KEN SMITH, DIRECTOR-GENERAL

Telephone: 3224 8113
Reference: D12281
Refer To: Ken Smith
Your Ref:

- 4 APR 2000

Submission No 122.
Spec 1-4.

FAMILIES, YOUTH & COMMUNITY CARE
QUEENSLAND
7th Floor, 111 George Street
Brisbane Queensland 4000
GPO Box 806
Brisbane Queensland 4001
Telephone: 07 3224 8113
Facsimile: 07 3225 8833
Email:
mailbox@families.qld.gov.au

Mr Gary Fenlon MLA
Chair
Legal, Constitutional and
Administrative Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Fenlon

Thank your for your letter dated 7 February 2000 which included your Committee's Discussion Paper No.1 concerning the review of the *Freedom of Information Act 1992* (Qld).

Families, Youth and Community Care Queensland and Disability Services Queensland welcome the opportunity to participate in this consultation process including the recently held meeting with your Committee at Parliament House on Friday 17 March.

I am pleased to provide the submission of Families, Youth and Community Care Queensland and Disability Services Queensland in response to the discussion paper prepared by your Committee.

Should you require any further information regarding this submission, please contact John Parisi, Executive Director, Organisational Capability on telephone 322 48667.

Yours sincerely

Ken Smith
Director General

Enc

Families, Youth and Community Care Queensland and Disability Services Queensland Response to LCARC Discussion Paper on the Review of the *Freedom of Information Act 1992* (Qld)

Background

The discussion paper refers to a concern among several submitters that "the use of the FOIQ by some applicants as a 'fishing expedition' for litigation purposes, ie, to obtain information on which a claim might be based or as alternative to using court processes to obtain information in a law suit (discovery)". This position fails to recognise that FOI provides an avenue for accessing material before a court process commences. This consequently provides an opportunity to collate material with a view to assessing the feasibility of court action in matters of 'public interest'. For example, documents accessed through FOIQ from this department were effectively used by the former Neerkol residents in their successful campaign to establish an inquiry into the circumstances of former residents in children's homes. In a similar vein, those people whose wages had been directed to the Aborigines Welfare Fund were able to use documents obtained under FOIQ to highlight injustices of previous government practice. The use of FOIQ in these circumstances would seem to exemplify the benefits provided by FOI legislation.

Discussion Point 2

Should the objects clauses of the FOIQ be revised as the IC (Q) suggests?

The Information Commissioner's submission suggests that the current object clause is "rather too brief". However it could be equally argued that it is pithy and its simplicity and clarity strengthens its impact on decision making. It is the experience of this agency, that when grappling with a 'public interest' issue, the object "to extend as far as possible the right of the community to have access to information held by Queensland government" lends itself to automatically being incorporated into the decision-making process. In contrast, the lengthy clause proposed by the Information Commissioner that

The purpose of the act is to confer rights on persons, and impose obligations on agencies and Ministers, with the object of furthering the principles, that in a free and democratic society, with a system of government based on representative democracy and sovereign power residing in the people ...etc..

is arguably convoluted and legalistic. Certainly the language is far more formal and less accessible to most people.

Discussion Point 8

Should the entire approach to FOI in Queensland be 'reversed' so that the onus is on agencies to routinely make certain information public (with the public still having the right to apply for information not already released)?

Through the introduction of both legislative and administrative measures, FOI is increasingly a 'backup' element of the information access regimes in both FYCCQ and DSQ. For example, the newly proclaimed Child Protection Act provides parents, children and others with legally enforceable rights to certain information. Administrative information access schemes include a unit established in response to the findings of the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Inquiry). This unit provides information to former residents of children's institutions. In addition, the position of Information Review Officer has been established in the Office of Child Protection to both provide direct access to documents to current and recent service users and provide advice and support to area offices regarding administrative release of material; DSQ is currently developing policy and procedures on administrative access by service users and the parents/nearest relatives of adults with an intellectual disability.

The nature of personal information held by the department (eg notifications of child abuse) means that much of the information people are seeking is almost inevitably defamatory. As suggested in

the discussion paper, further extension of administrative access schemes would be facilitated by the introduction of statutory protection for public officers providing administrative access against actions for defamation or breach of confidence along the same lines as S102 of FOIQ. Without such a provision, staff releasing information are placing themselves at risk of being sued.

The Department maintains an Internet site known as *Community Infonet*. Users can easily access specific areas of interest as well as navigate across key service areas of the Department such as:

- Ageing, including Seniors Card;
- Community Care
- Child Care, including Cooee Kids, a special site for children in rural and remote communities;
- Families;
- Disability;
- Juvenile Justice;
- International Year of Older Persons; and
- Youth, including The Duke of Edinburgh Award.

The interactive site offers a host of information, including departmental services, funding programs, publications, new developments in DSQ and FYCCQ, community events throughout Queensland, who to contact in the Department, links to other Internet sites and feedback forms. The inclusion of policy directives and manuals on this site is possible. However significant resources would be required to update it to maintain its currency.

Discussion Point 13

Should sufficient regard to the 'right to access government-held information' be included as an example of a 'fundamental legislative principle' in the Legislative Standards Act 1992 (Qld), s4?

This proposal is supported, as it would provide a tangible measure to further the commitment to FOIQ being an access mechanism of last resort.

Discussion Point 15

What, if any, are deficiencies in particular exemption provisions – eg, are any expressed too broadly, thereby unnecessarily limiting access – and how might their drafting be improved?

It is proposed that Section 44(1) be amended to cover 'personal information' rather than information relating to 'personal affairs'. This would bring the Queensland legislation into line with those in the Commonwealth and Western Australian jurisdictions.

If the Committee determines that the term 'personal affairs' should be retained, it is proposed that the term be defined in FOIQ. Such a definition could specify those aspects of work-related information, which fall within the personal affairs of public sector employees.

It is also proposed that Section 35 be amended to include exempt matter under Section 44 of the FOI Act. Currently if an application was to be received for "documents held by the Department regarding child protection issues and the X family" from an unrelated third party, there is no provision for the Department to neither confirm nor deny whether such documents exist. The mere confirmation that the department holds such documents represents a significant invasion of the X family's privacy and undermines any commitment that the department's involvement is not subject to public scrutiny. Such a commitment is integral to the effectiveness of child protection interventions. The inclusion of exempt matter under Section 44 in Section 35 is essential to address this anomaly.

The current legislation uses both the terms 'closest relative' and 'next of kin' (see Sections 51, 53 and 59). It is proposed that a consistent term be used and furthermore that this term is defined to assist decision-makers in determining who should be consulted. As noted by the Information

Commissioner in his submission neither of these terms is defined in the *Acts Interpretation Act 1954 QLD* and that at common law, these terms may not include a deceased person's spouse.

Discussion Point 30

Should the FOIQ be extended to cover contractors performing functions 'outsourced' by government? If so, why and how should this be effected?

As noted in our earlier submission, this agency supports the contention that service users have a right to access personal information held by organisations who provide services directly to the community and are funded by government agencies. However it is not proposed that FOIQ be extended to cover contractors. The associated infrastructure and expertise required to write formal decisions, ensure the availability of internal review mechanisms and properly respond to external reviews etc. is not readily available in the community services sector.

It is not uncommon for small community based services to be managed by a committee of volunteers and have only one or two paid employees. Grants under the Gaming Machine Community Benefit Fund are often provided to agencies with no paid employees. To meet the requirements of the FOIQ Act would either not be feasible or would alter the staffing and structure of organisations to such an extent as to change the nature of the service. Certainly, those community services that most resemble government agencies in their staffing and structure would be in a better position to incorporate the requirements. As a consequence, the extension of FOIQ could – albeit inadvertently – change the complexion of the sector by favouring the large more traditional agencies and undermining the viability of smaller community based services. Many of these agencies (eg indigenous services, women's refuges, rural neighbourhood services) emerged in part because of their comparative advantage over government and the 'major' non-profit agencies in providing effective services to particular target groups. It would be counter-productive if the extension of FOIQ undermined the very diversity that has strengthened the effectiveness of the community services sector. However it is quite realistic to incorporate a requirement for an information access regime in contractual agreements.

Discussion Point 43 / Discussion Point 60 / Discussion Point 61

Should there be a statutory time limit imposed on the IC(Q) in which to deal with external review applications?

Should the basic 45 day time limit for processing applications – in s27(7)(b) of the FOIQ – be reduced to 30 days?

Should the 15 day extension for third party consultation when required under s51 – in s 27(4)(b) of the FOIQ – be extended to 30 days?

The existing time limits within FOIQ Act have presented a significant challenge to this agency. It is noted that the Information Commissioner has recommended that the time available for processing a 'basic' application should be reduced from 45 days to 30 days and the period allowed for consultation should be increased from 15 days to 30 days. This proposal seems to be based on the assumption that consultation with third parties is the cause of time delays in completing decisions. This does not accurately reflect the experience of this agency. A major difference between an agency like ours and Commonwealth and local government agencies is the nature of the services provided and, as a result, the very personal nature of information held. The central reason processing takes so long in this agency is that most documents are non-standard and many involve the personal affairs of more than one person. Great care must be taken to protect the privacy of citizens. There is rarely an intention to release personal information to a third party where a substantial concern is likely to exist regarding disclosure. Accordingly consultation is not required and is not the primary source of time delays.

The introduction of a statutory time limit on the Information Commissioner is likely to exacerbate the difficulties experienced by this agency in meeting the time limits for original decision making. Inevitably the Information Commissioner's expectations regarding deadlines for provision of

documentation, schedules, statutory declarations etc will become less flexible. This will add to the pressure already experienced by the agency. However while the introduction of a statutory time limit on the Information Commissioner is not supported, it is proposed that the Information Commissioner be obliged to undertake external reviews in order of receipt. If 'public interest' or other reasons emerge as to why a particular review should be undertaken out of order, this should be acknowledged in writing and the reasons for the priority stated.

Discussion Point 46

Should the IC(Q) be empowered to order disclosure of otherwise exempt matter in the public interest?

This agency would not support such a proposal. Of particular concern is that it would negate the commitment made by the Department that the source of child protection notifications is not disclosed unless leave is granted by a court or tribunal. The recently proclaimed Child Protection Act includes a specific provision relating to the confidentiality of notifiers of harm. The possibility of the IC (Q) determining that disclosure of such matter was in the public interest would undermine a central element of the child protection system and should not be countenanced.

Discussion Points 70 and 71

Is the balancing of the public interests required by S44 (1) of the FOIQ sufficient to protect the evidence of children/adult victims of serious offences from use outside court processes?

If not, should 'personal affairs' be defined in the FOIQ to include recordings of evidence of children/ people generally?

Defining transcripts or tapes of evidence of victims as their personal affairs does not preclude the possibility of the material being disclosed in the 'public interest'. To ensure with some certainty that it could never be disclosed, the material would have to fall outside the ambit of the FOIQ Act. This could be achieved through amendment to Section 22. Such a proposal could attract criticism from the perspective of 'natural justice'. However it may be more appropriate for access to such material to be handled through application to the relevant court.

Other Matters under the Committee's Consideration

People with intellectual disabilities

The Committee has indicated that they are considering "the insertion of specific provisions concerning FOI use by intellectually disabled persons and minors". In this regard they have referred to the submission of the Information Commissioner (Queensland). Concern is held that the example does not adequately reflect an understanding that there are a range of disabilities and capacities among the people he has broadly- and inaccurately - characterised as 'intellectually disabled'. For example, distinctions may be required in the approach to people with psychiatric disabilities, people with acquired brain injury/impairment, people with dementia etc.

The Information Commissioner has proposed that if the FOIQ requires consultation with a person and if that person has an intellectual disability then routinely their closest relative or next of kin should be consulted on their behalf. This agency is concerned that that this proposal automatically presumes incompetence on the part of the person with an intellectual disability. This is clearly not the case. The approach should be based on the principle of presumed capacity, as in the Powers of Attorney Act. It is consistent with this approach to acknowledge that in certain circumstances a person may have an impaired capacity. This would then accommodate the other disability types (eg a person with a psychiatric disability of an episodic nature who may times have the capacity, and at others, not have capacity) and people with dementia.

DSQ proposes that the person with a disability who also has impaired capacity has the same rights as other people. It is a right of people to be involved throughout the process. The suggestion of the

Information Commissioner that the Act could be amended - to consult with the nearest relative "instead" – is not supported by DSQ.
Further it assumes that in circumstances in which a person does not have the capacity to form a view whether material is exempt from disclosure then their closest relative will share concurrent interests with the person. Unfortunately this is not always the case. It would be more appropriate to involve the person's substituted decision maker(s), who may or may not be a family member. When there is no family member or support network to assist the adult with impaired capacity or where there is dispute, the Adult Guardian may be appointed to a decision making capacity on behalf of the adult with a disability. In 1998 the Powers of Attorney Act established the office of the Adult Guardian. The Adult Guardian has responsibility to protect the rights and interests of people with impaired decision making capacity.

Minors

FOIQ does not distinguish between children and adults. This lack of distinction provides for the possibility of children having separate personal affairs from their parents. This is crucial to the effective operation of FOI in relation to documents relating to child protection. In circumstances, where parents' interests are concurrent with their children's there is no difficulty in disclosure of material. However if parents were generally able to act as agents for their children, it would preclude the possibility of their being able to communicate confidentially; for example, they would not be able to make complaints of being abused by a parent without the parent having a right of access to this material. Such a situation is untenable. A further complicating factor would arise in circumstances where parents are separated. It would need to be resolved whether the rights of parents differ on the basis of whether the child resides with them. The lack of distinction between children and adults in the current legislation provides scope for decision-making to occur on a case by case basis. While the repercussions of amendment are uncertain, change is not supported.