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ID

*Auditor-General of Queensland,*

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Your ref:

Our ref: 00-1442

**RECEIVED**

- 6 APR 2000

LEGAL, CONSTITUTIONAL AND  
ADMINISTRATIVE REVIEW  
COMMITTEE

Submission No 135  
Spec 1'4.

7 April 2000

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

Dear Mr Fenlon

Thank you for your letter of 7 February 2000 inviting comments regarding your Committee's Discussion Paper on the Review of the *Freedom of Information Act 1992* (FOI Act).

With the Queensland Audit Office (QAO) being a smaller agency many of the issues raised in the discussion paper have not been encountered by QAO. Accordingly I have confined my comments to discussion points of particular relevance to QAO.

In particular I urge the committee to give serious consideration to recommending the exemption of the QAO audit related documents from the FOI Act for reasons explained in this submission. If accepted, this amendment would bring Queensland in line with all other Australian jurisdictions (excluding Tasmania).

#### Discussion Point 10

QAO from the inception of the FOI Act has published its Statement of Affairs in the Annual Report presented to Parliament about September each year. This results in administrative cost savings and ensures that the Statement of Affairs is circulated to clients and other agencies including public and academic libraries in Australia and overseas. Annual Reports are also available on the internet. Admittedly for larger agencies inclusion of the Statement of Affairs could result in a fairly large Annual Report but certainly for smaller agencies this would be the better approach. A problem might occur in that the date of publishing an Annual Report could exceed the maximum time interval (twelve month) stipulated under the FOI Act. Though Annual Reports must be produced each year, a period slightly greater than twelve months might occur between each year's report however I do not believe this would present an insurmountable problem.

### Discussion Point 12

Whilst I believe that this ultimately is a matter for Government to decide I do not believe that changing the title of the FOI Act is warranted. Information published in respect of the Act identifies the purpose, and extra costs that would be incurred should be borne in mind. Also the present title is consistent with other Commonwealth and State legislation.

### Discussion Point 14

In respect of commercial-in-confidence related exemptions, in my opinion the need for reliance on these should be the exception rather than the rule.

### Discussion Points 15, 19, 20 & 21

Section 39(2) of the FOI Act pertains specifically to the Auditor-General and was inserted as a later amendment in 1994 to allow due regard to the confidentiality provision under the *Financial Administration and Audit Act 1977* (FA&A Act). Section 39(2) states "matter is also exempt matter if its disclosure is prohibited by s.92 of the *Financial Administration and Audit Act 1977* unless disclosure is required by a compelling reason in the public interest." When introducing this amendment the then Honourable the Attorney-General made the following comments regarding the public interest test pertaining to s.39(2) and s.48 of the FOI Act.

*"In addition, I wish to advert to the fact that the test in relation to the new s.48 inserted by this Bill is higher than that required in relation to the public interest aspect of most other grounds for exemption in the Act. This Bill will provide that for such disclosure there is required to be a compelling reason in the public interest. The reason for this is that it has been determined that the courts be given a clear standard in this regard, because Parliament has already expressed its view in relation to these particular secrecy clauses contained in other statutes. The same principle will apply also to the test contained in s.39 of the Act relating to the confidentiality provision in the *Financial Administration and Audit Act*."*

If only a general public interest test was imposed under the FOI Act, the Auditor-General would be placed in a difficult position. The QAO is not the primary source of the information gathered during an audit/examination. This information is the property of the audited entity and the responsible Minister. Another issue is that much of the information held by QAO represents matters considered as part of the deliberative process to arrive at a concluding audit report and its disclosure could prejudice an organisation's or an individual's good standing.

Though the addition of s.39(2) has strengthened the Auditor-General's ability to preserve the confidentiality of these documents there has been argument by applicants as to what constitutes a compelling reason. Crown Law advice to QAO was that as the term was not described under the FOI Act then due regard can be given to definitions in reputable dictionaries. Also the Information Commissioner has not to my knowledge had to consider an external application to determine on the matter.

Guidelines issued by either the Information Commissioner or some other controlling entity would assist in identifying for an applicant the grounds necessary to achieve such a reason under the FOI Act.

#### Discussion Points 19, 23, 25 & 26

QAO recently received an FOI request from an applicant who could not obtain the documents from the agency that created the documents because it was exempt under s.11 of the FOI Act. Many of the other exempt agencies including Government Owned Corporations and Local Government Owned Corporations are also audited by QAO. If a general public interest test was to be applied then most likely the majority of audit documentation held by QAO concerning these exempt agencies would be accessible under the FOI Act. Whether this is the intention of the Government would need to be clarified. Of course s.39(2) of the FOI Act will still apply to any application made however it is pointed out that most other Australian audit offices do not have this problem when dealing with a client's audit information due to exemptions given under respective Freedom of Information legislation eg. Australian National Audit Office, New South Wales, South & West Australian & Victorian Audit Offices.

The Tasmanian Audit Office is the only other Australian Audit Office not exempt under the relevant legislation. The Auditor-General however has recourse under the Act to refer a request to another agency when the information relates more closely to their operations. No consent of the other agency is required for transferring a request and no agency it seems is exempted under the legislation.

#### Discussion Point 30

This matter was raised in QAO's submission of 13 May 1999 as a matter needing clarification.

The FOI Act should be amended to allow access to documents in a contractor's possession that relate directly to the public service or function undertaken by these private sector providers. Specific mention of this arrangement should be included in the contract agreements signed by the controlling agencies and the private contractors.

#### Discussion Point 34

I suggest that the definition of "document" needs reviewing but it should not be replaced by the term "information". However the use of the term "data" if used needs to be defined e.g. it will be necessary to determine if it will include systems back ups which are prepared in case of disaster and over time are not easily searchable.

#### Discussion Point 38

It is considered that an internal review process should be a pre-requisite to external review. Some consideration however should be given to dealing with vexatious applications and how these may be defined.

#### Discussion Point 42

Publication in a summary form of all Information Commissioner (IC(Q)) decisions on the internet would be beneficial to most agencies particularly smaller agencies where officers are not fully occupied in performing FOI related duties.

#### Discussion Point 43

Whilst the imposition of a statutory time limit for external review may have some attraction, the cases appealed generally represent the more complex and difficult ones and the imposition of a time limit would need to be considered against this background and the additional costs that may result.

Discussion Points 53 & 54

Nominal fees comparable to the application fee should be introduced for all internal and external reviews. In fairness such fees should be refundable if a decision is either partially or fully in favour of the applicant.

Discussion Points 60, 61 & 67

The present time limits are considered adequate. Being a smaller agency the FOI duties at QAO are performed by officers employed in other capacities. To shorten the application and review periods would disrupt these officers' main duties. Reference in the FOI Act to working days would be preferable to take into account days lost due to public holidays.

Discussion Point 68

The 60 day period for lodging an application for external review is considered excessive compared to other time limits described under the legislation. If an application should be processed in 45 days then a similar period for lodgement of an application for external review seems fair.

Discussion Point 69

As pointed out in our original submission QAO material will at times identify individuals by name when referring audit issues to management for their views. Whilst it is recognised that at times the matter pertains to the person's work it should be remembered that at certain stages of reporting, management advice is being sought to clarify an auditor's initial assessment. Release of an individual's name in these documents does not recognise that a matter of concern referred to may have been subsequently remedied.

Officers' and suppliers' names are sometimes referred to in audit reports to identify specific examples of incorrect payments or matters requiring explanation. I consider that identification of these names to third parties would offend the principles of natural justice and their release under the FOI Act to be inappropriate.

Issuing guidelines would be beneficial here.

Discussion Points 74 & 75

It seems appropriate for the Department of Justice and Attorney-General to maintain statutory control over the legislation. However it would be preferable for the IC(Q) to be given the responsibility to administer the Act and monitor agency compliance as well as providing advice about the Act to applicants and agencies.

Yours faithfully



L J SCANLAN  
Auditor-General of Queensland