

**Submission by the
Office of the Information Commissioner**

**Legal Affairs and Community Safety Committee
*Inquiry into Strategic Review of the Office of the Queensland Ombudsman***

April 2018

The Queensland Office of the Information Commissioner (OIC) is an independent statutory authority. This submission does not represent the views or opinions of the Queensland Government.

The Office of the Information Commissioner is an independent statutory body and forms parts of the integrity and accountability framework in Queensland. The Office works alongside the Integrity Commissioner, Auditor General, the Ombudsman, and the Crime and Corruption Commissioner to maintain public confidence in Queensland's government institutions.

The statutory functions of the Information Commissioner under the *Right to Information Act 2009* (Qld) (**RTI Act**) include commenting on issues relating to the administration of right to information in the public sector environment. OIC's role includes assisting in achieving the goal of open and transparent government by promoting better and easier access to public sector information and improving the flow of information to the community.

OIC welcomes the opportunity to comment on the Inquiry into the Strategic Review of the Office of the Queensland Ombudsman (**Strategic Review Report**). OIC's submission is restricted to comments about **Recommendation 36** of the Strategic Review Report.

a) Recommendation 36 – Amendment of the RTI Act

OIC notes that the Strategic Review Report recommends amendment of Schedule 3, section 12 of the RTI Act to include secrecy provisions contained in section 92 of the *Ombudsman Act 2001* (**Ombudsman Act**). Under the RTI Act, if disclosure of information is prohibited by a provision of an Act listed in schedule 3, section 12, it will be exempt information and the agency can refuse access to it, unless it is the applicant's personal information. The RTI Act is not, however, intended to prevent or discourage the giving of access to documents containing exempt information.¹ It remains open to an agency to decide to give access under the RTI Act to documents containing exempt information.²

b) Legislating additional exemptions under the RTI Act

A right to information law that strikes an appropriate balance between the right of access and limiting that right of access on public interest grounds is critical to both a robust, accountable government and an informed community. Accordingly, it is important that individual legislative

¹ See section 4(2) of the RTI Act.

² See section 48(3) of the RTI Act.

proposals to amend the RTI to exempt or exclude information from the operation of the RTI Act are considered in the context of the broader policy and departures from such are clearly justified. OIC's general position regarding legislating additional exemptions and exclusions in the RTI Act aligns with:

- the recent Report on the Review of the *Right to Information Act 2009* and the *Information Privacy Act 2009 (Review Report)* tabled in Parliament in October 2017 following a comprehensive review, including public consultation. This Review Report recommended there be no further exemptions or exclusions and, in fact, recommended the removal of an existing exemption (**Recommendation 6**).³ The Review Report concluded that 'the RTI Act already contains sufficient exemptions and exclusions and the flexible public interest balancing test allows for adequate protection of information where required. To add 'tailored' exemptions or exclusions directed at certain documents or agency functions may suggest that the RTI Act does not adequately protect other types of information'⁴; and
- the Solomon report⁵ which recommended an overhaul of Queensland's FOI laws including very limited exclusions and fewer legislated exemptions under the new Right to Information Act. In the Solomon Report, the Panel specifically argued against including exclusions to allay concerns about disclosure where exemptions or the public interest test can easily protect sensitive information.

c) OIC's comments on recommended amendment to the RTI Act

As noted in the Strategic Review Report, OIC was consulted about the recommendation to amend to Schedule 3, section 12 of the RTI Act to include secrecy provisions contained in section 92 of the Ombudsman Act.⁶ OIC's position is that the public interest balancing test is an effective tool which allows decision makers to take into account and balance all public interest factors both favouring disclosure and nondisclosure that are relevant to the particular circumstances of the case. However, OIC notes that the recommended amendment to the RTI Act responds directly to specific concerns identified by the Ombudsman about an operational issue affecting the efficient and effective pursuit

³ The only changes to exemption provisions were an amendment to an exemption provision to increase disclosure, and removal of the investment incentive scheme exemption.

⁴ Report on the review of the *Right to Information Act 2009* and *Information Privacy Act 2009*, October 2017, p20 viewed at <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T2014.pdf>

⁵ In June 2008 the report on the wide ranging review of the FOI Act by an independent panel chaired by Dr David Solomon AM was delivered and is available at www.rti.qld.gov.au/data/assets/pdf_file/0019/107632/solomon-report.pdf

⁶ Recommendation 36 of the Strategic Review Report.

of informal and early resolutions by undermining the Ombudsman's ability to conduct confidential investigations.⁷

As such, OIC considers the proposed amendment to the RTI Act, through inclusion of section 92 of the OA Act in Schedule 3, section 12 of the RTI Act, is appropriately limited to specifically exempt information obtained in a preliminary inquiry or an investigation by the Ombudsman from the operation of the RTI Act. Further, this approach is consistent with how other confidentiality provisions are treated under the RTI Act where Parliament considers it is, on balance, not in the public interest to disclose the type of document.⁸

This approach can be distinguished from proposed amendments which seek to apply broad based exemptions or exclusion to a class or category of documents from the operation of the RTI Act, or with little or no clear justification for an amendment. Accordingly, in the circumstances of this particular case, it is OIC's view that the proposed amendment to Schedule 3, section 12 of the RTI Act to include secrecy provisions contained in section 92 of the Ombudsman Act is the preferred approach to address identified concerns raised by the Ombudsman should amendments to the RTI Act be considered necessary.

OIC remains available to provide any assistance to the Committee with regards to its Inquiry.

⁷ Strategic Review Report at page 65

⁸ See for example, section 314 *Adoption Act 2009* and section 53, *Auditor-General Act 2009*.