Personal Submission

RESPONSE to the discussion paper for the review of the *Freedom of Information Act 1992* (Qld)

Submission No 142
Spec 1.4

Introduction

The Legal, Constitutional and Administrative Review Committee (LCARC) has considered the Freedom of Information Act 1992 (QLD) ("the FOIQ") and raised a number of discussion points for comment. In summary, the terms of reference were to investigate the following matters:

1) Have the basic purposes and principles of the freedom of information legislation in Queensland been satisfied or do they require modification?

2) If the legislation is amended, should the following components be altered –
   - the objects clauses
   - the exemption provisions in Part 3, Division 2
   - the ambit of the application of the Act (should it be widened or narrowed?)
   - access to electronic and non-paper information (is it appropriate?)
   - internal and external review (especially relating to review and decision by the Information Commissioner)
   - fees and charges (whether too low or onerous?)
   - resource implications for agencies
   - time limits
   - sections 42(1) and 44(1) (relating to possible exemptions of certain information and public interest).

History of the review

The Committee pointed out that the origins of FOI lie in 18th century Swedish legislation. Westminster-style governance has traditionally focused on the need for "official secrecy" rather than on open, transparent government. In the 1960s, there was a push for FOI legislation and acts were passed federally and for the states. Queensland's FOI Act ("FOIQ") was passed following recommendations made in the 1989 "Fitzgerald Report", which formed the basis of a substantial FOI inquiry by the former Electoral and Administrative Review Commission (EARC). EARC recommended a review of the FOIQ, which has not occurred until now.

The Commonwealth FOI Act has been reviewed on several occasions. Jurisdictions worldwide have, or are in the process of implementing, FOI legislation. FOI legislation has even recently been introduced in the UK, home of the Westminster system.

The Committee called for public submissions in March 1999 and analysed 110 submissions, and examined New Zealand's unique approach to accessing government-held information. The present discussion paper was released to stimulate further public input on particular issues on FOI "design principles". There is no set format for a submission. Discussion points are addressed on the following pages.

Discussion Point 1 - The compatibility of FOI purposes and principles with our Westminster-system of government

There can be tension between the need to allow people to express their opinions openly in discussions (for example in committee processes) and the public desire to know what was said or recommended in such discussions. It may be preferable to avoid disclosure of informal notes of discussions, but to disclose each conclusion, or consensus, and the reasons for it. (Members of the Cabinet are able to discuss matters without public disclosure, while maintaining the principle of collective responsibility.) (S.36 Cabinet exemption). A balance is needed between government accountability to the public and efficient government processes.

Discussion Point 2 – Should the objects clauses of the FOIQ be revised as the Information Commissioner (Queensland) (IC(Q)) suggests?

The "objects" clauses set out the purpose of the law. They emphasise the move from official secrecy to open government. The FOIQ should proclaim that any discretion conferred by it should be exercised to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information, as with the FOIC. Rick Snell advised that FOI legislation should be interpreted with a bias towards disclosure. The US Attorney General in 1993 instructed agencies to apply a presumption of disclosure and to rely on exemptions only where there is a reasonable expectation of harm from disclosure. This appears to be in keeping with the intention of the Queensland Act.

Discussion Point 3 – Should the FOIQ include a provision stating that the Act is to be interpreted in a manner that furthers the Act's stated objects and/or a guiding principle or presumption of access?

This would be in keeping with comparable legislation except if harm to a government process or to a person could result.

Discussion Points 4 and 5 – Should the relationship between the exemption provisions and the objects clauses of the FOIQ be made clearer, or should the reference to exceptions or exemptions be removed from objects clause?

The objects clause should contain a general, high level reference to a "presumption" in favour of release of information.

Discussion Point 6 – Should any additional information be included in the objects clauses?

Yes, in line with Parliament's intention to underpin Australia democracy through this legislation.

Discussion Point 7 – Is there a "culture of secrecy" in Queensland and if so, what can be done?

Agencies should be educated to routinely release information of interest to the public in the first place, and release information on request outside the formal FOI process. A manual and guidelines on open government principles for all senior officers would be useful. However, costs should be met by a separate budget allocation, especially if all government contracts are made available outside FOI, for example. The expansion of section 18 ("Statement of Affairs") and section 19 ("Policy Documents") would provide for routine dissemination of documents. Agencies may be better able to make an extended range of "policy documents" available on their websites, rather than to meet numerous individual requests under FOI.

Discussion Point 8 – Should the entire approach to FOI in Queensland be reversed so the onus is on the agency to make certain information routinely available?

Yes, see above, by the expansion of sections 18 and 19 of the Act, and by the establishment of internal procedures. There should be funding allocated to this information-giving process, and safeguards in place to ensure information issued is not defamatory or in breach of confidence (commercial or otherwise) (extend S. 102 FOIQ). There should be a well-publicised THRESHOLD TEST FOR HARM, when considering the types of information released. The harm considered would include harm to people, businesses and organisations if the material is released, and also harm to public health/safety/the environment if the material is NOT released (IC (WA) system). The timing of the release of information is also a consideration.

Discussion Points 9 and 10 - Is the existence of the FOIQ adequately publicised? How could Part 2 provisions regarding Statement of Affairs and other documents be better publicised?

People are aware of FOIQ but their knowledge of the Statement of Affairs is limited. Better (clearer) general information is needed in a flow chart for people who find the use of text difficult. The Statement of Affairs could be more freely available. A central FOIQ body would be useful to ensure that agencies' response to FOI is more consistent and accountable, and to implement the Part 2 provisions of FOIQ.

Discussion Point 11 – Is there scope for performance agreements to impose responsibilities to ensure effective practices?

Signing an agreement will not guarantee compliance, but clearer guidelines should help. A manual to outline FOI requirements and responsibilities, and a central agency to provide backup information, would probably be more effective than agreements.

Discussion Point 12 – Should the title of the FOIQ be changed to the Access to Information Act?

Given the use of the words FOI in the titles of equivalent legislation worldwide, a change of name may be confusing rather than helpful.

Discussion Point 13 – Should "the right to access government-held information" be included as an example of a "fundamental legislative principle"?

The legislation relates to the "rights and liberties of individuals" but as government efficiency is also an issue, it is probably not essential to add this right as an example to the Legislative Standards Act 1992.

Discussion Point 14 – Exemptions (Sections 36-50) Should any of the current exemptions be removed, or others included?

The exemptions in existence are logical and useful. There is already allowance for the exercise of discretion (S.28 (1)) and for documents to be supplied with the exempted material deleted (S.32). It would be preferable, however, to ensure exemptions are uniform across states.

Discussion Point 15 – What deficiencies exist, in the exemption provisions?

S.36 Could be revised to its 1992 form.

Discussion Points 16, 17 & 18 – Should the different harm tests in the FOIQ exemption provisions be rationalised and/or simplified, or made more stringent? Should there be a general harm test?

The ALRC/ARC Review proposal makes sense: "as a general rule, exemption provisions should be drafted so as to require agencies to focus on whether harm would result from disclosure". However, Cabinet documents should still have a class exemption.

Discussion Point 19 – Should a general public interest test be imposed on all exemptions?

"Public interest" should be uniformly defined and rationalised rather than keyed to different standards as at present (Sections 39 (2)), 41, 43, 46 (1) (a)) where possible. The potential harm of disclosure should still be considered, even if disclosure is in the public interest, rather than the New Zealand example of public interest being at the core of FOI. Guidelines should be available on how to apply a public interest test (ALRC/ARC Review).

Discussion Points 20 & 21 – Should the public interest as it relates to exemptions be defined in the FOIQ, or should more guidance be provided on how to apply the public interest test ?

As suggested by the ALRC/ARC Review, general guidelines on how to apply the public interest test would be useful. Potential harm from disclosure should be considered as a balancing factor.

Discussion Point 22 – Should the ability of Ministers to sign an exemption certificate be revisited?

This provision can be justified by the Cabinet documents exemption, but a review of Ministers' use of the certificate may be possible.

Discussion Point 23 – Should action be taken to prevent the exclusion of agencies from the Act?

Bodies should be excluded from the Act only through amendments to the Act so the move is open to scrutiny.

Discussion Point 24 – Should specific bodies to which government provides funding or over which it exercises control be made subject to the FOIQ?

Government-owned corporations should be included under FOI, as they report to Ministers and receive public funds, but disclosure should not expose their commercial activities to harm (stringent use of harm test would be required). In New Zealand, GOCS are subject to FOI.

Discussion Points 25 & 26 – Should GOCS and LGOCS be excluded from FOIQ in relation to their (competitive) commercial activities ?

Yes, but they should ideally be subject to FOI in relation to their use of public funds for non-commercial government purposes.

Discussion Point 27 – Should government regulations prescribe GOC community service obligations under which documents are not accessible under FOIQ?

No - GOCS are publicly-owned and FOI should apply as far as possible, without harm to their operations.

Discussion Point 28 – Should there be additional controls to allow LGOC documents to be excluded from FOI?

The argument has been mounted that they are created differently, so they should be treated differently.

Discussion Points 29 & 30 – What arguments, if any, are there for extending the FOIQ to the private sector generally? Should the FOIQ be extended to cover contractors performing "outsourced" functions for government?

Citizens lose administrative law benefits and government accountability is threatened by outsourcing. The New Zealand and Ireland approach to records in the possession of independent contractors to public bodies is that they should be subject to FOI where the records relate to services carried out by the contractor for the public body.

Discussion Points 31 & 32 – Do sections 45 and 46 require amendment to strike a balance between disclosure of information in the public interest and the protection of business interests ? What should be done to guard against misuse of sections 45 and 46?

"Commercial in confidence" claims decrease accountability, and staff training on these sections is needed, as are guidelines for agencies on interpretation. Legislative amendment should not be necessary.

Discussion Point 33 – Should the FOIQ confer a general right of access to information rather than to documents, and if so, what should "information" encompass?

S.2(1) allows access to documents rather than to "information" (as in the object of the Act in S.4). Because of technological changes it should allow access to "recorded" information, not just "information" per se. This would give agencies an incentive to ensure their records are kept in a formal state. "Information" should be tightly defined.

Discussion Point 34 – If the FOIQ is to continue to provide access to "documents", could the definition of "document" be improved?

A definition of "document", as in the Acts Interpretation Act 1954 (Qld) ("AIA"), should be added.

Discussion Points 35 & 36 – What more can agencies do to assist FOI applicants and improve efficiency, create, manage and retrieve electronic documents and provide electronic access?

Good record-keeping practices are essential.

Discussion Point 37 – Which documents should be considered to be in the possession of the agency for the purposes of FOIQ?

The cost of searching for documents is a relevant factor here. A review of the meaning of "in the possession of" would be useful.

Discussion Point 38 – Should internal review be a pre-requisite to external review? Should conditions be attached to external review?

Internal review is useful as a monitoring tool and can reduce the number of external review applications to IC(Q). However, the scope of the internal review should be clarified.

Discussion Point 39 – Is there a case for a variation of the external review system?

There could be a Queensland administrative appeals tribunal, but there is an Information Commissioner.

Discussion Point 40 – Should the same person hold the offices of Queensland Ombudsman and Queensland Information Commissioner ?

Yes, provided the IC(Q)'s independence from government is maintained and he is properly resourced.

Discussion Point 41 – If the "method of review and decision" is legalistic and time-consuming, how can it be improved?

The IC(Q) submits that his approach focuses on negotiation at minimal cost, with 77% of cases in 1998-99 being resolved by informal methods. However, his decisions are subject to review by the Supreme Court. There is a case for the use of plain English by the IC(Q), and for summaries of decisions.

Discussion Point 42 – Should the IC(Q) prepare guidelines to help agencies use the FOIQ, and should it publish summaries of old decisions?

Guidelines and summaries would help agencies to use the FOIQ effectively.

Discussion Points 43 & 44 – Should there be a statutory time limit on the IC(Q) and if so, should there be provision for extensions?

Yes, there should be a time limit that would act as a performance indicator for the IC(Q), and also prevent the use of external review to delay the process. Three months could be the delay (90 days), which would still be longer than for the IC(WA). Extensions could be allowed for complex cases.

Discussion Points 45 & 46 - Should the IC(Q) have powers to enter and inspect documents and/or take action for contempt and/or order disclosure of otherwise exempt matter in the public interest?

The IC(Q) should have equivalent entry and search powers to the Ombudsman, as in SA. However, the power to order disclosure of exempt matter does not appear warranted.

Discussion Point 47 – Should the scope of the IC(Q)'s decision-making powers regarding certificates under sections 36, 37 or 42 be expanded?

There could be research into the possibility of review of this process by the IC(Q).

Discussion Points 48 & 49 – Should the non-personal information application fee be altered ? Should a uniform application fee be introduced for all information?

If agencies routinely release more information than at present, the issue of fees will become less significant. It can be very costly and time consuming for agencies to respond to FOI requests, and there is no recompense. It is proposed that there be a uniform application fee of $30 for both personal and non-personal information.

Discussion Points 50, 51 & 52 – Should charges be introduced for processing and/ or supervised access and should other components be costed (for example, photocopying)? If fees are increased, should there also be power to waive fees?

Given the costs to agencies of FOI requests, it would be equitable to impose charges for processing, access and photocopying, for example, with costs being imposed on a per page basis or a fixed scale.

Discussion Points 53 & 54 – Are any arguments for the introduction of application fees for internal and/or external review fees valid ? If so, how should such fees be imposed?

An internal review fee could discourage initial FOI requests, and external review is expensive. Impose fees as set out by IC(Q).

Discussion Point 55 – Comments in relation to S.28 (2) concerning voluminous applications.

All three proposals have merit.

Discussion Point 56 – Should S.28(3) be repeated or amended?

Retain it, but amend it to ensure it is not abused.

Discussion Point 57 – Should FOIQ contain a general provision enabling an agency to refuse to deal with frivolous and vexatious applications?

Yes, provided the IC(Q) agrees.

Discussion Point 58 – Should the FOIQ have a provision enabling an agency to refuse to deal with repeat/serial applications?

Suggest using IC(Q)'s format with administrative guidelines.

Discussion Point 59 – Is there a need for an entity to ensure data is collected and analysed and appropriate action is taken (in relation to the obligations under S.108 for the Attorney General to report annually to Parliament on the Act's operation)?

More assistance is needed for agencies to ensure they meet current requirements. They may not have a dedicated FOI section.

Discussion Points 60 & 61 – Are time limits under S.51 suitable (45 days to process applications, 15 days extension for third party consultation)?

Given the limited resources of this agency, there is minimal support for shortening the time limits.

Discussion Point 62 – Should agencies, Ministers or applicants be able to agree to extend time limits?

A discretion could be introduced, subject to conditions.

Discussion Point 63 – Should delay be taken as denied access instead of formal refusal?

No - too onerous.

Discussion Point 64 – Should S.27 be redrafted to provide for decisions to be made "as soon as reasonably practicable"?

No. It is important to be accountable.

Discussion Point 65 – Should there be provision to expedite the processing of applications?

Yes, for a very limited class of exceptions.

Discussion Point 66 – Should a statutory time limit be applied for applicants viewing or seeking copies of documents?

Yes. To give certainty, and to free up staff.

Discussion Point 67 – Should the 14 day time limit for dealing with internal review applications be extended?

Suggest an extension to 21 days to allow time for review.

Discussion Point 68 – Should the 60 day period for lodging an application for external review be reduced?

A reduction in the period could potentially disadvantage applicants.

Discussion Point 69 – Should there be guidelines on the release of public servants' personal information and on the circumstances justifying exceptions?

No. Relating to S.42(1) or S.44(1) the IC(Q) notes that nothing in his experience of the FOIQ would warrant a general exemption for matter that would identify public servants engaged in their duties of office and public servants must accept that they are accountable when they act in their official duties. Their legitimate personal privacy is already protected under S.44.

Discussion Points 70 & 71 – Is S.44 (1) sufficiently protecting the evidence of children/adult victims of serious offences, or should "Personal Affairs" be defined in the FOIQ to include recordings of evidence?

In the case of a child, it appears appropriate to add special protection.

Discussion Point 72 – Is the proposal for disclosure in the public interest of a legal representative appropriate?

Hard to enforce.

Discussion Point 73 – Should the personal affairs exemption (S.44) be amended to allow an agency to take account of special relationships?

There was not enough information supplied to assess this suggestion properly.

Discussion Points 74 & 75 – Should an entity be statutorily responsible for monitoring compliance with the FOIQ and providing advice about the FOIQ and if so, who or what should do so?

No entity currently has an ongoing statutory responsibility to monitor the operation of the FOIQ and ensure compliance, other than the S.108 requirement for the Attorney-General to report annually to Parliament. There should be a central body to lift some of the burden from the Department of Justice and Attorney-General and monitor and advise on FOI. The body should not be a government department (see ALRC/ARC Review). The independent IC(WA) appears to be a better model. The IC(Q) advises that his office has the necessary expertise to fulfil this function with additional resources, but legislative arrangements will be necessary.

Other matters

A Support provisions on FOI use by people with disability and minors
B Support periodic review.

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