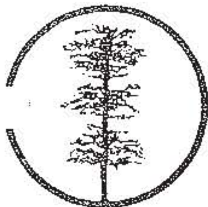

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6 April 2000

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Chair
Legal, Constitutional and
Administrative Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
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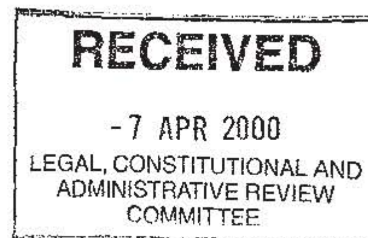


Submission No 138

Dear Sir,

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

We refer to your letter of 7 February 2000 and the enclosed discussion paper. Thank you for the invitation for further submissions on select discussion points and generally.

We have read the discussion paper and make the following comments in relation to the specific discussion points raised.

Discussion Point 1. It is of no practical relevance to consider whether a Westminster-style system of government is compatible with FOI purposes and principles. The simple fact is that any style of government is but the instrument of the people. On this proposition rests the right of the public to information in the power of government. The starting point of any discussion of FOI principles should be that the people are prima facie entitled to all information in the power of the government, no matter what its nature is. This principle is not contingent on particular types of government.

Discussion Point 2. The Environmental Defenders Office (Qld) Inc. supports the revision of the objects clauses of the FOIQ as the IC(Q) suggests.

Discussion Point 3. We support the inclusion of an overriding presumption of access to information. In our view, an interpretation provision should provide that decision makers under the Act are under a duty to interpret the Act in a manner that achieves the objects of the Act. Merely furthering the objects is, in our view, not a sufficiently strong statement of the obligation on decision makers.

Discussion Points 4 and 5. The objects clause should avoid direct reference to exemptions, so that the emphasis is on disclosure and not searching for exemptions against access to information.

Discussion Point 6. We support the inclusion of a statement in the objects that information in the power of the government is public property and the right of access to such information is a key element of our democratic system of government.

Discussion Point 7. In our view, there still exists a 'culture of secrecy' amongst many government agencies in Queensland. In some cases, this shows itself as outright opposition to the release of information, often despite the existence of strict statutory obligations to make such information available to the public. The entitlement to view planning schemes at the office of a local government under the *Integrated Planning Act* 1997 (Qld) is a notable example.

However, this is not where the main problem lies. In many cases, officers profess to a willingness to help as much as possible to provide information. Rather, this culture is exposed in the view that the provision of information is a privilege rather than a right and is not part of the 'core business' of the agency. In our view, this can only be resolved in the short term by a strong statement in the legislation, combined with a greater devotion of resources to responding to FOI requests and training officers 'on the ground' in the pro-FOI culture.

Discussion Point 8. We agree that the approach to FOI in Queensland should be reversed so that the onus is on agencies to make as much information as possible available informally, rather than invoking the procedures of the legislation. This is a logical extension of the overall right of access to information, which should be enshrined in the legislation. It should also be made the subject of statutory provision so that the public is able to request copies of documents without a formal request being made in the first instance. A statement should be inserted in the Act providing that officers should, where a formal request is received and it appears the documents sought are non-controversial, advise applicants that the documents could be made available administratively without triggering the formal FOI process.

Information of inherent public interest should be publicly available by way of registers or other automatic disclosure mechanisms under legislation. Examples are the creation of a public register of licences issued under the *Environmental Protection Act* and the creation of a public register of planning instruments, development applications and supporting material under the *Integrated Planning Act.*

Discussion Points 9 and 10. In our experience, the majority of the public are unaware of their rights to seek information under the FOIQ. In particular, there is insufficient reference to rights of access to information, either informally or through the FOIQ on government websites. None of the government websites that we regularly view have any section on the right of access to information or FOI processes.

In our view, this is not a matter which should be found solely within the Department of Justice and Attorney-General. Each department should be under a duty to publicise as much as possible the availability of information in the government's power. In our

view, the internet is an increasingly powerful tool for the availability of information and statements of affairs and other documents.

Discussion Point 11. No comment is made on this discussion point.

Discussion Point 12. We support the change of title of the legislation to *Access to Information Act*. However, in our view, the statement of objects and duty to achieve the objects of the Act are practically more important if access to information is to be a fact rather than an ideal.

Discussion Point 13. Our view is that the right of the public to information should be inserted in the *Legislative Standards Act* so that this right becomes an integral part of the policy and legislation making process across the whole of government.

Discussion Points 14 and 15. In our view, the exemption of matter relating to deliberative processes should be deleted, as should the executive council matter exemption. The cabinet document exemption should be limited to documents dealing with policy matters only and to documents prepared for, rather than simply submitted to cabinet. Alternatively, a pubic interest test could be added to the cabinet exemption or a time limit incorporated after which such documents can be freely accessed.

Further, the exemption relating to legal professional privilege should be limited to cases in which litigation is actually on foot in the matter, rather than as is currently the case, is exempt merely because it would be subject to legal professional privilege if legal proceedings specifically concerning the matter were to be taken at some later stage.

Discussion Points 16,17 and 18. With the exception of material relating to a person's personal affairs, we are wholly opposed to the utilisation of class exemptions in legislation of this nature. We have above referred to the cabinet, executive council and legal professional privilege exemptions in particular. We agree that consideration of whether harm would result should occur in the context of each particular document rather than on a broad basis. In our view, any consideration of harm should be as narrow as is necessary to protect the public interest, such as in the case of police investigations.

Discussion Points 19, 20, 21 and 22. In our view, public interest considerations have more often been used by decision makers to deny the public access to information rather than as a ground to override an exemption. Rather than adding yet another layer and complication to the decision making process, it is more appropriate to not have such a test in the first place. The concept of the 'public interest' is so subject to varying interpretation by different persons and is so amorphous in concept as to lack the substance required for decision making purposes.

Alternatively, the concept should be specifically defined in the legislation, which could be capable of supplementation by guidelines by the IC(Q). Finally, the ability of Ministers to sign conclusive certificates is an abuse of the whole concept of FOI

and the lack of a necessity to give reasons or bring the matter within a specific exemption invites its abuse.

Discussion Points 23 and 24. Section 11(1) of the FOIQ should be tightened to prevent agencies being excluded from the ambit of the legislation by regulation only. The right of access to information should have such primacy that exclusion from its provisions should only take place with a two-thirds majority vote of the parliament. In our view, any body to which the government provides funding should prima facie, be subject to access to information relating to the purposes for which the funding was provided.

Discussion Points 25, 26, 27 and 28. GOCs should be subject to access to information by the public where they are funded by the government. The general rule should be that any body funded by government, whether strictly a government agency or not, should be subject to access to information by the public.

Discussion Points 29 and 30. The arguments enunciated above have similar application to the private sector and for the same reason. However, there is good reason to extend rights of access to information to certain private bodies even when they receive no funding from the government but play a role in the management of a public resource such as water.

Discussion Points 31 and 32. The provisions should be amended to narrow the application of the commercial confidentiality exemption to situations where the release of the information would be likely to significantly and unreasonably expose a business organisation to a disadvantage.

Discussion Point 33, 34, 35, 36 and 37. From a conceptual point of view, the Act should refer to *information*, not *documents*. If this information is only to be available in recorded form, then it should be mandatory for all government officers to make notes of all discussions or telephone or other conversations which are not otherwise recorded and which relate to a particular decision making process. The definition of *document* should make clear that it extends to information stored in computer data bases whether or not produced in a paper form.

Discussion Points 38, 39 and 40, 41 and 42. Internal review should not be a pre-requisite to external review; rather it should be optional at the applicant's choice. In our view, external review should be undertaken by a state administrative review tribunal which will be perceived by the public as being independent from the government. Informal dispute resolution mechanisms are common in the procedures of administrative review tribunals and the courts in general. It would be appropriate for the tribunal or the IC(Q) to be responsible for preparing guidelines to assist agencies and applicants to understand, interpret and administer the Act. There should be statutory provision requiring all decisions to be published in full. These could be published on a website accessible by the public at large.

Discussion Points 43 and 44. It is inappropriate to place time limits on dealing with external applications, due to the often complex legal issues which can be

involved in dealing with such matters. However, it is important that such reviews are dealt with in a timely fashion.

Discussion Points 45, 46 and 47. Subject to the views expressed previously, the IC(Q) should have the power to enter premises and inspect documents and punish for contempt. The IC(Q) should also have an overriding power to order disclosure of otherwise exempt matter in the public interest. Further the scope of the IC(Q)'s decision making powers in relation to conclusive certificates should be expanded. The IC(Q) should have the power to enforce decisions made against agencies or ministers.

Discussion Points 48, 49, 50, 51 and 52. The non-personal information application fee should remain the same, but should be extended to personal information requests. Charges for processing and supervision should not be imposed. In most cases, supervision will not be necessary. Public interest and environmental groups representing significant sections of the public should be exempted from the requirement to pay fees and charges under the FOIQ or alternatively, should be charged for photocopying at a reduced rate. It is desirable to retain a flat fee charging system, subject to certain limited exemptions, so that there is little opportunity for abuse.

Discussion Points 53 and 54. It would be appropriate to charge a small fee for filing an external review application, but there should be no charge for an internal review application.

Discussion Points 55, 56, 57 and 58. The provision concerning voluminous applications should not be amended to widen the factors relevant to an agency's decision to refuse access. An increased emphasis should be placed on consultation with applicants where the request would substantially and unreasonably divert agency resources. Agencies should be required to indicate to applicants the sort of documents held to assist applicants in making more directed requests. Decision makers utilising this ground should provide reasons for taking this view in their letter of decision.

Whether an application is frivolous or vexatious is beside the object of the legislation. Inevitably, such a decision involves a subjective assessment by the decision maker which may be influenced by views of agency officers. If the desire is to make the system as efficient as possible, such a provision would be inappropriate as the time taken in making a decision as to whether the application is frivolous may make more time than if the application was processed normally. It is also suggested that it would be inappropriate to include a provision dealing with serial or repeat applications.

Such applications would make up but a small proportion of total FOI requests. Further, there may be good reason for making such requests, eg the documents have been lost or are incapable of being collated into a logical form. In these situations, serial or repeat requests may be necessary. Again, a decision as to whether an application falls into this class requires a highly subjective assessment which may be time consuming and prejudice the applicant's position.

Discussion Point 59. No comment on this discussion point.

Discussion Points 60, 61, 62, 63, 64, 65 and 66. The basic 45 day time limit for processing applications should be reduced to 20 business days. In all but the most complex cases, one month should be enough to deal with applications. The 15 day extension period should not be extended. Provision should be made for agencies and applicants to agree to extend response times. In the absence of any agreement, agencies should be subject to penalties for failure to comply with relevant time limits.

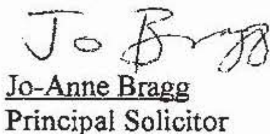
Discussion Points 67 and 68. The 14 day time limit for dealing with internal review applications should not be extended. The 60 day time period for lodging an application for external review is appropriate and should be retained.

Discussion Point 69, 70, 71, 72 and 73. No comment on this discussion point.

Discussion Points 74 and 75. An independent monitor of the administration of the FOIQ should be appointed. This function could be performed by the existing IC(Q) but preferably would be performed by an independent body or separate branch of the IC(Q) to that which handles applications.

Again, thank you for the opportunity to make comment on the discussion paper and generally. We would be grateful if you would keep us informed of the progress of the review and its outcomes.

Yours faithfully,
Environmental Defenders Office (Qld) Inc.



Jo-Anne Bragg
Principal Solicitor