

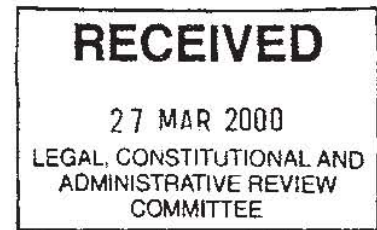
Townsville Community Legal Service Inc.

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Wednesday, 22 March 2000

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000



Submission No 119
Spec 1.4

Dear Director

Re: FOI IN QLD – DISCUSSION PAPER NO.1

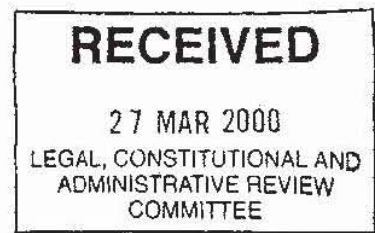
I enclose a copy of our submission. I also enclose a copy on disk.

Please do not hesitate to contact me should you need to discuss this matter further.

Yours faithfully

Townsville Community Legal Service Inc.

Per: William Mitchell
Solicitor



Submission 1A

LEGISLATIVE ASSEMBLY OF QLD Spec 1.4

**LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE
REVIEW COMMITTEE**

FREEDOM OF INFORMATION IN QUEENSLAND

DISCUSSION PAPER NO.1

TOWNSVILLE COMMUNITY LEGAL SERVICE INC.

MARCH 2000

NOT CONFIDENTIAL

Point Response**A.**

1. TCLS supports the comments made by the Dank's Committee and submits that the FOIQ is compatible with the Westminster style of Government.

Additionally, TCLS endorses the spirit of the submissions made by the IC(Q) that access to information plays a significant part in the democratic process.

B(I)

2. TCLS supports the comments made by the IC(Q). In previous submissions, TCLS has supported the idea that the objects clauses be amended to clarify and strengthen the rights of individuals who seek to use the FOIQ.
- 3.(a) TCLS submits that the FOIQ should include a provision that is to be interpreted in a manner to further the FOIQ's stated objects.
- 3.(b) TCLS submits that the overall spirit of the objects clauses should carry a guiding principle/presumption of access, without specific mention of exemptions or barriers to access.
4. TCLS submits that the objects clause does not need to specifically mention the exemptions and such absence would give legitimacy to a guiding principle/ presumption of access.
5. See responses 3 and 4.
6. TCLS submits that it cannot hurt to mention the place that the FOIQ holds in the representative democracy and in fact my help to strengthen the manner in which the objects clause is construed.
7. TCLS believes that a culture of secrecy still exists in relation to certain Government Departments and Agencies, whereas others have embraced the FOIQ without fear.

TCLS has particular concerns that a culture of secrecy exists most commonly at municipal level, where one or more of the following

issues may arise:

- decision -makers may not have had the same level of experience in public administration, or indeed administration of the FOIQ as their state counterparts;
- decision -makers may be "closer" to the issue that is subject of the FOIQ request and thereby have potentially conflicting interests;
- decision -makers may not have access to the same resources, advice and assistance as their state counterparts;
- a culture of "rate-payer complaint" may undermine decision-maker's acceptance of, and adherence to the FOIQ;
- decision-makers have become, in some cases, experts in why information should not be released, as opposed to why information should be released.

Many things can be done to overcome a culture of secrecy, including training and education.

8. TCLS supports such a proposal. TCLS believes that a majority of information released is non-controversial and as such a reversal of the approach makes sense.
9. TCLS submits that FOIQ is not widely publicised at present and the public would benefit from a significant public educational campaign.

TCLS believes that typically, other than professional/regular users, the public only become aware of FOIQ when they enter some form of complaint/review/appeals process, whereby a decision-maker is required to notify that person as to their rights to obtain access to information pursuant to the FOIQ.

Furthermore, when an individual becomes aware of their rights under the FOIQ, they often need to seek advice about the form and substance of their request.

TCLS believes that although a widespread education campaign

about the use of FOIQ may lead to increased requests, such a campaign may also increase the quality of requests and thereby lessen the resource load on agencies.

10. No comment
11. TCLS supports the introduction of a performance regime in relation to the processing of FOIQ requests. Such a regime should be entrenched in the FOIQ.
12. TCLS does not support a change of title unless such a change can be accommodated with minimal expense to the public and include a campaign of widespread community education.
13. TCLS supports the notion that the right of access to government-held information should be included as a part of the *Legislative Standards Act 1992*.

B(II)

14. TCLS does not believe that any new exemptions are warranted.

In relation to existing exemptions, TCLS supports the comments of the IC(Q) as to section 36 of the FOIQ.

15. No comment
16. TCLS submits that the harm tests could be simplified to the extent that the motivating issue is whether there is likely to be substantial harm as a result of release.
17. TCLS supports such a tightening of the test.
18. TCLS submits that a test should only apply where such a requirement already exists: ss 42, 45, 47, 49.
19. TCLS supports the inclusion of a public interest test over all exemptions for the following reasons:
 - improve the consistency in decision-making;
 - provide access to documents on the basis of the public interest where they have not previously been made

available;

20. TCLS submits that the public interest should not be defined in the FOIQ but left to the evolution of the common law. TCLS does support the issue of public interest guidelines to decision-makers to assist in the determinative process.
21. See above
22. No comment

B(III)

23. TCLS supports EARC's original recommendations as to the Parliamentary scrutiny of those agencies that might be excluded from the operation of the FOIQ.

TCLS also supports the recommendations of the IC(Q) in this regard. TCLS suggests that it would be a more open approach if no exclusions existed bar those that had been tabled in Parliament, subject of debate and thereby satisfied the democratic process and became a part of the FOIQ.

TCLS has concerns that if the exclusion regime exists externally to the FOIQ, then access by the public would be severely diminished.

Further, TCLS believes that if particular exclusions are allowed to be inserted into individual pieces of legislation, the effectiveness, cohesiveness and integrity of the FOIQ is threatened. TCLS submits that a piecemeal exclusion regime will create administrative difficulties for decision-makers and applicants alike.

24. TCLS supports such a move on the following conditions:
 - Agencies are provided with adequate resources and training;
 - The community sector is excluded from the FOIQ.
25. TCLS supports those submitters who argue that GOCs and LGOCs should be subject of the FOIQ. Further, TCLS suggests that any legitimate basis upon which GOCs and LGOCs should be excluded from the operation of the FOIQ can be more adequately dealt with

by way of exemption rather than exclusion.

In relation to the first argument, it seems to TCLS that the factor of GOC and LGOC public funding requires public accountability and on balance GOCs and LGOCs should be subject of the FOIQ.

In relation to the second argument, TCLS suggests that private sector regulatory mechanisms do not provide adequate protections and/or access to information. TCLS sees regular complaints about private sector regulatory frameworks, including:

- Regulatory schemes are often voluntary;
- Regulatory schemes often make non-binding recommendations and have no ability or power to enforce those recommendations;
- Regulatory schemes do not include an equivalent framework for release of information, though they might include privacy and confidentiality provisions;
- Regulatory schemes are not as accessible to the general public as legislative frameworks. Additionally, awareness of regulatory schemes is often poor amongst the general public, and such schemes are often poorly understood;
- Regulatory schemes do not engender the same level of consumer confidence in dispute resolution as those entrenched in legislation;
- Regulatory schemes are often *ad hoc* processes, which do not provide the same safeguards in relation to procedural fairness/natural justice as legislation.

In relation to the third argument, competitive issues that militate against release of information can be dealt with adequately by a process of exemption rather than exclusion.

26. TCLS does not support the exclusion of GOCs and LGOCs other for reasons debated in Parliament and so accepted within the democratic processes of the State.
27. TCLS has concerns about the use of delegated legislation, which

does not generally offer the public or the Parliament the same level of scrutiny. Some might argue that the reliance upon a regulatory framework is the thin edge of the edge in relation to moving away from publicly accountable processes. Additionally, an exemption regime should determine legitimate reasons for not releasing information.

28. TCLS does not support any differential treatment by the FOIQ of GOCs and LGOCs. The primary basis for this is the public interest in accessing information, which has relevance to the expenditure of public funds, whether they are state or local funds.
29. TCLS submits that the private sector should be subject of the FOIQ where certain key elements are present:
 - contracting out or out-sourcing of public moneys;
 - where private sector claims public moneys for services e.g Medicare, Legal Aid etc
30. TCLS believes that the scope of the FOIQ should not be limited simply by virtue that certain functions of government have been contracted out to the private sector.

The argument put forward by the Australian Law Reform Commission that FOI should not be extended to the private sector fails to acknowledge that in a contracting out scenario, the private sector is taking on the role of government, and/or acting as their agent.

Public Money

Perhaps the strongest argument is that the contracting out of government services inevitably involves the payment of large sums of public money to private enterprise, in order to achieve public ends.

It seems a legitimate argument that where public moneys are used by private enterprise, the public should have right to access information that relates to the expenditure of those moneys.

International Standards

Internationally, legislation supports the application of the FOI regime to private contractors on the basis that they are effectively agents of government.

Transparent Government

A cynic might otherwise suspect that where government did not want their actions subject to public scrutiny, they would simply contract the service out and thereby exempt the public from access rights.

Balancing Competing Interests

The Discussion Paper suggests that exposing the private sector to the FOIQ regime is problematic and public interest needs to be balanced against genuine business interests.

TCLS fails to see how genuine business interests can compete with the public interest where public money or resources are at stake.

TCLS suggests that an exemption subject to a public interest and/or harm test would prevent genuine business interests from being unduly affected.

31. TCLS supports the inclusion of guidelines or legislative criteria that direct decision-makers to use the exemption only where appropriate and not as a safety net exemption.
32. TCLS supports the issue of guidelines or amendment of the FOIQ to ensure adherence to the letter of the law in relation to these exemptions. It is of fundamental importance that training be provided to decision-makers, and that there be a directory requirement to observe guidelines, regulations in relation to the scope of the exemptions.

Effectively, whether the criteria is set out in guidelines, policy documents or legislation, the proof will be in the pudding, that is, whether agencies will be required to follow the guidelines and if not, whether they actually do. Legislation would impose a directory requirement, whereas policy may be ignored without penalty.

B(IV)

33. TCLS agrees with the comments of the ALRC/ARC as to potential expectation on agencies to record information for the purposes of a request under the FOI legislation.
34. TCLS submits that the term document may in fact be an outdated concept, referring as it does to a physical, usually written, object. TCLS supports the recommendations of the IC(Q) and ALRC/ARC in this regard.
35. TCLS believes that agencies need to have decision-makers well versed in the forms of storage, archival and record keeping undertaken by the agency.

Information Access Centre

It may be that each regional centre have a State Government, and shared Commonwealth Government, FOI information access centre, which has the following attributes:

- Ability to view information in all relevant formats, including audio, video, digital, cine-film, microfilm, microfische, x rays viewing, data disks and others;
- Ability to view information in a neutral, non-threatening and non-bureaucratic environment;
- Ability to collect information;
- Access to other information that may be relevant to interpretation or comprehension of the material subject of the request, including FOIQ legislation, policy, case-law etc;
- Ability to centralise all requests made initially to agencies;
- Central placement of all administrative manual and policy documents to alleviate the need for FOIQ requests for information that does not require FOIQ access. For example all government department policy manuals could be placed at the centre;

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- Instil consumer confidence in the openness of government;
 - Act as a service deliverer for other agencies;
 - Prevent duplication of services.

All participating agencies could contribute to the ongoing resourcing of the centre through a pro rata arrangement based on the number of requests received by each agency.

36. See comments above
37. TCLS cannot see why the current common law, as determined by *Re Price and Nominal Defendant* IC(Q), Decision No. 99003, June 1999 should be subject of individual attention for legislative reform. TCLS supports the retention of *Re Price* and does not support amendment to limit its application and effect.
38. TCLS supports the direction that all applicants first submit to internal review of decisions prior to applying for external review. TCLS' support is conditional. TCLS suggests that the ARC's current project on internal review of agency decisions should provide a best practice guide that is applicable to internal review of FOIQ decisions.

TCLS does also support than in limited and prescribed scenarios, internal review might be dispensed with and supports the comments of the IC(WA) in this regard.

B(V)

39. TCLS supports retention of the office of the IC(Q), however this office should be independent from that of the Ombudsman. The Ombudsman and IC(Q) should be subject of separate statutory appointment. At the Commonwealth level, the separation of the Ombudsman and Privacy Commissioner is a good model.

TCLS has concerns that conflicts might arise where the office is a dual appointment and that a dual appointment may in fact limit the expertise gained by the appointee.

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40. TCLS believes that the office of the IC(Q) and the Ombudsman should be separate and independent of each other and Government.
41. The decisions of the IC(Q) form the FOI jurisprudence of Queensland. These decisions form an integral part of the system by providing common law analysis of the provisions of the FOIQ. They no doubt appear overly legalistic to a layperson, however the decisions are recognised by practitioners as being an authoritative interpretation of the FOIQ.

Additionally, TCLS makes the following comments:

- If the IC(Q) was a separate statutory authority with adequate resources, it may be able to adopt quicker processes;
- If the IC(Q) were to adopt less legalistic processes, it may be that the decisions would have less impact on the jurisprudence, thereby lessening the overall impact of the FOIQ and undermining the reasons for enacting the FOIQ in the first place;
- If the IC(Q) were to produce less formal decisions, the public, profession and executive may lose confidence in the process of external review by the IC(Q);
- If the IC(Q) were to adopt a less formal approach, it may result in a denial of nature justice/procedural fairness in external review matters;
- A summary of each decision may assist in dissemination of the content to the public;
- If all decisions are to be published, they need to be placed within an overall database, accessible to the public, with some indication as to the higher order and lower order precedent value. See the concept of the Information Access Centre.
- One effect of publishing all decisions may be that the doctrine of precedent is misapplied or misunderstood, whereby people – and sometimes practitioners – rely on factually similar decisions. For example, the

Administrative Appeals Tribunal and Federal Court of Australia publish all decisions on the internet and it is quite simple to locate decisions that have factual similarity to the case on hand, however that does not mean that the decision has any precedent value at all.

42. (a) TCLS believes that agencies should receive guidance from the IC(Q) in a generic and systemic sense, however the IC(Q) must not lose its ability to remain impartial in relation to review of decisions.
- 42.(b) TCLS submits that the IC(Q) should ensure that all decisions are accessible to the public free of charge. See comments about the information access centre.
43. TCLS opposes the introduction of time limits. TCLS is, however, aware of delays in processing reviews. TCLS suggests that decisions should be delivered in a timely or reasonable time frame. Rather than the imposition of fixed, and often arbitrary or meaningless time limits, the IC(Q) should adopt case management practices that are both flexible and efficient. Such practices should include:
- Identification at an early stage whether the case might benefit from alternative dispute resolution;
 - Identify cases that raise issues of public interest or importance;
 - Identify whether different practices need to be applied to different types of cases, for example are applications involving the Queensland Police Service different to the Department of Transport;
 - a specialist case management coordinator who will implement differential case management strategies: see for example the Administrative Appeals Tribunal case management system;
 - Clear guidelines or directions as to pre hearing steps and/or processes, if such steps or processes are appropriate;
44. TCLS opposes the introduction of a statutory time limit.

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45. TCLS supports the IC(Q) recommendation that the IC(Q) have the same powers as the Ombudsman.
- 45.(a) TCLS submits that the IC(Q) should have the power to enter premises and inspect documents.
- 45.(b) TCLS submits that the FOIQ should contain contempt provisions.
46. TCLS submits that such a power would need to be exercised with caution and may need to be limited in the same way as the VCAT.
47. No comment.

B(VI)

48. TCLS supports the retention of the status quo.
- TCLS agrees with the comments of Dr Zifcak that user pays systems ultimately have a deterrent effect and would like to see the fees abolished, however, recognises that the costs associated with FOI are burdensome.
- TCLS also recognises that there needs to be some contribution to what is primarily a Government funded regime.
49. TCLS opposes the introduction of a fee for personal affairs documents.
50. TCLS opposes the introduction of fees for processing and access. Unlike the IC(Q), TCLS does not offer any alternatives and believes that any alteration to the existing fees regime will significantly deter access to the FOIQ and thereby subvert the true spirit of the Act.
51. TCLS supports the retention of the status quo, recognising that the higher rate of 50c per page offsets the other costs canvassed by the discussion paper.
52. If the fees regime changed from the status quo, there should a mandatory direction to waive fees if the person is in financial hardship, or if the request was made in the public interest.
53. TCLS opposes the introduction of fees for either internal review or external review.

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- 54.(a) TCLS submits those fees should be set below level in other jurisdictions.
 - 54.(b) TCLS submits that, at a minimum, personal information should be exempt from the fees regime.
 - 54.(c) TCLS submits that waiver provisions should be broad and include several reasons, such as hardship, public interest and a catch-all special circumstances type discretion.
 - 54.(d) TCLS supports this concept but has concerns that it would encourage the process to become more adversarial as is often the case in jurisdictions where costs follow the event.
 - 54.(e) No comment.

B(VII)

- 55. (a) TCLS would support the redrafting of section 28(2) if, and only if, such redrafting did not affect the rights of individuals in relation to access under the FOIQ.

The fact that a request may involve voluminous material or be time/resource intensive may simply be symptomatic of the importance of the request or the public interest of the request. TCLS does not believe that a voluminous request should mean that access would automatically be denied.

Conversely, TCLS understands that section 28(2) is rather narrow in its present form. TCLS certainly is supportive of the suggestion that the process be more consultative in order to narrow the application.

Anecdotal evidence suggests that some of those who make requests that are voluminous do so because previously they had not received relevant information for the simple reason that they had not specifically requested it or were not aware of its presence. Some applicants genuinely believe, rightly or wrongly that the "scatter-gun" approach is only approach that will actually result in a proper release.

Anecdotal evidence also suggests that on occasion, FOI decision-makers consult by simply asking "what do you want", thereby

making a mockery of proper consultation. Consultation must include the decision-maker giving the applicant some idea of what information is in existence so that the applicant is able to narrow their request. Consultation must provide individuals with some idea of the potential scope of their request, rather than assuming that each individual applicant understands exactly what information exists within Government files.

- 55.(b) TCLS cannot see how consultation with the IC(Q) would work where the refusal to grant access then became subject of external review to the IC(Q). It seems that the IC(Q) may thereby become *functus officio* and legally unable to further consider the matter.
- 55.(c) TCLS believes that the provision should be redrafted to include a mandatory requirement that the agency consult with the applicant prior to applying section 28(2).
56. TCLS believes that section 28(3) requires redrafting and agrees with the IC(Q) that the provision is overly generous to agencies. TCLS agrees that section 28(3) should be repealed.

Should section 28(3) survive the review process, then at the very least, any decision taken by an agency, pursuant to section 28(3), should include the following:

- a detailed statement of reasons as per the *Judicial Review Act 1991* – including details of exemptions relied upon; and
 - be subject to both internal and external review.
57. TCLS is concerned that insertion of such a provision may potentially be relied upon in a frivolous or vexatious manner and that such a provision needs to be tightly drafted to prevent misuse.

TCLS notes that at law, the meaning of frivolous or vexatious differs somewhat from the examples given in the discussion paper.

The High Court of Australia set out the test in *Dey v Victoria Railways Cmrs* (1949) 78 CLR 62 at 91, that is, that a claim is insupportable at law, disclosing no cause of action or groundless. Additionally, TCLS submits that the dismissal of an application for frivolous or vexatious reasons is high criteria to satisfy.

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- 58.** Serial or repeat applicants are not necessarily frivolous or vexatious at law, albeit in practice.

A separate provision as suggested by the IC(Q) seems acceptable as long as it carries the safeguard at (c)(ii) or similar safeguard.

Consultation with applicants may in fact subvert the need for applying such a provision and efforts should be made initially to explain that either the information sought is being reviewed or exempt.

A detailed statement of reasons should be supplied when such a provision is applied to a serial applicant.

- 59.(a)** See comments on Information Access Centre. It may be that one role of the IAC could be to centrally collate the data needed and provide statistical reports on the matters required.

59.(b) See above

59.(c) See Above

- 60.** TCLS submits that the 45 day time limit should be reduced to 30 days.

61. TCLS supports the time period being extended to 30 days.

62. TCLS supports the inclusion of a provision to allow extension by agreement. TCLS also considers that it is reasonable to expect that interim decision be made for partial release.

63. TCLS supports the reversal of the deeming on the basis that the onus is on the agency to make a decision within the statutory time limit and where they fail to make a decision, or fail to arrange an extension, the result should be deemed access. In practical terms however, it seems that deemed access may be impossibility, as the applicant doesn't actually get access to the information sought.

64. TCLS supports the inclusion of such a provision in the FOIQ.

65. TCLS supports the inclusion of such a provision in the FOIQ.

66. TCLS supports the inclusion of such a provision in the FOIQ.

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67. TCLS supports the extension of the limit to thirty days.
 68. TCLS opposes the reduction of the time limit in this regard.

B(VIII)

- 69.(a) TCLS supports the continued evolution of the common law via the decisions of the IC(Q) and believes that guidelines are unnecessary in this regard.
- 69.(b) TCLS opposes the inclusion of such a provision. TCLS recognises that there may be a legitimate safety concern for public servants in some agencies, however TCLS agrees with the recommendations of the IC(Q).
70. TCLS is unsure as to the truth of the allegation that post trial evidence of a personal nature has been subject of FOI for what might be described as ulterior motives. TCLS has concerns if such allegations are truthful. At present, the exemption at section 44(1) seems adequate to protect the evidence, although it does not provide certainty. TCLS submits that certainty could only be achieved by inclusion of a specific provision.
71. TCLS opposes the inclusion of such a provision at present. TCLS has concerns that preventing access to such material may in fact have a detrimental effect on the liberties of those who require access to the material for legitimate reason, for example preparation of appeals against conviction.

Ideally, however access should be limited to those who have a legitimate reason. In the case of seeking access to evidence for ulterior motives – unrelated to the evidence or trial, the section 44(1) exemption can be applied as, on balance, the public interest is not met. Conversely, the public interest may be met where a person is seeking access to evidence for legitimate motives – related to the evidence or trial.

B(IX)

72. TCLS does not support the inclusion of such a provision.
73. TCLS does not support the inclusion of such a provision. This factor should not be placed in any other higher order of prominence

than other factors relevant to balancing the public interest.

C.

- 74.(a)** See comments as to Information Access Centre. The centre could be responsible for overall coordination of the FOIQ, including monitoring compliance with the FOIQ
- 74.(b)** See comments above.
- 75.(a)** TCLS opposes this proposal.
- 75.(b)** TCLS opposes this proposal.
- 75.(c)** See comments above.
- 75.(d)** TCLS opposes this proposal.

DATED THIS 22nd DAY OF MARCH 2000.



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TOWNSVILLE COMMUNITY LEGAL SERVICE INC.