

No 35



Queensland
Government

The Honourable Linda Lavarch MP
Member for Kurwongbah

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Attorney-General and
Minister for Justice

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LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

Dr Lesley Clark MP
Chair
Legal, Constitutional and Administrative Review Committee
Parliament House
Cnr George and Alice Streets
BRISBANE QLD 4000

Dear  Clark

Thank you for your letter dated 1 December 2005 in relation to the review by the Legal, Constitutional and Administrative Review Committee (LCARC) of the accessibility of administrative justice mechanisms in the *Freedom of Information Act 1992 (Qld)* (the Act) and the *Judicial Review Act 1991 (Qld)*.

The Premier has requested that I co-ordinate a whole-of-Government submission to this review in accordance with my role as Minister responsible for these Acts. This information is provided to assist the Committee in the course of the review. Please note that the submission provides factual information on relevant aspects of FOI and judicial review in Queensland, rather than a response to the issues raised in the Discussion Paper. I would like to acknowledge the contributions made by a range of government agencies which have provided valuable insights into the operation of the legislation.

FREEDOM OF INFORMATION (FOI)

In relation to freedom of information, the following information is provided to assist in the Committee's review:

Preliminary Comments

The following general comments about the operation of the fees and charges scheme are discussed in more detail below:

- Close to 50% of FOI applicants seek access to information about their personal affairs, for which no application fees or charges are payable. Accordingly, cost is not an issue for these applicants.
- The introduction of processing charges in 2001 was accompanied by a requirement for agencies to consult with applicants so that FOI applications can be targeted to minimise costs.

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- The introduction of processing charges does not appear to have led to a decrease in the number of non-personal applications.
- The amount recovered by agencies in fees and charges is only a small proportion of the total cost of implementing FOI.

Please note that all statistics have been sourced from the FOI Annual Reports.

Introduction of processing charges for FOI - 2001

The Act and the *Freedom of Information Regulation 1992* (the Regulation) were amended in November 2001 to introduce, in relation to non-personal affairs applications, charges for processing applications and supervising inspection of documents. At that time, the Explanatory Notes for the *Freedom of Information Amendment Bill 2001* stated that the amendments:

...balance(d) the objects of the Act with the resource implications for the community of providing access to non-personal affairs information to well-resourced applicants who would have no difficulty in paying reasonable fees and charges.

In the second reading speech which introduced these amendments,¹ my predecessor, the Honourable R J Welford MP, then Attorney-General and Minister for Justice, noted that their passage would bring Queensland into line with all other Australian jurisdictions. In relation to the legislation prior to the amendments, he commented that:

The current charging scheme creates a perverse incentive for people to make large scale or voluminous applications or embark on commercial research or fishing expeditions at unjustified public expense...

The production of processing charges will require applicants to reconsider wide and all embracing applications...At present there is no incentive for applicants to confine their applications to the documents they actually require. As a result, some applicants have had not even bothered to collect the documents or pay the costs incurred...

FOI applications which seek access to voluminous quantities of documents have caused serious problems for the administration of FOI...

The former Attorney noted that there was no charge for individuals seeking information about their own personal affairs. In 2006, there is still no charge for personal applications which comprise close to 50% of all applications.

Another feature of the 2001 amendments was the requirement to provide written notice to applicants of the estimated charges for which they would be liable. This process provided applicants with the opportunity to consult with the agency to discuss how their application might be amended to reduce the charges. The amendment was consistent with recommendations made in the LCARC Report on *Freedom of Information in Queensland* (Report No. 32, December 2001) and restated in the Discussion Paper, that there should be 'a flexible and consultative approach to processing FOI applications...to allow better focussed applications, reduce processing time and cost, and, at the same time, improve outcomes for applicants.'

The Department of Transport has commented that:

The introduction of processing charges has encouraged most applicants to be more specific with their request for information. This has been a two-fold benefit with the applicant only seeking access to documents pertinent to their issue and the agency saving time in the retrieval and processing of information.

¹ Hansard, 17 October 2001, p. 2910

Increase in fees and charges

The application fee and processing and access charges are increased annually in accordance with the policy that ties government charges to the Consumer Price Index.

The access charge for providing photocopies of documents to applicants was reduced in 2002 from 50 cents to 20 cents per page. In 2006, it remains at 20 cents per page.

No upfront payment of charges for FOI applications

Application fees for non-personal applications are payable at the time an application is made but in general, processing charges are not required until access to the information is provided to applicants. The Act does allow agencies to require a deposit if it is 'considered appropriate'. If a deposit is required, it must be 25% of the estimated charge.²

Percentage of personal applications

As Table 1 shows, in any given year personal applications comprise close to 50% of all applications. Local Government receives around 10% of all FOI applications which is a higher proportion of non-personal applications. Conversely, some agencies receive a higher proportion. For example, the Department of Child Safety states that up to 90% of its applications are personal.

Year	Sector	Personal		Non-Personal		Total	
		Number	%	Number	%	Number	% of Total
1999-2000	State	4,623	49.8	4,663	50.2	9,286	88.91
	Local	178	15.4	980	84.6	1,158	11.09
Total		4,801	45.96	5,643	54.04	10,444	
2000-2001	State	5,283	56.1	4,141	43.9	9,424	89.25
	Local	153	13.5	981	86.5	1,134	10.75
Total		5,436	51.49	5,122	48.51	10,558	
2001-2002	State	5,237	53.9	4,471	46.1	9,708	88.20
	Local	199	15.3	1,101	84.7	1,300	11.80
Total		5,436	49.38	5,572	50.62	11,008	
2002-2003	State	5,362	54.3	4,510	45.7	9,872	88.85
	Local	204	16.5	1,035	83.5	1,239	11.15
Total		5,566	50.09	5,545	49.91	11,111	
2003-2004	State	5,046	45.8	5,983	54.2	11,029	89.75
	Local	192	15.3	1,067	84.7	1,259	10.25
Total		5,238	42.62	7,050	57.38	12,288	
2004-2005	State	5,215	46	6,119	54	11,334	90.28
	Local	175	14.3	1,045	85.7	1,220	9.72
Total		5,390	42.93	7,164	57.07	12,554	

Table 1: Personal applications compared to non-personal applications for State and Local Government

Trends for non-personal applications

It is difficult to assess from raw application data the impact of the introduction of processing charges in 2001. An analysis of the raw data reported under s.108 of the Act reveals that

² Section 10 of the Regulation

there has been an increase in the number of applications for non-personal information since the introduction of the charges scheme:

Year	Non-personal applications received by State Government agencies
2000-2001	4,141
2001-2002	4,471
2002-2003	4,510
2003-2004	5,983

Table 2: Numbers of non-personal applications - State Government

An alternative view of the raw data is by a linear trend on expected application numbers, based on the 1997-98 to 2000-01 figures (see attachments 1 and 2), in comparison to the number of actual applications received.

On this view, it appears that for a period of 18 – 24 months after the introduction of charges, the number of State Government applications did not reach the level that would have been expected had the processing charges not been introduced (see attachment 1). This slowing down in applications received was short-lived with the increase in applications received by 2004-05 virtually mirroring the decrease previously experienced. At 2004-05, the number of applications received is slightly higher than the number of expected applications had processing charges not been introduced. The figures for the coming few years will indicate whether or not this trend will continue.

The trend for Local Government presents a different picture (see attachment 2). The four years prior to the introduction of fees showed a significant steady increase in the number of applications. From the time that processing charges were introduced, the rate of actual applications in this sector slowed in comparison with the number of applications that may have been expected had no charges been introduced. The number of applications in the Local Government sector has been relatively stable for the past four years.

Of course, in the absence of controlling for other influences on application numbers, no conclusions can be safely drawn in respect of the impact of the introduction of processing charges on application rates.

The only data required to be collected by agencies is that specified under s.108 of the Act, which forms the basis of the Attorney-General's Annual Report to Parliament. That data collected covers matters such as the number of applications made and the exemptions relied upon in processing applications. Other information which might assist in understanding the impact of the processing charges scheme is not routinely collected, for example:

- the number of applications withdrawn after the issue of preliminary assessment notice
- the number of applications the terms of which are reduced after the issue of preliminary assessment notice
- the level of use of other schemes providing access to information, either administratively or under legislation such as the *Coroners Act 2003* (Qld).

Asking agencies to record information of this type on an ongoing basis may not be cost effective. The benefit of collecting useful data in relation to the administration of the Act needs to be balanced against placing an undue burden on agency FOI staff.

Fees and charges collected over the period

Over the last four years, the total amount collected in fees and charges for State and Local Government has increased steadily.

Year	Total Application Fees \$	Processing and Access Charges \$	Non-personal Applications \$	Average per Non-personal Application \$	Total \$
2001-2002	136,668.30,	112,425.21	5572	20.17	249,093.51
2002-2003	144,336.81	173,767.44	5545	31.33	318,104.25
2003-2004	175,611.67	203,974.63	7050	28.93	379,586.30
2004-2005	177,657.37	219,149.58	7164	30.58	396,806.95

Table 3: Fees and charges by type of application

Table 3 shows that the average cost to an applicant for processing and access charges has remained relatively stable in the last three years at approximately \$30 per application. In the year that the processing charges were introduced (2001-2002) the average cost was \$20.17. It appears from the data that the introduction of the processing charges added around \$10 to the cost of a non-personal application. Of course, these figures include applications for which no charges were payable on the basis, for example, of the time taken to process the application falling below the 2 hour threshold. Unfortunately, the data is not collected in a form that isolates those applications, however, statistics on the numbers of preliminary and final assessment notices issued will be collected during the next s. 108 reporting period. This should provide more meaningful data in relation to the average cost to applicants for access under the Act.

Amendments to the Act in 2005

In 2005, there were a number of amendments to the Act affecting fees and charges.³ Consistent with the 2001 amendments, there was no change to the principle that information relating to an applicant's personal affairs is available under the Act for no cost.

The 2005 amendments standardised procedures applying to fees and charges and encouraged applicants to carefully consider the particular terms of their request. Applicants are routinely advised that they may tailor their applications so as to reduce potential charges. Other 2005 amendments related to assistance to applicants, waiver of charges, transferred applications, vexatious applicants and misplaced documents.

Assistance to applicants

Some applicants are unclear on what documents to ask for and where they may be located. Section 25A of the Act requires agencies to assist an applicant to make an application in a form which complies with the Act. In practice, agencies are generally proactive in assisting applicants to make their requests in terms that are effectively targeted and clear. The recommended approach by the lead agency encourages communication with applicants at the early stages of the FOI process. This promotes efficient processing and has consequential cost savings to applicants.

³ The *Freedom of Information and Other Legislation Amendment Act 2005* (Qld) and the *Justice and Other Legislation Amendment Act 2005* (Qld).

Agencies also confer with applicants where the agency intends to refuse access under s.29 of the Act. Most commonly, agencies consider refusing access where the terms of the application are so broad that to process the application would substantially and unreasonably divert agency resources. Section 29A recasts the pre-amendment obligations found in the former s. 28, namely to consult the applicant before refusing to deal with the application under s. 29.

Waiver of charges

Charges must be waived if an individual or a non-profit organisation can demonstrate financial hardship.

For individuals, financial hardship is defined to include applicants who hold specified concession cards. There is no provision allowing a decision-maker to exercise discretion to waive charges in circumstances other than those specified in the Act. Certainty and consistency in decision-making is ensured by specifying in the Act which concession cards are accepted as proof of financial hardship for individuals. This minimises delays in processing which may occur whilst determining the waiver application.

Furthermore, amendments to the Act made in 2005 allow departmental staff to determine whether an individual is in 'financial hardship' and thus qualifies for waiver of fees under the Act. Previously this decision was made by the Department of the Premier and Cabinet for all departments. Removal of this administrative step may provide a benefit to applicants in that decisions about financial hardship for individuals will potentially be made in a shorter period.

Transfer

Transferred applications must now be treated as fresh applications by the transferee agency.⁴ This means that an applicant for non-personal documents is liable for an additional application fee for the part of the request which is transferred to another agency. This is intended to reduce the instances of applicants trying to avoid multiple application fees by only lodging one application for documents obviously held by a number of agencies. FOI Guidelines will recommend that agencies consult with applicants in these circumstances to determine whether they wish the transfer to proceed. This will avoid applications being transferred to a number of agencies (and costs incurred) without the applicant's consent.

Vexatious applicants

The issue of frequent and persistent users of administrative justice mechanisms has been raised from time to time. Paragraph 9.2 of the Discussion Paper refers to the new s. 29B of the Act which allows an agency, in a limited number of circumstances, to refuse to deal with an application for the same documents which have been previously requested. This new provision is framed to stem abuse by a small number of people of the rights conferred by the Act which has the potential to divert resources away from other FOI applications and more generally from other government priorities.⁵

Historically, the Information Commissioner had the power to refuse to deal with all or part of an application if the commissioner was satisfied that the application was frivolous, vexatious, misconceived or lacking substance. This remains the position, however, in addition, a new provision⁶ provides that the Information Commissioner may also, on her own motion or on application by one or more agencies, declare that a person is a vexatious applicant.

⁴ Section 26(7) of the Act.

⁵ LCARC Report No 32, December 2001, *Freedom of Information in Queensland*, paragraph 6.12.
6 s. 96A of the Act

Locating documents and misplaced documents

The Discussion Paper raised the issue of 'agency filing systems (effect of processing charges, safeguard on access charges regarding documents lost or misplaced)'. The Regulation⁷ prohibits agencies from charging an applicant for time spent searching for or retrieving a document which has been misfiled. This measure removes any penalty that may have been incurred by the applicant as a result of poor filing practices.

Locating documents is becoming easier with the move towards electronic documents records management systems (EDRMS). Some agencies already have sophisticated EDRMS and the State Government is currently sponsoring a whole-of-Government EDRMS project which is developing standardised document records management systems. One of the expected outcomes of this project is that agencies with EDRMS should have increased capability in the areas of locating and retrieving documents which are the subject of FOI requests.

Technology may reduce costs

Many agencies have adopted electronic processing through redaction software, an initiative developed for Queensland FOI by the Queensland Treasury FOI Unit. This software enables applications to be processed electronically, with documents being scanned into a computer and marked up on screen. The technology also allows agencies to provide electronic access to documents, for example on CD or USB drive which has the potential to reduce access charges. For example, copies of hundreds of pages of hard copy documents provided at a cost of 20 cents per page can be supplied on CD for the cost of the CD. Some agencies using redaction software report increased efficiencies in FOI processing which has the flow on effect of reducing processing charges for applicants.

The Department of Transport commented that, given the range of access options available to applicants, capping of access charges does not appear to be necessary.

Anecdotal feedback from some applicants, particularly regular users of FOI, supports the option of being provided with electronic access to documents. Agencies are increasingly opting to also store documents electronically, which results in savings in paper usage and archive storage space.

Alternative access

FOI is but one mechanism for accessing documents held by the public sector. An increasing range of information is available via the extensive public sector web presence. Complementing web publication is a range of additional schemes generally termed 'administrative access', which provide alternatives to FOI. Administrative access schemes provide access for a fee, or at no cost, depending on the information requested. Examples of administrative access schemes include Queensland Health (health records), Queensland Police Service (criminal histories) and Department of Justice and Attorney-General (court transcripts).

There are also access schemes for parties involved in legal processes which provide access to a limited range of documents for particular purposes, for example, under the *Uniform Civil Procedure Rules* or s.134A of the *Evidence Act 1977* (Qld). These mechanisms are potentially more expensive than FOI, with the cost under the UCPR ranging from \$15 to \$58 per 15 minutes of processing time.

Although there is no cross-sectoral data it appears from anecdotal reports that FOI is increasingly being used to obtain access to information for quasi-legal purposes, for example, by loss adjusters and insurance companies or for pre-litigation purposes such as

⁷ reg. 9

preliminary conferences in personal injuries claims. In relation to this issue, the Department of Industrial Relations stated that due to the lower cost in obtaining this information under FOI, these applicants can obtain a wealth of information that has been gathered during the course of an investigation.

Aside from cost, using FOI for these purposes places additional resource demands on agencies and rarely results in the applicant getting all the information they want. It is questionable as to whether FOI is the appropriate process to deal with these circumstances and is an issue that warrants further investigation.

The whole-of-Government FOI Queensland website (foi.qld.gov.au) provides information for the community on a range of administrative, statutory and court-related access schemes. Most agency websites include information on agency-specific administrative access schemes which can be accessed through the FOI Queensland website. The Department of Justice and Attorney-General plans to provide education to the community about access to Government information generally.

Cost of FOI to applicants compared to costs recovered by Government

There is no cross-sectorial data on the actual costs of administering FOI. In 2002-2003, State Government departments and agencies received 5362 personal FOI applications and 4510 non-personal FOI applications,⁸ with the total cost to departments and agencies estimated at \$9,294,935.20. In the same period, the revenue derived from fees and charges payable under the Act for State Government departments and agencies was \$251,091.84.⁹ This obvious discrepancy demonstrates that fees and charges are not intended to recoup the costs of administering the Act.

The Department of Industrial Relations estimated that, based on non-personal applications where third party interests were involved, FOI processing charges represented only 74% of the actual costs of a base-grade administrative officer (AO3) or 54% of the actual cost of a base-grade decision-maker (AO5).

Queensland Rail commented that 'it is far more expensive to administer FOI than the revenue received'.

Lead agency – the Department of Justice and Attorney-General

Since the introduction of FOI, the Department of Justice and Attorney-General has been the lead agency for the whole-of-Government co-ordination of FOI in Queensland. Over the years, the Department has provided, to varying degrees, support to agencies and the community on FOI, as well as administering the FOI legislation.

In April 2002, the Honourable Rod Welford, then Attorney-General and Minister for Justice responded to LCARC Report No. 32. That response committed the Queensland Government to implementing legislative and non-legislative initiatives. The non-legislative initiatives related to the whole-of-Government coordination and promotion of FOI in Queensland. The legislative initiatives formed the basis of the 2005 amendments to the Act. A strategic framework for the non-legislative initiatives was prepared by the Department which focussed on four key areas:

1. Education and training
 - improving FOI decision-making

⁸ Appendix 1.5 – Freedom of Information Annual Report 2002-2003.

⁹ Appendix 1.11 – Freedom of Information Annual Report 2002-2003.

- providing FOI practitioners with flexible, targeted training opportunities
- supporting FOI in-house awareness training for agencies

2. Information and support

- providing information, timely advice and support for FOI practitioners
- revising FOI Guidelines
- promoting best practice in FOI processing and decision-making

3. Community

- enhancing awareness of FOI and administrative access schemes in the community
- plain language publications
- applicant telephone helpline
- providing FOI access for equity groups

4. Policy and legislation

- maintaining a focus for FOI research, policy development and legislative review

The framework includes strategies designed to provide information to agencies, FOI practitioners and members of the public about FOI in Queensland and the assistance available through the Department as lead agency coordinating the whole-of-Government functions of FOI.

To date, initiatives to improve community understanding of and access to FOI include the launch of the Queensland Government's FOI website (www.foi.qld.gov.au) and the publication of an information brochure on FOI applications targeted at potential applicants (see attached). This brochure is available online as well as through the Department, agencies and 'information access points' in the community, including libraries, community legal centres and electorate offices of Members of Parliament. The brochure will be available in a range of community languages in 2006. This strategy will assist in broadening the diversity of population groups able to access information about their rights under the Act. Through the FOI Guidelines, agencies will also be encouraged to assist applicants who may be disadvantaged by distance, disability or other communication difficulties.

The Department also provides assistance to applicants during business hours via a telephone helpline. Applicants are assisted in understanding the FOI process and given advice on how and where to make applications.

In addition, the Department provides information and advice about the Act to FOI decision-makers and staff working in government departments, authorities and local councils. It conducts training on FOI in both city and regional locations and convenes the *State FOI Network* and *Local Government FOI Network*. These networks provide information to practitioners and provide a focus for discussion of issues relating to the application of the Act and FOI processing. The networks invite an officer from the Office of the Information

Commissioner to attend each meeting to report on recent external review decisions and procedural aspects of external review.

The Department has also distributed information sheets and practice material to FOI practitioners and the revised FOI Guidelines are scheduled for distribution and publication on the website during 2006. Departmental staff also regularly contribute to community forums and speak at conferences and other engagements to promote community awareness of FOI.

These initiatives are central to improving access to FOI which is important for all Queenslanders and our democratic system of government.

JUDICIAL REVIEW

I would like to emphasise Government's commitment to the goals which underpin the current legislative and structural arrangements in relation to judicial review.

Importantly, those affected by administrative decisions have the right to be advised in a timely way of the reasons for those decisions and to have decisions with which they disagree formally reviewed. Independent external review is available through the Ombudsman and, if misconduct is alleged, the Crime and Misconduct Commission. It is important that persons who are unsuccessful through external review process have the private right to choose whether or not to have the matter heard by the court. By making decision-makers accountable, original decision making and the processes supporting decisions are improved and the potential for dispute is minimised.

The *Judicial Review Act 1992* is only part of the Government's commitment to ensuring that individuals have appropriate opportunities for the review of the administrative decisions affecting them. Due to previous reforms in this area, considering the processes for the review of administrative decisions is a necessary part of developing the legislation authorising such decisions to be made.

Section 4 of the *Legislative Standards Act 1992* sets out the fundamental legislative principles for Queensland legislation. These include that legislation has sufficient regard to rights and liberties of individuals. Examples in subsection (3) of factors relevant to whether legislation has sufficient regard to rights and liberties of individuals include whether the legislation:

- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- (b) is consistent with principles of natural justice;".

Section 23(1)(f) of that Act requires the explanatory notes to include "a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency".

This law-making framework ensures proper review of issues relating to the review of administrative decisions by the Scrutiny of Legislation Committee and the Parliament.

As part of the policy development process or the review of existing administrative arrangements, merits-based review of administrative decisions, where appropriate, may be implemented as a more effective and efficient alternative to judicial review. For example:

- under *Transport Operations (Passengers) Act 1994*, an aggrieved person to apply for review to an independent review panel; and
- under the *Child Protection Act 1999* and the *Adoption of Children Act 1964*, aggrieved person has a right of review in the Children's Services Tribunal.

I hope this information is of assistance in the review of the accessibility of administrative justice. I look forward to the Committee's subsequent report to Parliament.

Yours sincerely

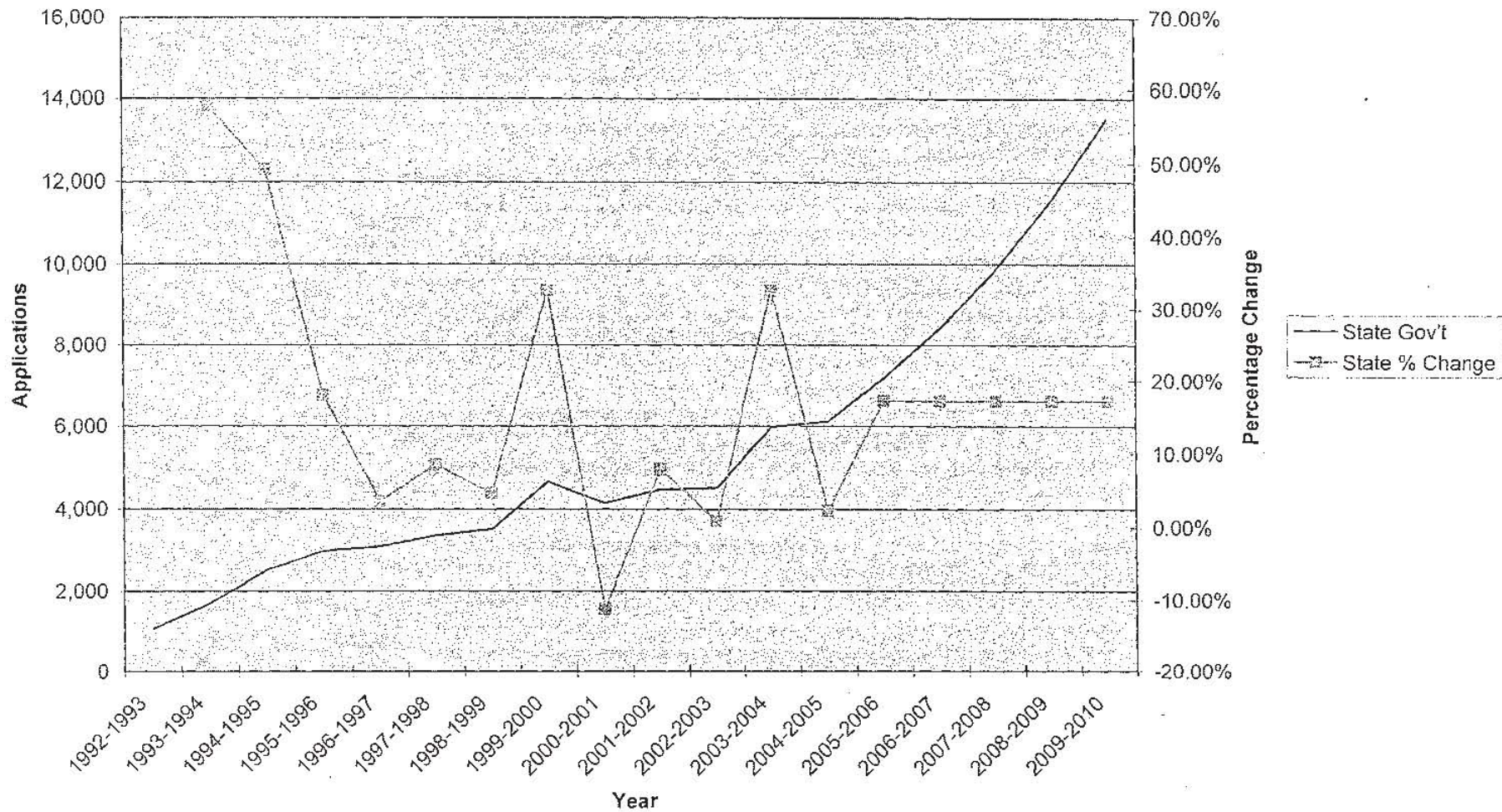
A handwritten signature in cursive script that reads "Linda Lavarch".

Hon Linda Lavarch MP
Attorney-General and Minister for Justice

Enclosures:

- Attachment 1 – Statistics – State Government
- Attachment 2 – Statistics – Local Government
- Brochure – "FOI – your right to access and amend information held by the Queensland Government"

State Gov't FOI Non-Personal Applications



Attachment 2 -- Local Government projections

Local Gov't FOI Non-Personal Applications

