AUSTRALIAN SOCIETY of ARCHIVISTS Inc.

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

April 7, 2000

Dear Ms Newton

Review of the *Freedom of Information Act 1992 (Qld)*

We would like to thank you for giving us the opportunity to provide further comment on the Queensland Freedom of Information legislation.

If you require further clarification, you can contact the Queensland Branch Convenor by phone (32721030), or email mxreid@datsipd.qld.gov.au

Yours sincerely

Margaret Reid

Margaret Reid
Convenor
Australian Society of Archivists (Queensland Branch)

Review of the *Freedom of Information Act 1992 (Qld)*

FOIQ objects clauses

Discussion point 2:
The objects clauses in the FOIQ should be revised to more adequately reflect the intention of the legislation, which is that freedom of information legislation confers a general right to obtain access to government documents. We strongly endorse the "leaning" approach to the application of freedom of information legislation, that is, one that incorporates a bias towards disclosure with appropriate exemptions. In terms of particular amendments, we agree with the Information Commissioner's suggestions as outlined in the Discussion Paper.

Discussion point 4:
The Act should be making an unequivocal statement that any exemptions operate subject to the spirit of the legislation: documents should be made available to an applicant unless there are good reasons to deny access, for example, an expectation of harm from disclosure.

The psychological value of amending the FOIQ in such a way that an open flow of information is encouraged is in the interest of increasing participation by the public in the democratic process. This may give Ministers and agencies statutory permission to use their discretionary powers under s.28 (1); it may dampen an over-zealous application of existing exemptions categories; and it may discourage a tendency to find imaginative ways to deny access.

Discussion point 6:
We argue that the most important principle underpinning freedom of information legislation is the right of every person to have access to documents held by government agencies (subject to specific exemptions necessary to protect public and private interests). Embedded in this concept is a recognition that information collected and created by government agencies is a public resource, and, by extension, is publicly owned. Furthermore, an open flow of information promotes rather than hampers good government.

It appears that it might be necessary to amend the Act's objects clauses to include statements which unequivocally state the underlying principles behind the introduction of administrative laws such as freedom of information. This may be necessary in order to promote a change in focus to one that enshrines openness with the authority of law.

Government secrecy

Discussion point 7:

We argued in our initial submission that *the capacity of agencies to implement the Freedom of Information Act is dependent ... on the quality and completeness of an agency's recordkeeping systems.* We also emphasised the nexus between FOI and archives (public records) legislation in requiring government agencies to introduce, and maintain good recordkeeping systems.

However, where records areas within government agencies are under-resourced, requests under FOIQ become an onerous task rather than a standard procedure. Inadequate recordkeeping means that records are not easy to find, backlogs build up, and FOI requests are seen as "vexatious", irrespective of whether they are or not. Delays in providing access to the records, or denial of access to the records without adequate justification can lead to a perception of secrecy on the part of the general community.

Discussion points 8; 10:
In our original submission we argued that *it should be possible for agencies to publish lists of records which are publicly available without the need for an FOI application.* This could prove less onerous to departments if more economical methods of supplying the public with government information was adopted, such as publishing documents on the Internet, or, printing documents only on request.

There should also be no reason why government agencies cannot publish summarised information, particularly in relation to public contracts with private providers. The argument usually put in these cases is that contracts comprise commercially confidential material. Summaries would at least give the public information about the main provisions of the agreement made and would go some of the way towards keeping the public informed about the use of public money.

Consistency in legislation

Discussion point 13:
It is important that related legislation be examined to ensure a consistent and cohesive approach, for example, the relationship between freedom of information legislation and public records legislation (currently the *Libraries and Archives Act, 1988*).

We also strongly endorse the argument put in the Discussion Paper that "right to access government-held information" be included as a "fundamental legislative principle" in the *Legislative Standards Act 1992 (Qld)*.

Exemption provisions

Discussion points 14 – 15:
The ASA (Qld) acknowledges the need for exemptions in freedom of information legislation as a way of managing competing democratic rights.

In 1990, when the Electoral and Administrative Review Commission sought public comment on the need for freedom of information legislation in Queensland, there was almost unanimous support for its introduction. One of the reasons advanced for this support was that "unnecessary secrecy was prejudicial to democracy", the implication being that freedom of information legislation would provide the necessary balance between a general right to obtain access to government documents and any legitimate claims for secrecy.

We do not wish to make specific comments about the current list of exemptions provisions, except to say that we look with interest at the New Zealand freedom of information legislation. We understand that this legislation has made very few exemptions available to government, including Cabinet material.

Our initial submission, like many others, expressed considerable disquiet over amendments made to the Act in relation to Cabinet documents. We put the argument that *if the accountability principle is to be adhered to, then documents which are not directly related to matters discussed in Cabinet, should be accessible under the Act;* and that, by extension, *overly broad* interpretations of, for example, "commercial-in-confidence" matters and "Cabinet-in-confidence" matters, were undesirable.

We strongly recommend that s. 36 of the FOIQ be restored to the form in which it was initially enacted in 1992 on the basis that the original wording *more precisely, and appropriately protected Cabinet confidentiality for the purposes of preserving collective ministerial responsibility.*

Application of harm tests

Discussion points 17-18:
We concur with the suggestion made in the Discussion Paper that the onus should be on the agency to prove that substantial harm would occur if information in the form of government documents was released.

The concept of "substantial harm" or even "harm" would necessarily have different applications in regard to the different categories of exemptions but should always be applied within the context of a bias towards disclosure.

Application of public interest tests

Discussion points 19-21:
We support the application of a public interest test on exemptions. We agree, however, that to do so agencies will require some form of guidance in order to understand what it means and to ensure that such a test is applied consistently across government.

We strongly endorse the position outlined in the Discussion Paper that certain factors (such as embarrassment to government) should be recognised as being irrelevant in the application of a public interest test. We agree that it would be useful to state this clearly in the legislation along the lines of the NSW FOI Act.

Audit of the application of the FOI Act

Discussion point 23 –30:
In our initial submission we put the position that *corporatised bodies should be considered public agencies for the purposes of the FOI Act, and should not be excluded by provisions in legislation which sets up the corporatised body.* We therefore strongly support the ideas canvassed in the Discussion Paper that it may be necessary to amend the FOIQ in order to disallow other, or new, legislation from excluding agencies or part thereof from the application of the FOIQ.

We are particularly concerned with a perception that exemptions based on a "commercial-in-confidence" status are being applied too liberally and too glibly to agencies that are not, in fact, private corporations. We argue that any bodies which receive a level of government funding or over which the government exercises some control, should be subject to FOIQ. Otherwise, the public has no way of knowing how these bodies are utilising public funding.

In relation to this last point, it is clear that our administrative law package needs to be reviewed in light of current government practices to outsource, commercialise or corporatise particular government functions. This has had a significant impact on, amongst other things, the public's right to know, and the public's expectation that government is actively committed to openness and transparency in administration.

We would also advocate the introduction of state privacy legislation to round out the administrative package.

Finally, we reiterate the position taken in our initial submission that *it may be appropriate to consider the application of FOI principles to the private sector to encourage accountability and the preservation of the integrity of company*

records.

Appropriate access to information in electronic and non-paper formats

The right to access *information* or *documents*

Discussion point 33-34:
The definitions used in FOIQ should be consistent with those used in the proposed public records bill. Freedom of information legislation confers a general right to obtain access to documents, not a general right to obtain information.

Adequacy of *access* to non-paper documents

Discussion point 35-36:
In our initial submission we discuss this point in relation to access to records of continuing value in light of the fact that if agencies do not take into consideration an on-going requirement by the public to access its records, irrespective of format, they will be denying access to the records.

Dealing with documents not in the agency's physical possession

Discussion point 37:
It seems difficult to justify additional costs being extended to an FOI applicant simply on the basis that records are stored either off-site, in a different location to the applicant (in the case, for example, of an applicant living outside the metropolitan area), or are temporarily in the custody of another agency. Irrespective of where the records are located, they should be under the intellectual control of the agency concerned and, therefore, records required by an FOI applicant should be retrievable.

We are also concerned about the occasional practice by some government agencies of charging an application fee for files that have already been transferred to the Queensland State Archives and which, if they were not in the temporary custody of the creating agency, would be available to the applicant free of charge. It is our understanding that freedom of information legislation does not apply to those records that are already publicly available. It is only records not available to members of the public at the State Archives that may be accessed using freedom of information legislation.

Fees and charges

Discussion points 48–52:
The ASA (Qld) supports the view that there should be some partial cost recovery scheme for administering the FOIQ regime. We recognise that due

to funding shortfalls, certain requests for access to information could result in *an unreasonable burden on the resources of an agency*. Therefore, we argued in our initial submission that it may not be unreasonable for an agency to consider a scale of charges to apply to applications which (a) do not relate to personal information; and (b) where large amounts of time are consumed in retrieval of records.

Having said that, however, we would re-iterate the overriding importance of good recordkeeping practices within government agencies, and a corresponding responsibility by government agencies to adequately resource areas that administer access to government information so as to enable efficient and timely responses to legitimate requests.

There is a strong argument to put that if government was proactive in making their recordkeeping systems more transparent and publicly available outside a legislative regime, there would perhaps be less of a need for intense processing of requests and a subsequent need to re-coup time and resources.

If new fee scales are introduced then we would support the proposal to amend the legislation to allow for an agency or Minister to reduce or waive fees. This should be subject to guidelines laid down by an authority such as the Information Commissioner.

Dealing with voluminous applications

Discussion points 55; 57-58:
We would strongly support a legislative amendment which recognises the resource implications for agencies forced to deal with repeat or unreasonable requests, while at the same time ensuring that the rights of the applicant are not ignored. We are of the opinion that this can best be achieved by requiring agencies to consult with the Information Commissioner, or equivalent body, before refusing an application, and by ensuring that agencies consult with the applicant before refusing to process the application.

Auditing the administration of FOI

Discussion points 74 - 75
In our initial submission we made reference to the importance of a strong, independent means of policing or auditing the administration of freedom of information legislation to ensure agency compliance. The Western Australian model (as outlined in the Discussion Paper) appears to meet our requirements.