QUEENSLAND GOVERNMENT

Minister for Aboriginal and Torres Strait Islander Policy
and Minister for Women's Policy
and Minister for Fair Trading

The Hon. Judy Spence MLA
Member for Mount Gravatt

Submission No 127

DA00/0022

04 APR 2000

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

Dear Gary,

I refer to your letter of 7 February 2000, enclosing the Legal, Constitutional and Administrative Review Committee's ("the Committee's") Discussion Paper No.1 on review of the *Freedom of Information Act 1992* ("the FOI Act").

The submissions from the Department of Equity and Fair Trading (DEFT) and the Department of Aboriginal and Torres Strait Islander Policy and Development (DATSIPD) have been enclosed as Attachment "1".

I would like to thank the Committee for the opportunity to provide submissions in relation to its inquiry.

Yours sincerely,

Judy Spence

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ATTACHMENT 1

DEPARTMENT OF EQUITY AND FAIR TRADING AND THE DEPARTMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER POLICY AND DEVELOPMENT

REVIEW OF THE FREEDOM OF INFORMATION ACT 1992

RESPONSE TO DISCUSSION PAPER NO.1

This submission has been produced by the Department of Aboriginal and Torres Strait Islander Policy and Development (DATSIPD) and Department of Equity and Fair Trading (DEFT) in response to the LCARC Discussion Paper No.1 which seeks comment on any or all of the discussion points contained in the paper by 7 April 2000.

1. While the committee welcomes further comment on FOI purposes and principles, their satisfaction and whether (and, if so, how) they require modification, the committee would particularly like to received comments about the compatibility of FOI purposes and principles with out Westminster-style system of government.

As DATSIPD and DEFT have previously made a detailed submission to the Committee, discussion points raised in the paper have not been addressed in detail where it is considered that the same issues have been previously considered. A copy of the previous submission is attached.

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

In his second reading Speech introducing the FOI Bill the then Attorney General said :

"The Bill replaces the presumption of secrecy with the presumption of openness".

At page 4 of his speech he recognised that the objectives of the Bill were:

- to give any member of the community the legally enforceable right to seek access to information contained in documents held by a minister, or agency subject only to the exemptions specified in the Act; and

- to provide a means whereby personal information held about people can be accessed by them and amended if incomplete, incorrect, out of date, or misleading; and

- to make information about an agency's operations open to the community by requiring the publication of information about its structure, policies and practices in dealing with members of the community.

DATSIPD and DEFT believe that these objectives are clearly recognised by section 4, 5 and 6 of the FOI Act. It is our view that the addition of "objects clauses" may assist in problems involving statutory interpretation and resolution of ambiguity, as the Second reading Speech currently does, but in reality such clauses add little to the currently stated intentions of the Act.

DATSIPD and DEFT have no objection to an extended objects clause but question whether it will achieve or address what appears to be a concern that the spirit and intent of the Act is not always embraced by agencies/government.

It is the view of the DATSIPD and DEFT that rather than inserting new objects clauses in the Act, it would be preferable to be less prescriptive and address issues of "objects" and a "presumption or guiding principle of access" by way of articulated policies and enhanced training.

3. In particular, should the FOIQ include:

(a) a provision stating that the Act is to be interpreted in a manner that furthers the Act's stated objects [like the FOIC, s 3(2)]?; and/or

(b) a guiding principle or presumption of access?

The suggestion that a clause be inserted to ensure that the Act is only interpreted in a manner that furthers the Act's stated objects may be superfluous. Section 14A of the *Acts Interpretation Act (Qld) 1954* provides as follows:

(1) *In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.*
(2) *Subsection (1) does not create or extend criminal liability but applies whether the Act's purpose is expressly stated in the Act.*
(3) *To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.*

4. Should the relationship between the exemption provisions and the objects clauses of the FOIQ be made more clear? For example, should the FOIQ provide that the exemption provisions 'operate subject to' or 'are to be interpreted in furtherance of" the objects of the Act? Alternatively, should the objects clause avoid direct reference to the exemptions?

5. Alternatively, if the FOIQ is to promote disclosure (in the interests of open government) should the reference to the exceptions and exemptions be removed from the objects clause?

It is our view that as the Act already encourages an interpretation favouring disclosure and acknowledges the existence of competing interests, it is not necessary to remove references to exceptions and exemptions. Clearly the public interest in disclosure will always be limited by the genuine public interest in non-disclosure of certain specified categories of information which comes into the hands of Government.

7. **Is there a 'culture of secrecy' in Queensland? If so, how is this evident? What can be done to overcome any such culture?**

It is, in our submission, an exaggeration to say that a "culture of secrecy" exists in Queensland. In our view any concerns about the culture of public sector agencies can be overcome by ongoing education programs including instruction at the induction of new employees so that more and more, public scrutiny of government action is recognised as a "fact of life" in public sector agencies. In our view there is a distinct lack of training and education regarding administrative law generally, and particularly Freedom of Information. At present the only source of training available is on the job or by way of private training providers engaged by individual departments.

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 so released)? If so:**
   (a) **How should this be achieved, eg, by statutory or administrative instruction?**
   (b) **What sort of (additional) information should agencies be required to routinely publish?**
   (c) **What (other) considerations are relevant?**

Question 8 in the discussion paper asks whether certain information should be made public as a matter of course. The *Financial Administration and Audit Act 1977* already imposes certain reporting requirements on Agencies while the Freedom of Information Act requires all agencies to publish a Statement of Affairs.

The vast majority of FOI applications are from persons seeking material which has a particular significance to them personally. This is recognised at page 7 of the LCARC Discussion Paper in the statistical profile of external review applicants for 1998/99 which reveals:

- *A low number of external review applications by politicians, journalists, citizens and lobby groups;*
- *The largest user group is (current and former) public servants seeking information about workplace disputes followed by business-people/ businesses seeking information for purposes relating to their business;*
- *Only 3% of cases involved applications by persons seeking information for use in pending or proposed legal proceedings; and*
- *The vast majority of external review applicants are citizens seeking personal information.*

Therefore, it may be difficult to justify the significant expenditure that would be required to establish and maintain such administrative access schemes when the question of whether the public is seeking such information is still in doubt. However, DATSIPD and DEFT are supportive of any mechanisms that

achieve greater openness and accountability, provided adequate funding is allocated to any such schemes. We would not support any proposal that resulted in funding being taken away from core services to the clients of DATSIPD and DEFT

9. Is the existence of the FOIQ adequately publicised? If not, how could it be better publicised? [For example, through public libraries, on-line, by assigning promotion of the FOIQ to somebody—see T/Ref C(i).]

It is conceded that in the general community there may not be a high level of awareness of the availability of FOI processes. Given that most interest in FOI comes from individuals seeking personal affairs matter and businesses seeking business related matter, it stands to reason that information regarding the availability of FOI should be provided to persons when they have dealings with government e.g. upon application for a licence, registration, submission of a tender or participation in an investigation.

10. In addition to any suggestions made in response to the above discussion points, are there any other ways in which the FOIQ, part 2 provisions concerning the publication of statements of affairs and other documents might be improved?

One option for consideration in this regard is to assign responsibility to a central body similar to as the former Human Rights and Administrative Law Branch of the Department of Justice and Attorney General but independent of any particular Department. The use of new technology such as the World Wide Web should also be considered as a medium to publish the departmental documents.

11. Is there scope for performance agreements of senior public officers to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information including FOI requests?

It is our view that while all public sector employees could benefit from an increased awareness of Freedom of Information, it would be unrealistic to include the above requirement in the performance agreements of senior officers. Linking performance agreements to outcomes of the Freedom of Information process could give rise to a perception that the Freedom of Information decision maker is acting at the direction of more senior officers.

It is a fundamental principle of administrative law that a person acting in such a role should not be fettered in the exercise of his or her discretion. Similarly it is important that the outward perception is that the decision maker is acting independently.

12. Should the title of the FOIQ be changed to the *Access to Information Act*?

Our view is that a change to the name of the legislation is not required and our preference would be to retain the term "freedom of information" which in our view, carries a more positive connotation.

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), s 4?

The is some merit in including the right to seek access to documents of public sector agencies as a "fundamental legislative principles" under the *Legislative Standards Act*. Such principles can of course be excluded, but only for sound public interest considerations and subject to the satisfaction of the Scrutiny of Legislation Committee.

Alternatively, it is preferable that all exclusions from the FOI Act be effected only by amendment of the FOI Act. We are in agreement with the Information Commissioner's view that agencies should only be excluded from the application of the FOI Act by amendment of the FOI Act or Regulations. It is otherwise difficult to know whether the Act applies to a particular situation.

However this does not address the current unsatisfactory position whereby any agency can be excluded from the operation of the Act by way of Regulation pursuant to section 11(1)(q) of the Freedom of Information Act which is, in effect, a Henry VIII clause.

14. Should any of the current exemptions be removed from the FOIQ? Should any new exemptions be inserted?

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?

Please refer to the earlier submission by DATSIPD and DEFT on these issues

16. Should the different harm tests that are (or should be) contained in the FOIQ exemption provisions be rationalised and/or simplified? If so, what form(s) should they take?

17. Should the harm tests be made more stringent, eg, by requiring decision makers to show that disclosure would result in *substantial* harm?

The application of exemptions contained in sub-sections 45(1)(b) (diminution of the commercial value of information) and 45(1)(c) (adversely effect business, professional, commercial or financial affairs) is problematic and

could remedied by insertion of a further requirement that the harm should be "substantial".

It is submitted that it is not appropriate to add a *harm* test or a *public interest test* to the exemptions provided for by sections 43 and 46. To do so would make documents available under FOI when such documents are not otherwise obtainable under long standing and accepted principles of law.

In its present form, Section 43 ensures that a document which would be protected from production in legal proceedings would not otherwise be obtained under the Act.

Section 46 (1)(a) provides that matter is exempt if its disclosure would found a breach of confidence. If one considers the relevant common law it is clear that a breach of confidence is difficult to establish and accordingly if applied correctly, the exemption in 46(1)(a) would be rarely applied. In our experience it is very rare that the common law " five point test" adopted by the Information Commissioner can be satisfied.

18. Should there be a general harm test imposed on all exemptions? If not, what exemptions are not suited to the application of such a test and why?

As a general rule, we are of the view that information held by government should be available to the general public unless there is a possibility of harm occurring to the interests of the government or third parties. However, we are also of the view that the "harm" test is not appropriate to certain exemptions. As stated above, it is not appropriate to add a "harm" test to the exemptions provided for by sections 43 ,46 and 50 so as to make documents available under FOI when such documents are not otherwise obtainable under long standing and accepted principles of common law.

19. Should there be a general public interest test imposed on all exemptions? [For example, the FOIQ could instead express the exemptions as a list of interests and documents to be protected, all of which are subject to the one public interest test (perhaps in addition to being subject to a single harm test: see above).] Are any exemptions ill-suited to the application of a public interest test and why?

20. Should the 'public interest' as it relates to exemptions be defined in the FOIQ? Alternatively, should the FOIQ deem any specified factors as relevant, or irrelevant (eg, embarrassment to government), for the purpose of determining what is required by the public interest?

21. If the 'public interest' is to remain undefined in the FOIQ, should more guidance be provided on how to apply the public interest test by other means? [For example, through guidelines issued by the IC(Q).]

When deciding on access there is a requirement to take public interest considerations into account section under section 34(2)(g). At present the

application of most exemption provisions is subject to a public interest balancing test. In our submission it would be difficult to predetermine public interest considerations and to do so could well restrict the discretion of decision makers to make information available.

On the other hand it may be useful to provide guidance in the form of administrative guidelines or a listing of matters which may be relevant in balancing competing public interests relevant to matter which may be prima facie exempt. Such a list could be prepared by an independent unit (such as former Human Rights and Administrative Law Branch of the Department of Justice and Attorney General) as a policy document. Such a process could then allow for the significant consultation that would be needed with all public sector agencies.

23. **Should—and, if so, what—action be taken to prevent the exclusion of agencies, or part thereof, from the application of the FOIQ by: (a) regulation; and (b) legislation other than the FOIQ?**

24. **Should a mechanism be introduced whereby specific bodies to which government provides funding or over which government may exercise control (and which are not otherwise 'agencies' within the meaning of the FOIQ) are made subject to the FOIQ? If so, what form should that mechanism take?**

As stated above DEFT and DATSIPD are in agreement with the Information Commissioner's view that agencies should only be excluded from the application of the FOI Act by amendment of the FOI Act or Regulations as it is otherwise difficult to know whether the Act applies to a particular situation.

It is the view of DEFT and DATSIPD that there is a case for greater accountability of organisations which obtain government funding but that it is impracticable to extend the Act to all such bodies. Many community organisations receive government funding but typically operate on limited budgets and given the costly nature of FOI and the need for specialised decision-making knowledge, such a proposition is untenable. It is suggested that increased accountability could be achieved in this regard by enhanced audit and reporting requirements.

25. **Should GOCs and LGOCs, as a matter of policy, be excluded from the application of the FOIQ in relation to their (competitive) commercial activities? Why/why not?**

26. **If GOCs and LGOCs are to be so excluded, is the manner of exclusion effected by ss 11A and 11B appropriate? If not, how should they be excluded?**

27. **Should the government be able to, by regulation, prescribe GOC community service obligations in relation to which documents are not accessible under the FOIQ?**

28. **Should there be additional controls in respect of documents of LGOCs being excluded from the FOIQ given the IC(Q)'s concern about LGOCs' method of creation?**

As stated in our earlier submission, DEFT and DAPSIDP are of the view that as GOCs are fundamentally public in nature in terms of funding and

accountability to ministers. In light of this it is important that individuals should have an effective and cost-effective means of seeking redress. In the absence of public law remedies, individuals must seek private law remedies which are more costly and often less conducive to a satisfactory resolution.

31. **Do the current commercial exemptions in the FOIQ—principally, ss 45 and 46—require amendment to ensure that an appropriate balance is struck between disclosure of information in the public interest and the protection of legitimate business interests? If so, what amendments need to be made?**

32. **What more can or should be done to try to ensure that agencies do not inappropriately claim that documents fall within the ss 45 and 46 exemptions? (For example, should the IC(Q) or some other body issue guidelines or otherwise have a monitoring role in relation to agencies invoking the exemptions?)**

While section 46 (1)(a) provides that matter is exempt if its disclosure would found a breach of confidence, if one considers the relevant common law it is clear that a breach of confidence is difficult to establish and accordingly, if applied correctly, the exemption in 46(1)(a) would be rarely applied. Guidelines regarding the application of s46 would be useful to clarify the fact that the concept of "breach of confidence" is a difficult test to establish at common law.

As stated above the application of exemptions contained in sub-sections 45(1)(b) (diminution of the commercial value of information) and 45(1)(c) (adversely effect business, professional, commercial or financial affairs) is problematic owing to lack of specificity. The insertion of a further requirement that the harm should be "substantial" would go some way toward resolving uncertainty as to whether the exemptions in s45(1)(b) or 45(1)(c) are applicable.

It is also our view that there is an important role for policy and training mechanisms to ensure correct understanding and application of the exemption provisions. Again we recommend that an independent unit such as former Human Rights and Administrative Law Branch of the Department of Justice and Attorney General be established to carry out such functions.

33. **Should the FOIQ confer a general right of access to *information* instead of a right to documents? If so, what should 'information' encompass?**

Having regard to the wide definition of "document" in the Acts Interpretation Act and sub-section 30(1) of the FOI Act it is submitted that the distinction between *"information"* and "*documents*" is adequately addressed and the use of the word "*documents*" does not impact on the types of information available.

34. **If the FOIQ is to continue to provide for access to documents, can the definition of *document* be improved? (For example, by clarifying that it includes data?)**

It is submitted that the current definition of *document* is adequate.

35. **What more can be done by agencies to assist FOI applicants in accessing *all* relevant documents (ie, including electronic and other non-paper form documents)?**

36. **How can agencies improve the efficiency and thoroughness of their procedures to create, manage and retrieve electronic documents, and, in particular, electronically provide access to documents to FOI applicants?**

There is scope for use of new technology eg scanning and provision of documents by computer disc or E-Mail. Subject to the acquisition of new technology and staff training, the use of this technology could result in quicker turnaround times and a reduction in postage costs. As the Act currently contemplates a "paper" regime and provision of photocopies, legislative amendment would be required before any such schemes could be considered.

37. **Which documents should be considered in the possession of an agency for the purposes of the FOIQ? Need the Act's definitions of 'documents of an agency' and 'official documents of a Minister' be amended in this regard? Alternatively, how might the FOIQ charging regime account for agencies' identification and retrieval of documents potentially relevant to an FOI request that are 'documents of an agency' but not in the agency's physical possession?**

As outlined in our earlier submission, DEFT and DAPSIPD are concerned that a document may be prepared by another agency and in its original form is exempt from disclosure under the Act e.g. under s.11. However the document may subsequently come into the possession of another agency and is then subject to disclosure. Please refer to our earlier submission on this issue.

38. **Should internal review necessarily be a prerequisite to external review? If not, should there be conditions attached as to when and how an applicant can proceed directly to external review? [For example: agreement of both the applicant and agency; by leave of the IC(Q)?]**

39. **Is there a case for any other model or a variation of the existing model of external review under the FOIQ?**

Given the large backlog and consequent time delays in obtaining external review decisions from the Information Commissioner, it is likely that the Information Commissioner's workload would increase significantly if internal review was no longer a prerequisite to external review. On the other hand, it is difficult for an internal reviewer to make an adequate decision within the statutory 14 day period. An internal review is a de-novo process involving a

complete review of documents and further consultation where necessary. It is submitted that an alternative solution to this issue is to extend the timelimit for making internal review decisions to 30 days. However, DATSIPD and DEFT do not oppose the proposal to let an applicant proceed directly to external review if both the agency and applicant concur an the course of action.

It is considered that subject to certain procedural changes and the provision of sufficient resources to the information commissioner, the current regime of external review by the information commissioner is preferable. It is considered that replacement by a formal tribunal with rights of appearance would be time consuming, and costly without providing significant advantages. It is considered that the provision of funds for increased staffing levels and increased reliance on informal dispute resolution would greatly enhance the effectiveness of the Information Commissioner. Please refer to our previous submission on these issues including our suggestions for improving the external review model.

41. **If, as T/Ref B(v) queries, the method of 'review and decision' by the IC(Q) is 'excessively legalistic and time-consuming', how in light of the above discussion can the IC(Q) adopt less legalistic and quicker processes? For example, is there more scope for the IC(Q) to use informal dispute resolution mechanisms?**

42. **Given the importance of providing FOI administrators guidance on the proper interpretation and application of the FOIQ:**

    (a) **Should the IC(Q) [or some other body responsible for overseeing the administration of the FOIQ: see T/Ref C(i)] be responsible for preparing guidelines to assist agencies and applicants to understand, interpret and administer the Act?**

    (b) **Should there be a statutory provision requiring the IC(Q) to publish <u>all</u> decisions in either full or summary form (as in Western Australia)?**

It is considered desirable for the Information Commissioner to provide guidelines regarding the application of the Act. While there is a slight risk that the Commissioner may choose to adopt an interpretation of case law that is not supported by other eminent lawyers such as the Crown Solicitor it is considered that he is ideally placed to perform this function given the depth of knowledge available to him and his access to resources such as interstate and overseas decisions on a specialised area of law.

Concern has been that "letter decisions" are difficult to access and yet they are sometimes quoted in decisions of the Information Commissioner despite the claim that they do not deal with new issues of law. Letter decisions can serve to provide a concise restatement of a principle or interpretation previously adopted, and may also deal with a particular factual circumstance which may be of relevance. Consequently it is submitted that all decisions of the Information Commissioner including "letter decisions" should be published. Please refer to our previous submission on this matter.

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

43. **If such a time limit is imposed, what should that time limit be and should it allow for extensions (and, if so, on what grounds)?**

Unless substantial resources are provided to the Information Commissioner, it would not be appropriate to impose a statutory timeframe for the completion of external review decisions. To do so increases the risk that decision-making is rushed without proper consideration of all relevant issues. Further, during the existing external review process, it is a common complaint that agencies are given inadequate time to produce documents and otherwise comply with requests of the Information Commissioner. These concerns are likely to be exacerbated should there be a statutory time limit on the completion of external review decisions.

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

DATSIPD and DEFT do not support the Information Commissioner being granted such a power. We submit that it is for more appropriate to leave this discretion in the hands of the public sector agency in question which will have the detailed understanding of the factual circumstances of the case in issue.

48. **Should the non-personal information application fee be abolished, remain at $30 or be increased (to what level)?**

49. **Should a uniform application fee be introduced (ie, should an application fee be introduced for *personal* information requests)?**

50. **Should charges be introduced for:**

    (a) **processing (for retrieval of documents, decision making and/or consultation); and/or**

    (b) **supervised access;**

    and if so, at what levels and in what form? (For example, per hour spent, per page disclosed or dealt with, a sliding scale, with caps on fees?)

51. **What other components of the charging regime need to be addressed (eg, photocopying)?**

52. **Especially if there are to be any fee increases, should the FOIQ be amended to enable agencies and ministers to waive or reduce fees? On what grounds?**

The current fee of $30 for non-personal applications is not unreasonable and there is considerable justification for a review of the fee structure to ensure increased cost recovery and to discourage "trawling exercises".

Statutory bodies such as the Building Services Authority & the Residential Tenancies Authority are required to be self-funding and adjust their fees and charges accordingly. However they are unable to recover the costs of

processing freedom of information applications. Please refer to the detailed arguments we made in respect of fees and charges in our previous submission.

55. In relation to s 28(2) concerning voluminous applications, should:
    (a) the word 'only' be deleted from the last paragraph of s 28(2) to widen the factors that agencies may have regard to when deciding whether to refuse to deal with an application because it would substantially and unreasonably divert agency resources;
    (b) agencies be required to consult with the IC(Q) before refusing an application under the provision; and/or
    (c) the provision be redrafted to emphasise the importance of agencies consulting with applicants about their applications?
56. Should s 28(3) of the FOIQ be repealed? If s 28(3) is to be retained, should it be amended to require the agency to: (a) identify the exemption provision(s) purported to be applicable; and (b) explain why all the sought documents are exempt thereunder?
57. Should the FOIQ contain a general provision enabling an agency to refuse to deal with frivolous and vexatious applications? If so, how should this provision be drafted and what provisos should it contain?
58. Alternatively (or additionally), should the FOIQ contain a provision enabling an agency to refuse to deal with serial/repeat applications? If so, should it be in the form suggested by the IC(Q) in the above text?

DEFT and DATSIPD favours the deletion of the word "only" from the last paragraph of s 28(2) to widen the factors that agencies may have regard to when deciding whether to refuse to deal with an application because it would substantially and unreasonably divert agency resources. Further, it is considered that the term "resources of the agency" should be interpreted as the resources available to an agency to deal with freedom of information applications. Please refer to our previous submission on this matter

59. In addition to having (relevant and not unduly onerous) data collection and reporting requirements, is there a need for an entity (other than the relevant minister) to be responsible for:
    (a) ensuring the timely, accurate and consistent reporting of that data;
    (b) undertaking a meaningful analysis of that data once collected; and
    (c) ensuring that, as a result of that analysis, any appropriate remedial action is taken?

DATSIPD and DEFT are of the view that there is a need for such a function and this function could be performed by an independent entity such as the former Human Rights and Administrative Law Branch of the Department of Justice and Attorney General.

60. **Should the basic 45 day time limit for processing access applications—in s 27(7)(b) of the FOIQ—be reduced to 30 days?**
61. **Should the 15 day extension for third party consultation when required under s 51—in s 27(4)(b) of the FOIQ—be extended to 30 days?**
62. **Should provision be made for agencies (or ministers) and applicants to agree to extend response times rather than incur an automatic deemed refusal? Should any such amendment be subject to the requirement that a partial or interim decision be made within the prescribed time limits on as many documents as possible?**
63. **Should an agency's (or minister's) failure to decide an access application and notify the applicant within the relevant time period be taken to be deemed access instead of deemed refusal?**
64. **Should s 27 be redrafted to provide that an agency or minister must decide an application and notify the applicant '*as soon as is reasonably practicable*' but, in any case, no later than the relevant time limit?**
65. **Should there be provision for the processing of applications to be expedited in circumstances where a compelling need exists? If so, in what circumstances? (For example, imminent threat to public safety, public health or the environment.)**
66. **Should a statutory time limit be applied for applicants viewing or seeking copies of documents to which access has been granted (say, 60 days)?**

It is considered that the current timeframes for initial decision making and consultation are appropriate. To reduce these timelines without increasing available resources could reasonably be expected to impact adversely on the quality of decision making.

We believe that provision should be made for agencies and applicants to agree to extend response times rather than incur automatic deemed refusal. This would formalise arrangements that are currently entered into at times when agencies are facing heavy workloads or unusually complicated applications. At present, many applicants are happy to wait a few extra days for a decision rather than treat the failure to deliver a decision on time as a deemed refusal and then wait several months or years for the Information Commissioner's decision.

We do not believe that the failure to make a decision within the prescribed timeframes should be regarded as a "deemed access". While this approach may seem plausible, as agencies are faced with numerous competing demands and finite resources with the result that at times, it will not be possible to always meet statutory timeframes. To allow "deemed" access in such cases could well cause substantial harm to innocent third parties.

It is submitted that to provide that a decision *should be made as soon as practicable but in any case no later than the relevant time limit* would have no practical effect. It is our experience that decision makers typically dispose of applications as soon as practicable. A member of the public may well believe that an application involving a handful of documents can be dealt with in a few days, being unaware that there are numerous prior applications to be dealt

with, searches to be undertaken from various parts of the agency and consultations with third parties before a decision can be made.

DEFT and DATSIPD believe that there should be provision for applications to be expedited in circumstances of compelling need. In fact, decision makers may currently do so without the need for legislative provision. Unfortunately, it is our experience that many applicants believe that there is a compelling need for their application to be dealt with urgently when in fact this is not supported by objective evidence. It is submitted that if such a provision were to be included, the applicant would need to produce compelling evidence to support their request for an expedited decision. In any event it is difficult to see how legislative amendment to the *Freedom of Information Act* 1992 is the most appropriate means of dealing with issues such as imminent threat to public safety, public health or the environment.

It is submitted that where an applicant wishes to inspect original documents a time limit of say 60 days would be appropriate. It should not be necessary to produce original documents except in exceptional cases and that onus should be on the applicant to establish the need to access original documents. At present the applicant is entitled to access original documents at any time after the access decision was made. This could be several months or even years, during which time the agency is often impeded in the performance of its functions by the absence of original documents.

67. Should the 14 day limit for dealing with internal review applications for access and amendment decisions—as set out in ss 52(6) and 60(6)—be extended? If so, what should the period be?

It is difficult for an internal reviewer to make an adequate decision within the statutory 14 day period. An internal review is supposed to be a de-novo process involving a complete review of documents and further consultation where necessary. It is submitted that a time frame of at least 30 days is required for an internal review.

68. Should the 60 day period for lodging an application for external review—as set out in s 73(1)(d)(i) of the FOIQ—be reduced? If so, what should the relevant time period be?

It is submitted that there is no good reason for such a long period in which to seek external review. It is considered that 28 days would be an appropriate period of time. In this regard it is noted that the Judicial Review Act, like many other legislative provisions, imposes a limitation of 28 days in which to make an application for review.

69. Is there a need to implement further measures to ensure that, where appropriate, public servants can claim exemptions in respect of their names and other identifying material? For example:
    (a) Should the IC(Q) (or some other body) issue guidelines setting out general principles regarding the release of public servants' personal information and the circumstances in which exemption from disclosure may be justified?[1]
    (b) Alternatively, should the FOIQ specify categories of personal affairs information of public servants that is not exempt under s 44?

It is clear that names of public servants in documents of an agency are not personal affairs matter within the meaning of section 44 where mentioned in relation to their employment (other then in respect of personnel and other related HR issues).

Under section 42(1)(c) names of public servants may only be exempted from disclosure where "disclosure could endanger a person's life or physical safety". It is suggested that exemption of names should also be permitted where there is a reasonable likelihood of harassment or intimidation.

70. Is the balancing of the public interests required by s 44(1) of the FOIQ sufficient to protect the evidence of children/adult victims of serious offences from use outside court processes? Does it provide sufficient certainty?
71. If not, should "personal affairs" be defined in the FOIQ to include recordings of evidence of children/ people generally?

It is our view that any material that identifies the victim of a crime should be regarded as personal affairs matter and should be exempted as such.

72. What particular deficiencies in the FOIQ might the proposal in T/Ref B(ix) seek to overcome? Does the proposal adequately overcome these deficiencies? Are there any alternative ways by which these deficiencies might be addressed?
73. Should the personal affairs exemption (s 44) be amended to provide that, in weighing the public interest in disclosure, an agency may have regard to any special relationship between the applicant and a third party? If so, on what basis should such a provision operate?
74. Should a person/entity be (statutorily) responsible for generally: monitoring compliance with, and the administration of, the FOIQ; and providing advice about, and ensuring a high level of agency and community awareness of, the FOIQ?
75. If so, who should perform this role:
    (a) the IC(Q);
    (b) a unit within the Department of Justice and Attorney-General;
    (c) a new independent (statutory) entity; or
    (d) some other existing person/entity?

We do not support the suggestion that section 44 be amended so that in weighing up the public interest in disclosure, the agency may have regard to any special relationship between the applicant and a third party. It is our experience that decision makers take this factor into account in deciding whether disclosure is in the public interest. Further, It is our experience that decision makers are mindful that disclosure under the *Freedom of Information Act* is disclosure to the world at large.

DATSIPD and DEFT are of the view that there is a need for an entity to perform a monitoring and advisory role and that such a role could be performed by an independent entity such as the former Human Rights and Administrative Law Branch of the Department of Justice and Attorney General.

A. WHETHER THE BASIC PURPOSES AND PRINCIPLES OF THE FREEDOM OF INFORMATION LEGISLATION IN QUEENSLAND AS SET OUT ABOVE HAVE BEEN SATISFIED, AND WHETHER THEY NOW REQUIRE MODIFICATION.

The pursuit of the openness and accountability in the processes of government should not be seen as a finite process permanently attainable within a defined period.

The *Freedom of Information Act 1992* ("the FOI Act") is now in its seventh year of operation in Queensland. The challenge for the administrators of this legislation was to promote a philosophical shift in the cultural attitudes of government - to replace the notion of Crown secrecy, with the notion that nothing is secret unless for a justifiable reason.

According to Fitzgerald QC:

> *"The importance of (FOI) legislation lies in the principle it espouses and in its ability to provide information to the public and the Parliament ... Its potential to make administration accountable and keep the voter and Parliament informed are well understood by its supporters and enemies."*

The passage of time since the enactment of the FOI legislation in Queensland has witnessed a significant deterioration in the level of training and education services provided by the Human Rights and Administrative Law Branch of the Department of Justice and Attorney-General.

The Department of Aboriginal and Torres Strait Islander Policy and Development (DATSIPD) and the Department of Equity and Fair Trading (DEFT) submit that consistency in decision-making, as well as increased levels of corporate knowledge within Queensland government agencies, will be greatly facilitated through an increased role in the provision of the following services by the Department of Justice and Attorney-General:

- Providing training and education to both state and local government agencies; and
- Updating policy and procedures manuals; and
- Designing systems of scrutiny and evaluation; and
- Assisting with the distribution of decisions of the Information Commissioner. (This role may be reduced by the innovation of the Information Commissioner's formal decisions being published in the Internet)

- Providing public education programs which highlight the benefits of the legislation. These programs should address the special needs of disadvantaged Queenslanders such as women and Indigenous people, who traditionally have not accessed the full benefits of government services.

The DATSIPD and the DEFT submit that, rather than seeking to modify the purposes and principles of the FOI Act, further resources need to be committed to the pursuit of them through increased activity by the Department of Justice and Attorney-General.

As stated by Kirby J:

> *"In a world of secrecy and opaque government, serious wrongs can occur which may never come to light. FOI legislation is at once a means of casting the light of scrutiny into the dark corners of government and a contribution to a new culture of openness in public administration."*

B. WHETHER THE FOI ACT SHOULD BE AMENDED, AND IN PARTICULAR:

(i) whether the objects clauses should be amended;

It is the view of the DATSIPD and the DEFT that the three basic objectives of the FOI Act are:

- to make information about an agency's operations open to the community by requiring the publication of information about its structure, policies and practices in dealing with members of the community; and

- to give any member of the community the legally enforceable right to seek access to information contained in documents held by a minister, or agency subject only to the exemptions specified in the Act; and

- to provide a means whereby personal information held about people can be accessed by them and amended if incomplete, incorrect, out of date, or misleading.

DATSIPD and DEFT believe that these objectives are properly expressed by section 4, 5 and 6 of the FOI Act.

In addition, section 5 outlines the thinking of Parliament in introducing the FOI Act that includes recognition of the competing interests involved.

On the one hand Parliament recognises that in a free and democratic society, the public interest is served by promoting open discussion of public affairs and enhancing government's accountability. However, Parliament has also recognised that one of the competing interests is the need to protect from disclosure information, the release of which would be contrary to the public interest because its disclosure would have a prejudicial effect.

The DATSIPD and the DEFT submit that the objects provisions of the FOI Act should not be amended.

(ii) whether, and to what extent, the exemption provisions in Part 3 Division 2 should be amended;

In relation to the prospect of amending exemption provisions contained in Division 2 of Part 3 of the FOI Act, the DATSIPD and the DEFT have focused on those provisions listed below.

(a) Sections 36 and 37 of the FOI Act:

The DATSIPD and the DEFT concur with the views of the Information Commissioner as stated in his Annual Report 1997-1998 (at p. 17) that:

> *"the correct balance would be achieved simply by amending the FOI to return s.36 to its original form (as first enacted in 1992), and preferably by repealing s.37, or else returning s.37 to its original form (as first enacted in 1992)."*

(b) Sub-section 40(c) and paragraphs 46(1)(a) and (b) of the FOI Act:

In his latest decision, Re Chambers and the Department of families, Youth and Community Care (Information Commissioner Qld., Decision No. 99001, 7 April 1999, unreported), the Information Commissioner considers the application of sub-section 40(c) and paragraphs 46(1)(a) and (b) of the FOI Act to documents relating to confidential public sector grievance processes and performance assessment documentation in relation to public servants.

Despite assurances of confidentiality given to the parties involved in the subject dispute, the Information Commissioner found these assurances to be incompatible with the then applicable public sector legislation; *Public Service Management and Employment Regulation 1988* s.99, s.99(1) (now, *Public Service Regulation 1997* - s.15, s.16(2)).

It is noteworthy that the Information Commissioner does recognise the incompatibility between public sector investigation process, public sector legislation and the FOI Act:

> *"It is possible to think of examples where the application of the natural and ordinary meaning of the language of s.99 of the PSME Regulation (and its successor provision) could lead to inappropriate consequences (such as the example given in the last sentence of the extract from the Department's submission quoted at paragraph 41 below; i.e., the suggestion that an officer of the public service must be informed of allegations of serious wrongdoing received by a Department against the officer, when or before the allegations are referred to the Criminal Justice Commission or the police for investigation - which could allow time for destroying evidence, tampering with witnesses, or otherwise prejudicing the investigation). ... In my view, it could prove a difficult exercise to place on the language used in the current provisions (namely, s.15 and s.16 of the Public Service Regulation 1997) an interpretation which the words are capable of bearing, and which could avoid inappropriate consequences of*

the kind adverted to above. Rather, there seems to me to be a case for careful consideration of whether amendments are necessary to introduce qualifications/exceptions to the rights and obligations that have been provided for in broad and unqualified terms in the current provisions."

It is submitted by the DATSIPD and the DEFT that the Committee should give serious consideration to the difficulties alluded to by the Information Commissioner in devising (perhaps in conjunction with the Office of the Public Service) a system of access to documents relating to public sector grievance processes and performance assessment documentation with more appropriate safeguards.

(c) Section 44 of the FOI Act:

- The DATSIPD and the DEFT are of the view that children should, as a matter of policy, be considered as having separate *"personal affairs"* from their parents.

  In this regard, it is submitted that it should not always be assumed that parents stand in the position of *locus parentis*. Assumptions along these lines do not adequately recognise the rights of children to privacy in relation to information concerning their *"personal affairs"*; and

- Further, the DATSIPD and the DEFT are of the view that the ambit of sub-section 44(3) of the FOI Act should be extended to provide a wider coverage of health professionals (for example; psychologists and social workers), in addition to the current situation, which only extends to qualified medical practitioners. This limitation is due to the interruption in the existing case law of the phrase "*information of a medical or psychiatric nature*", which has been linked to information prepared or created by qualified medical practitioners.

(d) Section 48 of the FOI Act:

The DATSIPD and the DEFT submits that sub-section 48(2) of the FOI Act be amended through the substitution of the phrase *"merely because it relates to"* for the phrase *"if it relates to"* appearing after the phrase *"under sub-section (1)*.

The purpose of such an amendment is to negate the scenario presented by information concerning shared *"personal affairs"* not being capable of protection under section 48 of the FOI Act.

For an explanation of the effect of the phrase *"merely because it relates to"*, the Committee is referred to the Information Commissioner's decision in Re "B" and Brisbane North Regional Health Authority (1994) 1 QAR 279 (at paragraphs 174-178).

(iii) whether the ambit of the application of the Act, both generally and by operation of section 11 and section 11A, should be narrowed or extended;

This question is not a new one and was considered by EARC as far back as December 1990.

It also formed part of the Terms of Reference (Reference G) of the Interdepartmental Working Group's Two Year Review of the FOI Act in 1995.

(a) Section 11 of the FOI Act:

The DATSIPD and the DEFT submit that the current exceptions to the operation of the FOI Act, as contained in section 11, are more than adequate.

The coverage provided by section 11 in respect of the exceptions to the operation of the FOI Act does accurately reflect the EARC's recommendations. The only notable departure from EARC's recommendations is the presence of paragraph 11(1)(q), which states that:

> "an agency, part of an agency or function of an agency prescribed by regulation for the purposes of this paragraph."

In its *"Report on Freedom of Information"*, EARC recommended [8.152(aa) at page 132] that Freedom of Information legislation not:

> *"contain a power to exempt by regulations persons or bodies or their functions from FOI legislation."*

In arriving at this conclusion, EARC considered numerous submissions expressing considerable concern at the existence of such a power.

Significant amongst these concerns were the following submissions (see EARC's Report at page 129):

From E. A Cunningham (S46):

> *"I totally reject the suggested discretionary power of Government to 'except persons and bodies from time to time from the operation of FOI legislation' as this is in complete conflict with the intent of FOI legislation. Party political influence and cronyism will be perceived by the public as threats to the impartiality of such FOI Legislation."*; and

EARC itself stated (at p. 129):

> *"... in order to ensure FOI legislation achieves openness and accountability in all aspects of government in Queensland, the Commission considers that any claim for exemption to FOI legislation should receive thorough public and parliamentary scrutiny. Accordingly, FOI legislation should not provide for a regulation-making power which would automatically exempt government agencies from the operation of FOI legislation ...".*

It is submitted that the effect of paragraph 11(1)(q) of the FOI Act may be regarded as being contrary to the central purposes of FOI legislation of openness and accountability and the fundamental legislative principles defined in section 4 of the *Legislative Standards Act 1992*.

(b) Deficiencies in the operation of section 11 of the FOI Act:

It is submitted by the DATSIPD and the DEFT that sub-section 11(2) of the FOI Act be amended to provide clarification that the exception to the operation of the FOI Act which sub-section 11(1) provides is meant to continue, notwithstanding that documents of the types listed in sub-section 11(1) may eventually become documents of a Queensland government agency.

Practical problems have arisen in the administration of sub-section 11(1) of the FOI Act in the circumstance where documents of an agency, or statutory officer specified in section 11(1) are in the possession, or control of another agency, which is subject to the provisions of the FOI Act.

For example, if an FOI application is received by the DATSIPD in relation to documents forwarded to this Department by the Parliamentary Judges Commission of Inquiry [paragraph 11(1)(c)], or the Litigation Reform Commission [paragraph 11(1)(g)], legal advice has suggested that the documents held by the DATSIPD, though created by agencies specified in sub-section 11(1), are subject to the FOI Act once in the hands of another agency.

It is, therefore, submitted that the FOI Act be amended to specifically state that where documents of an agency (whether in relation to a specific function) mentioned in sub-section 11(1) are forwarded to an agency caught by the FOI Act, these documents are not subject to the FOI Act.

If Parliament considered these agencies worth of a specific exemption in sub-section 11(1), it seems contradictory that documents created by these agencies in the hands of an agency subject to the FOI Act, would be subjected to the access provisions of the FOI Act.

(c) Sections 11A and 11B of the FOI Act:

Sections 11A and 11B deal with the application of the FOI Act to Government Owned Corporations (GOCs) and corporatised corporations.

The rationale behind the introduction of sections 11A and 11B into the FOI Act is that the principle of *"competitive neutrality"* means that GOC's and Local Government Owned Corporations (LGOCs), at least in relation to their competitive activities, should not have to comply with a scheme which does not apply to their private sector competitors.

The DATSIPD and the DEFT are opposed to the view that this protective approach be maintained for the following reasons:

- GOCs are publicly owned and are established with a view to exercising their powers in the public interest; and

- Legal accountability mechanisms (such as those provided for by the Corporations Law) do not impose the same level of redress as Administrative Law principles offer; and

- As GOCs are still fundamentally public in nature, individuals should have an effective, efficient means of seeking redress. In the absence of public law remedies, individuals must seek recourse to private law remedies which are not always as conducive to a satisfactory resolution; and

- So long as GOCs are publicly owned and subject to varying degrees of government control and carry out their functions in the public interest, individuals should be able to seek redress against adverse decisions made by them; and

- While there would appear to be conflict between the corporatisation of efficient and competition on a *"level paying field"* and Administrative Law objectives of openness, fairness, participation and allowing aggrieved individuals the opportunity for redress, I am of the view that Administrative Law principles have a legitimate role.

On these bases, the DATSIPD and DEFT are of the view that there should be no exemption from the rigors of the FOI Act for the competitive activities of GOCs and LGOCs.

It is the view that of the DATSIPD and the DEFT that adequate protection in relation to the commercially competitive activities of GOC's and LGOC's is already provided by sections 45, 47 and 49 of the FOI Act.

(iv) whether the FOI Act allows appropriate access to information in electronic and non-paper formats;

It is submitted by the DATSIPD and the DEFT that sub-section 30(1) of the FOI Act provides for sufficient access to information in electronic and non-paper formats.

(v) whether the mechanisms set out in the Act for internal and external review are effective, and in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming;

(a) Internal Review:

Insofar as it relates to internal review, the questions posed by this component of Reference B are very similar to those forming the subject of Reference E to the 1995 IDWG's Terms of Reference which stated:

> *"The effectiveness of the mechanisms set out in the Act for internal and external review.*
> *The IDWG refers to the fact that 'in 193/94, approximately 73% of applicants for internal review also went on to seek external review. The IDWG also states that agencies may decline to conduct an internal review within the fourteen (14) days allowed, in which case the original decision is taken to be affirmed under sub-section 52(6) of the Act."*

It is submitted that the most important aspects of the rights conferred upon an aggrieved person by section 52 of the FOI Act, are those contained in sub-section 52(4) and (5) – that the application be dealt with *de novo* (afresh) and by a person other than the original decision-maker.

In these provisions the FOI Act seeks to ensure that a person's rights to open and accountable government are not compromised through inappropriate government decision-making processes.

Sub-section 52(b) of the FOI Act specifies a 14 day time period within which an internal review decision must be made.

It is submitted that such a time period is inadequate. As an internal review decision-maker must consider the application afresh, 14 days is often not a sufficient period of time within which to conduct such a consideration of the subject application. This can be particularly so where an internal review decision-maker may be required to undertake further consultations under section 51 of the FOI Act

Consequently, in the face of such seemingly impossible time frames, some internal review decision-makers elect to simply affirm the earlier decision, or fail to make a decision within the 14 day period having the same effect as an affirmation of the earlier decision (sub-section 52(6)).

It is submitted that in order to allow a proper consideration of all issues relevant to an application for internal review, the time periods for making a decision should be extended to 28 days.

Many agencies do not possess a wealth of corporate knowledge concerning FOI. In some instances, the only officer within an agency with any FOI knowledge will be the FOI Coordinator, or the equivalent person charged with a delegated authority under section 33 of the FOI Act. As a result, some internal review decision-makers, having an insufficient knowledge of the operation of the FOI Act, rely heavily on the advice of the original decision-maker.

The avenues for agencies to improve their corporate knowledge of FOI have been significantly curtailed since the cessation of the training and education formerly undertaken by the Human Rights and Administrative Law Branch of the Department of Justice and Attorney-General in December 1996.

As such, any training functions in the operation and effect of the FOI Act is left to an agency's own FOI Coordinator. Frequently, such officers are unable to undertake the training role in any meaningful sense owing to a lack of resources and competing demands on that officer's time.

(b) External Review:

In its Report (18 April 1991) on *"FREEDOM OF INFORMATION FOR QUEENSLAND"* the Parliamentary Committee for Electoral and Administrative Review (PCEARC), stated (at page 25) that:

> *"The model proposed by EARC involves a departure from the legalistic adversarial model. The EARC proposal favours an informal, speedy approach. This area is perhaps the most important area for review in the prosed review of the legislation to take place within two years. There is a*

potential danger in the emergence of the new administrative law of excessive legalism ...".

There has certainly been a perception for some time on the part of some agencies and applicant's that the method of review and decisions of the Information Commissioner may be excessively legalistic and time-consuming.

It is submitted that viewed in isolation such a perception of the operations of the Information Commissioner is not entirely accurate, or fair.

Factors, which have inevitably led to the formation of these impressions, are:

- Not all of the matters, which fall to be determined by the Information Commissioner, are of a simple and straightforward nature, either in fact, or in law; and

- In order to ensure that the object and purpose of the FOI Act and the rights of parties receive proper consideration, the Information Commissioner in discharging his functions under section 71 of the FOI Act must properly consider all matters, which proceed to external review; and

- As with many other government agencies and statutory bodies, the Information Commissioner abilities to achieve his statutory responsibilities have been restricted due to funding levels.

- A lack of funding contributed significantly to the initial accumulation of a backlog in cases to be decided. In this regard, the following comments from the Sixth Annual Report of the Office of the Queensland Information Commissioner 1 July 1997 to 30 June 1998, should be noted (page 10):

  "...the large backlog of cases accumulated in the first few years of operation ... when the office was grossly under-resourced to meet the unforeseen high level of demand for its services."

(c) Excessive legalism:

In relation to criticism that the decisions of the Information Commissioner are excessively legalistic, it is the view of the DATSIPD and the DEFT that this view may well have resulted from some of the Information Commissioner's initial decisions following the enactment of FOI legislation in Queensland.

Certainly, many of the Information Commissioner's earlier decisions where he examined, for the first time, the interpretation of the FOI Act's exemption provisions are legalistic and complex. It must be remembered, however, that to a degree such an approach is unavoidable, especially when regard is had to the need to establish precedent.

The best explanation of this quandary between providing decisions which are "user friendly" and the proper determination of legal rights is provided by the Information Commissioner in his Annual Report 1997-98 (at pp. 11-12):

> *"Although it is best, whenever possible, to avoid an unduly legalistic approach to the application of the FOI Act, that is generally not possible with respect to applications for external review that cannot be resolved informally by negotiation, and must proceed to a formal decision by the Information Commissioner. In the usual case, an applicant is asserting a legal right (in accordance with s.21 of the FOI Act) to be given access to requested documents, and the respondent agency is asserting that the matter in issue falls within one of the exceptions to the right of access provided for in the FOI Act, usually one of the exemption provisions in Part 3, Division 2. The participants are entitled to have such a dispute resolved according to law, and I am obliged to resolve it according to proper legal standards and principles, including the duty to accord procedural fairness. A participant who is aggrieved by a formal decision of the Information Commissioner has the right to apply to the Supreme Court for judicial review if the participant considers that a legal error has been made. Moreover, Australian law imposes fairly onerous obligations as to the extent, and substantive content, of the reasons which must be furnished by a tribunal which (like the Information Commissioner pursuant to s.89(2) of the FOI Act) is required to give reasons for decisions: see H. Katzen "Inadequacy of Reasons as a Ground of Appeal", (1993) 1 Australian Journal of Administrative Law, p.33."*

While the DATSIPD and the DEFT are sympathetic to the constraints placed on the office of the Information Commissioner, it is submitted that this Office has not always recognised the competing demands placed on agencies (or applicants) during the conduct of an external review.

In the interests of affording natural justice to parties, the Information Commissioner may appear to impose some overly legalistic constraints and processes as part of determining an external review application. The DATSIPD and the DEFT are not critical of these procedures. However, given the Information Commissioner's significant backlog due to restricted resources, it is submitted that the Information Commissioner could adopt a more flexible and reasonable approach in the setting of time lines for agencies and/or applicants to provide material (which can often be as little as 5 days, followed by a six month delay at the Office of the Information Commissioner).

The decisions produced by the Information Commissioner are of considerable value to FOI practitioners. However, public servants (other than FOI decision-makers) and applicants from the wider community may be daunted and confused by the decisions. For example, an applicant may wonder why their FOI application seeking access to a complaint about a neighbourhood dispute could result in a lengthy decision that includes complex legal reasoning.

It is strongly recommended that the FOI Act be amended to require the Information Commissioner to produce an executive summary, or "plain English version" of each formal decision for the applicant and interested parties.

(d) Backlogs and delays:

One of the strategies employed by the Office of the Information Commissioner to reduce the backlog of overdue decision has been the introduction of "letter decisions", rather than every external review application having to proceed to conclusion by way of formal determination.

From the statistical data contained in the latest Report form the Office of the Information Commissioner, the adoption of this strategy has been extremely successful as an informal means of alternative dispute resolution.

This success of this strategy, however, does not come without its own criticisms.

In "letter decisions", the Information Commissioner states:

> *"Decisions by way of a letter to the participants in an external review are used when the formal resolution of an external review application involves the application of settled principles to the facts of a particular case and the formal decision has little or no broader or normative value that would warrant as wider dissemination as part of the Information Commissioner's formal decision series.*

Despite this advice, it has been the experience of some agencies that significant issues, which have not been the subject of a formal determination, have been resolved in "letter decisions". Often times, these "surprise" discoveries are made by agencies in the course of an external review process when principles from these "letter decisions" are quoted in submissions from other parties, or Information Commissioner draws an agency's attention to the fact that similar issues have been decided in a "letter decision".

It is imperative that, in the adoption and operation of its informal means of alternative dispute resolution, the Office of the Information Commissioner should not unilaterally determine the matters relevant to an external review (that is without seeking specific and detailed submissions from the parties on the particular facts of the case before the Information Commissioner). The mediation process should not be dominated by a desire to fit the circumstances of a given case into established precedent. The pursuit of improved statistical output should not come at the expense of procedural fairness to each party.

Increases in funding to the Office of the Information Commissioner may go a long way to alleviating these and other difficulties.

The DATSIPD and the DEFT recommend that the Office of the Information Commissioner be granted increased funding to allow for the proper consideration of all matters falling within its jurisdiction. However, it is submitted that a worthwhile condition on the granting of such additional funding would be to require an independent audit of the administrative and management procedures within the Office of the Information Commissioner. Some of the difficulties faced by the Office may be resolved through more efficient management and administrative systems.

In addition, it is imperative that the information Commissioner be required to publish the determinations made in "letter decisions". It should be noted that the DATSIPD and the DEFT are not suggesting that these determinations need reveal all of the details of the case at hand. However, a published set of informal determinations (which therefore have precedent value) will go a long way to achieving consistency in decision-making across government.

Finally, there have also been calls made in the past for the FOI Act to be amended so as to include a time limit on when the Information Commissioner must determine external review applications.

Such proposed amendments are usually borne out of frustration at delays in the external review process. It is submitted by the DATSIPD and the DEFT that, such a proposed amendment should not be endorsed for the following reasons:

- *"Decisions which proceed through to the stage of external review can ordinarily be expected to involve the more difficult issues of principle"* - (page 11, Annual Report of the Information Commissioner 1997-98); and

- *"The purpose of an external review authority is to take a more careful look at the more complex and contentious issues that arise in the administration of the FOI Act, while affording the opportunity .... for participants in a review to provide detailed inputs to the decision-making process by way of evidence and/or submissions on the issues for determination."* - (page 11, Annual Report of the Information Commissioner 1997-98).

Again, it is the submission of the DATSIPD and the DEFT that the provision of increased funding to the Office of the Information Commissioner could be a more appropriate way of decreasing the backlog of external review applications.

(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;

Presently, section 29 of the FOI Act and sections 6 to 11 of the *Freedom of Information Regulation 1992* ("the Regulations") prescribe the fees and charges regime.

The question of whether the application fee applies is based upon a decision-makers determination of whether the documents being sought are personal, or non-personal. If the documents being sought concern the applicant's *"personal affairs"*, no application fee is to be charged. If, however, the documents being sought are do not concern the applicant's *"personal affairs"*, a $30-00 application fee is required from the applicant.

Considerable difficulty has been experienced by agencies in the determination of whether a document concerns an applicant's *"personal affairs"*, or not. Neither the FOI Act, nor the Regulations specify to what degree a document must concern an applicant's personal affairs before an application can properly be considered personal, or non-personal in terms of section 6 of the Regulations.

In the decision of Re Stewart and Department of Transport (1993) 1 QAR 227 at 269, in considering the application of the $30-00 fee, the Information Commissioner stated:

> *"an application for access to documents need only seek one document which does not concern the personal affairs of the applicant to attract the imposition of the $30 application fee."*

The difficulty with this decision is that it does not provide any guidance where a document concerns the *"personal affairs"* of more than one person, a shared *"personal affairs"* scenario, or as to what degree the information contained in a document must concern the *"personal affairs"* of the applicant.

In this regard, the Administrative Law Division of the Department of Justice and Attorney-General sought to provide some assistance in its *"Freedom of Information - Policy and Procedures Manual: Local Government Edition"*:

> *"If 5% or less of the documents are non-personal and 95 are personal then no application fee should be applied. If more than 5% of the documents are non-personal then the applicant should be required to pay the $30.00 fee."*

There are a number of difficulties with this suggested approach:

- as with section 6 of the Regulations and the Information Commissioner's decision in Re Stewart (supra.), this approach does not specify the degree to which information contained in a document must concern the *"personal affairs"* of an applicant; and

- similarly, it does not provide for the scenario of shared *"personal affairs"*; and

- the 5% figure suggested by the Department of Justice and Attorney-General has no statutory basis; and

The main difficulty which is perceived by the DATSIPD and the DEFT to exist in relation to the current fees regime is that it is not interpreted consistently, or applied universally across Queensland government. This leads to confused expectations on the part of members of the community in relation to the operation of the FOI Act and how it is administered by Queensland government agencies.

Regardless of anomalies in the interpretation of the FOI and its Regulations, there are equally cogent arguments for both the increase and the abolition of FOI fees and charges.

Some of these arguments have been examined below.

(a) Arguments for increased fees and charges:

As a justification for an increase in FOI fees and charges many agencies cite the high costs involved in the administration of the Act.

The average processing cost per application for a number of separate agencies within the portfolio responsibilities of the Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading received in the current financial year (up to 10 May 1999) have been detailed in the Tables below:

AVERAGE COST IN PROCESSING PRIMARY LEVEL APPLICATIONS

AGENCY	AVERAGE COST
Minister for Fair Trading	$386.07
DEFT	$655.92
Auctioneers and Agents Committee	$1,194.11
DATSIPD	$64.90

AVERAGE COST IN PROCESSING INTERNAL REVIEW APPLICATIONS

AGENCY	AVERAGE COST
Minister for Fair Trading	Nil
DEFT	$246.38
Auctioneers and Agents Committee	$386.75
DATSIPD	Nil

AVERAGE COST IN PROCESSING EXTERNAL REVIEW APPLICATIONS

AGENCY	AVERAGE COST
Minister for Fair Trading	Nil
DEFT	$265.25
Auctioneers and Agents Committee	Nil
DATSIPD	Nil

The time costings of processing all applications for a number of separate agencies within the portfolio responsibilities of the Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading received in the current financial year (up to 10 May 1999) have been detailed in the Table below:

AGENCY	TOTAL TIME COSTINGS
Minister for Fair Trading	$1,178.00
DEFT	$33,162.20
Auctioneers and Agents Committee	$25,897.75
DATSIPD	$66.00

Accordingly, the total cost to the DATSIPD and the DEFT in processing FOI applications in the current financial year (up to 10 May 1999) is $60,303.95. It should be noted that this figure does not include the salaries of 2 dedicated administrative law staff and other associated on costs. The total amount of monies received in fees

and charges by the DATSIPD and DEFT totals $1931.00. The percentage return is 3.2%.

Given the substantial costs incurred in processing of FOI applications, there is a sound argument that fees and charges be increased so as to allow agencies to defray at least some of the administrative costs associated with processing applications.

In addition, see the submission of the Building Services Authority recommending an increase in the level of the application fee (Attachment "2").

(b) Arguments for reduced fees and charges:

Equally, there is a considerable argument that the "user-pays" principle is incompatible with the principle of democratic society being based on openness and accountability. The rationale being that accountable government is not something society should not have to pay for. As stated by Fitzgerald QC in the Fitzgerald Report, society pays when government. is not accountable:

> *"The ultimate check on public maladministration is public pinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed ...."*; and
>
> *"Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process ...".*

An important tenent of the FOI legislation is that each Queenslander can apply for access to documents that concern their personal affairs, free of charge (for example health records and education records). Disadvantaged Queenslanders (including Indigenous people and women) would be further disadvantaged if fees were introduced in relation to personal affairs applications.

According to Kirby J, cost and fees are the fourth deadly sin of the seven deadly sins of FOI:

> *"The fourth deadly sin is to render access to FOI so expensive that it is effectively put beyond the reach of ordinary citizens. This is a development that is becoming of concern in Australia. The critics of the administrative reforms in Australia (of which FOI was one) tend to find ready allies in the government of the day. During the Hawke Labor Government, one of the most constant critics was Senator Peter Walsh who lambasted the costs of the administrative law. He sometimes seemed reluctant to take into account the efficiency gains, improved accountability, increased political legitimacy and the other positive features of the new system. Calls for the containment of costs are particularly persuasive when directed to a Minister under pressure to reduce, or curtail, the costs of his or her administration. In Australia, we have been watching the debates about the increases of up to 150% in civil court fees in Britain. We have had similar debates where the government moved in 1997 to increase court fees by as much as 500%.*

> *This would have increased enormously the cost of bringing an appeal to the highest court. The Australian Senate disallowed the increases, which had been justified on the principle of "user pays". It is important for governments, whatever their political complexion, to understand that some basic activities of government simply have to be provided at the general cost of the taxpayer. They represent the price of governing a civilised community. To expect the user to pay fully for basic government services, such as a day in court, is surely wrong. The same, is true of FOI charges. ...*
>
> *Those who feel apologetic about FOI, its costs and occasional inconveniences, do well to reflect upon the need to return to the basic principle of accountable government. In Australia, this has been described by Finn as a 'republican idea'. It is the idea that power derives from the people and is not just something surrendered, gradually and reluctantly, by authority from above."*

[Justice Michael Kirby, *"Freedom of Information: The Seven Deadly Sins"*, British Section of The International Commission of Jurists Fortieth Anniversary Lecture Series London Wednesday, 17 December 1997.]

Consistent with such reasoning is EARC's recommendation (EARC Report at page 189) that there should be *"no application fee, irrespective of the character of information sought."*

However, in recognition of the need to defray at least some of the costs pertaining to the administration of the FOI Act, it is submitted that consideration should be give to:

- Maintaining the $30 fee for non-personal affairs applications

- Maintain the current position of no fees and charges for personal affairs applications

- As photocopying charges have not been increased since the FOI Act came not force, increasing photocopying charges in relation to non-personal affairs applications to $1-00 per side of an A4 page to be copied,

  Such a proposed increase is still considerably less than the courts scale of charges for photocopying; and

- Consistent with the risk management rationale of sub-section 35(f) of the *Financial Management Standard 1997*:

  > *"the administrative costs of charging and collecting the charges are more than, or may be more than , the revenue collected and resulting long term gains in efficiency"*,

  it is submitted that photocopying charges should only be levied in respect of non-personal affairs applications once the cost reaches a value of $20; and

- In relation to applicants who may be in difficult financial/social circumstances, a discretionary waiver of fees and charges be included in the FOI Act. A Cabinet Directive (thereby enabling sufficient flexibility to respond to changing social circumstances) could set the criteria for exercising the waiver. A waiver would greatly assist disadvantaged Queenslanders to take advantage of the benefits provided by the FOI Act in respect of access to documents concerning government decision-making and policy development processes. In addition, it would enable agencies to recognise that parents and children have separate personal affairs but to also waive the fees attached to non-personal affairs applications where appropriate.

- DATSIPD and DEFT are not recommending charges for processing times as it is our view that the administration of any such charging regime is more expensive than the charges that will be collected.

(vii) Whether amendments should be made to minimise the resource implications for agencies subject to the FOI Act in order to protect the public interests in proper and efficient government administration, and in particular:

- **whether section 28 provides an appropriate balance between the interests of applicants and agencies;**

Sub-section 28(1) of the FOI Act, through the use of permissive language in the presence of the word *"may"*, confers a discretion on an agency, or Minister to grant access to exempt matter, or an exempt document.

In this way, even though matter, or a document may be exempt from disclosure under one, or a combination of any of the exemption provisions contained in the Division 2 of Part 3 of the FOI Act, a decision-maker may still decide to release the relevant matter, or document to an applicant.

Indeed, the Information Commissioner has encouraged the use of sub-section 28(1) of the FOI Act in this way in relation to the decision of Norman and Mulgrave Shire Council (1994) 1 QAR 574, at paragraphs 13 to 16.

Sub-section 28(2) of the FOI Act allows an agency, or Minister to refuse access where the work involved in dealing with the application would, if carried out, substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or interfere substantially and unreasonably with the performance by the Minister of the Minister's functions

There has only been one decision of the Information Commissioner which considers the operation of section 28 in this way; Re Allanson and Queensland Tourist Travel Corporation (1997) 4 QAR 420. Unfortunately, the decision is not very instructive on this issue and does not explore the operation of sub-section 28(2) of the FOI Act.

There have been Commonwealth authorities which have considered that the determination of whether an application would unreasonably divert the resources of an agency, or Minster, should be assessed by reference to the resources allocated of the FOI area within the particular agency.

In particular, the DATSIPD and the DEFT submit that the preferred interpretation of sub-section 28(2) of the Queensland FOI Act is one which mirrors that of the Commonwealth Administrative Appeals Tribunal (AAT) in SRB and SRC v. Department of Health, Housing, Local Government and Community Services (1994) 19 AAR 178. In considering the application of the equivalent provision under the Commonwealth *Freedom of Information Act 1982,* the AAT held (at paragraph 29) that:

> *"The resources of the agency referred to in paragraph 24(1)(a) must be the resources which the respondent had at the time the request was lodged or had as at the date of the hearing. It can not mean resources, which the respondent might be able to obtain or even resources constituted by the filling of establishment positions. It also can not mean the whole of the resources of a large Department of State. To find this would make the section meaningless. We consider it means the resources reasonably required to deal with an FOI application consistent with attendance to other priorities."*

In order to any ambiguities in the interpretation of the sub-section 28(2) of the FOI Act, consideration should be given to amending the provision to specify that any determination of an unreasonable diversion of resources is not to be made by reference to an agency's resources in their entirety.

- **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;**

The DATSIPD and the DEFT submit that no changes should be made to the reporting requirements of the FOI Act.

- **whether time limits are appropriate.**

The Committee is referred to the submissions made under Reference B(v).

(viii) whether amendments should be made to either section 42(1) or section 44(1) of the Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the use(s) likely to be made of the information;

(a) Potential amendments to sub-section 42(1) of the FOI Act:

Sub-section 42(1) of the Act currently is not subject to a public interest test.

It is submitted by the DATSIPD and the DEFT that, no amendment is required to sub-section 42(1) of the FOI Act to protect the identity or other personal details of a person (other than the applicant). The correct interpretation and application of the language employed by the provision provides sufficient protection.

In this regard, it should be noted that matter is only exempt from disclosure under sub-section 42(1) of the FOI Act if disclosure *"could reasonably be expected to"* cause the kind of prejudice contemplated in the ensuing paragraphs to the sub-section.

Then Information Commissioner considered the meaning of the phrase *"could reasonably be expected to"* in Re "B" and Brisbane North Regional Health Authority (1994) 1 QAR 279 (at paragraph 160):

> *"The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist."*

Accordingly, the likely use(s) that may be made of information should already properly form part of a decision-makers consideration of whether disclosure of the information in issue would result in a real and substantial danger of the prejudice contemplated by sub-section 42(1) of the FOI Act occurring.

(b) Potential amendments to sub-section 44(1) of the Act:

The disclosure of information under sub-section 44(1) of the FOI Act is already subject to a countervailing public interest test.

In this regard, the Committee should note that those matters considered by a decision-maker in determining the balance of the public interest between disclosure and non-disclosure are not finite. Potential reasons in the public interest for disclosure and non-disclosure are infinite and will necessarily vary from case to case.

Inevitably the potential use(s) which may be made of information will form part of those matters considered in the process of weighing competing public interests between disclosure and non-disclosure.

(ix) whether amendments should be made to the Act to allow disclosure of material on conditions in the public interest (for example, to a legal representative who is prohibited from disclosing it to the applicant);

It is the view of the DATSIPD and the DEFT that any move to adopt such an amendment should be treated with caution, lest it lead to a proliferation of exceptions being formulated to the general legally enforceable right to seek access to government documents contain in the FOI Act.

It is suggested that any such amendment should probably be drafted in terms similar to sub-section 44(3) of the FOI Act, with the preferred view being that there should be defined circumstances.

Consideration should also be given to how long a prohibition on disclosure to a client would last and how it would be monitored/enforced.

C. ANY RELATED MATTER.

(a) Application fees on transfers under section 26 of the FOI Act:

Despite a view that sub-section 26(6) of the FOI Act has a clear literal meaning in that partial transfer under sub-section 26(2) are to be treated as separate application, uncertainty exists amongst Queensland FOI decision-makers as to whether a separate application fee is properly levied for non-personal applications in these circumstances.

Depending on the Committee's ultimate view in relation to the fee issue, it would be of assistance for the sake of consistency in the interpretation and application of sub-section 26(6), if consideration could be given to amending this provision so as to provide greater clarity.

(b) When do processing times commence?

Sub-section 29(2) of the FOI Act and sub-section 6(1) of the Regulations provides that, in respect of a non-personal application, the application fee must be paid *"at the time the application is made."*

Logically, this provision has been interpreted to mean that the statutory time frames within which non-personal FOI applications must be processed do not commence until such time as the application fee is paid. However, neither the FOI Act, nor the Regulations specifically this to be the case.

Again, for the sake of consistency in interpretation and application, as well as community expectations, the DATSIPD and the DEFT recommend that section 29 of the FOI and/or section 6 of the Regulations be amended to specifically states processing time frames prescribed by the FOI Act (for non-personal applications) will not commence until payment of the application fee is received.