations of sexual misconduct in the workplace.²³

Does acceptance of government-funded equipment affect a claim of privacy by the user of the equipment?

The fact that information concerning an individual's personal affairs may be contained in documents created using government-funded equipment – for example, an email sent from a work machine to a manager detailing health reasons for taking sick leave, or records of telephone calls made to an officer's spouse from an official telephone – would ordinarily be considered in the application of the public interest balancing test contained in s.44(1), as a factor favouring disclosure of the information.

That factor would, however, need to be balanced against factors favouring exemption or withholding of the matter, such as the individual's right to privacy, the sensitivity of the information, and a consideration of acceptable use policies that permit government employees to use public equipment for reasonable personal use.

Information Standard 38- Use of ICT Facilities and Devices (IS38) is relevant to employee privacy in relation to government supplied ICT. It relevantly states:

The provision of Government-owned ICT facilities and devices including internet and email facilities and devices are for officially approved purposes. Limited personal use of internet and email facilities and devices should be available on a basis approved by the agency's chief executive officer.

Employees are accountable to their employing agency for the use of these technologies. Employees found to be intentionally accessing, downloading, storing or distributing pornography using Government-owned ICT facilities and devices will be dismissed.

Employees may also be disciplined or dismissed for the misuse of the internet or electronic mail in respect of material which is offensive or unlawful, although not pornographic. A pattern of behaviour (for example, repeated use) is a factor for consideration in determining disciplinary measures (including dismissal).

To ensure consistent and effective management of ICT facilities and devices agencies must:

- *develop and implement clear policies and guidelines relating to the use of government-owned ICT facilities and devices;*
- *clearly inform employees what their responsibilities are under the policies and guidelines and the consequences if those policies and guidelines are broken; and*
- *clearly inform employees of procedures that will be used to monitor compliance with the policies and guidelines.*²⁴

²² *Baldwin and Department of Education; Others (Third Parties)* (1996) 3 QAR 251

²³ *NHL and the University of Queensland* (1997) 3 QAR 436

IS38 requires agencies to address employee use, agency monitoring, collection of employee personal information in the course of email interception and the purposes for which the information will be used. In addition, agencies must submit to the office of the Public Service Commissioner a report on employees who have been disciplined or dismissed as a result of accessing pornography and/or offensive material, including advice on what disciplinary action was taken.

7.5 – Commercial-in-confidence

Should the exemptions in s.45(1)(a) and (b) also be made subject to a public interest test?

Should confidentiality be available only if it can be shown disclosure would cause demonstrable harm to the competition process?

Should the exemption contain a specific reference to a time limitation on how long an exemption may be continue?

These provisions are in the form as substantially recommended by EARC.²⁵ The lack of a public interest balancing test in sections 45(1)(a) and 45(1)(b) reflects Parliament's recognition that disclosure of the matter protected – trade secrets and commercially valuable information – would be detrimental and against the public interest. The Information Commissioner and DJAG have issued guidance in relation to these provisions, in the form of informational and training materials.

As regards the question of a time limit, the Information Commissioner has found that the age of particular information is a relevant factor in considering whether that information remains commercially valuable (such as to qualify for exemption under s.45(1)(b)) and/or confidential (sections 46(1)(a) and (b)).

These provisions are invoked by agencies with relative infrequency. In the 2005/06 FOI reporting year, the s.45(1)(a) 'trade secrets' exemption was applied to 0.1% of all pages processed under FOI. Section 45(1)(b) was applied with slightly higher frequency, 0.6%.²⁶

7.6 – Other exemption provisions

Is each of these exemptions necessary?

Is the public interest test appropriate?

Would a 'harm' test be more appropriate?

The bulk of the listed exemption provisions (i.e., those not specifically addressed in the Discussion Paper) generally reflect the exemptions suggested by EARC.²⁷

²⁴ IS 38 policy statement, available at http://www.qgcio.qld.gov.au/02_infostand/standards/is38.htm.

²⁵ EARC Report, paras 7.205-7.209.

²⁶ FOI Annual Report, 2005/06. The figures for sections 46(1)(a) and 46(1)(b) were 0.3% for each.

²⁷ Sections 42AA (Matter created for ensuring security or good order of corrective services facility), 42A (Matter relating to national or State security) and 47A (Matter relating to investment incentive scheme) were not specifically recommended by EARC.

Certain of the listed exemptions do currently contain both harm and public interest balancing tests.²⁸ Section 40(d), for example, operates in relation to documents concerning agency industrial relations. An agency seeking to claim this exemption must firstly demonstrate that disclosure of the relevant matter could reasonably be expected to have a substantial adverse effect on the conduct by the agency of industrial relations. If this harm test is met, the agency must still consider whether disclosure of the matter would, on balance, nevertheless be in the public interest, taking into account relevant factors which may include accountability of agencies for decisions made and actions taken and transparency in government operations.

7.7 – Conclusive certificates

Should some or all conclusive certificates in the [FOI Act] be abolished?

If any are retained, should a time limit be applied to any certificate that is issued?

Should the use of conclusive certificates be monitored by the Information Commissioner?

Should any use of a conclusive certificate be reported to Parliament, and if so, when?

The term ‘the Minister’ as used in the four exemption provisions that permit the issue of conclusive certificates – sections 36, 37, 42 and 42A²⁹ – means the Minister responsible for the administration of the FOI Act.³⁰ Accordingly, in Queensland only the Attorney-General has the power to issue conclusive certificates under the FOI Act (in contrast to the position under the Commonwealth *Freedom of Information Act 1982*, which permits the issue of conclusive certificates by the Minister of the Department holding relevant documents, and in respect of exemption provisions including the equivalent of Queensland’s ‘deliberative process’ exemption).

Chapter 8 Administration of FOI in Queensland

8.1 – Public Sector Culture

To what extent does FOI in Queensland recalibrate the basic informational settings between open/closed, secrecy/openness, privacy/disclosure, and spin/deliberative dialogue?

How can a State, characterised by a strong executive, honour the original intent of FOI and address its anxiety about the capacity to govern effectively in a hungry and geared information age?

In accepting the administration of FOI operates beyond an application of primary legal obligations, how can bureaucratic and political interests be kept in balance?

No comment.

²⁸ Section 40(d) of the FOI Act, for example, provides that matter is exempt if its disclosure could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by an agency, unless disclosure would, on balance, be in the public interest.

²⁹ Section 36 – Cabinet matter; s.37 – Executive Council matter; s.42 – Matter relating to law enforcement or public safety; s.42A – matter relating to national or State security.

³⁰ See s.33(2)(a) of the *Acts Interpretation Act 1954* Qld and the Information Commissioner’s decision in *Fagan and Minister for Justice and Attorney-General and Minister for the Arts* 1995 2 QAR 583 at para 23.

Which of the administrative compliance behaviours described in Table 8.1 are practised in Queensland? – typically?, infrequently?

The Government is obviously keen to ensure that the highest standards in meeting public records and FOI obligations are met. Training conducted by DJAG addresses these issues and inclusion of FOI and public records training in induction courses contributes to a broad awareness of FOI principles across the public sector.

Behaviours described as ‘malicious non-compliance’ in Table 8.1 of the Discussion Paper – such as shredding and ‘deconstruction of files’ – would likely comprise a breach of agency codes of conduct and statutory obligations (such as those obtaining under the *Public Records Act 2002*), and feasibly amount to official misconduct as defined in the *Crime and Misconduct Act 2001*.

Section 96 of the FOI Act requires the Information Commissioner to refer evidence of breaches of duty or misconduct in the administration of the Act to the principal officer of a relevant agency.

In considering the steps towards addressing administrative compliance shortfalls suggested by Snell and others (pp. 100-102) plus incentives and sanctions and any other general measures, how might Queensland drive a cultural change necessary to give effect to the objects of the [FOI Act]?

8.2 – Information Policy

Planning for information lifecycles

Can the outcomes desired for FOI, and those of information policy, benefit from the inclusion of FOI considerations (with advancing ICT impacts and corporate governance notions in records management), in development of a whole of government information policy framework that sets strategic directions and a new model of ICT governance?

An integrated information strategy could address matters broader than FOI, including publication requirements, information architecture and infrastructure, administrative access to information and ‘open content’ licensing.

Should parliamentary oversight of FOI be elevated to a ‘dedicated focus on information as a dimension of all government activity’?

Parliamentary oversight of FOI currently includes the twice yearly meeting between the Legal, Constitutional and Administrative Review Committee and the Information Commissioner and the annual tabling by the Attorney-General of an annual report on the operation of the FOI Act.

Recordkeeping meets FOI and ICT

Are records management protocols and standards accessible, widely known and understood, consistent, and reflective of the practical realities of government activity – particularly on questions of retention, storage and release of electronic (non-paper) information? What is done well? What can be done better?

Under the *Public Records Act 2002*, the State Archivist is authorised to make policies, standards and guidelines about the making, keeping, preserving management and disposal of public records. QSA consults with public authorities to develop the policies, standards and guidelines issued under the Queensland Government's Recordkeeping Policy framework. QSA promotes the existence of these policies standards and guidelines in official correspondence, public sector meetings, record keepers' forums, conferences, workshops and seminars. It writes to newly appointed CEOs of public authorities to ensure they are aware of their recordkeeping obligations, the policies, standards and guidelines published by QSA, and the practical advice and recordkeeping tools available.

QSA has led agencies through a two stage self assessment process to monitor agency capacity to meet their record-keeping obligations. This occurred for departments and local governments in 2006-067 and GOCs and statutory entities in 2007-08. Formal record keeping compliance surveys were issued in each stage following the self assessment. The self assessment and surveys reveal increased awareness and commitment, especially at the executive level, to fulfilling recordkeeping responsibilities across the Queensland public sector.

QSA is coordinating a National Information Management Skills Summit in October 2008, the aim of which is to raise awareness of information management skills and identify strategies to address capacity challenges.

Recordkeeping standards (IS 40, 41 and 31) are accessible on the Information Standards website.³¹ The content for these standards is managed by QSA.

To what extent can ex ante decision-making assist in the administration of FOI?

How can the volume and status of drafts and emails be better managed with the advent of ICT, in both better meeting expectations and achieving reasonable outcomes for all under FOI?

'Drafts' of documents fall within the broad definition of 'documents' set out in the *Acts Interpretation Act 1954* Qld and as augmented by the FOI Act itself, and are therefore amenable to application under the FOI Act.

Email and electronic communication pose challenges in respect of records management and FOI, particularly in terms of managing the sheer volume of 'documents' generated, particularly variant 'strings' of emails that originate from the same 'root' message. In practical terms, FOI decision-makers may attempt to deal with this issue by negotiating directly with applicants to reach agreement on the extent to which multiple copies and 'chains' of email correspondence should be included within the scope of a particular application.

Managing the volume and status of drafts and emails is mostly achieved by way of the application of relevant recordkeeping policies, standards and guidelines such as QSA's *Managing Emails that are Public Records* Policy and Guideline issued in April 2007.

³¹ See http://www.qgcio.qld.gov.au/02_infostand/standards.htm.

Are access rights 'stuck in a time warp' in terms of ICT? What improvements can be made?

Agencies have not expressed a concern that technological advances present any special challenge in making documents available under FOI. Many agencies frequently do use electronic means for providing access to documents (such as email, or via CD-ROM) where appropriate. It should be noted, however, that in dealing with applications involving sensitive personal affairs information, experience suggests issues such as identification and security are best dealt with by way of physical, as opposed to electronic, delivery of hard copy documents (or a CD-ROM), which can be provided directly to applicants for collection or by registered post.

Advice as to electronic access to documents has been included in DJAG's FOI Guidelines.³² The Government is open to suggestions as to how access rights might be modified to accommodate technological advances.

Thinking about metadata

How can requirements in handling raw data and metadata under FOI be improved in balancing the public interest? Should applicants be able to obtain raw data in the possession of an agency? Should there be any obligation on an agency to process data to provide the particular information that an applicant is seeking?

Information Standard 34 – Metadata (IS34) forms the central standard for the management of metadata schemes for Government information resources. Under IS34, agencies are required to have documented processes and procedures in place to ensure the capture, quality, accessibility, accuracy and currency of metadata. Metadata is not currently recorded when information is created or recorded on registers.

IS34 does not address FOI issues. However, given the broad definition of 'document' for FOI purposes, there is no current obstacle to applicants seeking access to either 'raw data' or 'metadata'.

Generally, agency practice is not to include 'metadata' – understood as the 'background' information to substantive documents (used for indexing or cataloguing purposes)³³ – unless the applicant specifically requests same, so as to expedite processing and avoid the provision of unnecessary or unintelligible information.

As regards obligations on agencies to process 'raw data' in response to an FOI request, the definition of 'document' is generally sufficiently broad to capture such information, which can be dealt with on request. Additionally, s.30(1)(e) of the FOI Act obliges agencies to interrogate databases containing information relevant to an FOI access application so as to create documents for production, where the means for doing so are 'usually available' to the agency.

³² FOI Guidelines, p.239.

³³ Australian Standard 5044 'AGLS Metadata Element Set' (with which Queensland Government metadata schemes are required to be interoperable under IS34) defines metadata as 'structured information that describes and/or enables finding, managing, controlling, understanding or preserving other information over time'. *AGLS Metadata Element Set*, Part 1 – Reference Description, p. 5. [available at <http://www.naa.gov.au/records-management/publications/agls-element.aspx>].

Disseminating information, plus FOI

What can Queensland learn and do in response to international models such as the UK's information asset registers and single internet entry point – when seeking in this Review to 'improve access to government documents and reduce the time and costs involved in accessing government documents'?

What can be done sector-wide to achieve e-FOI where ICT enables electronic lodgement, payment and access methods yielding time and cost savings?

Some agencies currently do receive both applications and application fees electronically. A major concern, however, is that such methods are not appropriate in many situations involving requests for access to personal affairs information, given difficulties with security, privacy and electronic proof of identity.

Should FOI move towards a 'push model' of proactive disclosure before individual FOI requests? If so, how and to what extent, can ICT open up 'routine disclosure' and 'active dissemination' pre-FOI?

As noted above, and as the Panel has recognised elsewhere in the Discussion Paper, Government agencies increasingly publish a significant deal of information of their own volition, i.e. outside statutory requirements and FOI requests. Concepts of 'active dissemination' must be tempered by legitimate third party and public interests that need to be protected against open disclosure. DJAG's FOI Guidelines contain guidance relating to proactive disclosure.³⁴

Re-using government information

This issue is being considered as part of the Government Information Licensing Framework (GILF) being developed by Treasury's Office of Economic and Statistical Research (OESR).

The GILF project is about creating and implementing a new standardised information licensing arrangement for all Queensland government information. This will provide enhanced, on demand access to accurate, consistent and authoritative Government-held information.

Stage 2 of the *Government Information Licensing Framework Project* was established to create a framework for the Queensland Government to support data and information access and use between Queensland Government agencies, between the Queensland Government and other government jurisdictions, between the Queensland Government and the private sector, and to the community. The framework will confirm the status of the Queensland Government as a single business entity and establish standardised terms, conditions and rules for information transactions to support strategic information access and use in the delivery of government priorities.

³⁴ FOI Guidelines, p.16.

Importantly, IS33 (Information Access and Pricing) requires agencies to refrain from imposing unnecessary licence conditions or other restrictions which will inhibit the use of government information by citizens.³⁵

What role can FOI play in the Smart State in today's and tomorrow's information economy?

How can re-use rights for information contained in 'documents' released under FOI be clarified, and where appropriate, extended?

Use and re-use schemes generally serve a different purpose to FOI schemes. Use and Re-use looks to achieve research and commercial objectives whilst for FOI, transparency and accountability are dominant objectives. Use and re-use schemes are not generally seen as providing alternative access to information that is regularly sought under FOI.

No conditions or restrictions can be attached to documents disclosed under the FOI Act. As the Information Commissioner observed in *Stewart and Department of Transport* (1993) 1 QAR 227 (at paragraph 9):

... s.21 of the Qld FOI Act confers a legally enforceable right of access on any person with no requirement to show a special interest in obtaining particular information...the FOI Act confers no power to exact any undertaking, or to impose any condition, concerning the use to which a person granted access to a document under the FOI Act will put the document or information contained in it.

It should be noted that an applicant who receives documents in response to an FOI access application may be constrained by the general law in the uses to which they may put the relevant information. Section 102 of the FOI Act, which contains statutory protections against defamation and breach of confidence, also expressly provides in subsection 102(2) that the giving of access to a document under the Act 'must not be taken for the purposes of the law relating to defamation or breach of confidence to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.'

This provision contemplates that an applicant for access under the FOI Act may obtain access to confidential information – such as, for example, by way of a discretionary disclosure by the agency – in circumstances where its further publication by the applicant would nevertheless constitute a breach of confidence.³⁶

Is there still (if ever there was) a need for documents released under FOI to be watermarked 'FOI Release' and non-editable formats preferred by government?

'Watermarking' is not a requirement under the FOI Act, but an administrative practice recommended by DJAG³⁷ and adopted by agencies as a means of allowing agencies to track government documents released into the community. In any case, agencies

³⁵ IS33, Principle 3.1.1.8.

³⁶ For a fuller analysis of the potential limits to re-use by an applicant of information given under the FOI Act see the Information Commissioner's decision in *Shaw and the University of Queensland; L'Estrange (Third Party)* (1993 S0134; 18 December 1995), paras 20-22.

³⁷ See FOI Guidelines, 8.6.1, 'Use of watermarks or transparency to indicate FOI release', p. 241.

ultimately recognise that the right of access contained in s.30 of the FOI Act allows an applicant to request a 'clean' copy of a document (by empowering applicants to request access in a particular form).

What principles could guide the balance between the rights of the public to access information as a 'public resource' and the revenue raising initiatives of government from 'corporate resources'?

Not all information that might be amenable to an application under the FOI Act should properly be regarded as a 'public resource'. Personal affairs information is one such class of 'non-public' information. Additionally, the Government receives considerable amounts of commercially sensitive information from third parties way of compulsion, or for regulatory or licensing purposes. In these situations the Government is in a position more analogous to that of 'custodian' or 'bailee' of the relevant information, rather than steward of a 'public resource'. Section 30(3) of the FOI Act implicitly recognises this distinction, by allowing agencies to restrict the form of access to documents where providing access in a form as requested by an applicant (generally, for example, a copy of a document) would infringe a third party's copyright.

8.3 – Protection of privacy interests

Should the differences that exist between 'personal information' and information that relates to definitional 'personal affairs' be reconciled?

Privacy and FOI mechanisms operate in relation to distinct but related interests. Privacy rules generally seek to ensure relevant information is controlled and only used or disclosed in limited and clearly defined circumstances. FOI attempts to deliver ready and open access to information.

Adopting the broad concept of 'personal information' throughout the FOI Act (and not just in relation to s.44(1), which has been addressed above) would:

- Expand the scope of information that persons could seek to have amended under s.53 of the FOI Act; and
- Impact on the fees and charges regime, as fees and processing charges are currently not imposed on individuals seeking access to their 'personal affairs' information (a concept which as noted above is relatively narrow in scope).

Should Queensland consider adopting a scheme like that operating in New Zealand in which people seek personal information about themselves may do so mainly under a new Privacy Act, rather than through FOI? If there were to be a Queensland Privacy Act covering access to personal information and the correction of errors, should the Act extend beyond those official and other agencies covered by FOI to the private sector, and if so, how far?

Access and amendment rights regarding one's own personal information are generally regarded as key privacy rights.

In the event that new privacy legislation was enacted, what mechanisms should be developed to ensure consistency of administration and decision-making as between privacy and FOI legislation?

The rights of access and amendment recognised in Queensland's administrative privacy regime (IS42 and IS42A)) are effectively exercised through the provisions of the FOI Act. Agencies have not expressed any substantial administrative or operational difficulties with this arrangement.

8.4 – Other mechanisms for accessing information held by Government

Is there any need for FOI legislation to take account of other mechanisms for accessing information held by government, other than through s. 22 of the Freedom of Information Act 1992?

- No comment

Should there be any changes to government secrecy laws or codes of conduct to take account of the operation of FOI?

- No comment

8.5 – FOI applications for access

How can the application process be streamlined, made more efficient and user-friendly?

- No comment

Should agencies adopt guidelines giving effect to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report?

Certain of the issues highlighted by the Commonwealth Ombudsman as set out on pages 130 and 131 of the Discussion Paper are, in Queensland, clearly regulated by the FOI Act itself, such as the obligation to assist applicants (s.25A), and the requirement to advise of review rights in a notice of decision (s.34). The remainder are generally covered via the advice and awareness services delivered by DJAG as lead agency for FOI, particularly the FOI Guidelines.

8.6 – FOI applications for amendment

Should applicants be able to use the FOI Act to request amendment of personal information irrespective of how they became aware of the document containing the information?

Section 53 of the FOI Act as currently framed enables a person who has had access to a document from an agency (whether or not under the Act) containing information relating to their personal affairs to apply to the agency to have that information amended if they believe that it is inaccurate, incomplete, out of date or misleading.³⁸ In accordance with the terms of the section, applicants are only required to demonstrate proof of access to relevant information.

Should the requirements of the FOI Act and any privacy legislation be harmonised to ensure the same conditions apply in relation to the amendment of personal information in official documents under both schemes?

³⁸ The amendment rights contained in the FOI Act are complemented by IPP 8 in IS42, which requires agencies to check the veracity of personal information they hold prior to use.

There is a conceptual tension between the concepts of ‘personal information’ and ‘personal affairs’. As has been noted elsewhere in this response, whilst adopting the former, broader concept would expand the range of information individuals could seek to have amended under the amendment provisions of the FOI Act, it would also potentially expand the scope of the personal affairs exemption in s.44(1).

8.7 – FOI Review process

8.7.1 Internal review

Should internal review remain mandatory?

Should applicants have the option of going directly to external review?

Should formal internal review be abolished?

Should the charging regime be adjusted to favour any particular outcome?

8.7.2 External review

Should external review be conducted by the Ombudsman, the Information Commissioner or by an Administrative Tribunal? What are the advantages/disadvantages of each method of providing external review?

Should there be an external body to perform the kind of supervisory/advisory functions identified by the ALRC/ARC, the S.A. Legislative Review Council and LCARC that might be performed by an FOI monitor?

If external review is to be the function of the Ombudsman or the Information Commissioner could or should that office also perform the role of FOI monitor?

Are appointment and other procedures appropriate for maintaining the independence of the Information Commissioner?

As the Panel observes, LCARC is currently considering administrative review rights generally within the context of reforms to civil and administrative justice.

8.8 – Other considerations

Should, and if so how can, there be scope for cross-agency resourcing support and delegation of decision-making authorities under the Freedom of Information Act 1992?

Amendments to the FOI Act in 2005 included specific provision for cross-agency delegation of decision-making within the same portfolio (sections 33(4) and (5) of the FOI Act). Further cross-agency resourcing and delegation initiatives would, in principle, assist in expeditious and efficient FOI processing. There are various statutory impediments to such an approach, such as confidentiality obligations binding officers of specific agencies, however agencies do not consider issues of this kind insurmountable.

Should there be a power to receive and investigate complaints about the administration of FOI in Queensland? Should that power include ‘own motion’ investigation, and be given to the Ombudsman or a FOI monitor-styled body?

The Queensland Ombudsman is empowered to both review complaints regarding administrative actions, and conduct own-motion investigations. Applicants who are dissatisfied by the conduct of agencies in dealing with their FOI application may complain to the Ombudsman.

Are there any improvements possible to streamline notice requirements under the Freedom of Information Act 1992?

No comment.

Chapter 9 Costs and time

9.1 – Fees and charges

Is the existing fees and charges regime in the Freedom of Information Act 1992 reasonable and balanced?

What are the comparative merits of a flat fee scaled by volume and the current time-based charging model?

What alternatives exist to ensure consistency in the application of any fees and charges regime?

Amendments to the charges regime were passed in 2005. The current processing charges regime does not reflect the actual cost incurred by agencies in processing relevant applications.

At p. 140 of the Discussion Paper, the Panel notes that “it appears fees and charges have been a substantial contributing factor to a reduction in the use of FOI legislation for purposes other than access to an applicant’s personal information.” A review of statistics from recent FOI Annual Reports does not appear to support this assertion. Non-personal applications in fact increased as a percentage of the total number of applications in the years following the introduction of processing charges, and have in the last three years comprised more than half of all applications lodged with State Government agencies.³⁹

Additionally, while the average cost to an applicant lodging a non-personal FOI application following the introduction of the charges regime increased,⁴⁰ charges have remained relatively stable in the last four years at approximately \$30 per application.⁴¹

Year	Total	Processing	Total	Non-	Average cost
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³⁹ Non-personal applications to State Government agencies increased from 43.9% (expressed as a percentage of total applications) in 2000/01 (immediately prior to the introduction of processing charges), to 46.1% the following year, and climbed to a peak of 54.2% in 2003/04. The figure in the latest reported year, 2005/06, was 50.4% - see generally FOI Annual Reports 2000/2001 to 2005/2006.

⁴⁰ The average cost in 2000-01 was \$14.98 – FOI Annual Report 2000/01.

⁴¹ Prepared from data published in FOI Annual Reports 2002/03-2005/06.

	Application Fees \$	and Access Charges \$	\$	personal Applications	of processing and access charges (excluding application fee) \$
2000-2001	133,252.00	62,046.90	195,298.90	4141	14.98
2001-2002	136,668.30	112,425.21	249,093.51	5572	20.17
2002-2003	144,336.81	173,767.44	318,104.25	5545	31.33
2003-2004	175,611.67	203,974.63	379,586.30	7050	28.93
2004-2005	177,657.37	219,149.58	396,806.95	7164	30.58
2005-2006	139,575.61	173,577.02	313,152.63	6119	28.37

9.2 – Time limits

Are the existing time limits reasonable and consistent with the objectives of the Freedom of Information Act 1992?

Beyond amendments to the existing time limits, what initiatives exist which could improve early disclosure under the Act?

Time limits across FOI regimes in comparable jurisdictions vary considerably, and in many cases time limits can prove to be somewhat artificial where voluminous or complex requests are made, and/or third party consultations are required.

In response to a survey recently conducted by DJAG, departments identified a range of factors impacting on their ability to comply with the time frames specified in the Act. Large volumes of applications (one Department cited 70-100 applications ‘on the go’ at any one time), and applications with large numbers of documents (50,000 in the case of one specific application) were factors relevant for many departments. Others included difficulty finding or locating documents, multiple and repeat applications, the need for legal or technical advice, the requirement to consult multiple third parties, staff absences, transfer of responsibilities following Machinery of Government changes and the complexity of the FOI Act.

However, departments with out of time applications had been proactive in addressing these matters and had taken steps to improve their compliance. They included employing additional staff, improving management processes and using technology such as DVD burners, redaction and search software and an automatic page numbering machine. Additionally, DJAG has produced a comprehensive set of processing guidelines, an advice line and provides training opportunities on a range of

aspects of FOI administration and applying the FOI Act for agencies and local government. In 2006 and 2007 DJAG provided 3365.5 training hours to a total of 556 FOI staff in Brisbane and in regional centres.

9.3 – Voluminous and/or vexatious requests

Should the Act contain a power to declare an applicant for information vexatious?

Should that power be exercisable at first instance by an agency or by the Information Commissioner?

On what grounds should an applicant be declared vexatious?

Alternatively, should there be a provision entitling an agency to declare a request to be vexatious?

On what grounds should an application be declared vexatious?

Should it be possible to declare an application vexatious because it is voluminous?

Should voluminous applications be able to be refused under a provision such as section 29?

Should a more definitive test be applied when determining whether a voluminous application might be refused, such as the number of pages it would produce, the number of days it would require to process or the cost of processing it?

Should journalists and/or MPs be exempt from provisions concerning vexatious requests?

Should journalists and/or MPs be exempt from provisions concerning voluminous requests?

As the Panel is aware, the FOI Act currently empowers the Information Commissioner to both decline to review a particular application on the basis it is frivolous, vexatious, misconceived, or lacking in substance (s.77(1)(a)), and to declare a particular applicant vexatious, either on own motion or the application of one or more agencies (s.96A). The Information Commissioner is yet to exercise the power.

Large numbers of applications from particular applicants is an issue of concern to agencies. By way of example, in 2007, one portfolio fielded 75 applications from the same group and a local government agency received 77 applications from one individual.

‘Repeat applicants’ of this kind are an issue across a number of jurisdictions. Judge Kevin O’Connor, AM, President of the NSW Administrative Decisions Tribunal (which hears FOI appeals) recently stated that repeat applicants ‘will often file mountains of paper, will regularly arrive at the counter seeking attention or make numerous fax or phone calls. They may become personally abusive to staff’.⁴² Queensland’s FOI experience is similar, with agencies reporting a very small number of applicants who lodge repeat applications, harass and intimidate staff, report individuals to oversight bodies such as the CMC and/or overwhelm agencies and Ministers with correspondence.

⁴² New South Wales Administrative Decisions Tribunal Annual Report 2006/07, p.4.

As to the criteria for declaring either an applicant or application vexatious, etc., sufficient guidance can currently be obtained from the general law. Volume would generally comprise one factor among many to be considered in determining the issue.

Voluminous requests are a substantial cause of delay in FOI administration. Ultimately, FOI applications fall to be decided by a single officer, and volume imposes considerable demands on decision-makers in dealing with FOI file loads. A common agency view is that the FOI Act limits the ability to manage large (potentially time consuming) applications. Many applications of this kind can be very resource-intensive to process, requiring detailed consideration of each page of information, supported by multi-layer checks to ensure effective quality control checks. These checks are particularly critical where the documents in question contain highly sensitive information such as the personal details of crime victims, witnesses or complainants.

Chapter 10 Effectiveness and adequacy of data collection and reporting

What data should be collected for the annual s. 108 reports?

How can the collection of the data be improved?

How can the integrity of the data be improved?

Should the Information Commissioner (or some other agency) be given responsibility for analysing the data and publishing information about the way FOI operates in Queensland, based on an analysis of that data?

Should the Information Commissioner (or some other agency) be made responsible for ensuring that the data required to be provided under s. 108 is appropriate?

Should the data be used to benchmark the performance of individual agencies? If so, who should perform this role?

DJAG has been proactive in providing guidance to agencies in relation to the collection of s.108 data. Guidelines are provided to agencies when the request for data is sent out, and specific guidelines are issued when reporting is likely to be complicated by matters such as Machinery of Government changes. The purpose of those guidelines is to ensure, as far as possible, that reporting is consistent and accurate and that no matters are lost or the subject of double-reporting.

In many jurisdictions reporting is done on the basis of the number of applications rather than the number of pages. Capturing page data does, however, provide a useful insight into reasons for agency delay in meeting statutory deadlines (i.e. due to sheer volume of pages processed), and how often particular exemption provisions are being applied in the decision-making process.

It should be noted that most agencies use either Treasury Recording and Management System (TRAMS) based on Microsoft Access or Administrative Law System based on Clarion (Department of Transport) to capture and manipulate FOI reporting data. Agencies using these databases are generally satisfied with their operation and capacity to generate reports such as s.108 information.

If section 108 statistics were used to assist in ‘benchmarking’ the performance of individual agencies, any statistical information relied upon would have to be considered in the context of the different nature of information held by different agencies, which may affect outcomes such as release rates.

Chapter 11 Conclusion - A new beginning?

Should a new Act be called something other than the Freedom of Information Act?

If so, what would be the best title?

‘Freedom of Information’ as a concept is widely recognised in the community and across multiple jurisdictions. Conversely, it may be that the name of the Act could be reframed to better reflect the Act’s key purposes, which include not only access to but amendment of information. In any case, the benefits to be obtained by any proposal to change the name of the Act would need to be balanced against potential for community confusion and administrative and transitional costs.

Clarifications

Appendix 1: An overview of Information Privacy Law and Practice in Australia and New Zealand

- Page 176 - Information standards are no longer issued by the Department of Innovation and Information Economy. Information Standards are now issued by the Department of Public Works.

Bibliography – Information Standards

- Page 207 – Information Standard 41 - *Managing Technology-Dependent Records* is to be subsumed into Information Standard 40 – Recordkeeping.