QUEENSLAND GOVERNMENT

Hon. Rod Welford MLA

Minister for Environment and Heritage and Minister for Natural Resources

- 7 APR 2000

Mr Gary Fenlon MLA
Chair
Legal, Constitutional and
Administrative Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Fenlon

Thank you for your letter of 7 February 2000 inviting comments on the Committee's *Freedom of Information in Queensland Discussion Paper No. 1.*

Please find attached a combined submission by the Environmental Protection Agency (EPA) and Department of Natural Resources (DNR) on the paper.

Should you have any queries regarding this submission please contact Ms Judy Lloyd, Environmental Protection Agency on telephone 32276458 or Mr Edwin Spring, Department of Natural Resources on telephone 38963705.

Yours sincerely

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SUBMISSION

FREEDOM OF INFORMATION IN QUEENSLAND

DISCUSSION PAPER NO. 1

Environmental Protection Agency
and
Department of Natural Resources

This submission responds to those aspects of the Discussion Paper of special interest to the Environmental Protection Agency (EPA) and the Department of Natural Resources (DNR) and supplements our earlier submission of May 1999 to the Committee's review.

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, eg, by statutory or administrative instruction?

   (b) What sort of (additional) information should agencies be required to routinely publish?

   (c) What (other) considerations are relevant?

   DNR/EPA give in-principle support to the concept of reverse onus, with some caveats.

   Reverse onus would be most readily applied if the information is contained in a format that is prepared with an explicit view to it being released at a later date (thus taking account of the need not to include exempt matter). This would be most appropriate for high-level policy issues or matters of broad public interest.

   A very substantial part of the information produced in the normal course of government business of agencies is contained in file collections (such as correspondence with individual citizens and business organisations, interdepartmental memoranda and reports, and in-house departmental briefs, reports and memoranda) and databases that are not created with a view to automatic release to the general public. Special care needs to taken to guard against "reverse onus" rules that promote inappropriate disclosure of confidential business affairs and personal affairs information as well as other public interest immunity categories of information, such as Crown legal advice, Cabinet and Executive Council records.

   The main problems the Departments perceive are legal protections for staff releasing information, common law provisions impacting on release of information, authorisation to release and staff training particularly in relation to skilling staff across all business units in recognition of information which could be exempt under the FOI Act.

   It would be useful to ensure that, as part of the drafting process for new legislation, clear provisions are made requiring public access to specified information. This would provide precise guidance for staff to routinely release information administratively and would reflect the openness and accountability required within government in the twenty first century.

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

The FOI Act is not adequately publicised. Though individual agencies could take on that responsibility (subject to adequate resourcing), it would be better for that function to be the express responsibility of a central coordinating body. Please refer to discussion points 74 and 75 for EPA/DNR views on promoting FOI via a central coordinating body.

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?**

The Statement of Affairs could be incorporated in the annual reports of government agencies, but there would be some practical problems for major agencies in the logistics and costs of incorporating detailed Statements of Affairs in already lengthy and costly annual reports. It might mean having to trim the scope of Statements of Affairs content requirements. On the other hand it could lessen the problem of current non-compliance by some agencies with section 18 of the Act and provide better compliance monitoring.

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

DNR/EPA do not support a change in name for the following reasons:

a. There already exists a substantial recognition factor within the community about Freedom of Information. Obviously this could be vastly improved but starting from "scratch" is likely to negate or impede the hard won progress already achieved in publicising FOI.

b. Freedom of Information is a term used throughout the world to describe or refer to accessing information and the more widely a term is used assists in its dissemination at a local level, especially when many FOI issues involve international companies, international treaty obligations, global environmental issues and so on.

c. The term "Freedom" very clearly epitomises the underlying principles of the legislation such as openness, accountability, rights, and having knowledge of, and the power to contribute to, the process of government.

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**

Supported.

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**

Some definitional guidance might assist the public and decision-makers but, realistically, within the legislation itself this could only be by way of some limited examples and an indication that "public interest" is not a closed category of grounds favouring or disfavouring public disclosure. Australian judicial authority (e.g *Sankey v Whitlam (1978) 142 CLR 1*) and IC(Q) decisions suggest this is so and the public interest can encompass principles as broad as the access applicant's simple need to know. It is axiomatic that FOI applicants generally believe they need to know the information they seek. Policy guidelines taking account of IC(Q) and other authorities on applying public interest tests would be helpful to both FOI users and decision-makers.

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).]**

DNR/EPA support this proposal. It would probably work best if an indicative definition is established in the Act in wording that does not deter the public from submitting innovative as well as standard types of public interest arguments.

This legislative provision should be supported by guidelines on the concept of public interest and how it applies in practice. These guidelines could be issued by a central coordinating body with oversight of the administration of the Act as outlined in discussion points 74 and 75 below

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?**

In general, accountability and participation principles espoused in the FOI Act and elsewhere by government should ensure exclusion is a genuine last option. The FOI Act exemption provisions already provide a very comprehensive array of grounds for achieving non-disclosure in genuine cases for the great bulk of agencies' operations. Other principles related to major economic, state security, public health and safety interests also come into play and can, in special cases, require exclusion of functions of agencies from FOI.

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

Sections 11A and 11B were intended by Parliament to prevent GOCs and LGOCs from being disadvantaged when operating in a commercial environment. The current situation can result in the inequitable situation of GOCs being advantaged over their private sector counterparts as well as not being answerable to the community from whom they draw part of their operating expenditure.

It should be made clear that documents forwarded to government departments to fulfill various statutory requirements should not be automatically exempt by virtue of the application of ss 11A and 11B and associated provisions within the GOCs legislation. Rather the GOCs should be subject to the same considerations as any similar commercial organisation within the bounds of the adequate exemption provisions contained in the Act.

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?

Community service obligations, by their very nature, relate closely to service delivery obligations to the community on a non-commercial basis. This suggests that FOI accountability should apply unless an affected GOC can convincingly demonstrate, on a case by case basis, to the IC(Q) and/or supervising Minister that FOI disclosure would not be, on balance, in the public interest.

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?

Equitable principles suggest LGOCs should generally operate under no less rigorous conditions than GOCs.

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

Applicants already have access to any existing non-exempt information in the possession of the agency (this includes hardcopy documents, e-mail printouts, audio and video tapes). At its widest interpretation, this proposal has the potential for requiring agencies to pull together disparate pieces of information and data so as to place them in a coherent interpreted form and would lead to agencies becoming free research services. This has major resource implications for agencies.

In contrast to the clear concept of "document", as broadly defined by the Acts Interpretation Act 1954, "information" is an open-ended concept of variable definition and need not be in recorded form. Administering such an open-ended scheme would be impracticable in terms of rights and obligations of the parties.

"Information" should be confined by definition to recorded information compatible with the thrust of the *Acts Interpretation Act* definition of document which is already wide enough to capture raw data, electronic or otherwise.

In that context, it could be unrealistic and highly disruptive for maintaining core operations of agencies unless there is a major expansion of both FOI-related and other operational resources for collating and interpreting information for the access convenience of applicants. Resource supplementation would need to occur not just centrally in agencies, but also across affected line business groups which are custodians of targeted information. In DNR's and EPA's cases this means a large network of offices around the State.

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?)

Where data is recorded in any form that fits within the extremely wide range of forms encompassed by the *Acts Interpretation Act 1954* definition of 'document", it is standard FOI processing practice of DNR and EPA to incorporate it in the scope of access applications. However an amendment of the FOI legislation to remove any doubt seems a reasonable step.

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

DNR's FOI practice has been to assume at the outset that documents generated by or otherwise in the possession of an external party for the purposes of DNR functions are probably Departmental documents for the purposes of the FOI Act. Efforts are then made to establish:

- if there exists any contractual or other legally enforceable right to recovery of documents from external possessor of documents related to an FOI application to DNR; and
- whether the possessor (for example an outsourced service provider) objects to voluntary return of the documents for FOI processing.

If a conflict of views emerges, formal legal advice may be sought. Clarifying this position through amending the FOI Act is attractive at first glance but there are legal complexities that will not be readily settled by amending the Act. Terms of service contracts with outside service providers will need to also accurately reflect the true legal position.

In practice, DNR has not been confronted so far with the search and retrieval costs problem put to the Committee by the Boards mentioned at page 29 of the Discussion Paper.

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)?]

In principle there may be limited special circumstances where bypassing internal review is justifiable and beneficial. The onus to prove a case for this should fall on the applicant and the IC(Q). In practice, there could be disadvantages to the applicant, given the probability of delay at the IC(Q) well beyond the standard 14 decision time limit on the internal reviewer (unless IC(Q) resources and case throughput management improve substantially and external review decision time limits are imposed). This would generally occur where sufficiency of search is disputed, particularly for document sources in rural and isolated localities. In this context, it may be more fruitful for direct external review rights to be limited to exemption issues at the leave of the IC(Q).

Contrary to the assertion at page 30 of the Discussion Paper that "most decisions are appealed to the IC(Q) anyway", DNR andEPA experience is that the majority of internal reviews do not result in external reviews. Many external reviews are also ultimately withdrawn, often after very lengthy periods of IC(Q) processing and Agency submissions. Unless the IC(Q)'s processing is very prompt, the availability of direct external review might produce another unintended outcome. Some agencies might prefer not to spend time on the internal review stage and could encourage applicants to take their claim to 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 <u>all</u> decisions in either full or summary form (as in Western Australia)?

As indicated elsewhere in this submission, guidelines would be welcome. Updating the FOI Act interpretation manual issued by the Justice Department some years ago could be a useful start. IC(Q) decisions already meet some of this need, but succinct summaries of leading and new cases, such as that produced by the Commonwealth Attorney Generals department produced, would be useful, as would practice guidelines and directions. Please refer also to discussion points 74 and 75

Fees and Charges Discussion Points (48 to 54)

Suggested reforms on fees and charges were outlined in the joint DNR-EPA submission of May 1999. An underlying principle of FOI administration is that it is not a government service akin to services like rail transport where cost recovery is more defensible. It is an accountability and participation scheme. Justice Kirby of the High Court of Australia has recently stated *that "to expect the user to pay fully for basic government services such as a day in court is surely wrong. The same is true of FOI charges".*

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

In respect of (a), the removal of "only" would bring the FOI Act Queensland more into line with the Commonwealth scheme but the latter still specifies limits to the factors to be considered. This achieves consistency across government administration of the Act.

In respect of (b), we could do so though the practice could be detrimental to the applicants' needs if the IC(Q) is unable to settle the matter more quickly than by standard processing.

In respect of (c), the obligation to consult with applicants is already clearly spelt out and is rigorously complied with by DNR and EPA.

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?

There is a need for a provision to moderate the excesses framed around the notion of "repeat" applicants (rather than allowing agencies to label applicants as "vexatious") in a way that will ensure agencies cannot abuse it to deny applicants their legitimate rights. The FOI(Q) formulation is a reasonable starting point. Some consideration may be needed of whether an agency could also take into account actions by a repeat applicant that are not strictly and directly related to the FOI application, for instance alternative access rights the applicant may have already exhausted in grievance or other review settings. DNR's practical experience with this problem has centred substantially on long running public sector employment grievances and on water licensing disputes. Refusal for excessive repeat applications could be one category of decision that could warrant a special right of direct access to external review by 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?

See 57 above.

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?

The DNR/EPA joint submission of May 1999 canvassed several issues concerning section 108 reporting. There is a need for a coordinating entity. It is for the Parliament to decide the depth of reporting it needs and which is to be the appropriate coordinating entity. *Please refer to discussion points 74 and 75*

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?

DNR and EPA, like most Agencies, process applications as expeditiously as possible. Obviously, decisions will be made more quickly on applications which are less complex and for which obtaining documents is easier than those which require searching across much of the State and include multiple consultations with third parties. For example, DNR has been able to process around 36 percent of applications within 30 days.

Significant difficulties would arise, however, in meeting this deadline for larger, more complex, applications. DNR and EPA also face additional difficulties because, unlike some agencies that are small and centralised, the task of identifying and accessing documents is often a significant logistical exercise. It is not uncommon, for example, for an FOI request to capture documents in several locations across the state. Consequently, much of the processing time is taken up with obtaining access to the documents.

For these reasons, DNR/EPA do not support the introduction of a 30 day deadline for processing FOI requests. If, however, the decision is made to proceed with this proposal, it is essential that agencies be given a statutory right to negotiate an extension of time with the applicant. Alternatively, agencies would require a significant increase in the resources available to them to allow the request to be met within the 30 day limit.

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?

The 15 days time limit is generally sufficient in most cases, but there is again a need for the Act to provide for negotiated extension.

Many DNR/EPA clients are located in rural and isolated areas and can sometimes be difficult to communicate with promptly. This could prejudice the rights of third parties and applicants to ensure the quality of access decisions is procedurally fair to all parties. In addition, many third parties wish to seek legal advice before responding and this is difficult to achieve within 15 calendar days

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?

This is supported as indicated at Discussion Point 60 above.

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?

Failure to decide should not be assumed to be deemed access. Complex applications, including ones requiring very substantial search and recovery action for records located throughout Queensland, and those requiring complex consultations with third parties, can cause unfortunate but unavoidable processing delays. Deeming of access approval can consequently erode rights of third parties in the private and public sector and conflict with the duty of the Department to avoid improper disclosure of documents that legitimately need restricted access.

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 principle underpinning this proposal is supportable in theory but practical implementation presents problems. The Departments already apply that approach where there is a clear justification for application queue jumping and where processing resources permit. However applicants generally feel their own needs should receive priority and the exceptional treatment for "compelling public interest" could be used by some to "jump the queue". It should not be prescribed in the legislation but left to applicants to put forward such submissions to the decision-maker.

67. **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?**[1]

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

These proposals are not supported. In cases of genuine need to keep public servant identities secret there are adequate exemption and other protective provisions in the Act as it stands.

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?**

Supported in principle. The eligibility test for such relationships would need to be closely defined and, where practicable, be supported by the consent of the third party.

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?

DNR and EPA believe that a central coordinating body would greatly enhance public awareness of FOI and facilitate more effective and efficient processing of FOI applications. Responsibility for these functions should be provided for under statute so as to ensure they are performed appropriately in the long term, rather than wound back after an initial period of vigour.

In respect of 74 (a) a central body could ensure compliance with the reporting functions of the Act, namely Statement of Affairs and section 108 reporting. The central body should have the power to monitor the operation of FOI for effectiveness and consistency. This would ensure quality control across agencies and equitable treatment for applicants.

The central body could also disseminate information about Information Commissioner decisions including comprehensive case summaries and also provide other administrative law summaries where there is an impact on FOI. The recent High Court decision in Esso Australia Resources Ltd v Commissioner of Taxation (1999) HCA 67 on legal professional privilege is a recent case in point.

In respect of 74 (b), a central body comprising FOI specialists could advise FOI coordinators on unusual or difficult applications and could also provide an independent advisory role to assist the public in understanding FOI processes and exemption provisions. These specialists could also be responsible for providing regular training for practitioners and for enhancing public awareness of FOI through such mechanisms as promotional campaigns, seminars, and relevant literature such as pamphlets.

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 central coordinating body could be housed within the Office of the Information Commissioner (similar to the arrangement in Western Australia). This body should have the power to monitor all aspects of the FOI process including external review. It is important, however, that a clear distinction be drawn within the organisation between the review function and the coordination function to ensure the integrity of external reviews and monitoring are not compromised.

The body should be created within the FOI Act with responsibilities defined and with regular review of its effectiveness. This would ensure that a central coordinating role is maintained despite restructures or funding issues as has occurred in the past with the previous coordinating role provided by the Department of Justice and Attorney General. Providing for regular review of the central body would ensure that the needs of stakeholders are being met and the body was fulfilling its statutory obligations.