QUEENSLAND GOVERNMENT

Minister for Health

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Submission No 155
Spec 1.4

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

Dear Mr Fenlon

I refer to your letter dated 7 February 2000 in relation to the Legal, Constitutional and Administrative Review Committee's review of the *Freedom of Information Act 1992* (the FOI Act).

I understand that you granted this Department a one week extension to the original 7 April 2000 deadline for the provision of further submissions to the review. I would like to take this opportunity to thank you for your assistance in this regard.

I **enclose** a copy of the supplementary submissions of Queensland Health, in response to the select discussion points identified in the Committee's discussion paper.

I am advised that the Office of the Health Practitioner Registration Boards has already lodged a submission with you separately.

I trust that the enclosed submission will be of assistance with your review of the FOI Act.

Should you have any queries or require additional information in relation to this matter, please do not hesitate to contact Ms Alessandra Liussi, Acting Manager, Legal and Administrative Law Unit, Queensland Health on telephone (07) 323 40302.

Yours sincerely

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SUBMISSION TO THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

IN RESPONSE TO DISCUSSION PAPER NO. 1

REVIEW OF THE *FREEDOM OF INFORMATION ACT 1992*

APRIL 2000

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Section 44(1) — Applicability to Personnel Records

Queensland Health has previously submitted that the term "personal affairs" should be defined in the FOI Act.

In this regard, Queensland Health has specific concerns in relation to the applicability of the FOI Act to the personnel records of individuals employed by agencies, particularly in light of the generic way in which s.44(1) is presently worded, and decisions issued by the Information Commissioner interpreting that provision.

In a recent case involving an FOI application for access to the personnel records of an officer of Queensland Health, the Information Commissioner determined that the following kinds of matter were exempt from disclosure to the access applicant under s.44(1) of the FOI Act:

a) the officer's academic and student records and details of studies undertaken; birth and marriage records; references from persons known to the officer which dealt with the officer's personal qualities (as opposed to her work competencies); leave printouts, leave applications and accompanying reasons for requesting leave; banking details; private address and phone number; present location; date of birth; family circumstances and next of kin; nationality; employee number; and

b) the employee numbers of other officers whose names appeared in records which also concerned the officer.

The Information Commissioner also endorsed the exemption from disclosure, under s.40(c) of the FOI Act, of:

c) probation and final service reports on the officer, and memoranda concerning whether the officer should receive standard pay increments.

However, the Information Commissioner determined that the access applicant was entitled to access to the balance of the officer's personnel file, which included matters such as:

d) employment applications submitted by the officer, including details of her educational qualifications, work experience, personal qualities and qualifications for the positions applied for, and referees.

e) particulars of the officer's appointment to positions in Queensland Health and another agency, and details regarding her position classifications and paypoints, and her movements within the agencies (eg. taking up duty, cancellation of appointments, resignation, promotions and transfers);

f) details regarding the officer's secondment to another agency, and subsequent relinquishment of her position with Queensland Health.

Queensland Health was required to disclose this information to the access applicant, in accordance with precedent established in the Information Commissioner's formal decisions, in which he has drawn a distinction between matters which concern the private aspects of employees' lives, and work-related matters. The Information Commissioner has consistently held that officers of agencies should be entitled to control the dissemination of matter held on departmental files which concerns the private aspects of their lives; i.e., matter such as that described in items a), b) and c) above, but that other types of matter, such as those described in items d), e) and f) above, which pertained to aspects of their employment, were open to access under the FOI Act.

It is submitted that the mere fact that an individual is employed by a department, local government or public authority, and paid out of public funds, does not provide sufficient justification for permitting any member of the public to scrutinise that individual's personnel records, subject only to the deletion of "personal affairs" matter of the type described in items a), b) and c) above.

In another case, Queensland Health received an FOI application, seeking access to all documents relating to the selection of officers for seven advertised positions within the department, including five at the Senior Executive Service (SES) level. The documents sought included all material submitted by the applicants (both successful and unsuccessful) for those positions. The access applicant was neither an officer of the department, nor an applicant for any of the positions in question.

Based on the precedent established by the Information Commissioner's decision in *Re Baldwin and Department of Education* (1996) 3 QAR 251, Queensland Health was required to grant access to the material sought, including the applications, selection criteria statements and *curricula vitae* of all applicants for those positions, subject only to the deletion of "personal affairs" matter concerning the successful applicants, and identifying matter concerning the unsuccessful applicants. The processing of that application involved the painstaking examination of more than 4,200 pages of material in order to delete work history or other references which would identify unsuccessful applicants, or from which their identities could reasonably be ascertained.

It is conceded that a right of access to information concerning the classification levels and salary ranges of individuals paid out of public funds may accord with the principles of government accountability which underlie the FOI Act. There may also be some circumstances in which disclosure of other specific types of information in personnel records may be in the public interest (for example, situations in which an officer's academic credentials or work history are brought into question, or where questions of fairness arise in relation to the selection process which led to an officer's appointment).

However, it is submitted that the current situation, in which any member of the public can, by simply paying the prescribed $30 application fee, and without being required to demonstrate any legitimate interest in the information sought, obtain access to matter of the types described in items d), e) and f) above, or material submitted by unsuccessful job applicants, is inappropriate. This situation runs contrary to the expectations of public officers, and of persons seeking employment in the public sector. It does not accord with human resources practices in the community at large, or with any of the stated purposes for the enactment of the FOI Act, as set out in s.5(1) of the Act. In addition, it provides an opportunity for the FOI Act to be utilised as a means of harassment or intimidation against public officers.

Section 44(3) — Information of a medical or psychiatric nature

Queensland Health agrees with the Information Commissioner (Qld) regarding the difficulties inherent in interpreting the scope of the phrase "information of a medical or psychiatric nature" (see IC (Q) submission no 56, paragraph B38). It is submitted that clinical information, the disclosure of which might be prejudicial to the physical or mental health or wellbeing of the person to whom the information relates, is often recorded by health practitioners other than physicians.

In its previous submission to the committee, Queensland Health recommended that consideration be given to amending s.44(3) along the lines of the analogous provision in the Commonwealth FOI Act. Section 41(3) of that Act provides that, where giving access to matter provided by a "qualified person" might be detrimental to the health of an FOI access applicant, access is instead provided to a "qualified person". The term "qualified person" is defined in s.41(8) of the Commonwealth FOI Act in non-exhaustive terms, and includes a range of health practitioners, i.e., medical practitioners, psychiatrists, psychologists, marriage guidance counsellors and social workers.

Queensland Health recommends that consideration be given to adapting the analogous provisions in s.41 of the Commonwealth FOI Act for inclusion in s.44(3) of Queensland's FOI Act, with consideration also being given to expanding the categories of "qualified person" to include registered nurses. It is submitted that this is appropriate, in view of the key role nursing staff play in patient care, which routinely involves their recording of clinical information about patients, and which may, in certain circumstances, include information appropriate for release under the mechanism provided for in s.44(3) of the FOI Act.

Term of Reference B(III)

Whether the ambit of the application of the FOI Act, both generally and by operation of s.11 and s.11A, should be narrowed or extended

Discussion Paper No. 1 states, at page 20, that the committee "*is currently considering suggestions made in a number of submissions to amend the list of bodies in s.11(1) and welcomes any further submissions in this regard.*"

In its May 1999 submission to the committee, Queensland Health recommended that section 11 of the FOI Act should be amended to exclude from the FOI Act's operation documents relating to the quality assurance processes within Queensland Health.

Documents created for the purposes of Quality Assurance within Queensland Health should be excluded from the ambit of the Act. These documents contain highly sensitive information, and the prospect of disclosure could reduce the level and value of the information provided to Quality Assurance Committees, with resulting detriment to the quality of service provided within health facilities.

These documents are created for the specific purpose of identifying opportunities to improve the safety and effectiveness of patient care. The activities of Quality Assurance Committees are oriented towards benefiting the larger patient population.

Quality assurance activities will only be effective if sensitive information is provided to Quality Assurance Committees. The prospect of disclosure will lead to a reluctance on the part of health professionals to participate in such processes, thereby reducing the potential benefit to future patients. There is a strong public interest in having quality assurance processes in health care that are not inhibited by the threat of disclosure under FOI processes.

Since lodging that submission, Queensland Health has become aware of representations from organisations representing health care professionals, including the Australian Medical Association (Queensland Branch), and the Royal Australasian College of Surgeons, expressing similar concerns about the prospect of quality assurance documentation being publicly accessible under the FOI Act.

In enacting section 11 of the FOI Act, the Queensland Parliament has recognised that there are certain agencies, parts of agencies or functions of agencies, to which the FOI Act should not apply. In addition to the list of provisions set out in s.11(1) of the FOI Act, there are a number of agencies prescribed by regulation for the purposes of s.11(1)(q) of the Act.

As a result of those provisions, the FOI Act does not apply to specifically identified functions of agencies, including the conciliation of health service complaints under Part 6 of the *Health Rights Commission Act 1991* [see s.11(1)(p) of the FOI Act]. Presumably, the rationale for the exclusion of this aspect of the Health Rights Commission's work is the need to ensure the highest degree of public confidence in the integrity of the conciliation process, through assuring absolute confidentiality in respect of that process.

Queensland Health submits that the same considerations apply to the quality assurance programs, which have been adopted in hospitals as a mechanism for monitoring and assessing health care delivery, identifying opportunities for improvement, and taking action to implement and maintain positive changes.

Quality assurance programs rely on hospital staff to voluntarily provide reports regarding any mistakes or deficiencies in patient care which have taken place. In addition, medical staff critically assess medical records to identify particular incidents involving inappropriate or inadequate clinical care, and review clinical practices and privileges. An essential element of quality assurance is the provision of accurate and detailed information by hospital staff (including information which, in many cases, may reflect on the clinical skill or judgment of the clinicians concerned).

The explanatory notes to the *Health Legislation Amendment Bill 1999* relevantly stated:

> *The quality assurance committee provisions in the* Health Services Act 1991 *(ss.30-38) (the Act) are intended to provide the necessary regulatory framework for restricting disclosure of committee information, and providing immunity for committee members, in order to encourage frank and open discussion and critical analysis of health services under review. Such committees serve the public interest by facilitating improvements to health services.*

The relevant provisions in the *Health Services Act* pertaining to quality assurance committees, as amended by the *Health Legislation Amendment Act 1999*, contain specific prohibitions on the disclosure, by a member of a committee, of information acquired by the person in that capacity (see s.33), and on the giving in evidence of such information (see s.34). However, they provide no protection against the release through the FOI process of confidential information provided to a quality assurance committee, or created by, at the request of, or for the use of a committee.

It is submitted that the existing exemption provisions in Part 3, Division 2 of the FOI Act do not provide an adequate basis for ensuring the confidentiality of such information. The prospect of such information being accessible through the FOI process will seriously inhibit hospital staff from providing full and frank disclosure of information, with such circumspection clearly working to the detriment of patients in Queensland's public health care system.

Term of Reference B(VI)

The appropriateness of, and need for, the existing regime of fees and charges in respect of both access to documents and internal and external review

Discussion Point 51 — What other components of the charging regime need to be addressed (eg, photocopying)?

A technical matter which does not appear to have been addressed in Discussion Paper No. 1 relates to the relevant statutory provision (i.e., s.8 of the *Freedom of Information Regulation 1992*), which governs the charge for giving access to photocopies of documents in A4 size. While specifying the size of photocopies to which access is given, that provision does not distinguish between black and white photocopies and colour copies. As the actual cost of providing colour photocopies well exceeds 50c per page, it is recommended that s.8 of the FOI Regulation be clarified to indicate that that 50c per page charge is applicable only to black and white photocopies in A4 size. It would then be open to agencies to calculate the charges applicable to colour photocopies (in A4 size) in accordance with s.9 of the FOI Regulation (i.e., the amount that the agency considers reasonable, where that amount does not exceed the amount that reasonably reflects the cost of providing the copy).

Discussion Point 52 — Especially if there are to be any fee increases, should the FOIQ be amended to enable agencies and ministers to waive or reduce fees? On what grounds?

In its previous submission to the committee, Queensland Health recommended that waiver and reduction on the grounds of hardship or public interest should be incorporated into the scheme of fees and charges for processing initial FOI applications. In addition, Queensland Health supports the suggestion on page 40 of Discussion Paper No. 1 regarding waiver where "*collecting charges would be more costly than not collecting them*".

Term of Reference B(VII)

'Vexatious' applications

Discussion Point 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?

In its previous submission to the committee, Queensland Health recommended that a provision be added to section 28 of the FOI Act, to address frivolous and vexatious FOI applications. At that time, it was noted that the disproportionate consumption of agency resources may arise not only in the context of an individual application but rather by virtue of an applicant's pattern of conduct; i.e., a systemic use of the FOI Act to one agency, or to a number of agencies.

It is noted that several Canadian jurisdictions have adopted specific mechanisms in their FOI legislation to address this problem (see the relevant provisions in the FOI legislation of the Provinces of British Columbia and Ontario, as set out in Attachment B(vii)1, IC(Q) submission no 56). Queensland Health recommends consideration of the inclusion in the FOI Act of an analogous mechanism, under which agency decision-makers could make a decision (to which appeal rights would attach) to refuse to process an application in circumstances in which there are reasonable grounds to believe that the application is part of a pattern of conduct that amounts to an abuse of the right of access, or is made in bad faith or for a purpose other than to obtain access.

In addition, Queensland Health submits that consideration should be given to making a parallel amendment to the Information Commissioner's powers in relation to such matters. Under s.77(1) of the FOI Act, the Information Commissioner currently has the power to decide not to proceed with a review, if he is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance. Arguably, the language of s.77(1) restricts the Information Commissioner to examining a particular application in isolation, and does not permit him to decline to proceed with a review in circumstances in which there is clear evidence, based on an applicant's pattern of conduct, that the FOI Act is being employed in a systematic and vexatious manner.

Whether time limits are appropriate

Discussion Point 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?

While noting the range of views canvassed in Discussion Paper No. 1 in support of a reduction in the time limit for determining initial applications, Queensland Health does not support any variation of the currently prescribed time limit.

In particular, Queensland Health disputes the Information Commissioner's view that the basic time limit for determining FOI applications should be reduced from 45 to 30 days, "*in light of agencies' six years experience in the administration of the FOIQ*". It is submitted that the 'experience factor' is largely irrelevant in dealing with complex FOI applications involving a large number of documents, and that any move to reduce the time limit would ultimately work to the detriment of applicants. Requiring agencies to finalise applications within a shorter time period than currently prescribed would affect the ability of agencies to fully explore the possibility of providing partial access to documents, and would likely result in more 'global' exemption claims for documents. It would also, arguably, increase the number of matters which cannot be resolved within the prescribed time period, thus increasing the volume of matters proceeding to external review on the basis of a 'deemed refusal' of access, and thereby delaying the applicant's entitlement to access to the documents in issue.

Discussion Point 67 — Should the 14 day limit for dealing with internal review applications for access and amendment decisions—as set out in ss.52(6) and 60(6)—be extended? If so, what should the period be?

Queensland Health adopts the arguments canvassed at pages 50-51 of Discussion Paper No. 1, and reiterates its support for an extension of the time limit for determining internal review applications from 15 to 30 days.

Discussion Point 68 — Should the 60 day period for lodging an application for external review—as set out in s.73(1)(d)(i) of the FOIQ—be reduced? If so, what should the relevant time period be?

It is noted on page 51 of Discussion Paper No. 1 that the present 60 day limit for seeking external review is consistent with the time limit applicable in all other Australian jurisdictions except the ACT, and that "*a reduction in the 60 day period could potentially disadvantage applicants by removing their appeal rights*".

However, it is not apparent why the time limit for seeking external review under Queensland's FOI Act is more than twice the period prescribed for seeking internal review (or indeed, the time period for commencing proceedings under the *Judicial Review Act* in respect of a decision made on external review). Further, it is submitted that a reduction in the prescribed time limit

would not disadvantage applicants, since the Information Commissioner would presumably still be empowered, under s.73(1)(d) of the FOI Act, to allow an applicant further time to lodge an external review, either before or after the end of the prescribed period.

In light of the above, Queensland Health concurs with the submissions reported at page 51 of Discussion Paper No. 1 regarding a reduction in the period, within which a non-reverse FOI external review application must be lodged, from 60 to 28 days.

Term of Reference C

Any related matter

Provisions regarding deceased persons, intellectually disabled persons and minors

Queensland Health generally supports the relevant recommendations made by the Information Commissioner (Qld) (see paragraphs C1 to C13, IC(Q) submission no. 56).

In particular, Queensland Health considers that the current inconsistent terminology ("closest relative" and "next of kin") as used in sections 51(3), 53(b) and 59(4)(a)(i) of the FOI Act should be standardised as "closest relative", and that a definition of the term "closest relative" should be inserted in s.7 of the FOI Act, to provide clarity for agencies in terms of the appropriate individual with whom consultation should take place.

It is submitted that analogous provisions in other Queensland legislation (for example, the definition of "senior available next of kin" in s.4 of the *Transplantation and Anatomy Act 1979*) could be adapted to provide an appropriate definition of "closest relative":

> ***"closest relative"*** *means—*
>
> *(a) in relation to a child—the first of the following persons who, in the following order of priority, is reasonably available—*
>
> *(i) the spouse of the child;*
>
> *(ii) a parent of the child;*
>
> *(iii) a sibling, who has attained the age of 18 years, of the child;*
>
> *(iv) a guardian of the child; and*
>
> *(b) in relation to any other person—the first of the following persons who, in the following order of priority, is reasonably available—*
>
> *(i) the spouse of the person;*
>
> *(ii) a child, who has attained the age of 18 years, of the person;*
>
> *(iii) a parent of the person;*
>
> *(iv) a sibling, who has attained the age of 18 years, of the person.*