Submission No 161
Spec 1-4

JSD:cg

28 April, 2000

Bar Association of Queensland

Level 5, Inns of Court
107 North Quay
Brisbane Qld 4000

Pb: (07) 3236 2477
Fax: (07) 3236 1180
DX: 905
Email:
chiefexec@qldbar.asn.au

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Sir

Review of the Freedom of Information Act 1992 (Qld)

Thank you for inviting the Association to make a submission to your Committee's review of the *Freedom of Information Act 1992.*

The discussion paper which you sent to us was comprehensive and provided a stimulating analysis of important issues.

Please find enclosed the Association's submission.

Yours faithfully
BAR ASSOCIATION OF QUEENSLAND

J S DOUGLAS QC
President

SUBMISSION TO THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE BY THE BAR ASSOCIATION OF QUEENSLAND

FREEDOM OF INFORMATION IN QUEENSLAND

The following submission is in response to Discussion Paper No 1 and adopts the format contained in that discussion paper.

A WHETHER THE BASIC PURPOSES AND PRINCIPLES OF THE FOI ACT HAVE BEEN SATISFIED, AND WHETHER THEY NOW REQUIRE MODIFICATION

The Committee has invited particular comment about the compatibility of FOI purposes and principles with our Westminster-style system of government.

The basic purposes and principles of FOI legislation, which are conveniently summarised in the discussion paper, are:

- enhancing democratic ideals by enabling citizens to access information that will allow them to effectively participate in the processes of policy making and government;
- increasing the accountability of government by making it more open to public scrutiny;
- enabling citizens to understand the decision-making process; and
- though all these things, improving the quality of decision-making by government agencies;
- enabling citizens to access government-held information about them personally and to correct any inaccuracies in that information.

These purposes and principles do not relate to any specific system of government and are designed to enhance any form of government, be it Westminster, presidential or some other system.

Fundamental Westminster principles, such as the principle of collective Cabinet responsibility, are recognised in the FOIQ.

The practice of responsible government under a Westminster system is enhanced by FOI which enables citizens, community groups and the media access to information, facilitates informed public debate and thereby increases the accountability of government.

B(I) WHETHER THE FOI ACT'S OBJECTS CLAUSES SHOULD BE AMENDED

It is desirable to reformulate and combine the objects clause of the FOIQ and the reasons for enactment clause.

It is appropriate to also include an equivalent to the FOIC s3(2). Such a provision would encourage the FOIQ to be interpreted so as to further the Act's stated objectives and that any discretion conferred by the Act be exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

Modification to the objects clauses should serve to emphasise that one of the objectives of the Act is to enhance a person's right to amend information concerning their personal affairs.

The objectives of the Act would also be enhanced by a provision along the lines of that suggested by the ALRC/ARC that the exemption provisions should be interpreted against a presumption that disclosure of government information is in the public interest.

Although a presumption in favour of access emerges from decisions of the Information Commission, it is appropriate that the presumption or guiding principle of access be stated in the Act.

Otherwise, there should be no reference to the exceptions and exemptions in the objects clause.

More generally, pro-disclosure practices should be encouraged by both statutory and administrative instruction. These would encourage the routine release of information in the public interest and encourage agencies, when requested, to release information informally outside the formal FOI process.

Certain categories of documents are clearly appropriate for release outside the FOI Act including documents containing interpretations, guidelines, statements of policy, practices or precedents and particulars of administrative schemes. Such policy documents are recognised in the Act as appropriate for agencies to make available for inspection. In addition to these, consideration should be given to the disclosure of documents which are capable of being routinely released without an appreciable risk of direct harm to an individual or the public interest. Such information would include statistical information, policy information, and other documents which do not, for example, disclose sensitive private facts.

Disclosure of such documents outside of formal FOI procedures should be subject to the same statutory protection available to public officers against actions for defamation or breach of confidence under the FOI Act, provided the release is made in good faith and without gross negligence (compare s102 FOIQ).

Continuing work to make citizens aware of their rights of access and to assist them to exercise those rights should be encouraged.

Although a reasonable argument can be made for the title of the Act to be changed to the Access to Information Act (thereby preventing confusion with other rights such as freedom of communication) the retention of the existing name is justified since:

1. freedom of information legislation and principles are well established and the name of the current Act is reflected in statutes in other jurisdictions;

2. a name change to Access to Information might unintentionally serve to emphasise that access to information is dependent or driven by individual applications for access. It might deter the free provision of information independent of formal requests for access.

The right of access to government-held information should be included as an example of a fundamental legislative principle in the Legislative Standards Act 1992.

B(II) WHETHER, AND TO WHAT EXTENT, THE EXEMPTION PROVISIONS IN THE FOI ACT, PART 3 DIVISION 2 SHOULD BE AMENDED

In principle, there is considerable merit in reducing the number of exemptions, simplifying them and/or reducing their scope.

However, certain changes may have the unfortunate and unintended consequence of disturbing interpretations which are well-settled under existing provisions.

Changes to particular provisions should be made where a case for the removal of an exemption, the simplification of an exemption or a reduction in its scope can be justified.

Moreover, where possible exemptions should reflect exemptions contained in other State FOI Acts and, in appropriate cases, the FOIC.

Naturally, there may be good reason for the FOIQ to continue to adopt different formulations to those contained in the FOIC where such a course is a deliberate choice of the legislature, particularly where the Queensland legislature intended that an exemption be more narrowly defined or subjected to a more stringent public interest or harm test. However, where there is no such deliberate choice, the provisions of the FOIQ should reflect those of the FOIC.

Conformity between exemptions under the FOIQ and the FOIC has the advantage of bringing to the assistance of citizens and government agencies interpretations

which have been given under the FOIC. It also removes scope for arguments that different formulations under each Act necessarily means that the Queensland legislature deliberatively intended not to adopt the content of the comparable FOIC provision.

Of the current exemption provisions in the FOIQ, the most disturbing and unjustified is the extent of the cabinet documents and related executive council documents exemptions (ss36 and 37).

At the very least, s36 should be amended to restore it to the form in which it appeared when it was initially enacted. The current exemption extends to documents which are not essential in order to protect cabinet confidentiality or collective ministerial responsibility.

As to exemption provisions which require a decision-maker to be satisfied that certain harmful consequences would result should the information sought be released, it is appropriate that the exemption require decision-makers to focus on whether harm would result from disclosure of the particular document.

As to harm tests in the FOIQ, given the variety of exemptions and the diverse interests which they are intended to protect it is unrealistic to expect that one standard harm test can be applied to a number of exemptions.

Different forms of public interest tests in the FOIQ should be rationalised, where possible.

There is little utility in providing a statutory definition of the public interest given the inherent flexibility of that term and the variety of circumstances in which it must be applied in the FOI context.

Nevertheless, agencies should be encouraged to carefully consider how any public interest test is applied, especially by emphasising factors which are relevant and irrelevant to the public interest, eg that embarrassment to government is irrelevant.

Although a case can be made for the retention of conclusive certificates, the extent of the use of such certificates and the kinds of documents in respect of which they are applied should be the subject of monitoring and report by the Information Commissioner.

B(III) WHETHER THE AMBIT OF THE APPLICATION OF THE FOI ACT, BOTH GENERALLY AND BY OPERATION OF S11 AND S11A, SHOULD BE NARROWED OR EXTENDED

The list of agencies excluded from the FOI Act should not be further extended unless a compelling case can be made for such an exclusion. The exclusion of

agencies should only be possible through legislation, not by regulation.

Government-owned corporations (GOCs) should not, as a matter of policy, be excluded from the application of the Act. The fact that GOCs operate in a commercially competitive environment is not, in itself, a sufficient reason to exclude them from the Act. Since GOCs are publicly funded they should be publicly accountable. The exclusion of the application of the Act to GOCs would reduce the extent to which their performance can be assessed.

The commercial activities of GOC may be exempt under a specific exemption, eg business affairs. This would sill permit disclosure if disclosure would, on balance, be in the public interest.

There is a strong case for extending the FOIQ to specific documents or classes of documents in a contractor's possession that relate directly to the performance of their contractual obligations. For example, the trend towards the privatisation of prisons warrants the FOIQ being extended to private prison operators. Without such a provision the public is inhibited in assessing the performance of bodies to whom government services have been "contracted out" and to determine whether the contracting out of such services should be maintained, extended or discontinued.

In circumstances in which such contractors have responsibility for the welfare of individuals, the provision of essential services and the maintenance of public health, there is a compelling case for extending the FOIQ to records which relate to the services being carried out by the contractor under its contractual obligations with a government agency.

Excessive reliance on "commercial-in-confidence" claims, especially in relation to services being provided by contractors to government, should be discouraged.

Consideration should be given to the enactment of a more demanding commercial exemption which provides that documents will be exempt only if disclosure of information relating to business, commercial or financial matters would be likely to expose the business organisation to an identified prejudice. The risk of being subjected to public criticism or having the performance of its contractual obligations scrutinised or the loss of a contract or the possibility of not having a contract renewed as a result should not constitute such a prejudice.

B(IV) WHETHER THE FOI ACT ALLOWS APPROPRIATE ACCESS TO INFORMATION IN ELECTRONIC AND NON-PAPER FORMATS

Although the Act should encourage access to information in the electronic and non-paper formats, this does not justify the creation of a general right of access to information. Such a fundamental change would have significant resource implications by requiring information to be created.

The definition of document should be clarified to provide that it includes data.

The definition of "document of an agency" does not warrant revision because of the possible inconvenience or cost to agencies having to retrieve documents from persons into whose possession they have placed a document. It is appropriate that a "document of an agency" include documents under the control of an agency to which the agency has a present legal entitlement to take physical possession. Otherwise, the purposes of the Act could be subverted by having documents placed into the possession of an agent.

B(V) WHETHER THE MECHANISMS SET OUT IN THE FOI ACT FOR INTERNAL REVIEW ARE EFFECTIVE

Internal review should be retained because it is cost effective and relatively quick. Without a system of internal review, substantial administrative and cost burdens would be shifted to the Information Commissioner. However, the retention of a system of internal review does not mean that special provision should not be made for expedited external review where, for example, the Information Commissioner entertains a complaint or if, for some other reason, the person seeking access and the agency seek an early external review.

In the circumstances, internal review should not necessarily be a prerequisite to external review where both the applicant and the agency agree, or the Information Commissioner permits external review to be made without internal review occurring.

B(V) (CONTINUED) WHETHER THE MECHANISMS SET OUT IN THE FOI ACT FOR EXTERNAL REVIEW ARE EFFECTIVE AND, IN PARTICULAR, WHETHER THE METHOD OF REVIEW AND DECISION BY THE INFORMATION COMMISSIONER IS EXCESSIVELY LEGALISTIC AND TIME-CONSUMING

The Information Commissioner model should be retained.

The independence of the Information Commissioner should be maintained.

Provided adequate procedures exist to ensure that the Ombudsman takes no part in any applications made to the Ombudsman's office under the FOIQ, it should be possible for the same person to hold the offices of Queensland Ombudsman and Queensland Information Commissioner.

To some extent a "legalistic" approach by the Information Commissioner is inevitable because the determination upon review involves legal provisions affecting the rights and interests of individuals and agencies.

The Information Commissioner can attempt to informally resolve reviews in a non-adversarial context.

Although some decisions of the Information Commissioner might be regarded by certain members of the general public as being excessively legalistic, the decisions were important in explaining matters of principle and providing a solid foundation for later decision-making under the Act.

Nevertheless, it is important for the Information Commissioner, where possible, to produce succinct judgments and, where practical, publish a summary of important decisions.

Although there is an argument with the imposition of a statutory time limit on the Information Commissioner in which to deal with external review applications, the preferred approach is for the Information Commissioner to issue performance targets and for the achievement of those targets to be monitored. Given the range of cases with which the Information Commissioner must deal, it is unlikely that a single time limit will be appropriate for most cases. In recent times, superior courts have published guidelines as to the period within which reserved judgments are normally expected to be delivered. The Information Commissioner might consider issuing a similar guideline.

Subject to appropriate controls and monitoring, the Information Commissioner should have the power to enter premises of agencies subject to FOIQ and inspect documents. Without such a power the purpose of the FOI Act can be subverted by unscrupulous agencies or individuals within an agency denying that documents exist.

The Information Commissioner should not be empowered to punish for contempt. Although some tribunals have powers to punish for contempt, specific conduct at which the suggested power of the Information Commissioner might be directed should be the subject of specific provision.

Although there is an attractive argument that the Information Commissioner should be granted the power to order disclosure of otherwise exempt matter if the Commissioner considers that it is in the public interest to do so, on balance such a provision is not justified. Sufficient provision for the disclosure of documents in the public interest should be made in:

- the general objectives of the Act;
- the manner in which public interests tests are formulated and exemptions narrowly defined

B(VI) THE APPROPRIATENESS OF, AND THE NEED FOR, THE EXISTING REGIME OF FEES AND CHARGES IN RESPECT OF BOTH ACCESS TO DOCUMENTS AND INTERNAL AND EXTERNAL REVIEW

No compelling case have been made out for substantially increasing fees and charges under the Act. Such an increase would unduly inhibit those who can least afford to pay for access.

There is a case for restricting the current application fee to a prescribed number of documents under one application fee so as to avoid potential abuse of the system.

There is a case for the imposition of a reasonable fee for the cost of retrieving documents, especially where FOI applications are made by commercial entities or for commercial purposes.

The Information Commissioner's suggestion that there be a scale charging regime has considerable merit. The option of having charges based on the time spent option has the potential to reward agencies and harm applicants for information because of the excessive length of time taken by agencies to locate documents or the inefficiency of their record keeping systems.

Provision should exist for the waiver/reduction of fees and charges. The grounds for waiving fees need not be specified in the Act. Agencies should be encouraged to waive or reduce charges in appropriate circumstances where, for example, the application relates to personal information of the applicant (in the event of a fee for retrieval being introduced in such cases), the payment of fees will cause the applicant financial hardship or on the ground that there is a public interest in the release of the documents.

There should be no fee on internal review since internal review is a necessary part of an agency's decision-making process and a necessary cost involved in the administration of the FOI Act.

In the case of external review, any fee is unlikely to significantly contribute to the actual cost of external review and a substantial external review fee would be likely to deter meritorious applications for external review by those unable to afford it.

But if application fees are introduced for external review, there should be provision for the waiver of those fees where the application relates to the personal information of the applicant, the payment of fees would cause financial hardship, or there is a public interest in the release of the documents. Fees should be refunded where the proceedings are decided wholly or partly in favour of the applicant.

B(VII) WHETHER THE FOI ACT SHOULD BE AMENDED TO MINIMISE THE RESOURCE IMPLICATIONS FOR AGENCIES SUBJECT TO THE ACT IN ORDER TO PROTECT THE PUBLIC INTEREST IN PROPER AND EFFICIENT GOVERNMENT ADMINISTRATION:

The proposals contained in the discussion paper which encourage agencies to actively consult with applicants to narrow onerous and unnecessarily complex applications are meritorious.

The provision in relation to voluminous applications should be modified to reflect its Commonwealth equivalent.

An agency should consult with the Information Commission before refusing to process voluminous applications.

Section 28(3) should be repealed since it has a potential to be inappropriately invoked by agencies.

The Act should contain a general provision enabling an agency to refuse to deal with frivolous and vexatious applications.

There should also be a power to refuse to deal with repeat or serial applications. The form suggested by the Information Commissioner is appropriate.

B(VII) (CONTINUED) WHETHER THE FOI ACT SHOULD BE AMENDED TO MINIMISE THE RESOURCE IMPLICATIONS FOR AGENCIES SUBJECT TO THE ACT IN ORDER TO PROTECT THE PUBLIC INTEREST IN PROPER AND EFFICIENT GOVERNMENT ADMINISTRATION:

If the requirements of s108 are unduly onerous and require more information than is appropriate, necessary or useful, there nevertheless should be provision for the monitoring of agencies' compliance with the Act.

B(VII) (CONTINUED) WHETHER THE FOI ACT SHOULD BE AMENDED TO MINIMISE THE RESOURCE IMPLICATIONS FOR AGENCIES SUBJECT TO THE ACT IN ORDER TO PROTECT THE PUBLIC INTEREST IN PROPER AND EFFICIENT GOVERNMENT ADMINISTRATION:

The time limits provided by the Act are generally appropriate. However, a case exists for extending the period provided for consultation with third parties under s51.

B(VIII) WHETHER AMENDMENTS SHOULD BE MADE TO EITHER S42(1) OR S44(1) OF THE FOI ACT TO EXEMPT FROM DISCLOSURE INFORMATION CONCERNING THE IDENTITY OR OTHER PERSONAL DETAILS OF A PERSON (OTHER THAN THE APPLICANT) UNLESS ITS DISCLOSURE WOULD BE IN THE PUBLIC INTEREST HAVING REGARD TO THE USE(S) LIKELY TO BE MADE OF THE INFORMATION

There is an obvious need to afford public servants and other individuals some

form of protection against unwarranted disclosure of personal details.

The current provisions are generally adequate. However, the Information Commissioner should 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.

B(IX) WHETHER AMENDMENTS SHOULD BE MADE TO THE FOI ACT TO ALLOW DISCLOSURE OF MATERIAL ON CONDITIONS IN THE PUBLIC INTEREST (EG, TO A LEGAL REPRESENTATIVE WHO IS PROHIBITED FROM DISCLOSING IT TO THE APPLICANT)

Although a provision which permitted material to be disclosed on conditions has certain attractions, such a provision would have the potential for over-use.

Moreover, enforcement of such conditions is problematic.