Submission No 128

OFFICE OF HEALTH PRACTITIONER REGISTRATION BOARDS

GPO BOX 2438
BRISBANE QLD 4001

19th FLOOR FORESTRY HOUSE
160 MARY STREET
BRISBANE QLD 4000

E-Mail: *foi@healthregboards.qld.gov.au*
Telephone: *(07) 3234 1548* Facsimile No: *(07) 3225 2527*

Serving:
Chiropractors & Osteopaths Board of Qld
Dental Board of Queenstand
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Physiotherapists Board of Qld
Podiatrists Board of Qld
Psychologists Board of Qld
Speech Pathologists Board

In reply please refer to:
FOIREV.jp

Ref No.:
FOIREV.jp

4 April, 2000

Ms Kerryn Newton
The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Ms Newton

Re: Review of Freedom of Information legislation in Queensland -*Discussion Paper No. 1*

I attach the *Submission* from the Office of Health Practitioner Registration Boards to the Legal, Constitutional and Administrative Review Committee's *Discussion Paper No. 1* concerning the review of Freedom of Information Legislation in Queensland.

This document is the combined view of the 11 Health Registration Boards of Queensland, who are listed in the *Submission's* introduction.

If you have any queries pertaining to the attached document, please do not hesitate to contact either myself or Mr John Posner, who is the Boards' appointed Freedom of Information Officer, on the above telephone/fax/email numbers.

Yours sincerely

John Greenaway
Executive Officer

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REVIEW OF THE FREEDOM OF INFORMATION ACT 1992

Submission
of
The Office of Health Practitioner Registration Boards
to
Discussion Paper No. 1

April 3, 2000

INTRODUCTION

This document is the submission from the 11 Health Practitioner Registration Boards in response to the issues raised in the *Discussion Paper No. 1*, produced by the Legal, Constitutional and Administrative Review Committee concerning the review of Freedom of Information legislation in Queensland.

The Boards, in alphabetical order, are:

- Chiropractors & Osteopaths Board of Queensland;
- Dental Board of Queensland;
- Dental Technicians & Dental Prosthetists Board of Queensland
- Medical Board of Queensland;
- Occupational Therapists Board of Queensland;
- Optometrists Board of Queensland;
- Pharmacy Board of Queensland;
- Physiotherapists Board of Queensland;
- Podiatrists Board of Queensland;
- Psychologists Board of Queensland;
- Speech Pathologists Board of Queensland.

The views expressed in this document are to be taken into consideration with those already provided to the Review Committee in two previous submission documents dated 11 May 1999 and 19 October 1999.

The same acronyms as used by the Review Committee in their *Discussion Paper no. 1* have also been used by the Boards in this document.

John Greenaway
Registrar

Section A

Whether the basic purposes and principles of the FOI Act have been satisfied and whether they now require modification

Discussion Point

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 receive comments about the compatibility of FOI purposes and principles with our Westminster-style system of government.

No submission.

Section B(I)

Whether the FOI Act's object clauses should be amended

Discussion Points

2. Should the objects clauses of the *Freedom of Information Act Q'ld 1992* (FOIQ) be revised as the Information Commissioner Queensland (IC(Q)) suggests?

The Boards do not object to the suggested revisions to the objects clauses of the FOIQ as suggested by the IC(Q).

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 Boards have no objection to the inclusion of 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)]. It is the Boards' experience, however, that the inclusion of a stated 'presumption of access' would create a misleading impression to an applicant that full access was going to be granted to each and every document requested. This is not the intention of the FOIQ.

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?

No submission.

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?

No submission.

6. Should any additional matters be stipulated in the objects clauses, eg, a statement that Parliament's intention in providing a right of access to government-held information is to underpin Australia's constitutionally guaranteed representative democracy; an acknowledgment that information collected and created by government officials is a public resource?

No submission.

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

The Boards, from their own perspective, can clearly state that there is no 'culture of secrecy' in respect of access to documents they hold. The Medical Board of Queensland, which processes by far the majority of the FOI applications received by the 11 Boards, released 3132 out of a total of 4333 documents (72%) requested in the financial year 1998-99. This percentage of disclosure is similarly reflected in previous years' figures. It should also be noted that the majority of the FOI applications received by the Medical Board relate to complaints investigations, involving documents dealing with personal matters and Board administrative processes.

Nevertheless, the Boards accept that the perception of a 'culture of secrecy' will often exist in those applicants who, for whatever reason, have not been granted full access to all of the documents they have requested. This has been the case in the Medical Board's experience, especially amongst members of the public who have become dedicated serial FOI applicants to a particular agency and are not granted full access to everything they request. This perception is then enhanced by the length of time it takes for an external review of an agency's decision to be processed by the IC(Q). One way to overcome this would be to require the Information Commissioner to process external reviews within a reasonable, stipulated period of time (as is every other process of an FOI application). This at least would stifle those claims that the external review process is simply a method of further slowing down the FOI application process on the part of the agency.

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, e.g. by statutory or administrative instruction?
(b) What sort of (additional) information should agencies be required to routinely publish?
(c) What (other) considerations are relevant?

The problem of 'reversing' the onus, as proposed here, so that agencies are required to routinely make certain information public is to determine exactly what sort of information could be released in such a manner. Certainly the information would have to be of a general nature, otherwise its release may well prejudice either 'essential public interests' or 'the private or business affairs of members of the community in respect of whom information is collected and held by government'.

Agencies are already required under various legislation to publish a large amount of information about their activities and financial management in documents such as annual reports, annual accounts, statements of affairs, codes of conduct and policies etc. These are all documents readily accessible to the public, which have to be kept up to date, accurate and produced at the very minimum on an annual basis. The Boards query what other type of information they would each be expected to routinely disclose over and above what is already published.

To impose statutory requirements that information be released routinely (in the context of the FOIQ) would require analysis of the types of information being currently requested in FOI applications. For example, the majority of FOI applications received by the 11 Registration Boards are requests for documents concerned with complaints investigations. The Medical Board also receives FOI applications requesting access to documents concerning its registrant health impairment programme. These types of applications are expected to increase, now that all of the Registration Boards are required to run similar programmes for their registrants under the Health Practitioners (Professional Standards) Act 1999. Naturally much of the information contained in these documents is of a personal and highly confidential nature. The Boards cannot see where such information could possibly be released for general public consumption on a routine basis, as proposed here. The Boards note that the FOIQ, as it currently stands, already:

- *grants members of the general public with the right to request access to information held in their respective records;*
- *places the onus on the agency to establish that any decision it makes must be justified (under the provisions of the Act); and*

- ☐ *requires the agency to assist the applicant making the application in the correct manner and, if necessary, redirect the applicant/application to the correct agency.*

Finally, there is the matter of cost. The current administrative costs of the FOIQ is one of the most important issues under review by the Review Committee. This proposal raises the possibility of yet further FOIQ administrative costs, without any mention of additional funding for agencies to pay for it. Government, as a whole, is in the process of reducing its administrative costs through the reduction of bureaucracy where possible. The Boards submit that this proposal would result in an increase in agencies' administrative expenses, without any appreciable benefit to the release of information.

The Boards submit that they do not support the entire approach to FOI in Queensland be 'reversed' as proposed in discussion point no. 8.

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

No submission.

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?

No submission.

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?

The Boards submit that the current responsibilities and duties of an agency regarding FOI requests already contained in the provisions of the FOIQ are sufficient by themselves. The effective and efficient practice of FOI applications should be considered to be an inherent aspect of the respective senior public officer's performance as a whole and not as a separate issue.

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

No submission.

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?

No submission.

Section B (II)

Whether and to what extent, the exemption provisions in the FOI Act, Part 3 Division 2 should be amended.

Discussion Points

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—e.g. are any expressed too broadly, thereby unnecessarily limiting access—and how might their drafting be improved?

S. 41 -Matter relating to deliberative processes -Expert Opinion or Analysis

The Boards are responsible for the investigation of complaints made about registered practitioners. Most of these complaints are lodged with the Medical Board and deal with allegations about medical treatment received by the complainant from a medical practitioner. Reports prepared by independent medical experts are often obtained to aid the Boards in their investigations. The Boards submit that this section should be amended to enable 'expert' reports obtained during an investigation process to be exempted if necessary.

These reports will often form some of the most important evidence influencing a Board's decision to proceed or not to proceed with a formal charge. These reports have been the subject of FOI applications, especially while the investigation is still on-going, from applicants who have nothing to do with the actual matter being investigated, often other medical practitioners. Although the Boards do their best to de-identify such reports so as not to reveal the identities of the actual parties concerned, often the identity of the registrant can be ascertained by another member of the same profession on the basis of treatment or hospitals involved. Under the current wording of s.41 of the FOIQ, these reports cannot be exempted from disclosure because they fall under the ambit of s.41(2).

The Boards note, however, that in the comparative FOI legislation of:

1. *New South Wales (Sch. 9 FOI Act 1989);*
2. *Victoria (s.30 FOI Act 1982);*
3. *South Australia (Sch. 9 FOI Act 1991);*
4. *Western Australia (Sch. 9 FOI Act 1992); and*
5. *Tasmania (s. 27 FOI Act 1991);*

such reports may be exempted from disclosure. The Boards submit that the option of

exemption should also be made available in Queensland, so that , prior to any formal, public disciplinary action, these reports should not be accessible to any outside third party.

Submission - that s.41(2)(c) be deleted, or amended to enable an agency to claim an exemption on reports of expert opinion or analysis.

Section 42(1)(c)
The Boards support the recommendation of the IC(Q) that this section be amended to include the words:

"...or subject a person to acts of serious harassment."

Many of the FOI applicants applying to the Boards are members of the public who are complaining against a registrant for reasons of alleged malpractice, sexual harassment, etc. A number of these applicants hold antagonistic feelings (of varying degree) against the concerned registrants. This antagonistic attitude can take the form of the threat (real or otherwise) of some kind of harassment against the respective registrant. Registrants have advised the Boards during the FOI consultation process of their personal fears of harassment from complainants/FOI applicants and raise serious concerns that the release of certain information might trigger off such action against themselves. As the IC(Q) rightly points out, such threats do not, in themselves, justify the claiming of the current s.42(1)(c). The amended rewording of this section, however, as recommended by the IC(Q) would overcome this.

Submission - that s.42(1)(c) be amended as recommended by the IC(Q).

S. 44 -Matter affecting personal affairs - Public Interest
Section one of this provision states that matter concerning the personal affairs of a person (living or dead) is exempt matter unless its disclosure "...would, on balance, be in the public interest.". The inclusion of a public interest balancing test is at variance with the reasoning behind this exemption provision. The IC(Q) is quite specific in his interpretation of what can be termed the "personal affairs" of a person in his decision Re Stewart (93006). Such information is clearly not about a government agency or its workings.

There is no public interest test in the comparative provision of the FOI legislation of:

1. *the Commonwealth (s.41 FOI Act 1982);*
2. *South Australia (Sch.6 FOI Act 1991);*
3. *Tasmania (s.30 FOI Act 1991); and*
4. *the A.C.T. (s.41 FOI Act 1989).*

A fundamental purpose of the FOIQ is to make government more accountable. It is not, however, to be a means for gathering information of a personal nature about other persons held on government records. Yet, even when information clearly meets the Information

Commissioner's strict "personal affairs" criteria, there still remains a public interest balancing test.

The Boards submit that "public interest" should not be a factor when considering whether to exempt matter concerning the "personal affairs" of a person. The corresponding provisions of the FOI legislation of the Commonwealth, South Australia, Tasmania and the A.C.T. support this view.

Submission - that the public interest balancing test be removed from s.44

S. 44 -Matter affecting personal affairs - Qualified Persons
Section four of this provision states that an agency "may appoint a qualified medical practitioner to make a decision" concerning granting of access to information "of a medical or psychiatric nature concerning the person making the application", where it is felt that to do so might be prejudicial to the physical/mental well-being of the applicant.

The comparative exemption provision, s.41, in the Commonwealth FOI Act lists the following "qualified persons" as suitable to make this decision:
- *medical practitioner;*
- *psychiatrist;*
- *psychologist;*
- *marriage guidance counselor; and*
- *social worker.*

The category of professional persons who may be appointed in Queensland should be similarly broadened beyond that merely of a "qualified medical practitioner". The Boards note that the IC(Q) also favours a broadening of range of 'qualified persons', albeit not quite as wide as that the Commonwealth legislation. The IC(Q) is, however, in support of adding psychologists to the current list. It has been the experience of the Medical Board that in a number of instances it has decided to disclose the relevant information to an applicant under s.44(3) of the Act, only to discover that the applicant is a patient of a psychologist, not a psychiatrist. This has caused needless anxiety and confusion on the part of the applicant, who cannot understand why a psychologist is not a perfectly acceptable professional to handle such sensitive information. The Boards agree with this view.

Submission - that the category of qualified persons be extended at a minimum to include psychologists as well as medical practitioners.

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

No submission.

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

The Boards raise the following concerns regarding this point.

- ❑ *What is the level of proof that would need to be reached by a decision maker in deciding whether or not disclosure of a document would result in substantial harm?*
- ❑ *The effect of such a requirement on the free and confidential communication between a Board's investigating officers and sources of information during the investigation process. The Boards have found that their effectiveness as investigators are considerably diminished when information being gathered can be accessed by the registrants concerned prior to the completion of the investigation. The Boards are concerned that such a requirement would make it easier for registrants under investigations to gain access to this information and so reduce the effectiveness of the Boards' actions. The Boards submit that this would not be in the public interest, given one of their primary roles is the investigation of complaints for public safety.*

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?

No submission.

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).]

The imposition of a general public interest test would not be feasible given the nature of certain of the exemption provisions, e.g. legal professional privilege. It would also require a broad definition of 'public interest', as it refers to this Act. This again may well not be feasible given the diverse range of information held by government and local government agencies and the areas of responsibility in which they operate. Such a definition would need to be flexible enough to take all this into account, as well as other issues that may be pertinent at the time of

the FOI application being processed. It should also not be too amorphous as to make it's understanding and use an issue of contention and disparity between differing agencies.

Conversely, if there was no definition in the Act, then the interpretation of each exemption provision would be affected by the current meaning of public interest as used by the courts. This in turn would require agencies are kept abreast of any such court interpretations and that their FOI decision makers are trained to understand and so implement them. This, in turn, would inevitably mean higher administrative costs. Although the IC(Q) could provide such information to agencies, the Boards are concerned that these extra duties would impose further strains on this office's limited resources. If this were to result in yet further delays in the processing of external reviews, then it would not be of any advantage to the general public.

22. Should the ability of ministers to sign conclusive certificates be revisited?

No submission.

Section B (III)

Whether the ambit of the application of the FOI Act, both generally and by operation of s 11 and s 11A, should be narrowed or extended.

Discussion Points

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?

No submission.

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?

No submission.

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

No submission.

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?

No submission.

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?

No submission.

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?

No submission.

29. What arguments, if any, are there for extending the FOIQ to the private sector generally?

No submission.

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

Although the Boards fully support the fundamental principles of the FOIQ and are not adverse to the concept that contractors performing functions 'outsourced'' by government should be considered for inclusion under FOI, the possible cost impact of such a measure on the administration of the Act must also be taken into account.

The Boards pointed out in their supplementary submission of 19 October 1999 that they each engage the services of a number of major private legal firms, such as Minter Ellison, Phillips Fox, Gilshenan & Luton. The Boards receive FOI applications which requires the processing of documents held on the records of their respective private legal advisors, who are not prepared to release or grant access of their files to a Board officer. A major concern of the private legal firms, notwithstanding issues of legal professional privilege and privacy, is that the physical possession of the file by the Board would then mean that all of the documents would have to be included in the scope of the FOI application. At the same time it is accepted that the Board's FOI Officer have a statutory right to have access to the relevant documents for processing.

The only practical way the Boards can gain access to these documents is to delegate the responsibility on the individual private legal firms to determine which of the documents on their own files are the legal property of the Board. However, the Boards are charged for all of the time and photocopying expenses incurred by the private legal firm in its location and collation of these documents.

The Boards also note that the IC(Q) in his submission to the Review Committee and his

decision no. 99003 makes no mention of the cost factors. Does this presume that he expects such costs to be totally borne by the government agency concerned and not passed onto the applicant?

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?

No submission.

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?)

No submission.

Section B (IV)
Whether the FOI Act allows appropriate access to information in electronic and non-paper formats

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

If it was the decision of the Review Committee that the FOIQ should confer a general right of access to information instead of a right to documents, a very precise definition of the term 'information' would need to be included in the Act. It would need to make quite clear the rights of applicants of the type of 'information' they wish to access. For example, would a request for the compilation (and possible calculation) of specific statistics drawn from a mass of information held by an agency be eligible if the FOIQ were to be amended as proposed? Currently such an application would not be considered caught because the Act refers to a document, which implies something that has been created.

The right to access information, however, could be taken by some applicants as a right to access information in its purest form. The possible implications of this on the administration of the FOIQ by agencies such as the Boards could be extremely expensive. The Boards possess limited resources, but because of the nature of their responsibilities receive proportionately more FOIs applications than other agencies. The Boards accept that a new definition of the term 'document' is needed to take into account the most recent technological advances in methods of records storage (see below).

Submission: the concept of the right to access 'documents' rather than 'information' per se be maintained.

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?)

The Boards have no objection to the definition being 'improved' by further clarification regarding the inclusion of the word 'data', but it must be made clear that agencies are not responsible for processing data into the form requested by the applicant.

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

No submission.

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?

The Boards note that the proposals raised in the Public Relations Bill 1999 will require agencies to be more accountable in terms of their record management policies and procedures. In particular with those policies, standards and guidelines issued by the State archivist. These new proposals in the Bill include specific mention of access under FOI. The Boards are of the opinion that it would be excessive if the FOIQ were also to include provisions dealing with the same issues.

The Boards submit that it is the role of the Public Records Bill 1999, not the FOIQ, to determine the procedures and processes of records management.

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?

In the Boards' Addendum Submission, dated 19th October 1999, great concern was expressed about the processing costs in regard to the location and collation of documents held by an agent (e.g. legal advisors) deemed to be included in an FOI scope of application. The Boards understand there to be three factors under consideration here;

1. *the individual's right of access under FOI;*
2. *the administrative costs borne by an agency affected through the exercise of that right by an individual; and*

3. the trend for government services to become more user-pays orientated.

The Boards accept that should the FOI process operate on a totally user-pays basis it would (in many cases) be too cost prohibitive and have a commensurately detrimental effect on the ability of many individuals to exercise their FOI rights. The issue, therefore, is the balancing of the FOI rights of an applicant against those of the public interest of the general community, when the FOI processing costs borne by an agency with limited financial resources (such as one of the Boards) will have a negative impact on that agency's ability to fulfil its statutory duties. The Boards consider that an important distinction should be made between non-personal and personal FOI applications here. The latter, in the Boards' opinion, should be given more leeway regarding costs to reflect the original purpose and spirit of the legislation. In other words, the individual's right to access government held information about themselves should not be compromised because of financial considerations.

The Boards submit that:

- ***when processing 'personal' applications, processing costs should continue to be borne by an agency;***
- ***when processing non-personal applications, the Boards submit that it is not in the public interest for agencies to have to incur such costs. In those types of FOI applications, such costs should be redeemable from the applicant by way of a fee equal to the costs incurred by the agency.***

Section B (V)

Whether the mechanisms set out in the FOI Act for internal review are effective.

Discussion Point

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)?]

The Boards have no objection to the proposal that an applicant could appeal directly to the IC(Q) (with the latter's approval) and submit the following:

- *that such an action would in no way reflect on the ability of the agency concerned in its administration of the FOI process and be so considered by the IC(Q) in his processing of the external review;*
- *that it would not impose further strain on the resources of the IC(Q) resulting in yet longer processing times of external reviews;*
- *that, in the case of serial FOI applicants whose actions can be reasonably proven to have a negative effect on the ability of an agency to perform its statutory responsibilities, the agency concerned may request approval of the IC(Q) to waive its duty of internal review.*

Section B (V) (continued)

Whether the mechanisms set out in the FOI Act for external review are effective and, in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming.

Discussion Points

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

See the matters raised below in the Boards' responses to the other discussion points under section B (V).

40. Should the same person hold the offices of Queensland Ombudsman and Queensland Information Commissioner?

The only issue the Boards wish to raise regarding this discussion point is the question of accountability. Who is the IC(Q) accountable to, from the point of view of an applicant who is unhappy about the length of time it is taking for an external review to be processed? The Medical Board has one FOI applicant whose external review application has not been processed since its formal receipt by the IC(Q) in 1994. Ordinarily it would be to the Ombudsman, but in this case such a complaint would be dealt with by the same person. Is this a denial of natural justice to the applicant?

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?

In their submission of 11 May 1999, the Boards made the following points:

(a) that the IC(Q)'s decisions be written as far as possible in plain English; and

(b) that the IC(Q)'s current policy regarding mediation be reviewed, taking into account his reluctance to uphold an agency's use of s.28(2).

(a) Although the Boards accept the premise of the IC(Q) that it was his intention in the beginning to produce a series of 'precedent' external review decisions, it does not accept that such an excessively legalistic approach still has to continue. The Boards agree that this method should be used when a new precedent is involved in an external review decision. However, a great many of the external review applications before the IC(Q) do not involve precedents. This is because the external review process is free (to the applicant) and therefore can be, and is, exercised by many FOI applicants merely dissatisfied with the original decision and the subsequent internal review. There is no other criteria currently required for an external review appeal in the FOIQ.

It is the IC(Q)'s continued pursuit of this very lengthy, legalistic approach to processing each external review application that is one of the reasons for the enormous backlog of unprocessed external review appeals. The IC(Q) claims that he needs to do this because all of his decisions are accountable (if challenged) to the Supreme Court. The point is, though, how many of his decisions have ever been challenged in the Supreme Court? The cost of such a challenge is enormous and well beyond the financial resources of most FOI applicants. The Boards are of the opinion that this argument by the IC(Q), although theoretically correct, is in practical terms not supported by the number of actual Supreme Court challenges. In other words, it does not justify the IC(Q)'s excessively legal approach to every appeal he processes. The approach of the IC(Q) may be out of tune with the intent of the Act, because if it takes as long to get a IC(Q) decision as a High court judgement, then it is not an avenue of appeal that is freely and easily available to aggrieved people.

Furthermore, by its very nature the commodity the IC(Q) is involved with in the appeal, i.e. information, is often time dependant in its relevancy to the applicant. If the appeal process is as lengthy as it currently is, then again it may defeat the purpose and spirit of the Act. Natural justice should require the IC(Q) to review his current methodology and take into account the need for speedier, more understandable decisions for the benefit of the applicant. It can also be argued that the perception that a 'culture of secrecy' exists in Queensland is not deflected by the current, often lengthy, external review process.

The Boards submit that the considerable bank of legalistic, lengthy decisions already made by the IC(Q) should be more than sufficient to enable the production of shorter, plainer English decisions, drawing on the FOI issues already fully considered and discussed in the earlier decisions. This would result in the following:

- ***faster processing time as originally envisaged;***
- ***decisions that were more relevant to the applicants in regard to the time the original FOI applications were lodged;***
- ***decisions that were more easily understood by the majority of FOI applicants, who do not have professional legal knowledge;***
- ***decisions that would meet the natural justice requirements (to all parties) inherent in the role of IC(Q).***

(b) The Boards support more use of the IC(Q)'s mediation powers, because, if successful, this would also help to reduce the number of formal external review decisions that would necessarily have to be made. However, to be successful, the Boards feel that there must be a fundamental change away from the current, overly legalistic approach to decision making by the IC(Q).

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 all decisions in either full or summary form (as in Western Australia)?

(a) The Boards would support the IC(Q) having overall responsibility for the production of up to date FOI guidelines, on the proviso that it would not further erode the IC(Q)'s limited resources, and so have a negative impact on the already considerable backlog of external reviews yet to be processed. If this were to be the case, then the Boards would prefer that such a responsibility be transferred to another appropriate department/agency with adequate resources. See also the Boards' response to discussion point no. 75.

(b) The Boards support such a statutory provision, because:
- *it is one of the few accurate methods of measuring the efficiency of the IC(Q) in the time it takes to process external reviews;*
- *it makes the IC(Q) publicly accountable for his decisions.*

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

The views of the Boards regarding this issue were clearly stated in their submission paper, dated 11 May 1999. They were as follows:
- *there are specific time periods set in the provisions of the FOIQ regarding the responsibilities of both government agencies and FOI applicants: there are none regarding the responsibilities of the IC(Q).*
- *this is one of the methods by which the Act ensures government accountability to the general community: currently the IC(Q) is not so accountable.*
- *imposed time limits require government agencies to become more efficient in the administration of their FOIQ responsibilities: currently there is no such requirement (and consequently incentive) for the IC(Q) to do so.*
- *FOI applicants are entitled to know that their external reviews will be completed by a certain date: the Medical Board has a number of outstanding external reviews which are now several years old.*
- *statutory time limits would ensure that external reviews would be processed in a more chronological order based on their receipt: currently the IC(Q) has the discretion of choosing when an external review will be processed because there is no requirement to meet any specific deadlines.*

The Boards submit that the IC(Q) be required to make his decisions within a statutory time limit.

44. 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)?

The FOI Act sets very specific time periods within which government agencies must complete various actions, including acknowledgment of receipt of FOI applications, consultation with third parties, decision making and internal reviews. This is one of the methods by which the Act ensures government accountability to the general community. Similarly, applicants must apply for both internal and external reviews of decisions within definite time periods.

In their submission of 11 May 1999, the Boards recognized that the IC(Q) requires time to consider documents and make decisions. Consequently the Boards submitted that the IC(Q) be granted a period of a maximum of six months to process an external review application. The Boards expressed the view that any period longer than six months was unreasonable to the FOI applicant and the government agency concerned. An example was given of the IC(Q)'s published decision on the Internet, No. 99001, made on 7 April 1999, which concerned an external review application originally made in October 1996.

The Boards note, however, that in his submission to the Review Committee the IC(Q) stated that the present resources of his office were in his opinion capable of achieving comparable standards of timeliness with his WA counterpart (on the proviso that the large backlog of current external reviews were 'absent'). Unfortunately, how the latter was to be achieved (without presumably increasing the current resources of the IC(Q)) was not discussed.

The Boards therefore propose that some consideration should be given by the Review Committee to enable the IC(Q) to achieve this objective, because if the backlog of cases is removed, the IC(Q) on his own assertion will be able to emulate the standards of of timeliness of his WA counterpart. This would enable the Review Committee to consider the option of a much shorter statutory time limit than the original six months proposed by the Boards in their submission of 11 May 1999. The Boards have no objection to the concept of an extension of time being granted to the IC(Q) when processing a particular external review application. The Boards submit, though, that:

- ❑ *the IC(Q) must provide reason(s) as to why the extension is being requested; and*
- ❑ *the extension must be mutually agreeable to the three main parties, i.e the applicant , the government agency and the IC(Q).*

45. Should the IC(Q) have the power to:
(a) enter premises and inspect documents; and/or
(b) punish for contempt?

(a)The Boards query how such a proposal would be administered? Who would decide when an agency is deliberately not disclosing the presence of documents in its records to an FOI applicant? What level of proof would the IC(Q) need to justify use of such a draconian measure and would such a decision be accountable to any other person/entity?

One of the primary functions of the Boards is the investigation of complaints alleged against their respective registrants. Many of the documents held by the Boards in the course of these investigations are of a confidential and sensitive nature. The confidentiality of the registrants is also important, especially before the completion of an investigation and before the Board has determined whether the complaint has been substantiated and requires disciplinary action. How would the Act ensure that documents of a confidential and sensitive nature outside the scope of an FOI application (but relevant to the issue which instigated the FOI) were not forced to be released to the IC(Q)?

Would the required production of these documents to the IC(Q) be considered a breach of promise of confidentiality to the third parties concerned? It has often been the case that an FOI applicant has refused to accept that a Board does not possess such and such a document in its records, or has accused a Board of deliberately covering up some action by changing a document after the event. The Boards have never done any such thing. The FOIQ, however, places the onus on the agency at all times to justify its actions. How would it be determined (and by who) that an agency has deliberately obstructed the processing of an FOI thereby requiring the IC(Q) to take such an action? What sort of proof would an agency need to provide to the IC(Q) for him not to take such a draconian step as proposed here? Would an agency have a right of appeal against such a decision by the IC(Q)? The Boards are of the opinion that the powers of compulsion granted to the IC(Q) under the current FOIQ (e.g. ss. 85 & 86), are sufficient enough for the execution of his duties and responsibilities.

The Boards submit that they do not support the proposed granting to the IC(Q) (and therefore his officers) the power to enter premises and inspect documents.

(b) Not applicable in view of the Boards' submission above.

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

The Boards do not support the proposal that the IC(Q) should be empowered to order disclosure of otherwise exempt matter in the public interest for these reasons:

- *the document concerned has been established as being exempt under the provisions of the FOIQ by the department/agency and the IC(Q), and the Boards do not accept that it is the IC(Q)'s role then to decide whether, in his opinion, the document should still be released.*
- *it pre-supposes that agencies would exempt a document without taking the various*

public interest factors (if appropriate) into consideration, thereby failing in their FOI responsibilities.

- ❑ *agencies, like the Boards, will often also use profesional expertise in determining their decision regarding matters of a complex technical nature, e.g. medical or psychological. The proposal would empower the IC(Q), who would not possess this expertise, to overturn such decisions. Furthermore, the Boards believe the only way the IC(Q) could make a considered judgement whether or not to order disclosure "in the public interest" would be by consulting with experts (other than the agency)in the relevant field of professional knowledge. The Boards are concerned that such consultation would prejudice the confidentiality of the document(s) concerned (already justified as being exempt under the FOIQ).*

The Boards submit that they do not support that the IC(Q) be empowered to order disclosure of otherwise exempt matter in the public interest.

47. Should the scope of the IC(Q)'s decision-making powers in relation to conclusive certificates signed by a minister under ss 36, 37 or 42 be expanded? (In this regard, refer to discussion point 22 regarding the need for conclusive certificates.)

No submission.

Section B (VI)
The appropriateness of, and the need for, the existing regime of fees and charges in respect of both access to documents and internal and external review.

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

Firstly, the Boards are not in favour of abolishing the non-personal information application fee. As the FOIQ stands at present, it is one of the very few avenues of recouping an agency's FOI administration costs. Although the possible introduction of FOI processing costs would certainly increase the amount of costs that could be recouped from an applicant, the Boards still feel that some distinction should be maintained between non-personal and personal applications (see the Boards' response to discussion point no. 49 below).

Having stated the view that the fee should not be abolished, should it remain at $30 or be increased? There are two factors that need to be considered here. Whether FOI processing charges were to be introduced, or, conversely, if they were not.

If processing fees were to be introduced then the Boards feel there is a strong argument for not increasing the current $30 application fee. The $30 fee is on a par with the application fees

charged by the other Australian FOI legislation with FOI processing charges. To increase it would be unreasonable. FOI applications considered to be of a non-personal nature include not only those made by third parties or entities who have no relationship with the subject of the FOI application, but also those who do, such as next-of-kin.[1] *The Boards do not want non-personal applications from next-of-kin, e.g. child about a parent, to become so financially onerous to the applicants that they are deterred from exercising their FOI rights. This would be against the public interest and the very purpose of the legislation.*

If, however, FOI processing charges were not to be introduced, then the Boards are in favour of increasing the non-personal FOI application fee. The Boards, however, mindful of the comments by the Hon Justice Kirby and quoted in the Discussion Paper, accept that any rise must take into account that FOI is now a basic activity of government and hence should not be regarded as something to be fully funded on a user-pay basis. Consequently, the Boards submit that the non-personal application fee should be set at a maximum of $50.

The Boards submit that:

- ***the non-personal application fee should not be abolished;***
- ***if processing charges were to be introduced, the non-personal application fee remain at $30;***
- ***if processing charges were not to be introduced, the non-personal application fee be set at a maximum of $50.***

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

The Boards are not in favour of charging a uniform application fee for both personal and non-personal requests. The Boards feel that the current distinction between the two types of FOI applications should continue. One of the fundamental purposes of the Act is to make government more accountable to the general public by granting individuals the right to seek access to information held by the government about themselves. In other words, the right to make applications deemed to be of a personal nature under the Act. Currently that right is free. It may no longer be in the future as a result of this review.

The Boards recognize that the introduction of some type of financial burden on that right will be considered by some members of the community in a negative light. Nevertheless, as the administration of FOI becomes more complex and the number of applications continues to grow, then the costs involved and how they are met must be reviewed. The Boards are not in favour of introducing a fee that would be clearly discriminatory against those members of the

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[1]. See the decision by the IC(Q) *Re Eunice Turner and Northern Downs District Health Service* no.97009

community with lesser financial resources.

The Boards submit that if it was the decision of the Review Committee to recommend the introduction of an application fee for personal applications, then it should be a lesser amount than for non-personal applications.

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?)

(a) The Boards hold the view that it is necessary, for some type of FOI processing charge regime to be introduced in Queensland in order to defray (albeit only partially) the growing cost of FOI administration borne by government agencies, particularly those like the Registration Boards, which are self funded and have very limited financial resources. Agencies do not have access to unlimited financial resources. If they are forced to continue to bear, notwithstanding the non-personal application fee, the real cost of FOI applications, then their budgets will have to take this into account regarding the administration of their other statutory duties.

The Boards accept that FOI processing charges as calculated in the other Australian jurisdictions have resulted in the complaint that the FOI process has become too expensive and therefore defeats the purpose for which it was created. This is because the processing charge structure is based upon the amount of time spent at a rate ranging from $7.50 per ¼hour to $30 per hour. When calculated as a total charge this can add up to a considerable amount of money for even the most basic of FOI applications. The Boards are therefore not in favour of processing charges based purely on a time factor.

Similarly, the Boards do not favour processing charges based purely on the number of documents involved in an FOI application. One reason is how would it be determined which documents are to be considered for a processing charge. For example, if the FOI decision maker was required to search through a record containing several hundred documents to locate the specific documents requested by the applicant, how would the processing charge be calculated? Would it be calculated on the total number of documents the FOI decision maker actually had to search through in order to locate the requested documents? Or would it be calculated only on the actual number of documents located? Both have merit: the first because it more accurately reflects the processing action taken by the FOI decision maker, the second because it reflects what the applicant was actually seeking access to.

The Boards refute the suggestion raised by the IC(Q) that the charge could be fixed to the number of documents actually disclosed on the grounds that it would be discriminatory against

an agency. The Medical Board has received FOI applications where the decisions, involving hundreds of documents, have justifiably refused access to many more documents than disclosed. To only charge the applicant a processing charge for the small proportion of documents actually disclosed would be unfair, considering the actual amount of work undertaken by the FOI decision maker.

The Boards also disagree with the view that such a regime would encourage agencies to disclose more documents. The purpose of the FOIQ is to grant the people the right to apply for access to information held on government records, not the general granting of access of information per se. There are legitimate reasons why agencies sometimes do not disclose information and the exemption provisions of the FOIQ provide for this. To suggest that a methodology of process charging should in any way affect this is not supported by the Boards.

The Boards are in favour of a processing charges regime based on a combination of the number of documents involved (all of them, not just those disclosed to the applicant) and the time taken to process them. The IC(Q)'s suggested methodology regarding capping of charges and how much those charges could be are also supported by the Boards as a good guide for the Review Committee to consider, namely:

- *1-20 pages $30*
- *21-50 pages $45*
- *51-80 pages $60*
- *81-120 pages $75*
- *121-160 pages $90*
- *161-200 pages $105*

Finally, the Boards are in favour of granting personal applications a 'free' quota before processing charges would be incurred by the applicant. As stated in their response to discussion point no. 49, the Boards believe that some form of distinction should remain between personal and non-personal applications, but within financial reason. The suggested figure of 400 documents by the IC(Q) is considered by the Boards as unreasonable for an agency, and recommend instead 200 documents.

The Boards submit that they are in favour of :

- ***a 'combined' processing charges regime as suggested by the IC(Q) in his submission;***
- ***granting personal applicants a 'free' quota before processing charges would incur.***

(b) The Boards do not support the concept of charging for supervised access, if other processing charges have already been imposed on the applicant. The Boards accept that this is a responsibility of the agency concerned inherent in its administration of the FOIQ, just as the Boards are each required to provide public access to their registers of registrants and do not charge a fee for the presence of an officer.

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

The Boards support the current standard photocopying charge of 50c per document and do not believe it should be changed. Whilst it may be more expensive than that charged by other FOI legislation in Australia, Queensland is the only state not to charge processing fees in its FOI legislation. Therfore to use the argument that the photocopying charges should match that of the other Australian FOI legislation is to unreasonably isolate the one from the other. It may well be the case too that were processing charges to be introduced as a result of this review, they would still be substantially lower than elsewhere in Australia. Finally, the Boards have never received a complaint from any applicant complaining about the cost of photocopying. Indeed, as compared to some other public agencies the current fee is not high, (e.g. $3 photocopying fee per page from the Public Records Office).

The Boards submit that there be no change to the current photocopying charge of 50c per document.

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 Boards support the proposal that the FOIQ be amended (if there are to be any fee increases) to enable agencies and ministers to waive or reduce fees. The Boards feel that this option should be made available to a Minister or Principal Officer (and/or delegate) on the following grounds:

- ❑ *genuine financial hardship on the part of an applicant, as this should not ultimately deprive a person of their FOI rights under the law; or*
- ❑ *genuine administrative errors on the part of an agency which has resulted in higher, unwarranted processing fees or charges to the applicant; or*
- ❑ *at the discretion of a Minister or Principal Officer (and/or delegate), but which must be accountable to the Auditor-General.*

The Boards submit that the FOIQ be amended to enable agencies and ministers to waiver or reduce fees.

53. Are any of the arguments for the introduction of application fees for internal and/or external review valid? If so, which ones and why?

The Boards support the following arguments that application fees should be introduced for internal and/or external reviews (but on the suggested criteria described below under discussion point no. 54):

- ❑ *action must be taken to recoup a portion of the growing FOI administrative costs from applicants as agencies, particularly small agencies like Boards, do not have unlimited funds;*

- *the introduction of reasonably affordable fees, especially if made refundable, would not defeat the purpose of the FOI legislation;*
- *it would act as a deterrent to serial FOI applicants who seek only to tie up an agency's limited resources for their own benefit; and*
- *it would reduce the amount of documents going to the IC(Q) (see discussion point no. 54 below).*

54. If application fees are introduced for internal and/or external review:
(a) at what level should those fees be set; and
(b) should they apply to reviews of decisions concerning both personal and non-personal information?
Should provision be made for:
(c) waiver of those fees and, if so, in what circumstances;
(d) refunds of those fees where proceedings are decided (wholly or partly) in favour of the applicant; and/or
(e) the fees extending to applications relating to a deemed refusal?

Internal Reviews
(a) & (b) For internal reviews of decisions of:
- *personal applications of more than 200 documents ; and*
- *non-personal applications of more than 50 documents;*

the Boards submit that the Review Committee consider the option of introducing a small fee.

This would make applicants consider which documents out of a large application (i.e. over 200 documents) they actually wish to seek access to, rather than just demand a general internal review for all of the documents as is currently the case. The Boards argue that there should be a responsibility on the applicant not to unnecessarily tie up an agency's limited resources in internal reviews for documents which they do not actually intend ever obtaining a copy of (were disclosure to be granted as a result of the review). One way to achieve this is to make the applicant aware that there will be a financial cost for such actions. The Boards have had experience of serial FOI applicants who have deliberately used the internal review process in such a fashion.

(c) The Boards submit that the power to waive the internal review fee (if introduced) should be granted to the Minister or Principal Officer (and delegate) of an agency in the following circumstances:
- *genuine financial hardship on the part of an applicant, as this should not ultimately deprive a person of their FOI rights under the law; or*
- *at the discretion of a Minister or Principal Officer (and/or delegate), but which must be accountable to the Auditor-General.*

(d) The Boards submit that a Minister or Principal Officer (and/or delegate) be granted the

power to refund the internal review fee (if introduced) to an applicant in the following circumstances only:

- ❑ *that the decision of the original FOI decision maker was found to be wholly in error and fully overturned by the internal reviewing officer.*

(e) Not applicable.

The Boards submit that they support the introduction of an internal review fee under the conditions stated above.

External Reviews

(a) & (b) The Boards accept the view expressed by the IC(Q) that were the introduction of an application fee for external reviews to occur, then it should be:

- ❑ *reasonable, so as to be affordable to the majority of applicants; and*
- ❑ *set at a rate of $50.*

The Boards also believe that an external review application fee should extend to both personal and non-personal requests, but with the imposition of the fee on personal requests only where they involve more than 200 documents. This would make applicants consider exactly which documents out of a large application to which they have been refused access, they actually wish to go to external review. The Boards submit that such a fee structure would have the effect of reducing the size of the external reviews going to the IC(Q) with the commensurate relief on the latter's limited resources.

(c) The Boards submit that the waiver should be at the discretion of the IC(Q).

(d) The Boards submit any refund should be made to the applicant in the following circumstances only:

- ❑ *when the proceedings are decided wholly in favour of the applicant; or*
- ❑ *at the discretion of the IC(Q). (but accountable to the Auditor-General).*

The Boards do not support a refund being made for external reviews found to be partially in favour of the applicant on the basis that the agency concerned has not been found to be totally in error and so seriously disadvantaged the applicant.

The Boards also submit that this would act as a further spur for applicants to reduce the number of documents going to the IC(Q) by their considering exactly which documents of an application have the most chance of receiving a favourable outcome, thus entitling them to a refund.

(e) The Boards submit the fee for external review should also extend to those applications relating to a deemed refusal, but under the same criteria as described above.

The Boards submit that they support the introduction of an external review fee under the conditions stated above.

Section B (VII)

Whether the FOI Act should be amended to minimise the resource implications for agencies subject to the Act in order to protect the public inteest in proper and efficient government administration, and in particular:

- **whether s.28 provides and appropriate balance between the interests of applicants and agents;**
- **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:**
- **whether time limits are appropriate.**

Discussion Points

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 emphasize the importance of agencies consulting with applicants about their applications?

The Boards' concern about the current wording of s.28(2) was raised in their submission of 11 May 1999, where it was submitted that limiting an agency's right to refuse to process an application solely on the grounds of the identification, location or collation of documents is both unrealistic and unreasonable. Modern records filing systems employed by government agencies today make the identification and location of documents a relatively straightforward procedure and this is certainly the view of the Information Commissioner in his correspondence with the Medical Board. The Medical Board has not been successful in claiming s.28(2)(b) irrespective of the burden requests have placed on the agency.

It is noted, however, that the IC(Q) also holds the view that the provision needs amending to take into account a wider range of FOI processing duties.

(a) The Boards submit that they support the omission of the word "only" from the last paragraph of s.28(2), but would prefer that the provision as a whole be amended to be more in line with the wording used in either s.24 of the Commonwealth FOI Act, or s.25 of the NSW FOI legislation. This is because the Boards have found that the IC(Q) has taken the view that modern records filing systems employed by government agencies today make the identification and location of documents a relatively straightforward procedure and consequently has never

upheld a s.28(2) decision by one of the Boards, no matter how voluminous an application. One example of this was given in the Boards' submission of 11 May 1999 regarding request for access to every document related to any legal payments made by the Medical Board over a 16 year period. Furthermore, the applicant refused to negotiate with the Medical Board in any way regarding the scope of his application.

The Boards feel, taking into account the comments of the IC(Q) in his submission to the Review Committee, that, without the specific inclusion of wider FOI administrative tasks beyond that of the 'identifying, location or collation the documents', the present reluctance of the IC(Q) to uphold the use of s.28(2) by agencies will continue.

(b) Would this impose yet further strain on the limited resources of the IC(Q)? How would the IC(Q) be able to evaluate the genuineness of an agency's claim? Would it require the IC(Q) having to send one of his own officers to the agency? Would the agency have the right to ask for a review of the IC(Q)'s decision, and if so, to whom? Would the time taken for such a consultation be considered outside of the 45/60 day processing time limit, as this could have implications on the ability of the agency to fulfill it's FOI statutory requirements (should the IC(Q) decide it must process the application)? Alternatively, would the inclusion of such a consultation require the imposing of a time limit on the IC(Q) to respond?

(c) The Boards would support this proposal, as long as an agency would not be penalized by a lack of adequate processing time by the exclusion of any time taken by the consultation process between it and the applicant.

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?

The Boards do not support the proposal that s.28(3) be repealed. The Boards note the comment made by the IC(Q) in his submission that this provision is "..one which is susceptible to misuse by decision-makers unfamiliar with their agencies' documents, or seeking to limit their workload.". If this is the case, then surely this is further argument for increased funding to be made available to agencies to administer FOI, rather than the repealing of a particular provision. The IC(Q) accepts that applications affected by this provision may be uncommon, but they are not impossible. Therefore, the Boards query why this provision should be repealed? The Boards, however, do accept that the current wording of the provision is very broad and would not object to it being amended to include:

- ☐ *identification of the exemption provision(s) purported to be applicable; and*
- ☐ *the reasons why the sought documents are exempt thereunder.*

The Boards submit that although they do not support s.28.(3) being repealed, it should be amended as suggested above.

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?

The Boards support the proposal that a general provision be drafted enabling agencies to refuse to deal with frivolous and vexatious applications. The Medical Board gave some examples in the submission document of 11 May 1999 of the problems it has encountered with vexatious applications and the fact that currently it has no other alternative but to process them. The Boards note that the IC(Q) in his submission has acknowledged that a problem does exist for agencies regarding this issue.

In his attachment no. B(vii), the IC(Q) provided some examples of current overseas FOI legislation (or proposed legislation) where the issue of an agency refusing to process frivolous and vexatious applications has been considered. In the case of the British Columbia and Alberta examples, an agency requires the authorization of their respective counterparts to the IC(Q) before they can refuse to process such an application. The Boards must express their concern if a similar requirement was introduced in the FOIQ, because of the known reluctance of the current IC(Q) to exercise the powers already granted him regarding vexatious and frivolous applications under s.77 of the FOIQ. The Boards feel that any such provision should place the onus of the decision on the agency, not the IC(Q), with the applicant having appeal rights to the IC(Q). The Boards refer the Review Committee instead to the following examples of provisions which enable an agency to make such a decision from two non-Australian jurisdictions.

Firstly, in the United Kingdom's Freedom of Information Bill 1999, currently before the House of Commons:

> *"Vexatious or repeated requests*
> *12. - (1) A public authority is not obliged to comply with a request for information if the request is vexatious".*

Secondly, in South Africa's Promotion of Access to Information Act:

> *"Part 2: Access to Records of Public Bodies*
> *Chapter 4 : Grounds for Refusal of Access to Records*
> *45. Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources*
> *The information officer of a public body may refuse a request for access to a record of the body if-*
>
> > *a) the request is manifestly frivolous or vexatious;".*

The Boards submit that the Review Committee consider the granting of power to an agency to refuse to process an application that is 'manifestly frivolous or vexatious", without first requiring the approval of the IC(Q).

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?

The Boards specifically raised this issue in their document of 11 May 1999 with the submission that "...the Queensland FOI Act be amended to include a similar provision to s.24A of the FOI Act 1982 Vic.". The reasons why the Board made this submission were as follows:

- *the Boards have had the experience of FOI applications being used strategically to divert Board resources from inquiries;*
- *the Medical Board in particular has had experience of FOI applications being used as a method to tie up its limited secretariat resources in complex administrative activities. For example, one applicant, who was the subject of a Board investigation, sent by fax FOI applications at a rate of two or three per day.*
- *many of these applications were requests for the same information, or for information that required the processing of considerable numbers of documents, or for information which had nothing to do with the matter which was under investigation.*
- *to further tie up the Board's resources, an associate of the applicant also lodged numerous applications with the Board, apparently in support of the efforts of the first practitioner.*
- *the IC(Q) advised that under the current wording of the FOIQ, the Board was obliged to separately process each application, so diverting limited financial and personnel resources away from the Board's statutory primary duties .*

Such a manipulation of Freedom of Information is surely not intended by Parliament and consequently the Boards' views on this matter remain the same.

The Boards submit that they support the suggested provision made by the IC(Q) in his submission.

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?

If funding was to be made available to support the creation of such an entity, then the Boards submit that it would be of greater benefit if it was used for the education of, and the povision of up to date FOI advice to, FOI decision makers. Statistical information regarding the number of FOIs processed etc is already provided to Parliament and thence the public on an annual basis. Applicants already have the right of appealing to the IC(Q) if they have any concerns

regarding the processing of their FOI requests and agencies are in turn responsible to the IC(Q) in such cases. It is the Boards' contention that rather than utilize new FOI funding on remedial action, use that extra funding on improving the quality of the source, i.e. the FOI decision-makers.

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?

The Boards note with interest that the IC(Q) recommends a reduction in the processing time for agencies, whilst merely discussing the issues of the feasibility of a statutory time limit on his own processing of external review applications (and the reasons why currently it may not be possible). The Boards' view is that the current time period should not be reduced to 30 days for the following reasons:

- *as each of the Boards is a small agency with limited resources such a reduction will have an effect on its ability to carry out its primary statutory duties by requiring the dedication of further resources to FOI to ensure that the reduced deadline is met;*
- *many of the applications received by the Boards require consultation with more than one third party; a reduction in the standard processing period will have a commensurate effect on the consultation period and so impose further strain on the ability of the agency to make a decision that is fully considered and therefore of more benefit to the applicant;*
- *the Boards have never received any complaints from any of its many applicants regarding the current time lines as being either too long or unreasonable.*

The Boards submit that the current 45 day time limit not be reduced.

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?

No, the Boards have found that the additional 15 days period is adequate.

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?

The production of a partial decision is a practice already adopted by the Boards and it has been found to be most effective. The Boards support the concept that the current statutorily imposed response times should be able to be extended through the mutual agreement of the agency and applicant. The Boards also support the proposition that in such cases, a part or interim decision be made available to the applicant. However, any new amendment should not include a requirement on the agency to have to produce a part decision relating to a specific

percentage of the total number of documents involved. To do so may defeat the purpose of the original purpose of the amendment, i.e. the allowance of further time for processing; as well as possibly force an agency to make hurried, not sufficiently considered decision. This would not be in the best interests of either the applicant or the agency.

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?

The Boards strongly oppose the above proposal. The Boards do not agree with the view that the introduction of such a proposal in the FOIQ would result in any better disclosure rate to applicants. On the contrary, such a measure could well have the opposite effect by making agencies take an even more conservative line regarding disclosure, if it is felt they may not be able to meet the deadline and so make a very negative decision regarding disclosure just to be on the safe side. Furthermore, the introduction of such a measure would mean there would be no possibility of an extension of the processing period through negotiation with applicants. Why would applicants negotiate when they know that full access would be granted to them for all of the documents on the expiry of the current processing period?
The Boards also feel that this proposal pre-supposes that:

- *a 'culture of secrecy' does exist in Queensland, and*
- *agencies are generally prejudiced against the FOIQ and do everything in their power to obstruct its administration.*

The answer, in the Boards' opinion, is not to try and make the FOIQ even more coercive on agencies, but instead to press for funds to be available for agencies to be able to educate and train their FOI staff for a more efficient service.

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?

The Boards raise the following queries regarding this proposed redrafting of s.27:

- *Who would determine what is reasonably practicable, the applicant or the agency?*
- *Would it take into account that an agency (especially ones like the Boards with limited FOI resources) may have several other FOI applications currently being processed, each of which involved many more documents? In such cases would it be equitable to process a new FOI application before these others, purely on the grounds that it concerns fewer documents and so must be processed "as soon as is reasonably practicable"?*

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.)

The Boards query how it would be determined and who would determine that a compelling need existed? Would it be the responsibility of the agency, or the applicant, or some other person/entity to whom the applicant can appeal to? If it was the latter then how would the time factor be considered? An appeal to the IC(Q) , for example, must take time. The IC(Q) would need to have knowledge of all of the facts and would need to balance the possible consequences of not ordering an agency to expeditiously process the particular FOI application against doing so. The time taken to reach a considered decision may well negate the very purpose of the proposal, i.e. the urgent expedition of an FOI application. The examples given in the Discussion Paper would indicate to the Boards that it would be the responsible agency, i.e. public safety or public health. The Boards submit that these issues have to be considered before such a provision was included in the FOIQ.

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)?

The Boards submit that there should be a statutory time limit for applicants viewing or seeking copies of documents to which access has been granted for the following reasons.

- ❑ *It is unreasonable to expect agencies to have to hold documents, which may have been recovered from off site storage areas, as a result of an FOI application for an indefinite period of time purely at the whim of an applicant.*
- ❑ *Agencies should not be penalized by applicants suddenly requesting access to documents they may have been granted access to under FOI months, or even years, previously.*

The Boards have no objection to a 60 day period, as suggested in the Discussion Paper, or any longer period, as long as any such period can be considered reasonable in terms of the storage limitations of an agency. The Boards further submit that if the applicant has taken no action whatsoever to access or view the documents within the statutory time limit, then the applicant should be required to make a new FOI application for those documents. The Principal Officer should, however, be given discretionary powers to enable a waiver of this requirement.

The Boards submit that they support the proposal that a statutory time limit (60 days or otherwise) be applied to applicants' viewing or seeking copies of documents to which access has been granted .

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?

The Boards submitted a list of reasons why they believe the current 14 day time limit is

inadequate and should be extended in its submission paper to the Review Committee, dated 11 May 1999. These were:

1. *The FOI Act specifically uses the term "days" rather than "business days" (as defined under s.36 of the Acts Interpretation Act 1954), which means that the 14 days period includes Saturdays, Sundays and public holidays. Consequently the time available for making the internal review decision is immediately reduced by at least one week-end, possibly two, depending on the day of the week the internal review application is received.*

   The Act also states that the applicant must be notified of the decision within the 14 days period, or it is taken that internal review affirms "the original decision". Unless the applicant has access to a facsimile machine, notification of the internal review decision will almost always be by post. It is usually not feasible to advise the applicant of an internal review decision by telephone. Notification by post is considered under s.39A(1) of the Acts Interpretation Act 1954 to have taken effect "...at the time at which a the letter would be delivered in the ordinary course of post, unless the contrary is proved." So, even if the applicant was only one day's post away, it still means that the time allowed for the internal review officer to actually make the review decision is reduced by that one day. If, however, the applicant lives further away, then the commensurate postal time must be taken into consideration.

   All of these factors reduce the already short period in which an internal review must be processed and the applicant notified of the decision to an unreasonable requirement.

2. *The internal reviewing officer has less than 14 days in which to review the original decision to decide whether or not to uphold or amend it, no matter how many documents are involved, or how complex, sensitive or confidential the information concerned. This, in the opinion of the Board, is an unreasonable requirement for the officer concerned and may well detract from the quality of the review decision for the applicant.*

3. *The internal review is an important remedy in the FOI process, yet it has to be completed in less than a third of the time allowed for the making of the original decision.*

4. *Internal review officers must be senior to the original decision makers, and will have their own responsibilities and duties. So in most cases their role as internal review officer is essentially their only contact with FOI. Yet FOI is becoming more specialized as an area of public administration, requiring skills such as: knowledge of the Information Commissioner's interpretations of the Act discussed in his external review decisions; and an understanding of legal concepts such as "natural justice", breach of confidence" and "public interest". The Boards feel that it is often unreasonable to expect internal review officers to appraise themselves of the issues and make an internal review decision in just 14 days.*

5. *If an agency fails to fully process an internal review within the statutory 14 days, then the applicant is to consider that the original decision has simply been affirmed, even if, in fact, this is not the case. The applicant then has the right to apply to the Information Commissioner for an external review. The Boards have on occasion been unsuccessful in negotiating an extension of the period for internal review.*

In accordance with these reasons, the Boards make the following submissions regarding this issue:

- ***that the 14 day limit for processing internal reviews should be extended.***
- ***The FOIQ should be amended so that the use of the term 'day' is redefined as that under s.36 of the Acts Interpretation Act 1954.***
- ***The period of time be extended from 14 days to 30 days (the same time period allowed under the FOIC).***
- ***The FOIQ be amended to allow for the opportunity of negotiation between the agency and the FOI applicant for a mutually agreed extension of processing time.***

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?

No submission.

Section B (VIII)

Whether amendments should be made to either s 42(1) or s 44(1) of the FOI 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.

Discussion Points

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?

(b) Alternatively, should the FOIQ specify categories of personal affairs information of public servants that is not exempt under s 44?

No submission.

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?

The Boards submit that it does not provide 'sufficient certainty'.

One of the primary functions of the Boards is the investigation of complaints about their registrants, the substance of which range from minor issues to alleged sexual molestation. Recently this has included the alleged sexual molestation of a child. It is often the case during the investigatory process of such alleged serious offences that the Boards receive FOI applications from the registrants concerned, or their legal advisors, requesting access to statements and other recordings of evidence made by the victims in the Board's possession.

The Medical Board has also received applications for the same documents from other third parties after the investigation process is completed and resulted in subsequent action before the Medical Assessment Tribunal (an adjunct of the Supreme Court). In such cases the victim statements may well have been presented as evidence at the Tribunal. The requirement on the part of the FOI decision-maker to have to justify that the balance of public interest favours non-disclosure, as against disclosure, seriously affects the ability of the Boards to provide the confidential environment often vital to the victims.

There is no doubt that the investigatory functions of the Boards operate more effectively when confidentiality can be maintained (as far as it is legally possible) with the actual victims. The IC(Q) , however, has taken the view on several occasions that the registrants under investigation have a right under natural justice to be aware of the substance and nature of the alleged complaint and consequently some form of access to these documents. Certainly the registrants being investigated are entitled to their rights under natural justice, but this should not include access to documents such as victim statements. Especially prior to the completion of the investigation and the Board making its final decision whether or not to formally charge the registrant. The Boards submit that it is one of the purposes of the 'discovery' process to provide the registrant, if ultimately charged by a Board, with access to the supporting evidence, not that of the FOIQ.

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

The Boards submit that it should be so re-defined, but only where it can be reasonably satisfied that the releasing of such documents would not have, or may well not lead to, a prejudicial effect to the physical or mental health or wellbeing of the person.

Section B (IX)

Whether amendments should be made to the FOI Act to allow disclosure of material on conditions in the public interest (eg. to a legal representative who is prohibited from disclosing it to the applicant).

Discussion Points

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?

The Boards do not support this proposal and agree with the views taken by the IC(Q) and the ALRC/ARC. It would be very difficult, if not impossible, for small agencies with limited resources, like the Boards, to ensure compliance on the part of a legal advisor to a registrant under investigation, if information was disclosed to the former on the condition that it not be made available to the client.

The Boards believe that they have a responsibility to the public, inherent in their primary statutory duties, regarding the disclosure of information held in their possession. There are times when the non-disclosure of information will be the correct decision in the public interest, e.g. during the investigation of a registrant charged with a serious offense impacting on their right to practise for public safety reasons. In these situations, agencies have a duty to balance the public interest of an individual against that of the general public as a whole.

The introduction of this proposal could well be used by some applicants as a way of obtaining information, which currently they would not be entitled to under the FOIQ, through a third party. The Boards note that the Discussion Paper made particular mention of the fact that "...it is also conceptually difficult to consider that information is available to a person's legal agent but not to the person themselves." The Boards also cannot see how such a provision could be successfully monitored given the limited resources available to many agencies.

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?

If it was the Review Committee's recommendation to amend s.44 in regard to 'any special relationship' between the applicant and a third party, then the Boards submit that such a relationship should be restricted only to the following:

- ☐ *between a parent and a child; or*
- ☐ *between a legal guardian and child; or*
- ☐ *between partners (married & de facto);*

where it can be reasonably satisfied that a relationship does, in fact, exist between the parties concerned.

The Boards further submit that relationships essentially of a professional nature, such as those existing between lawyers and clients or doctors and patients, should not be considered as 'special relationships' under s.44. To include such relationships would be discriminatory against those applicants who are not 'professionals'. The Boards do not accept that a solicitor, for example, should have any more right of access under FOI to information concerning the personal affairs of a third party as against a relative (outside that of the parent/child/partner) of that third party.

Section C (I)
The need for independent co-ordination and monitoring of Queensland's FOI regime.

Discussion Points

74. Should a person/entity be (statutorily) responsible for generally:
(a) monitoring compliance with, and the administration of, the FOIQ; and
(b) providing advice about, and ensuring a high level of agency and community awareness of, the FOIQ?

The Boards support such a proposal as long as it will result in the further effective training of those officers responsible for administering FOI and the provision of efficient and pertinent FOI advice. However, the Boards do have a number of queries arising from this proposal:

- *Who will pay for such a person/entity?*
- *Would it be funded on an agency user-pays basis, or would it be funded by the State Government?*
- *A greater community awareness of FOIQ will almost certainly result in a higher number of FOIs being received by agencies, thus increasing the cost burden on those agencies with limited resources. Will the State Government provide the necessary support funding?*
- *What powers would such a person/entity need to have to ensure that agencies were complying with the administration of the FOIQ and what are the types of penalties, for those agencies who fail to do so, being contemplated?*
- *How would such a person/entity monitor the compliance of FOI by those private organizations that are acting as agents of government departments/agencies, and what types of penalties could be imposed?*

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?
Why?

The Boards submit that this role should not be the responsibility of the IC(Q) because:

- *the IC(Q) is part of the FOI process and therefore should be accountable to an external*

monitoring/compliance body like every other agency;

- ☐ *the limited resources of the IC(Q) would be even further stretched; and*
- ☐ *there might be a conflict of interest in the current dual role of the IC(Q) and Ombudsman. For example, who would applicants complain to if they felt that their external reviews were taking an unreasonable period of time to be processed? If it concerned another public agency it would be to the Ombudsman, which is obviously out of the question here. The Supreme Court, the entity to which an applicant can appeal an external review decision by the IC(Q), is well beyond the financial reach of the vast majority of applicants.*

EXTRA SUBMISSION

s. 33 -Persons who are to make decisions for agencies and Ministers

Sections one and two of this provision say, in respect of applications dealt with by either a state government or local government agency, that such applications are to be dealt with by the agency's or local government's principal officer. They also say that the principal officer can direct "any such other officer" of the agency/local government to deal with the application instead in their place.

It does not state in the provision that such a delegation of decision making in respect of FOI applications is in any way limited, in particular with regard to s.44(3). Although s.44(3) states that "...the principal officer or Minister may direct that access to the document is not to be given to the person.....", there is no reference under s.33 to any such limitation of the delegated decision maker's powers. Indeed, there is no mention in an part of s.33 that the delegated decision maker's powers does not extend to making a decision under s.44(3), under the authority to do so granted by the principal officer. The Boards are aware that the IC(Q) has decided to interpret the fact that because s.44(3) explicitly names the principal officer or Minister as the decision maker, then this overrides the delegated decision making powers granted to another officer.

This has not, however, been tested in court and is only an opinion. There is, consequently, some ambiguity as to the powers of a delegated decision maker. The Boards submit that an amendment be made to either s.44(3), or s.33, which makes it quite clear if the delegated decision maker possesses, or does not possess, the authority to make such a decision.

Submission: that an amendment be made to the FOIQ in regard to the powers of a delegated decision maker concerning s.44(3).