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Spec 1-4

3 April 2000

Mr G. Fenlon MLA
Chair
Legal, Constitutional and
Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Fenlon

Re: Review of the *Freedom of Information Act 1992*

I refer to the Legal, Constitutional and Administrative Review Committee's invitation for a second round of public submissions in relation to the review of the *Freedom of Information Act 1992 (Qld)*, with respect to broad policy issues.

The attached submission is directed toward addressing the peculiar needs of the Queensland Police Service as a law enforcement agency, and a public interest in promoting the principle of accountable government.

Should you have any inquiries regarding this submission please contact Superintendent John Doyle, Freedom of Information Unit (telephone 3364 4670).

Yours faithfully

R.N. McGibbon

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DEPUTY COMMISSIONER
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Supplementary Submission to the Legal, Constitutional and Administrative Review Committee

On the review of the

Freedom of Information Act 1992 (Qld)

By the

Queensland Police Service

March 2000

INTRODUCTION

As a consequence of release by the Legal, Constitutional and Administrative Review Committee of a discussion paper on the *Freedom of Information Act 1992 (Qld)*, the Queensland Police Service responded with a detailed submission on technical issues in May 1999. This supplementary submission is therefore directed toward addressing a limited number of issues relating to broad policy or freedom of information principles emanating from the review. It also provides an avenue to comment on some of the submissions made by the Information Commission (Qld) to the Committee.

Part A – Supplementary Submissions

Some seventy five (75) discussion points have been identified within the paper released by the Committee. However, it is considered appropriate on this occasion to restrict response to some specific issues, referencing comments to points as numbered within the discussion document.

1. REFERENCE 'A' - Whether the basic purposes and principles of the Freedom of Information Act have been satisfied, and whether they now require modification.

While the purpose of the legislation was a furtherance of the principle of open government, the majority of applications received by the Queensland Police Service are observed to relate to a discovery process in either contemplation or furtherance of private legal proceedings.

Employment of investigation agents or accessing documents through usual discovery processes have been identified as involving considerable monetary expense, as well as being often time consuming. An application submitted pursuant to the freedom of information legislation effectively moves the attendant cost factor to the government agency concerned.

It is submitted that a balance needs to be identified between the public interest in maintaining processes allowing access to documents held by government agencies, and a need to limit the consequent administrative burden experienced by an agency.

With a growth in community awareness of legislative provisions, the Police Service has observed a corresponding increase in access applications. A very real concern is the extent to which resources will ultimately have to be diverted away from performance of the principal functions of the agency.

2. REFERENCE 'B'(vi) -The appropriateness of and the need for the existing regime of fees and charges in respect of both access to documents and internal and external review.

The existing regime is premised, as indicated in section 29(2), on distinguishing applications for documents concerning the personal affairs of the applicant from all other types of applications.

These two classes do not form a rational distinction for an organisation such as the Queensland Police Service.

The core casework functions of the Police Service result in generation of documents that concern the inextricably entwined personal affairs of two or more persons, often the complainant and suspect / offender.

A current interpretation of section 29(2) provided by the Information Commissioner is that no fee shall be payable if the document sought contains some information relating to the applicant's personal affairs, notwithstanding the fact that it also contains information concerning the personal affairs of another individual. See *Re Stewart and Department of Transport* (1993) 1 QAR 227.

Although documents may be *predominantly* concerned with the personal affairs of a third party, no fee is required from the applicant. In many cases the Police Service is required to undertake extensive third party consultation in accordance with section 51 of the Act.

It is further asserted that in endeavours to process applications a considerable editing process is involved, with a consequent need for the agency to provide an applicant with a detailed explanation of exemption provisions. Applications concerning mixed personal affairs of third parties often generate internal reviews.

Section 29(2) was perhaps drawn in anticipation of many agencies holding documents, or a readily identifiable file relating to a series of transactions, involving the agency and a particular individual – perhaps a client of the agency. That distinction is not appropriate for this agency, and probably not useful or conducive of certainty for many other agencies.

3. REFERENCE 'B'(vii) Whether the FOI Act should be amended to minimise the resource implications for agencies subject to the Act in order to protect the public interest in proper and efficient government administration, and in particular:

- **whether s28 provides an appropriate balance between the interests of applicants and agencies;**

The intention of section 28 of the FOI Act was to allow agencies to refuse to process applications where a substantial and unreasonable diversion of the resources of an agency would occur. The current wording of the section, however, has proven to be unduly restrictive in application of this provision.

This section provides that the substantial and unreasonable diversion has "*regard **only** to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents*" (emphasis by the writer).

There are many instances where actual application of the exemption provisions is the cause of an unreasonable diversion of an agency's resources. For instance, there may be 1500 documents relevant to a

particular application. Such volume would alone be insufficient reason to invoke the operation of section 28. However, of these documents there may be 10 to 15 exempt words or phrases per document (names, addresses, etc.). This would require staff to physically remove or excise 15,000 to 22,500 words or phrases. Editing is therefore demonstrated as substantially and unreasonably diverting the resources of an agency.

It is recommended that an appropriate amendment be made for the purpose of rectifying this anomaly.

4. REFERENCE B(vii) (continued) - whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purpose;...

While this issue was addressed in some detail by the Queensland Police Service in the May 1999 submission, it has come to attention that statistical data included in the reporting process may be seriously inaccurate and misleading. This appears to be due to differing interpretations by agencies with respect to data required to be recorded.

Example 1: One agency maintains a record of each time an exemption has application to an entry within the page of a document, while a second agency records the exemption as having been applied once per page. If ten words or phrases are therefore exempt pursuant to a particular provision, the first agency's statistical return will reflect that fact. However, the second agency, while utilising the provision to the same extent, will be shown as having less reason to apply the exemption.

Example 2: Where refusal results as a consequence of the application of an exemption provision, it is not always clear from resultant statistics that such refusal was due to the availability of the documents through another scheme as provided by section 22 of the Act. A wrong impression may be created where an agency, having made access to material available by introduction of an appropriate scheme, is seen to record a substantial number of refusals in the statistical return.

A second issue is the degree to which detailed statistical information may be identified as helpful in estimating the extent to which the objectives of the legislation are being met. It is asserted that the only truly relevant data would consist of the

- number of applications received;
- number of times access to documents is refused; and
- number of internal and external reviews.

The stated information would adequately ensure accountability by an agency and satisfy public interest.

5 REFERENCE 'C' - Any Related Matter

(i) (Section 35) Information as to existence of certain documents

Although an agency or Minister is not required to give information as to the existence or non-existence of a document containing exempt matter pursuant to sections 36, 37 or 42, the current wording of section 35 of the Act does not include section 44 matters. This creates a major difficulty in situations where a person's privacy is invaded merely by the confirmation that documents are in existence, and no allowance is made for adequate protection of a person's *personal affairs*.

Example 1: **A** requires information relating to a situation where **B** was charged with a serious offence (perhaps years ago), but those charges were subsequently withdrawn. The mere confirmation that documentation is in existence tends also to be a confirmation that **B** was involved in a police investigation, even if the documents themselves are found to be fully exempt.

Example 2: An applicant requests access to another person's criminal history. Any information that discloses the existence of any such documentation may be as invasive of privacy as release of the information contained in the document.

It is therefore recommended that consideration be given to the inclusion of section 44 in the provisions of section 35 of the Act.

(ii) Assessment of Documents - Responsibility of Decision Maker

Notwithstanding the existence of specific exemption provisions within the Act, it is not always a simple duty to foresee whether substantial harm may be caused by the release of documents. A decision maker is often required to conduct his/her assessment in isolation and without any clear indication of the intended use to be made of the information by an applicant.

This issue is of particular concern to the Queensland Police Service, having regard to some specific cases where the applicant's own history demonstrated a vengeful nature. While it is noted that section 42(1)(c) is designed to afford some protection in these circumstances, given the interpretation by the Information Commissioner in *Murphy and the Queensland Treasury* (1993) Decision No. 95023, this provision has limited application. Release of information that might easily lead the applicant to identify the informant may easily put the safety of that person at risk.

It is submitted that a special provision should be considered to permit refusal of documents where a substantial risk may be reasonably envisaged, even though this course might be contrary to public interest in normal circumstances. Naturally there remains a necessity of ensuring accountability on the part of the agency, but without such a provision a rather onerous responsibility is being placed upon the decision maker.

Part B – Submission by the Information Commissioner (Qld)

The QPS has been afforded an opportunity to view the submission of the Information Commissioner (Qld). At the outset the QPS wishes to acknowledge that the submission is comprehensive, well researched and adds much to the discussion to the review of the FOI Act. It canvasses many issues, which the Information Commissioner (Qld) opines, will ensure the continued effectiveness of the freedom of information legislation in Queensland. Some of the Information Commissioner's (Qld) submissions are supported by the QPS, many are not.

The QPS does not propose to undertake a detailed analysis of the theories and philosophies underpinning his submission. Rather, this agency will highlight some submissions, which it is considered, do not accurately reflect the experience of agencies in processing FOI applications. As only 3% of FOI applications ever proceed to external review (paragraph A20 OIC submission) it may be the case that the Information Commissioner (Qld) does not fully appreciate the ramifications of the FOI Act on agencies at an operational level.

1. Privacy and Consultation

From the tenor of the Information Commissioner's (Qld) submission it would be understandable (though mistaken) for a person to have the impression that agencies are reluctant to release government information and rely heavily on the exemption provisions to conceal documents from release. This impression is far from reality.

The experience of the QPS is that the majority of FOI applicants are applying for documents in which they have some interest. However, whether the applicant is a suspect, complainant or witness they generally seek access to documents that involve other people.

The reference to individuals in documents, other than the FOI applicant, often raises issues of third party privacy. The QPS's section 108 report for 1998/99 indicates that the privacy exemption contained in section 44(1) of the FOI Act accounted for 69% of all exemption provisions used by the Service. The perception that this agency is using the exemption provisions to predominantly protect the QPS policy or decision making documents from release is far from the reality. The predominate exemption provision used by the QPS is to protect the privacy of third parties.

This agency is cognisant of the need to ensure that the privacy of individuals is not unduly or inappropriately invaded.

The QPS considers that the need to protect the privacy of individuals extends not only to the application of the exemption provisions but also to the determination of whether individuals should be consulted pursuant to section 51 of the FOI Act.

Section 51 of the FOI Act states that where an agency believes that the provision of access to a document could reasonably be expected to be of substantial concern to a person, the agency should take steps to obtain that person's view as to whether or not the document contains exempt matter.

The Information Commissioner (Qld) has been critical of agencies who have refused access to matter which relates to third parties without consulting those third parties (see paragraph B228 OIC submission). This agency has often adopted the considered view to refuse to release information relating to third parties without consulting the third party. This occurs when the QPS considers that the subject matter amounts to the *"personal affairs"* of the third party and that the mere process of consultation would constitute an invasion into the privacy of the third party. For instance, this agency often receives applications from convicted or alleged offenders of sexual abuse or sexual assault. This Unit has adopted the policy of not consulting with the third party victim and automatically claiming the section 44(1) exemption. To contact the victim of such offences, often years after the incident, for the purposes of an FOI consultation amounts to a re-victimisation of the victim.

The Office of the Information Commissioner (Qld) has adopted a contrary practice and will often consult with victims of crime. Such a practice erodes the rights of the victim and in many instances the victim believes that the FOI process is being used by the FOI applicant as an indirect form of harassment.

This matter highlights the practical approach adopted by agencies at a 'grass roots' or operational level as opposed to the more philosophical approach adopted by the Information Commissioner (Qld).

2. External Review

The submission by the Information Commissioner in relation to the external review process raises two (2) issues regarding timeliness and the legalistic nature of his decisions.

It is accepted that the under-resourcing of the Office of the Information Commissioner (Qld) has had a significant impact on their ability to deal with external reviews in a timely fashion. It would appear that the Information Commissioner (Qld) is satisfied that the recent increase in funding is satisfactory to deal with the current demand for his services. At paragraph B172 of his submission, the Information Commissioner (Qld) noted the progress that he has had in dealing with the backlog of external review

applications. Nevertheless there is still 15% of external review applications made in the 1997/98 financial year which have not been finalised and one would suspect that there are some earlier reviews which have also not been completed. The Service has previously identified an external review which has taken six years to finalise.

The time consuming finalisation of external reviews is disadvantageous to both FOI agencies and FOI applicants.

The submissions made by agencies to exempt documents from release lose their currency and applicability through the expiration of time. The fact that documents are ultimately released to applicants by the Information Commissioner (Qld) is not of concern. The real issue is that considerable resources have been expended making submissions to the Information Commissioner (Qld) on a set of facts that exist at the time.

Whether such delay in making determinations is by design or is an unintended consequence of the backlog of files is not known.

Lengthy delays to finalise external reviews are also disadvantageous to applicants and third parties that may be effected by the decision, some of whom have moved, changed employers or even passed away.

The QPS is not advocating that strict statutory time limits apply to the Information Commissioner (Qld) to finalise external reviews. The complexity and exigency of each review will make it difficult to adhere to strict time limits. The Service does consider it appropriate for the Information Commission (Qld) to make some commitment in terms of policy to process external review applications in a given time. A period of 18 or 24 months would seem to be most generous.

The legalistic nature of the Information Commissioner's (Qld) determinations has also been criticised by many agencies. The Information Commissioner (Qld) has defended this matter by referring to the legal framework which he is required to operate in. He has also championed the Information Commission (Qld) model claiming advantages over a court or tribunal that adopted court like procedures. This includes *"greater access to justice for individuals, in the form of a less confrontation and less intimidating forum for dispute resolution"* (paragraph B145 OIC submission).

The published determinations and determinations by way of letter issued by the Information Commissioner (Qld) are of such length and complexity that it is doubted that any FOI applicant can actually understand them. It would appear that there has been no attempt at all to make these determinations reader friendly or even comprehensible to a lay person.

The QPS has been faced with a similar problem in the past, that is the statutory requirements of the FOI Act often result in the determinations of this agency being complex. To remedy this situation, the Service frequently forwards a 1 ½ to 2 page determination letter to an applicant summarising this

agency's decision in plain non legal language. An annexure is then attached to this letter which contains a comprehensive analysis of the relevant legislation and case law. This manifests a belief of this agency that FOI applicants should be informed of the FOI determination in a manner that they can comprehend. It is axiomatic to the attainment of justice that FOI applicants are made aware of decisions that affect them in a manner that they can comprehend. Indeed, one would have thought that this would have been the advantage of the Information Commissioner (Qld) model over a court or tribunal.

Due regard must be had to the identity of the FOI applicant including their level of education to ensure that they are not disadvantaged in any FOI external review.

3. Section 22

The mischief intended to be addressed by the FOI Act was the general inability of citizens to access documents held by government.

To this end, the intention of section 22(a) and 22(b) of the FOI Act is to refuse applicants access to documents which they could otherwise obtain under an enactment or arrangement made by an agency.

The current wording of section 22(a) and 22(b) of the FOI Act does not reflect the legislative intention of these provisions and the QPS supports the amendment sought by the Information Commissioner (Qld).

These sections lead to an issue regarding the use that persons are making of the FOI process. FOI applicants frequently use the FOI process as a form of discovery.

If participants involved in legal proceedings could obtain documents under a discovery process then agencies should be able to rely on an appropriately worded section 22 to refuse to process an FOI application for those same documents. In such a case a refusal to provide those same documents under the FOI Act would still be consistent with the object of the FOI Act and the reasons for its enactment. Accordingly, an appropriate amendment is requested.