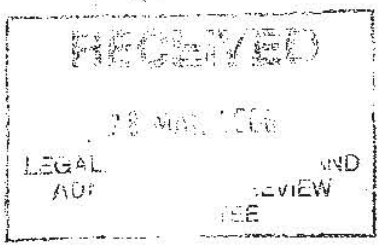

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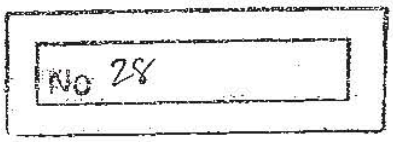

Ms Julie Copley
Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Copley

Re: **Inquiry into the Accessibility of Administrative Justice in Queensland**

Following is my submission in relation to Key issue 1, as identified in the Discussion Paper issued by the committee in December 2005:

> **What is the effect, if any, of the fees and charges regime under the FOI Act on access to information and the amendment of documents. Is amendment of the FOI Act and/or administrative reform necessary.**

I have been involved in the interpretation and application of Queensland's FOI Act, as an FOI practitioner, since the commencement of the legislation in late 1992. However, I am making this submission in a private capacity, and it reflects my personal views regarding aspects of the fees and charges regime under the FOI Act.

Information about the current FOI fees and charges regime

The Discussion Paper indicates that information for both applicants and practitioners about FOI fees and charges is available on the Information Commissioner's website, as well as from the specialised FOI unit within the Department of Justice and Attorney-General (the 'lead agency', responsible for administering Queensland's FOI legislation).

In my view, the information that is currently available is quite limited in scope and does not address a number of the matters of interpretation that remain unclear (as discussed below):

Office of the Information Commissioner

- The provisions in the FOI Act and FOI Regulation dealing with fees and charges are not included in the "Section Index" on the Information Commissioner's website.
- Detailed "Practitioner guidelines" developed by the Information Commissioner to explain aspects of the fees and charges regime are currently unavailable (having been removed from the Information Commissioner's website in October 2005, for review in light of the 2005 amendments to the fees and charges regime).
- No information is available on fees and charges issues raised on external review applications, where those issues are resolved through conciliation rather than by way of formal or letter decision.

- Even for the external review matters that do proceed to a formal decision, very few of the resulting decisions in relation to issues concerning fees and charges are published on the Information Commissioner's website. (The *Re JSD and Medical Board of Queensland* decision cited in the Discussion Paper is one of a very small number of decisions dealing with fees and charges that have been published by the Information Commissioner. For unpublished "letter decisions", the only information that is available on the analysis undertaken by the Information Commissioner is in the short summaries that appear on the Information Commissioner's website, and that website appears to no longer provide information on that office's policy regarding the procedure, and costs involved, for obtaining copies of such unpublished "letter decisions".)

Department of Justice and Attorney-General

- The FOI Policy and Procedures Manual (originally published in 1992, revised edition published in 1996-1997) pre-dates the introduction of the new fees and charges regime in 2001, and thus does not address many of the issues concerning that regime.
- The only information concerning fees and charges on the recently launched 'whole-of-government' FOI website [**http://www.foi.qld.gov.au/**] is very brief information intended for FOI applicants, appearing under the heading "Making an FOI application". Although guidelines addressing some aspects of the current fees and charges regime have received some distribution to FOI practitioners who are members of an informal FOI practitioners network, that material has not yet been made available to the broader FOI community.

It would greatly assist both FOI practitioners and members of the community wishing to make applications under the FOI Act if there were more readily available information on the current fees and charges regime that fully explains the proper interpretation and application of the various issues arising in relation to these issues. The availability of such information would assist in ensuring consistency of application of the prescribed fees and charges, and reduce the number of matters proceeding to internal or external review.

Effect of FOI fees and charges on the amendment of documents.

The FOI Act provides that there are no fees or charges payable for a personal FOI access application under Part 3 of the FOI Act, or for an application to amend 'personal affairs' documents under Part 4 of the FOI Act. This is consistent with statements that have repeatedly been made since the introduction of Queensland's FOI Act in 1992 that individuals should be able to gain access to information held by government concerning their own personal affairs, and ensure the accuracy of such information, free of charge. On that basis, it would appear at first blush that the FOI fees and charges regime would have no effect on the amendment of documents.

However, one of the statutory prerequisites to an application for amendment of documents under Part 4 of the FOI Act is that the applicant has previously had access to the document, whether or not such access was under the FOI Act.

As long as the applicant is able to obtain access to the document under FOI, or under an alternative administrative access regime which does not involve any cost to the applicant, then there should be no costs involved in such access (or any subsequent amendment application). But if the document in question is subject to an alternative access regime established by an agency, where that access is subject to a fee or charge (as provided for in section 22(a) of the FOI Act), then the agency may refuse access under FOI and require the person to seek access to the document in question under the alternative scheme, and pay the costs associated with access under that scheme.

I am aware of several agencies that have established such alternative access schemes with associated fees or charges, which extend to documents that arguably would be characterised as 'personal affairs' documents under FOI. One example of such a scheme is the Queensland Ambulance Service's scheme for accessing ambulance reports. The 2004-2005 Annual Report for the Department of Emergency Services states (at pages 71-72):

Access to departmental documents (other than ambulance reports and audit trails from ambulance communication centres), and amendment of departmental documents concerning the personal affairs of members of the community, are provided through the Freedom of Information Act 1992.

...

Access to ambulance reports and audit trails from ambulance communication centres is available through an administrative access scheme administered and managed by the Queensland Ambulance Service. The cost is currently set at $33.80 per application

[I understand that the fee has subsequently been increased to $34.65]

Requiring individuals to obtain access to such documents under such alternative arrangements, with associated costs, significantly undermines one of the fundamental principles underlying the FOI regime; namely, that access to 'personal affairs' information should be free of charge.

The mandatory application fee for non-personal FOI applications

In the 2002 report on FOI in Queensland, the committee has previously reviewed issued concerning the prescribed application fee for non-personal FOI access applications, and recommended that consideration be given to amending the FOI Act so that the fee should not be payable for applications relating to a deceased close relative of the applicant, or where information about a close relative who is still alive is significant to an applicant. This recommendation was not accepted by the government, and the 2005 amendments to the FOI Act include a new provision (section 35C(1)) which explicitly states that an application fee may not be waived.

However, it appears that some agencies are ignoring that statutory requirement and waiving the mandatory non-personal application fee in certain circumstances (eg. in the type of circumstances raised by the committee in its 2002 report). This can be readily demonstrated by analysing the figures reported in the FOI Annual Reports prepared by the Department of Justice and Attorney-General under section 108 of the FOI Act. (see Appendix 1.6 to the Annual Report which identifies the number of non-personal FOI applications made to each agency/portfolio, and Appendix 1.11 which includes the amount of fees collected by each agency/portfolio). As the application fee is the only "fee" collected under the legislation, the figure reported in Appendix 1.11 should be a multiple of the number reported in Appendix 1.6. However, even where the calculation is done using the highest application fee amount prescribed in a given reporting period, it is apparent that there is significant under-collection of the application fee for non-personal applications.

It is essential that the fees and charges regime be consistently applied, as the current lack of uniformity among agencies is confusing for applicants and makes it difficult for agencies who are complying with the strict terms of the legislation to justify their position, both to applicants (who often state that they have not been required to pay the prescribed fee for similar types of non-personal applications made to other agencies), and in unwarranted review applications brought by applicants because of such discrepancies in approach.

The processing and access charges regime

It is difficult to really ascertain how well the current regime is functioning, as the reporting requirements under section 108 of the FOI Act do not include any reporting on certain aspects (eg. applications for waiver of charges on grounds of financial hardship). In addition, what is reported is just raw figures, without any real quality control mechanisms in place to ensure that agencies are consistently interpreting and applying the statutory provisions under which the relevant charges are calculated.

- **The two-hour threshold**

Since the introduction of time-based processing charges in 2001, the FOI Act has contained a provision whereby such charges are not imposed if the time spent processing the application is less than a prescribed limit. However, there are several factors which lead to a lack of uniformity in the application of that provision.

The 2001 amendments specified that the time-based charges were not payable where the total amount of time taken was "2 hours or less". (see section 8, FOI Regulation). However, the 2005 amendments substituted a new version of section 8, which lacks internal consistency. The heading of the section says "less than 2 hours"; the body of the section says "2 hours or less", leaving it unclear what happens when processing time is exactly 2 hours.

In addition, the application of this provision depends on an individual FOI decision-maker's interpretation of exactly which aspects of processing an application comprise chargeable time, and experience suggests that there is wide variation in how individuals officers are interpreting the relevant provisions.

Search/retrieval: The amount of time actually spent in searching for or retrieving a document should be readily ascertainable, but an element of subjectivity is introduced by the provision for adjustment of that amount where a document is not found in the place where it ought to be filed (see section 9, FOI Regulation).

Decision-making: Further subjectivity is introduced as a result of the vague language in Item 1, Part 1 of the Schedule to the FOI Regulation, which provides that the time-based charges are payable for time spent in "making, or doing things related to making a decision on an application for access". I am not aware of any detailed guidance that assists in understanding the intended scope of that provision.

Is the phrase "making a decision" intended to relate only to time that is directly referable to the ultimate access decision, or does it also include time spent making any of the other decisions that are made in the course of processing an FOI application (eg. a decision re: substantial diversion of resources per section 29; a decision that an application fee is payable but remains unpaid per section 25A(3))? From discussions with other FOI decision-makers, it is apparent that there is wide variance in their understanding of the specific tasks which are considered to be chargeable, or non-chargeable, to the access applicant.

There is a further issue concerning the two-hour threshold, in that its applicability results in the non-imposition of only the time-based processing charges, with any applicable access charges (for the cost of photocopies or other forms of access) still being payable. This can result in situations where the time-based charges are not imposed, pursuant to the two hour threshold, but the agency is still required to collect the access charges (which may be minimal, where only a few pages of material are being released, or the release is in an electronic form with minimal associated cost). I am aware that in such circumstances, some agencies adopt a common-sense approach of not requiring payment of such access charges as the administrative cost of collecting and processing such payment vastly exceeds the amount due. However, at present, there is no provision in the FOI Act which technically permits that approach.

It would be helpful if consideration could be given to introducing a specific provision in the legislation, or promulgation of interpretive guidelines that agencies are required to follow, which addresses this situation.

Legislative approach: eg. section 47(6) of Ireland's *Freedom of Information Act 1997*

> *(6) A fee shall not be charged under subsection (1) if, in the opinion of the head concerned, the cost of collecting and accounting for the fee together with any other administrative costs incurred by the public body concerned in relation to the fee would exceed the amount of the fee.*

Guidelines approach: eg. see Ministry of Justice Charging Guidelines for Official Information Act 1982 Requests (March 2002):

> *2. FIXING THE AMOUNT OF CHARGE*
>
> *2.1 The amount of charge should be determined by:*
> ...
> *(c) the number of A4 sized or foolscap photocopy or printed pages to be provided exceeding 20.*
> ...

2.4 Where the free threshold is only exceeded by a small margin it is a matter of discretion whether any fee should be paid ...,

...

4. PHOTOCOPYING

4.1 Photocopying or printing on standard A4 or foolscap paper where the total number of pages is in excess of 20 pages should be charged out as follows:

- 20c for each page after the first 20 pages.

- Waiver of charges

When the processing charges regime was introduced into the FOI Act in 2001, the explanatory notes and Hansard debate indicated that the purposes of introducing such charges were to ensure that persons who were seeking access to information concerning their personal affairs could still do so without charge, and that those who were financially capable of making a contribution to the cost of processing non-personal FOI applications should be required to do (with special provision being made to protect those individuals who were in genuine hardship).

At the time of its introduction in 2001, the fees and charges regime in Queensland's FOI Act was described in Parliament as being "the most generous in Australia". However, a review of the comparative table set out in Appendix A of the Discussion Paper would appear to indicate that, as least as far the availability of waiver of charges is concerned, that is not the case.

Circumstances in which waiver is available

The FOI Acts in other Australian jurisdictions variously provide for waiver of charges in a broader range of circumstances than that recognised under Queensland's FOI Act:

- financial hardship established by other means (i.e., a person who does not hold a concession card of a specific type, but can establish they have an equivalent level of financial need to the level established for entitlement to a pension or benefit under such cards)
- a general discretion for FOI decision-makers to waive or reduce FOI charges
- waiver on grounds that disclosure would be in the public interest.

Queensland's FOI Act provides only two circumstances in which processing and access charges will be waived on grounds of financial hardship:

- where an individual provides evidence that they are the "holder" of a concession card of the prescribed type (issued by Centrelink or the Department of Veterans' Affairs)
- where a non-profit organisation provides evidence establishing the non-profit status of the organisation, and its financial hardship.

In relation to individuals, it appears that the underlying rationale for prescribing the specific types of concession cards is that each of them is means-tested, and thus establishes the financial need of the holder. However, there is at least one sub-category of Centrelink concession card (the 'blind pension') which is not means-tested, and therefore bears no relationship to the holder's financial means. In addition, the sole prescribed criterion is unduly restrictive, as there are other identifiable categories of individuals who, although able to establish their impecuniosity by any generally accepted standard, would not be entitled to a waiver of charges because of their ineligibility to hold a concession card of the prescribed types (eg. minors, persons who reside outside Australia, prisoners).

In December 2005, the FOI Act was amended by introducing a new definition of "holder" (of a concession card):

holder, of a concession card, at a time the concession card is being relied on for a purpose under this Act, means an individual who is named on the concession card and would be qualified to be named on the concession card if the concession card were issued at the time the concession card is being relied on.

This has had the effect of broadening the scope of the entitlement, so that it now covers not only the individual to whom the concession card is issued but also any other person who is named on the card (i.e., dependants of the cardholder), provided that such other person would be qualified to be named on the card if the card were issued at the time it is being relied upon as evidence of financial hardship.

The revised definition of "holder" would arguably come into play where an individual seeking waiver of charges on grounds of financial hardship lodges as evidence of their financial hardship a concession card on which they are listed as a dependant, but the respondent agency is aware that the individual's present circumstances (eg. imprisonment or detention in a psychiatric facility) may render them ineligible to be considered a dependant of the card-holder.

I query whether FOI decision-makers in Queensland agencies are in a position to determine whether an individual would be "qualified to be named" on a concession card issued by Centrelink or the Department of Veterans' Affairs, under the very complex legislation governing the issuance of such cards. As an example of this complexity, the "Guide to Social Security Law" available on the website of the Commonwealth Department of Family and Community Services contains a flowchart (copy attached) which demonstrates the complexities of determining whether an individual who is "in gaol or psychiatric institution because of criminal charges" is entitled to a social security pension or benefit.

Special mechanism applying to departments

A provision in the FOI Act that has received very little attention is the special mechanism that governs the determination of applications for charge waiver that are made to departments.

When the processing charges regime was introduced in 2001, the FOI Act provided that all charge waiver applications made to departments, whether lodged by individuals or non-profit organisations, had to be referred to the Department of the Premier and Cabinet for determination by the "prescribed person" within that department. By an amendment that came into force in late 2005, that mechanism has been altered so that it now only applies to charge waiver contentions lodged with departments by non-profit organisations. (see section 10, schedule 4 of the FOI Act.)

I have never been able to find any explanation of the rationale for the introduction of this special mechanism applying only to departments, while all other agencies subject to the FOI Act (local governments, public authorities) have always been able to make their own decisions on all charge waiver contentions. The process imposes an additional administrative burden on departmental FOI staff in terms of having to prepare and forward all relevant documentation to the Department of the Premier and Cabinet, and then subsequently convey the prescribed person's decision to the applicant, along with the details of their applicable review rights. I note that because the decision of the prescribed person is, for the purposes of review, taken to be the decision of the principal officer of the department concerned, this creates separate review paths for waiver applications dealt with by departments (which proceed directly to external review) and those dealt with by non-departments (which go through internal review, unless the decision was made by the agency's principal officer).

Very little information is available publicly on the operation of this specialised regime. The decisions of the prescribed person are made available only to the respondent department, thus providing no general guidance for agencies or the public on the interpretation of the relevant provisions.

Provision permitting an applicant to seek charge waiver before notification of liability for charges

When the FOI processing charges regime was introduced in 2001, there was no provision which permitted an access applicant to contend for waiver of charges (on grounds of financial hardship) prior to the receipt of a notice from the agency concerned confirming that charges were payable, and setting out the applicant's options in terms of a response to that notice.

The 2005 amendments to the FOI Act introduced a new provision which permits an individual to contend for waiver of charges on grounds of financial hardship before they have been given a preliminary assessment notice.

The stated rationale for this new provision is that if the concession card is acceptable, and the applicant is therefore entitled to a waiver of all processing and access charges, it relieves the agency of the administrative burden involved in preparation of a preliminary assessment of charges notice in a situation where there will ultimately be no charges payable.

While that may well be a valid consideration, the new mechanism imposes a different administrative burden (i.e., preparing a decision on the waiver contention, and dealing with any review arising out of that decision), when there may well be no charges payable because the application can be processed in less than 2 hours). Consideration should be given to the possible introduction of a provision to address this scenario.

Potential for abuse of charge waiver provisions

The FOI Act provides that where a non-personal FOI application will attract processing charges, the applicant is to be provided with a preliminary assessment of those charges (unless they have contended for waiver of charges at the outset). In response to a preliminary assessment notice, the applicant can elect to pay the charges and proceed with the application, can negotiate with the agency in order to reduce the charges, or can withdraw the application.

An applicant may lodge a non-personal application which is extremely broad in scope, covering many thousands of documents, which would attract a considerable level of processing and/or access charges. Under the present regime, there is nothing to stop to an applicant who receives a substantial preliminary assessment notice from simply withdrawing the application, and finding a concession card holder who will re-lodge the application in their own name (in which case, all charges must be waived, thus negating any incentive for the applicant to renegotiate, or better define, the scope of the application).

I am aware of one overseas jurisdiction in which the prospect of such abuse of the charging regime has been specifically recognised, and addressed. The *Freedom of Information Act 1997 (Fees) Regulations 2003*, made under Ireland's *Freedom of Information Act 1997*, make provision for waiver of charges for a "medical card holder" and a "dependant of a medical card holder", but the definitions of those categories (in section 1(5) of the Regulations) provide that the person seeking such a waiver must be a person who, in the opinion of the head of the respondent agency, is not applying "*on behalf of some other person who, in the opinion of the head, is seeking to avoid the payment of a fee ...*".

Comparison with other jurisdictions (Appendix A to Discussion Paper)

While the information in the comparative table re: FOI fees and charges in other Australian jurisdictions is interesting, it is difficult to draw firm conclusions based on such comparison because of some significant differences in the specific language of the legislative provisions, or guidance that has been issued regarding the proper interpretation / application of the relevant provisions.

An example of this is the time-based charge for processing (or "dealing with") an application. In South Australia, advice provided by the State's FOI 'lead agency' at a 2005 forum of FOI practitioners indicated that agencies could charge for time spent numbering documents and preparing document schedules, but could not charge for internal consultations within an agency, or for obtaining legal advice or drafting the access decision. In Western Australia, the time-based processing charge (for "dealing with an application") does not include time spent searching for documents.

Re: the fees and charges amounts listed in the table:

- Since the table was prepared, Queensland's application fee and time-based processing charge have increased (effective 19 December 2005) to $35.25 and 5.20, respectively.

- Although the table lists the NSW application fee as $30, the *Freedom of Information (Fees and Charges Order) 1989* actually prescribes a range of amounts (the fee for an access application is to be "not less than $20 and not more than $30"). While most agencies appear to have opted for the higher amount, at least some (eg. the NSW Department of Corrective Services) charge the lower amount.

Susan Heal

28 March 2006