Education Queensland

Submission No 163
Spec 1:4.

Ms Kerryn Newton
Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
BRISBANE Q 4000

Dear Ms Newton

I refer to an invitation from the Legal, Constitutional and Administrative Review Committee for a second round of public input into its review of the *Freedom of Information Act 1992*.

Please find attached Education Queensland's submission in response to the Committee's Discussion Paper No. 1, concerning freedom of information in Queensland.

I would like to thank the Committee for its patience in allowing a late submission from my Department.

I have also received, from the Chair of the Legal, Constitutional and Administrative Review Committee, an invitation to give evidence at the Committee's hearings next week. Education Queensland is pleased to accept this offer and, at that time, my representatives will address some of the issues discussed in the department's response.

Yours sincerely

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QUEENSLAND GOVERNMENT

PREAMBLE

The existing legislation ensures the protection of some, but not all of the fundamental tenets of the Westminster system of government. Cabinet material and material prepared for the Minister's use in Parliament are exempted from release. However, there are no exemptions for documents prepared by the Chief Executive officer for the Minister, despite the close relationship between those documents and those prepared for Cabinet and Parliament. Particularly in terms of policy advice, as opposed to advice on administrative decisions, ready access to documents might impact on the willingness and capacity of Chief Executive Officers to give frank advice to their Minister or at least to formalise that advice. The Minister, as a member of the Executive, is accountable to the Parliament and the Minister's decisions are accounted for in Parliament. The nature of advice from the Chief Executive Officer and whether the Minister accepts or rejects the advice of the Chief Executive Officer in making a decision is irrelevant in the context of his/her accountability to the Parliament.

FOI is frequently used by the media and political parties to obtain information, which is in turn made available in some form to the general public. There are no requirements placed on applicants regarding the subsequent publication of that information. There can be selective publication of material and/or publication of material out of context. It is not always possible readily to correct such misinformation. It cannot be assumed that all members of the general public will be able to discern the accuracy and validity of such information. Thus the application of the current FOI legislation, which by any standards would be considered to be an open regime, can, on occasions, cause legitimate concern within Government agencies. This might, in part, be addressed by extending the Cabinet and Parliamentary exemptions to communications between the Chief Executive Officer and the Minister.

Education Queensland has a commitment to the ongoing and effective operation of the Freedom of Information Act in this State. However, there is a range of factors which impinge on the department's ability to make information available, that readily manifest themselves.

By its nature, the organisation is very large. The department is the largest employer in the state , with 42,000 employees and 1500 work sites. There is an increasing emphasis on decentralised decision-making, particularly concerning operational issues. Data collection is being continually enhanced, however, the need for efficiencies dictates that only information needed is necessarily collected, and only stored where it will be used. The department's central office is increasingly becoming a strategic centre, with operations now focussed squarely in District Offices and schools. There are also significant privacy considerations with data, particularly where it involves students.

In a large, decentralised organisation, effective records management systems are essential. The records management system in Education Queensland has been identified as needing enhancement, with a review process having recently been completed. As the outcomes of that process are implemented, it is likely that information will become more readily identifiable and accessible.

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

Discussion Point 8

A major part of the charter of freedom of information legislation is facilitating access to a range of documents held by the agency. Education Queensland supports an open approach regarding information which can be properly disclosed in preference to compelling people to use the more formal and time-consuming freedom of information process..

The department is in the process of employing a range of strategies to promote alternative access to documents when requested and where appropriate. The alternatives include the use of Section 16 of the *Public Service Regulation 1997* which provides current staff with the right to access personal records.

In a similar way, other departmental policies encourage alternative access. For example, guidelines to facilitate parental and student access to student records at the school, with the exception of guidance-type files, is set out clearly in the Department of Education policy and guidelines.

Further, the department is currently reviewing its records management practices. One of the outcomes of this review should be that documents, paper-based as well as electronic, are easily retrieved and accessed. This will assist the department in facilitating administrative access in a cost effective manner. The department submits that there is no need for a statutory requirement to routinely make information available. It is good management practice.

Consistent with the department's policy of encouraging informal, administrative access, statutory mechanisms are regarded as the more "heavy-handed" option. Administrative access is best facilitated by administrative means.

Discussion Point 11

Any requirement to have mandatory clauses in Performance Agreements of senior staff will not be effective. Openness is a cultural thing and any attempt to mandate through PAs or some other documentation will simply see the matter ignored if the culture is wrong.

Discussion Point 12

It would be more useful to change the title of the Act as proposed than to have the objects of the Act changed specifically to include concepts of openness, as espoused in discussion points 2 to 6.

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

Discussion Point 14

There is no case for removing any of the current exemptions.

Discussion Point 16

The public interest tests already included in the exemption provisions are adequate to allow decision-makers to consider the impact of harm, if any, which might flow from release of information. Harm of the kind which should attract an exemption from release of information would also be a significant public interest factor against release of information. If the harm is great enough to justify exemption it would also be indicated as a significant public interest against release.

Discussion Point 18

There should not be a general harm test imposed on all exemptions. This would not be appropriate for exemptions based on classes of documents which currently carry no public interest test. The reasons for not attaching public interest tests to sections 36, 37, 43, 45(1)(a) and 46(1)(a) are based on the accepted principles of our Parliamentary system of government or on significant legal precedents and still justify the exemption of documents which come within the classes described in the exemption provisions. For the same reasons these exemptions should not be subject to a harm test.

Discussion Point 19

Education Queensland's responses to the discussion points 16 and 18 apply equally to this point.

Discussion Point 20

Decisions made by the Queensland Information Commissioner and other relevant jurisdictions have provided comprehensive guidance on the application of public interest tests. Officers experienced in making decisions on access pursuant to the FOIQ are generally conversant with these decisions and have a good understanding of the application of public interest tests. It could be helpful for the FOIQ to include some relevant and irrelevant factors to provide an indication to people, both applicants for information and officers in agencies who are not FOIQ decision-makers, of how public interest tests are applied.

However, the inclusion of any specific public interests factors in the FOIQ should make it clear that the included factors are not exhaustive and that any public interest factors which might apply in all the circumstances of a given case are to be considered.

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

Discussion Point 24

The FOI Act should apply to all organisations receiving government funding, whether or not they are providing a service that is comparable to that provided by a government agency. There would need to be a way of quarantining the application of FOI to those areas of the non government organisation that utilise public funding.

However, it is the capacity to get information on decision making about public funds that is crucial, and as governments increasingly contract out service delivery the public is entitled to access information on how those funds are used. Given that the shareholders/owners of those companies benefit financially from public funding, there is no argument against this, provided there is effective quarantining of non public funded activity.

Where there is direct competition with government service deliverers, extending FOI to non-government groups in receipt of public funds is essential for competitive neutrality, and accountability in the disbursement of funds and scrutiny of decisions affecting the public.

Discussion Point 29

It would not be viable to extend the freedom of information legislation generally to the private sector. However, there may be merit in extending the accountability mechanisms whereby tax-payer funding is provided to private sector organisations so as to provide a public policy function, especially where the State is in direct competition with such State- (and Commonwealth-) funded private organisations. Where there are public accountability restraints placed on the State in providing a service, and there is a competitive environment, it would be reasonable that similar restraints are imposed on the tax-payer funded private service providers.

Discussion Point 30

It is logical that organisations performing contracts with Government, where Government is outsourcing the provision of Government service to the public, to be subject to accountability through freedom of information legislation. This could be achieved in two ways; either through mandatory contractual terms in Government outsourcing contracts which ensure that documents created by the contractor in performing the taxpayer-funded government function are the property of the contracting agency, and hence covered by the legislation; or through legislative provision that such documents are the property of the agency and hence caught.

Discussion Point 31

In the context of protecting the legitimate business interests of private providers, a distinction needs to be drawn between private organisations providing an outsourced service which is the responsibility of government; and organisations in the private sector providing services in the marketplace with no connection to government. In respect of outsourced services, the interpretation and application of sections 45 and 46 should allow public scrutiny of outsourced Government services which shifts the implementation of public policy from government to private providers, but for which Government retains accountability.

Discussion Point 32

The application of section 45 and 46 is quite limited. In respect of section 45 there is a lack of accessible case law about the application to relevant fact situations. One difficulty seems to be the timing in respect of such decisions. Once a matter reaches the decision-making stage at external review, significant periods of time have elapsed and the lack of immediacy often reduces the value and sensitivity of the information which obviates the need for a formal decision or affects the decision itself. It would be appropriate for decision-makers to have timely access to authoritative advice in respect of the application of these sections.

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

Discussion Points 33-36

Education Queensland is currently undertaking a review of its records and Document Management Unit systems. Such a review endorses the agency's position that government is increasingly moving towards what will be known as "the paperless office".

In this respect, the department submits that the definition of "document" under the FOIA and the *Acts Interpretation Act 1954* should in fact be reflective of changing technologies.

The agency actively supports the provision of information administratively where possible, outside of the ambit of FOI legislation. This would provide more efficient access to information by applicants as well as relieve the sometimes-onerous burden on decision-makers complying with applications of a voluminous nature that could have been dealt with outside the parameters of the Act itself.

Discussion Point 37

The unreported decision in Re Price and Nominal Defendant, IC(Q) Decision No. 99003, 30 June 1999 extends the range of documents "under the control of an agency" to documents held by an agency's legal advisers to which the agency has access. This requires an agency to undertake searches of files, not necessarily in its possession, for documents which will, overwhelmingly, be duplicates of documents already identified.

The extension of searches to documents which may be in the physical possession of another person or agency but which may be retrieved by the agency subject to the application raises questions of sufficiency of search within that agency. For example, there is regular attachment of documents to letters sent between agencies which will be placed on another agency's file. However, it is arguable that the "sending" agency could retrieve the documents, on request, and will quite often seek a copy of a document sent elsewhere if the original is mislaid within the agency. The Price decision places an onus on an agency to extend a search to wherever its control may reasonably reach.

While it is conceded that every effort should be made to retrieve documents relevant to an application, it may be impractical to extend search obligations to documents which are not within the agency's immediate control.

However, if the wider search obligation is maintained, there should be no obligation on the agency processing the application to guarantee that the documents potentially available are duplicates of those retrieved. This is a risk borne by the applicant who bears the cost of a wider search on the basis that charges will be imposed for the number of documents considered. However the applicant should be given sufficient information to allow an informed choice as to whether such a search is desired and whether they want to incur the relevant costs.

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

Discussion Point 38

There is no evidence to suggest internal review is not working effectively in this organisation. The current internal review arrangements provide that if an internal review is not completed within 14 days the initial decision is taken to be affirmed and the applicant, if still unsatisfied, can then proceed to external review. The internal review process does not constitute so great a delay to the rights of applicants to seek an external review by the Information Commissioner as to justify any discrimination between applications. In Education Queensland's experience most internal review applicants do not proceed to external review indicating that the internal review process is useful in resolving applications and relieving the Information Commissioner's office of a greater number of external review applications than it currently receives.

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

Discussion Point 39

This is theoretically a better model than a judicial one. However, there is no evidence that the Information Commissioner is 'speedy'. The department submits that there is no need for the Information Commissioner's power to be extended. Education Queensland does not see evidence of any problem to warrant such an extension.

Discussion Point 42

There should be a statutory provision requiring the Information Commissioner to publish all decisions in either full or summary form. The summary should be in plain English. This is an effective means of achieving greater consistency in decision-making. It also affords fairness to an applicant uncertain of precedents in support of access who may take up the opportunity to review the agency's decision if apprised of a favourable precedent. The quality of decision-making is enhanced in a regime where the applicant can easily access relevant rulings.

FOI administrators are a shifting resource and it is not uncommon for an agency to lose its experienced FOI decision-makers. Expertise in FOI is not easy to acquire and the absence or loss of an agency's key decision-makers presents the possibility of poor decision-making, confusion and destabilisation in areas of the agency charged with processing searches and providing information to aid in decision-making.

An independent control body with responsibility for assisting agencies with FOI is urgently required. If such a permanent funded resource is maintained it could be staffed, in part, by agency secondees selected for their outstanding knowledge and ability in FOI decision-making. Service on an "FOI advisory panel" could be seen as recognition of expertise and the short-term nature of a secondment to the panel would ensure that agencies benefit from dissemination of ideas and legal views while retaining their capable decision-makers.

Discussion Point 45

Education Queensland does not believe that evidence has been presented of the need to confer on the IC(Q) the power to enter premises and inspect documents or to punish officers of agencies for contempt.

Discussion Point 46

The Information Commissioner should not have the power to order disclosure of otherwise exempt matter. The structure of the FOIQ reflects the consideration and determination of the extent and circumstances governing the release of information held by government agencies. The FOIQ makes provision for the release of documents where public interest tests apply and on that basis the Commissioner can decide whether the public interest supports release. Exemptions for classes of documents which do not have regard to the public interest have been included in the FOIQ to ensure documents meeting the description of the class will not be released. Allowing the IC(Q) to override those provisions would be contrary to legislative intention.

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

Discussion Point 48

Applications for documents containing information which is the personal affairs of the applicant should continue to be free of an application fee.

Discussion Point 50

Education Queensland supports the introduction of a charge for access to documents. However, the form of the charge should be calculated on a per-document-considered basis rather than on the cost of processing time and should replace the current application fee. Applications for personal affairs documents of the applicant should continue to be free of charge. Education Queensland does not support the introduction of a charge for supervising applicants inspecting documents. Agencies must have discretion to waive charges.

Discussion Point 51

The Information Commissioner's decision, Price and the Surveyors Board of Queensland (decision number 97017, 24 October 1997,) determined that the photocopying fee should not apply to documents which contain any personal affairs matter of the applicant. The application of this decision means that documents which were created for, or are about, the applicant's employment affairs must be photocopied without charge if they happen to contain incidentally personal affairs matter, such as the employee's personal address or date of birth. Photocopying charges should apply unless the purpose of the document relates to the personal affairs of the applicant.

Discussion Point 52

As stated earlier, if fees are to increase or to be applied to personal affairs applications, agencies and ministers must have the discretion either to waive or reduce the fees.

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, AND IN PARTICULAR:

- whether s28 provides an appropriate balance between the interests of applicants and agencies;

...

Discussion Point 55

(a) Section 28(2), in its interpretation is disadvantageous to large agencies because it has no regard to the current financial management practices of government agencies where the FOI section will not necessarily be well-resourced. An agency with a generous budget will have difficulty establishing that the application "substantially and unreasonably" divert the agency from performing its functions "having regard only to the number and volume of the documents" and to "any difficulty in identifying, locating or collating" them. Use of the word "only" ignores the sensitivities inherent in some documents which will frequently demand extensive consultation and consideration of public interest tests. Removal of the word "only" would widen the range of factors to which regard can be had in making this decision.

(b) Education Queensland has had occasional instances of applications proceeding to external review following unsuccessful consultation with an applicant on the scope of an application and subsequent refusal to process an application. In this agency's experience external review mechanisms have been helpful in assisting the applicant to identify the documents sought and to narrow the scope of the application. However, in most cases Education Queensland decision makers have been successful in negotiating with applicants. Consultation with the Information Commissioner prior to refusing an application will assist the process of narrowing the scope, but will slow down the decision-making process and make it more bureaucratic right from the initial stages of an application. In the experience of this agency a requirement to consult with the IC(Q) in all cases where invoking section 28(2) is contemplated is unnecessary.

(c) Subsection 28(4) provides for the reasonable opportunity of consultation with the applicant. There is no need for this section to be amended to clarify the importance of agencies consulting with applicants about their applications.

Discussion Point 56

Subsection 28(3) should be retained.

Discussion Point 57

While from time to time it would be tempting to have power to refuse to deal with an applicant who has lodged a "frivolous and vexatious" application, that judgement would be a very difficult one to apply. It would necessarily involve some subjective analysis of the applicant's motive in lodging the application, as well as a detailed investigation into the context of the application. If such a section was to be enacted, consideration should be given to having the Information Commissioner, as an independent arbiter, make the decision on submission from the agency . This avoids real or perceived bias in ascertaining whether a particular application is frivolous or vexatious.

Discussion Point 58

The inclusion of a provision to refuse an application by a "serial" applicant as proposed by the Information Commissioner is a sensible approach to a "vexatious applications" section. It is, however, observed that a decision in those circumstances will not be a time-consuming decision – merely a repeat of a previous decision or a letter enclosing an Information Commissioner's decision. "Serial" applications are less problematic than voluminous "trawling" applications.

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, AND IN PARTICULAR:

...

- whether time limits are appropriate

Discussion Points 62-68

The department supports the view that many applicants such as journalists or political figures do seek information which is essentially time-critical. However, compliance with FOI deadlines is determined by the nature of the application and the number of applications current at any given time and, on that basis, the department believes a 45 day limit to process initial applications should be maintained.

Education Queensland also agrees that whenever possible and where practical, provision should be made for agencies and applicants to agree to extend response times in lieu of incurring an automatic deemed refusal. It would be practical to make partial decisions within the prescribed time limits on as many documents as possible in some cases. The department concurs that such a discretionary provision would appease many applicants who would otherwise be frustrated with the sometimes time-consuming FOI processing system.

C ANY RELATED MATTER

C(I) THE NEED FOR INDEPENDENT COORDINATION AND MONITORING OF QUEENSLAND'S FOI REGIME

Discussion Point 74

Since the FOI section of the Human Rights and Administrative Law Branch in the Department of Justice and Attorney-General was disbanded, it has been difficult to receive timely advice in respect of the administration of the legislation. Training of officers in the processes has been difficult to coordinate. There is a need for a body to provide advice and ensure a high level of agency and community awareness. That function should rest within the portfolio of the Attorney-General. There is a conflict in the Information Commissioner performing such a function, and establishing another independent body advising in respect of the FOI legislation would be an efficient use of public funds.