

The Right to Information

**Reviewing Queensland's
Freedom of Information Act**

**The report by the FOI
Independent Review Panel
June 2008**

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FOI Independent Review Panel

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1 Introduction and executive summary

The Panel has carried out a fundamental and comprehensive review of freedom of information in Queensland. It began by looking at the problems the law currently presents for end-users, for government and for the bureaucracy. It went back to first principles in searching for the way to resolve the conflicts and difficulties that had emerged in the more than 15 years since the law was enacted and crafted solutions that should provide answers for the biggest problems that each group has under FOI. The Panel was prepared to question, and in several areas reject, some of the accepted wisdom surrounding FOI.

The result is not merely an upgrade of the legislation, but a new model. It includes some unique features that are designed to overcome problems that appear to be inherent in most systems. Not everything is new – there are many sections of the legislation that would not be changed at all – but in a number of important and key areas the changes proposed are quite profound.

The public interest

The public interest is the central, unifying feature of freedom of information. As the Australian Law Reform Commission/Administrative Review Council Report said in 1995, “What most distinguishes the approach to disclosure of government information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest.”¹ It headlined its discussion of the public interest test, “The availability of government information should be determined by the public interest”.²

But the application of public interest tests has always been one of the most significant weaknesses of FOI. Again, as the ALRC/ARC Report said, “Public interest tests allow all considerations relevant to a particular request to be balanced ... it can at times be difficult to perform this balancing exercise.”³

One problem is that “the public interest” has been regarded as “an amorphous concept”, undefined, and dependant on the application of subjective criteria.⁴ Another is that most FOI laws include at least several different public interest tests. Some put a small emphasis on disclosure, others tip the balance heavily in favour of withholding information. Yet another problem in Queensland (and in some other jurisdictions) is the way the role of the public interest has been downgraded by assuming that if a document can be classified as falling within the bounds of an exemption, there is a prima facie case against disclosure under a public interest test. That does not give the public interest a fair chance in the balancing exercise, contrary to the original intention of the legislation.

¹ Australian Law Reform Commission(ALRC)/Administrative Review Council (ARC), *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No. 77, ARC Report No. 40, December 1995, p. 95 (hereinafter referred to as the ALRC/ARC Report).

² ALRC/ARC Report, p. 95.

³ ALRC/ARC Report, p. 95.

⁴ ALRC/ARC Report, p. 95.

The proposals the Panel is putting forward are designed to overcome these difficulties.

First, the essential features of the public interest, relevant to FOI, will be listed in the legislation. This will allow decision-makers to more easily identify the relevant public interest factors that need to be balanced. It will also allow applicants to decide whether their application has been properly assessed on public interest grounds.

Second, a single public interest test will be applied. It is in the form, “Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.”

Third, all exemptions in the present legislation that include a public interest test will no longer be exemptions. Instead, the harm each exemption was intended to protect against will be included in the public interest factors that have to be weighed.

These changes are designed to simplify the administration of the public interest test by making it more transparent, understandable and credible, to make it more likely that it will be applied in the way the legislation intended.

The consequence of not including exemptions containing a public interest test is to create a radically different but more effective legislative architecture for FOI, involving just two stages. When an applicant makes a request for a document, the agency first assesses whether it falls within one of the small number of true exemptions – those without a public interest test.⁵ If the matter is not exempt then access is available unless disclosure, on balance, would be contrary to the public interest. In making that decision, the agency would check the factors listed in the legislation to see which are applicable to the particular document being assessed and, if relevant also consult a time and harm weighting guide that particularises some harms as being more critical to the public interest and indicates how some harms may cease to carry any weight after a suggested number of years.⁶

The main game

The Panel’s own assessment of the FOI experience, and its Terms of Reference, have required it to ensure that the right to access information is balanced with the need for government to preserve the integrity and confidentiality of certain information in order to govern effectively.

History in Queensland, as in many other jurisdictions, has proven unambiguously that there is little point legislating for access to information if there is no ongoing political will to support its effects. The corresponding public sector cultural responses in administration of FOI inevitably move to crush the original promise of open government and, with it, accountability. Thus the Panel sought to understand the reasons at the core of successive governments’ anxiety, even hostility, about FOI in the pragmatic attempt to have Parliament (not relatively junior FOI officers) address

⁵ These exemptions do not include a public interest test because the Parliament has, in effect, decided that the public interest in the exemption is of such importance that it would not be outweighed by other factors.

⁶ See chapters 9, 10 and 11.

those concerns directly and transparently, so that the balance of the FOI Act can get on with the job of open government.

The Panel determined that there were two such areas that needed a principled and certain solution:

The Cabinet exemption redrafted

The Panel has approached the Cabinet exemption from first principles. The Panel has not recommended a return to the original 1992 Cabinet exemption, because that would result in too much uncertainty about outcomes of FOI applications and would simply perpetuate the consequences of conflict. What would have changed to give any better outcomes than those that followed 1993?

Instead, the Panel looked at the purpose of the exemption. It should be about protecting the collective ministerial responsibility of ministers in Cabinet and no more. As it happens, in Queensland, that principle is enshrined in the Constitution. Applying this principle, the Cabinet exemption is then based not on the description of a particular document, but on the effect of releasing it – would its release impact on collective ministerial responsibility? One consequence of this proposal would be to eliminate the much criticised possibility of documents being taken into Cabinet purely to hide them from public view. It would wind back the exemption to something like the situation that applied when the Act was introduced in 1992, though there would be much more certainty about its application.

These exemptions have been balanced with a proposal that the Premier (supported by the Cabinet Secretary) should regularly consider proactively releasing Cabinet material, including an edited version of the Cabinet agenda. Similar regular and proactive release of Cabinet material happen in a number of other Westminster jurisdictions in the world.⁷

Incoming ministerial briefing books, parliamentary estimates briefs and question time briefs – a new exemption

Just as there is a very high degree of public interest in the effective operation of collective ministerial responsibility, so too there is a compelling public interest in enabling individual ministerial responsibility to operate post-FOI. Anodyne guff is not the kind of information that Ministers want or need from their officials. If Ministers are to be accountable, then they must be informed of the good, the bad and the ugly within their areas of ministerial responsibility. There are three essential occasions when this uninhibited flow of information to the Minister must occur: when the minister is appointed to the portfolio (“red/blue books” – incoming Minister’s briefs); when the Minister must account to Parliament in question time (“PPQs”); and when the Minister must account to Parliament for the ministerial portfolio’s past and planned expenditure of parliamentary appropriations (estimates briefs). This is not to deny transparency and accountability of Ministers and their portfolio responsibilities as there are alternative existing mechanisms for that to occur but it does enable the

⁷ See chapter 8.

assumption of ministerial responsibility by giving the freedom for information to flow through to the Minister at those three critical checkpoints.

In addition, the Panel proposes a reduction in the 30 year rule on Cabinet material, to just 10 years. For exempt incoming ministerial briefs, parliamentary estimates briefs and question time briefs, the Panel proposes that the exemption expire after 3 years (subject to a possible extension of time on public interest grounds by the Information Commissioner).⁸

FOI needs political support and an enabling broader information policy context

The Panel argues for a whole of government strategic information policy and governance arrangements addressing the lifecycle of government information and interconnecting strategically with other relevant public policies. FOI's place in the government information experience should be recast as the Act of last resort moving the existing "pull" model to a "push" model where government routinely and proactively releases government information without the need to make an FOI request.⁹

Personal information

In accordance with what the Queensland Government has told the Australian Law Reform Commission on moving towards a nationally uniform privacy code, the Panel has assumed that Queensland will inevitably introduce a Privacy Act and do so, sooner rather than later. The Panel has recommended, as the ALRC is expected to do, that requests for personal information will largely be moved out of FOI and into the privacy regime. This will have major advantages for users, who sometimes cannot access their material under FOI but would probably get it under privacy. It would also benefit the administration of FOI because it would remove some of the clutter.¹⁰

Exclusions

The Panel has considered the ever-growing list of exclusions in the FOI Act. Britain is currently going through an exercise designed to broaden the coverage of its FOI Act, not least to take account of the way governmental functions are being increasingly performed by corporatised agencies or even by private industry. The Panel has examined the extended "level playing field" fiction and proposes that all Government Business Enterprises should be covered by FOI, though many of their documents may not be accessible once the public interest test is applied. The Panel also considers that many bodies that receive funding or a fee for service from the State should be accountable under FOI, at least to the extent of the services that public money enables them to provide.¹¹

⁸ See chapter 8.

⁹ See chapters 3, 5, 16 and 17.

¹⁰ See chapter 4.

¹¹ See chapter 7.

Time and costs

The present charging system is a disaster. It requires a significant amount of training time for FOI officers, and then a great deal of their time when they have to deal with requests. It needs more time than it is worth. The Panel proposes a system based on the number of (full) pages provided in response to a request. But to make sure the person making the request gets what is really wanted, the agency in future should provide, as a first response to a request, a Schedule of Relevant Documents and engage the requester to decide which of the documents in the list are really wanted. This will cut processing time and it will cut the costs of providing material. And it will reduce disputes. The Panel is proposing a shorter period for agencies to process requests and is changing “calendar days” to “working days”.¹²

Office of the Information Commissioner

The Panel wants to revamp the Information Commissioner’s office. These proposals are not entirely new, but build on the recommendations in the 1995 ALRC/ARC and 2001 LCARC reports for an FOI monitor. They also reflect the experience in such places as Britain, Scotland and Ireland. The current lead agency model has not worked, and needs to be replaced with the Information Commissioner who is an active and shared resource across government, as the champion of FOI and responsible for helping agencies implement it. The Office would run a help-line for applicants and agencies. The new Privacy Commissioner should be located within the Office of the Information Commissioner so that the inherent tensions between information access and privacy protection can be best managed.

External review should continue to be conducted by the Office, under an FOI Commissioner. However there should be the possibility of questions of law going to the proposed new Queensland Civil and Administrative Tribunal. A new Act would prescribe a capped mediation period with a determination within 40 working days thereafter.

The Panel proposes to give the Information Commissioner a significant role in information policy generally, across government. The Information Commissioner would take a leading role in encouraging the proactive release of information by agencies. The Panel also deals with the problem of contentious issues management, suggesting guidelines for the provision of information additional to that requested, so as to ensure a balanced context is provided. Contentious and other interesting material released to applicants should be posted on an agency’s website, but only after a 24-hour moratorium.¹³

Agency culture

The Panel is proposing a number of sanctions and incentives to encourage the proper administration of the Act. These include protecting the decision-maker from being overborne by a superior, and reinforcing the importance of the penalties for deliberate breaches of the record-keeping requirements of the *Public Records Act 2002*. The

¹² See chapters 13 and 14.

¹³ See chapter 20.

Panel is also proposing that the Information Commissioner should provide annual report cards on agencies to the Parliamentary Committee, reviewing the way agencies meet their obligations under the Act.

More important, however, would be the adoption by the Government and the Parliament of a publicly proclaimed pro-disclosure, pro-FOI policy approach. This would be assisted by the adoption of a new FOI Act (with a new name),¹⁴ and public commitments by the Premier and by the Parliament to the new information disclosure regime.¹⁵

Consequences – what’s in it for stakeholders?

For end users of information

For the public generally, the greatest benefit of the changes proposed by the Panel would be the provision of a much greater amount of information outside the FOI regime. This will occur through a new proactive disclosure regime guided by the Information Commissioner requiring agencies to publish far more information about the agency and its activities than is currently required. Agencies will also publish on their websites information they have already provided through FOI.

For people using FOI to make requests, the benefits will be considerable. More information should be made available as a result of the proper application of the public interest test. Information should be made available more quickly and it should be more responsive to the request that has been made. The applicant will be able to choose the material and will only have to pay for what is requested (and only for material that is provided without deletions). The charge should be lower than currently applies, for most users. A new review system should result in quicker results where an agency’s decision has been disputed. Questions of law will be able to be resolved more cheaply, and quickly, than at present.

In general, the law will be more upfront and honest, with a new architecture and greater definition that removes the structural bias and advantage that currently favours agencies. Access to restricted information about Cabinet and other governmental decisions will be available sooner, such as for Cabinet after 10, rather than 30, years.

For Ministers

The main advantage for Ministers will be that there will be much more certainty about which documents are exempt, and about how the public interest will be determined. The system will keep three specified categories of essential ministerial briefing documents from release for three years. The exemption of documents on a principled basis will mean that Ministers will not have to resort to what are perceived to be improper means of avoiding FOI through the system adopted in recent years of pushing them into the Cabinet room.

¹⁴ See chapter 25.

¹⁵ See chapter 24.

For agencies

The new system will make it much easier for agencies to apply the law and to administer the system. It will mean decision-makers will not be subjected to undue pressure to keep secret material that might be embarrassing for government. It will mean more assistance is available to decision-makers from the Office of the Information Commissioner and cross-agency support will become available if it is needed. A simplified charging regime will reduce pressure on FOI officers.

The Panel was invited by its Terms of Reference and comments by the Premier to produce recommendations that would look at best practice around Australia and the world. Whilst it has done that, in some respects it has gone beyond best practice, in the belief that it can produce a better, more effective model that, in the public interest, will improve the delivery and availability of information held by government.

2 Background and methodology

This report is the culmination of an eight-month inquiry by the independent expert Panel appointed by the Queensland Government to inquire into the *Freedom of Information Act 1992*, and to identify ways to improve and modernise the Act.

The Panel was appointed on 17 September 2007 and was asked to produce a discussion paper in January 2008. This was published on 30 January 2008.¹⁶ The paper covered the themes included in this report. This report extends the thinking in the discussion paper in many areas and explores some new ideas that emerged in responses to the paper's questions, in other public submissions, and in proposals advanced at the public seminar the Panel held jointly with the Australian Law Reform Commission (ALRC) in Brisbane on 6 March 2008. Other matters arise from publications or announcements by various individuals or bodies since the discussion paper was made public, including the ALRC's discussion paper on privacy, and the Queensland Government's decision to create a new Civil and Administrative Tribunal.

The Terms of Reference for the review were:

Background

1. The Queensland Government recognises that freedom of information is an essential right of every person and that access to government information is fundamental to openness, transparency and accountability in government.
2. At the same time, it needs to be recognised that the disclosure of particular information could have a prejudicial effect on public interests or the private or business affairs of members of the community about whom information is collected and held by government.
3. The *Freedom of Information Act 1992* (FOI Act) seeks to achieve a balance between these competing interests. However, the FOI Act is now 15 years old and there have been significant changes during that time to the way in which government creates, manages and stores the information it holds.
4. Rapid advances in information and communication technologies have led to the creation of millions of government documents each year. The culture within government is now generally more open, with considerable Government information publicly accessible on the internet. Nevertheless, there is still scope to improve access to government documents and reduce the time and costs involved in accessing government documents.
5. To this end, an independent expert review panel will be established to review the FOI Act and to identify ways to improve and modernise the FOI Act.
6. The independent review panel will be asked to prepare a discussion paper, for public consultation, on the extent to which the FOI Act provides an effective framework for access to documents held by government.

¹⁶ FOI Independent Review Panel, *Enhancing Open and Accountable Government - Review of the Freedom of Information Act 1992*, Discussion Paper, January 2008 (hereinafter referred to as the FOI Independent Review Panel discussion paper).

7. The discussion paper is to be developed within three months, with a view to the discussion paper being released in January 2008 for community consultation. Following community input, the panel will prepare a final report for Government's consideration. It is the Government's intention that any legislative amendments to implement improvements to the FOI Act will be introduced into Parliament during 2008.

Terms of Reference

8. The review panel is to consider (but not limit itself to) the following issues in relation to the FOI Act:
 - a. The purposes and principles of freedom of information and whether the FOI Act satisfies those purposes and principles, in particular:
 - i the objects clauses in the FOI Act;
 - ii the ambit of the application of the Act, including the appropriateness of the definition of 'document' (section 7 FOI Act) and the operation of section 11 and section 11A (bodies to which the FOI Act does not apply); and
 - iii the exemption provisions in Part 3 Division 2 of the FOI Act.
 - b. The effectiveness of processes under the FOI Act (including application and review processes) and ways in which those processes can be streamlined and made more efficient and user-friendly, including the utilisation of current and future technologies.
 - c. The time and costs involved in providing access to government documents, having regard to the need to achieve a balance between facilitating legitimate and timely access to government documents and ensuring proper and efficient government administration. In considering this issue, the review panel is to specifically consider:
 - i the appropriateness of the existing fees regime;
 - ii the appropriateness of current time limits contained in the Act; and
 - iii dealing with voluminous and/or vexatious requests.
 - d. The effectiveness and adequacy of current reporting and data collection requirements, to inform public understanding about the operation and administration of the FOI Act.
9. In identifying ways to improve and modernise Queensland's freedom of information regime, the independent review panel is to consider (but not limit itself to):
 - a. relevant existing and proposed Commonwealth, State and Territory laws and practices;
 - b. other recent reviews of freedom of information legislation, nationally and internationally;
 - c. information or data from agencies that will assist in the identification of issues relating to the administration of the FOI Act;
 - d. the operation of the freedom of information regime in an evolving technological environment;
 - e. specific issues relating to access by individuals to personal information, including the interaction between Queensland's freedom of information regime and the protection of privacy interests;

- f. balancing the public interest in access to information with the need to preserve the integrity and confidentiality of deliberative processes for Ministers and other decision makers; and
- g. the interaction of the FOI Act with other mechanisms (including non-legislative mechanisms) for accessing information held by government.¹⁷

On 11 October 2007, the Premier, Anna Bligh, made a ministerial statement to the Parliament about the review. She said —

A healthy democracy must be supported by strong accountability mechanisms, and one of the most important of these is freedom of information legislation. The *Freedom of Information Act* has now been in place for 15 years, and my government believes that it is timely to assess whether these laws are working effectively and what improvements can be made. Over the last 15 years technology has advanced in ways that could only have been guessed at. In 1992 when these laws were first put in place in Queensland, the internet was in its earliest infancy. Computers were only just beginning to become common in the workplace, email was largely nonexistent and SMS was undreamed of. Rapid advances in information and communication technologies have resulted in the creation of millions of documents within government each year. The ease with which documents can now be created means searches and the examination of documents can take many hours, leading to longer time frames and higher processing costs.

Enhanced technology also brings with it challenges, especially in relation to individual privacy. Government holds a significant amount of personal information. There is regulation of the use of private information—how it is gathered, stored and disclosed through the application of the information privacy principles. We must strike a balance between ensuring transparency through FOI disclosure and the protection of individual privacy.

I believe there are opportunities to provide the public with greater access to information and to promote greater transparency to use modern technology and smarter operating systems. The panel that I have appointed to review the FOI legislation is being chaired by Dr David Solomon AM. David Solomon is a barrister, an author, a journalist and a respected commentator on Australian government, politics and constitutional law. Dr Solomon was also chair of the Electoral and Administrative Review Commission in 1992 and 1993. Dr Solomon is joined on the panel by Ms Simone Webbe, a former Deputy Director-General of the Department of the Premier and Cabinet, and Mr Dominic McGann, a partner with law firm McCullough Robertson. The terms of reference for the review are wide, and I table these terms of reference for the benefit of the House. The panel will prepare an information paper for release in January 2008, which will form the basis for public consultation. A final report for Cabinet consideration will then follow with any necessary legislation to be brought before the House next year. By establishing this independent review panel to comprehensively review our freedom of

¹⁷ FOI Independent Review Terms of Reference.

information laws, my government is demonstrating its ongoing commitment to open and accountable government.¹⁸

The Panel undertook an extensive literature search and consulted a large number of experts, practitioners and FOI users in preparing the discussion paper. Its methodology was explained in the discussion paper.¹⁹

Almost 600 copies of the discussion paper were circulated to agencies, interested parties and members of the public and it was also made available through the internet. More than 60 organisations and individuals made submissions in response to the paper, many of them providing extensive and detailed answers to the questions posed in the paper, and offering advice and information. The Queensland Government provided a “Whole of Government” response that was not intended to be a policy response, but instead focused “solely on technical and administrative aspects” of the Act.²⁰

The Panel placed most of the submissions on the website established by the Department of Justice and Attorney-General for the FOI review. All of the submissions were closely studied by the Panel, including those that were not published. This report includes quotations from many of the submissions, though in most cases only representative samples have been selected to try to reflect the different arguments that were put.

While preparing the report, the Panel continued its consultative process and its review of the literature and of developments in other jurisdictions. It also analysed the responses it received from agencies to the surveys it conducted in 2007 and various agency responses to questions on particular issues raised in correspondence throughout the review period. Members of the Panel benefited from attending an “International Summit on Open Access to Public Sector Information” conference (held in Brisbane on 4 March 2008), that featured a number of prominent international experts.

Acknowledgments

The Panel’s review of the *Freedom of Information Act 1992* has been greatly assisted by positive and helpful contributions from many FOI practitioners, users and experts. The submissions made in response to the discussion paper were extremely helpful as were the formal and informal contributions at the seminar that was conducted jointly with the Australian Law Reform Commission in Brisbane on 6 March 2008.

The Panel is extremely grateful to its two-person secretariat. Catherine O’Malley served as the Panel’s executive officer and took an active part in the Panel’s deliberations. She also acted as the Panel’s research officer and its primary contact

¹⁸ Bligh, A.M., Ministerial Statement, Queensland Parliamentary Debates, 11 October 2007, p. 3434.

¹⁹ FOI Independent Review Panel discussion paper, p. 17.

²⁰ Queensland Government submission to the FOI Independent Review Panel discussion paper, title page.

with agencies and FOI practitioners. She was ably and enthusiastically assisted by Esther Blackwell.

3 Information policy

Has freedom of information law been as transformational in policy terms as first aspired?

Specifically, has FOI in Queensland brought about a “major philosophical and cultural shift in the institutions of Government” and the democratisation of information²¹ in the last fifteen years?

In short, the prevailing consensus is “no” (see chapters 1, 5 and 24).

Championed by the catalytic Fitzgerald Inquiry,²² the subsequent Electoral and Administrative Review Commission²³ and parliamentary committees,²⁴ FOI had gathered a broad-based appeal. With a growing rate of adoption across Australian jurisdictions and the reforming commitment of a relatively new government, the Goss Government introduced FOI as part of its administrative reform agenda.

In the early stages of implementation, public sector training and awareness of the requirements of freedom of information were high. So were expectations.

It is not that the Government’s formally stated policy outcomes of open, accountable and participatory government have since changed. Indeed, successive governments assert FOI as a key element in government openness and accountability.

The present Government (that commissioned this Review to “improve and modernise”²⁵ FOI) declares, for example, as one of its top seven Strategic Priorities that support the Queensland Government’s Smart State vision:

Modernising the Federation and Delivering Accountable Government

...

- Engage communities in government decisions and processes

...

- Deliver an open, proactive and accountable public sector, focused on improving government service provision.²⁶

²¹ Wells, D.M., Freedom of Information Bill 1991, Second Reading speech, Queensland Parliamentary Debates, 5 December 1991, p. 3850.

²² Fitzgerald, G.E. (Tony) (Chairman), *Report of a Commission of Inquiry pursuant to Orders in Council*, delivered 3 July 1989.

²³ Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990.

²⁴ Parliamentary Committee for Electoral and Administrative Review, *Freedom of Information for Queensland – A Report of the Parliamentary Committee for Electoral and Administrative Review*, No. 6, 18 April 1991; Parliamentary Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report No. 32, December 2001 (hereinafter referred to as LCARC, *Freedom of Information in Queensland*, Report No. 32).

²⁵ FOI Independent Review Terms of Reference.

Arguably though, what has changed has been the favourable policy momentum to sustain freedom of information law and practice in the spirit of the original draft of the *Freedom of Information Act 1992*. Absent this, and congruent political will, serial legislative amendments and contrary public sector cultural norming fill the space left behind.

If the activity of the post-Fitzgerald Inquiry period was the catalyst for many new administrative reform measures such as freedom of information, then definitive political leadership in setting a new information policy paradigm is what is required twenty years on to sharpen the blunt instrument that FOI has become.

FOI needs not just public policy statements in favour of open and accountable government that engages with communities in its decisions and processes but the scaffolding effect of an FOI-friendly, overarching public policy on information.

Queensland (as is the case in many other jurisdictions) does not have a whole of government strategic information policy.²⁷

Information and communication technologies management and purchasing policies, records management policies, and a licensing framework are but subsets of the broader strategic picture that is required – as is freedom of information. What is required is a public policy that sees the interconnections, and governs all aspects of the information lifecycle: including planning, creating, collecting, organising, using, disseminating and storing.

The call for a whole of government approach to information is not new. In 2006, the Service Delivery and Performance Commission found that a “significant area of opportunity for the Government is in improving its management of information”.²⁸

The Panel’s recent enquiries indicate that the public sector is still working its way towards an integrated and strategic direction for information management in response to the 2006 recommendations.²⁹

But the Panel’s call is for more than an information management and a sector-wide ICT vision. The “front-end” information policy issues of information planning, creating and collecting are as critical. So too the big picture in *translating* an understanding that for a Smart State, government information is a core strategic asset. What therefore are the investment goals and strategies to reap greater dividends, including cross-leveraging strategies for (and from) other relevant public policy outcomes such as for an open, accountable and participatory government?

²⁶ Queensland Government Priorities 2008 at <<http://www.thepremier.qld.gov.au/priorities/index.shtm>> last reviewed 10/3/08, accessed on 10/4/08.

²⁷ Service Delivery and Performance Commission, *Report on Review of ICT Governance in the Queensland Government*, September 2006, pp. 1-2, and following.

²⁸ Service Delivery and Performance Commission, *Report on Review of ICT Governance in the Queensland Government*, September 2006, p. 2.

²⁹ Discussion Paper on Information Management in the Queensland Government (consultation draft), March 2008, draft 1.0.

Time has proven that it is too ambitious for freedom of information law of itself to deliver strategic change in government openness and accountability. Its sphere of influence is confined to the “back-end” (decisions about dissemination of information in response to formal requests) and has been limited in its potency in any event.

Rhys Stubbs from the University of Tasmania submitted that contrary to the argument that the intention of FOI is to remove traditional unevenness of information possession in the public sphere (as contended by Nobel Prize winner for economics, Joseph E. Stiglitz) —

The way FOI has been introduced in Australia, though, perpetuates traditional information asymmetries between the citizenry and the state: one party continues to hold better and more information against the other. Representatives have historically held the right to withhold information from the public under notions of parliamentary sovereignty and responsible government: elections and parliamentary rules constitute accountability. The principle and manner of FOI introduced within the different Federal, state and territory jurisdictions do not fundamentally challenge this tenet (Snell 2006, 11). Instead, the laws have been designed so as to work around the assumption of closed representative government, forming a barricade that distinguishes what the public can and cannot access. This barricade means individuals are left to struggle for information with deficient legislation against government with “institutional memory, specialised expertise and ... a longer term interest in influencing the evolution of case law” (Terrill 2000a, 31).³⁰

A recent Scottish study concluded —

... the conceptualisation and embedding of FOI as predominantly an administrative task and function (albeit also infused with political imperatives) ... further weakens the opportunity to employ it strategically as a lever with which to bring about organisational change, including the erosion of established “information domains”. Within Scotland’s local government FOI sits subsumed within the Weberian “iron cage” of bureaucratic-administrative rationality, contributing incremental change in organisational arrangements, its strategic (and democratic) potential largely unacknowledged and untapped.³¹

The same could be observed fairly of the Queensland experience.

The sustaining, missing link in getting government from a freedom of information law to real enhancements in openness and accountability is a politically supportive and enabling broader information policy context.

³⁰ Rhys Stubbs submission to the FOI Independent Review Panel discussion paper, p. 6 (footnote included).

³¹ Burt, E. and Taylor, J., “Managing Freedom of Information in Scottish Public Bodies: Administrative Imperatives and Political Settings”, *Open Government: A Journal on Freedom of Information*, Volume 4 Issue 1, 11 April 2008.

This is bigger than the (draft) strategic priorities in the (consultation draft) discussion paper on information management³² which is only concerned with ensuring information is “appropriately available” where existing FOI “control” guides the appropriateness. Rather, a change statement in information policy is required, not just a consolidation and extension around the bits and pieces that already exist.

A comprehensively developed formal policy statement with appropriate consultation will take time. In the short term at least, let not a matter of form preclude the matter of substance. In order to maintain change momentum for improved FOI outcomes and as a critical partner for the new Act recommended by the Panel, Government should make a high profile and priority decision on guiding information policy principles and strategies as they relate to FOI’s impact on the government information lifecycle: a decision that sponsors FOI as the Act of “last resort” in accessing government information due to a fundamental paradigm shift for government to move from a “pull model” to a “push model” in its disclosure of information.

3.1 FOI as last resort in a push model

The Panel’s discussion paper highlighted —

FOI users and commentators also look for new ways of thinking about *information freedom* that technologies can deliver quickly and cheaply, but with a paradigm shift and a confidence that not only will governments still be able to govern, they will govern better.

Stewart suggests that freedom of information laws:

- which solely focus upon request and response will never fully achieve open government. RD/AD [routinely disclose and actively disseminate] emphasises identifying possible public interest in a document (before ever receiving a request) and consequently circulating information about the document, or the document itself, to those likely to be interested. There are many other steps that can be taken such as having an easily distributed “public edition” with excisions (if needed) and putting frequently requested documents in real or electronic reading rooms.

Moira Paterson described the criticisms of existing freedom of information frameworks similarly as depending

too much on a “pull model” which focuses on the dissemination of information in response to the making of individual requests for access rather than on a “push model” which emphasises the proactive publication of information ... What is required, therefore, is an obligation for agencies to anticipate requests and to use internet technology to make broad categories of information immediately

³² Discussion Paper on Information Management in the Queensland Government (consultation draft), March 2008 draft 1.0, p. 12.

available in a readily accessible form as is currently required in the United States.³³

FOI as a last resort in a push model means that a broader information policy would support government information routinely and proactively disclosed by government without first needing a formal request for the information. This would leave the freedom of information law to manage a much smaller holding of government information representing that which is truly in contest in terms of contrary or competing public interests.

The current experience in Queensland is recounted by *The Courier-Mail's* FOI Consultant, John Doyle, thus —

In effect, the perception is that government agencies continue to control access to information and such information is generally only available by utilising FOI or other legislation. It should not take some government crisis, as in the case of recent events involving Queensland Health, for the public to become aware that mismanagement is occurring.

...

Furthermore, the costs of administering openness and transparency should not be treated as a financial liability or disincentive but as an investment in Queensland's proper public administration.

...

The lack of "Openness" and the default setting of "confidential" are issues that need resolution.

...

In reality there has been an increasing trend for most departmental staff to refer even the simplest inquiry to their media liaison officers.

Frequently, these media officers will not provide the information and refer the inquirer to FOI. Conversely, inquiries to FOI offices have resulted in return contact from media officers instead of an FOI officer. Rather than being open and accountable, departments appear to be more concerned with information management and pre-empting negative media reports.³⁴

An international freedom of information comparative survey published by UNESCO in January 2008 analysing the laws of 14 countries found increasing favour for the push model.

The dominant trend in all countries is to make more and more information available on a proactive basis, particularly online, whether or not this is required under a right to information law. This can promote a number of efficiencies for the public sector, as well as better service provision, both as reflected tendencies to move to ever more significant forms of e-government. Given the relative ease and low cost of proactive publication over the Internet, it only makes sense that this should be promoted, among other things because it serves as a means to reduce the number of (relatively costly) requests for

³³ FOI Independent Review Panel discussion paper pp. 118-119 (footnotes omitted).

³⁴ John Doyle submission to the FOI Independent Review Panel discussion paper, p. 2.

information. It is likely the case that the request load in countries which upload actively is far less than it would be if they did not do this.³⁵

In Queensland, the Parliamentary Legal, Constitutional and Administrative Review Committee in its *The Accessibility of Administrative Justice* Report in April 2008 opined —

In an age when search engines continually updates and improves its free delivery of information, and the speed of delivery, generally-available information, it seems incongruous that Queensland people are required to make written application and wait at least a month for what is, in very many cases, information which could be published without incident. Similarly, for information to be delivered, in paper form, rather than via digital means – online or via text message – is incongruous also.³⁶

The Wilderness Society (Queensland) Inc. submitted —

...TWSQ believes that as a guiding principle for the management and release of information, much information held by government should be available outside of FoI processes, without resort to application. This allows for greater access to information which is likely to be available under FoI anyway, but involves little or no workload or cost to the holding agency.³⁷

Rockhampton City Council's Manager Information Services and Leader of Team Records are the two main staff dealing with FOI on a day to day basis for that Council, and they ask —

If citizens can search 100,000's of Websites over the Internet in seconds, why can't they search government records themselves. If a whole of government system was developed and implemented properly, FOI would not be required, people would simply log-in and search for what they wanted.³⁸

3.2 What are the ways government information can be proactively disclosed?

The Queensland *Freedom of Information Act 1992* provides for limited publication of information concerning the affairs of agencies in the form of an annual Statement of Affairs³⁹ as well as publication of the agencies' policy documents.⁴⁰ The utility of these provisions in practice is addressed in chapter 21. Suffice to note that the limited

³⁵ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed., UNESCO, January 2008, p. 147.

³⁶ Parliamentary Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice*, Report No. 64, April 2008, p. 37, (hereinafter referred to as LCARC, *The Accessibility of Administrative Justice*, Report No. 64).

³⁷ The Wilderness Society (Queensland) Inc. submission to the FOI Independent Review Panel discussion paper, p. 2.

³⁸ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 10.

³⁹ *Freedom of Information Act 1992*, s. 18.

⁴⁰ *Freedom of Information Act 1992*, s. 19.

nature and extent of the existing publication provision falls a long way short of that required to recast FOI within a “push” information policy model.

The Panel considers that the following elements should form part of a more highly evolved “push” model —

- publication schemes and proactive decision-making processes that routinely release information (including documents themselves or public editions thereof) at large, or to specific interest sectors, as enabled by a range of ICT features;
- disclosure logs that provide online access to information already released under freedom of information. (The Government of the day may also wish to add supplementary contextual information providing greater balance or depth to the issue(s));
- greater administrative release through the exercise of executive discretion in good faith and in the appropriate circumstances (with sufficient legal protection) rather than the current tendency to refer all requests for documents to be managed through the longer and more expensive FOI processing model; and
- administrative access schemes for appropriate information sets, such as Queensland Health (health records) and Queensland Police Service (criminal records).⁴¹

This “push” model would be supported by sufficient legal protections, and through the active monitoring efforts and collaborative approach of the Information Commissioner in a revamped role (see chapter 20).

A number of submissions to the Panel’s discussion paper supported these varying ways to increase routine dissemination of information by government, without the need to make FOI applications.

The following example highlights the inadequacies of FOI’s relationship with other legislation, in the absence of a whole of government information policy context supporting a push model. The *Integrated Planning Act 1997* requires that development applications be publicly available up to the point of approval or lapsing. After that point, the development applications are no longer public and Councils tend to make people seek such information through FOI, even though it was once publicly available. The Panel considers those development applications that are no longer current (and have not been destroyed in compliance with appropriate disposal schedules) would be likely candidates for a local government model publication scheme to be approved by the Information Commissioner.

In its submission, the Redland City Council understood the wider benefits of integrating information access into everyday business.

... administrative access makes the process easier for the agency and for the public and should be facilitated/encouraged by any changes that are proposed ... the whole point of administrative access is that line areas are

⁴¹ The Panel considers that “appropriate information sets” does not include personal affairs information for which a fee is levied under an administrative access scheme where it would otherwise have been a *free* entitlement under FOI.

given the tools to provide access and this is considered to be the better approach.⁴²

Support too is found in *The Accessibility of Administrative Justice* report by the Queensland Parliamentary Legal, Constitutional and Administrative Review Committee in its April 2008 recommendation.

The *Freedom of Information Act 1992* should be amended to require every agency to adopt and maintain a scheme which relates to the general publication of information by the agency and is approved by the Information Commissioner.⁴³

The Parliamentary Committee suggested that —

... publication of government-held information should be established practice. Almost all information, “the grist of government processes”, should be available generally, without charge, without the need for a written application and without the need to resort to an application under the *Freedom of Information Act*. Accordingly, rather than wholly discretionary “administrative access schemes” information should be made available via government policies regarding “publication”. Delivery of information in this way should be evaluated and improved on a continual basis.⁴⁴

The mandatory duty to publish in the United Kingdom requires that every public body must develop, publish and implement a publication scheme taking into account the public interest in access to the information it holds.

Importantly, the scheme must be approved by the Information Commissioner. The Commissioner may put a time limit on his or her approval or, with six months notice, withdraw the approval (section 19). Furthermore, the Law provides for the development of model publication schemes by the Commissioner for different classes of public body. [see <www.ico.gov.uk> – approved model schemes for local government, health sector and education] As long as the scheme remains approved, any public body within the relevant class may simply apply that scheme, rather than developing its own (section 20).

This system builds a degree of flexibility into the obligation of proactive publication, so that public bodies may adapt implementation in this area to their specific needs. It also provides for oversight by the Commissioner without placing too great a burden on him or her, taking into account the very numerous public bodies. Importantly, it allows for the levering up of proactive publication obligations over time, as public bodies gain capacity in this area.⁴⁵

⁴² Redland City Council submission to the FOI Independent Review Panel discussion paper, p. 2.

⁴³ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, p. 41.

⁴⁴ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, p. 38.

⁴⁵ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed., UNESCO, January 2008, p. 122.

The Panel notes and supports in principle the further strategy (recommended by Mayo and Steinberg) raised in the Panel's discussion paper —

To improve government's responsiveness to demand for public sector information, by July 2008 OPSI [UK Office of Public Sector Information] should create a web-based channel to gather and assess requests for publication of public sector information.⁴⁶

The United States requires its information be made available electronically. Mexican law requires public bodies to make a computer available to the public for the purpose of accessing information, along with a printer and technical support where needed. The Kyrgyz and Azeri laws provide for dissemination via public libraries and the Internet while the Indian and Peruvian laws contain specific instructions to public bodies to use appropriate methods of dissemination, including in rural or low-population density areas. Further, Mendel's international comparative survey found —

Under the United States law, any information which has been released pursuant to a request and which is likely to be the subject of another request must be made available electronically, along with an index of such records. This provides a built-in mechanism for ensuring important information regularly becomes available. In Mexico, all information provided in response to a request is available electronically.

The Bulgarian law is innovative, requiring public bodies to publish information where this may prevent a threat to life, health, security or property, or where this is in the overall public interest, a potentially extensive obligation. The Azeri law similarly requires information posing a threat to life, health, property, the environment or other matters of significant public interest to be disseminated immediately on a proactive basis.⁴⁷

The United Kingdom uses disclosure logs for electronic publication of information released under freedom of information. The United Kingdom's *Best Practice Guidance on Disclosure Logs* states —

The purpose of a disclosure log is to make individual releases of information under the FOI Act available to the widest possible public audience. The benefits of a disclosure log include:

- Providing the public with a user-friendly source of information disclosed under FOI/EIRs by a public authority;
- Allowing information disclosed to one requester to be made available to a wider public audience;
- Allowing information released to be accompanied with supporting information, explaining issues of public interest in greater depth;

⁴⁶ Mayo, E. and Steinberg, T., *The Power of Information: An Independent Review*, June 2007, p. 5.

⁴⁷ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed., UNESCO, January 2008, p. 147.

- Giving the public greater understanding of what information the public authority holds, thus enabling the public to make better informed information requests in the future.⁴⁸

Disclosure log information is grouped thematically or chronologically and is subject to a search facility on keywords. The United Kingdom’s best practice guidelines encourage the sophisticated disclosure log to include information which has been disclosed proactively, as well as all or most of the information released by the public bodies in response to FOI requests (subject to lawfulness such as protection of privacy). And, an effective disclosure log complements agencies’ publication schemes:

Where appropriate, you should use your disclosure log as a driver for reviewing the information that your authority publishes as a matter of routine. For example, your disclosure log may include statistics released for one financial year that could be published proactively in successive years by way of a new class of information added to the Publication Scheme. Information published through a public authority’s disclosure log may actively influence the expansion of the public authority’s Publication Scheme.⁴⁹

...

A disclosure log should provide users with means to view and/or download documents that have been referred to on the disclosure log. A disclosure log should not merely provide a list or summary of information disclosed but should provide direct access to the information itself.

The best disclosure logs provide access via links to true copies of the documents which may be viewed and downloaded by a user without recourse to additional assistance from the public authority. If some information is withheld, this should be stated so users can see this when they download a document.⁵⁰

The Panel considers that information released under the disclosure logs should be no sooner than 24 hours after the requester is provided with the information in order to respect the requester’s first outlay of time, effort and expense in seeking the information.

3.3 How: Information policy enablers for a modern and improved FOI?

Public Records Act 2002

The Panel’s discussion paper recognised one of the ongoing challenges for the public sector and freedom of information is the “extent to which there is disjoint between its

⁴⁸ Department for Constitutional Affairs, *Best Practice Guidance on Disclosure Logs*, United Kingdom, December 2005, p. 2.

⁴⁹ Department for Constitutional Affairs, *Best Practice Guidance on Disclosure Logs*, United Kingdom, December 2005, p. 4.

⁵⁰ Department for Constitutional Affairs, *Best Practice Guidance on Disclosure Logs*, United Kingdom, December 2005, p. 6.

records management practices, priorities and workforce skills versus the requirements of legislation, standards, guidelines and expectations of good governance”⁵¹.

In 2001, Queensland’s Legal, Constitutional and Administrative Review Committee (LCARC) recommended an audit to assess the current standard of records management (both paper and non-paper) in Queensland agencies. LCARC anticipated that such an audit would benefit freedom of information (“an effective FOI regime is dependent on good records management practices in agencies”²⁸⁰), the time-based charging regime for FOI and the administrative privacy regime.²⁸¹

Queensland’s *Public Records Act 2002* requires the public sector to “make and keep full and accurate records of its activities”²⁸² and its administration is supported by various standards and guidelines such as *Information Standard 40: Recordkeeping*, *Information Standard 41: Managing Technology – Dependent Records*, *Information Standard 31: Retention and Disposal of Public Records*, *Best Practice Guide to Recordkeeping*, *Managing Electronic Messages as Records*, *Managing Email as Public Records*. The *Electronic Transactions (Queensland) Act 2001* gives electronic transactions legal recognition equating with paper-based transactions and requires that legally recognised electronic records are captured, maintained, preserved, and made accessible in accordance with the State’s laws.

...

The sector-wide audit of records management standards recommended by LCARC in 2001 has not occurred.⁵²

The Queensland Government submission reported —

Under the *Public Records Act 2002*, the State Archivist is authorised to make policies, standards and guidelines about the making, keeping, preserving management and disposal of public records. [Queensland State Archives] consults with public authorities to develop the policies, standards and guidelines issued under the Queensland Government’s Recordkeeping Policy framework. [Queensland State Archives] promotes the existence of these policies standards and guidelines in official correspondence, public sector meetings, record keepers’ forums, conferences, workshops and seminars. It writes to newly appointed CEOs of public authorities to ensure they are aware of their recordkeeping obligations, the policies, standards and guidelines published by QSA, and the practical advice and recordkeeping tools available.

[Queensland State Archives] has led agencies through a two stage self assessment process to monitor agency capacity to meet their record-keeping obligations. This occurred for departments and local governments in 2006-07 and GOCs and statutory entities in 2007-08. Formal record keeping compliance surveys were issued in each stage following the self assessment.

⁵¹ FOI Independent Review Panel discussion paper, p. 109.

⁵² FOI Independent Review Panel discussion paper, pp. 108-109.

The self assessment and surveys reveal increased awareness and commitment, especially at the executive level, to fulfilling recordkeeping responsibilities across the Queensland public sector.⁵³

Queensland's Ombudsman, David Bevan, submitted —

What I do consider essential is the need for agencies to implement protocols regarding document naming, storage and archiving, and to educate their staff about the applicable provisions contained in the *Public Records Act* (and relevant agency record retention and disposal schedules made under that Act) in order to maximise the efficiency with which documents falling within the scope of an FOI access application can be identified and located. From my experience as Ombudsman and, previously, as Information Commissioner, it is my opinion that one of the most significant problems in agencies is a lack of knowledge at all levels of the agency's obligations with respect to the retention and disposal of documents, and the various standards and best practice guidelines relating to storing, archiving and retrieval of documents.

As to the specific issue raised by the Panel regarding drafts of documents, I have noted the memorandum prepared by Queensland State Archives titled "Drafts as Public Records". In my experience, there is no uniformity of approach among agencies regarding the retention or destruction of draft documents. Yet many FOI access applications will specifically request access to drafts or notated versions of documents. It seems that applicants are particularly interested in seeing any changes or notations that have been made to documents before a final version is produced. I agree with the approach set down by the State Archivist namely, that drafts should be retained if there is a business reason for doing so, and if the draft records alterations of significance.

I am aware that, on many occasions, staff of the Office of the Information Commissioner received files from agencies that contained multiple copies of the same documents and multiple copies of drafts and re-drafts. Many of those drafts contained nothing more than typographical or grammatical amendments and added nothing to an applicant's understanding of the history of the document. Had the State Archivist's guidelines been followed, such documents would properly have been destroyed. Again, however, the key to implementing a uniform approach to this issue across government lies in preparing adequate organisational record-keeping procedures, and educating staff about the importance of those procedures.⁵⁴

Megan Carter who has been working in the field of FOI since 1981, including in Queensland as a consultant and trainer, also submitted —

Records management as a function has traditionally been regarded as low-level, staffed by the most junior officers, neither time-critical nor mission-

⁵³ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 22.

⁵⁴ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, pp. 3-4 (footnote omitted).

critical. It is frequently poorly resourced, in terms of staff as well as facilities. Years of neglect have led to problems in records management not just across Australia but internationally. The advent of FOI highlighted these problems, and in some cases was the catalyst for remedial action.

However, in general staff have low levels of skills and knowledge of good records management practices. Even at the simple level of putting proper titles on emails, or version control of draft documents, very few agencies have good records practices in place. There is very little training for the Records staff themselves or for staff generally in records management. Practices in records retention cover the entire spectrum from keeping everything “just in case”, to premature destruction of important public records. During FOI training, I include a segment on Records Management as it is quite clear that few of the FOI trainees are aware of even basic records management issues such as the existence of the *Public Records Act* and disposal schedules.

Induction training for all staff should have a segment on records management, including aspects such as handling emails. Specific short training sessions on records management should be offered as part of departmental training schedules. Periodic audits should check compliance with policies and practices.⁵⁵

The Panel agrees with this grim assessment of the state of play in records management. Add to that a full appreciation of the speed, volume and complexity of documents enabled by ICT, plus the challenges arising through the decentralised take up of Electronic Document Records Management System (EDRMS) where there is no uniformity across the Queensland public sector with agencies implementing individual systems (and varying taxonomies).⁵⁶

The low profile and priority of the public records Information Standards and associated guidelines across government is a major concern for FOI. Significantly better awareness and compliance with *existing* Standards and guidelines would deliver better outcomes for all players in FOI.

The compelling character of information is that it affects everyone. There are no excuses. “Public records” is a broad definition affecting all public servants, every day. As such, all public servants have a duty to be aware and compliant with the governing arrangements, and all agencies must take an active role in their implementation. These are not matters that just concern the State Archivist and the records sections of departments.

The Panel agrees with the Parliamentary Committee and other commentators that FOI (and compliance with the obligations set forth in the *Public Records Act 2002*) would benefit significantly from a sector-wide audit initially to comprehensively assess and benchmark performance, with subsequent authority to audit periodically.

⁵⁵ Megan Carter submission to the FOI Independent Review Panel discussion paper, pp. 16-17.

⁵⁶ FOI Independent Review Panel discussion paper, pp. 117-118; Service Delivery and Performance Commission, *Report on Review of ICT Governance in the Queensland Government*, September 2006, p. 3.

The State Archivist’s current authority and role in making, consulting and promoting the policies, standards and guidelines with a non-mandatory, self assessment process to monitor agency capacity is not sufficient to surmount the public records challenges that beset FOI and public administration obligations generally.

The Panel recognises that the prospect of improving the lot of FOI and records-making, keeping, management and disposal particularly – is multi-dimensional and involves, necessarily, the heightened contributions of a number of players including ICT governance and the other responsibilities held by the role of the Chief Information Office, as well as a recommended broader, more substantive role in information policy by the Information Commissioner (see chapter 20).

Their combined efforts with the State Archivist, overseen by the Strategic Information and ICT CEO Committee, and reported to the Parliamentary Committee through the Information Commissioner, would be critical in supporting a new strategic information policy framework that was comprehensive, interconnected and transformative.

Electronic records management opportunities

As the Panel’s discussion paper noted, the Queensland public sector is moving progressively to implement EDRMS with the expectation that it will “facilitate quicker, easier and smarter handling of documents on a daily basis (document management) as well as proper handling of archival responsibilities (records management).”⁵⁷

Implemented well and subject to continuous improvement strategies, EDRMS should yield benefits for FOI in time savings and effectiveness in document search and retrieval.

EDRMS could be an initial platform to service two other key opportunities for FOI.

The first is EDRMS could record *ex ante* decision-making where documents that can be released without difficulty and those that might need specific consideration can be identified by those who understand the documents best, at the outset. As part of a new information policy approach, this would greatly assist later FOI decision-making but importantly it would enable easier access to uncontroversial documents through greater ICT initiatives or pending those initiatives simply through the exercise of administrative discretion without the need to proceed to FOI.

Nicola White who had been working with New Zealand’s FOI regime for nearly 20 years explained in her recent book reporting her research project on that Act —

That same broad sorting approach [Danks Committee view of the *Official Information Act* (OIA) sorting information into available, protected, and that requiring specific consideration over time] could be built into electronic information management systems, so that documents were tagged from the

⁵⁷ FOI Independent Review Panel discussion paper, p. 109.

start with an availability status of “yes”, “no” (for the short or medium term) or “maybe”. It should be possible to reconcile this approach with the OIA framework, in large part because the categorisation should operate in favour of opening up groups of documents for automatic availability.⁵⁸

Megan Carter submitted that a first step might be to trial the innovation in small pilot programs.

A variety of planning and assessment tools might be helpful if properly used. It would be useful to launch small pilot programs in which promising approaches are used in/on a defined area, and then the results evaluated and shared.⁵⁹

The Panel considers that this would be a sensible approach in preparing to transition the public sector to a consistent, well-planned *ex ante* decision-making standard that integrates well with EDRMS versions across the sector and is supported in its wider roll-out by user-friendly, agency specific guidelines.

Apart from the strategic information policy and public sector change management value it offers, the Panel expects that the small amount of time involved in the knowledgeable line areas’ input in simply initialling a “yes”, “no”, “don’t know/maybe” *ex ante* decision is a fraction of the time and effort (and therefore cost) otherwise involved subsequently.

The Redland City Council makes the further suggestion⁶⁰ also consistent with reform developments elsewhere internationally, such as the United Kingdom —

One key would be the capability of EDMS to record the “confidentiality” status of documents so that any records that are not suitable for general release are appropriately secured, whilst all others are automatically available via the website through an information portal or reading room type facility.

This is the second key opportunity for FOI that electronic storage of documents might offer: proactively publishing EDRMS metadata (such as document title, subject, author, date of creation – roughly equivalent to the data recorded for each book in a library catalogue⁶¹), and further an information portal capability for opening documents tagged (*ex ante*) “yes” for release.

Australia’s Right To Know (RTK), a coalition of media groups, submitted —

The public’s right of access to Government information can be strengthened by use of information technology. Government agencies in Queensland should endeavour to manage and store all documents electronically and create

⁵⁸ White, N., *Free and Frank: Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, Wellington, 2007, pp. 259-260.

⁵⁹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 17.

⁶⁰ Redland City Council submission to the FOI Independent Review Panel discussion paper, p. 12.

⁶¹ Roberts, R. *Blacked Out: Government Secrecy in the Information Age*, Cambridge University Press, New York, 2006, p. 219.

a centralised and freely accessible online database to allow the public to identify relevant information about documents and submit requests for documents online.⁶²

And further,

Additionally, RTK submits that advances in information and communications technology present opportunities for better storage, search and retrieval of government information. RTK notes that it is technically feasible to make information in Government databases accessible over the Internet. RTK submits that Queensland Government departments should make metadata in relation to documents, such as the title, subject, author and date of creation (as referred to on page 114 of the Discussion Paper), publicly and freely available through a centralised, online database. The online resource should also set out information on how to access unpublished government information, similar to the “inforoute” service offered by the Office of Public Sector Information in the United Kingdom. To implement such measures, Government agencies should ensure that to the greatest extent possible, information about documents is stored electronically and categorised in a way to facilitate quick and accurate retrieval.⁶³

The Panel’s discussion paper explained the United Kingdom reforms —

The Office of Public Sector Information (within the UK National Archives) maintains a single point of access called “inforoute” which provides direct access to the Government’s Information Asset Register. This Register lists information resources held by the UK Government, concentrating on government information that has not yet been, or will not be formally published. As such, the Register complements, not duplicates, existing lists of published materials and freedom of information publication schemes and seeks to cater for the “pressing demand to identify unpublished data holdings within Government”.

The Register aims to cover the vast quantities of information held by all government departments and agencies, including databases, old sets of files, recent electronic files, collections of statistics, and research.

Individual departments have primary responsibility for putting in place their own Information Asset Registers (to agreed indexing practices) which they will maintain on their own websites with links and search facilities from inforoute. The UK government says that “inforoute is evolving constantly as a collaborative effort across Government. It must not become resource-intensive or over centralised”.⁶⁴

⁶² Australia’s Right to Know submission to the FOI Independent Review Panel discussion paper, p. 2.

⁶³ Australia’s Right to Know submission to the FOI Independent Review Panel discussion paper, p. 8.

⁶⁴ FOI Independent Review Panel discussion paper, pp. 115-116 (footnotes omitted).

Similar databases exist in the US (Government Information Locator Services – GILS) and Canada (Info Source).

Megan Carter submitted —

A single entry point would have great utility. As a practitioner who has maintained an FOI-related web site since 1995, it is not possible to overstate the extent to which requesters are unaware of their FOI rights, of which jurisdiction holds the information they seek or how to obtain it...The issue of a single entry point for Australia (with direct links to each State/Territory page) is beyond the scope of this review, but would be a valuable counterpart at the federal level.⁶⁵

With the capital costs only recently expended for the varying EDRMS across the Queensland public sector, the Panel’s discussion paper acknowledged that it “may be a decade before systems’ attrition opens up new purchases to a single product”⁶⁶ but that technical and governance transition phase would require significant lead time in any event.

The Panel recommends that Government can move beyond the fifteen years old, not-in-demand, Statement of Affairs model of publishing general categories of information holdings to a more useful, contemporary, internationally practised, ICT-enabled publication of EDRMS metadata with search capability. Ideally, online access would be through a single entry point. Pending availability of the next round of new ICT systems budget to replace existing EDRMSs, agency-based pilot programs would also be a sensible and pragmatic first step with appropriate learning and feedback loops for the sector-wide endeavour.

The staff handling FOI in the Rockhampton City Council suggested —

... the best method to overcome good ICT governance is [to] make a process that can be easily implemented in the first instance and matured over time. These processes or methods could [be] developed by a central government body and then distributed to the agencies for implementation. The requirements should be simple at first and scaling up depending on the size and security required.⁶⁷

This project and future ICT sector-wide innovations should also be managed within the new whole of government strategic information policy framework, including opportunity benefits sought sector-wide from other government initiatives such as Information Queensland (and its Government Information Catalogue) and the Government Information Licensing Framework.

⁶⁵ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 18.

⁶⁶ FOI Independent Review Panel discussion paper, p. 118.

⁶⁷ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 10.

Websites and the Internet

As the Panel's discussion paper and the Queensland Government's submission note, the Queensland Government already publishes information through its websites. Initiatives such as Information Queensland, a four-year \$6.3 million program hosted by the Department of Natural Resources and Water enabling the discovery, viewing, downloading and sharing of government information⁶⁸ are commendable.

The Panel considers there is greater scope to employ the Internet in proactive publication and use of government information whilst ensuring a constant review and maintenance of that which has already been published to ensure that it does not itself become out-of-date or misleading; and that ICT innovations keep publications as user-friendly and readily accessible as possible.

Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. submitted —

Government agencies should be creating knowledgeable records for people to access. "Info-glut" is not power. Not many agency websites are kept up-to-date and this often invalidates information held. There should be up-to-date contact information available on websites, to enable people to email, phone or talk directly with trained Information Officers able to monitor and supply documents and information not yet available on their agency websites.⁶⁹

Megan Carter in addressing her submission to the Panel's question on how ICT could open up "routine disclosure" and "active dissemination" pre-FOI, suggested —

... apart from posting on websites (with references on the What's New/What's Changed pages), options would include:

- Topic-specific mailing lists or discussion groups/forums to which the public could subscribe at no cost.
- Websites dedicated to specific topics/developments and not merely to the Department or agency as a whole (eg. <GoldCoastMotorway.qld.gov.au>, <fluoridation.qld.gov.au>, <conservation.qld.gov.au>). The public could subscribe for email notifications of additions or changes.
- Blogs with RSS [Really Simple Syndication] feeds that would allow interested parties to subscribe to releases on a particular topic.⁷⁰

These suggestions merit further consideration by agencies, the Information Commissioner and other stakeholders.

⁶⁸ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 8.

⁶⁹ Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 16.

⁷⁰ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 19.

Rights of use and reuse of public sector information

Whilst it is well-established⁷¹ that release under the *Freedom of Information Act 1992* comes without condition (other than any constraints that might be imposed by the general law), the Panel has discerned that part of the reluctance by government to release documents under FOI electronically or without a watermark, or not at all, is due to its concern as to how the information might be reused.

As part of the new information policy paradigm that is required in promoting better FOI outcomes in terms of its legislative objects, a policy decision by Government accepting, even encouraging, reuse of public sector information (such as starting with the developing Government Information Licensing Framework) should help liberate the said reluctance that is experienced in the FOI domain with clean, electronic, manipulable releases of data and documents.

As the Panel's discussion paper highlighted —

One of the stated objectives for the United Kingdom's Information Asset Register is "to facilitate and encourage the reuse of government information".

In 2001, the UK Office of Public Sector Information developed a "Click-Use" licence that enables a wide range of Crown copyright material and Parliamentary material to be reused on defined terms. A development in the regulatory framework came with the enactment of a European Directive on the reuse of public sector information in 2003, the purpose of which is to *encourage* the reuse of public sector information.⁷²

The Queensland Government submission explained the Government Information Licensing Framework (GILF) as —

... creating and implementing a new standardised information licensing arrangement for all Queensland government information. This will provide enhanced, on demand access to accurate, consistent and authoritative Government-held information.

Stage 2 of the *Government Information Licensing Framework Project* was established to create a framework for the Queensland Government to support data and information access and use between Queensland Government agencies, between the Queensland Government and other government jurisdictions, between the Queensland Government and the private sector, and to the community. The framework will confirm the status of the Queensland Government as a single business entity and establish standardised terms, condition and rules for information transactions to support strategic information access and use in the delivery of government priorities.

⁷¹ *Stewart and Department of Transport* (1993) 1 QAR 227 (at paragraph 9), as quoted in the Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 25.

⁷² FOI Independent Review Panel discussion paper, p. 121 (footnotes omitted), and see further p. 122.

Importantly, IS33 (Information Access and Pricing) requires agencies to refrain from imposing unnecessary licence conditions or other restrictions which will inhibit the use of government information by citizens.⁷³

And, although the Queensland Government submission highlighted that “use and reuse schemes are not generally seen as providing alternative access to information that is regularly sought under FOI”,⁷⁴ the Panel considers that GILF’s objective to have “85% of all public sector information”,⁷⁵ (not just spatial information) open and available through its Framework, would be a significant open door to Queensland government information.

3.4 Why: collateral advantages?

Over and above the benefits in favour of enhanced openness and accountability in government and more broadly in participatory democracy (see chapter 6), the principles in favour of a public policy shift in routinely publishing government information are many. The creative thought processes, skills, experience, time, budgets, interests and innovative effort of non-government players collaborate in often unpredictably positive ways delivering better social, economic, environmental and even government outcomes. Such sits squarely within the frame of the Government’s Smart State ambition.

Environmental Defenders Office (Qld) Inc. and Environmental Defender’s Office of Northern Queensland Inc. appreciated the connections.

An open and accessible FOI regime promotes more open government and better community interaction. The more valuable information that the public can access and reuse to build knowledge and empower the community, the healthier the Queensland society, economy and environment will become.⁷⁶

Academic commentator, Alasdair Roberts, has provided a number of compelling examples from the United States in particular where computer-assisted reporting by media using government information, and data sharing with non-government organisations or academic research centres, have returned significant regulatory benefits to government:

- Environmental groups used Toxics Release Inventory data to discover and shame heavy polluters, often with a remarkable impact on industry behaviour.
- Advocacy groups created their own websites to allow the public to search data for information about polluters in their own community.

⁷³ Queensland Government submission to the FOI Independent Review Panel discussion paper, pp. 24-25.

⁷⁴ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 25.

⁷⁵ International Summit on Open Access to Public Sector Information, 4 March 2008.

⁷⁶ Environmental Defenders Office (Qld) Inc. and Environmental Defender’s Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 17.

- The *New York Times* used data from the Fatality Analysis Reporting System to demonstrate that fatal crashes involving Ford Explorer sport utility vehicles were three times as likely to be related to tyre failures as fatal crashes involving other brands which substantiated concerns about the reliability of Firestone tyres that were routinely installed on new Explorers. Despite growing controversy over Firestone’s tyres, budget-constrained federal regulators had not detected the pattern in their own database.⁷⁷

Nicholas Gruen, an economist and Visiting Fellow at the Australia Pacific School of Economics and Governance, provides this example in showing how information drives innovation (and, even how public disclosure of poor performance in a hospital can be significantly in the public interest):

New York cardiology pilot (as a result of data collection and analysis)-

- 27 surgeons were phased out of by-pass surgery.
- One hospital with mysteriously high mortality rate with emergencies. Lost 11 of 42 patients. The next year – 0 deaths.
- 41 percent mortality decline over three years.
- Press got hold of the data and resisting great professional pressure the system managers held firm.
- It is now regularly published leading to “report cards” for both hospitals and doctors.
- The system exports to other states and countries – a “destination” for cardiac patients.⁷⁸

The *Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information* adopted by members from 40 countries representing governments, civil society organisations, international bodies and financial institutions, donor agencies and foundations, private sector companies, media outlets and scholars, under the auspices of the Carter Center in February 2008 (Appendix 8) “acknowledged and appreciated” that —

... the right of access to information is a foundation for citizen participation, good governance, public administration efficiency, accountability and efforts to combat corruption, media and investigative journalism, human development, social inclusion, and the realization of other socio-economic and civil-political rights.

⁷⁷ Roberts, R. *Blacked Out: Government Secrecy in the Information Age*, Cambridge University Press, New York, 2006, pp. 201-203. Further reported examples where sharing and reuse of public sector information in other jurisdictions have resulted in social and economic benefits appear in the Panel’s discussion paper, p. 119, pp. 120-121; including references to the independent UK report by Mayo, E. and Steinberg, T., “The Power of Information: An Independent Review”, June 2007.

⁷⁸ Gruen, N., “How to choose your job, your oncologist, your fund manager and your real estate agent: Improving information flows in markets”, International Summit on Open Access to Public Sector Information, 4 March 2008.

... the right of access to information promotes efficient markets, commercial investment, competition for government business, fair administration and compliance of laws and regulations.⁷⁹

The declaration also said, “States should integrate promotion of the rights of access to information into their own national development and growth strategies and sectoral policies”.⁸⁰

RECOMMENDATIONS:

Recommendation 1

As a priority, the Queensland Government should develop a whole of government strategic information policy that posits government information as a core strategic asset in the Smart State vision, addressing the lifecycle of government information and interconnecting strategically with other relevant public policies. Freedom of information, privacy, public records, ICT governance and systems would constitute some of the elements of this overarching information policy, and would benefit from policy consistencies and cross-leveraging results.

Recommendation 2

Pending completion of the whole of government strategic information policy (Rec. 1), the Queensland Government should in the interim recast FOI’s place in the government information experience as the Act of last resort moving the existing “pull” model to a “push” model where government routinely and proactively releases government information without the need to make an FOI request.

Recommendation 3

The following elements should form part of the more highly evolved “push” model in Queensland and should be provided for in the freedom of information legislation, and supported by guidelines, sufficient legal protections, and the active monitoring efforts and collaborative approach of the Information Commissioner in a revamped role (more in chapter 20):

- publication schemes and proactive decision-making processes that routinely release as much information as practicable (including documents themselves or public editions thereof) at large, or to specific interest sectors, as enabled by a range of ever-improving ICT features;

⁷⁹ The Carter Centre, “Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information”, Paper from the International Conference on the Right to Public Information. 27-29 February 2008, p. 1.

<www.cartercenter.org/news/pr/ati_declaration.html>

⁸⁰ The Carter Centre, “Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information”, Paper from the International Conference on the Right to Public Information. 27-29 February 2008, p. 5.

<www.cartercenter.org/news/pr/ati_declaration.html>

- disclosure logs that provide online access to information already released under freedom of information (subject to lawful exceptions) no sooner than 24 hours after release to the requester (with supplementary contextual information providing greater balance or depth to the issue(s) that the Government considers necessary);
- greater administrative release through the exercise of executive discretion in good faith and in the appropriate circumstances (with sufficient legal protection) rather than the current tendency to refer all requests for documents to be managed through the longer and more expensive FOI processing model; and
- administrative access schemes for appropriate information sets only.

Specifically, the freedom of information legislation would impose a mandatory obligation for agencies and public authorities to develop and implement a publication scheme taking into account the public interest in access to the information it holds. The publication schemes must be approved by the Information Commissioner in a similar model to that operating in the United Kingdom which recognises flexibility and capacity building imperatives in the system and includes development of model publication schemes by the Information Commissioner for different classes of public body such as for local government, the health sector and education.

Published information should be made available electronically wherever possible.

Recommendation 4

The Public Records *Information Standards* (currently Nos. 31, 40, 41) should be accorded a significantly greater profile and priority in government requiring an increased monitoring and compliance effort, through-

- development of whole of government strategic information policy (Rec. 1) supported in governance terms by the collaborative efforts of the Information Commissioner, the Queensland State Archivist, and the Chief Information Officer, overseen by the Strategic Information and ICT CEO Committee, and reporting to the Parliamentary Legal, Constitutional and Administrative Review Committee through the Information Commissioner;
- sector-wide mandatory audit to assess the current standard of records management;
- deliver targeted capacity building strategies (informed by audit results) such as training and ICT solutions to compliance and systems issues; and
- periodic audits on an ongoing basis to monitor and support continuous improvements in compliance, development of standards and guidelines, and responses to emerging ICT challenges.

Recommendation 5

Ex ante decision-making rules, legal protections and support mechanisms should be introduced as a strategy in routine and proactive disclosure where documents that can be released without difficulty and those that might need specific consideration are identified at the outset. As a first stage, select pilot programs would assist preparations to transition the wider public sector to a consistent, well-planned *ex ante* decision-making standard that integrates well with EDRMS versions across the sector and is supported in its wider roll-out by user-friendly, agency specific guidelines.

Recommendation 6

Proactive publication of EDRMS metadata (such as document title, subject, author, date of creation) with search capability should be pursued, at least in select pilot form pending ICT capability and governance. The recommended model would be similar to the United Kingdom's "inforoute" and Information Asset Register and would deliver a single point of access to the publication of metadata listing unpublished information resources of government. An information portal capability for opening documents tagged (*ex ante*) "yes" for release should also be pursued.

Recommendation 7

Other ICT-enabled strategies for further consideration in publication schemes include:

- Topic-specific mailing lists or discussion groups/forums to which the public could subscribe at no cost.
- Websites dedicated to specific topics/developments and not merely to the Department or agency as a whole (eg. <GoldCoastMotorway.qld.gov.au>, <fluoridation.qld.gov.au>, <conservation.qld.gov.au>). The public could subscribe for email notifications of additions or changes.
- Blogs with Really Simple Syndication feeds that would allow interested parties to subscribe to releases on a particular topic.

Recommendation 8

The governance arrangements supporting a new strategic information policy framework should include the Information Commissioner collaborating with the Chief Information Officer and the Queensland State Archivist overseen by the relevant CEO steering committee.

Recommendation 9

The Information Commissioner, in collaboration with the Chief Information Officer and the Queensland State Archivist, should consider whether the UK's "Click-Use" licence initiative with the developments on the GILF and IS 33 and advise on Crown copyright reuse.

Recommendation 10

The Information Commissioner should take a leadership role in the change management involved in implementing a new information policy adopting a “push” model. The Information Commissioner should also guide consistency in implementation, and be alert and responsive to the support needs of smaller public authorities and local government.

4 Privacy and “personal information”

The Panel’s Terms of Reference directed it to consider —

specific issues relating to access by individuals to personal information, including the interaction between Queensland’s freedom of information regime and the protection of privacy interests⁸¹

The discussion paper issued by the Panel considered these issues in chapter 8, “Administration of FOI in Queensland”, and asked the following questions –

8.3 Protection of privacy interests

Should the differences that exist between “personal information” and information that relates to definitional “personal affairs” be reconciled?

Should Queensland consider adopting a scheme like that operating in New Zealand in which people seek personal information about themselves may do so mainly under a new Privacy Act, rather than through FOI? If there were to be a Queensland Privacy Act covering access to personal information and the correction of errors, should the Act extend beyond those official and other agencies covered by FOI to the private sector, and if so, how far?

In the event that new privacy legislation was enacted, what mechanisms should be developed to ensure consistency of administration and decision-making as between privacy and FOI legislation?

8.6 FOI applications for amendment

Should applicants be able to use the FOI Act to request amendment of personal information irrespective of how they became aware of the document containing the information?

Should the requirements of the FOI Act and any privacy legislation be harmonised to ensure the same conditions apply in relation to the amendment of personal information in official documents under both schemes?⁸²

The first question in 8.3 was also raised in chapter 7, which dealt with “Exemption provisions”, in this way —

7.4 Personal affairs

Should the term “personal affairs” in s. 44 of the Act be replaced by “personal information”?

⁸¹ FOI Independent Review Terms of Reference.

⁸² FOI Independent Review Panel discussion paper, p. 127 and p. 132.

Should the exemption reflect the provisions of Information Standard 42: Information Privacy, whether or not that becomes part of a new Privacy Act?

To what extent should workplace information about government employees be protected by s. 44?

*Does acceptance of government-funded equipment affect a claim of privacy by the user of the equipment?*⁸³

4.1 Interaction of FOI and privacy

The Panel acknowledges that, as the Queensland Government's response to the discussion paper puts it —

The nature and status of Queensland's information privacy regime, and its interaction with the FOI scheme, is an issue undergoing active policy consideration.⁸⁴

In fact, the legislative and regulatory environment at the Commonwealth as well as the State level is under review. The Commonwealth Government will shortly be considering major changes to its *Privacy Act* following the completion of the Australian Law Reform Commission's report, "Review of Australian Privacy Law". The ALRC's reporting date was 30 May 2008. Any action the Commonwealth takes may influence decisions by the Queensland Government on whether to introduce a State Privacy Act. Most other States already have Privacy Acts but Queensland has relied on an administrative scheme until now. The issue is likely to be considered also by the Standing Committee of Attorneys-General.

There may be some uncertainty about the policies that the Federal Government will adopt following the report of the ALRC. However the Panel is required to formulate recommendations about freedom of information and the protection of privacy interests. This required it to consider what it believes are the best ways of achieving these ends. In doing so, it has had recourse to the discussion paper prepared by the ALRC on privacy, though it recognises that the ultimate recommendations that the ALRC makes may not be identical with the proposals outlined in that paper, and that the Federal Government may not implement them fully (or at all).

The Panel's discussion paper noted —

In most jurisdictions there are direct links between freedom of information and privacy legislation while in the Northern Territory both are contained in the same legislation, the *Information Act 2002*. A superficial observer might wonder whether there are not irreconcilable tensions between the two concepts and might find it difficult to appreciate how the two concepts could complement one another. On the one hand, freedom of information is about making more official information available to anyone seeking it. On the other,

⁸³ FOI Independent Review Panel discussion paper, p. 85.

⁸⁴ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 16.

the main concern of privacy legislation is to protect and prevent the disclosure of personal information.

In fact both sets of laws have similar objectives when dealing with personal information. In relation to this kind of information (the nature of which was discussed in chapter 7 at 7.4, pp. 84-85) both aim to provide the individual about whom information has been obtained with access to that information and the ability to correct it if the person considers it is wrong. Freedom of information laws seek to deny such information to others who may seek it, or to restrict the kind of information that might be provided, using a public interest test.

As it happens, “the statistics make clear that (FOI) is used primarily as a tool for the exercise of information privacy rights”.⁸⁵ In most jurisdictions, the proportion of FOI applications dealing with personal issues is around 90 per cent. In Queensland, it is around 50 per cent, partly because many government workplace issues are not considered to relate to personal affairs, and partly because many applications are dealt with outside the FOI legislation, through administrative access schemes such as those of Queensland Health.

The Panel understands that the Queensland Government may soon consider changing Queensland’s current administrative regime for privacy, with a legislative scheme bringing it in line with the Commonwealth and most other States and Territories. This may be why there is a specific reference in our Terms of Reference to the relationship between FOI and privacy. In any event, the two are, as noted above, very closely linked so far as most users of FOI are concerned. However it is not the Panel’s role to make any recommendation about the adoption of a Privacy Act.

It would be possible to combine FOI and privacy in the one Act - this is what the Northern Territory has done, incorporating also its law governing archives, and combining the administration of FOI and privacy in the one office. This is probably dictated by the relatively small population in the Territory.⁸⁶

Moira Paterson has commented that —

The overlaps and tensions between freedom of information, information privacy and public records regimes and the fact that they have strong common links raises the question as to whether they should all be combined within a single Act. Another alternative would be to combine the freedom of information and information privacy laws along the lines taken in several of the Canadian provinces.⁸⁷

⁸⁵ Paterson, M., *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Sydney, 2005, p. 494.

⁸⁶ FOI Independent Review Panel discussion paper, p. 126.

⁸⁷ Paterson, M., *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Sydney, 2005, pp. 29-30.

However as she noted, the 1995 ALRC/ARC Review considered, but then rejected, the notion of combining all three Acts after finding that despite their many common aspects, each regime had a distinct purpose which was understood by the bureaucracy and, to a lesser extent, by the general public. The Review was also concerned that the proposal to extend the *Privacy Act 1988* to the private sector detracted from the appeal of a single Act.⁸⁸ The ALRC is reconsidering the issue as part of its Privacy Law review and its discussion paper affirms its earlier view that there is insufficient benefit in the proposal to outweigh the disadvantages of disturbing the current legislative framework and adds, “In particular, the fact that the *Privacy Act* regulates both the public and private sectors detracts from the appeal of a single Act.”⁸⁹

The Panel notes that the major disadvantage of combining freedom of information and privacy in the one Act adverted to by the ALRC is that the Commonwealth’s *Privacy Act* deals with both the public and private sectors. This would not be the case with a Queensland Privacy Act. The ALRC discussion paper is proposing that the reach of the Commonwealth’s *Privacy Act* should be extended to cover the whole of the private sector, excluding the need for a Queensland Privacy Act to touch the private sector. In fact, if the Commonwealth Act is amended as the ALRC seems likely to propose, Queensland would be prevented from having its privacy laws cover the private sector, under the Constitution.⁹⁰

The present *Privacy Act* of the Commonwealth excludes small businesses with a turnover of less than \$3 million. This means that potentially up to 94 per cent of businesses are exempt from the current Act. In its discussion paper, the ALRC says —

The ALRC is not convinced that an exemption for small business is either necessary or justifiable. While cost of compliance with the *Privacy Act* is an important consideration, this factor alone does not provide a sufficient policy basis to support the exemption. Further, the fact that no comparable overseas jurisdictions - including the United Kingdom, Canada and New Zealand - have an exemption for small businesses is a relevant consideration.⁹¹

The Panel considers that most applications for personal information under the *Freedom of Information Act*, and applications for amendment, should be dealt with under a privacy regime, in a separate Act.

The Panel’s discussion paper noted that most jurisdictions have opted for separate FOI and privacy laws, though not always separate administrations. It pointed out —

⁸⁸ Paterson, M., *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Sydney, 2005, p. 30. ALRC/ARC Report, pp. 47-49.

⁸⁹ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 474.

⁹⁰ *Commonwealth of Australia Constitution Act 1900* (The Constitution), s. 109 – “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

⁹¹ Australian Law Reform Commission, “Review of Australian Privacy Law”, Volume 1, Discussion Paper 72, September 2007, p. 1036.

New Zealand has moved access to personal information from FOI (the Official Information Act) to the Privacy Act. The Privacy Commissioner works closely with the Ombudsmen, who are the final review body under the Official Information Act. One advantage of this approach is that it allows FOI officers to concentrate on the task that should be their main concern, the release of information about the activities of government. Personal affairs matters should be able to be dealt with more efficiently under a Privacy Act regime, by officials trained specially for that specific task.⁹²

Paterson has written —

The requirement for applicants to make use of freedom of information mechanisms to exercise their rights to access and amend public records serves two policy purposes. It avoids duplication and the danger that information privacy rules will develop differently from those applicable to freedom of information requests. It also means that the scarce resources available for privacy oversight functions are not taken up in dealing with access and amendment complaints. However, that solution is not ideal given that freedom of information legislation is designed primarily as a vehicle for universal access and that its review mechanisms are more expensive from the perspective of applicants than those which are available in respect of breaches of the categories of privacy principles. It also creates difficulties to the extent that the rights available under each regime have not been fully synchronised with each other ...⁹³

The ALRC/ARC Review considered the overlap of the *Privacy Act* and FOI Act provisions relating to access and amendment of records and concluded that it did not give rise to any major difficulties.⁹⁴ That, it should be recalled, was written more than 12 years ago and it has a different view now.

The Queensland Government submission to this Panel says —

The rights of access and amendment recognised in Queensland's administrative privacy regime (IS42 and IS42A)) are effectively exercised through the provisions of the FOI Act. Agencies have not expressed any substantial administrative or operational difficulties with this arrangement.⁹⁵

However, as Paul Henderson pointed out in a pre-discussion paper submission to the Panel —

Queensland agencies have, in the past attempted to restrict an applicant to access their “personal affairs” and, without statutory sanction gratuitously

⁹² FOI Independent Review Panel discussion paper, p. 127.

⁹³ Paterson, M., *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Sydney, 2005, pp. 200-201.

⁹⁴ ALRC/ARC Report, pp. 55-56.

⁹⁵ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 27.

convert applications under the IPP's (policy based) on to an application for access under s. 21 of the *Freedom of Information Act 1992*. (Statutory)⁹⁶

Queensland's claimed lack of difficulty over the FOI/privacy overlap is different from the current experience at the Commonwealth level. In its discussion paper on privacy the ALRC says "Submissions to this Inquiry have noted, however, that the overlap can lead to confusion for agencies and the public".⁹⁷

The ALRC discussion paper says the ALRC "has considered various models for dealing with the overlap, including having access and amendment dealt with exclusively under the FOI Act." It says —

Another option is for access to personal information to be dealt with under the FOI Act, and amendment under the *Privacy Act*. In the ALRC's view, however, it would be confusing for agencies and the public to have access and amendment dealt with under more than one Act.

In the ALRC's view, an individual's right to access or amend his or her own personal information held by an agency should be dealt with under a new Part in the *Privacy Act*. The right to access and amend one's own personal information are fundamental privacy rights and should be dealt with under privacy legislation and subject to oversight by the Privacy Commissioner.⁹⁸

A number of submissions received by the Panel directly supported this approach. The Queensland University of Technology submission said —

The University is supportive of greater consistency between the FOI Act and IS42 and supports the suggestion that applications for access to documents relating to a person's own personal information could become the province of privacy legislation rather than FOI. This would allow the FOI Act to become the vehicle for people who want access to information about the government and its operations, rather than information about themselves. This would enhance the FOI Act's objective to provide for transparency and accountability of government.⁹⁹

The Queensland Civil Liberties Council submitted —

... we would submit that it would be entirely appropriate to remove those provisions dealing with access to personal information and the correction of errors to the *Privacy Act* leaving the FOI Act to deal with public interest issues. In fact, such a rearrangement as seems to have occurred in New Zealand may aid in focussing attention of decision makers under the FOI Act on the public

⁹⁶ Henderson, P., correspondence to the FOI Independent Review Panel, 28 December 2007, p. 2

⁹⁷ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 457.

⁹⁸ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 458 (footnote omitted).

⁹⁹ Queensland University of Technology submission to the FOI Independent Review Panel discussion paper, p. 3.

interest nature of the process and not on the position of the individual seeking access to the information.¹⁰⁰

The Roman Catholic Archdiocese of Brisbane submitted —

“Personal Information” should refer to any information that is held about an individual. The New Zealand approach is favoured whereby individuals see “personal information” about themselves and do so under the provisions of a Privacy Act rather than an FOI Act.

For example, Church, Not-for-Profit, and Community organisations comply with civil laws and as needs be, the Federal Government’s *Privacy Act* provisions. At present, Church organisations are required to promote and make available their privacy policy to members of the public. This policy is based on the National Privacy Principles (NPPs) and enables individuals access to personal information subject to certain exceptions as outlined in NPP6 and to make amendments to that information or to attach a statement from them when the organization is unwilling to amend that personal information record.

Consideration could be given to the introduction of a complementary Privacy Act in Queensland so that members of the public affected by these service providers could access their personal information.

To ensure consistency in the administration of a Privacy Act and an FOI Act a complementary Privacy Commissioner’s role is favoured that would collaborate closely with the Information Commissioner and operate in a similar manner (e.g., answerable to Parliament and not the Government of the day; educate and inform users; resolve contentious issues on their subject area; and, report annually to Parliament by way of an Annual Report).¹⁰¹

The Queensland Government submission says, in relation to the question asked by the Panel about whether Queensland should consider adopting a scheme like that operating in New Zealand in which people seeking personal information about themselves may do so mainly under a new Privacy Act, rather than through FOI —

Access and amendment rights regarding one’s own personal information are generally regarded as key privacy rights.¹⁰²

The ALRC Privacy discussion paper noted —

The Office of the Information Commissioner Northern Territory submitted that FOI access applications are frequently made up of a mix of personal and

¹⁰⁰ Queensland Civil Liberties Council submission to the FOI Independent Review Panel discussion paper, p. 20.

¹⁰¹ Roman Catholic Archdiocese of Brisbane submission to the FOI Independent Review Panel discussion paper, p. 5.

¹⁰² Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 26.

non-personal information. In the ALRC's view, this issue can be dealt with administratively by agencies and the AAT, for example, by designing forms to allow for applications relating to personal and non-personal information to be dealt with together.

In the interest of clarity, the ALRC proposes that the FOI Act be amended to provide that an individual's right to access or correct his or her own personal information is dealt with under the *Privacy Act* ...¹⁰³

The Panel agrees with the Queensland Government and the ALRC that access and amendment rights regarding one's personal information are generally regarded as key or fundamental privacy rights. It considers there would be considerable advantages in protecting those rights under a privacy regime rather than through FOI processes. Such a change should make the process simpler and quicker, for applicants and for agencies. It would permit a designated Privacy Commissioner to help safeguard and promote privacy rights, and improve procedures for providing access by people to their personal information and encourage people to discover what information is held about them and that it is accurate. It would permit greater specialisation and the development of expertise in privacy matters. It would also mean that the FOI Act would deal primarily with the matters for which it was designed, relating to governance and accountability. The system works well in New Zealand. It seems likely to be adopted by the Commonwealth.

The need for a Privacy Commissioner at State level is becoming more evident, aside from the need that would arise if the ALRC's proposals are adopted and Queensland joins most other States that already have privacy legislation. As the Government response to the discussion paper indicates, a project under the name Government Information Licensing Framework (GILF) is currently being developed by the Treasury's Office of Economic and Statistical Research (OESR).

The GILF project is about creating and implementing a new standardised information licensing arrangement for all Queensland government information. This will provide enhanced, on demand access to accurate, consistent and authoritative Government-held information.

Stage 2 of the *Government Information Licensing Framework Project* was established to create a framework for the Queensland Government to support data and information access and use between Queensland Government agencies, between the Queensland Government and other government jurisdictions, between the Queensland Government and the private sector, and to the community. The framework will confirm the status of the Queensland Government as a single business entity and establish standardised terms, conditions and rules for information transactions to support strategic information access and use in the delivery of government priorities.¹⁰⁴

¹⁰³ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 459 (footnote omitted).

¹⁰⁴ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 24.

While there are currently privacy standards that would be applied by individual agencies participating in GILF, it seems desirable there should be a need for a Privacy Commissioner to oversee their use. A call for the creation of a Privacy Commissioner was also prompted by the Justice and Other Information Disclosure Bill which allows various agencies electronic access to sensitive information. The Queensland Council of Civil Liberties spokesman, Terry O’Gorman, was quoted as saying a Privacy Commissioner was needed to ensure the various protections built into the Bill were upheld.¹⁰⁵

However the Queensland Ombudsman has suggested that his office could perform the Privacy Commissioner role. In his submission to the Panel, he said —

In the event that the Queensland Parliament enacts privacy legislation, I have indicated to the Department of Justice and Attorney-General that I am not opposed to its recommendation (as contained in its Discussion Paper dated 4 October 2007) that the Ombudsman’s Office take on a complaint resolution/oversight role as regards privacy. With the allocation of additional resources, I consider that the Ombudsman’s Office would be well-suited to discharge the role. It has the necessary independence and an established profile and reputation in the community as a complaint resolution/watchdog body.

As I understand it, the proposed privacy role for the Ombudsman’s Office would be restricted to:

- complaints and own motion investigations;
- administrative improvement;
- promoting awareness of the privacy regime;
- advocacy; and
- promoting best practice.

Of course, if the government were ultimately to decide that the oversight body should have power to make binding orders, then the role would be unsuitable for the Ombudsman’s Office. It would not be appropriate to revise the Ombudsman’s powers to make binding orders in relation to administrative actions generally, or privacy alone.

An alternative would be to combine the responsibility for privacy and FOI oversight/complaint handling within the one body, whether that body was my Office or a refocussed Office of the Information Commissioner. I note that a similar scheme has been proposed in Western Australia - namely, the Office of Privacy and Information Commissioner. We understand the legislation gives the option for the Ombudsman to hold those offices. Combining the two responsibilities would have the benefit of recognising the important connection between FOI and privacy.¹⁰⁶

¹⁰⁵ *The Courier-Mail*, 12 March 2008, p. 5.

¹⁰⁶ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 14.

RECOMMENDATIONS:

Recommendation 11

Access and amendment rights for personal information should be moved from freedom of information to a privacy regime, preferably to a separate Privacy Act.

Recommendation 12

There should be a Privacy Commissioner appointed to oversee the system providing for access and amendment of personal information.

4.2 Personal affairs and personal information

In 1991, the Commonwealth *Freedom of Information Act 1982* was amended to replace the phrase “information relating to personal affairs” with the phrase “personal information”. The aim was to introduce consistency between the exemption provision in the *Freedom of Information Act 1982* and the *Privacy Act 1988*.

As the ALRC’s current discussion paper on Australian Privacy Law explains,

12.10 The interrelationship between the FOI Act and the *Privacy Act* is significant. The FOI Act and the *Privacy Act* both regulate the way in which information is handled in government, but have different objectives. Freedom of information legislation is concerned mainly with transparency in government and protects privacy only to the extent that non-disclosure is, on balance, in the public interest. In contrast, privacy legislation is primarily focused on data protection and provides for transparency only to the extent that it enhances the information privacy rights of individuals. The *Privacy Act* and the FOI Act are designed to interact with each other. For example, the public sector exemptions under the *Privacy Act* largely mirror the exemptions under the FOI Act.

Disclosure of personal information

12.11 The most obvious interaction between the two Acts is that disclosing an individual’s personal information to another person under the FOI Act has the potential to interfere with that individual’s privacy. The FOI Act provides that every person has a legally enforceable right to obtain access to a document of an agency or an official document of a Minister, other than an exempt document.

12.12 Section 41(1) of the FOI Act provides that a document is an exempt document if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). The definition of “personal information” in the FOI Act corresponds

with that in the *Privacy Act*. The exemption under s 41(1) is subject to an exception that a person cannot be denied access to a document on the basis that it contains his or her own information. It does not prevent reliance, however, on the exemption where the information cannot be separated from personal information about another person.¹⁰⁷

The ALRC discussion paper has suggested several amendments to the FOI Act. It proposes —

Section 41(1) of the *Freedom of Information Act 1982* (Cth) should be amended to provide that a document is exempt if it:

- (a) contains personal information, and the disclosure of that information would constitute a breach of the proposed “Use and Disclosure” principle and disclosure would not, on balance, be in the public interest; or
- (b) contains personal information of a deceased individual, and the disclosure of that information would constitute a breach of the proposed “Use and Disclosure” principle (but where the principle would require consent the agency must consider whether the proposed disclosure would involve the unreasonable disclosure of personal information about any individual including the deceased individual) and disclosure would not, on balance, be in the public interest.¹⁰⁸

It also proposes to change the definition of “personal information”.

In the ALRC’s view, the definition of “personal information” should not be limited, as it currently is, to information about an individual who can be identified “from the information”. For example, if an agency has access to other information and is able to link that information with information it holds in such a way that an individual can be identified, that individual is “reasonably identifiable” and the information should be “personal information” for the purposes of the *Privacy Act*. This amendment will bring the definition into line with other jurisdictions and international instruments.¹⁰⁹

Queensland has not changed its exemption provision from “personal affairs”. As the Panel’s discussion paper observed —

The LCARC Report of 2001 noted that Information Standard 42: Information Privacy, currently applicable in Queensland, uses the term “personal information”. It did not see any real conflict at that stage with the FOI Act.

¹⁰⁷ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, pp. 449-450 (footnotes omitted).

¹⁰⁸ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 452.

¹⁰⁹ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 452.

However given the possibility that Queensland might enact its own privacy legislation, this issue may need to be revisited, as LCARC suggested.¹¹⁰

The discussion paper went on to say —

Two further issues arise, one of them also raised by LCARC. It noted the application of the section to public sector employees, and raised the question of the extent to which they forfeited privacy rights when they were carrying out their official duties. It favoured the view that the disclosure of personal information of public servants as it related to the performance of their duties did not threaten personal privacy. How much information may be disclosed may depend on the application of the public interest test that the section contains. It would presumably be sufficient to cover amendments introduced in Victoria to require consideration of whether the release of information would or was reasonably likely to endanger the life or public safety of any person. This amendment followed a case which concerned the release of names and addresses of nurses in a hospital in a situation that could have been dangerous.

A further issue concerns the way in which public sector employees can access their employment records, and how such applications are categorised. According to an early ruling by the Information Commissioner, information which merely concerns the performance by government employees of their employment duties is ordinarily incapable of being characterised as information concerning the employee's personal affairs, for the purposes of the Act.¹¹¹

The discussion paper asked —

Should the term “personal affairs” in s. 44 of the Act be replaced by “personal information”?

Should the exemption reflect the provisions of Information Standard 42: Information Privacy, whether or not that becomes part of a new Privacy Act?

To what extent should workplace information about government employees be protected by s. 44?

*Does acceptance of government-funded equipment affect a claim of privacy by the user of the equipment?*¹¹²

The Brisbane City Council submitted —

Council supports the term “personal affairs” being replaced with “personal information” wherever it appears throughout the FOI Act, not just in relation to s.44 of the Act. This would assist applicants to better understanding the

¹¹⁰ FOI Independent Review Panel discussion paper, p. 84.

¹¹¹ FOI Independent Review Panel discussion paper, p. 84-85.

¹¹² FOI Independent Review Panel discussion paper, p. 85.

difference between a “personal information” application and a “non-personal information” application and whether an application fee should be paid or not. It would also assist practitioners in the administration of the Act.¹¹³

The Queensland Ombudsman wrote —

I recommend that steps be taken to harmonise the concept of “personal affairs” in the FOI Act, with the concept of “personal information” that is used in Information Standard 42 (and in all other Privacy Acts that have already been enacted in Australia), and to make clearer the relationship between FOI and privacy. The use of consistent terminology will become even more important if the Queensland Parliament enacts a Privacy Act.

I support amending s.44(1) of the FOI Act to closely reflect the intent of s.41 of the Commonwealth FOI Act. That is, the term “personal information” should be used, using the definition that corresponds with that used in IS 42. The test should be whether disclosure would involve the unreasonable disclosure of personal information about any person. Information the disclosure of which would breach IS 42 would be exempt, subject to the public interest override that I have recommended be inserted into the Act to cover all exemption provisions.¹¹⁴

Megan Carter said the area of greatest difficulty in this area was that of work performance and assessment. She said —

Early Commonwealth case law excluded this from the definition of “personal affairs” (as it then was), and Queensland case law followed this line of authority. The Irish FOI Act definition .. includes such material within the definition of “personal information” ... but is still subject to the public interest test. I would recommend this latter approach be adopted in Queensland.¹¹⁵

The Queensland Government response to the Panel’s question as to whether “personal affairs” should be replaced by “personal information” in s. 44 of the Act was in the following terms —

The nature and status of Queensland’s information privacy regime, and its interaction with the FOI scheme, is an issue undergoing active policy consideration.

The phrase “personal information”, originating as it does in an information privacy context, is defined in very broad terms.¹¹⁶ The phrase “personal

¹¹³ Brisbane City Council submission to the FOI Independent Review Panel discussion paper, p. 2.

¹¹⁴ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 9.

¹¹⁵ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 13.

¹¹⁶ Information Standard 42 – Information Privacy defines “personal information” as “information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion”.

affairs” is undefined in the FOI Act, but, as a consequence of decisions issued by the Information Commissioner, the concept is generally understood to refer only to the private aspects of a person’s life (and not, for example, to their employment or professional affairs). The Information Commissioner has identified a “well-accepted core meaning” of the concept, which includes:

- family and marital relationships;
- health or ill-health;
- relationships with and emotional ties to other people; and
- domestic responsibilities or financial obligations.¹¹⁷

In 1991 the Commonwealth Government changed “personal affairs” in its *Freedom of Information Act 1982* to “personal information” so as to create consistency between the Commonwealth FOI Act and the *Privacy Act 1988*. Replacing “personal affairs” with “personal information” in the Queensland FOI Act would, without any additional amendment, expand the scope of the exemption contained in s.44(1), by including a considerable range of information relating to public servants and officials that is not presently regarded as falling within the meaning of “personal affairs”, such as routine employment information, names as appearing in official documents, and work or business contact details.

The “personal affairs” concept is generally well understood by FOI decision-makers.

A further consideration is the interaction between s. 44 of the FOI Act and the *Public Records Act 2002*. Section 44 of the FOI Act is directly cross-referenced in the Restricted Access Period (RAP) provisions of the *Public Records Act 2002*, and the *Public Records Act 2002* also refers to the concept of “personal affairs”, rather than “personal information”. Under section 16(4) of the *Public Records Act 2002* a RAP of up to 100 years can apply to public records containing matter affecting “personal affairs”.¹¹⁸

As to the question, “Should the differences that exist between ‘personal information’ and information that relates to definitional ‘personal affairs’ be reconciled?” the Queensland Government response was —

Privacy and FOI mechanisms operate in relation to distinct but related interests. Privacy rules generally seek to ensure relevant information is controlled and only used or disclosed in limited and clearly defined circumstances. FOI attempts to deliver ready and open access to information.

¹¹⁷ See *Stewart and Department of Transport* (1993) 1 QAR 227, where the Information Commissioner reviewed relevant AAT and Federal Court decisions (among others) dealing with the equivalent concept in the Commonwealth *Freedom of Information Act 1982*.

¹¹⁸ Queensland Government submission to the FOI Independent Review Panel discussion paper, pp. 16-17.

Adopting the broad concept of “personal information” throughout the FOI Act (and not just in relation to s.44(1), which has been addressed above) would:

- Expand the scope of information that persons could seek to have amended under s.53 of the FOI Act; and
- Impact on the fees and charges regime, as fees and processing charges are currently not imposed on individuals seeking access to their “personal affairs” information (a concept which as noted above is relatively narrow in scope).¹¹⁹

The Panel has considered the Government’s responses, but it believes it is desirable the terminology in FOI and privacy should be standardised. While it is true that “personal information” is broader than “personal affairs” the current exemption in the Act does include a public interest test that would reduce the impact of the exemption.

However, the issue needs to be considered from the privacy viewpoint. In recommendation 11 above, the Panel has proposed that issues concerning personal information should be dealt with under either a Privacy Act. This accords with developments at the national level that have been supported by the Queensland Government.

In a submission to the ALRC Issues Paper 31, *Review of Privacy*, the Queensland Government said —

The Queensland Government endorses the concept of national uniformity. In general terms, agencies have expressed the view that national consistency would enable a smoother carriage for the regulation of personal information between the states, Commonwealth government and the private sector, simplify the management of personal information in outsourcing and Public Private Partnership arrangements, and reduce issues where data is shared between the state and the Commonwealth.

The Queensland Government’s preferred model for any nationally uniform scheme would be for a consistent set of privacy principles binding both public and private sectors to be adopted by each jurisdiction by way of mirror legislation ...¹²⁰

The ALRC discussion paper, while indicating that the Commonwealth probably has the constitutional power to enact legislation in the privacy field to the near-exclusion of State law, proposes the Commonwealth and States establish a co-operative scheme. It considers the States and Territories should enact legislation that regulates the handling of personal information in that State or Territory’s public sectors that —

¹¹⁹ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 26.

¹²⁰ Queensland Government submission to Australian Law Reform Commission, Issues Paper 31, *Review of Privacy*, March 2007, p. 4.

- (a) applies the proposed Unified Privacy Principles (UPPs) and the proposed *Privacy (Health Information) Regulations* as in force under the *Privacy Act* from time to time; and
- (b) includes at a minimum:
 - (i) relevant definitions used in the *Privacy Act* (including “personal information”, “sensitive information” and “health information”);
 - (ii) provisions allowing public interest determinations and temporary public interest determinations;
 - (iii) provisions relating to state and territory incorporated bodies (including statutory corporations);
 - (iv) provisions relating to state and territory government contracts; and
 - (v) provisions relating to data breach notification.

The legislation also should provide for the resolution of complaints by state and territory privacy regulators and agencies with responsibility for privacy regulation in that state or territory’s public sector.¹²¹

The ALRC recommendation in (b)(i) above, is for use of the term “personal information”.

The Panel’s recommendation 11, and recommendation 13, that follows, are consistent with the national scheme that is likely to be adopted, and with the Queensland Government’s policy of seeking national uniformity in the privacy area.

RECOMMENDATION:

Recommendation 13

In FOI and privacy legislation the term “personal information” should replace the term “personal affairs”.

4.3 Consequential changes

The introduction of national uniform privacy principles in legislative form, and the two recommendations above, would have implications for several areas of State concern outside the direct FOI area. First, the legislation would replace the Information Privacy Principles and Information Standard No. 42.

Second, they may have implications for the *Public Records Act 2002* which uses the term “personal affairs”. However the ALRC considers that the Commonwealth’s

¹²¹ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 260.

Archives Act 1983, which also uses the term “personal affairs”, need not be amended.¹²² Nevertheless, it is proposing that —

in the interest of national consistency, the Australian Government and state and territory governments, in consultation with the Council of Australasian Archives and Records Authorities should consider reviewing the *Archives Act* and equivalent state and territory public records legislation to ensure that the “open access period” under each Act is consistent.¹²³

Third, the changes could have implications for the way employees of agencies and others might access personnel records. If the changes are adopted, the Public Service Regulations 2007 would need to be amended to reflect the standards and practices of the new privacy regime. Alternatively, the Privacy Act could set out the regime that would apply to the access by Public Service employees to their personnel records. The Panel believes the Privacy Act should clearly set down the principles that should apply and these should be reflected in any regulations that were thought necessary.

RECOMMENDATION:

Recommendation 14

If a new privacy regime is adopted, attention should be given to amending the Public Service Regulations 2007 to reflect its standards and practices unless those standards and practices were able to be sufficiently detailed in the Privacy Act.

4.4 Sensitive personal information and third parties

This matter was not raised in the discussion paper, but has been brought to the Panel’s attention by a number of people who have written submissions. The Panel has sought advice from Queensland Health in relation to one particular problem and, importantly, the systemic problem that it suggests exists.

The particular problem concerned the circumstances of the issuing of a justices examination order (JEO) under the *Mental Health Act 2000* and the subsequent refusal of access to the order or to the application for the order for the person against whom the order was made (who was found by the examining psychiatrist not to meet the description alleged). The JEO was held to be exempt because its disclosure could reasonably be expected to result in a person being subjected to a serious act of harassment or intimidation. The application was held to be exempt because (mainly) of an expectation of confidentiality. At the time of writing this report, the matter was

¹²² Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 470.

¹²³ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, p. 472.

still being considered by the Information Commissioner, and other issues concerning the correction of records were being explored.

The panel is aware that similar issues have arisen in other agencies. For example, it has received a submission concerning allegations of child abuse being levelled against adoptive parents, where the people against whom the allegations were made were not permitted access to information which would have allowed them to discover what had been alleged against them.

In relation to the JEO problem, which the Panel has tried to follow up through correspondence, a number of issues arise, including the validity of the reason for refusing access. While it may be reasonable to protect the identity of the person responsible for providing the information which resulted in the JP issuing the JEO order, it seems wrong for the person who has suffered from its possibly wrongful use not to be told, for example, the alleged behaviour which persuaded the JP the JEO should be issued. It also seems unusual that the person the subject of a JEO should not have been given a copy of the JEO.

The ALRC/ARC discussed one aspect of the problem in its joint report, under the heading “Dob ins”.¹²⁴ It pointed out that in the Commonwealth’s jurisdiction, agencies had used a number of exemptions to avoid disclosing the identity or contents of “dob ins” including existence or identity of a confidential source of information, substantial adverse effect on the proper conduct of an agency and breach of confidence. It said there was no government-wide protocol for how agencies should deal with these situations. It advised, without making a recommendation, that agencies should be particularly careful when dealing with anonymous allegations and where the identity of the informer was known, the agency should ensure that he or she was aware of the seriousness of making a false allegation. It said that as a general rule, agencies should immediately advise the person who was the subject of an allegation of its substance and invite him or her to respond. “The Review understands that this is the standard practice in some State agencies.”¹²⁵ That clearly does not appear to be the practice adopted by Queensland Health, from what the Panel has been able to discover.

In a footnote, the ALRC/ARC Report noted that the British Columbia legislation provides that an agency must, on refusing to disclose personal information supplied in confidence about an applicant, give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of the person who supplied the information.¹²⁶

The Panel considers this is one of several strategies that could be adopted by agencies. Another arises from a proposal of the ALRC in its privacy discussion paper. The information could be made available if it could be examined by a third party, independent of the person against whom the order was made, and of the agency. The ALRC discussion paper says, in part —

¹²⁴ ALRC/ARC Report, pp. 134-135.

¹²⁵ ALRC/ARC Report, p. 135.

¹²⁶ ALRC/ARC Report, p. 135 (footnote 48).

26.14 Where an organisation has lawfully denied a request for access, NPP 6.3 requires the organisation nevertheless to consider whether it would be acceptable to provide access to a mutually agreed third party intermediary.

...

Where a request for access to personal information is legitimately refused, provision for the use of a mutually agreed intermediary is important because it allows for a more flexible response. It balances the need to withhold access to personal information in appropriate circumstances with an individual's right to know what personal information is held about him or her. The objective behind this provision was explained in the explanatory material accompanying its introduction:

[NPP 6.3] is not intended to provide a mechanism to reduce access if access would otherwise be required. There will be some cases - investigations of fraud or theft for example - where no form of access is appropriate. In other cases, it should be considered as an alternative to complete denial of access. For example, in the health context, an intermediary could usefully explain the contents of the health record to the individual as an alternative to denying access to the health information altogether.

The ALRC went on to propose —

The proposed "Access and Correction" principle should provide that, where an organisation is not required to provide an individual with access to his or her personal information because of an exception to the general provision granting a right of access, the organisation must take reasonable steps to reach an appropriate compromise, involving the use of a mutually agreed intermediary, that would allow for sufficient access to meet the needs of both parties.¹²⁷

The ALRC proposal is one answer to some of the problems that arise in this area. The British Columbia legislation is another. They are not incompatible. However the Panel considers the problems that have been brought to its attention have been exacerbated by the way the public interest test has been avoided by the agency. It has chosen an exemption under s. 42 of the Act ("Matter relating to law enforcement or public safety") that does not include a public interest test. Yet it is difficult to think of a more compelling circumstance for information access than where police, in execution of a JEO, enter a person's home to take a person away for psychiatric assessment against the citizen's will, but following a psychiatric assessment that concludes detention was not justified, the agency refuses to provide the person with any information about the nature of the behaviour that was alleged that provided the foundation for issuing the JEO.

¹²⁷ Australian Law Reform Commission, *Review of Australian Privacy Law*, Volume 1, Discussion Paper 72, September 2007, pp. 759-761.

The Panel accepts there is a public interest in protecting the identity of the person who reported the behaviour to the authorities – it is important to safeguard the future operation of the reporting system. However, it finds it difficult to understand how it could ever be concluded that it is not in the public interest for the person the subject of the JEO to be given no information at all. The person was deprived of their liberty and also suffered damage to their reputation but cannot discover what was alleged against them.

It has long been established that —

The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.¹²⁸

And the *Freedom of Information Act 1992* specifically deals with the public interest in a person accessing documents concerning their personal affairs, in s. 6 –

6 Matter relating to personal affairs of applicant

If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding—

- (a) whether it is in the public interest to grant access to the applicant; and
- (b) the effect that the disclosure of the matter might have.¹²⁹

If the documents are not to be made available because they could not be redacted in a way that protected the identity of the informant, the person the subject of the JEO should at the very least be informed by the examining medical officer of the alleged conduct that resulted in the JEO being issued.

It is by no means conclusive that s. 42 does not contain a public interest test. It is always open for an agency to release matter to an applicant even though it is covered by an exemption – see section 28. What these cases demonstrate is the way exemption provisions can be applied without proper consideration of the impact of decisions under FOI on applicants.

There are other issues concerning the way JEOs are issued that are possibly beyond the scope of the Panel's Terms of Reference, though the way they are exercised in some cases raise freedom of information problems for those affected. Queensland

¹²⁸ Pemberton and The University of Queensland [1994] QICmr 32 (5 December 1994).

¹²⁹ *Freedom of Information Act 1992*, s. 6.

Health informed the Panel that in the past three years, a total of 2,542 JEOs were made out. Over 50 per cent of these did not result in a recommendation for assessment after examination by a doctor or authorised mental health practitioner.

Queensland Health said —

When considering these statistics, it is important to note that there are many reasons why a JEO may not result in a recommendation for assessment. For example, assessment documents are not made if the doctor or authorised mental health practitioner decides the person did not meet the criteria for involuntary assessment, or the person consents to further assessment or treatment, or an involuntary treatment order already exists. In other circumstances, the person may not have a mental illness. Other services (such as drug or alcohol rehabilitation or counselling services) may be more appropriate. The doctor or health practitioner can give information and make referral where appropriate.¹³⁰

The Panel nevertheless finds it surprising that, in the past three years, over fifty percent of the JEOs made did not result in a recommendation for assessment after examination by a doctor or authorised mental health practitioner.¹³¹ The relevant legislation provides that a magistrate or JP will only make a JEO when they reasonably believe that “the person about whom the application is made has a mental illness”.¹³² The Panel considers that, where JPs are making adverse and detrimental assessments of the state of people’s mental health with an error rate of more than 50 percent, then the State’s access to information regime must, in the public interest, enable a citizen’s right to know at least the alleged behaviour of concern.

The Panel notes that it is extremely rare for a magistrate to issue a JEO. Over 96 percent of the JEOs in the past three years were issued, not by a magistrate, but by a Justice of the Peace who is not required to hold any medical qualification despite the power to make a decision on another’s mental illness.

RECOMMENDATION:

Recommendation 15

Where an agency receives personal information from a third party in confidence, the agency in considering the public interest and an applicant’s right of access, should provide the applicant with a summary of the information (unless information can not be “de-identified”) and/or provide the information through an independent intermediary.

¹³⁰ Queensland Health correspondence to the FOI Independent Review Panel, 14 April 2008.

¹³¹ Queensland Health correspondence to the FOI Independent Review Panel, 14 April 2008.

¹³² Queensland Health correspondence to the FOI Independent Review Panel, 14 April 2008.

4.5 Use of government-funded equipment

The Panel's discussion paper asked, "Does acceptance of government-funded equipment affect a claim of privacy by the user of the equipment?" The Government's response was —

The fact that information concerning an individual's personal affairs may be contained in documents created using government-funded equipment - for example, an email sent from a work machine to a manager detailing health reasons for taking sick leave, or records of telephone calls made to an officer's spouse from an official telephone - would ordinarily be considered in the application of the public interest balancing test contained in s.44(1), as a factor favouring disclosure of the information.

That factor would, however, need to be balanced against factors favouring exemption or withholding of the matter, such as the individual's right to privacy, the sensitivity of the information, and a consideration of acceptable use policies that permit government employees to use public equipment for reasonable personal use.

Information Standard 38 - Use of ICT Facilities and Devices (IS38) is relevant to employee privacy in relation to government supplied ICT. It relevantly states:

The provision of Government-owned ICT facilities and devices including internet and email facilities and devices are for officially approved purposes. Limited personal use of internet and email facilities and devices should be available on a basis approved by the agency's chief executive officer.

Employees are accountable to their employing agency for the use of these technologies. Employees found to be intentionally accessing, downloading, storing or distributing pornography using Government-owned ICT facilities and devices will be dismissed.

Employees may also be disciplined or dismissed for the misuse of the internet or electronic mail in respect of material which is offensive or unlawful, although not pornographic. A pattern of behaviour (for example, repeated use) is a factor for consideration in determining disciplinary measures (including dismissal).

To ensure consistent and effective management of ICT facilities and devices agencies must:

- *develop and implement clear policies and guidelines relating to the use of government-owned ICT facilities and devices;*
- *clearly inform employees what their responsibilities are under the policies and guidelines and the consequences if those policies and guidelines are broken; and*

- *clearly inform employees of procedures that will be used to monitor compliance with the policies and guidelines.*¹³³

IS38 requires agencies to address employee use, agency monitoring, collection of employee personal information in the course of email interception and the purposes for which the information will be used. In addition, agencies must submit to the office of the Public Service Commissioner a report on employees who have been disciplined or dismissed as a result of accessing pornography and/or offensive material, including advice on what disciplinary action was taken.¹³⁴

The Queensland Ombudsman said —

If public servants and politicians are provided with government-funded equipment, then I consider that information that is gathered by the government about the use of that equipment, or that is required to be provided to the government by the user as part of the contract of use, is disclosable under the FOI Act and should not be regarded as being information that is private in nature. Such equipment is provided to public servants and Ministers by reason of their employment by the people of Queensland who pay for the equipment. As such, a high level of accountability to the public attaches to the use of the equipment. The primary reason such equipment is provided is for employment purposes, though in most cases, supplementary private use is also permitted. Where issues arise out of the private use of government equipment, I consider that the overriding principle of accountability to the public of Queensland for the use of publicly-funded equipment means that there is a strong public interest favouring disclosure that, except in exceptional circumstances, would override any privacy concerns.¹³⁵

Megan Carter responded to the Panel’s question in this way —

My personal view is that any public official who believes they have privacy while using work facilities such as their work email account, is in a fool’s paradise. However, it is fair to say that there are differences in agencies’ acceptable use policies and staff ignorance of such policies. I would entertain an argument if the content of the document were genuinely personal (eg: discussion of a sensitive health matter with a family member via work email), but not if the officer was expressing a strong personal opinion about a work-related matter.

“Webmail” (e-mail addresses which can be managed wholly within a web browser) and SMS are now so widespread and robust that in offices with internet access I believe it is reasonable to tighten acceptable use policies, clarify that all messages are work-related and potentially public records, and

¹³³ IS 38 policy statement, available at

<http://www.qgcio.qld.gov.au/02_infostand/standards/is38.htm>.

¹³⁴ Queensland Government submission to the FOI Independent Review Panel discussion paper, pp. 18-19.

¹³⁵ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, pp. 9-10.

further reduce the work email account for personal content. Family medical emergencies can be discussed via webmail, SMS and phone.¹³⁶

The Panel considers the current official guidelines are adequate at present. But they would be more useful if they were better known by employees. Public service employees have no choice but to use government equipment and as a consequence their privacy is liable to be invaded, even if their conduct is within approved guidelines. They need to be properly informed of the way their privacy rights may be compromised.

RECOMMENDATION:

Recommendation 16

The contents of information standard 38 should be widely publicised by agencies and regularly brought to the attention of employees using government-supplied equipment such as computers, and facilities such as email and internet.

¹³⁶ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 13.

5 A new operational system

What can we learn from 70-plus national FOI laws and even more sub-national ones? A great deal. Most of them, perhaps all of them, have not lived up to the expectations of those who were responsible for them. It would be too harsh to blame their architects, who crafted laws that in theory should have delivered the new, open and accountable system of democratic government that everyone seemed to want. Nor can the faults in the system be attributed entirely to the public servants, who were required to serve, through their executives, the government of the day, and through it, the public. Nor to the users, who on occasions made demands on the system that were unreasonable and even vexatious, and on others who demanded documents that they never bothered to read or use. There are excuses also for governments, that inherited systems where secrecy was the rule (and indeed that rule had been enshrined in the criminal law through official secrets legislation). Adopting “open government” was easy in principle, but extraordinarily complicated and difficult in practice.

It would seem to be relatively simple to write a freedom of information law that provides a reasonable balance between the requirements of people to access information about the way they are governed, and the government’s need to consider in confidence the policies and laws it may wish to propose. The problem, in Queensland and elsewhere, is that governments do not always remain committed to openness when that means they may be exposed to political criticism for past decisions, actions or inactions.

The Panel in this report is presenting a practical solution, based on a principled approach to the conflict between on the one hand, the demands of open government, and on the other, the way government has been conducted for more than a century – and in the view of many politicians, needs to be conducted if governments are to survive politically. The underlying problem is that at least in the initial stages of FOI, there was a degree of sympathy among those engaged in politics for the view expressed by then Queensland Premier, Sir Joh Bjelke Petersen, at a Senate hearing considering the first draft of the Commonwealth legislation, when he claimed that FOI legislation in principle represented “an attempt to graft upon the governmental structure of Australia, which is modelled upon the Westminster system ... ideas and concepts which are alien to that system”.¹³⁷ Since then, all of the major countries boasting Westminster-style systems, including Britain, Canada, Australia, New Zealand, India and South Africa, have embraced FOI.

Yet there has been a considerable degree of dissatisfaction with the operation of FOI. This has prompted innumerable reviews and attempts to patch the system. At the Commonwealth level, for example, three major pieces of work – the Australian Law Reform Commission/Administrative Review Council Review report of 1995, the Ombudsman’s own-motion report, *Needs to Know*, in 1999 and the Senate inquiry in 2001 into a private member’s Bill seeking to implement much of the ALRC/ARC Review – produced significant reform proposals, almost none of which were taken up by Government. There have been major reviews in most States, including

¹³⁷ Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information*, Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, Australian Government Publishing Services, Canberra, 1979, p. 34 (footnote omitted).

Queensland, with little result. Most of the proposed reforms would have improved the operation of the existing FOI laws. They were not adopted because what was absent from the mix was any political will, at a leadership level, to implement them.

The Panel was given a very broad mandate by Cabinet to consider virtually every aspect of freedom of information and to explore its interface with information policy, information and communication technologies, and the protection of privacy. It was also required to balance the public interest in access to information with “the need to preserve the integrity and confidentiality of deliberative processes for Ministers and other decision makers”.¹³⁸

In undertaking this task the Panel decided it would not commence with yet another line-by-line examination of the existing legislation. Rather, it would engage in an analysis of the issues that underlie the concept of freedom of information and the problems that are apparent in the operation of the regime, focussing on how those problems might be best resolved. It was prepared to consider and, if it thought it necessary, to challenge, long-held presumptions about how FOI should operate. It would base its proposals on principles that it would declare and explain.¹³⁹

One of the first matters the Panel had to consider was why the political will to create a freedom of information regime, evidenced by the passage of legislation, so often falls away after the law has become operational. There are at least three reasons. The first might be termed “executive anxiety”. This is the concern felt by Ministers and their senior advisors that FOI might endanger their ability to govern effectively. Some may feel their time and efforts are being distracted from the main game, the business of government. The second concerns the surrender through FOI of one of their main assets in the political battle to maintain dominance in the public arena, which will determine whether they will be re-elected. Information is power, secrecy provides political advantage, and time is a crucial currency – even more so now, with a 24 hours a day, 7 days a week news schedule, with everything happening with “outstanding speed”.¹⁴⁰ The third is the loss of conviction, hope and patience with FOI, one of the new administrative law reforms that more than any other, antagonises public servants and ministers because it seems bothersome and cumbersome in its administration, and provides an outlet for the querulous, vexatious and salacious, while apparently delivering few tangible benefits.

Part of the problem has nothing to do with FOI. The hyped-up news cycle referred to above, Tony Blair’s complaint that “A vast aspect of our jobs today is coping with the media – its sheer scale, weight and constant hyperactivity at points, it literally overwhelms” - is driven by technology, competition and other factors, but not FOI.¹⁴¹ And “open government” is occurring through means other than FOI – predominantly

¹³⁸ FOI Independent Review Terms of Reference.

¹³⁹ Some of these coincide with principles elaborated at a conference held at the Carter Centre, in Atlanta, in February 2008. See, The Carter Centre, “Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information”. Paper from the International Conference on the Right to Public Information. 27-29 February 2008.

www.cartercenter.org/news/pr/ati_declaration.html This is appendix 6.

¹⁴⁰ FOI Independent Review Panel discussion paper, p. 90 (footnote omitted).

¹⁴¹ FOI Independent Review Panel discussion paper, p. 90 (footnote omitted).

from “leaks” to Opposition politicians or the media, or through whistleblowing – a trend that is probably irreversible.

But there are several issues that do arise from the design and administration of FOI and it should be possible to address these directly, and to rectify the problems. If that can be done, it may be possible to regain the political will to implement a good FOI system. Unless there is that conviction, other reforms the Panel is proposing will not deliver their full potential.

The core problem for government is that quoted above from the Terms of Reference – the need to preserve the integrity and confidentiality of deliberative processes for Ministers and other decision makers. The Panel believes this can be achieved simply and without compromising other essential features of FOI. It can also be done while actually narrowing (to a considerable extent) the exemption provided for matter taken to Cabinet under the current Queensland law. The Panel considers this can be achieved by the application of a proper constitutional principle – indeed it is a constitutional imperative, the collective responsibility of Ministers to Parliament – in such a way that would provide the certainty that Ministers are entitled to have over the control and dissemination of Cabinet materials.

A similar application of principle – based on the individual responsibility of Ministers to Parliament – would direct itself to responding to executive government’s anxiety to preserve the necessary integrity and confidentiality of three essential categories of advice: incoming ministerial briefing books, parliamentary estimates briefs and question time briefs that are actually provided to each minister, and any drafts and topic lists of those documents, providing a guarantee that these would also be protected from disclosure under FOI. There is a strong public interest in Ministers being fully briefed so that they can understand the magnitude and sensitivities of an issue and thereby assume ministerial responsibility, properly answer parliamentary questions, provide sound information to Parliament, robustly defend policy decisions and, where necessary, protect collective ministerial responsibility. A guidance document issued by the British Department of Constitutional Affairs explains why it is in the public interest for officials to be able to give free and frank advice to Ministers and why this advice should not be made available under FOI.

This advice must enable [Ministers] to see the political context of the question being asked, the likely motivation for the question, the views of other MPs and Peers of the issue being discussed, and it must give them a full overview of the policy issue, Government position and background of the issue being discussed.

Even though some of the information in a PQ background briefing will be factual, and in many cases readily available in the public domain, it should nevertheless be withheld. Part of the process of providing free and frank advice is selecting the factual information that should go into a briefing pack.¹⁴²

¹⁴² White, N., *Free and Frank: Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, Wellington 2007, p. 304 (footnote omitted).

The application of the principles of collective and individual ministerial responsibility carries with it what might be regarded as a trade-off, but is really a necessary consequence of adopting the principles. Logically, if ministerial responsibility is the reason for exempting particular documents from FOI, then when ministerial responsibility ceases to apply, the documents should become more readily available. The 30-year rule preventing the disclosure of Cabinet decisions and submissions cannot be justified on this basis. Ten years seems a more appropriate period – this already applies in some other Australian States - while the three specified types of documents prepared to brief individual ministers should need to be kept confidential for no more than three years.

The fundamental change that freedom of information was intended to bring about was that people had a right to access information held by government. Unfortunately that clear statement of intent seems to have been buried by the scores of pages of legislation that are devoted to exclusions and exemptions and other qualifications of that right. The Panel proposes to confirm that right by adopting a different approach to the handling of requests for information.

The first, essential contention is that there should be maximum disclosure of information. Subject to some limited exemptions, all non-personal documents in the hands of government should be regarded as open and able to be accessed by the people. There should be an obligation on government, recognised and accepted by government, that it will disclose much of this material, proactively, or else make available for ready access. This would occur in a number of ways —

- Publication (including internet) supported by agency publication schemes
- “Push model” enablers, including –
 - proactive feeds to interest groups
 - disclosure logs
 - Information Asset Register-type capability
 - *ex ante* decision-making
 - ongoing review for publication opportunities, including web-based channel to gather and assess publication requests
 - Government Information Licensing Framework (GILF)
 - Information Commissioner collaboration and support
- Administrative release
- Formal Administrative Access Schemes across agencies for appropriate information sets
- Early Release Schedule time has expired.¹⁴³

People would be able to apply for access to any other documents not made available by agencies in these ways.

The Panel considers that access to personal information should be obtained through privacy legislation, in the form of a Queensland Privacy Act dealing only with information in the hands of government agencies. It is probable that the Commonwealth *Privacy Act* will be extended to cover virtually all private bodies

¹⁴³ These terms were explained in chapter 3. (Early Release Schedule in chapter 11).

within all states and territories, as well as nationally, and that the federal *Privacy Act* will be amended to allow people to seek their personal information.

This shift will mean that the FOI law will be concerned mainly with governance issues, rather than being an avenue for people seeking personal information. This should help to simplify the administration of the law.

The Panel believes the FOI law should apply primarily to government agencies, and to some bodies with which it has a close relationship, such as contractors and Government Business Enterprises. The proposed ambit of the law, and the reasons for suggesting some changes to the present law, are detailed in chapter 7.

The Panel has decided to recommend that the current exemptions in the legislation to which no public interest test is attached (such as the Cabinet exemption) should be retained. However all the remaining exemptions should be abolished as stand-alone, specified exemptions. Any documents that would have fallen within these categories should instead be subjected to a standardised public interest test, the test being that “access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.” The “public interest” would be defined in the legislation, in a non-exclusive list of factors that may be considered. The detailed specification of particular harm factors that might need to be taken into account in evaluating the public interest in a particular case will be included in a schedule to the Act. Those harm factors would include the various harms currently identified in those exemptions in the Act containing a public interest test and an indication of the weighting that might normally be associated with those harms. The schedule would in some cases provide a guide as to the time any particular harm might need to be considered. Some harms may have a very high degree of weighting shortly after a document is created, but the harm may diminish rapidly as time passes. Others might remain of serious concern for a number of years. The proposed “Time and Harm Weighting Guide” is intended to provide practitioners and applicants with an indication of how the various harms might be relevant to a particular document at the time it is being assessed on public interest grounds.

A two-step approach to accessing documents

The approach that the Panel recommends should be adopted for information requests is that there is a right of access, unless either —

- (a) the matter falls within an exemption, except where the time limit for the particular exemption has expired (e.g. three years for an estimates, incoming ministerial or question time briefing document) and the Information Commissioner has not agreed to a request by the Minister or an agency for it to be further extended; or
- (b) the disclosure of the matter, on balance, would be contrary to the public interest.

As will be explained in more detail in chapter 9, the present system that allows documents to be classified as an exemption subject to a public interest test, is not working as it was intended. The exemption invariably is more important in

determining whether access should be granted than the public interest test. Sometimes this happens through the application of what amounts to putting an onus on the requester to establish a public interest, in circumstances where the requester is obviously ignorant of the exact contents of the document being sought. Sometimes, the need for a public interest test to be applied is ignored. Sometimes, the fact that a document comes within an exemption is considered to be a hurdle that a public interest test will never be able to overcome.

If a requester is dissatisfied with the decision on his/her application for a document, and wishes to appeal, the present system requires that he/she should seek internal review – that is, review by a more senior officer in the relevant agency, if one is available. The Panel believes that this requirement should not be mandatory, and the requester should have the option of proceeding immediately to external review, by an independent body. This should be the Information Commissioner, who at first instance, should try to obtain a negotiated settlement of the dispute.

The Panel has considered new time frames for review, a different method of charging for applications, a review of the role of the Information Commissioner to ensure the system within agencies works better and more uniformly, as well as the encouragement of proactive disclosure systems that would result in agencies releasing more information to the public and interested people or bodies well before it is requested.

Figure 5.1 below shows diagrammatically the new scheme.

It considers all these changes would be beneficial for government as well as for requesters. Government must come to accept (as the New Zealand Government does) that the release of information and the encouragement of public debate actually improves the quality of advice offered to government and its own decision-making processes. Requesters, particularly the media, Opposition MPs and non-government organisations such as environmental organisations, should not be so discouraged from making use of FOI that they walk away from it and use other means to obtain information. But the impact of the proposals the Panel is making will be relatively marginal unless core support for freedom of information comes from the Premier and Cabinet and Parliament. Political will, will make or break the system.¹⁴⁴

¹⁴⁴ Figure 5.2 below shows spheres of influence impacting on the administration of FOI.

Figure 5.1

LEGISLATIVE ARCHITECTURE¹

Maximum Disclosure

All (non-personal) documents are **open** as enabled by-

▶ Privacy regime applies to personal information

Obligation to publish and promote open government

(1) proactive disclosure (in the first instance),

▶ Publication (including internet) supported by Agency Publication Schemes

▶ "Push model" enablers, including-

- proactive feeds to interest groups
- disclosure logs
- Information Asset Register-type capability
- *ex ante* decision-making
- ongoing review for publication opportunities, including web-based channel to gather and assess publication requests
- Government Information Licensing Framework (GILF)
- Information Commissioner collaboration and support

or

▶ Administrative release

▶ Formal Administrative Access Schemes across agencies for appropriate information sets

▶ Early Release Schedule time has expired

Last resort

(2) an application for access under the new Act

unless matter-

▶ Check *Early Release Schedule* (for expiry of exemption by time)

Minimum exemptions:

a) is **exempt**, except where time has expired and the Information Commissioner has not extended time on application of the Government or affected third party; or

Categorical (limited) with early release valve

or

b) the disclosure of which, on balance, would be contrary to the **public interest**.

▶ Public interest test is defined in the Act-

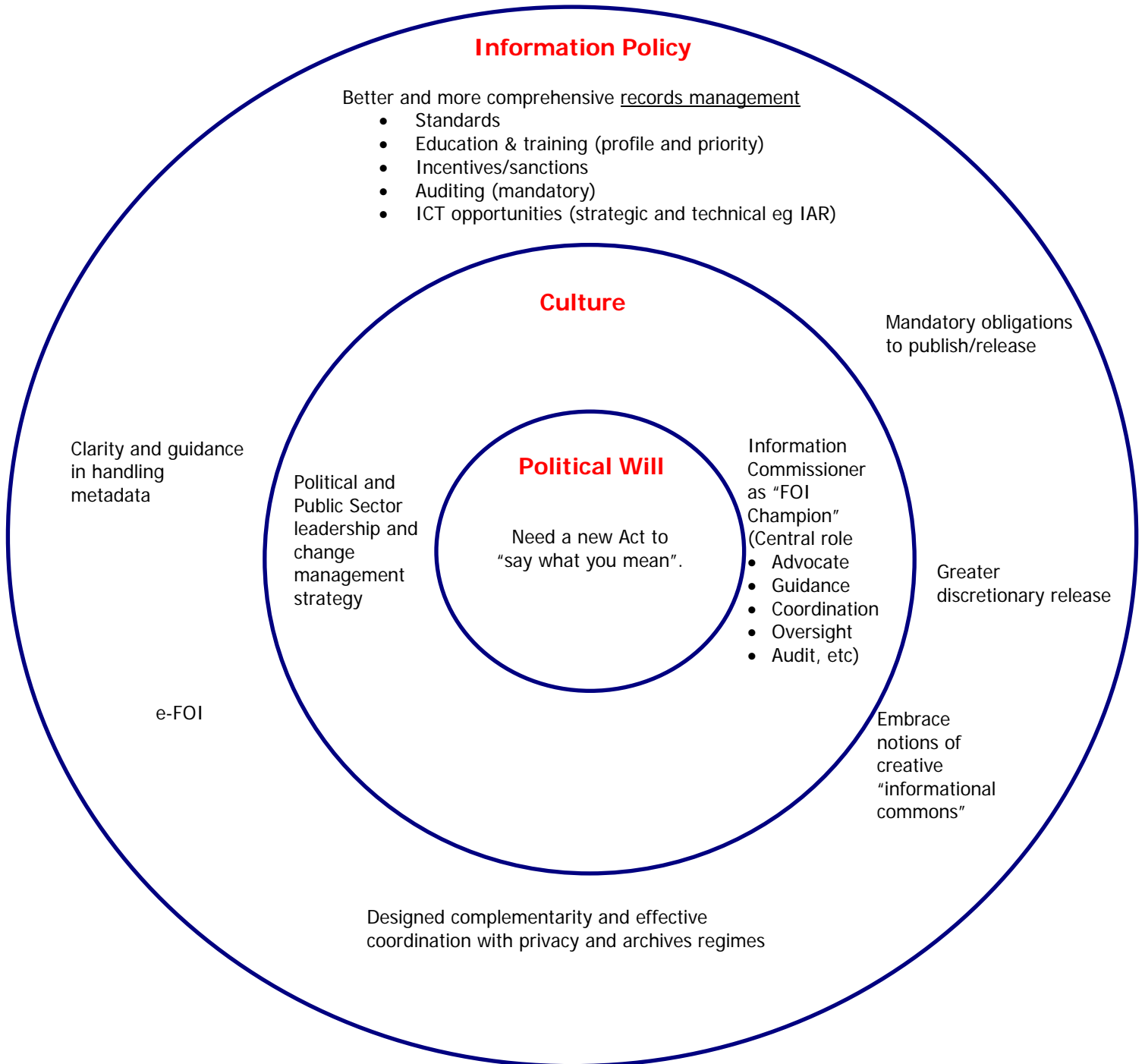
- with a non-exclusive list of factors; and
- a requirement to consult *Time and Harm Weighting Guide* for assessment of specific harms and any designated harm expiry time frame: the decision-maker to weight the harm factors accordingly in the balancing of the public interest.

Consequential (Harm test) with one public interest test listing factors, plus a weighting guide

Internal (optional) and External **Review** (External review commences with prescribed mediation period by Information Commissioner then, if necessary, determination by the Information Commissioner. Referral, or appeal, on questions of law only to QCAT.)

¹ Legislation supported by recommended public sector culture changes.

Figure 5.2 FOI: spheres of influence



6 Objects

The Panel's discussion paper, published in January 2008, was titled "Enhancing open and accountable government". As Professor John McMillan, the Commonwealth Ombudsman has pointed out —

"Open Government" is now both a catchword and a fundamental doctrine in democratic government. It is nevertheless a truism that open government will never be attained in its purest sense, and that societies and governments will never be completely open. Confidentiality, privacy and secrecy are commonplace in all forms of transaction, not just in government, but also in commercial, social and personal interaction. While accepting that inevitability, it is equally important to grasp that information is both the lifeblood of democracy and a currency of power. Democratic and responsible government thus requires that the public—who ultimately provide both the source and legitimacy for governmental power—has a right to know how it is being governed. Relationships across government and with the public depend upon an effective flow of information. "Open government" is designed to facilitate that information flow and to ensure that the public is fully informed about government processes and decision-making. In short, "open government" provides a means to promote public accountability.¹⁴⁵

Accountability has a series of meanings. Professor Richard Mulgan says government accountability is based on the accountability of the executive to parliament and the judiciary, the former through financial accountability and ministerial responsibility. He says —

Beyond formal accountability, institutions such as parliament and the courts, the wider structure of democratic politics – through such mechanisms as voting, interest groups and communication through the media – can be seen as providing further avenues for government accountability. All such mechanisms offer citizens individually or collectively the opportunity to question elements of the government, to engage them in public discussion about their actions and to seek changes. Accountability is thus a central feature of representative democracy.¹⁴⁶

Thus, open government promotes accountability and accountability is a central feature of representative democracy. And freedom of information is a crucial ingredient of, and contributor to, open government and accountability.

Toby Mendel, in his book *Freedom of information: a comparative legal survey*, deals extensively with what he describes as the utilitarian goals underlying the widespread recognition of the right to information. He says —

¹⁴⁵ McMillan J., "Freedom of Information and whistleblower legislation: An Australian perspective". Presentation to the 9th Asian Ombudsman Association Conference, Hong Kong, 30 November 2005, p. 1.

¹⁴⁶ Mulgan, R., "Accountability" in Galligan, B., and Roberts, W., *The Oxford Companion to Australian Politics*, OUP, South Melbourne, 2007, pp. 12-13.

Information is an essential underpinning of democracy at every level. At its most general, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies for example of public education and health services, to mechanisms for commenting on draft policies, laws or development programmes.

Effective participation at all of these levels depends, in fairly obvious ways, on access to information, including information held by public bodies. Voting is not simply a political beauty contest. For elections to fulfil their proper function – described under international law as ensuing that “[t]he will of the people shall be the basis of the authority of government” – the electorate must have access to information. The same is true of other forms of participation. It is difficult, for example, to provide useful input to a policy process without access to the thinking on policy directions within government, for example in the form of a draft policy, as well as the background information upon which that thinking is based.

Participation is also central to sound and fair development decision-making. The UNDP Human Development Report 2002: *Deepening Democracy in a Fragmented World* points to three key benefits of democratic participation: it is itself a fundamental human right which all should enjoy; it protects against economic and political catastrophes; and it “can trigger a virtuous cycle of development”. Inasmuch as access to information underpins effective participation, it also contributes to these outcomes ...

Democracy also involves accountability and good governance. The public have a right to scrutinise the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

...

Commentators often focus on the more political aspects of the right to information but it also serves a number of other important social goals ...

Finally, an aspect of the right to information that is often neglected is the use of this right to facilitate effective business practices. Commercial users are, in many countries, one of the most significant user groups. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. A right to information helps promote a fluid information flow between government and the business sector, maximising the potential for synergies. This is an important benefit of

right to information legislation, and helps answer the concerns of some governments about the cost of implementing such legislation.¹⁴⁷

The Panel's discussion paper asked nine separate questions about what the Objects section of the Act should contain and what it should say, and whether there should be a preamble and what it should say.

The Queensland Government submission said, "The Government has no objection to considering an expanded objects section within the FOI Act."¹⁴⁸

The Queensland Council for Civil Liberties said the Act should contain a preamble. It said —

The right of an individual to access information created by the Act is the mechanism by which the public interest in the public having access to public information is secured.¹⁴⁹

As to whether the Objects section should be expanded it said —

the Act should focus on the serving of those public interest grounds identified by the Parliamentary Legal and Constitutional Administrative Review Committee (LCARC) and others namely

- effective participation in government
- increasing accountability
- understand the decision-making process
- create a culture of openness and transparency
- improve the quality of decision-making
- greater public confidence in government

rather than the "rights" of an applicant to a document.¹⁵⁰

It also considered the Act should specifically recognise "openness" as an object, "It should also place the onus on the Executive to consider the purposes and objects of the Act in all decision-making activities."¹⁵¹

Megan Carter also referred to the LCARC Report of 2001. She said —

I tend to agree with LCARC that without some reference to the competing interests, an Objects clause would give a false impression of total availability. And yet in terms of the balance within the Act, there is one page setting out the Object of increasing access, compared with 15 pages setting out restrictions, so

¹⁴⁷ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, pp. 4-5 (footnotes omitted).

¹⁴⁸ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 4.

¹⁴⁹ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 4.

¹⁵⁰ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 4.

¹⁵¹ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 4.

that it is vitally important to get a clear statement of maximising disclosure in the Objects clause.¹⁵²

The Queensland Ombudsman considered that the Act should contain a Preamble. He said —

The Preamble should make clear that access to government information is a right and that the FOI Act is intended as a legislative support to the overriding principle of openness in government. I note the recommendations that the Australian Law Reform Commission made in 1995 regarding the insertion into the Commonwealth FOI Act of a Preamble. Similarly, I consider that the Queensland Act should contain a Preamble that explains that:

- access to information held by the government is a public right essential to the freedom of communication that is inherent in Queensland’s system of representative democratic government;
- this right of access will enable the community to participate in the processes of government and will enhance government accountability;
- the right recognises that information held by government is a public resource;
- the right of access to one’s own personal information also serves to protect individuals’ privacy;
- the Act should not displace less formal procedures for access to information but should be regarded as a legislative “last resort”.¹⁵³

The Ombudsman also considered that enhancing the public’s ability to participate in government policy formulation and decision-making was an important object of FOI legislation and should be included in the Objects clause. He said —

In addition, I have no difficulty with further expanding the objects clause to include better public administration and improved decision-making, nor with acknowledging “openness” as a specific aim of the Act. All are recognised benefits of an effective and accepted FOI regime.¹⁵⁴

The Australian Press Council said —

The objects clause should be redrafted to give greater emphasis to the aims of open and accountable government and to reduce the emphasis given to exemptions to the obligation to disclose information.¹⁵⁵

Rhys Stubbs from the University of Tasmania said —

¹⁵² Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 4.

¹⁵³ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 2 (footnote omitted).

¹⁵⁴ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 2.

¹⁵⁵ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 10.

The section of the Act should be expanded to include better public administration and other benefits such as improved quality of government decision-making. But what does this really mean? I think there are two sides as to how FOI actually contributes to “better” governance. First, it means better governance in the sense of increasing democratic participation and accountability. Second, the enhanced transparency facilitates more informed, clear and concise public authority. Essentially, the second point springs from the first: as the policy process is opened up, participants become more aware of the need to be up to date and articulate.

...

(T)he Object section should acknowledge openness and accountability, which are the essence of FOI. How are those interpreting the Act meant to fully understand this otherwise? There should be no assumptions when it comes to such democratically important legislation.¹⁵⁶

Stubbs also considered there should be a preamble.

Indeed, the FOI Act should contain a preamble stating the extent to which the right to information applies to the general public. Hopefully the preamble would stipulate how Australian citizens have a universal right to view documents, with minimal exemptions, in the possession of government officials who serve the community. And this right is based on the fact that power ultimately resides in the people, who have the democratic entitlement of knowing what their government has done and is planning to do.¹⁵⁷

The present Act does not include a Preamble but it has an extensive Objects section that was amended to reflect many of the suggestions made by LCARC.

The current Objects provision in the Act says —

4 Object of Act and its achievement

- (1) The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.
- (2) Parliament recognises that, in a free and democratic society—
 - (a) the public interest is served by promoting open discussion of public affairs and enhancing government’s accountability; and
 - (b) the community should be kept informed of government’s operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and
 - (c) members of the community should have access to information held by government in relation to their personal affairs and should be given a way to ensure the information is accurate, complete, up-to-date and not misleading.

¹⁵⁶ Rhys Stubbs submission to the FOI Independent Review Panel discussion paper, p. 4.

¹⁵⁷ Rhys Stubbs submission to the FOI Independent Review Panel discussion paper, p. 3.

- (3) Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—
 - (a) essential public interests; or
 - (b) the private or business affairs of members of the community about whom information is collected and held by government.
- (4) This Act is intended to strike a balance between those competing interests.
- (5) The object of this Act is achieved by—
 - (a) giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and
 - (b) requiring particular information and documents concerning government operations to be made available to the public; and
 - (c) giving members of the community a right to bring about the amendment of documents held by government containing information in relation to their personal affairs to ensure the information is accurate, complete, up-to-date and not misleading.
- (6) It is Parliament’s intention that this Act be interpreted to further the object stated in subsection (1) in the context of the matters stated in subsections (2) to (5).¹⁵⁸

A preamble and an objects section

The discussion paper relevantly opened this chapter with the headlined question, “Preamble – why FOI?”. After considering the various submissions and numerous academic and other commentaries, the Panel is convinced that the Act does need to contain a section that specifically answers that question, “why FOI?”. It should place FOI in context, and explain why and how it is intended to contribute to a healthier democracy and enhance its practice. This is where it is possible to explain how FOI can support the system of representative, democratic government and encourage better public administration. This is also where it can be explained that FOI is part of a larger information policy system, that aims to increase the information government makes available to the public. This is where it should be explained that FOI is moving from being a primary method of accessing government information, to an option of last resort, because ideally government will become more proactive in making information public.

However, because it is essential that these reasons for enacting the legislation should be able to be taken into account by any court that has to interpret any of the provisions of the Act, and by anyone administering the Act, it is necessary to include them within the body of the Act. A preamble is not considered to be part of an Act for this purpose. The Panel proposes that this section should be called “Reasons for

¹⁵⁸ *Freedom of Information Act 1992*, s. 4.

enactment of Act”. This was the heading on section 5 of the original FOI Act, which was omitted from the Act in 2005 when section 4 was expanded to include much of what was then in section 5.

One of the problems with the decision in 2005 to include the reasons for enactment in the Objects section is that the section has become unwieldy and confusing. The inclusion of competing interests that tell against making information available sends the wrong message. The Objects section should be a clear statement of what the Act is intended to do. It should be reduced to its essentials – indeed, to its one essential aim. It is both possible and desirable to narrow its focus and to make it detail the primary purpose of the Act.

What is the object of the Act? In the Panel’s view, it is to provide the right of access to information held by the Queensland Government unless, on balance, it is contrary to the public interest to disclose that information.

In accordance with current drafting practice in Queensland, a footnote could then point the reader to the (new) section of the Act that (largely) defines “the public interest”.¹⁵⁹ It would not be necessary to refer, as the current section does, to personal information and its correction, as this should be covered in a new Privacy Act.

It is undesirable and unnecessary to list, as the present Act does, the “competing interests” that may prevent disclosure because of their prejudicial effect, as these are to be absorbed in the public interest test. As it currently stands, section 4 suggests the right to information is far too highly qualified. It is sufficient, in the Panel’s view to detail the one limitation to the right, namely the public interest.

It remains necessary to continue to include the direction (in effect, to the courts, agencies and the Information Commissioner) that the Act should be interpreted to further the stated object of the Act.

The Panel also considers it is necessary that a new Act should contain a preamble that explains why it is replacing the former Act. It should say that this new legislation brings a different approach to FOI, one based on a principled approach to determining what information should be made available and when. The inclusion of this preamble should underscore the fact that the new legislation involves a new commitment to making as much information as possible available.

RECOMMENDATIONS:

Recommendation 17

The Act should contain a section under the heading “Reasons for enactment of Act” stating —

Parliament recognises that in a free and democratic society —

¹⁵⁹ See chapter 9.

- (a) there should be open discussion of public affairs;
- (b) information held by government is a public resource;
- (c) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community;
- (d) openness in government enhances the accountability of government;
- (e) openness in government can increase the participation of citizens in democratic processes leading to better informed decision-making;
- (f) freedom of information legislation can contribute to a healthier representative, democratic government and enhance its practice;
- (g) freedom of information legislation can improve public administration, and the quality of government decision-making; and
- (h) freedom of information legislation is only one of a number of measures that should be adopted by government to increase the flow of information that the government controls to citizens.

Recommendation 18

The Objects section of the Act should say —

- (1) The object of this Act is to provide the right of access to information held by the Government unless, on balance, it is contrary to the public interest to provide that information.
- (2) The Act should be applied and interpreted to further the object stated in (1).

Recommendation 19

The Act should contain a Preamble stating —

This Act replaces the *Freedom of Information Act 1992*. It emphasises and promotes the right to information and involves a new commitment to providing information. It brings a different approach to FOI, one based on a principled approach to determining what information should be made available and when.

7 **Ambit of the Act**

7.1 **Government Business Enterprises**

Government Business Enterprise (GBE) is a term used, particularly by the Commonwealth Government, to describe a variety of government-owned business entities. It is used here to include what in Queensland are described as Government Owned Corporations (GOCs) and some statutory authorities and incorporated entities created by government as business enterprises. GBEs are treated in four different ways under the existing Queensland freedom of information legislation. Some are treated simply as agencies and are covered by the Act in the same way as other agencies. Some are excluded from coverage by the Act, in relation to various (identified) activities, under s. 11(1) of the Act – for example, the Queensland Treasury Corporation is excluded “in relation to its borrowing, liability and asset management related functions” (s. 11(1)(m)). Some, under s. 11A, have some of their documents excluded from coverage by the Act. These are documents received or brought into existence while carrying out “commercial activities” or any community service obligation prescribed by regulation. The five entities covered by this exclusion are listed in Schedule 2 to the Act and include, for example, Queensland Rail and the Queensland Investment Corporation. Another group of GBEs is totally excluded from FOI because they are company GOCs or other incorporated entities that owe their existence to the Commonwealth Corporations Law. As a consequence of this, each is not a body that is a public authority for the purposes of the FOI Act.¹⁶⁰

A submission by John Doyle, an FOI consultant with *The Courier-Mail*, reveals that the Information Commissioner agrees that company GOCs are not covered by FOI. *The Courier-Mail* had sought access to documents of Queensland Racing Limited. After this was refused it sought external review, and the Information Commissioner, in a letter expressing a “preliminary view” said Queensland Racing Limited did not fall within the definition of public authority because it was established under the Corporations Act, which was a Federal rather than a Queensland Act.¹⁶¹

Some of the GBEs that are listed in sections 11 and 11A (and therefore partly excluded from its operations) are also incorporated under the *Corporations Act* and hence not covered by the Act at all, but the Act has not been amended to remove them.

The Government’s policy is to have all GOCs become company GOCs.¹⁶² When this happens they would all fall completely outside the scope of FOI. However the Government’s response to the Panel’s discussion paper suggests that the total exclusion of company GOCs from FOI may be an unintended consequence of its corporatisation program. The Government response said —

While the FOI Act defines “public authority” broadly, the issue raised by the Panel at p. 64 of the Discussion Paper relating to the application of the Act to public authorities which have been created under the *Corporations Act 2001* —

¹⁶⁰ The FOI Independent Review Panel discussion paper analysed this development at p. 64.

¹⁶¹ John Doyle submission to the FOI Independent Review Panel discussion paper, pp. 5-6.

¹⁶² Bligh, A.M., Government Owned Corporations Amendment Bill, Second Reading speech, Parliamentary Debates, 31 October 2006, p. 295.

and not under a Queensland enactment – is noted. The Government’s intention is that generally, bodies established on Government initiative and for a public purpose should fall within the ambit of the FOI Act, unless expressly excluded by the Act.¹⁶³

If that is so, there may be at least two relatively simple ways of correcting the problem and bringing company GOCs back within the reach of FOI. This could be achieved by extending the definition of “public authority” in s. 9 of the present Act to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another state or territory. Alternatively, as bodies “supported directly or indirectly by government funds or other assistance or over which government is in a position to exercise control” (section 9(1)(c)(i)(A)) the Government could declare them by regulation to be public authorities for the purposes of the Act.

It is desirable to consider what kind of access should be allowed to the documents of GOCs if they are to be open to FOI: whether one of the two kinds already available under s. 11 or 11A, as mentioned above, or some other form of access. The method of exclusion chosen in ss. 11 and 11A has considerable implications for the material that is protected from disclosure under FOI.

The Government submission in response to the Panel’s discussion paper makes the claim —

GOCs are generally subject to the FOI Act. In general terms, it is the documents held by those entities which were received or brought into existence by the GOC in carrying out its commercial activities or prescribed community service obligations that are excluded from the operation of the FOI Act. The precise scope of commercial activities will vary from case to case ...
¹⁶⁴

This assertion does not explain why there are two different provisions covering GBEs. Some GBEs, listed in s. 11(1) of the Act, are excluded from the Act in relation to various identified functions. The GBEs and the nature of their exclusions identified in the section are –

- (m) Queensland Treasury Corporation in relation to its borrowing, liability and asset management related functions; or
- (n) Queensland Treasury Holdings Pty Ltd ACN 011 027 295, its wholly owned subsidiaries, and the entities controlled by the subsidiaries, in relation to their competitive commercial activities; or ...
- (r) Queensland Events Corporation Pty Ltd ACN 010 814 310, its wholly owned subsidiaries, and the entities controlled by the subsidiaries, in relation to their competitive commercial activities; or

¹⁶³ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 11.

¹⁶⁴ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 12.

- (s) Gold Coast Events Co Pty Ltd ACN 010 949 649, its wholly owned subsidiaries, and the entities controlled by the subsidiaries, in relation to their competitive commercial activities; or
- (t) Gold Coast Motor Events Co in relation to its competitive commercial activities ...¹⁶⁵

On the other hand, s. 11A is an exclusion but operates as an extremely complex class exemption that does not, on its face, explain its effect. The section says –

11A Application of Act to GOCs

This Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.

Schedule 2 lists five GOCs or groups of GOCs, the first of which says–

GOC	Application provision
Queensland Rail, or a port authority (within the meaning of the <i>Transport Infrastructure Act 1994</i>), that is a GOC.	<i>Transport Infrastructure Act 1994</i> , section 486 ¹⁶⁶

The *Transport Infrastructure Act 1994*, s. 486 is in these terms –

486 Application of Freedom of Information Act and Judicial Review Act

- (1) The [Freedom of Information Act 1992](#) does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities.
- (2) The [Judicial Review Act 1991](#) does not apply to a decision of a transport GOC made in carrying out its excluded activities.
- (3) A regulation may declare the activities of a transport GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis.
- (4) In this section –

commercial activities means activities conducted on a commercial basis.

community service obligations has the same meaning as in the [Government Owned Corporations Act 1993](#).

excluded activities means –

- (a) commercial activities; or
- (b) community service obligations prescribed under a regulation.

¹⁶⁵ *Freedom of Information Act 1992*, s.11(1); The bodies identified in (n), (r) and (s) are clearly company GOCs, and now fall outside the Act.

¹⁶⁶ *Freedom of Information Act 1992*, Schedule 2.

transport GOC means a GOC whose functions relate mainly to transport.¹⁶⁷

Effectively, it is for the government to decide whether any particular activity of a transport GOC is a commercial activity or involves a community service obligation and that as a consequence any documents in relation to those matters is excluded from FOI. It must be noted, however, that it is no contribution to freedom of information, or understanding, for an exclusion to require anyone to sift through so many twists and legislative turns to discover whether or not a document might be exempt – and of course the material quoted above is not the end of it: there remain such regulations as may or may not have declared or prescribed activities to be beyond the bounds of FOI.

It is of even more significance that these documents are excluded/exempted whether they are in the hands of the GOC or any other agency. This is an important difference between the documents of GOCs covered by s. 11 and those covered by s. 11A. As LCARC expressed it in its report —

Currently, ss 11A and 11B operate as a *documents based* exclusion. As such, the prescribed GOCs and LGOCs receive more favourable treatment than their private sector competitors. This is because FOI immunity “travels” with these entities’ documents wherever they go. In contrast, documents created by, or concerning, any private corporations or citizen which are in the possession or control of an agency are subject to the Act and are capable of being accessed under the Act subject to the applications of the exemptions provisions.

The current document-based exclusion (which appears to be unique in Australia) is inappropriate given that it affords GOCs more favourable treatment than their private sector competitors – and indeed government-owned commercial entities mentioned in s 11(1) and the FOI Regulations.

...

The committee believes that a more appropriate manner of dealing with GOCs and LGOCs would be to repeal s. 11A, s. 11B and schedule 2 and to separately list the relevant bodies in s. 11(1) in respect of documents regarding their “competitive commercial activities”, a term already defined in s. 7. (The phrase “its commercial activities” is inappropriate as, to the extent that the GOC has no competitor, there is no justification for separate treatment.)¹⁶⁸

LCARC also recommended that the exclusion covering the documents of GOCs and LGOCs concerning community service obligations (CSOs) be removed. It pointed out that in a general sense CSOs fulfil government social or community objectives; are unprofitable and so are government-funded; and would not be performed by the private sector. It said the Government’s ability to prescribe by regulation CSOs regarding which information is not to be disclosed appears to go further than exclusion provisions concerning GOC information in other Australian jurisdictions.¹⁶⁹

¹⁶⁷ *Transport Infrastructure Act 1994*, s.486.

¹⁶⁸ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 249.

¹⁶⁹ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 250.

The Panel's discussion paper listed the following brief arguments from the ALRC/ARC report for and against extending the FOI Act to cover GBEs –

In favour of FOI coverage:

- private sector accountability mechanisms and market forces do not displace the need for public accountability of GBEs due to:
 - GBEs expenditure of considerable public money, which suggests that they should therefore be publicly accountable for the use of that money;
 - GBEs are accountable to Ministers financially and strategically and the public has a democratic interest in their workings;
 - traditional private sector corporate reporting, accounting and audit requirements do not provide public accountability and potential for a just result to be achieved in individual circumstances, unlike FOI and other administrative law mechanisms which do have the potential to provide such results and benefits; and
 - the competitive environment does not facilitate a fair and just provision of goods and services. Although private remedies exist, their cost makes them prohibitive for most people, whereas administrative law remedies are by and large cheaper and therefore more accessible, and likely to lead to better accountability and decision-making ...
- GBEs should be subject to FOI to promote transparency of their operations. Such transparency is particularly important given GBEs privileged position in relation to access to capital, cost of capital, and taxation, and other regulatory privileges as compared to the private sector.
- GBEs that carry out regulatory functions should be subject to the same controls as other regulatory government bodies. As such, the FOI Act should apply to a GBE's public functions or service delivery, especially where those functions are carried out in a "less competitive or monopoly market".

Arguments against extending the FOI Act to GBEs:

- the objectives of the FOI Act are irrelevant to GBEs because GBEs operate in a commercially competitive environment;
- there is sufficient accountability provided through private sector regulatory mechanisms. For example, in a genuinely competitive market, market mechanisms ensure a high quality of administration thus removing the need for the accountability provided by the FOI Act; and
- there is a need to protect the commercial interests of the GBE from additional administrative and financial burdens and to put them on a level playing field with their private sector competitors. A level playing field

can best be achieved by removing regulatory intrusions into the affairs of GBEs, which do not apply to the private sector.¹⁷⁰

The discussion paper then said —

The ALRC/ARC Report noted that whether a completely level playing field was achievable (in relation to the private sector and GBEs) was debateable. At the end of the day GBEs were not private sector bodies though they might resemble them in many respects. It agreed that GBEs were subject to a wide range of accountability mechanisms, but said the FOI Act enhanced democratic accountability by allowing public examination of government policy and decision-making and increasing participation in that decision-making. However it considered there were questions about the degree and type of accountability that should be required and the best way to achieve it, and whether GBEs had multiple functions. Generally it considered GBEs should be subject to the FOI Act. However the greater the extent to which a GBE's commercial activities were carried out in a competitive market, the less the justification for applying the FOI Act. Those that were engaged predominantly in commercial activities in a competitive market should not be subject to the Act.¹⁷¹

The Panel's discussion paper also doubted the "level playing fields" argument. It said —

Nor is it necessarily correct to assume that corporatising GOCs creates a level (commercial) playing field. While a GOC may fall under the regulatory umbrellas erected by the Australian Competition and Consumer Commission and/or the Australian Securities and Investment Commission, they will not have to satisfy the requirements of the Australian Stock Exchange (in relation to continuous disclosure, in particular) as will most of their commercial competitors. And owing to their ability to tap government funding, they will not be subject to the discipline that commercial lenders might impose on non-GOC corporations. Additionally, documents provided by GOCs to the State are protected against disclosure under FOI, where in many cases the documents that their commercial competitors provide may not be.

The fact that GOCs have to satisfy strict legislative requirements about the way they conduct their businesses and report regularly to Ministers provides a limited degree of accountability. But in the absence of FOI and other administrative law remedies, GOCs are largely protected in their dealings with citizens/customers. Although GOCs are being insulated from this accountability, the shareholding Ministers and the Government remain politically accountable for their activities, even though they may have a blinkered view of what the GOCs are doing.¹⁷²

¹⁷⁰ Gregorcuk, H., "Freedom of Information: Government Owned Corporations, Contractors and Cabinet Exemptions", Research Bulletin No 5/99, Queensland Parliamentary Library, Brisbane, May 1999, pp. 16 – 17 (hereinafter referred to as Gregorcuk).

¹⁷¹ FOI Independent Review Panel discussion paper, pp. 65-66 (footnote omitted).

¹⁷² FOI Independent Review Panel discussion paper, pp. 66-67.

The Panel's discussion paper asked three questions directly concerning GOCs. They were —

Should Government Owned Corporations (however constituted) be exempt from provisions of the Act covering agencies and, if so, to what extent?

If world's best practice in FOI law is that FOI should extend to "any body that is exercising government functions" should any attempt be made to define what are "government functions" at a time when the responsibility for many such functions is being devolved to the private sector or GOCs?

*Should people be able to access their personal information held by organisations like GOCs that are ultimately controlled by government and, if so, to what extent?*¹⁷³

Respondents included Australia's Right to Know (RTK). It submitted —

Public agencies owned by the taxpayer carrying out public functions must be open to the QLD FOI Act, given the considerable expenditure of public money, their accountability to Ministers and ultimately, the public. Importantly, GOCs are normally involved in public functions or service delivery often in a less competitive or monopoly market and therefore need to be accountable on performance and administration. Any GOC failings present significant political problems for the relevant Minister and Government and a vigorous FOI regime reduces the temptation for secrecy.¹⁷⁴

The Leader of the Opposition, Lawrence Springborg, said —

Government owned corporations are just that: they are owned by the Government and, therefore, it is Queenslanders who are the shareholders through the shareholding Ministers. Therefore, FOI laws should have as their core an expectation that GOCs release information.

Given that many GOCs are in competing commercial environments however, the State Opposition accepts that commercial-in-confidence provisions will need to apply.¹⁷⁵

The Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. said GOCs —

were constituted to continue to provide public utility services in the face of encroaching privatisation of public resources. GOC shareholders are ministers of state who are also elected representatives of the people. GOCs are fully

¹⁷³ FOI Independent Review Panel discussion paper, p. 67.

¹⁷⁴ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 9.

¹⁷⁵ Lawrence Springborg submission to the FOI Independent Review Panel discussion paper, p. 3.

government-funded public entities and should be accountable to the public for any decisions their government-funded directors, employees and shareholders make, and GOCs should be subject to the Act.¹⁷⁶

Rockhampton City Council said —

If Government owned corporations are truly competing in an open marketplace then they should be treated like private sector entities, however if they are a monopoly then FOI should apply as it does to other Government agencies.¹⁷⁷

Megan Carter submitted that GOCs should be covered by FOI in respect of publication requirements (statements of affairs), all personal information and all other information apart from that where disclosure would damage their competitive commercial activities.¹⁷⁸

The Roman Catholic Archdiocese of Brisbane said —

Government Owned Corporations (GOC) that clearly fall within the ambit of a ministerial portfolio as an essential service and with Government endorsed/influenced appointments to their Boards of Governance should be held accountable for their actions to the community at large and subject to a Code of Conduct as applies to other public officials bound by the FOI Act's terms and provisions. In these circumstances, the following needs to apply:

1. Those covered by this extension of the FOI Act should be granted the same legal protections and support that currently apply to the Government's own Departments and Agencies.
2. The same exemption provisions that apply under the provisions of the Act should apply also to those service providers covered by the Act.
3. The extension of the FOI Act must specifically state the extent to which they are bound by the provisions of the FOI Act (e.g., only in regard to the essential services or public utilities that they are providing on behalf of the Government).
4. The cost recovery mechanism that applies currently under the FOI Act could apply to them in relation to what charges they can apply to applicants for information and further extended to allow them to claim back from the Government the difference between allowable charges and full recovery.¹⁷⁹

¹⁷⁶ Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 9.

¹⁷⁷ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 5.

¹⁷⁸ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 6.

¹⁷⁹ Roman Catholic Archdiocese of Brisbane submission to the FOI Independent Review Panel discussion paper, p. 4.

The Panel is required by its Terms of Reference to look specifically at “the operation of section 11 and section 11A (bodies to which the FOI Act does not apply)” and to do so in the context of considering the “purposes and principles of freedom of information”. The Panel can discern no principle for the distinction currently drawn in the Act between GOCs that are excluded for certain purposes, and other GOCs some of whose documents are excluded.

The Queensland Ombudsman wrote —

I consider that all GOCs should be subject to the FOI Act. I am strongly of the view that private entities that carry out public functions using public funds are accountable to the public for the way in which they perform those services and spend those funds, and should be subject to all the usual accountability measures, including the application of the FOI Act, and scrutiny by the Crime and Misconduct Commission, the Ombudsman and the Auditor-General. The commercial interests of GOCs are adequately protected by the exemptions available to agencies which are subject to the FOI Act. For example, documents that relate to their competitive commercial activities may qualify for exemption under s.45(1)(c) of the FOI Act.

As far as I can understand the position in other states, there does not appear to be a particular problem posed by GOCs vis-à-vis the FOI Act. It would seem that GOCs generally do not receive a specific exemption for commercial-type activities, but rely on the general exemptions contained in the respective FOI Acts.

To give effect to that position, s.11A and Schedule 2 of the FOI Act would need to be repealed (and any consequential amendments made to complementary legislation).

In terms of defining which bodies exercise government functions and should therefore be subject to the FOI Act, I support the analysis set out in ALRC Report 77¹⁸⁰ which identified government control as the most important characteristic. If the body is controlled by the government and spends public funds, then I consider it should be subject to the FOI Act. Government control will be established if the government has an ownership interest in the body of at least 50%. In the case of a body corporate, the government has a controlling interest if it is able to:

- control (whether directly or through its ownership interest in other bodies) the composition of the board of directors;
- cast (or control casting of) more than one half of the maximum number of votes that might be cast at a general meeting of the body;
- control more than one half of the issued share capital of the body.

If the government does not have a controlling interest in the body, then it should not be subject to the FOI Act.¹⁸¹

¹⁸⁰ ALRC/ARC Report, pp. 209-216.

¹⁸¹ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 6.

The Panel did not receive any submissions from GBEs in response to the questions asked in its discussion paper. It then wrote to 19 GBEs drawing the issues to their attention and asking if they wished to respond. As mentioned above, the Government's response to the discussion paper suggests that in corporatising GOCs under the *Corporations Act* it was not the Government's intention to take them out of the ambit of FOI.¹⁸²

By late-May replies had been received from six GOCs – Port of Townsville, Queensland Rail, Ports Corporation of Queensland, Energex, Tarong Energy and SunWater. All but Port of Townsville and SunWater are company GOCs and therefore outside FOI at present. While Port of Townsville is covered by s. 11A, it indicated it will become a company GOC on 1 July 2008. Port of Townsville submitted it should be exempt from the FOI Act as most of its documentation was exempt under that Act and it was subject to the Commonwealth *Privacy Act 1988* in relation to personal information.¹⁸³ Queensland Rail said it accepted it should not be completely exempt from FOI and said it did not use its exemptions under the Act lightly. It said the current provisions that allowed government to exempt specific functions of a GOC was an effective way for Government to ensure that any government functions carried on by GOCs were subject to the Act.¹⁸⁴ Ports Corporation of Queensland was against extending FOI to GOCs.¹⁸⁵ Energex said it was generally satisfied with the current legislative regime for FOI. It considered “public authority” in s. 9 of the Act could be more broadly defined to confirm that the Act applied to company GOCs, and considered it did fall within the definition of “public authority”.¹⁸⁶ Tarong Energy agreed with the Government submission and did not want any changes to the regime covering GOCs.¹⁸⁷ However, SunWater was supportive of the application of FOI to GOCs. It considered “government functions” should be clearly defined and limited “so that there is no need to argue about the commercial functions of organisations such as GOCs that have both elements as part of a general business”.¹⁸⁸

None of the GOCs that replied attempted to counter the argument detailed in the discussion paper that the application of the exclusions in the Act meant that they were not on a “level playing field” with private enterprise, but rather had a more privileged position.

It is likely that under the proposals being developed by the Australian Law Reform Commission all GOCs will be subject to the provisions of the *Privacy Act* (as most probably are already) and hence be required to make personal information available. This in effect is the answer to the third of the questions raised by the Panel and quoted above. It means the application of FOI to GOCs need only be concerned with governance issues.

¹⁸² Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 5.

¹⁸³ Port of Townsville letter to the FOI Independent Review Panel, 28 March 2008.

¹⁸⁴ Queensland Rail letter to the FOI Independent Review Panel, 31 March 2008.

¹⁸⁵ Ports Corporation of Queensland letter to the FOI Independent Review Panel, 2 April 2008.

¹⁸⁶ Energex letter to the FOI Independent Review Panel, 3 April 2008.

¹⁸⁷ Tarong Energy letter to the FOI Independent Review Panel, 30 April 2008.

¹⁸⁸ SunWater letter to the FOI Independent Review Panel, 12 May 2008.

In the past, the government has been persuaded to have the FOI Act amended to put some or most of their activities outside the reach of FOI. Some have been included, individually, as being excluded under s. 11(1) in relation to specified activities, normally their “competitive commercial activities”. Others have gained exemption under s. 11A with a documents-based exclusion. As LCARC noted in its 2001 report —

The current document-based ... is inappropriate given that it affords GOCs more favourable treatment than their private sector competitors – and indeed government-owned commercial entities mentioned in s 11(1) and the FOI Regulations.¹⁸⁹

This favourable treatment is a far cry from the “level playing field” argument that has been used to defend the creation of the s. 11A exclusion.

The various GBEs have, over the years since the original *Freedom of Information Act* was passed in Queensland, managed to obtain legislative intervention so as to insulate themselves from FOI, in a way that parallels the expansion of the Cabinet exemption. Both the exclusions and the exemption need to be wound back to improve accountability and promote the openness that FOI was meant to foster and encourage.

The Panel considers, as a matter of principle, that all GBEs should be treated the same way in relation to FOI. It believes they should be entitled to have their “competitive commercial activities” protected from disclosure, but not those activities where they face no competition from the private sector. Nor should their activities in relation to their community service obligations be excluded/exempt from disclosure. In fact it should be a requirement by government that matters relating to CSOs should be subject to FOI directly when they are the responsibility of GBEs, through legislative deeming provisions, and indirectly, through contractual arrangements with the relevant agency, when CSOs are performed by a private sector organisation.

The Panel also considers that this exclusion for GBEs for their “competitive commercial activities” should be subject to a public interest test, of the kind described in chapter 9. This would bring into any determination of public interest those issues commonly described as “commercial in confidence”, but the various harms that come within that business rubric would not necessarily be determinative of the outcome of any particular application for disclosure. The public interest test should be introduced as a practical way of recognising that GOCs and LGOCs are emanations of government, and that ultimately Ministers are accountable for their activities, even their competitive commercial activities. Completely excluding GBEs from FOI, or even just their competitive commercial activities, sends the wrong message to directors and managers of GOCs, concerning their ultimate responsibility to Government and to the Queensland people to whom the shareholding ministers are ultimately responsible.

The Panel considers that for the same reasons LGOCs should be treated in the same way as GOCs. There are additional reasons, however, why LGOCs should come within the purview of FOI. LGOCs are even less accountable than GOCs and they

¹⁸⁹ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 249.

can be created with fewer safeguards, simply through a resolution of the relevant local government body.

The Panel agrees with the reasoning that led the Electoral and Administrative Review Commission to conclude that it was in the public interest that all statutory authorities should be subject to FOI legislation. In the report in which it recommended the adoption of the FOI law, EARC said —

Statutory authorities, whether engaged in commercially competitive activity or not, raise two preliminary issues. First, the statutory power conferred upon the relevant authority to engage in the relevant activity, is conferred by Parliament for a public purpose. It follows that there is always a public interest in ensuring that what is, and that what remains, the conferral of a statutory power is exercised in accordance with the basis upon which it was conferred. It follows further, that the exercise of the power should be subject to the same measure of openness and accountability as the exercise of all other public powers. FOI legislation is an important means of effecting those objectives. Second, irrespective of their current capital or corporate composition, statutory authorities owe their genesis to the State either in terms of original funding or the exaction of statutory charges. Again it follows, there is a public interest in ensuring that there is continuing accountability in respect of such funds, as for all State funds.¹⁹⁰

RECOMMENDATIONS:

Recommendation 20

All bodies that are established or funded by the government or are carrying out functions on behalf of government, should be covered by FOI, unless it is in the public interest that they should not be covered.

Recommendation 21

Sections 11A and 11B and Schedule 2 should be repealed.

Recommendation 22

In section 11(1) subsections (m), (n), (r), (s) and (t) should be repealed.

Recommendation 23

As recommended in chapter 9, the harm factors included in the public interest test should include a reference to a possible prejudice to the competitive commercial activities of a Government Business Enterprise that could result from the release of information.

¹⁹⁰ Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, p. 117.

Recommendation 24

The definition of “public authority” in s. 9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.

7.2 Privately contracted government services

The Panel asked in its discussion paper —

Should there be special provisions in the Act (and, if necessary, in other legislation) to ensure that when government services are contracted out to corporations, partnerships or individuals, that the contractor should be required to provide information that would have been required under FOI if the services were being provided by an agency?¹⁹¹

The discussion paper referred extensively to the way the ALRC/ARC Review dealt with this issue, including its comment, “The trend towards government contracting with private sector bodies to provide services to the community raises significant regulatory and accountability issues.”

Where an agency contracts with a private sector body to provide services to the public on behalf of government, public information access considerations arise because it is the public, not the contracting agency, that is the ultimate recipient of the service. It is in this situation that the traditional distinction between the public and private sectors becomes blurred ... (I)f any problems occur in relation to the provision of the service, it is members of the public who will be affected and whose ability to seek redress may be reduced by the fact that they are not party to the contract. It is in this situation that adequate access to information about the performance of the contract needs to be guaranteed. Contracting with private sector bodies for the provision of services directly to the public on behalf of government poses a potential threat to government accountability and openness provided by the FOI Act. It should not be possible to avoid that accountability and openness by contracting with the private sector for the provision of services.¹⁹²

In a later report concerning contracting out, the ARC said —

... it is important that the gains in government accountability that have been achieved by the FOI Act should not be lost or diminished where services are contracted out. Normal commercial practices may not, of themselves, lead to contractors providing information voluntarily to members of the public upon request. Appropriate regimes can and should be developed which can protect

¹⁹¹ FOI Independent Review Panel discussion paper, p. 67.

¹⁹² ALRC/ARC Report, p. 199.

the interests of contractors while still ensuring democratic accountability through access to information.¹⁹³

As the discussion paper noted, the ALRC/ARC Report and the later ARC Report made a series of recommendations designed to remedy this problem. They included:

- Requiring agencies to include provisions in contracts requirements that contractors record and provide adequate information to the agency and to allow parliamentary scrutiny as well as public information access rights.
- Complaint procedures should be adequate and not lost or diminished as a result of a service being provided by a contractor rather than the government.
- Contractor's documents that directly relate to the performance of contractual obligations be deemed to be in the possession of the relevant agency.¹⁹⁴

As the discussion paper pointed out, in relation to the last of these points, the ARC noted that the citizen would then have a statutory right to seek access to the document by making an FOI request to the agency. It said a further amendment to the Act would be required to require contractors to provide these documents to the agency when an FOI request was made.¹⁹⁵

There are more radical proposals to deal with the contracting out issue. In Britain, for example, Prime Minister Gordon Brown has launched a review of FOI concentrating on the coverage of the Act. The consultation paper issued by the Government says it believes there are good reasons for doing so —

- some organisations receive large amounts of taxpayers' money to carry out functions of a public nature but are not currently subject to the Act. In fulfilling those functions it would seem appropriate that they be subject to the same scrutiny as public authorities within the scope of the Act. To include such organisations within the scope of the Act would increase transparency in the distribution and expenditure of public funds;
- some organisations have contracts to carry out important work that would otherwise be done by the public authority they contract with. For example, prisons run by HM Prison Service are currently covered by the Act but prisons operated by private contractors are not. The prisons provide similar services and apply similar standards regardless of whether they are run directly by the state or privately under contract;
- access to information about a particular service may vary across the country if in some areas it is provided by a public authority, such as the

¹⁹³ Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, August 1998, p. 52.

¹⁹⁴ ALRC/ARC Report and Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, August 1998.

¹⁹⁵ Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, August 1998, p. 57.

local authority, and in other areas it is provided under contract by a private company or by a charity or voluntary organisation in receipt of a grant;

- the coverage of the Act is narrower than that of the Environmental Information Regulations 2004 (EIRs). The EIRs apply to almost all the public authorities that are listed in Schedule 1 to the Act, as well as organisations that are under the control of these public authorities and are responsible for developing, managing, regulating or inspecting the environment on behalf of the public. It may be appropriate for some of the organisations that are covered by the EIRs also to be covered by the Act;
- some non-public authorities consider that they carry out work of a public nature and would readily accept that they should be included within the scope of the Act.¹⁹⁶

The UK paper went on to outline five options available to the Government as a consequence of the inclusion in the original Act of a power (in section 5) to designate additional organisations to which the FOI Act would apply.

The options were –

- Option 1: take no action at this time.
- Option 2: self-regulation by relevant organisations.
- Option 3: build information access obligations into contracts with organisations delivering public services.
- Option 4: introduce a single section 5 order covering a specified set of organisations.
- Option 5: introduce a series of section 5 orders so as progressively to widen coverage of the Act over time.¹⁹⁷

The consultation period closed on 1 February 2008, but at the date of writing this report, no policy decisions had been made public. However, The Campaign for Freedom of Information released its submission to the Government in mid-March. It proposes that private contractors providing services to the public on behalf of public authorities should be made subject to the Act in their own right.¹⁹⁸

The campaign director, Maurice Frankel, issued a statement in which he said —

These services were previously provided by public authorities directly and would otherwise have come under the *Freedom of Information Act* when it

¹⁹⁶ Ministry of Justice, “*Freedom of Information Act 2000: Designation of additional authorities*” October 2007, p. 10.

¹⁹⁷ Ministry of Justice, “*Freedom of Information Act 2000: Designation of additional authorities*” October 2007, pp. 11-13.

¹⁹⁸ The Campaign for Freedom of Information, “Contractors ‘should be subject to Information Act’”, 14 March 2008. <<http://foia.blogspot.com/>>

came into force in 2005. Contracting-out has led to a reduction in the public's rights to information, which should be restored.

The campaign said —

The private bodies which should be brought under the Act include those providing treatment or diagnosis to NHS patients, private care home owners acting under contract to local authorities, contractors running schools for local education authorities or operating prisons or prisoner escort services. Private train, bus and tram operating companies and contractors responsible for the running of London underground lines should also be covered by the Act, the Campaign says.

The same principle should also apply to voluntary organisations providing services under contracts with public authorities, says the Campaign. Bodies representing the voluntary sector have recently argued that the Act should not extend to them. But the Campaign points out that public funding for the voluntary sector has risen from £5 billion annually in 1997 to £10 billion in 2007, much of it to enable the voluntary sector to take over the provision of services from public authorities. The Campaign points out that some of the large voluntary bodies receive more public funds than conventional public authorities.¹⁹⁹

The responses to the Panel's discussion paper included the following submissions:

Australia's Right to Know submitted that as a bare minimum the recommendations of the ALRC/ARC Report should be implemented. These included requirements that —

- agencies include provisions in contracts requiring that contractors record and provide adequate information to the agency and to allow Parliamentary scrutiny as well as public access rights;
- complaint procedures be adequate and not lost or diminished as a result of a service being provided by a contractor rather than the government; and
- contractors' documents that directly relate to the performance of contractual obligations be deemed to be in the possession of the relevant agency.²⁰⁰

The Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. said —

Private sector bodies with government service contracts – and those sub-contracted to them out of the same government funding – should be accountable to the government agencies they service. Government/private

¹⁹⁹ The Campaign for Freedom of Information, "Contractors 'should be subject to Information Act'", 14 March 2008. <<http://foia.blogspot.com/>>

²⁰⁰ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 9.

sector contracts should include conditions that clearly set out agency FOI obligations that will also apply to the contractors and sub-contractors.²⁰¹

However, the Roman Catholic Archdiocese of Brisbane pointed out that the arrangements under which the Government tendered out services or functions on a fee for service basis varied enormously, and to include them in an extension of the FOI Act's provisions "would be impractical on a number of grounds". These included —

- a) Whilst compliant with civil laws, independent contractors such as Church, Not-for-Profit, and Community organisations vary considerably in size and scope and are bound by their own independent legal operating structures (e.g. sole trader, private company, incorporated association or public company) and associated reporting relationships;
- b) The values underpinning the behaviour of such organisations may well be similar but will not be the same as Government's;
- c) To assume such bodies are an extension of Government is too simplistic particularly as the Church and similar bodies perform a variety of other roles within society. The public advocacy nature of some of these bodies, on occasion, may be quite contrary to Government intent; and
- d) There is no obligation (nor provision through available funding) to account for the handling of imposed public sector management "control" mechanisms (e.g., Ombudsman) that currently exists in the public sector.²⁰²

The Queensland Ombudsman said —

It is clear that accountability should not be lost because information relating to the provision of a service is in the possession of a private sector body and not a government agency. To avoid this problem, I favour an amendment to the FOI Act so as to deem documents in the possession of the contractor, that relate directly to the performance of the contractor's contractual obligations, to be in the possession of the government agency, and therefore accessible under the FOI Act by application to the government agency, subject to the current exemption provisions. Of course, the success of this approach would be dependent on all such contracts imposing obligations on the contractors to create appropriate records and to provide them to the government agency, with periodic auditing of the contractor's adherence to its record-keeping obligations. Any such amendment to the FOI Act must be co-ordinated with corresponding adjustments to the standard conditions of contract employed by all agencies which are subject to the FOI Act.

²⁰¹ Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 9.

²⁰² Roman Catholic Archdiocese of Brisbane submission to the FOI Independent Review Panel discussion paper, pp. 4-5.

This approach sits comfortably with s.7 of the FOI Act which defines “document of an agency” to mean a document in the possession or under the control of an agency, including a document to which the agency is entitled to access. Further, this approach does not impose onerous administrative or processing obligations on contractors which might result if a contractor was deemed to be an agency for the purposes of the FOI Act.²⁰³

In April 2008, LCARC published its report on *The Accessibility of Administrative Justice*.²⁰⁴ In relation to the issue of the contracting out of government services, it made the following two recommendations.

Recommendation 12: The Financial Management Standard 1997 should be amended to require annual reporting of contracts, including those with commercial-in-confidence clauses, entered into by government entities. The requirement should be for information regarding:

- all contracts with private providers, regardless of value; and
- where commercial-in-confidence clauses are contained in a contract –
 - the accountable officer or equivalent; and
 - the reasons for non-disclosure.

Recommendation 13: The Public Service Commissioner should issue a directive to ensure that, where government agencies engage non-government entities to carry out functions prescribed by statute, the terms of contract should give the agency a right of access to documents produced in the course of performing those functions.²⁰⁵

The Panel notes that from 1 January 2008, the State Procurement Policy requires agencies to publish details of all awarded contracts and standing offer arrangements with a value of \$100,000 or more on the Queensland Government Chief Procurement Office website.²⁰⁶ This will have the additional advantage of permitting interested parties to identify particular contractors.

Since the ALRC and ARC analysed the contracting-out phenomenon there has been a continuing trend for governments world-wide to utilise the private sector to perform what previously were public sector functions. Whether intentional or not, the adoption of contracting out has reduced the accountability of government through administrative law regimes such as freedom of information.

In Queensland as in Britain, organisations receive large amounts of taxpayers’ money to carry out functions of a public nature. The Panel agrees with the British Government that there are good reasons why,

²⁰³ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p 5.

²⁰⁴ Parliamentary Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice*, Report No. 64, April 2008.

²⁰⁵ Parliamentary Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice*, Report No. 64, April 2008, p. 137.

²⁰⁶ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 9.

in fulfilling those functions it would seem appropriate that they be subject to the same scrutiny as public authorities within the scope of the Act. To include such organisations within the scope of the Act would increase transparency in the distribution and expenditure of public funds.²⁰⁷

The same principle applies even when the contract amounts may not be properly described as large.

The Panel believes that in principle, freedom of information should extend to private contractors performing functions that were once performed by government and/or are considered generally to be the responsibility of government to deliver to the public.

The ALRC/ARC Review identified three approaches, each of which it considered might be adopted in appropriate circumstances. The first would make the private sector contractor directly subject to the FOI Act whenever a legislative scheme was established under which private sector bodies would be contracted to provide services to the public on behalf of the government. The second would deem documents to be in the possession of the contracting agency. The third ALRC/ARC option would incorporate information access rights in individual contracts.

The later ARC review suggested five options. In brief, they involved: first, extending the coverage of the FOI Act to contractors; second, deeming specific documents in a contractor's possession to be in possession of an agency; third, deeming documents in a contractor's possession that relate directly to the performance of their contractual obligations to be in the possession of the agency; fourth, incorporating information access rights into individual contracts; and fifth, establishing a separate information access regime. The ARC itself opted for the third option. This effectively coincides with the second option earlier proposed by the ALRC/ARC.

The Panel also considers that this is the best option. Its main advantage is that it would reduce any compliance costs for contractors as the relevant agency would process FOI requests. It would of course be necessary for agencies to include in their tender documents notice that this FOI regime would apply to successful tenderers. However because there would be a relatively minor financial impact on contractors, if any at all, there should be no net increase in tender prices.

RECOMMENDATIONS:

Recommendation 25

The FOI legislation should include a Part dealing with access to the documents of organisations that are not agencies.

²⁰⁷ Ministry of Justice, "*Freedom of Information Act 2000: Designation of additional authorities*", October 2007, p. 10.

Recommendation 26

Where a private organisation contracts to perform functions that were once performed by government and/or are considered generally to be the responsibility of government to deliver to the public, FOI should be extended to cover the documents of that organisation in relation to any such function. Those documents that relate directly to the performance of their contractual obligations would be deemed by the FOI legislation to be the documents of the relevant agency, for the purposes of FOI.

7.3 Government-subsidised private sector bodies including voluntary organisations

The Panel's discussion paper asked the following question, which relates to the issue raised in the 7.2, above, as well as to this part and 7.4 below.

*Should the private sector remain outside the reach of the FOI Act?*²⁰⁸

Two of the responses are shown here, but see also the response of the Roman Catholic Archdiocese of Brisbane quoted above on page 94.

The Rockhampton City Council commented on the principles that should apply in determining whether bodies should be covered by the Act. It said —

We agree that a better method need to be determined, as the case of Grammar schools showed in the past. Something around controlling interest such as 50% or more might be a measure. Funding percentages might be another method.²⁰⁹

Australia's Right to Know contended —

That other bodies in receipt of government funding should fall within the scope of the QLD FOI Act. For example, considerable public funding is provided to the private school sector in Queensland, yet parents of students in the private school system cannot access records through FOI, which is available to parents in the public school system. Organisations in receipt of government funding need to be accountable for that funding, funding disbursements and related decisions, administration and management – not only to the Government but also to citizens. Given the extent of public funding into the private sector, issues like teacher and school performance standards must be available to citizens.²¹⁰

²⁰⁸ FOI Independent Review panel discussion paper, p. 67.

²⁰⁹ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 5.

²¹⁰ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 9.

Satisfying the requirements of FOI is not always simple, or cheap. As the Rockhampton City Council pointed out in a submission —

FOI is a burden on the public sector, which can carry the cost when required; adding this cost to the private sector could force many to close up. Also to extend this to the private sector would open a flood gate of organisations trying to discover what their competitors are doing.²¹¹

The Panel agrees that the provision of public funding to private bodies, and the acceptance of that funding, gives the government (and citizens) some entitlement to require them to account. However, as with private contractors, public access to the documents of such bodies should be limited to those matters to which public money is directed. Receipt of public funding should not open an organisation (or an individual) to a general liability to FOI – only to providing access to information about those aspects of its operations that are funded or supported by government. As mentioned earlier in this chapter, section 9(1)(c)(i)(A) of the Act already allows the Government to declare by regulation bodies to be a public authority for the purposes of the Act where they are “supported directly or indirectly by government funds or other assistance ...”.²¹²

The 2008 LCARC report also dealt with this issue. It made the following recommendation:

Recommendation 11: Section 8 of the *Freedom of Information Act 1992* and section 4(b) of the *Judicial Review Act 1991* should be amended to extend the application of the Acts to public or private body performing functions or engaging in activities which, although private in character, are also of public interest and concern and involve funds that are provided or obtained (in whole or in part):

- out of amounts appropriated by Parliament; or
- from a tax, charge, fee or levy authorised by or under an enactment.

The broadening of the scope of application of the Act may raise the need for limited amendment to:

- section 11 of the *Freedom of Information Act 1992* (Act not to apply to certain bodies etc) - for example, to ensure that a private lawyer providing legal aid services was not acting within the scope of that Act; and
- part 1, division 5 of the *Judicial Review Act 1991*.²¹³

As with the contractor situation, the most convenient means of providing access to documents by citizens is by deeming relevant documents of the organisation to be documents of the agency concerned. As with contractors, one of the advantages of this approach would be that there would be little if any cost associated with

²¹¹ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 4.

²¹² *Freedom of Information Act 1992*, s. 9(1)(c)(i)(A).

²¹³ Parliamentary Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice*, Report No. 64, April 2008, p. 137.

administering FOI borne by the organisation, which might be a voluntary organisation with little capacity to meet the demands of FOI.

RECOMMENDATION:

Recommendation 27

The Part of the FOI legislation dealing with access to the documents of organisations that are not agencies, should include a section relating to organisations that receive funding assistance, including in-kind support, from government. The FOI law should contain a provision deeming that documents in a recipient's possession that relate directly to the performance by the function subsidised by the government be documents in the possession of the agency, and hence subject to FOI.

7.4 Other private sector bodies

Some private sector bodies were covered by the original FOI legislation not because they received (or once did receive) government funding, but because they were established under an Act of the Queensland Parliament for a public purpose. Among these was the Queensland Law Society, which has been trying for many years to be excluded from coverage.

However, there is a strong argument that what are described by the UK campaign for Freedom of Information as “private bodies with public functions” should be fully accountable under FOI. In Britain, these include bodies such as the Press Complaints Commission, Advertising Standards Association, Solicitors Regulation Authority and other bodies carrying out self-regulatory functions which the government itself would otherwise undertake.²¹⁴

In the Queensland context, this would mean the Law Society, putting to one side the fact that it is an agency for the purposes of the Act, would remain subject to the Act. It would also mean that the Bar Association, which unlike the Law Society is not established under an Act and therefore at present not subject to FOI, would come within its provisions. Other professional organisations exercising similar regulatory functions would also be caught. The Panel believes that this extension of FOI to private bodies with public functions is both legitimate and necessary because of the greater public interest and concern about the accountability of those organisation performing regulatory functions that otherwise would be the responsibility of government.²¹⁵

²¹⁴ The Campaign for Freedom of Information, “*Freedom of Information Act 2000* Designation of additional public authorities”, Response to Ministry of Justice consultation, 3 March 2008, p. 12. <<http://www.cfoi.org.uk/opengov.html#labour>>

²¹⁵ The Panel wrote to the Bar Association of Queensland about this issue, seeking a response to the suggestion that FOI might be extended to cover some of its activities as a private body

RECOMMENDATION:

Recommendation 28

Private bodies with public regulatory functions that would otherwise be required to be exercised by government should be subject to FOI in relation to their performance of those functions.

7.5 Exclusions

Since the enactment of the FOI legislation in 1992, the list of exclusions in s. 11(1) of the Act has increased significantly. Further exclusions were introduced in ss. 11A-E. The second reading speeches of responsible Ministers and the relevant explanatory memoranda have only occasionally sought to justify or explain why a particular body has been taken out of the reach of FOI or had some of its documents excluded from scrutiny under FOI. As mentioned earlier, these changes have had a major negative impact on freedom of information in Queensland.

The Panel believes that no body currently subject to FOI should be granted an exclusion either generally or in relation to a class of its documents unless the reasons for doing so are explained to Parliament and can be justified in terms of the public interest.

When the Electoral and Administrative Review Commission was considering what bodies should be covered by the FOI legislation it was recommending, it confined the exclusions (now covered by ss. 11 and 11A-E) to the courts and judges in respect of the exercise of their judicial functions, the Legislative Assembly, the Governor, Commissions of Inquiry and the Information Commissioner. It specifically decided that bodies such as statutory authorities, the Treasury Corporation, the Office of the Public Trustee and the Office of the Auditor-General should not be exempt.²¹⁶

EARC's approach recognised —

That there are certain persons or bodies, or functions of certain persons or bodies, which should not be made subject to FOI legislation. Except in respect of those persons or bodies or the functions of those persons or bodies, all persons or bodies created or established for a public purpose are automatically subject to FOI legislation; and other persons or bodies funded by government or over which government may exercise control may by regulation also be made subject to FOI legislation. That is the approach which

with public functions. The Bar Association had not replied by the time this report was completed.

²¹⁶ Electoral and Administrative Review Commission, Report on Freedom of information, December 1990, Chapter 8.

the Commission considers should be adopted for the FOI legislation of Queensland, thus ensuring both a comprehensive and comprehensible coverage of FOI legislation.²¹⁷

The Panel believes this approach was principled and correct and that it is time to return to EARC's approach of excluding persons or bodies from the legislation only if the amended legislation remains both "comprehensive and comprehensible". Blanket exclusions of people or bodies or their documents or functions, other than those originally provided for in the Act, are undesirable. They are also unnecessary. Aside from the exemptions discussed in chapter 8, where there is a very high public interest in relying on a class exemption, the general rule in relation to other bodies "created or established for a public purpose" should be that explained in chapter 9, namely, that "there is a right of access to information unless its disclosure, on balance, would be contrary to the public interest".

The bodies currently excluded from the Act, other than those originally designated as exempt by EARC, should instead be required to demonstrate that a document sought under FOI should not be made public because of the application of this public interest test. The Panel considers that several of the bodies and their functions in s. 11(1)(m) to (y) should no longer be excluded from FOI, while none of the exclusions in ss. 11A to 11E should be retained.

The Panel believes the exclusions concerning investigations or audits, and conciliation of complaints, in sub-sections (o), (p), (pa) and (q) should be retained. It also would retain (u) and (v), which concern registers of pecuniary interests of relatives of local government councillors and of CEOs and senior employees. The exclusion for parents and citizens associations, in (w) should also be retained as these are fund-raising organisations that support schools.

However the Panel considers the exclusion of grammar schools cannot be justified for the reasons explained by EARC (at pages 118-119 of its report)²¹⁸ and because the Panel believes all schools receiving government funding should be subject to the Act, in relation to the functions supported by that funding.

The Panel also considers that the exclusions of education agencies in sub-section (y) in relation to individual and systemic student information, should not be retained. Economist Nicholas Gruen, speaking at an International Summit on Open Access to Public Sector Information in Brisbane in March 2008, pointed out that the provision of such information had been beneficial in value adding to schools in the United Kingdom. He said it was transforming accountability; that individual schools that were not performing well were targeted for change, as were areas that were not performing well; and that schools that were performing well could be rewarded with recognition, resources and recruitment of expertise elsewhere where it may be needed.

²¹⁷ Electoral and Administrative Review Commission, Report on Freedom of information, December 1990, p. 107.

²¹⁸ Electoral and Administrative Review Commission, Report on Freedom of information, December 1990, p. 118-119.

The latest exclusion inserted into the Act is s. 11CA, which was added to the Act in 2008 as a consequence of legislation passed by Parliament in 2007. This excludes particular documents under the *Ambulance Service Act 1991* and the *Health Services Act 1991* from FOI. Effectively it excludes all documents concerning an RCA. An RCA (which does not appear to be defined in the FOI Act) is, according to the *Health Services Act*, a “root cause analysis” of a reportable event and means a systematic process of analysis under which factors that contributed to the happening of an event may be identified and remedial measures that could be implemented to prevent a recurrence of a similar event may be identified. The relevant “events” are explained in the *Health Services Act* and include the death of a person in various circumstances, wrong procedures, retention of an instrument or other material in a person’s body during surgery, and a suicide in various circumstances.

In his second reading speech, the Minister for Health, Stephen Robertson, explained

RCA is an internationally recognised incident management technique for identifying and addressing system issues. It is a structured process that involves the establishment of a multidisciplinary team to retrospectively analyse the chain of events responsible for an adverse event. The analysis, which focuses on system issues, is conducted to help find out what happened, why it happened and what must be done to prevent the event from happening again.²¹⁹

There was no mention in the speech of the amendment to the FOI legislation and why all aspects of an RCA should be excluded from FOI, permanently.

No doubt much of the RCA material would not ordinarily be available under FOI, as being personal information and for other public interest reasons. However, the wholesale exclusion from FOI of all root cause analysis is difficult to justify in this post-Patel age. Much of it would be discoverable in relevant court proceedings. The Panel considers that s.11CA should be repealed, and applications for access to RCA matter be dealt with in the normal course through the application of the public interest test.

The next exclusions, in s. 11D, concern Schedule 3 of the Act. It lists provisions of other Acts that by their terms exclude or limit the operation of the Act. It is included as a schedule “for information purposes”. Unfortunately it does not provide up to date information.

The Panel believes it is wrong in principle for other legislation to exclude or exempt some of the activities of agencies from the FOI Act. This is an Act of general application and any exemptions or exclusions should be contained in the Act and not achieved by a backdoor method that effectively amends the Act. Exclusions or exemptions should be consistent with the Act. The Panel’s impression is that in many cases the application of the public interest test would result in the documents with which these laws are concerned not being made available under FOI. They should not have an alternative means of avoiding scrutiny. The “comprehensive and

²¹⁹ Robertson, S., Health and Other Legislation Amendment Bill 2007, Second Reading speech, Queensland Parliamentary Debates, 6 February 2007, p. 44.

comprehensible coverage” of the Act should not be distorted or undermined by indirect legislative means.

The Panel appreciates that a new Act would, by implication, repeal the provisions listed in Schedule 3 unless the new Act provided for their continuance. It considers that any exemption or exclusion currently provided for in those Acts should only be continued if those exemptions or exclusions could be justified for inclusion in the new Act.

The final provision is s. 11E. Its aim is to prevent offenders (that is, prisoners) or their agents from accessing “risk assessment documents”. This provision is not a pure exclusion or exemption provision. Rather it operates to prevent a class of persons from using the Act to access a particular class of documents.

This provision drew the attention of LCARC in its 2008 Report. It says —

Section 4 of the *Freedom of Information Act*, which sets out the objects of the Act and how they are to be achieved, provides that it is in the public interest for rights to access information held by Queensland government under the Act to be available to all people, generally. However, section 4 also acknowledges that public interests in access compete with public interests in the protection from disclosure of certain types of information.

Almost without exception, in the *Freedom of Information Act*, the public interests in the protection from disclosure of information held by the Queensland Government are stated and accommodated in the provisions regarding exempt matter.

However, the committee notes a number of submissions regarding section 11E of the *Freedom of Information Act*.

This provision, located in the part of the Act regarding agencies excluded from the operation of the Act, excludes prisoners or their agents from using the Act to access documents regarding risk assessment documents. The committee suggests that this provision, inserted by amendment to the Act in 2005, does not sit well within part 1 division 4 of the Act.

The committee’s recommendation (**recommendation 4**) affirms the principles set out in section 4. The accessibility of administrative justice is compromised if a particular group of people in the community are excluded from the general legislative right to access information held by Government.

The committee will write to:

- the Minister for Police and Corrective Services and the Attorney-General and Minister for Justice, noting the committee’s recommendation and pointing out the inconsistency between section 11E and section 4 of the *Freedom of Information Act*; and

- the Chair of the Queensland Parliament’s Scrutiny of Legislation Committee, noting the committee’s recommendation.²²⁰

The Panel shares LCARC’s concerns about this provision. It received a submission from the Prisoners’ Legal Service Inc. pointing out the importance of risk assessment documents to the way prisoners are treated and the possibility, if they are not able to be accessed, that they may contain falsehoods.²²¹

Queensland Corrective Services, at the Panel’s request, provided a response to the submission of the Prisoners’ Legal Service Inc. in which it said the purpose of the provision was to ensure that “authors of risk assessment reports are candid in their assessment and can submit their report without fear of reprisal from an offender.”²²² The response also rejected the recommendation that offenders’ agents should be allowed access to the documents. “Once a document is disclosed to an agent there is a risk that it may end up in the hands of the offender to whom it relates. This would frustrate the purpose of section 11E.”²²³

The Panel considers the provision is not justified. Section 42(1) of the Act, covering law enforcement and public safety, already meets most of the concerns it is meant to address. The public interest test would meet others. The Panel considers offenders should have a right to these documents under s. 44 as matters affecting personal information. However, that access should be provided through their legal representative in the same way that the present Act provides that access may be provided to an appropriately provided health care professional in some circumstances. The ethical obligations of the lawyer could be invoked through an appropriate provision in the Act, based on s. 44(5), to meet the concerns of the agency that material will not be provided to the offender where that would not be appropriate. Making the material available to a legal representative would, however, help to meet the concerns expressed by the Prisoners’ Legal Service Inc. about inappropriate or false documentation affecting the offender’s future prospects.

RECOMMENDATIONS:

Recommendation 29

The sub-sections (x) and (y) of s. 11(1) should be repealed.

Recommendation 30

That sections 11CA, 11D and 11E and Schedule 3 be repealed.

²²⁰ Parliamentary Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice*, Report No. 64, April 2008, p. 47.

²²¹ As exemplified in *Attorney-General for the State of Queensland v. Toms* [2006] QSC 298, at p. 14 where Chesterman J. criticised a psychologist’s report as containing “a serious dishonesty”.

²²² Queensland Corrective Services letter to the FOI Independent Review Panel, 7 May 2008.

²²³ Queensland Corrective Services letter to the FOI independent Review Panel, 7 May 2008.

Recommendation 31

That personal information in the form of a risk assessment document relating to an offender should be able to be provided to a lawyer, acting as the offender's agent, rather than to the offender. A provision to this effect should be included in the proposed Privacy Act.

8 Cabinet and the other exemptions

8.1 The Cabinet documents exemption

The discussion paper noted —

Cabinet and the doctrine of ministerial responsibility are at the heart of the Westminster system of Government. The system relies on secrecy to protect its central tenet: the unity of the executive government. Every country and every sub-national government that subscribes to the Westminster system has included within their freedom of information laws special exemption for Cabinet documents.

The doctrine of collective ministerial responsibility requires that all ministers subscribe to policies determined by (or on behalf of) the Cabinet, irrespective of their personal views. This means that material of any kind that indicates a Minister made a submission to Cabinet at odds with the view finally determined by the Cabinet, or that he or she dissented from a Cabinet decision either during debate or when a decision was taken, must not be publicly revealed. In most Westminster-system governments, official records of Cabinet decisions and submissions are kept secret for around 30 years. Records of what was actually said in Cabinet, as recorded by public servants, are kept secret for an even longer period – 50 years in the case of the Commonwealth Government.

Yet most Cabinet decisions are made public shortly after they are taken. These days in many jurisdictions Cabinet submissions will include a draft statement to be issued to the media shortly after the decision is taken. The timing of any announcement will depend on a variety of circumstances: including, whether other parties have to be first informed of the decision, whether legislation must first be prepared, and whether political circumstances dictate there should be some delay.

Cabinet does not operate in a vacuum. No discussion of the operation of Cabinet and of ministerial responsibility can avoid consideration of the advice received by Cabinet collectively and ministers individually that contribute to the deliberative processes of the Cabinet. This advice also needs to remain confidential in order to preserve Cabinet's protective blanket. Collective ministerial responsibility could be undermined if documents that revealed the advice given to Ministers in preparation for Cabinet meetings was to be made public. The argument is that such information would, by inference, involve the disclosure of deliberations that may or probably did occur in Cabinet...

In Australia, Cabinet and Executive Council exemptions are class exemptions and do not contain a public interest balancing test. The presumption is that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility.²²⁴

²²⁴ FOI Independent Review Panel discussion paper, pp. 79–80.

The New Zealand *Official Information Act* takes a different approach. It establishes in s. 5 that information shall be made available unless there is good reason for withholding it. In s. 9 it states good reason for withholding official information exists, for the purposes of s. 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available. It goes on to say that the section applies if, and only if, the withholding of the information is necessary to —

- (f) Maintain the constitutional conventions for the time being which protect —
 - ...
 - (ii) Collective and individual ministerial responsibility;
 - (iii) The political neutrality of officials;
 - (iv) The confidentiality of advice tendered by Ministers of the Crown and officials, or
- (g) Maintain the effective conduct of public affairs through —
 - (i) The free and frank expression of opinions by or between or to Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty ...²²⁵

Gregorczyk says —

This represents quite a conceptual shift from the Australian position. The New Zealand alternative focuses on the question of “what are the consequences of revealing this particular Cabinet information” as opposed to the Australian position which is a blanket approach of “this is a Cabinet document and therefore it must be exempt.”²²⁶

The Queensland provision on Cabinet matter (s. 36) has become increasingly controversial. The history of the expansion of the provision has been related previously (see chapter 4 of the discussion paper) along with some of the criticisms levelled at those changes. Whatever the intentions of the various amendments, it is difficult to justify – by reference to the purpose of the Cabinet exemption – a scheme that allows ministers to take documents into the Cabinet room for no purpose other than to avoid them being accessible through FOI. The very existence of this bolt hole sends the wrong message to public servants about the desirability of openness.

The research paper by Helen Gregorczyk notes that the WA Inc. Royal Commission concluded that “in accordance with the convention of ministerial responsibility there should be a purposive element in determining what documents should be protected by the exemption; that is, only documents brought into existence for the purpose of submission to Cabinet should qualify for exemption.”²²⁷ Gregorczyk also notes that —

²²⁵ *Official Information Act 1982*, s. 9.

²²⁶ Gregorczyk, p. 36 (footnote omitted).

²²⁷ Gregorczyk, p. 33.

academic criticism has highlighted the paradoxical position left open by the lack of a public interest test in the Cabinet exemption. That is, defining a class of documents that will not be disclosed irrespective of the contents of those documents, neglects any public interest to be served through enforcement of the right of access and fails to take into account whether any damage will occur from disclosure and as such this is at odds with the democratic aims of FOI legislation.²²⁸

Gregorczyk says that in Australia —

All jurisdictions, except Queensland, have some purposive element in terms of specifying the reason for which the documents submitted to Cabinet were created. All jurisdictions, bar Queensland, have a “factual/statistical material” exception. Most jurisdictions (not the ACT, Cth or Qld) have a sunset clause; that is, a clause which specifies the exemption will only apply to documents for a certain time, usually 10 to 20 years. Most jurisdictions, including Queensland (but not SA, WA or NSW) have a “conclusive certificate” provision. Generally, where such a certificate is issued it limits the reviewing body’s power to determining whether there are reasonable grounds for the claim that the documents are exempt (as opposed to a full merits review). The conclusive certificates are a way of maintaining control over sensitive documents by ensuring that the final decision on disclosure is made at the highest levels of government.²²⁹

It is, perhaps, somewhat ironic that given the absence of a purposive element in the Queensland Act’s exemption for Cabinet documents, the definition of Cabinet documents contained in the Queensland Cabinet Handbook does include some documents which have a purposive element – for example, “reports and attachments to submissions that have been brought into existence for the purpose of submission to Cabinet” and “reports or studies within or for the Queensland Government that are intended to form the basis of a Cabinet document or an attachment to a Cabinet document.”²³⁰

More to the point is the fact that the Queensland Cabinet Handbook actually lists those documents it considers to be Cabinet documents. For the most part, they would fall within any definition in any of the FOI legislation identifying Cabinet documents or information that is covered by an exemption in most other jurisdictions. The Handbook says Cabinet documents may include, but are not limited to, the following —

- submissions, submitted or proposed to be submitted to Cabinet;
- Cabinet agenda, notice of meetings and business lists for meetings;
- minutes and decisions of Cabinet;

²²⁸ Gregorczyk, pp. 33–34.

²²⁹ Gregorczyk, p. 33.

²³⁰ Department of the Premier and Cabinet, *Queensland Cabinet Handbook*, March 2007, section 1.6.

- briefing papers prepared for use by Ministers or Chief Executive Officers in relation to matters submitted or proposed to be submitted to Cabinet;
- documentation and minutes of Cabinet Committee meetings;
- reports generated by the Cabinet Secretariat or agencies which show Cabinet submissions or proposed Cabinet submissions;
- corrigenda to Cabinet submissions;
- reports and attachments to submissions that have been brought into existence for the purpose of submission to Cabinet;
- legislative proposals, Bills, explanatory notes and Second Reading speeches;
- correspondence between Ministers and/or the Premier that is submitted to Cabinet or that proposes matters to be raised in Cabinet;²³¹
- consultation comments on first lodgement and final Cabinet documents;
- reports or studies within or for the Queensland Government that are intended to form the basis of a Cabinet document or an attachment to a Cabinet document;
- all other minutes, correspondence between Ministers and other material that relate to Cabinet matters, eg. letters seeking waiver of all or part of the Cabinet process or minutes seeking comments on submissions;
- drafts, copies or extracts of any of the above; and all formats of the above, including hard copy, electronic, or microfilm formats.²³²

The only mildly contentious matters in that list – contentious in that they would not satisfy the tests for exemption in many jurisdictions because they might fall within the description of purely factual or statistical material, for example – are “reports and attachments to submissions that have been brought into existence for the purpose of submission to Cabinet” and “reports or studies within or for the Queensland Government that are intended to form the basis of a Cabinet document or an attachment to a Cabinet document”. These, as noted above, contain a purposive element, and there might therefore be fewer objections to their classification as Cabinet documents than would otherwise be the case. Otherwise the documents now classified by the Queensland Government as Cabinet documents for its own, internal, purposes, would generally fall within the exemption in the original wording of the 1992 Queensland Act. The current definition in the Queensland Handbook would not include the irrelevant documents that might be and occasionally are taken into Cabinet to gain the exemption under the current iteration of the Act.

In introducing the definition of Cabinet documents, the Queensland Cabinet Handbook makes this statement —

Cabinet documents are diverse in their form and may broadly be defined as documents, which if disclosed, would reveal any consideration or deliberation

²³¹ This appears to be badly expressed – the relevant correspondence is about Cabinet matters.

²³² Department of the Premier and Cabinet, *Queensland Cabinet Handbook*, March 2007, section 1.6.

of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations.²³³

This definition is relevant to the approach the Panel proposes to recommend and will be considered below.

Cabinet exemptions – how liberal are they?

There are a number of ways in which different jurisdictions treat (or possibly could treat) the Cabinet exemption, as is clear from the analysis above by Gregorczyk. It is useful to consider them on the basis of the results they produce – that is, in terms of whether documents are more or less susceptible to release under FOI.

The regime that is most secretive – most protective of documents – is that under the present Queensland Act. This is because (a) it provides for ministers to issue conclusive certificates; (b) it contains no public interest test; (c) it has no exception for factual/statistical material; (d) it contains no purposive element and (e) “submit” to Cabinet is defined as bringing to Cabinet irrespective of purpose, the nature of the matter or the way Cabinet deals with it.

Less secretive are the provisions of the Commonwealth and original Queensland Acts. These also (a) provide for ministers to issue conclusive certificates; and (b) contain no public interest test. But (c) they contain an exception for factual/statistical material; and (d) they contain a purposive element.

In some jurisdictions the exemption includes a sunset clause of 10 years. These are less secretive.

An FOI Act would be less secretive still if it contained a public interest test.

It would be even less secretive if ministers could not issue conclusive certificates.

In practice, the least secretive provisions are those of the New Zealand *Official Information Act*. This poses not a categorical but a consequential test – it must be shown by an official that withholding the document is necessary to maintain the interest claimed (for example, collective ministerial responsibility). And this harm-based assessment also involves a public interest test.

Cabinet exemptions – the debate

Freedom of information in Queensland was one of the reforms that emerged, through the processes of the Electoral and Administrative Review Commission, as a result of recommendations by G. E. (Tony) Fitzgerald in his report on corruption. He argued —

Although leaks are common place, it is claimed that communications and advice to Ministers and Cabinet discussion must be confidential so that they

²³³ Department of the Premier and Cabinet, *Queensland Cabinet Handbook*, March 2007, section 1.6.

can be candid and not inhibited by fear of ill informed or captious public criticism. The secrecy of Cabinet discussions is seen as being consistent with the doctrines of Cabinet solidarity and collective responsibility under which all Ministers, irrespective of their individual views are required to support Cabinet decisions in Parliament.

It is obvious however, that confidentiality also proves a ready means by which a Government can withhold information which it is reluctant to disclose ...

The ultimate check to public administration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit, and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.

Secrecy and propaganda are major impediments to accountability, which is a pre-requisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.

Information is the lynch pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.²³⁴

Rick Snell and Paula Walker, in their submission to the LCARC review of the FOI Act, said the provisions of the Act —

allow scope for any documents placed before Cabinet to be subject to the exemption – even those documents that were not prepared for the purpose of submission to Cabinet or the Executive Council, and even for those documents which have already been published. Section 21 ... has been reduced to a right of access subject to Ministerial veto.

The Queensland Information Commissioner suggests the appropriate approach is to re-think the degree of secrecy that is genuinely essential for the proper functioning of the Cabinet process, having regard to the nature of representative democracy, the objectives of the FOI Act. He also suggests that the correct balance would be achieved simply by amending the Act to return to sections in their original form.

This submission recommends that the Commissioner's proposal should be implemented as a minimum. The incorporation of a public interest test in determining whether "Cabinet documents" should be released (as in the New Zealand legislation) would further support the objectives of the Act ...²³⁵

²³⁴ Fitzgerald, G.E. (Tony) (Chairman), *Report of a Commission of Inquiry pursuant to Orders in Council*, delivered 3 July 1989, p. 126.

²³⁵ Snell, R. and Walker, P., submission to the Parliamentary Legal, Constitutional and Administrative Review Committee Review of the *Freedom of Information Act 1992* (Qld), p. 11.

In her commentary on these provisions, Moira Paterson says —

The need to protect Cabinet confidentiality has generally been accepted as a necessary feature of freedom of information legislation in countries with Westminster-style systems of government and it is usually taken for granted that this interest is of such importance that it is inappropriate to allow scope for it to be weighed up against competing interests in favour of disclosure. Logically, however, the doctrine of responsible government requires only the protection of documents which shed light on its deliberations. Documents which disclose its decisions or the material that forms the basis for its decisions should arguably be exempt only to the extent that their disclosure will result in some demonstrable harm. The fact that the Cabinet exemptions go much further than this has been justified on the basis that some submissions which are closely associated with a particular minister may be taken as reflecting his or her own views and that it is difficult to differentiate legislatively between documents which do and do not require protection. However as has been pointed out by Cossins, the failure to include a public interest test (or even a harm-based test) “prevents an assessment of any violation to the democratic process sought to be protected or maintained by FOI legislation”.²³⁶

Submissions

The Australian Press Council, in its submission, said Cabinet documents and deliberative documents were the exemptions that were most problematic.

These are the documents which members of the media and community groups are most interested in inspecting and are also the documents which governments and officials are most anxious to withhold from scrutiny. The reason for this conflict is clear: this is the material that gives greatest insight into why governments make the decisions they do, and provides the factual material, research and advice upon which decisions are founded. A resolution of this fundamental conflict between governments and others with regard to the accessibility of this material is essential to the development of a working FOI regime.

The Press Council concedes that some of this material is confidential in nature and it is appropriate to restrict access to it. However, it rejects the contention that all of this material should be subject to a blanket exemption from public scrutiny. Where the material does not reveal detail as to the internal dynamics of government, it should be in the public domain unless its disclosure would be likely to jeopardise the public interest in some tangible way.²³⁷

Australia’s Right to Know said —

²³⁶ Paterson, M, *Freedom of Information and Privacy in Australia*, pp. 340-341 (footnotes omitted).

²³⁷ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 7.

... the broad exemptions for documents submitted to or prepared for Cabinet and the Executive Council should require the decision maker to give weight to the public interest in giving access to these categories of documents. RTK submits that Cabinet and Executive Council documents should not be given a “halo” of secrecy, but instead be included in a single exemption for internal government documents, which includes a public interest test.²³⁸

The Queensland Ombudsman said —

The controversy surrounding the current wording of s. 36 and s. 37 of the FOI Act has been widely discussed and is well documented. Both Commissioner Albietz and I took every opportunity, in nearly every Annual Report we each published since the provisions were amended in 1993 and 1995, to criticise their overly broad scope. In my view, their reach is so wide that they cannot be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional concepts of collective Ministerial responsibility to such an extent that I consider them to be directly opposed to the achievement of the objects of the FOI Act, namely, the promotion of openness and government accountability.²³⁹

The Roman Catholic Archdiocese of Brisbane said —

Neither Cabinet nor Executive Council matters should have a class exemption. Associated factual/statistical material should also not be exempted from disclosure. Like other government decisions and actions a public interest and a no harm test should apply.²⁴⁰

On the other hand, Megan Carter said of the introduction of a public interest test for Cabinet matter —

This too would be a radical move. It would also have an impact on the level of officer delegated to make FOI decisions on Cabinet documents. It is unfair and probably inappropriate to expect junior and middle-ranking FOI Officers to make decisions to release Cabinet documents in the public interest without fear of reprisals.²⁴¹

Other commentary

Although New Zealand’s FOI regime provides the freest access to Cabinet information, most of its critics would like to see it further liberalised. The New

²³⁸ Australia’s Right to Know submission to the FOI Independent Review Panel discussion paper, p. 7.

²³⁹ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 8.

²⁴⁰ Roman Catholic Archdiocese of Brisbane submission to the FOI Independent Review Panel discussion paper, p. 6.

²⁴¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 10.

Zealand Law Reform Commission conducted a review of the Act in 1997. It concluded in respect of this exemption —

Greater certainty would exist if general protection were given to categories of information relating to the processes of government, for instance advice to Ministers, or draft legislation, or Cabinet papers. This would also, however, reduce the availability of information. The Law Commission does not detect any call or need for such a fundamental change in the scheme of the statute. If anything, the call is for greater availability and transparency and more systemic disclosure of a wide range of information. The interests or participation and accountability make it critically important to allow for judgment and balance, especially in cases where the public interest in disclosure is particularly strong or where (as is often the case) the need to withhold information may be expected to diminish over time.²⁴²

On the other hand, the ALRC/ARC Report in 1995 recommended several changes to the Commonwealth legislation. However, it rejected suggestions that the ability of Ministers to issue a conclusive certificate should cease to be available, saying “Given the fundamental role of Cabinet in the Westminster system of government it is appropriate that the ultimate responsibility for exemption of Cabinet documents lies with Ministers.”²⁴³

On the question of the Cabinet exemption as a class exemption, it said —

This exemption has always been controversial because it seems to contradict the principle of open government. Cabinet is the “peak body” for government decision-making yet its deliberations are secret. The Review considers that Cabinet documents warrant a class exemption. It is not in the public interest to expose Cabinet documents to the balancing process contained in most other exemptions or to risk undermining the process of collective Cabinet decision-making. To breach the “Cabinet oyster” would be to alter our system of government fundamentally. Amending the FOI Act is not the appropriate way to effect such a radical change...²⁴⁴

However, the Review did recommend that only documents that were created for the purpose of submission to Cabinet should be exempt. It also proposed that documents should only be exempt for 20 years after the date they were created.²⁴⁵

Cabinet exemptions – issues

1. Conclusive certificates. The argument of the ALRC/ARC Report is essentially that Ministers should have the “ultimate responsibility for exemption of Cabinet documents”. On the other hand, LCARC thought that conclusive certificates should not be available in relation to the Cabinet document exemption. It considered “that

²⁴² Law Commission, *Review of the Official Information Act, Report No. 40*, 1997, p. 81 (footnotes omitted).

²⁴³ ALRC/ARC Report, p. 109.

²⁴⁴ ALRC/ARC Report, p. 109 (footnotes omitted).

²⁴⁵ ALRC/ARC Report, pp. 111-112.

conclusive certificates are inconsistent with the fundamental precepts of FOI and should only be included where there is strong justification for doing so.” It added, “If matter is not legally exempt pursuant to s. 36 or s. 37, there should be no provision for the Attorney-General to effectively override that legal position.”²⁴⁶

The Panel considers that conclusive certificates, which according to the LCARC Report have been issued just twice in Queensland, are neither necessary nor desirable. They are not necessary because the way the exemption will be defined should be sufficient to cover any material that needs to be covered to protect the integrity of Cabinet and responsible government. (See below, and recommendation 49.) It may not be wide enough to protect against the disclosure of material that might be politically embarrassing, but that is not supposed to be the function of FOI. Conclusive certificates are undesirable because they give the government the power to subvert the legislation.

There is a further discussion of conclusive certificates in chapter 12.

2. Public interest test. This issue is discussed in detail in chapter 9. For present purposes, it is sufficient to make the point that not all interests that arise for consideration are of equal weight. Decision-makers, including courts, have to balance those that arise, though currently they are given little legislative assistance in making any decision, and in any event, the weight given to a particular interest may vary, depending on the circumstances of the case. What is clear is that the High Court has accorded very great weight to the public interest in preserving Cabinet secrecy. In a case that did not arise under FOI but concerned the discovery of Cabinet materials for the purposes of civil litigation – and courts are very protective of judicial proceedings – the High Court, by a 6-1 majority, upheld a claim by the Commonwealth for public interest immunity. The joint majority judgment said —

6. But it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential. Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course. The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of

²⁴⁶ LCARC, *Freedom of Information In Queensland*, Report No. 32, p.189.

Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.

...

9. ... In the case of documents recording the actual deliberations of Cabinet, only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure, they being documents with a pre-eminent claim to confidentiality. The process of determining whether an order for disclosure of documents in that class should be made remains one of weighing the public interest in the maintenance of confidentiality against the public interest in the due administration of justice, but the degree of protection against disclosure which is called for by the nature of that class will dictate the paramountcy of the claim for immunity in all but quite exceptional situations.

10. Indeed, for our part we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights.²⁴⁷

Given this approach by Australia's highest court, there seems little point in applying a public interest test for the Cabinet exemption. The Northern Territory *Information Act* proclaims in section 44 —

Exemption –

Government information referred to in this Division is exempt because it is not in the public interest to disclose the information.²⁴⁸

The Division includes sections relating to Executive Council, Cabinet, the Territory economy, security and law enforcement, secrecy provisions, preservation of the system of justice and information obtained or created because of investigation.

There are important public interest considerations involved in the legislative decision to authorise a Cabinet exemption from FOI. Whatever law is adopted must attempt to balance the public accountability of the government against the ability of the government to govern effectively.

²⁴⁷ *Commonwealth v. Northern Land Council* (1993) 176 CLR 604 (footnotes omitted).

²⁴⁸ *Information Act 2002* (NT), s. 44.

3. Purposive test. The absence of a purposive test for documents taken to Cabinet is one of the ways in which the Cabinet exemption has been extended to cover material that has nothing to do with the legitimate concerns that need to be protected by the Cabinet exemption. The ALRC/ARC Report proposed that the relevant section of the Commonwealth FOI Act should be redrafted “to make it abundantly clear that it applies only to documents that have been brought into existence for the purpose of submission and consideration by Cabinet.”²⁴⁹

It is probably sufficient here to note the point made earlier that the official Queensland Cabinet Handbook uses a purposive test to determine whether some documents fall within the definition of Cabinet documents.

4. Time limits. There is an increasing trend to limit the period for which a Cabinet exemption might be claimed. Several recent laws, namely those of the Northern Territory and Ireland, have placed a 10-year limit on the exemption. The general principle involved is discussed in chapters 9 and 11. So far as the Cabinet exemption is concerned, it is sufficient to note that the justification for the exemption in the present circumstances in Queensland would seem to have largely evaporated after a decade or so. The Cabinet “oyster” will be well and truly shucked after 10 years as a result of the publication of political memoirs, media reports and work by historians. The need to protect Cabinet confidentiality and Cabinet’s collective responsibility to Parliament ceases to have any force. It could be argued that strictly speaking Cabinet’s accountability ceases with every new parliamentary election – Cabinet can only be responsible to the Parliament in which it holds office as the Government.

The Panel’s proposal – based on principle

Much of the debate about the role of Cabinet is influenced by the fact that in almost all jurisdictions in which the Westminster system operates, the Cabinet system, though well understood, is shrouded in mystique. It is one of those “conventions” which emerged (necessarily) as part of the unwritten British constitution, and which was adopted in most Commonwealth countries. Those which did adopt formal, written constitutions, like Australia, generally avoided referring specifically to the cabinet system, though they provided for the basic elements on which it was constituted, such as the appointment of ministers by a Governor or Governor-General. But the notions of collective and individual ministerial responsibility were not elevated above the status of conventions – though conventions thought to be quite basic to the understanding of how the relevant constitution functioned.

One consequence is that the explanation for the Cabinet exemption in most FOI laws is often difficult to come to grips with, as it needs to be justified in terms of conventions that are difficult to pin down with any real precision. Moira Paterson, for example, explains that there are generally two distinct policy rationales for the exemption of Cabinet documents —

The first is directed at the protection of the convention of collective responsibility and requires that information which reveals the views expressed by ministers during the course of Cabinet deliberations should be kept secret.

²⁴⁹ ALRC/ARC Report, p. 111.

As the Cabinet process is a complex one and may involve informal gatherings of Cabinet ministers as well as formal meetings, it extends to the protection of views expressed in those contexts also. Protection of the so-called “Cabinet oyster” is necessary because of the expectation that the Cabinet will present a collective front and that the making of collective decisions should be preceded by full and frank expressions of opinion by individual ministers ...

The second rationale is directed at the protection of information which reveals what was deliberated on and decided by the Cabinet. This may require the protection of material that was generated for the purposes of Cabinet discussion and documents which outline or refer to what was decided. Such material is protected on the basis that its disclosure may result in some harm (for example, by allowing people to take steps to avoid the consequences of new measures) if it precedes the formal announcement of the Cabinet’s decision.²⁵⁰

The Cabinet exemption stands on much firmer ground in Queensland. In 1993 the Electoral and Administrative Review Commission recommended that the Queensland Constitution should be consolidated – at the time it was made up of about 20 separate Acts, Orders in Council and other instruments. In 1999 the Government reviewed the subsequent parliamentary committee reports on EARC’s proposal and released discussion drafts of a plain English consolidated constitution. It appointed the Queensland Constitutional Review Commission to promote and facilitate debate on constitutional reform issues. Subsequently the *Constitution of Queensland Act 2001* was enacted. One noteworthy feature of the revamped Constitution is that unlike written constitutions in most other Westminster system jurisdictions it makes specific mention of the Cabinet. The relevant section is in these terms —

42 Cabinet

- (1) There must be a Cabinet consisting of the Premier and a number of other Ministers appointed under section 43.
- (2) The Cabinet is collectively responsible to the Parliament.²⁵¹

In Queensland, therefore, collective ministerial responsibility is not based on mere convention. It is mandated and required by the Constitution. In the Panel’s view, that is what the Cabinet exemption is appropriate to protect. And it should be limited to performing that task. It should also be expressed in terms that reflect that intention.

The Panel’s proposal is that the Cabinet exemption should be limited to submissions and Cabinet decisions, whether in draft or finalised, and any other matter that if made public would compromise or undermine Cabinet’s collective ministerial responsibility to the Parliament. The protected documents would include the Cabinet agenda, Cabinet briefs prepared by Departments and notes made by Ministers or their advisors in relation to a Cabinet meeting. In effect, this is what the Queensland Cabinet Handbook defines as Cabinet documents when it says —

²⁵⁰ Paterson, M., *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths 2006, pp. 332-333.

²⁵¹ *Constitution of Queensland Act 2001*, s. 42.

Cabinet documents are diverse in their form and may broadly be defined as documents, which if disclosed, would reveal any consideration or deliberation of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations.²⁵²

What would not be covered are materials that contain factual and/or statistical material unless the release of that material would involve disclosure of any unpublished deliberation or decision of Cabinet. Otherwise, the matters covered would be almost identical with those matters currently listed in the Queensland Cabinet Handbook as Cabinet documents. The test, however, is not whether they are on that list, but whether they satisfy the criteria in the definition above.

The Panel considers that factual/statistical material that is extracted from a report and detailed within a Cabinet submission should be covered by the exemption, because to release it could indicate the nature of the submission. The factual/statistical material in this instance becomes part of the argument that the relevant Minister is making for adopting the submission. The exemption, when set out in legislative form, should include this as an example of what the exemption covers. Whole reports containing factual/statistical material that might be attached or annexed to a submission, would not necessarily be covered by the exemption, depending on whether their disclosure “would reveal any consideration or deliberation of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations”.

Earlier, under the heading “Cabinet exemptions – how liberal are they?” this report examined the range of outcomes of different FOI regimes in terms of whether documents are more or less susceptible to release. The Panel considers the scheme it has proposed would be slightly more open (less secretive) than the original 1992 Queensland legislation or the Commonwealth Act because of the removal of conclusive certificates, though less open than the New Zealand scheme. It would also provide much more certainty in the application of this narrower exemption.

The discretion to release material that falls within the exemption

It is necessary to emphasise that the fact that even though a document falls within the category of exempt Cabinet documents, it is a category based on the consequences of the disclosure of the documents. This is why the release of any particular document to a requester remains an option open to the relevant agency or Minister. As the discussion paper noted, most Cabinet decisions are made public only shortly after they are taken. Material in submissions will frequently form the basis of media statements accompanying an announcement or be expressed in comments by Ministers either to the media or to Parliament. In New Zealand, some agencies make some of their Cabinet submissions available on their websites, soon after Cabinet has considered them.

It will normally be the case that a relatively junior officer looking after FOI will feel it is not within his or her discretion to release a document that is covered by the Cabinet

²⁵² Department of the Premier and Cabinet, *Queensland Cabinet Handbook*, March 2007, section 1.6.

exemption. The Panel considers that the Government should develop a process where the Premier as Chair of Cabinet with the Cabinet secretary's support, or their delegates, consider on a regular basis – perhaps weekly, after Cabinet meetings - what material that has been considered by Cabinet should be proactively released. This team could also be given the responsibility for determining what materials that would fall within the exemption, should nevertheless be released after an FOI application is made that asks for them or some related document, together with the release of additional material that would put it in a proper context. Alternatively (or, preferably, additionally) individual Ministers, in consultation and agreement with the Premier as chair of Cabinet, could take the initiative in releasing Cabinet material related to their own portfolios where it is sought through FOI processes.

Two submissions received by the Panel put forward a related proposal the Panel considers to have merit. This was a recommendation originally made by the Electoral and Administrative Review Commission in Report No. 6, dealing with “Freedom of Information”. As noted by David Fagan, Editor of *The Courier-Mail*, in his submission, the confidentiality of Cabinet would “be offset by maintenance of a Cabinet register which would see publication”²⁵³ of —

- a. details of the terms of all decisions made by Cabinet after the commencement of the FOI Act;
- b. the reference number assigned to each decision;
- c. the date on which each decision was made.²⁵⁴

Fagan pointed out this recommendation did not survive the drafting of the Act, and that the Electoral and Administrative Review Commission unsuccessfully renewed its call for this provision in its “Review of Government Media and Information Services” in 1993.²⁵⁵

The Queensland Integrity Commissioner, Gary Crooke QC, made a similar suggestion. He said in his submission, referring to the need to bring about cultural change, “Perhaps the hitherto sacred preserve of Cabinet Secrecy could be visited with a fresh mindset. Consideration could be given to such expedients as publishing a list of Cabinet Agenda items. Perhaps later, an appropriate summary of decisions could be published ...”²⁵⁶

One submission received by the Panel pointed to an example of this practice. The Queensland Council for Civil Liberties said —

We observe that the Welsh Cabinet now publishes the Minutes Papers and Agendas of its meetings with certain exemptions. We invite you to visit

²⁵³ David Fagan submission to the FOI Independent Review Panel discussion paper, p. 3.

²⁵⁴ David Fagan submission to the FOI Independent Review Panel discussion paper, p. 3.

²⁵⁵ David Fagan submission to the FOI Independent Review Panel discussion paper, p. 3.

²⁵⁶ QLD Integrity Commissioner submission to the FOI Independent Review Panel discussion paper, p. 1.

<www.wales.gov.uk/cabinet> where the Minutes of the Cabinet can be read and the exemptions are listed.²⁵⁷

As has been mentioned previously, the New Zealand government publishes a considerable amount of Cabinet material within a short period of its consideration by Cabinet. No observer has suggested this has had any ill-effects.

The Panel considers a suitably edited Cabinet agenda list, identifying those matters that needed to remain confidential, could be published without damage to Cabinet's integrity. Summaries of decisions could also be published – most would already have been announced. The approval and release of these lists would be the responsibility of the group mentioned above - the Premier as Chair of Cabinet, in consultation with the Cabinet secretariat, or their delegates.

RECOMMENDATIONS:

Recommendation 32

Cabinet decisions, Cabinet submissions and Cabinet Briefing Notes, whether final or in draft form, and all other matter that would, if made public, compromise the collective ministerial responsibility of Cabinet under the Constitution, should be exempt documents. Those exempt Cabinet documents would include minutes or notes of Cabinet decisions and discussions, briefs for Ministers attending Cabinet meetings, the Cabinet agenda and pre-Cabinet consultations between officials and Ministers and among Ministers. This exemption applies only to documents brought into existence for the purpose of submission to Cabinet. Cabinet includes Cabinet committees.

Recommendation 33

Factual/statistical material that is extracted from a report and detailed within a Cabinet submission should be covered by the exemption, because to release it could indicate the nature of the submission, and hence compromise collective ministerial responsibility. The cover sheet and body of a Cabinet Submission is not to be interrogated in deciding application of the exemption (disclosure would compromise collective responsibility of Cabinet). However, any attachments including whole reports of factual/statistical material attached or annexed to Cabinet submissions, would not normally be covered by the exemption unless disclosure would compromise collective responsibility of Cabinet requiring proof that any such attachment was prepared for the purpose of submission to Cabinet.

²⁵⁷ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 12.

Recommendation 34

The Premier, as Chair of Cabinet, in consultation with the Cabinet secretariat, or their delegates, should decide weekly after Cabinet meetings, what Cabinet material should be released proactively. They should also release an edited version of the Cabinet agenda and a summary of those Cabinet decisions that it was no longer necessary to treat as confidential.

At the end of this chapter, the Panel refers to what it calls the “illegality proviso” in s. 42. At common law, if a Minister or the Cabinet acts illegally, they would not be considered to be acting in their capacity as a Minister or Cabinet. The consequence of this is that any material relating to such actions would not be protected by the Cabinet (or any other) exemption.

8.2 Executive Council documents exemption

The ALRC/ARC Report recommended that the section providing for Executive Council exemptions should be repealed. Executive Council documents deal mainly with statutory appointments, commissions, regulations and proclamations. Almost all the decisions made by Executive Council are published within a very short period, generally in the Government Gazette. However the explanatory memorandums are not published. The ALRC/ARC Report noted that Executive Council documents that warrant protection can be withheld under other provisions, such as personal information.²⁵⁸ It also noted that the Department of Prime Minister and Cabinet was opposed to this proposal.

LCARC, on the other hand, recommended that the Executive Council exemption should remain, though it proposed it be narrowed somewhat – it had undergone the same amendments between 1995 and 2000 as those made to the Cabinet exemption.

In the course of its report, LCARC pointed out that EARC’s original recommendation for the Executive Council exemption was based on the argument that —

(a) the Governor, as the Queen’s representative, should not be subject to FOI legislation and accordingly it is inappropriate to subject to FOI legislation a body through which the Governor functions; (b) as the Governor is excluded from the Act, the body within the executive branch of government over which the Governor presides should similarly be exempt; and (c) exemption is necessary to complement the Cabinet exemption because, in effect, Executive Council is the formal expression of the Cabinet process.²⁵⁹

²⁵⁸ ALRC/ARC Report, Recommendation 50, p. 113.

²⁵⁹ LCARC Report, *Freedom of Information in Queensland*, No. 31, pp. 196-197.

The Panel considers the principles outlined by EARC are correct. It would be inconsistent with the approach the Panel has proposed for Cabinet material for the Executive Council exemption to be treated any differently.

The Queensland Constitution provides an additional reason for maintaining the exemption for the Executive Council. Section 48, dealing with the Executive Council, includes a provision requiring members of the Executive Council to take or make the oath or affirmation of office and secrecy prescribed in a schedule to the Constitution.

It would be anomalous for the members of the Executive Council to be bound to secrecy but for the documents which came before them to be available under FOI, even though much of the material can be reflective of what has happened in Cabinet.

RECOMMENDATION:

Recommendation 35

An exemption for Executive Council documents be retained.

8.3 Specific ministerial documents exemption

The Queensland Cabinet Handbook notes that “Cabinet collectively, and Ministers individually, are responsible and accountable to the Crown, the Parliament, and ultimately the electorate.”²⁶⁰ This section examines the implications of the doctrine of individual ministerial responsibility and whether it requires that some documents should be exempted from FOI in reliance on that doctrine.

The discussion paper, quoted at the beginning of this chapter, contains an extract from the New Zealand *Official Information Act 1982*. It provides for the withholding of information if the withholding is necessary to —

- (f) Maintain the constitutional conventions for the time being which protect —
...
- (ii) Collective and individual ministerial responsibility;

That is, it makes no distinction between the need to protect both collective and individual ministerial responsibility.

Political science literature for 30 or 40 years has included discussion about whether there has been a lessening of the significance of individual ministerial responsibility, particularly in relation to a Minister’s responsibility for actions taken by departmental officials. It has also included considerable debate about whether responsibility means accountability or answerability rather than the type of responsibility that might cause

²⁶⁰ Department of the Premier and Cabinet, *Queensland Cabinet Handbook*, March 2007, p. 2.

a Minister to have to resign or be sacked if things go wrong. However, there is no doubt that Ministers remain responsible and accountable to Parliament for the core activities of their portfolios, and for what they personally do or decide. They are also personally liable for what they say in Parliament. A Minister who misleads Parliament, for example, may not survive as a Minister.

But a Minister cannot be responsible for his portfolio if he or she does not know what is happening within his or her department. Ministers need to be briefed about what their departments are doing, what problems exist and how they are being dealt with. Unless they know, democratic accountability is a sham. Ignorance should not be an option if government is to operate responsibly.

Ministers in Queensland, like those in other Westminster systems, are regularly briefed on matters that they will be involved with in Cabinet. These documents are in most cases (certainly in Queensland) covered by the Cabinet documents exemption. However, there are two sets of documents provided to Ministers that are not properly covered by that exemption, though in Queensland they have been protected by the extended Cabinet exemption – that is, by being submitted to the Cabinet, though perhaps not for its consideration. These are the incoming Departmental briefs that a Minister receives on taking office (generally, either after an election, or on a change of Department) and the brief provided by the Department in preparation for the consideration by Parliament of the annual budget estimates. Both provide a birds-eye view of the Department and its activities as a whole, a snapshot in time of its current issues, policy agenda, resources and problems. They are not deliberative documents – they do not require an immediate response from the Minister (though they may prompt one) – and it would be difficult to justify them being withheld from FOI under the deliberative processes exemption. Nevertheless in virtually all jurisdictions, they are withheld from release, using that exemption or another such as the Cabinet exemption, and/or using a conclusive certificate. The estimates briefings provide the Minister with an extended commentary on the ministerial portfolio statements that are provided to Parliament with the Budget papers to explain the details of a Department’s estimates. The estimates briefing documents may also be covered by the parliamentary privilege exemption.

There would be a real governance problem if the FOI law was to inhibit the free and frank provision of *information* by officials to Ministers. (The question of whether “free and frank” *advice* by officials might be inhibited by FOI is a quite distinct issue, and one that the courts – and senior officials - are becoming less inclined to accept as a real possibility.)²⁶¹ In New Zealand, where the disclosure of such information is apparently quite common, a recent study by Nicola White suggests, nevertheless, that some negative effects have emerged.

It is also evident, however, that the openness has come at a price. Papers are written differently; if it is obvious that a paper will become public, it will inevitably be written with an eye to a public audience. The processes adjust to reflect the new reality. A Cabinet paper that will be released within hours or days of the decision being made is unlikely to be a vehicle for a full and free advice. Rather, it is likely to be an exposition of the reasoning behind the

²⁶¹ FOI Independent Review Panel discussion paper, p. 83.

decisions the government is making. Similarly, now that it is customary for post-election briefs, or briefings to incoming ministers, to be published fairly quickly, their content has become largely anodyne. It is not conducive to building effective working relationships to greet a new minister with a document that is about to [be] published that contains political bombshells.²⁶²

Nor, it must be said, is the building of effective relationships between Ministers and officials likely to be encouraged if a Minister decides to release or leak political bombshells that their officials have documented, even where they reflect on a previous administration. Again, they may make officials less likely to give Ministers the full benefit of their departmental experience.

White said many of her interviewees —

Encountered reluctance to write down “wild ideas” before testing them at the political level, because the political cost of defending them if they turned out to be flawed was too high. The reason why this defensive behaviour is now widespread is simple: people do not perceive the protection provided by the relevant grounds in the Act as reliable or effective. Time and again, people comment informally that a good public servant will not write anything down that could not be released under the OIA (at least in terms of these withholding grounds). While it is possible that the withholding grounds might apply (and some argue that in general they do eventually protect what needs to be protected), most people consider the arguments too difficult and time-consuming to make.²⁶³

“Anodyne” information, as White describes it, is not the kind of information that Ministers want or need from their officials. If Ministers are to be “accountable to the Crown, the Parliament, and ultimately the electorate” they must know what is happening within their particular areas of ministerial responsibility. This is not just about accountability: it is about better government that comes through accountability. It is also important that Ministers be briefed to the point where they will not, through ignorance, give misleading information to Parliament, particularly during question time or during the conduct of its estimates committees.

And just as there is a very high degree of public interest in the effective operation of collective ministerial responsibility, so too there is a significant public interest in ministers being able to meet their individual responsibility to “the Crown, the Parliament, and ultimately the electorate”.²⁶⁴ Again, this implies that there should be no public interest test applied separately to an exemption covering the provision of specified briefing materials by officials to ministers.

The freedom of information laws are meant to promote the accountability of government, but they are not meant to overturn or displace the fundamental concepts

²⁶² White N., *Free and Frank - Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, 2007, p. 231.

²⁶³ White N., *Free and Frank - Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, 2007, p. 231.

²⁶⁴ Department of the Premier and Cabinet, *Queensland Cabinet Handbook*, March 2007, p. 2.

of ministerial responsibility. If individual ministerial responsibility is to be preserved and to be meaningful, it is essential that ministers should be fully informed, and not simply fed “anodyne” guff. That will not happen unless the information is protected from disclosure under FOI.

According to Carter and Bouris, the AAT considers there is a strong public interest in preserving the confidentiality of advice given to Ministers on how parliamentary questions should be answered. They refer to a decision of the AAT agreeing with the following comment by Morling J, sitting as the former Document Review Tribunal —

It is obvious that the confidential relationships between Ministers and their official advisers must be preserved. When Ministers are asked questions in Parliament they must be able to seek advice on a confidential basis before answering those questions. They are entitled to receive draft answers which, upon reflection, they may wish to discard.²⁶⁵

The Panel understands that the Department of the Premier and Cabinet in Queensland receives very few requests for parliamentary question (without notice) briefs, and that in such cases, it has applied the exemption in s. 50(c)(i) (infringe the privileges of Parliament) to refuse them.

The application of the Parliamentary privileges exemption to prevent the release of draft ministerial answers to possible parliamentary questions has been approved in a 2007 decision of the Office of the Information Commissioner, based on a decision of the Qld Court of Appeal in 1997 in a case concerning the extent of parliamentary privilege under Commonwealth law.²⁶⁶ In the *Daglish* case, Assistant Information Commissioner M. Gittins was concerned with a document headed “Parliamentary Brief” containing “details of the relevant topic, a recommended response and relevant background information”. The decision in this case, and the judgment in the *O’Chee* case, are such as to suggest that estimates briefs as well as draft answers to questions would be covered by the Parliamentary privilege exemption.

In Britain, the Department of Constitutional Affairs recommends that advice containing “opinion and speculation about the reasons behind a question and likely motivation” and

[a]ll other background material (including factual material, such as “if pressed” lines, political briefing on the policy, information marked “not to be disclosed”, “worst accusations” “elephant traps”, “Best points” unused supplementary questions,²⁶⁷

²⁶⁵ Carter, M. and Bouris, A., *Freedom of Information – Balancing the Public Interest*, UCL, London, 2006, p. 157, referring to *Re F. E. Peters and Public Service Board and Department of Prime Minister and Cabinet* (No. 4) [1986] AAT No. 2751, quoting Morling J. in *Re Peters* (No. 2) 1983 5 ALN N306, para [20].

²⁶⁶ L and J Daglish and the Department of Natural Resources and Water, Application No. 210094, 24 January 2007, referring to *O’Chee v Rowley* (1997) 142 FLR 1.

²⁶⁷ White, N. White N., *Free and Frank - Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, 2007, Appendix B, p. 303. Reproduced from <<http://www.foi.gov.uk/practitioner/index.html>>

should be withheld. Ministers/agencies are advised to use the exemption concerning “prejudice to the effective conduct of public affairs – free and frank advice”.²⁶⁸

There is a paramount public interest in preserving the confidentiality of this kind of advice, and that it should be protected directly through an exemption based on the need to preserve a Minister’s individual responsibility to Parliament, rather than through the resort to the parliamentary privilege exemption.

As will be evident from the above discussion, the Panel believes three forms of briefing for Ministers need to be protected from disclosure under FOI. The first are the “blue/red books”, the briefings prepared by officials in advance of an election or where there is a change of government, or its equivalent for a new Minister when there has been a change in ministerial arrangements. These provide a complete overview of the department. The second are the annual briefings on the estimates. These provide a detailed explanation of the ministerial portfolio statements that are provided to parliament and may be in some ways an update on the blue/red book briefing. The third are the briefing notes provided to ministers to prepare them for question time in the Parliament.

Five further matters should be mentioned.

First, it could be objected that to provide these new exemptions in the freedom of information legislation is unprecedented. One explanation for this is that the briefings, particularly on estimates, either were not created by departments at the time the 1992 legislation was prepared, or, in the case of the blue/red books contained comparatively much less. Information technology has made it much easier for officials to collate and present to ministers information that would have been difficult to present to them a decade and more ago. Another reason is that these materials have been protected in the past using other exemptions, such as that concerning parliamentary privilege. It is better that a principled reason for their non-disclosure, based on the role of the minister, is available.

Second, most of the information that is contained in the briefing and estimates books would be available for release through FOI, in other documents held by agencies. The information will not be made exempt by being included in the ministerial briefing documents that pull the information together. Most of the information contained in a parliamentary brief will be given to Parliament by a Minister in answer to relevant questions.

Third, as with the Cabinet and Executive Council exemptions, there remains a discretion for officials or Ministers to release information contained in these briefing documents. This was exemplified early in 2008 when the Federal Treasurer decided to release under FOI much of the Red Book briefing he received from the Treasury on taking office (though about half of the paper was blacked out under other exemptions). Ministers occasionally table a Question Time brief or have it included in Hansard.

²⁶⁸ *Freedom of Information Act 2000* (United Kingdom), s. 36(2)(b).

Fourth, the Panel’s proposals envisage that documents falling under this heading, and all others, would normally become available for public release after a time specified in a schedule approved by the parliament (3 years – see chapter 11).

This proposed exemption, while new (though the material it protects has normally been kept from disclosure under other exemptions) is based on principle: it reinforces the personal, individual responsibility of ministers and their ability to govern effectively, as required by the Constitution.

RECOMMENDATION:

Recommendation 36

To preserve and promote individual ministerial responsibility —

- incoming ministerial briefing books (“red/blue books”) for when a Minister is appointed to the portfolio;
- annual parliamentary estimates briefs for when the Minister must account to Parliament for the ministerial portfolio’s past and planned expenditure of parliamentary appropriations; and
- parliamentary question time briefs (“PPQs”) for when the Minister must account to Parliament in question time,

(and any drafts or topic lists of those documents) should be exempt from disclosure under FOI.

8.4 Vice-regal exemption

At the beginning of this chapter, an extract from the discussion paper pointed out that the New Zealand *Official Information Act 1982* provides that information can be withheld, if and only if, the withholding of the information is necessary to maintain a number of constitutional conventions which were then listed. The first that occurs in the Act was not included in that extract. It is, “The confidentiality of communications by or with the Sovereign or her representative.”²⁶⁹

The Queensland Act in s. 11(1)(a) excludes “the Governor” from the application of the Act. However, this exclusion would not cover the Governor in the terms of the constitutional convention that is recognised in New Zealand, such as communications between the Sovereign and the Premier or between the Governor, acting as the Sovereign’s representative, and the Premier. This is because s. 11 relates only to exclude the scope of the Act from the Governor, as distinct from an exemption covering the Governor’s correspondence in the hands of the Premier. Release of that correspondence would breach the constitutional convention. The Panel considers this constitutional convention should be observed by means of a specific exemption. This would be consistent with EARC’s original concern over FOI coverage of the Queen’s

²⁶⁹ *Official Information Act 1982* (New Zealand), s. 9(2)(f)(i).

representative. The protection afforded by the New Zealand provision to the Sovereign is echoed in British legislation and in Thailand.

RECOMMENDATION:

Recommendation 37

To maintain the constitutional convention that protects the confidentiality of communications by or with the Sovereign or her representative, documents that are communications between the Sovereign and the Governor, and between the Sovereign and the Premier, and between the Governor, representing the Sovereign, and the Premier, and documents recording any such communications, should be exempt from FOI.

8.5 Other exemptions where there is a paramount public interest in non-disclosure

The exemptions that follow are, like those discussed above, in a category where the public interest in their observance is set at such a high level that it is unlikely in almost any circumstance that might be encountered in the administration of FOI, that there would be some other public interest or combination of public interests that could result in documents being made available. For this reason the Panel proposes that the exemptions should not include a public interest test as that has already been determined by Parliament. However, it is important to make two points about the way these (and other) exemptions operate. The first is that they are not mandatory. Section 28 of the *Freedom of Information Act 1992* does not require access to be refused to exempt matter. It provides that an agency or Minister “may” refuse access. An agency or Minister may have good reason to release a document that is classified as exempt. The Panel believes section 28 should be regarded as a critical element in the freedom of information scheme, though it notes that it has not been used very much. However, the Panel considers the provision should be expressed in a way that makes it much clearer to agencies and Ministers that matter that falls within the exemption is able to be released under FOI. Section 28 should be amended to clarify its meaning by adding two words, “grant or”, so that it reads, “An agency or Minister may grant or refuse access to exempt matter or exempt documents.” The second matter is what might be described as the illegality proviso. This was referred to earlier and is explained in more detail at the end of this chapter.

RECOMMENDATION:

Recommendation 38

Section 28 should be amended to clarify its meaning by adding two words, “grant or”, so that it reads, “An agency or Minister may grant or refuse access to exempt matter or exempt documents.”

The present Act contains a number of other exemptions that are expressed as not being subject to a public interest test. They are —

- s. 42 — Matter relating to law enforcement or public safety (though the section contains some exceptions and some provisions that do include a public interest test and a ministerial certificate provision);
- s. 42A — Matter relating to national or State security;
- s. 43 — Matter affecting legal proceedings;
- s. 45 — Matter relating to trade secrets, business affairs and research (though not the entire section);
- s. 46 — Matter communicated in confidence (though not the whole section - only the provision that disclosure of the matter would found an action for breach of confidence);
- s. 47A — Matter relating to investment incentive scheme; and
- s. 50 — Matter disclosure of which would be contempt of Parliament or contempt of court.

Generally, the Panel considers these exemptions should be maintained, though it considers, for reasons expressed below, that the exemption in s. 47A is unnecessary and undesirable. It believes a public interest test should, in effect, apply to the whole of s. 45.

It considers that all the remaining sections – 42, 42A, 43, 46 (in part) and 50 - together with those dealt with earlier in this chapter – 36, 37 and new sections with material concerning the Sovereign and her representative, and another concerning individual ministerial responsibility - should be grouped together in a distinct part of the Act. Those aspects of the exemptions mentioned above that contain (or, in the Panel’s view, should contain) a public interest component or test, should be treated in a different way, and not as exemptions. These are considered in chapter 10. The nature of the public interest test that should be applied is considered in chapter 9.

Section 42 - Matter relating to law enforcement or public safety

This is a complex provision which has been amended on five occasions. Subsection (1) lists 11 matters which are exempt if their disclosure could reasonably be expected to cause various listed harms relating to law enforcement or public safety. Subsection (1A) contains two matters which are declared to be exempt – information given in the course of an investigation of a contravention or possible contravention of the law, and information given under compulsion under an Act that abrogated the privilege against self-incrimination. Subsections (3A) and (3B) exempt matter relating to a prescribed crime body or another agency in the performance of the prescribed functions of the body, though such matter is not exempt if it consists of information about the applicant and the investigation has been finalised. Subsections (3A) and (3B) relate to the Crime and Misconduct Commission and its predecessors, the former Criminal Justice Commission and Queensland Crime Commission. Subsection (3) allows a Minister to certify that specified matter, if it existed, would be exempt matter under subsection (1). This is a provision for what can be, in effect, (because of the operation of s. 84 (3)) a conclusive certificate. The Panel believes this is unnecessary and undesirable, for reasons that are explained in chapter 11.

Subsection 1 does not contain a public interest test in one of the traditional forms. However, matter is exempt only if its disclosure “could reasonably be expected to” result in one or more of the listed prejudices or harms. The prejudices or harms are all of a kind that would rank highly as factors telling against disclosure if they were considered in a public interest test. The same applies to the exemption in (3A) covering investigations by the Crime and Misconduct Commission (CMC). In the case of (3A) it seems likely that much of the information would also be protected as “personal information”, if that terminology were to replace “personal affairs” as the Panel proposes.

In response to a letter from the Panel seeking the CMC’s view on whether the exemption could be made subject to a public interest test, the CMC said it was “strongly of the view that the current exemption of section 42(3A), qualified by section 42(3B) of the FOI Act, should be maintained as it promotes the public interest by enabling the CMC to discharge its statutory responsibilities by encouraging the willing and candid assistance of officials in its investigations.”²⁷⁰

The Panel also received a submission from Lawrence Springborg, the Leader of the Opposition, concerning s. 42(3A). Mr Springborg said —

It has become a habit for some Ministers and/or departments to refer documents and issues to the CMC themselves when the Minister and/or department knows with absolute certainty that there is no crime or misconduct involved; but they know with equal certainty that the revelations in the documents will cause embarrassment or show incompetence and/or dishonesty.

Ministers refer these documents to the CMC who naturally determine that there is no actual crime or misconduct but are unable to pass judgment on

²⁷⁰ Crime and Misconduct Commission letter to the FOI Independent Review Panel, 8 April 2008, p. 2.

whether the actions were dishonest or incompetent. But because the documents have been referred for investigation to the CMC they remain hidden from public view forever unless the Minister or Premier chooses to release them themselves for which there is no obligation.

...

One way the clause may be amended is to make it clear that the exemption only applies to:

- Issues currently under investigation; or
- Issues for which the CMC has investigated and for which proceedings for crime and misconduct have commenced.²⁷¹

The Panel observes that under the sub-section, matter is exempt only in relation to the “performance of the prescribed functions” of the CMC. If a complaint that is referred to the CMC could never have been said to fall within its “prescribed functions”, the matter should not be exempt simply by reason of its referral to the CMC.

More importantly, however, it must be repeated that it remains open to an agency (including the CMC) to give access to a document that falls within the description of exempt matter or an exempt document (see s. 28). If the CMC considered it was being misused to conceal documents, it would be open to it to make those documents public, in response to a relevant FOI request.

The Panel proposes no change to the sub-sections concerning the CMC.

The Panel also received a number of submissions from the Queensland Police Service, seeking to have various activities exempted, additional to those protected by the existing provisions of s. 42 concerning law enforcement.

A submission on 12 May 2008, said in part —

Of particular concern to the Service is that other law enforcement agencies or individuals may be reluctant to provide intelligence to the QPS because prima facie that information is subject to the provisions of the FOI Act.

A perception that intelligence information provided to, or obtained by the QPS is subject to the FOI Act may deter individuals or organisations from providing such information. This perception would be removed if documents of the intelligence gathering services of the QPS were not subject to the Act, as is presently the case for ASIO documents.

In all probability there would be certain reluctance from interstate intelligence services to forward “documents” to the QPS which contain intelligence information because of the spectre that such information may be the subject of an FOI application. The concern is genuine and the proliferation of documentation

²⁷¹ Springborg, L. letter to the FOI Independent Review Panel, 6 May 2008.

with this sensitive information if such a matter went to external review highlights the problem.

The State Security Operations Group also holds classified intelligence disseminated from the Australian Security Intelligence Organisation ("ASIO") and other law enforcement organisations. Whilst paragraph 11(1)(j) of the FOI Act deems the Act not to apply to documents originated by the Commonwealth intelligence services, there is no blanket protection for intelligence documents created by other law enforcement agencies and forwarded to the QPS.

Furthermore, a public perception that notionally, documents generated by Crime Stoppers may be released to an applicant and prejudice the future supply of information. The Crime Stoppers hotline is generally utilised by private citizens who generally would have no involvement with law enforcement agencies. It is essential that these citizens can be assured that documents that have been generated as a result of the information they have provided which may identify them will not be available under the FOI Act.²⁷²

The preferred position of the QPS was that its intelligence gathering services – the State Intelligence Group, the State Security Operations Group and Crime Stoppers should all be listed under s. 11 as bodies to which the Act did not apply.

The Panel notes that in most jurisdictions in Australia the documents of equivalent bodies are exempt. It considers an exemption for the matter obtained by these bodies should be included in s. 42, similar to that provided for the CMC. This would not be an exemption that would extend to the QPS generally, its activities being covered by the general provisions of s. 42.

The Panel proposes not to change s. 42 to make it subject to a public interest test. However the exceptions to the exemption, listed in subsection (2) should be tested against the public interest test proposed by the Panel in chapter 9.

Section 42A - Matter relating to national or State security

This section exempts matter where disclosure could reasonably be expected to damage the security of the Commonwealth or a State. It contains, in subsection (4) a provision for what can be, in effect (because of the operation of s. 84 (3)), a conclusive certificate. The Panel believes this is unnecessary, given that no public interest test applies to this section.

Section 43 - Matter affecting legal proceedings

This provides an exemption for matter that would be privileged from production in a legal proceeding on the ground of legal professional privilege. The Panel proposes no change to it.

²⁷² Queensland Police Service submission to the FOI Independent Review Panel discussion paper, pp. 9-10.

Section 45 – Matter relating to trade secrets, business affairs and research

The discussion paper pointed out —

Commercial-in-Confidence is a shorthand term for a series of exemptions contained in s. 45 of the Queensland FOI Act, covering trade secrets, business affairs and research. The section, in (1)(a), makes trade secrets exempt matter. In (1)(b) it makes information that has a commercial value exempt if its disclosure could reasonably be expected to destroy or diminish the commercial value of the information. And in (1)(c) it makes other business, professional, commercial or financial information exempt if its disclosure could reasonably be expected to have an adverse effect on those affairs or on the future supply of such information to government, unless its disclosure, on balance, would be in the public interest.²⁷³

Finn has noted that the ALRC/ARC review suggests the public interest test in 45(1)(c) applies to the whole of s. 45.²⁷⁴ However as he points out, the Information Commissioner has decided it applies only to s. 45(1)(c).²⁷⁵

Most Australian jurisdictions do not apply a public interest test to all parts of their equivalent of s. 45. The ALRC/ARC Report recommended no change to the Commonwealth’s provision, arguing —

These exemptions protect valuable commercial information that in many cases the Commonwealth has obtained free of charge and in the public interest. It is essential to ensure that this information continues to be available to the government and that its value is not compromise by that availability.²⁷⁶

Finn acknowledges the importance of confidentiality but argues —

that the present structure of the Freedom of Information Acts places too great a weight upon commercial confidentiality. The existing near absolute and rigid protection of such information cannot be justified. A new balance should be struck.²⁷⁷

Brisbane City Council said it did not support —

Changes to the current exemptions under s. 45(1)(a) and (b) which would make those exemptions subject to a public interest test. The deciding factor should remain whether or not the information constitutes a “trade secret” or has “commercial value”. There would be no public interest in the disclosure

²⁷³ FOI Independent Review Panel discussion paper, p. 85.

²⁷⁴ Finn, C., “Getting the Good Oil: Freedom of Information and Contracting Out,” Australian Journal of Administrative Law, Vol. 5 1998, 113, at p. 116.

²⁷⁵ Referring to *Cannon v Quality Egg Farms* (1994) 1 QAR 491. Finn suggests the drafting of s. 45 is unclear in this respect. Finn, C., “Getting the Good Oil: Freedom of Information and Contracting Out,” Australian Journal of Administrative Law, Vol. 5 1998, 113, at p. 116.

²⁷⁶ ALRC/ARC Report, p. 141.

²⁷⁷ Finn, C., “Getting the Good Oil: Freedom of Information and Contracting Out,” Australian Journal of Administrative Law, Vol. 5 1998, 113, at p. 127.

of a “trade secret” or information which has “commercial value” which could result in a detrimental affect on a person, company or agency.²⁷⁸

As Finn points out, the Victorian Act contains a public interest test that can be imposed during external review and it covers the whole of the Victorian equivalent of s. 45 (and most other exemptions). Clearly, there is a public interest in maintaining confidentiality along the lines of the ALRC argument. But this is not so absolute that it should exclude any countervailing public interest considerations. It might be a rare occasion when openness might prevail, but the Panel considers the possibility that it could occur should not be excluded. The kind of public interests that might prevail over confidentiality include those specified in the Canadian *Access to Information Act* which contains a public interest override where information relates to public health, public safety or protection of the environment.

Subsection (3) provides an exemption for matter that would disclose “the purpose or results of research” and does not contain a public interest test. However LCARC recommended that this exemption should not apply to research that has been completed and that it should contain a public interest test. The Panel agrees with those recommendations. LCARC also recommended that the harm test that it contains should be changed so that it required a “substantial adverse effect” rather than an adverse effect. The Panel does not agree with that recommendation. The harm test should remain as it is in the current legislation, referring to “adverse effect”.

Section 46 – Matter communicated in confidence

This section contains two parts. The first, subsection (1) (a) provides that matter is exempt if “its disclosure would found an action for breach of confidence”. There is no public interest test to be applied. The Panel does not propose any change to this.

The second part, in subsection (1)(b), deals with information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest. The Panel believes this should be removed from the current section and the exemption dealt with under the public interest test (see chapters 9 and 10).

Section 47A – Matter relating to investment incentive scheme

The discussion paper explained that this exemption was introduced to overcome a decision of the Information Commissioner to grant access to documents concerning financial assistance the Government had provided to Berri Ltd. The Information Commissioner had decided that the information sought was not exempted under the provisions of s. 45, business affairs. In preventing the disclosure of this particular information, the Government enacted a provision exempting the examination of an important facet of its economic activity. In terms of any future financial assistance, whether under this scheme or any other, the object might have been achieved by using the existing exemption covering matter communicated in confidence.

²⁷⁸ Brisbane City Council submission to the FOI Independent Review Panel discussion paper, p. 2.

According to Nicholas Seddon, “It is a very simple matter to make secret anything connected with a contract.”²⁷⁹ He says the Western Australia Supreme Court has rejected an argument that there are inherent limits, dictated by public policy, on what can be agreed to be confidential in government contracts.

If the sole purpose of a contractual confidentiality clause is to thwart the operation of the FOI legislation, then a court may be able to say that it will not lend its aid to the enforcement of the clause. But there is obviously a difficult onus on the applicant to show that this was indeed the purpose behind the confidentiality clause. As already noted, an exception to the general proposition that the law of contract does not limit the inappropriate use of confidentiality clauses is where an illegal purpose is being pursued (for example, if the clause his criminal conduct). Illegality may include the public policy head of not contracting to thwart the operation of legislation. In the BGC case the applicant was unable to show that the clause had this purpose.²⁸⁰

In a footnote he comments —

It is by no means clear that including a commercial-in-confidence clause so as to take advantage of the commercial-in-confidence exemption in the FOI legislation would be against public policy. Possibly if this was the sole purpose and there was no legitimate reason to keep the relevant information secret, the public policy argument could be pursued.²⁸¹

As noted in the discussion paper, when this amendment was introduced the Premier indicated that “grant amounts under the scheme would be disclosed after a period of eight years.”²⁸²

The Panel considers this section should be deleted as its primary purpose can be achieved by using the communicated in confidence provision, through a contractual provision that would result in the disclosure of information founding an action for breach of confidence (s. 46(1)(a)).

However, given the Government’s undertaking that the details of such schemes should be released after eight years, the Panel considers their details should be able to be protected only if they satisfy the public interest test. A harm, based on the damage to the State’s competitive (as against other States’) interests, should be included in the factors of the public interest test, while an eight years limit should be included in the Time and Harm Weighting Guide.

²⁷⁹ Seddon, N., *Government contracts – Federal, State and Local*, Federation Press, Sydney, 2004, p. 375.

²⁸⁰ Seddon, N., *Government contracts – Federal, State and Local*, Federation Press, Sydney, 2004, p. 375.

²⁸¹ Seddon, N., *Government contracts – Federal, State and Local*, Federation Press, Sydney, 2004, p. 375.

²⁸² FOI Independent Review Panel discussion paper, p. 34.

Section 50 – Matter disclosure of which would be in contempt of Parliament or contempt of court

The Panel considers this exemption is entirely appropriate. It is not one for which it would be appropriate to have a public interest test. The public interest in observing the law would not be overridden by any other public interest.

Illegality

Mention was made in the last paragraph of 8.1 above of what was described as an illegality proviso. Section 42, dealing with the law enforcement exemption, contains the following provision –

42 (2) Matter is not exempt under subsection (1) if –

(a) it consists of –

- (i) matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law ...²⁸³

The principle encapsulated in this provision, applies universally. If, for example, the Cabinet as a whole or a Minister individually acts illegally, the documents recording/recommending or otherwise connected with such an action would not be protected by any provision of the freedom of information law. This is so whether or not a specific provision is contained in the legislation in relation to an exemption, or indeed whether or not a general provision is included in the Act. This is not because of any considerations of public interest: rather it flows from the fact that if a Minister or the Cabinet acts illegally, they are not considered (by the common law) as acting in their capacity as a Minister or as the Cabinet.

RECOMMENDATIONS:

Recommendation 39

The exemptions contained in sections 42, 42A, 43, 46 (1)(a) and 50 continue to apply, with no public interest test. The exemption in s. 47A should be removed from the Act.

Recommendation 40

Section 42 should be amended to include an exemption for matter that consists of information obtained or created by the State Intelligence Group, the State Security Operations Group or Crime Stoppers.

²⁸³ *Freedom of Information Act 1992*, s. 42.

9 The public interest

There are three distinct public interest tests in the current Queensland legislation (or four, if one was to count exemptions where no public interest test is applied, because the Parliament in effect has ruled the public interest in the exemption – for Cabinet, for example – is so manifestly important that there is no need to balance it against any public interest favouring disclosure).

One test tilts the balance strongly against a finding of public interest that would permit disclosure. This is contained in section 39 – matter whose disclosure is prohibited under two named Acts and section 48 – matter prohibited by an Act mentioned in Schedule 1. The public interest test only allows disclosure if it “is required by a compelling reason in the public interest.”²⁸⁴

The most common public interest test is in exemptions such as those dealing with operations of agencies (s. 40), commercial-in-confidence (s. 45) and affecting the economy of the State (s. 47) which detail the specific harm that could reasonably be expected to result from disclosure and provide for exemption unless “disclosure would, on balance, be in the public interest”.²⁸⁵ The same test is applied concerning the release of matter affecting personal affairs (s. 44) though no harm is (directly) specified – it is implied.

The third public interest test is in section 41, matter relating to deliberative processes. This makes the public interest test an element of the exemption. In effect, it requires an agency or Minister to avoid release of material if the matter fits the definition of deliberative process in the section and its disclosure “would, on balance, be contrary to the public interest”.²⁸⁶

The public interest tests dictate the degree of weight to be given to the benefit as against the harm flowing from disclosure. And while the harm is generally indicated in each particular exemption, there is no indication in the Queensland legislation, nor in those of most other jurisdictions, of what factors might be considered in weighing the public interest. However some FOI laws stipulate that particular matters are not to be considered in determining the public interest. The NSW *Freedom of Information Act*, for example, says in s. 59A —

For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:

- (a) cause embarrassment to the Government or a loss of confidence in the Government, or

²⁸⁴ *Freedom of Information Act 1992*, s. 39 and s. 48.

²⁸⁵ *Freedom of Information Act 1992*, s. 47.

²⁸⁶ *Freedom of Information Act 1992*, s. 41.

- (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.²⁸⁷

The discussion paper pointed out that —

(T)he public interest “is an amorphous concept” which is not defined in the FOI Act or any other statute. In Australia, it has been left to the courts to provide a common law definition. As the ALRC/ARC Report explains, it is something that is of serious concern or benefit to the public, not merely of individual interest. “It does not mean ‘of interest to the public’ but ‘in the interest of the public’”. The Report says —

This lack of definition can mean the public interest is difficult for agencies, applicants and the AAT to ascertain. Despite this, the Review does not consider that any attempt should be made to define the public interest in the FOI Act. The public interest will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility.

However the Report went on to propose that the FOI Commissioner should issue guidelines on how a public interest test should be applied.

Paterson suggests “A phrase that is not defined and capable of a wide range of definitions has the potential to work to the disadvantage of applicants.”

The Commonwealth Ombudsman, John McMillan, commenting on the most recent High Court decision on FOI, *McKinnon v Secretary, Department of Treasury*²⁸⁸ said, “It is disappointing that the High Court did not take the opportunity to provide guidance on the meaning of public interest – whatever that guidance happens to be.”²⁸⁹

LCARC took a similar approach to that of the ALRC/ARC Report. It said —

The committee does not believe that it is possible or desirable to define the public interest in legislation. The public interest changes over time and according to the circumstances of each case. Decision-makers must have some flexibility in considering what is in the public interest when balancing all relevant considerations to disclosing or withholding information.

However the committee considers it appropriate to insert a clear and unambiguous provision in the Act reflecting the principle that government embarrassment is irrelevant to the consideration of whether the disclosure of information would be in the public interest. Although this principle has been recognised in QIC’s decisions, the committee believes that there is value in

²⁸⁷ *Freedom of Information Act 1989* (New South Wales), s. 59A.

²⁸⁸ *McKinnon v Secretary, Department of Treasury* (2006) 228CLR423 45.

²⁸⁹ FOI Independent Review Panel discussion paper, p. 77 (footnotes omitted).

including a legislative provision to this effect to ensure that it is clear to decision-makers.

The committee also considers that guidelines for decision-makers on the application of the public interest tests would overcome some of the difficulties currently experienced while maintaining the necessary flexibility. The FOI monitor would be best placed to prepare such guidelines and conduct complementary training.²⁹⁰

The Government's response was in these terms —

Not adopted. The suggested amendment is unnecessary. The considerations for applying the “public interest” and “harm” tests have been established over a number of years and are clear. It is irrelevant to those considerations that disclosure would embarrass the government. This is the view adopted by the Information Commissioner. The Department of Justice and Attorney-General will consider developing guidelines to address this issue.²⁹¹

Paterson noted that —

Both of the 1979 and 1987 Senate Committee Reports specifically rejected any attempt to define “public interest”. The 1979 Senate Committee stressed that the relevant public interest factor might vary from case to case and that it was not possible to anticipate all of the factors that might be relevant. Any attempt to define it with the legislation might therefore narrow it as a limitation of the ambit of individual exemption provisions. The 1987 Senate Committee also commented that the process of balancing competing interests was not susceptible to clear rules or simple formulae.²⁹²

In the previous paragraph of her text, Paterson pointed out that the 1979 Senate Committee had indicated that the “public interest” was a convenient and useful tool for aggregating any number of interests that might bear on a disputed question of general concern²⁹³. She said —

The concept also received favourable comment in the 1987 Senate Committee Report although the Committee pointed out that it was of more assistance to an external review body skilled by professional experience in weighing factors against each other than it was to a decision-maker within an agency.²⁹⁴

²⁹⁰ Parliamentary Legal, Constitutional and Administrative Review Committee submission to the FOI Independent Review Panel discussion paper, p. 185.

²⁹¹ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 45.

²⁹² *Freedom of Information and Privacy in Australia*, LexisNexis, Butterworths, Sydney, p. 220 (footnotes omitted).

²⁹³ *Freedom of Information and Privacy in Australia*, LexisNexis, Butterworths, Sydney, p. 220 (footnote omitted).

²⁹⁴ *Freedom of Information and Privacy in Australia*, LexisNexis, Butterworths, Sydney, p. 220 (footnote omitted).

The last issue Paterson mentions is one of several crucial problems that have caused the Panel to question the collective wisdom of those who wrote the reports that have been referred to above. This one is crucial because only rarely is the public interest assessment made by an agency challenged by an applicant and may then be checked and possibly corrected by an external review body. How the officer in the agency applies the public interest test is more often than not determinative of the outcome of the application for access to a document.

The Panel's concern about the way the public interest test is applied in Queensland was aroused when it was informed that in at least one agency, the approach adopted is that if an exemption applies to a particular document there is no need to assess the public interest to see whether the document should be released. To some extent this view may appear to be supported by several statements in material prepared by the Office of the Information Commissioner, published on its website, for the use of agencies and the public. The first comment, under the heading "How the public interest balancing tests work" states, "If the basic elements of an exemption are satisfied, for most exemptions there will be a public interest consideration favouring non-disclosure of the document/s in issue."²⁹⁵

Later, providing examples of public interest considerations favouring non-disclosure, the material says —

Exemptions – satisfaction of the elements of one of the exemptions gives rise to a public interest consideration favouring non-disclosure, except in the case of the section 41 "deliberative process" exemption.²⁹⁶

The application of these guidelines would seem to turn the public interest test from a "balancing" exercise to one where there is a presumption that once the basic elements of the exemption are satisfied, the public interest will ordinarily favour non-disclosure. Perhaps this means no more than there is an onus on the applicant to show there is a public interest in disclosure. As the Department of Justice and Attorney-General put it in an earlier explanation of the public interest, "There must be some discernable movement forward or some net benefit or gain (no matter how small) in the public interest for the balancing test to favour disclosure."²⁹⁷ However, the way the test is now expressed may well encourage FOI officers to give little if any weight to public interest considerations.

If the test were to be truly a "balancing" one, as seems to be required by the Act, then an approach similar to that suggested by the NZ Ombudsmen, for a differently worded test, but with a similar intended effect, would have been more appropriate for Queensland's current Act. The Ombudsmen's Practice Guidelines suggest agencies should identify whether one of the withholding grounds applies, and if so the interest protected by that ground is the relevant interest to weigh against other considerations favouring release. Agencies should then identify the considerations which render it in

²⁹⁵ Office of the Information Commissioner Queensland, FOI Concepts, "Grievance or disciplinary investigations", p. 1.

²⁹⁶ Office of the Information Commissioner Queensland, FOI Concepts, "Grievance or disciplinary investigations", p. 4.

²⁹⁷ Practitioners Guide to the Qld FOI Act, 1996, 5.3.1.

the public interest for information to be disclosed. They should assess the content of the information requested, the context in which it was generated and the purpose of the request, and then weigh the competing considerations “and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information”.²⁹⁸

The guideline recognises the important responsibility the agency has in evaluating the public interest: only it can identify the particular public interest grounds that are relevant to the contents of the document that has been requested. The requester can only invoke a public interest argument blindly. There is an inherent unfairness in putting an onus on the requester to establish the public interest in a situation where the requester is necessarily ignorant of the public interests that may arise from the document’s contents. Only the agency has the ability to assess the public interest in its proper context.

A second crucial problem is related to the first. It is the lack of any definition of the public interest. This is seen by most of the reviewers mentioned above as an advantage – they say it allows for flexibility and for change over time. Yet they acknowledge it does present difficulties for agencies (and for applicants, as Paterson points out). The solution some of them propose is to have guidelines developed by the Information Commissioner or some similar body.

A further problem with the application of the current test should be mentioned. It concerns onus. The Queensland Government response to the Panel’s discussion paper said the Minister or agency bears the onus of proof. It said —

This key principle is enshrined in section 81 of the FOI Act, which provides that, in an external review under Part 5 of the FOI Act, the respondent agency or Minister has the onus of establishing that the decision under review – generally a decision to withhold information on the basis of a statutory exemption – was justified. The review mechanisms within the Act therefore enable an applicant to require an agency to clearly establish any exemption claims.²⁹⁹

This provision, however, only applies for external review by the Information Commissioner, a stage in the FOI process that most applicants do not reach. The practice adopted by agencies is reflected by this comment in a sample document forwarded to an applicant whose request for access had been denied in part because, as the letter put it, it was “found to be prima facie exempt under s. 44(1) – personal affairs”. It continued —

Your application for information does not inform me or suggest any particular public interest considerations favouring disclosure (of the other persons’ personal affairs information) that I should take into account in determining

²⁹⁸ Carter, M., and Bouris, A., *Freedom of Information: Balancing the Public Interest Test*, The Constitution Unit, University College London and Information Consultants Pty Ltd, May 2006, pp. 15-16.

²⁹⁹ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 3.

whether or not disclosure of this information would, on balance, be in the public interest.³⁰⁰

This highlights the difficulty facing an applicant when the applicant does not know what the components of a public interest test are, but that nevertheless the agency wants the applicant to suggest why the public interest favours disclosure. The inference of the statement is that the applicant's failure to provide a public interest reason means there is no public interest in disclosure.

The Panel, for reasons that will be discussed below, considers first, that there should be a single public interest test in the legislation to be applied whenever the circumstances require, and second, that the legislation should detail as many of the factors as is possible that might be taken into account in determining the benefits of disclosure or the harm that might flow from disclosure, as well as those matters that should not be taken into account. In relation to any one document, it would only be necessary for a decision-maker to take into account a relatively few relevant factors. The Panel considers it is more appropriate for Parliament to approve these guidelines than it is for the Information Commissioner or for the courts, though as has been noted earlier, the courts have been fairly reluctant to undertake this task.

Nevertheless, the Information Commissioner would have a role in fleshing out the statutory definition by publishing an information sheet explaining the detailed application of the public interest test in different circumstances, and providing examples of how it operates.

The Panel believes these proposed changes would make a significant difference to the way FOI is administered, reducing confusion and uncertainty, and helping to achieve more uniformity across agencies in decision-making. They would also help achieve the objects of the legislation.

Submissions

The Brisbane City Council saw no need for changing the present system concerning the public interest tests. It said —

Council believes that the existing “public interest tests” that apply to certain exemption provisions has worked (and continues to work) extremely well. This is evidenced by the extremely low percentage of FOI applications that proceed to internal review, and the even lower percentage of applications that go to external review.

The precedents that have been established on the “public interest test” are a valuable tool for practitioners to consider when deciding an FOI application. Council does not support the establishment of guidelines on matters that need to be considered when determining the public interest, nor does it believe that they should be included in the Act as factors that should be taken into account when dealing with an application. It is felt that each application should be

³⁰⁰ Sample letter provided by the Department of Justice and Attorney-General, p. 8.

dealt with on its merits and any public interest considerations should be unique to each application.³⁰¹

Megan Carter, an expert who provides training and consultancy on FOI matters in a large number of jurisdictions, said —

I believe the public interest test is of such importance to FOI that I wrote a book about its application, which contains many specific examples from Queensland ... My co-author and I found that best practice from English-speaking Westminster-style jurisdictions is that the phrase “public interest” is not further defined. This requires the FOI Officer (and all others involved) to be as specific as possible about the public interests for and against disclosure; in other words, it focuses attention back on the specific of each individual case, which is optimal ...

I think it is too difficult and overly prescriptive to try and capture the range and nuances of public interest arguments in a legislative form, but this is more achievable in the form of guidelines with examples.³⁰²

On the other hand, Cape York Land Council said in its experience of the operation of FOI in Queensland was —

That the public interest test is not adequately taken into account. As noted above, Cape York Land Council considers that the “public interest” should continue to play a role, but with its application clearly defined and guidelines provided on how a public interest test should be applied.³⁰³

However the submission by Australia’s Right to Know (RTK) supported the codification of a single public interest test. Its submission said —

8.4 Division 2 of the QLD FOI Act takes an inconsistent approach to balancing competing public interests. Many of the exemptions impose a requirement that the decision-maker exempt matter falling within the terms of the exemption unless disclosure would, on balance, be in the public interest. In RTK’s view, this wording is inconsistent with the presumption that the release of documents of a Government agency or Minister will be in the public interest, which underpins the right of access to documents in section 21 of the QLD FOI Act and the objects expressed in section 4. It is also in stark contrast with the public interest test in section 41 (1)(b), which provides for the exemption of certain matters to do with the deliberative processes of an agency if its disclosure would, on balance, be contrary to the public interest.

8.5 In this context, RTK submits that the factors identified in the more recent cases on the meaning of “public interest” be taken into account with a view to

³⁰¹ Brisbane City Council submission to the FOI Independent Review Panel discussion paper, p. 1.

³⁰² Megan Carter submission to the FOI Independent Review Panel discussion paper, p 11.

³⁰³ Cape York Land Council submission to the FOI Independent Review Panel discussion paper, pp. 4-5.

codifying what the “public interest” means under the QLD FOI Act. RTK supports the adoption of a uniform public interest test for all categories of exempt matter, which permits the exemption of documents if disclosure could reasonably be expected to cause direct and tangible harm to an essential public interest.³⁰⁴

The Queensland Law Society also favoured providing statutory guidance in applying exemptions. The Law Society in Queensland is subject to the FOI Act. In its submission it said —

The FOI Act provides insufficient guidance to decision-makers in applying criteria for exemptions. Extensive recourse must be had to a plethora of decided cases, which exercise can be quite demanding especially in an agency like the Society which doesn’t necessarily have the expertise or experience to apply the decision-based precedents in an authoritative way.³⁰⁵

The Panel notes that this comment is from the Society that represents almost all Queensland solicitors. How much more difficult it must be for FOI officers who do not have a legal background, or for applicants lacking any legal resources.

Other Views

LCARC decided against having a single, overriding public interest or harm test, saying “public interest and harm tests currently vary between exemptions because the matter protected by some exemptions is inherently more sensitive than matter protected by other exemptions”.³⁰⁶ As may be seen in chapters 8 and 10, the Panel proposes to deal with the problem in a different way.

LCARC also decided not to recommend that the Information Commissioner should have the power to order disclosure of otherwise exempt matter if the Information Commissioner considers that it is in the public interest to do so. The committee said —

- such a provision would be otiose in respect of the exemption provisions that already incorporate a public balancing test;
- for the remaining exemptions, either the harm these exemptions refer to or the harm inherent in the disclosure of documents of that type justifies an exemptions without the need for a public interest test; and
- to apply a public interest balancing test to information which has traditionally had the benefit of class protection under the general law ... would require careful consideration and strong justification.³⁰⁷

³⁰⁴ Australia’s Right To Know submission to the FOI Independent Review Panel discussion paper, p. 7.

³⁰⁵ Queensland Law Society submission to the FOI Independent Review Panel discussion paper, p. 5.

³⁰⁶ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 181.

³⁰⁷ LCARC, *Freedom of Information in Queensland*, Report No. 32, pp. 156-157.

The Panel notes that the Victorian *Freedom of Information Act* in section 50 gives the Tribunal, on an application for review, the same power as an agency or a Minister, including power to decide that access should be granted to an exempt document (but not a Cabinet document, a document concerning national security or defence, certain law enforcement documents and documents containing personal affairs) “where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act”.³⁰⁸ This is generally a different public interest test from that specified for individual exemptions in the Act.

The Queensland Council for Civil Liberties recommends that the Information Commissioner be given an even more substantial power. In its submission, it said —

Section 28 of the Queensland *Freedom of Information Act* (“the FOI Act”) allows agencies to release exempt documents. The Council can see no reason why this discretion should not be given to the reviewing body. In its view such a step would tend to in fact reinforce public interest consideration under the Act and not narrow them.³⁰⁹ The Council would support the Victorian model where the overriding discretion does not apply to exemptions for Cabinet documents and those containing personal information.³¹⁰

9.1 A single test of the public interest

Under the present legislation the public interest tests provide variously for (a) a substantial bias against disclosure, (b) a “balance” where there is effectively an onus on an applicant to overcome a decision that a document is covered by an exemption, or (c) a slight bias towards disclosure. While it is possible to discern such differences of intention in applying a public interest test, this does not mean that the application of the three tests will produce significantly different results in a particular case. The wording of the tests implies there that the public interest can be measured with some kind of mathematical precision. However as the High Court has pointed out —

... the expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view”.³¹¹

Where the legislation deliberately avoids any elaboration of factual matters that might be taken into account, the scope for the exercise of discretionary value judgments to

³⁰⁸ *Freedom of Information Act 1982* (Victoria), s. 50.

³⁰⁹ Lye, J., and Moe, T., “Prospects for Review of FOI: Can the Commonwealth Regain the Initiative” in *Administrative Law: Are the States overtaking the Commonwealth?* AIAL, Canberra, 1994, p. 150.

³¹⁰ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 10.

³¹¹ *O’Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson and Gaudron JJ., at 217. The quotation is from *Water Conservation and Irrigation Commission (NSW) v Browning*, (1947) 74 CLR 492, per Dixon, J., at p 505.

result in a range of conclusions may be quite considerable, depending on the particular material that is under examination.

The High Court emphasises the importance of the purpose and objects of an Act in assessing the public interest under that Act. The object of the present *Freedom of Information Act 1992* is "... to extend as far as possible the right of the community to have access to information held by the Queensland Government."³¹² Section 4 goes on to state —

(2) Parliament recognises that, in a free and democratic society —

(a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability ...³¹³

It goes on to give other reasons for openness and then to recognise competing interests where the disclosure of information would be contrary to the public interest.

The Parliament, in this section, has already begun the task of elaborating some of the central issues that need to be taken into consideration when the public interest has to be weighed. It says in subsection 4, "This Act is intended to strike a balance between those competing interests."³¹⁴

That task, however, is made more difficult by the adoption of tests that try to move the balance point, depending on the particular prejudice (or harm) that the Act wants to overcome. This presents a conceptual problem, but more important, it makes the application of the relevant tests more difficult and less certain, as it adds more complexity to the tasks faced by FOI decision-makers.

The Panel considers these problems would be reduced if a single public interest test was used throughout the legislation. The Panel accepts LCARC's view that the matter protected by some exemptions may be inherently more sensitive than matter protected by other exemptions. However the different weighting is best achieved not by changing the wording of the public interest test but by applying a single test that takes account of the circumstances of the particular case and the nature of the interests being protected.

The test the Panel favours is based on that adopted in s. 41, "Matter relating to deliberative processes"³¹⁵. However it should be expressed in a way that puts the emphasis on disclosure, not non-disclosure. It should be in the form,

"Access it to be provided to matter unless its disclosure, on balance, would be contrary to the public interest."

This formulation best reflects the object and purpose of the Act which provides for a right of access to information unless on balance, it is contrary to the public interest to

³¹² *Freedom of Information Act 1992*, s. 4.

³¹³ *Freedom of Information Act 1992*, s. 4.

³¹⁴ *Freedom of Information Act 1992*, s. 4.

³¹⁵ *Freedom of Information Act 1992*, s. 41.

do so. It favours the release of information, but allows competing considerations to be taken properly into account. Its adoption as the general rule would help focus the attention of decision-makers on the true intent of the legislation, and help them avoid adopting an approach reflecting the view that predominates in the Queensland FOI culture, and elsewhere, that if a document is covered by an exemption, public interest favours non-disclosure.

The Queensland Ombudsman, in a submission, proposed a public interest test that would move the balance much further than the Panel is suggesting in favour of disclosure. He said —

I support the inclusion of a general public interest override that applies to all exemption provisions to ensure that documents are released, whether or not they technically qualify for exemption, if their disclosure would not, on balance, cause substantial harm to the public interest.³¹⁶

On the other hand, the Queensland Council for Civil Liberties favours a suggestion by legal author Moira Paterson that there must be a risk of harm and, “That must be a harm that outweighs the democratic interest in government accountability”.³¹⁷

This is much closer to the view taken by the Panel, though it does not take into account the possibility that there are other pro-disclosure factors that might need to be taken into account generally, or in the specific case. Toby Mendel, the law program director of a human rights NGO based in London, in a new book provides a good example of the way an obvious harm might be more than balanced by the need for disclosure. This is “sensitive military information which exposed corruption in the armed forces. Although disclosure may at first appear to weaken national defence, eliminating corruption in the armed forces may, over time, actually strengthen it.”³¹⁸

As he points out, it is not possible to draft exceptions so as to take into account all overriding public interests, and particular circumstances at a given time may mean that the overall interest is served by disclosure. These are further reasons for the Panel’s proposal (explained in detail in chapters 8 and 10) to dispense with all of the exemptions that do or should involve a public interest test, and instead apply to documents that would have fallen within such an exemption a public interest test that also evaluates the harm that might result if the document were to be released.

Except in those cases where for reasons developed in chapter 8 there is no need or reason to apply a public interest test, the test itself needs to be untrammelled by a prior determination that a document falls within a class of documents that would normally be exempt. The public interest test requires a balancing of factors that might favour disclosure against factors, involving various kinds of possible harms, that favour non-disclosure. All things being relatively equal, or where there is doubt, the

³¹⁶ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 7.

³¹⁷ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 15.

³¹⁸ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 36.

objects clause requires release. The harm to the specified interest must be greater than the public interest in having the information. Some harm can be suffered to the specified interest but it must not be disproportionate to the benefit of releasing the information. It is not necessary to go as far as the Ombudsman suggests and require that documents be released unless their disclosure would cause substantial harm. It is sufficient that the harm should not outweigh the public interest in disclosure. The formula proposed by the Panel expresses this in a way that emphasises the obligation to release unless disclosure, on balance, would be contrary to the public interest.

What is crucial is that the public interest must be assessed on a case by case basis. The circumstances may differ in seemingly similar cases, if only because the time factor may be different. What is important is that the contents of each particular document must be assessed, not just the claim of a specified interest, and the reasonably anticipated consequence of disclosure assessed in relation to all relevant factors of the public interest.

RECOMMENDATION:

Recommendation 41

Only one form of public interest test should be used in the legislation.

It should be in the following form —

“Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.”

9.2 Defining the public interest

The Northern Territory is one of the few jurisdictions that provides in legislation some indications as to what constitutes the public interest, as well as some factors that are not relevant in determining the public interest – the latter course is followed in a number of jurisdictions. Section 52 of the Northern Territory *Information Act*, dealing with the deliberative processes exemption, lists seven factors that an agency “may have regard to” in considering the public interest.³¹⁹

However, it is not as unusual as some commentary might suggest, for governments to try to define the factors that need to be taken into account when assessing the public interest. For example, all Australian Governments agreed in 1995 to list in the Competition Principles Policy Agreements the factors that would be used to determine what is in the public interest, in relation to the application of that agreement.³²⁰

³¹⁹ *Information Act 2002* (Northern Territory), s. 52.

³²⁰ Available on the National Competition Council website at <http://www.ncc.gov.au/activity.asp?activityID=38>.

As noted above, the Queensland Parliament has detailed some of the competing considerations affecting an assessment of public interest in section 4 of the Act. More are detailed in Division 2, dealing with “exempt matter”. While it may well be impossible to produce a legislative definition of the public interest, the Panel believes that it is possible to include in the Act a quite detailed (although not exhaustive) list of the factors which might arise for consideration in the process of deciding whether the disclosure, on balance, would be contrary to the public interest. This partial definition would incorporate those factors already detailed by the Parliament in section 4 and those referred to as “exempt matters”, and also include the factors that courts and tribunals have enumerated as being relevant when they have been considering (mainly) FOI public interest cases. Those cases, and legislation in other jurisdictions, also provide a useful list of factors that should not be taken into account in considering the public interest and the Panel believes it is desirable these should also be listed. Some of these are detailed in the ALRC/ARC Report as factors that might be included as guidelines developed by the Information Commissioner.³²¹

A further reason for listing the factors that might be considered when applying the public interest test is that this will remove (for applicants) some of the mystery of the public interest assessment process. While FOI officers would normally have lists of possible factors available to them,³²² most applicants have little knowledge of the factors on which they might rely in seeking disclosure. Listing the factors in legislation would make the process more transparent, and shift the knowledge power balance that currently favours agencies to a more neutral position.

This reform would also help to achieve greater consistency in decision-making across (and even within) agencies. It would mean all decision-makers are accessing and applying the same ground rules, rather than making their own idiosyncratic assessments based on their individual appreciation of the factors they believe they should consider when assessing the public interest.

There can be no doubt that the absence of definition or guidance is frustrating for many people. One person who made a submission to the Panel, Val McGrath, has been trying to access very old (80 years) records. She has had to resort to using public interest criteria in trying to establish her family history but, as she says —

... it seems that the [public interest] criteria can be used by the FOI unit for their own purpose as I have never been able to get a clear definition of the criteria, and also family members do not appear to be classed as the public we have little chance of gaining access under that criteria if they do not want to release the information.³²³

The Panel considers that the factors listed below should be considered in applying the public interest test. They are arranged in groups that indicate whether the particular

³²¹ ALRC/ARC Report, pp. 96-97.

³²² Accumulated through experience, by sifting through Information Commissioner and tribunal decisions, and/or from published lists, such as those in Carter, M., and Bouris, A., *Freedom of Information: Balancing the Public Interest Test*, The Constitution Unit, University College London and Information Consultants Pty Ltd, May 2006.

³²³ Val McGrath submission to the FOI Independent Review Panel discussion paper, p. 2.

factor favours disclosure, or should be weighed against disclosure by reason of the harm that would result, or are otherwise relevant, in the sense that depending on the circumstances they might favour either disclosure or non-disclosure. It should be noted that some factors carry more weight than others, again depending to some extent on the circumstances of a particular case. A fourth group is also listed. These are factors that normally should not be taken into account in assessing the public interest. It should also be noted that there may be public interest factors that are not listed here, but may need to be considered because of the special circumstances of a case. The weight that might be assigned to a particular factor might also be expected to vary over time – for example, as people put more value on the desirability of open government.

Although some factors will normally carry more weight than others, it is important to recognise that factual issues will always need to be considered when carrying out the balancing tests. This is made clear in cases where courts are required to carry out such balancing exercises. For example, in *Hinch v. Attorney-General (Victoria)*, all the Justices of the High Court undertook this exercise when balancing the public interest in the administration of justice against the public interest in open discussion and free access to information. That case concerned contempt of court.³²⁴ In *John Fairfax Group v Local Court of New South Wales*, Kirby P. said —

If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the role of openness must be modified to meet the exigencies of the particular case.³²⁵

Special mention should be made of one specific factor favouring disclosure. This is, that the information is the applicant's personal information. The present Act contains a provision that favours such disclosure. Section 6 says —

6 Matter relating to personal affairs of applicant

If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding —

- (a) whether it is in the public interest to grant access to the applicant; and
- (b) the effect that the disclosure of the matter might have.³²⁶

This is an important principle that should be taken into account by decision-makers. This might be better achieved by transferring the section to lead the part of the Act that lists the factors to be taken into account in assessing the public interest, while

³²⁴ *Hinch v. Attorney-General (Victoria)* (1987) 164 CLR 15.

³²⁵ *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 at p. 141.

³²⁶ *Freedom of Information Act 1992*, s. 6.

retaining its identity as a separate section of the Act. A similar provision should be included in the Privacy Act.

The Panel considers the factors that may be taken into account in weighing the public interest include —

a. Factors that favour disclosure:

Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance government's accountability;

Disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;

Disclosure of the information could reasonably be expected to inform the community of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community;

Disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds;

Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of a public agency or by public officials;

Disclosure of the information could reasonably be expected to evidence or be likely to identify that an agency has, or its staff have, engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith;

The information is the applicant's personal information;

Disclosure of the information could reasonably be expected to advance the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies;

Disclosure of the information could reasonably be expected to reveal the reasons for a decision;

Disclosure of the information could reasonably be expected to reveal the reasoning and other useful contextual information behind government decisions which have affected or will have a significant effect on people;

Disclosure of the information could reasonably be expected to reveal that the information was incorrect or the document contains information that is gratuitous, unfairly subjective or irrelevant or the like;

Disclosure of the information could reasonably be expected to show the information provided to or by the government is incomplete, incorrect, out of date or misleading;

Disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety;

Disclosure of the information could reasonably be expected to contribute to the maintenance of social peace and order;

Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness;

Disclosure of the information could reasonably be expected to contribute to the enforcement of the criminal law; and

Disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.

b. Factors that favour non-disclosure, otherwise described as harm factors:

Disclosure of the information could reasonably be expected to prejudice the collective or individual responsibility of ministers to parliament;

Disclosure of the information could reasonably be expected to prejudice the private or business affairs of members of the community about whom information is collected and held by government;

Disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy;

Disclosure of the information could reasonably be expected to prejudice the fair treatment of individuals, including protecting a person from disclosure of unsubstantiated allegations of impropriety or wrongdoing;

Disclosure of the information could reasonably be expected to prejudice security or public safety;

Disclosure of the information could reasonably be expected to prejudice law enforcement;

Disclosure of the information could reasonably be expected to prejudice the security or good order of a corrective services facility;

Disclosure of the information could reasonably be expected to prejudice the economy of the State;

Disclosure of the information could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency;

Disclosure of the information could reasonably be expected to prejudice intergovernmental relations;

Disclosure of the information could reasonably be expected to prejudice trade secrets,

business affairs and research of an agency or person;

Disclosure of the information could reasonably be expected to prejudice an agency obtaining confidential information;

Disclosure of the information could reasonably be expected to prejudice the financial or property interests of an agency or the State;

Disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency;

Disclosure of the information could reasonably be expected to prejudice the conduct of investigations, audit and review by the Ombudsman, Auditor-General or Service Delivery and Performance Commission;³²⁷

Disclosure of the information could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency;

Disclosure of the information could reasonably be expected to prejudice the deliberative process in a public body;

Disclosure of the information could reasonably be expected to prejudice the effectiveness of testing or auditing procedures; and

Disclosure of the information would otherwise be prohibited by an enactment.

c. Other factors that are relevant include:

Disclosure of the information could reasonably be expected to contribute to the administration of justice for an individual; and

Disclosure of the information could reasonably be expected to impact on the protection of the environment.

d. Irrelevant factors include:

Disclosure of the information could reasonably be expected to cause embarrassment to the Government or a loss of confidence in the Government;

Disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document;

Disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant; and

The author of the document had high seniority within the agency.

³²⁷ See effect on Service Delivery and Performance Commission of the Public Service Bill 2008.

The Panel considers that the incorporation in the Act of a non-exhaustive list of factors (relevant to the determination of whether in a particular case access to matter would be granted unless on balance, it would be contrary to the public interest) would not reduce the flexibility inherent in the public interest concept, nor would it freeze that concept in time. Rather, it would achieve what LCARC sought through the publication of guidelines, namely, to “overcome some of the difficulties currently experienced while maintaining the necessary flexibility”. It believes it would improve decision-making at first instance in agencies and should result in more uniformity in the administration of freedom of information across all agencies.

It would also be desirable for the Information Commissioner to issue guidelines on the application of the public interest test, providing examples of the way some of the factors might be (or have been) applied in particular cases. Guidelines used to be published by the WA Information Commissioner providing assistance both to agencies and to applicants. The Information Commissioner should publish the guidelines on a website so that they are accessible to the public, as well as to FOI officers.

RECOMMENDATIONS:

Recommendation 42

The legislation should contain a non-exhaustive list of the factors that should be considered by decision-makers when applying the public interest test, and factors that should not be considered. The factors should be those listed above, in this chapter of the report. The legislation should make it clear that these are not the only factors that may be considered in a particular case.

Recommendation 43

The Information Commissioner should make publicly available, on the website and elsewhere, guidelines on the application of the public interest test, including examples of the way it should be and has been applied.

Recommendation 44

Section 6 of the present Act (amended as proposed by the Panel in chapter 4) should be placed at the beginning of the Part of the Act that lists the factors to be taken into account in assessing the public interest. A similar provision should be included in the Privacy Act.

The “compelling reasons” provisions

Section 48 exempts matters whose disclosure is prohibited by various secrecy provisions in other Acts, listed in Schedule 1, unless disclosure is required by a compelling reason in the public interest.

The section reads —

48 Matter to which secrecy provisions of enactments apply

- (1) Matter is exempt matter if its disclosure is prohibited by an enactment mentioned in schedule 1 unless disclosure is required by a compelling reason in the public interest.
- (2) Matter is not exempt under subsection (1) if it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to the document containing the matter is being made.³²⁸

The schedule lists provisions in more than a dozen Acts.

The Panel's concern is with the requirement in s. 48 that there be a "compelling reason in the public interest" before there can be disclosure in relation to this section.

The EARC report proposed that any secrecy provisions should be overridden by FOI legislation, in the absence of express statutory provision.³²⁹ The issue was also considered by the Queensland Law Reform Commission which noted that at the time (1994) s. 48 provided that a secrecy provision was only exempt if "its disclosure would, on balance, be contrary to the public interest". It proposed to change this to bring it into line with the other provisions of the Act which said the relevant information was exempt "unless its disclosure would, on balance, be in the public interest".³³⁰

The Panel's examination of the history of this provision suggests there is no reason why the public interest test should be different from that of any other part of the legislation. If, as the QLRC appeared to suggest, uniformity of application is important, the test in s. 48 should be changed to conform with the general test proposed by the Panel. This would be achieved by deleting from the Act the section and Schedule 1.

The secrecy provisions currently listed in the Acts in the Schedule would continue to operate in their own terms and by force of those Acts. However the new FOI Act would apply to FOI applications in relation to the activities protected by those secrecy provisions. The Panel is not disregarding the fact that the Parliament has approved those secrecy provisions. What it has done is to include as a factor for non-disclosure of information, the fact that there is a relevant secrecy provision. It says, "disclosure of the information would otherwise be prohibited by an enactment." This would be then taken into account in the assessment of the public interest according to the standard test in the legislation.

³²⁸ *Freedom of Information Act 1992*, s. 48.

³²⁹ Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, p. 91.

³³⁰ Queensland Law Reform Commission, *The Freedom of Information Act 1992 Review of Secrecy Provision Exemption*, March 1994, p. 105.

The Panel also considers that s. 39(2) which provides for matter to be exempt because its disclosure would be prohibited by the *Financial Administration and Audit Act 1977*, s. 92, or the *Service Delivery and Performance Commission Act 2005*, s. 92, “unless disclosure is required by a compelling reason in the public interest”, should be repealed. The effect of doing so would be to apply the standard public interest test in place of the “compelling reason” test. Once again, a factor for non-disclosure would be that there is a relevant secrecy provision. Additionally, there is a factor that says in part, disclosure of the information could reasonably be expected to prejudice the conduct of investigations, audit and review by the Auditor-General.

RECOMMENDATION:

Recommendation 45

Sections 39(2) and 48 and Schedule 1 should be repealed.

10 Harm factors

The central, driving principle the Panel considers should govern freedom of information is that unless there is a good reason to withhold them, all documents held by government should be open and available to the public.

As outlined in earlier chapters, the Panel believes there is only one good reason for withholding access, namely that, on balance, it would be contrary to the public interest for the document to be disclosed. This led the Panel to conclude that there should be a two-stage test to determine whether a document should be released under FOI. The first, negative test, is whether a document falls within an exemption that does not contain a public interest test. If it falls within the terms of the exemption it is able to be withheld (or those parts of it covered by the exemption may be withheld). The reason no public interest test is applied in the case of these exemptions is that it has already been determined, legislatively, that the public interest in applying that particular exemption is so high that no other public interest consideration should be permitted to tip the balance in favour of disclosure. The second step, for all other documents not covered by those specific exemptions, is the public interest test – whether, on balance, it would be contrary to the public interest for it to be disclosed.

The *Freedom of Information Act 1992* contains a number of exemptions that include or are made subject to a public interest test. As was noted in chapter 9, dealing with the public interest, the Panel is concerned about the way in which the public interest test is applied in Queensland. The official guidelines issued initially by the Department of Justice and Attorney-General and later by the Office of the Information Commissioner result in practitioners adopting a presumption that if a document falls within one of these exemptions the public interest will ordinarily favour non-disclosure. This was contrasted with the approach favoured by the New Zealand Ombudsmen whose Practice Guidelines suggest agencies should identify whether one of the withholding grounds applies, and if so the interest protected by that ground is the relevant interest to weigh against other considerations favouring release. Agencies should then identify the considerations which render it in the public interest for information to be disclosed. They should assess the content of the information requested, the context in which it was generated and the purpose of the request, and then weigh the competing considerations “and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information”.³³¹

The Panel is not confident that proposing new guidelines to replace the present ones issued by the Information Commissioner with advice based on that given by the NZ Ombudsmen to the agencies it oversees would overcome the current mindset and practices of agencies.

The Panel also considers that the legislative formula of stipulating an exemption that includes or is subject to a public interest test is wrong in principle, and in practice, in that it runs counter to the objects of the Act, currently stated in section 4, and it

³³¹ Carter, M., and Bouris, A., *Freedom of Information: Balancing the Public Interest Test*, The Constitution Unit, University College London and Information Consultants Pty Ltd, May 2006, pp. 15-16.

confounds any fair measure of public interest in relegating its assessment until after the precise terms of the exemption have first been secured. The fact that the *Freedom of Information Act 1992* lists these various descriptions of documents as “Exempt matter” (the heading of Division 2 of the Act) creates an assumption that a series of classes of documents fall outside the normal ambit of the Act, and it contradicts the object of the Act to extend as far as possible the right of the community to have access to information held by the Queensland Government.

The Panel considers that the description “exempt matter” should apply only to those matters where the Parliament has determined no public interest test should be applied because the public interest requires documents (or parts of documents) falling within those prescribed areas to be exempt.

The Panel considers the present “exempt/public interest” categories need to be subject to a different and more effective framework in the Act to better achieve the legislative objects, including striking a balance between competing interests.

It is not desirable that a document should be classified or labelled as falling within one of the current “exempt/public interest” categories which an FOI officer is then faced with the task of determining whether particular documents need to be withheld from disclosure for public interest reasons.

Each of the “exempt/public interest” categories is intended to deal with a particular harm occurring through the disclosure of material, but that object can be achieved more robustly, namely, by ensuring that a public interest test encompasses those particular harms. The factors proposed by the Panel for inclusion in public interest tests in chapter 9 include those harms that the “exempt/public interest” categories in the present Act are meant to prevent from being damaged by disclosure. These are prescribed “harm factors” that must be taken into account when assessing the public interest.

Rather than the protracted artificiality of the current legislative scheme (whereby a public interest test follows an initial classification of harm-based exemption) or even a general “public interest override” scheme (which, in the Panel’s view, rightly simplifies public interest tests into one consistent expression, it still remains a second step imposed on top of a prima facie exemption), the Panel’s recommendation remedies the fraught disaggregation of public interest balancing by making the test not a forced, latterly or unduly complicated one, but one that is more instinctively real.

Critically, the decision-making process becomes a single, united exercise of balancing all factors for and against disclosure, as weighted by the Act and by a consideration of the circumstances of the case.

Conceptually, rather than the FOI decision-makers turning their first attentions to a “shopping list” of exemptions, they would turn to a public interest balancing test that would include the same iterations of harm but as part of a genuinely broader perspective of the public interest.

Government rightly needs to be assured that that which is truly exempt under the current Act, where harm from disclosure surmounts public interest, would remain so.

Conversely, applicants need to be assured that that which is disclosed under the current Act because it is in the interests, or not contrary to the interests, of the public, would remain so. The new Act would not change those outcomes and they are underscored by a Time and Harm Weighting Guide in the Act adopting the particular specification of harm in the terms of the current “exempt/public interest” categories so as to continue Parliament’s consideration of the greater weight to be accorded those factors in particular, together with a new legislative guide where practicable on the impact of time on harm to assist decision-makers further (see chapter 11).

RECOMMENDATION:

Recommendation 46

The disclosure harms concerned with the present “exempt/public interest” categories in the Act, namely sections 38, 39, 40, 41, 42AA, 44, 46(1)(b), 47, 48 and 49, together with section 45, to which at present a public interest test applies in part only, be moved to the Time and Harm Weighting Guide in the new Act. The harm is no longer an “exemption” subject to a public interest test, but a “harm factor” accorded its due weight within a public interest test. Consideration of the harm those provisions were designed to counter is preserved but reframed with the benefit of legislative guidance as to relative weightings in the public interest.

11 Time and Harm Weighting Guide

In chapters 5, 9 and 10 this report has indicated the Panel's intention to propose that a Time and Harm Weighting Guide should be included as a schedule to the new FOI Act. This chapter provides more information about the way this proposed Guide would operate, and details its contents.

A major problem with the administration of the present Act is that if a document can be classified as falling within an exemption that includes a public interest test, FOI officers are encouraged to regard this as a *prima facie* reason why it should be exempted, when the public interest test is applied. The detail and structure of the exemption threshold are such that when met, the exemption envelope becomes in practice a difficult barrier for any countering public interest to breach. The Panel considers that this is not the intent of the FOI law. However this practical bias will not be overcome without a fundamental redesign of the law, to allow it to achieve its original objective.

The Panel is proposing that the exemptions that require a public interest test to be applied, should no longer be listed as exemptions in the legislation. Instead, as explained in chapter 5, any documents that would have fallen within these categories should be subjected to a standardised public interest test, the test being that "access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest." The "public interest" is to be defined in the legislation, by listing a non-exclusive list of factors. These factors call upon the decision-maker to weigh both "for" and "against" considerations, together.

The detailed specification of particular harm factors that might need to be taken into account in evaluating the public interest in a particular case is to be included in a schedule to the Act. Those harm factors are in effect the various harms currently identified in those exemptions in the Act containing a public interest test and an indication of the weighting that might normally be associated with those harms. The schedule will in some cases provide a guide as to the time any particular harm is likely to be relevant.

The "Time and Harm Weighting Guide" is intended to provide practitioners and applicants with an indication of how the various harms might be relevant to a particular document at the time it is being assessed on public interest grounds.

The Guide has two elements. The first is descriptive of the relevant harm in the public interest test. It contains extended explanations of most of the "harms" listed in the public interest test. These are taken directly from the present exemptions in the Act that include a public interest test. However each of those descriptions is not intended to be a full definition of the relevant public interest harm. That harm may be (and normally will be) wider than the description in the guide. But what is described in this guide should normally be weighted higher (in assessing the public interest) than aspects of the harm that are not detailed. Unless the material falls within the description in this guide it would not carry the additional weight ascribed to those documents that are covered directly by the guide.

It must be stressed that the fact that a particular document can be said to raise concern about a harm factor, does not mean that it is automatically exempt. The public interest test has to be applied.

In some cases, but not all, there is a second element, a time factor. This is not to be regarded as a bar to the release of documents that involve the relevant harm before the expiry of the time that is mentioned. It is not a prescribed waiting period preventing an earlier release of the document. It is a guide, and no more, detailing what the Parliament considers would normally be the time when the harm would cease to be a relevant factor to be weighed when considering the public interest. Unless determined otherwise by the Information Commissioner, it is a maximum time, but not a required time for preserving the document from release.

However, it would be reasonable to assume that the closer it is to the time when the waiting period is due to expire, the less likely it is that the harm will be an important consideration – that is, the less the weight that should be accorded to that harm.

A weighting guide setting out the subset of harm factors that are of particular concern serves two purposes. First, it guides the FOI decision-maker in according due and different weight to the particularised subset of harm and the factors that may pertain more generally. Second, it assures executive government that FOI decision-makers must turn their mind specifically to the harms particularised in the weighting guide so that those matters will be the subject of specific deliberation in making a decision on the public interest.

The Panel proposes that this guide should be included as a schedule to the Act because it considers it important that the Parliament, rather than the executive government, should set the guidelines and provide some guidance of the comparative weight of factors that will be implemented by FOI officers and overseen by the Information Commissioner. Particularising the various harms is essential if the public interest tests are to serve their proper purpose. In the absence of these descriptions it would be possible for agencies to exempt a far broader range of documents by reference to the generalised harms listed in the public interest test. It would be a backward step if the present exemptions were to be abandoned in favour of a less particularised test than is contained in the current Act.

There may be occasions when, before the expiry of the time factor in the schedule, an agency considers that the contents of a particular document should not be available for access when that time is to be reached. In those circumstances, the agency should be able to apply to the Information Commissioner to extend the time in the schedule, on public interest grounds. It would be preferable that the agency should make such an application before the time expires, but it should also be possible for an application to be made after time, when an application for access has been made.

In the schedule, the absence of a time factor indicates only that it is impossible to generalise about when the documents that fall within the particular description should normally be able to be released without the harm their release might involve outweighing the public interest in their release. In one of the categories below, the schedule explains the way the time factor could be evaluated, rather than specifying a time.

The proposed schedule:

Time and Harm Weighting Guide

<i>Description</i>	<i>Time Factor</i>
<p>Matter affecting relations with other governments A document where disclosure could reasonably be expected to—</p> <ul style="list-style-type: none"> (a) cause damage to relations between the State and another government; or (b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government. 	<p>Ten years</p>
<p>Matter relating to investigations by Ombudsman, reviews by Service Delivery and Performance Commission or audits by Auditor-General etc. A document where disclosure could reasonably be expected to prejudice the conduct of —</p> <ul style="list-style-type: none"> (a) an investigation by the Ombudsman; or (b) an audit by the Auditor-General; or (c) a review by the Service Delivery and Performance Commission. 	<p>No time specified</p> <p>Depends on nature of investigation, audit, or review.</p>
<p>Matter concerning certain operations of agencies A document where disclosure could reasonably be expected to —</p> <ul style="list-style-type: none"> (a) prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency; or (b) prejudice the attainment of the objects of a test, examination or audit conducted by an agency; or (c) have a substantial adverse effect on the management or assessment by an agency of the agency’s personnel; or (d) have a substantial adverse effect on the conduct of industrial relations by an agency. 	<p>No time specified</p> <p>May depend on life-cycle of agency.</p>
<p>Matter relating to deliberative processes Disclosure of a document that is —</p> <ul style="list-style-type: none"> (i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or (ii) a consultation or deliberation that has taken place; in the course of, or for the purposes of, the deliberative processes involved in the functions of government. <p>However matter relating to deliberative process does not include —</p> <ul style="list-style-type: none"> (a) matter that appears in an agency’s policy document; or factual or statistical matter; or (b) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates. 	<p>No time specified.</p> <p>However - where the process is to result in consultation with the public, the document can be withheld until that occurs. Where consultation is</p>

Or –

- (a) a report of a prescribed body or organisation established within an agency; or
- (b) the record of, as a formal statement of the reasons for, a final decision, order or ruling given in the exercise of —
 - (i) a power; or
 - (ii) an adjudicative function; or
 - (iii) a statutory function; or
 - (iv) the administration of a publicly funded scheme.

not proposed, the document should be made available.

Matter created for ensuring security or good order of corrective services facility

No time specified

Disclosure of a document that is —

- (a) a recording of a telephone call made by an offender from a corrective services facility; or
- (b) an audio recording made in a corrective services facility for the security or good order of the facility; or
- (c) a visual recording of a corrective services facility or a part of a corrective services facility; or
- (d) a document to the extent that it refers to or contains any part of a recording mentioned in paragraph (a), (b) or (c).

Matter affecting personal information

No time specified

Disclosure of a document that concerns the personal information of a person, whether living or dead.

Matter relating to trade secrets, business affairs and research

No time specified

1. A document that —

- (a) would disclose trade secrets of an agency or another person; or
- (b) would disclose information (other than trade secrets) that has a commercial value to an agency or another person and could reasonably be expected to destroy or diminish the commercial value of the information; or
- (c) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;

2. A document

- (a) that would disclose the purpose or results of research, whether or not the research is yet to be started, the research has started but is unfinished, or the research is finished; and
- (b) whose disclosure could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research was, is being, or is intended to be, carried out.

A document does not fall within this provision merely because it concerns research that was, is being, or is intended to be, carried out by the agency or other person by, or on whose behalf, an application for access to the document containing the matter is being made.

Matter communicated in confidence

A document that consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information.

This does not apply to matter unless it consists of information communicated by a person or body other than —

- (a) a person in the capacity of —
 - (i) a Minister; or
 - (ii) a member of the staff of, or a consultant to, a Minister; or
 - (iii) an officer of an agency; or
- (b) the State or an agency.

Matter affecting the economy of State

1. A document where disclosure could reasonably be expected—
 - (a) to have a substantial adverse effect on the ability of government to manage the economy of the State; or
 - (b) to expose any person or class of persons to an unfair advantage or disadvantage because of the premature disclosure of information concerning proposed action or inaction of the Legislative Assembly or government in the course of, or for the purpose of, managing the economy of the State.
2. Without limiting subsection (1)(a), that paragraph applies to matter the disclosure of which would reveal —
 - (a) the consideration of a contemplated movement in government taxes, fees or charges; or
 - (b) the imposition of credit controls.

Matter relating to the State’s competitive advantage

A document where disclosure could reasonably be expected to have a substantial adverse effect on the State’s competitive advantage in relation to the business or commercial sector.

Matter affecting financial or property interests

A document where disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency.

No time specified

No time specified

Eight years

No time specified

RECOMMENDATIONS:

Recommendation 47

The Time and Harm Weighting Guide detailed above should be a schedule to the Act.

Recommendation 48

An agency or affected third party may apply to the Information Commissioner to extend the time specified in the schedule for any particular document, on public interest grounds.

12 Conclusive certificates

The discussion paper, at pp. 88-89, said —

The Minister may issue a certificate stating that a specified matter falls within one of four exempt matter provisions – s. 36 (Cabinet), 37 (Executive Council), 42 (Law enforcement or public safety) or 42A (National or State security). The certificate can be overridden on appeal if the Information Commissioner is satisfied there were no reasonable grounds for the issue of the certificate. If this happens, however, the Minister can in turn override the Information Commissioner and confirm the certificate. (s. 84)

The LCARC Report recommended that the power to issue a conclusive certificate under the Cabinet and Executive Council exemptions should be withdrawn. The Government rejected this recommendation, noting that the Information Commissioner had told LCARC it did not appear these provisions were being misused or invoked inappropriately. LCARC reported that just two conclusive certificates had been issued.

The ALRC/ARC Report and the LCARC Report both recommended that the use of conclusive certificates should be monitored, at the Commonwealth level by the proposed FOI Commissioner, in Queensland by the Information Commissioner. The ALRC/ARC Report proposed that some conclusive certificates should be time-limited, though there were differences about what the time limits should be, and to which certificates they should apply.

In 2007 the Victorian Government introduced legislation to abolish conclusive certificates in relation to the Cabinet exemption. The Western Australian Government also introduced a Bill in 2007 to repeal Part 2 Division 4 of the WA Act which permits the Premier to sign a certificate that operates as conclusive proof that a document is exempt under the Cabinet, Executive Council, or intergovernmental relations provisions. No certificates had ever been issued.

At the Commonwealth level, the Rudd Government came to office at the end of 2007 with a policy of abolishing conclusive certificates. Its policy document noted that the High Court's recent decision in the *McKinnon* case had effectively placed conclusive certificates beyond administrative review. "Labor believes that conclusive certificates are no longer an appropriate legislative device to be used in government information management."³³²

Submissions

The Queensland Ombudsman said —

I support the abolition of conclusive certificates. While I am not aware of any instances in Queensland where such provisions have been misused or invoked inappropriately, I do not believe it is appropriate for Ministers to have the

³³² FOI Independent Review Panel discussion paper, pp. 88-89 (footnotes omitted).

power to override the relevant tribunal's jurisdiction (as independent arbiter) to review documents in issue and to make a decision about whether or not those documents qualify for exemption.³³³

Australia's Right to Know said —

In RTK's submission, the exemption provisions which empower Queensland Ministers to sign certificates to specify that certain matter is exempt from disclosure under sections 36, 37, 42 and 42A, are contrary to the objects and spirit of the QLD FOI Act. While RTK notes that section 84 of the QLD FOI Act allows review of the issue of certificates by the Queensland Information Commissioner, it is subject to an overriding power of the Minister to confirm the certificate. Furthermore, the review by the Information Commissioner is a very limited one - to determine whether there were no reasonable grounds for the issue of the certificate. This is an extremely narrow test, which only requires a ground that is not unreasonable or fanciful and does not involve consideration of competing public interests in favour of disclosure.

In RTK's view, it is inappropriate that Government Ministers should have the power to determine that certain categories of documents are exempt from public scrutiny. It is contrary to the object of fostering public participation in and scrutiny of Government to allow individual Ministers to withhold information relating to their functions and responsibilities. RTK submits that the Ministerial certificate regime should be abolished. This will increase government accountability and do much to address the concern that FOI processes are always vulnerable to political intervention.³³⁴

The Queensland Council for Civil Liberties said in part —

The original justification for conclusive certificates was that they represented an additional safeguard. The Council takes the view that the existence of conclusive certificates is inconsistent with the fundamental precepts of the FOI Act. In particular such certificates are usually used to preclude the release of highly sensitive information which is exactly the sort of information which the FOI Act should allow access to.³³⁵

The Australian Press Council also submitted that those provisions in the Act that permit the issuing of conclusive or ministerial certificates should be removed.³³⁶

The Queensland Government response merely pointed out that the Minister referred to in the provisions permitting the issuing of conclusive certificates was the Attorney-General. It said —

³³³ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 11.

³³⁴ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 5 (footnote omitted).

³³⁵ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 15.

³³⁶ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 10.

Accordingly, in Queensland only the Attorney-General has the power to issue conclusive certificates under the FOI Act (in contrast to the position under the Commonwealth Freedom of Information Act 1982, which permits the use of conclusive certificates by the Minister of the Department holding relevant documents, and in respect of exemption provisions including the equivalent of Queensland's "deliberative process" exemption).³³⁷

Before the 2007 Federal election, the Australian Labor Party published a policy on Freedom of Information that included a commitment "to abolish conclusive certificates, ensuring the public interest test is applied more thoroughly and consistently and establishing a pro-disclosure culture throughout government."³³⁸

Discussion

The use of conclusive certificates in Queensland has been rare. There may have been a good case for their inclusion in early FOI laws, when governments were uncertain about the way they would be interpreted. However there seems to be no justification now for the retention in the law of what amounts to a ministerial blank cheque – even if only the Attorney-General can provide the necessary signature. The proposition that a Minister should have the power to ignore or override a decision by the independent arbiter cannot be justified.

RECOMMENDATION:

Recommendation 49

The provisions allowing the Attorney-General to issue conclusive certificates under the FOI Act should be removed from the Act.

³³⁷ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 20.

³³⁸ Rudd, K. and Ludwig, J., "Government Information: Restoring Trust and Integrity", Election 2007 Policy Document, October 2007, p. 7.

13 Time limits for process

For some applicants seeking documents through FOI, it would be fair to say that access delayed, is access denied. This is particularly the case when an exemption is relied on by an agency, and the applicant has to go through internal and then external review. Until recently, that final step was likely to take at least six months. As the Australian Press Council wrote in its submission —

In the context of many FoI applications, time is of the essence. If information necessary to enable an assessment of the correctness of a government decision is delayed, citizens may be denied the opportunity to seek a change in policy before it is fully implemented. In some instances this would amount to a denial of the right to democratic participation. This is particularly the case where the policy being considered involves a contractual obligation with a non-government entity. If the contract becomes binding before the citizenry have an opportunity to raise concerns, any change of policy will incur penalties and possibly expensive legal action. It is preferable if people have an opportunity to seek revision of policy at an early stage, before the government becomes locked-in to a particular course of action.

Journalists who seek information for the purpose of reporting on government policy or activity frequently find that any information that they acquire via the FoI process is received after such a lengthy delay that it is no longer newsworthy. A lengthy delay strips the information of its news value and defeats the purpose for which the FoI application was lodged.³³⁹

According to the LCARC report in 2001, in 2000-2001 approximately 70 per cent of applications to State Government agencies were processed within the 45-day period specified in the FOI Act, while local government agencies processed 80 per cent in time.³⁴⁰ More recent annual reports of the Attorney-General do not include any data on the timeliness of responses. The Department of Justice and Attorney-General advised the Panel that agencies have never been required to report on the frequency with which they meet the statutory time frames in the Act. Following the 2001 LCARC Report, the then Attorney-General responded, “The Department of Justice and Attorney-General will consider whether agencies should be required to report on the frequency with which they meet the time frames in the FOI Act”.³⁴¹ The Department of Justice and Attorney-General advised the Panel —

However this possibility of requiring such reporting was not implemented and the Department holds no historical data of this kind. Amendments to the FOI Act passed in October 2007 require agencies to notify applicants where

³³⁹ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 3.

³⁴⁰ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 88.

³⁴¹ Welford, R., Ministerial Response to LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 21.

agencies have failed to make a decision within the statutory appropriate period and “a deemed decision results”.³⁴²

The best available evidence that there continue to be problems in meeting the 45-day limit is in the Queensland Government response to the discussion paper. It reported —

Time limits across FOI regimes in comparable jurisdictions vary considerably, and in many cases time limits can prove to be somewhat artificial where voluminous or complex requests are made, and/or third party consultations are required.

In response to a survey recently conducted by DJAG, departments identified a range of factors impacting on their ability to comply with the time frames specified in the Act. Large volumes of applications (one Department cited 70-100 applications ‘on the go’ at any one time), and applications with large numbers of documents (50,000 in the case of one specific application) were factors relevant for many departments. Others included difficulty finding or locating documents, multiple and repeat applications, the need for legal or technical advice, the requirement to consult multiple third parties, staff absences, transfer of responsibilities following Machinery of Government changes and the complexity of the FOI Act.³⁴³

The discussion paper pointed out the complexity of the current provisions of the FOI legislation governing time limits —

- an FOI application must be in writing, provide sufficient information concerning the document to enable its identification, state an address for notices and, if the application is being made on behalf of the applicant, state the name of the applicant.³⁴⁴ In addition, if it does not concern the applicant's personal affairs, it must include the application fee;³⁴⁵
- importantly, if an application does not comply with the Act, there is an obligation to assist an applicant to ensure the application does comply with the Act.³⁴⁶ Otherwise, only valid applications give rise to the obligation upon agencies to comply with the Act and only documents in existence prior to the application are affected by the application, unless the agency exercises a discretion to extend the application to a “post-application document” in which case different outcomes which apply in relation to such a document;³⁴⁷
- if after consulting under s. 25A(2) of the Act, an agency decides the application does not contain sufficient information concerning the

³⁴² Department of Justice and Attorney-General letter to the FOI Independent Review Panel, 11 April 2008.

³⁴³ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 30.

³⁴⁴ *Freedom of Information Act 1992*, s. 25(2).

³⁴⁵ *Freedom of Information Act 1992*, s. 35B.

³⁴⁶ *Freedom of Information Act 1992*, s. 25A(1)-(2).

³⁴⁷ *Freedom of Information Act 1992*, s. 25(3)-(5).

document to enable identification or that an application fee is payable, the agency must give the applicant written notice.³⁴⁸ Importantly, the time between the date of any notice under s. 25A(3) of the Act and when the applicant gives the information or pays the application fee does not count as part of the “appropriate period” (which is referred to below in relation to s. 27 of the FOI Act),³⁴⁹ although an applicant will be taken to have withdrawn the application if the applicant fails to give the information within 30 days after the day of the notice or fails to pay the application fee;³⁵⁰

- otherwise, an agency must take all reasonable steps to ensure the applicant is notified that the application has been received as soon as practicable, but in any case not later than 14 days, after the application is received;³⁵¹ and
- thereafter, within the “appropriate period”, which varies according to the age of a document and whether or not it relates to the personal affairs of the applicant, between 45 and 60 days from the receipt of the application, the agency must process the application (in terms of whether access will be given and in what form and what, if any, charges that will apply) and provide access.³⁵²

Further complexity and, consequentially, additional delay is introduced to the time limits if:³⁵³

- there is a transfer of the application from one agency to another;³⁵⁴
- there are any third parties who may be affected by the disclosure and in relation to whom it is necessary to consult;³⁵⁵
- a concession card is involved;³⁵⁶
- there is a deemed refusal;³⁵⁷
- an “extended processing period”;³⁵⁸
- the application would “substantially and unreasonably divert the resources” of the agency;³⁵⁹
- access is deferred for particular reasons, such as presentation to Parliament or the media;³⁶⁰

³⁴⁸ *Freedom of Information Act 1992*, s. 25A(3).

³⁴⁹ *Freedom of Information Act 1992*, s. 25A(4).

³⁵⁰ *Freedom of Information Act 1992*, s. 25A(5).

³⁵¹ *Freedom of Information Act 1992*, s. 27(1).

³⁵² *Freedom of Information Act 1992*, s. 27.

³⁵³ FOI Independent Review Panel discussion paper, pp. 144-145.

³⁵⁴ *Freedom of Information Act 1992*, s. 26.

³⁵⁵ *Freedom of Information Act 1992*, ss. 27(5) and 51.

³⁵⁶ *Freedom of Information Act 1992*, s. 27A.

³⁵⁷ *Freedom of Information Act 1992*, ss. 27(5)-(5A).

³⁵⁸ *Freedom of Information Act 1992*, s. 27B.

³⁵⁹ *Freedom of Information Act 1992*, ss. 29 and 29A.

³⁶⁰ *Freedom of Information Act 1992*, ss. 31 and 31A.

- internal review is sought;³⁶¹ and
- external review is sought.³⁶²

The discussion paper said —

Importantly, such complexity raises genuine concerns about whether it reduces the effectiveness of FOI legislation, both in terms of the use made of FOI legislation (as any delays will tend to affect the immediacy of the relevant information and therefore the willingness to pursue its disclosure) as well as the cost burden for the administration of FOI legislation. In addition, such complexity is arguably merely representative of a culture predisposed to non-disclosure. That is, prescription is a situation where process is preferred over substance (that is, disclosure).³⁶³

It then suggested three options —

Beyond tinkering with the existing complexity that attaches to the time limits, other options which could be utilised to "free up" that complexity include:

- the introduction of a single set of time limits for acknowledgement of receipt, processing of the application (including consultation with affected third parties), internal review and external review rather than the topsy of time limits that currently exist;
- if time limits are not adhered to, the capacity for all or some of the fees and charges to be refunded to the applicant;
- the capacity for expedited searches, as exists in the United States *Freedom of Information Act 1966*. An expedited search is available where a request is made by a person primarily engaged in disseminating information to the public and the information sought is urgently needed to inform the public about some actual or alleged federal government activity.³⁶⁴

Very few submissions dealt with the issue of time limits at all, and none suggested any solutions to the problem of complexity that the Panel had detailed. Among those that did consider the issue generally were the Australian Press Council and Megan Carter.

The Australian Press Council said —

One of the key reasons cited by journalists for not using FoI processes to gain information in relation to government is the length of time it takes to process applications. While state governments are often described as performing better than the federal government in this respect, the time taken to process FoI applications is still unreasonably excessive ...

³⁶¹ *Freedom of Information Act 1992*, division 4 of part 3.

³⁶² *Freedom of Information Act 1992*, part 5.

³⁶³ FOI Independent Review Panel discussion paper, p. 146.

³⁶⁴ FOI Independent Review Panel discussion paper, p. 146.

If the FoI process is to be of any utility to journalists it must be capable of yielding results within a time frame that is much shorter and more predictable. The statutory period within which a response must be forwarded to the applicant should be shortened to fourteen days and the scope for extensions of time needs to be significantly reduced. Where information is released after the statutory period, the applicant's fee should be refunded. Most important, the information management practices of government agencies need to be streamlined in order to facilitate the faster processing of FoI applications.³⁶⁵

Megan Carter, replying to the questions as to whether the existing time limits in Queensland were reasonable and consistent with the objectives of the Act, said —

The initial period of 45 days could be reduced to 30 days but I would not recommend a reduction below this level. FOI Officers are encouraged to deal with requests as soon as possible, and with sufficient resources, they would be in a position to do so. Many agencies live in a constant backlog situation and for them, the time limits lose their meaning.³⁶⁶

Responding to the question about what initiatives could improve early disclosure, she said —

When I managed a large team of FOI decision makers within a single agency, one method used was to chart our statistics as to who had the fastest rate of release. The team's overall average was reduced significantly, with the fastest decision maker eventually averaging 12 days per request. Rewards were nominal (usually edible), but the competition was fun and the recognition was valued. Good Practice Awards from the FOI Monitor in a variety of forms would be one initiative to improve early disclosure rates. Favourable mentions of Most Improved Agency, Speediest Agency etc in the Annual report could also help.

On the punitive side, one option is to prevent agencies from collecting charges when time limits were exceeded, or even to refund the application fee in those circumstances. The FOI Monitor could also give unfavourable mention to agencies who have been tardy without good reason. Incorporating meeting of deadlines in senior officer's performance agreements has already been mentioned, but there are dangers with too strong an emphasis on timeliness at the expense of accuracy.³⁶⁷

13.1 Standard processing time

When the ALRC/ARC Review considered this issue it noted that for the previous nine years the time limit for processing FOI requests at the Commonwealth level had been 30 days. The report continued —

³⁶⁵ Australian Press Council submission to the FOI Independent Review Panel discussion paper, pp. 3-4.

³⁶⁶ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 25.

³⁶⁷ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 25.

It has been suggested that recent advances in information technology and records management mean that it should now be easier for agencies to identify and retrieve information and that, consequently, the time limit for processing a request should be reduced.³⁶⁸

However the ALRC/ARC Review decided that agencies might need some time to adjust, and instead recommended that the time limit be reduced three years later, to 14 days.³⁶⁹ The time limit remains at 30 days.

Elsewhere in Australia, only Victoria has as long a period for processing as Queensland (45 days), most States and Territories have a 30-day limit, while NSW has 21 days. New Zealand has a 20 working days limit.

The Panel considers that Queensland's time limit needs to be reduced, at least to the 30-day period set for the Commonwealth and most States and Territories. Queensland's agencies overall have not yet sufficiently adopted the information and record keeping technologies that prompted the ALRC/ARC to consider might justify a reduction in the time limit to 14 days (by 1998!). However the Panel has been informed that the majority of government agencies have adopted an Electronic Document and Records Management System (EDRMS) and the rest are moving to do so.

The Panel has decided that the various time periods in the part of the Act should be expressed as working days, rather than calendar days. This is a practical recognition of the difficulty agencies sometimes face in meeting timelines when public holidays occur during the processing period. The Christmas - New Year period is particularly difficult. While calendar days are the norm in Australian jurisdictions, working days are used in such places as the United Kingdom, the United States and New Zealand.

Although the Panel would like to see the processing period reduced to the 30 calendar days referred to above, for an interim period it is recommending that it be reduced to 25 working days – that is, five calendar weeks or 35 calendar days if there are no intervening holidays. The Panel considers a further reduction to 20 working days should be considered when the new legislation is reviewed after it has been in operation for four years.

The Panel considers that the legislation should make it clear that the 25 working day period is the maximum period that agencies can take to provide documents, and should not be regarded as the norm. Agencies should be encouraged to deal with applications as they are received, or at least as quickly as is possible. LCARC made a similar recommendation.³⁷⁰

The Panel does not propose to review each of the various time limits currently specified in the FOI Act that were referred to in the discussion paper and have been reproduced above. Rather it intends to recommend systemic changes that should

³⁶⁸ ALRC/ARC Report, p. 83.

³⁶⁹ ALRC/ARC Report, p. 84.

³⁷⁰ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 88.

result the better and more timely delivery of documents in response to applications for access.

RECOMMENDATION:

Recommendation 50

The maximum period for supplying documents in response to an application for access should be reduced from 45 calendar days to 25 working days. The legislation should be amended to require agencies to supply documents as soon as possible, but no later than 25 working days.

13.2 Reducing the search

The Panel has considered a number of ways in which the task of FOI officers in searching for relevant documents might be reduced and made easier. Other reviews have emphasised the desirability of discussions between FOI officers and requesters to try to narrow the range of information being sought. The ALRC/ARC Review, for example, recommended that the Commonwealth Act should be re-drafted to emphasise the importance of agencies consulting with applicants about their requests, arguing that this would have a “valuable symbolic and educative effect”.³⁷¹ The Panel concurs.

There is a more practical way to achieve this objective.

At some point in response to an FOI request, the responsible officer in the agency will typically prepare a schedule of documents that are relevant to the request. In some agencies this is prepared at an initial stage when the FOI officer assembles the documents relevant to the request. In some others, it may not occur until the agency is working out what charges might be levied.

The schedule is in the form of what is referred to as metadata. It identifies particular documents with a title or description, a date, and normally an author. If shared with the applicant sooner rather than later, it would allow most requesters to decide which individual documents on the schedule they seek. This should save time and money for both the requester and the agency. Opening dialogue between agency and requester in this way also promotes a context of mutual responsibility in FOI processing enabling a more responsive FOI experience.

Earlier provision of a Schedule of Relevant Documents also would allow, for example, a requester to specify that a particular email was wanted, and not the 20 or 30 identical emails that had been received by people in the agency. It would allow a requester to identify the final brief that had been prepared, rather than those that contained corrections or misspellings. That is, it would identify “ephemeral” material

³⁷¹ ALRC/ARC Report, p. 86.

that may be subject to FOI but would not be regarded as part of the public record under the *Public Records Act 2002*. The schedule should be drawn up in a way that allows the FOI officer to indicate that a particular item is regarded as being ephemeral and then the requester can decide whether to pursue it or not.

The preparation of the schedule is a normal part of the FOI officer's task. As (electronic) records systems improve, it will be a task that will be performed far more easily through the use of search engines that are an essential part of an agency's information system.

LCARC made a similar recommendation in 2001.³⁷² The Government's response said it supported the preparation of schedules in appropriate circumstances, but it said "given the variation of applications and decisions, this is a matter that should be left to agencies' discretion. If schedules were required for all decisions this would be resource intensive and add to the time taken to process applications".³⁷³

In *Price and the Nominal Defendant*,³⁷⁴ the Information Commissioner said —

... many agencies do produce schedules of that kind. I would not wish to discourage agencies from doing so. In many instances, it is a practical necessity, and a matter of good record-keeping practice, for an FOI administrator to prepare such a schedule so as to assist the agency to keep track of precisely what material has been disclosed to an access applicant and what has not.

The Panel agrees that such a schedule is best practice and seeks to extend that advantage. Purposefully changing the timing of its provision and requiring it for all requests would be a benefit, not a burden for agencies.

The task of preparing the schedule will become easier as information systems improve, but in any event the task has to be undertaken in response to an FOI request. The Panel believes that it should be the first response to a request so that the acknowledgment that the agency is required to send to the requester would include the schedule. This would allow the requester to make an informed decision to narrow the request to those documents that the requester considers are relevant. The 10 working days given to the agency within which to acknowledge any request should be sufficient to allow the schedule to be prepared.

The time frame the Panel recommends for processing FOI requests has been simplified to just one "stop clock" in the 25 working day period up to decision date, which is at the point that the agency provides the Schedule of Relevant Documents to the requester. At that point, the decision time frame stops until the requester returns the Schedule. It is analogous to placing a purchase order: the requester is at that point responsible for deciding which documents from the relevant list (Schedule) it undertakes to pay for access (should access be granted).

³⁷² LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 118.

³⁷³ Welford, R., Ministerial Response to LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 29.

³⁷⁴ S97/97, 24 November 1999, OIC.

If the requester does not respond to the agency's Schedule of Relevant Documents within 20 working days then the requester forfeits its FOI application fee. Should the requester wish to continue with that FOI request after the forfeiting 20 working day period then the requester will need to lodge a fresh FOI application and pay the application fee again.

This scenario is unlike the one recommended in chapter 17 concerning the 40 working days within which the requester needs to seek access to documents already the subject of a decision where it would be inconsistent with the "push" model to require a re-run of the FOI processing. In contrast to that (existing s.31A) scenario, the agency has not already expended the time and resources in making a decision on the relevant documents at the schedule stage. The agency cannot be expected to have FOI applications open for unlimited or unreasonable periods of time and needs to prioritise and manage its finite resources.

If the requester decides once the Schedule of Relevant Documents has been considered that an FOI request in different terms is required to meet its needs, then the requester would need to lodge a new request (and pay a new application fee) and may choose not to proceed further with the original request. Having said this, the agency remains responsible (see s. 25A) to seek sufficient information to identify the documents the subject of the request if necessary as an initial duty before the "clock" starts and *prior to* producing a Schedule of Relevant Documents. This would be part of the original request (and included in the original application fee).

The Panel considers that providing the requester with the Schedule would contribute significantly to the administration of FOI, assisting administrators and requesters, and allowing the examination of relevant documents to be reduced to documents that are responsive to the requester's needs.

RECOMMENDATIONS:

Recommendation 51

When acknowledging receipt of an FOI request, a Schedule of Relevant Documents, including an indication of those documents that are considered to be ephemeral, should be provided.

Recommendation 52

The Information Commissioner should issue guidelines to agencies to assist consistency in the production and management of Schedules of Relevant Documents (e.g. Schedule format).

13.3 Role of the Information Commissioner

The Panel believes that the Information Commissioner should play an important role in improving the performance of agencies in their response to FOI requests.

As is proposed in a later chapter, the Information Commissioner should also have a role in supervising the performance by agencies of their FOI activities, through investigating complaints and through “own-motion” investigations – these essentially being the functions that the Ombudsman would normally perform, but is prevented from doing so in the current legislation.³⁷⁵

The Information Commissioner would be enabled through an annual report card presented to Parliament, to evaluate the performance of each agency and the manner (including timeliness) in which it deals with FOI applications.

The agency report cards may take the form of red, amber or green overall assessment whilst also enabling specification of low performance areas and those indicating a continuous improvement focus.

This report card would also provide a way of attracting the attention of all responsible senior executives in agencies, including CEOs, that would probably be at least as effective as that suggested in the ALRC/ARC Review. That review proposed that “Performance agreements of all senior officers should be required to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information, including FOI requests.”³⁷⁶

One problem with the ALRC/ARC proposal is that it could lead to CEOs distorting the FOI process in their efforts to maximise their performance measures. On the other hand, there are several important advantages of the report card system. First, it is public, whereas no one (other than the Premier and the CEO) will know how the CEO’s performance has been rated. The report card will be available for the agency, all other agencies, the parliamentary committee and the public for study and analysis. Second, it will be more meaningful than the tick or cross awarded to the CEO, providing a holistic, quantitative and qualitative perspective of the agency’s performance. And third, it will be owned by the agency and the FOI officers who are responsible for the agency’s efforts.

RECOMMENDATIONS:

Recommendation 53

The Information Commissioner should have the power to consider and report on complaints about the way an agency deals with applications for access, including the timeliness of its process. The Information Commissioner should have the power to conduct own-motion inquiries in relation to such issues.

³⁷⁵ *Freedom of Information Act 1992*, s. 107.

³⁷⁶ ALRC/ARC Report, Recommendation 8, p. 38.

Recommendation 54

The Information Commissioner should conduct audits of agency performance of FOI and produce annual report cards on agencies for examination by the parliamentary committee.

13.4 Centralised and/or delegated FOI decision-making

In a submission, the Rockhampton City Council said —

FOI is not a process that should be taken lightly, it requires highly skilled individuals committed to open and honest Government, who can fend off potential influences by senior management not to release information.

One solution is to set an independent FOI process office that agencies must use. A fee for service could be used or a scaled annual fee could be imposed. Many Local Government Authorities struggle with FOI as they usually never resource it properly, not can the[y] afford to do so. A professional government funded body may be a better approach, that way the process will be followed correctly and someone independent will decide what to release. This will take away the ability of bureaucrats to interfere with the process.³⁷⁷

This is a real issue for many smaller agencies, particularly local government agencies. There are a number of solutions that need to be investigated, including the provision of services such as those described in the submission, either by the Queensland Local Government Association or by a State Government agency. This is an issue that could be further explored by the Information Commissioner.

The Information Commissioner should also take responsibility for informing all agencies, but particularly the smaller ones, about the latest information and techniques for processing FOI requests, including technology such as redaction.

There are some agencies where FOI might benefit from being more decentralised, through delegated decision-making processes. The ALRC/ARC report commented that in many (Commonwealth) agencies very few officers were delegated to handle FOI requests. It said —

In those agencies, all FOI requests must be channelled through a few officers. The Review considers that FOI decision-making should not be confined to a select few within an agency. Increasing the number of authorised officers would help promote greater openness and would demonstrate that the release of government information is an integral part of operations, not a specialised and rarified procedure separate from the normal business of the agency. It would also help to avoid delays in request handling. Agencies that have officers in each State and Territory and in regional areas should ensure that at

³⁷⁷ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 13.

each of these local levels adequate numbers of officers are authorised to release documents.³⁷⁸

The Panel's surveys and enquiries suggest that many Queensland agencies would benefit from adopting a similar approach to that suggested by the ALRC/ARC Review.

The Panel also considers there is considerable merit in the proposal by Rockhampton City Council for "an independent FOI process office" that agencies might (though not must) use. This is not possible under the present legislation because section 33 limits the ability of CEOs to delegate their powers to make decisions about applications made under the Act to officers of the agency. The Panel considers that in relation particularly to local government, the delegation that the Act permits – "another officer of the agency who the local government, by resolution, nominates" (s. 33(1)(b)(ii)) – is too restrictive and there is a case for allowing local government to contract out some of their FOI work. There would need to be strict secrecy provisions involved, but this would provide a practical solution to the problems suggested in the Rockhampton City Council submission. There seems to be no philosophical reason to insist that FOI can only be dealt with within an agency. There are many examples of agencies (and government generally) contracting out services to the private sector that were previously thought could only be done "in house". One such example, close to FOI, is the provision of legal services by non-government lawyers.

RECOMMENDATIONS:

Recommendation 55

The Information Commissioner should investigate options for the provision of FOI services to smaller agencies that are unable to develop the necessary expertise to deal adequately with FOI requests.

Recommendation 56

The Information Commissioner should encourage larger agencies to increase the number of officers authorised and qualified to handle FOI matters.

Recommendation 57

The Information Commissioner should ensure that all agencies and their FOI sections are made aware of the latest technological advances applicable to FOI, and of the way agencies in Queensland are applying them.

³⁷⁸ ALRC/ARC Report, p. 37.

13.5 Timeliness – Incentives and Sanctions

The Information Commissioner’s annual report cards to parliament on the performance of agencies in the FOI and information field should contain quantitative and qualitative assessments that would include an agency’s timeliness in administration of the Act. The Information Commissioner could comment on an agency’s attempts to meet processing milestones ahead of the maximum due date (most desired), or on an agency’s repeated failure to perform by the maximum due dates (least desired).

But not only would the public nature of the report cards provide its own performance incentive for CEOs and agencies but the Information Commissioner’s role would be more than a reporting authority. With the Information Commissioner’s jurisdictional role in complaints and “own motion” investigations as well as its role to assist and guide agencies in administration of the Act, the Information Commissioner could use performance information gained during the annual report card process to inform its priorities in focussing its other responsibilities (and resources).

As suggested in the Panel’s discussion paper³⁷⁹ and in several submissions, the Panel agrees that where agencies do not meet the requirements of the legislation in relation to timeliness, the requestor should be able to have the FOI application fee refunded.

RECOMMENDATIONS:

Recommendation 58

FOI should be considered as part of the mainstream function of government agencies and superior performance by officers should merit official recognition.

Recommendation 59

Where an agency fails to meet deadlines specified in the Act for the provision of information to requesters, the requester is entitled to a refund of the FOI application fee.

13.6 The “functus” amendments and extending processing time

In October 2007, the Government introduced amendments to the FOI Act to deal with “out of time” decisions on applications, the so-called “functus” amendments. These corrected a situation where, without a statutory basis, agencies had released information to applicants as a result of decisions that were made beyond the time specified and when, according to the Act, there had therefore been a “deemed refusal”. (See s. 27)

³⁷⁹ FOI Independent Review Panel discussion paper, p. 103.

The amendments were extremely complex, dealing with three different time periods. For present purposes the provisions in Division 6 of the Act can be ignored, as they effectively have expired. The crucial new section of the Act that was introduced as part of the “functus” amendments was s. 27B, “Extended processing period”. Essentially this allows an agency or Minister to seek the agreement of a requester to extend the period in which a decision can be made about a request, without the deemed refusal coming into effect.

The most important effect of s. 27B is that it allows an agency or a Minister to continue to consider an application and to make a decision, at any time before the agency or Minister is informed that the requester has sought a review of the deemed (because of the expiry of time) refusal of the request. (Sub-section 4).

However this power is not made conditional on a request for an extension having been made, or even that a request for an extension of time has been refused. (Sub-section 5)

The Panel considers this provision needs to be redrafted. The concept behind it is relatively simple, but it is difficult to find it in the section or to apply it. What the section should do is allow agencies to keep working on a request beyond the time when there is a deemed refusal, so long as they have asked the applicant for an extension of time and the applicant has not refused that request, and not taken advantage of the deemed refusal to apply for external review. If a request for an extension of time is granted, the applicant should be bound by the new time limit and should not be able to renege as permitted by the current s. 27(B)(3)(a). The agency must cease processing the request once it learns the applicant has applied for external review.

RECOMMENDATION:

Recommendation 60

Section 27B should be redrafted to provide that an agency or Minister may keep working on a request beyond the time when there is a deemed refusal, so long as they have asked the applicant for an extension of time in writing and the applicant has not refused that request, and not taken advantage of the deemed refusal to apply for external review. If a request for an extension of time is granted, the applicant is bound by the new time limit. The agency or Minister must stop processing the request if they are informed the applicant has sought external review or the applicant has refused the request for an extension.

13.7 A new timeline

The Panel’s recommendations would greatly simplify and improve the speedy delivery of documents requested under FOI. In essence (apart from the need to transfer an application to another agency or consult with third parties) they would require —

- Within 10 working days of a request being received, and an application fee paid, the agency/Minister would be required to acknowledge receipt of the request and provide the requester with a schedule of documents relevant to the request. At that point, the clock would stop, until the requester notifies the agency/Minister of the documents required.
- Once the agency/Minister is told of the documents required, it has 25 working days from the date the request was received, excluding the time the requester was considering the schedule and deciding the documents that were required, to make a decision of what documents it will provide, and to make them available to the requester.
- If no decision is made by the end of that period, there is a deemed refusal.
- The agency/Minister at any time may ask the requester to agree to an extension of the 25 working days period.
- If the requester agrees, the period is so extended.
- If the requester advises before the end of the 25 working days that there is no agreement to extend the period, there is a deemed refusal after 25 working days if no decision has been made.
- If after the 25 working days period the requester advises of a refusal to agree to an extension of time, there is immediately a deemed refusal under the Act.
- Until the requester replies in the negative to the request for an extension of time or deemed refusal review rights are exercised, the agency/Minister may continue to consider the application and to make a decision upon it. If a decision is made after the original time frame but before advice of the requester's refusal is received by the agency (or review rights exercised) then that decision actually made is the decision under review (not a deemed decision that all documents were refused).

It should be noted that in the next chapter the Panel recommends that the procedure involving the issue of preliminary assessment notices and final assessment notices, and the requirement for deposits, should be abandoned. This will greatly reduce the time taken by FOI officers in trying to assess charges. The recommended costs regime requires simply, transparently and objectively, a calculation based on quantity. This should also obviate expenditure of time and resources on disputes about costs. To demonstrate the proposed time lines, the Panel has prepared Appendix 6, which sets out model time lines for an FOI decision and the internal and/or external review of an FOI decision.

14 Fees and charges

The report in 1990 by the Electoral and Administrative Review Commission (EARC) that recommended Queensland should adopt an FOI law, said —

Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.³⁸⁰

EARC proposed there should be no application fee for FOI and that applicants should not be charged for the time spent searching for documents or for decision-making time. The only charges it considered necessary were photocopying charges, though not for the first 50 pages, with such charges to be levied at a rate that subsequently increased with the number of pages obtained.³⁸¹

The ALRC/ARC Review in 1995 said —

The Review considers that agencies should continue to be able to impose charges for FOI access to documents other than the applicant's personal information. Although charging for access to information undoubtedly reduces its accessibility, some form of contribution from applicants is appropriate. The current fees and charges regime is, however, too complicated and penalises applicants for agencies' inefficient information management practices. The Review recommends a new approach.³⁸²

The ALRC/ARC correctly acknowledged that charging for access to information reduces its accessibility. This is often euphemistically described as “demand management” – that is, a way of reducing usage by making people pay. It certainly does have that effect on some large-scale users, such as newspapers. But it also impacts on non-government organisations such as environmental groups. The responses of the Australian Press Council and the Gold Coast and Hinterland Environment Council to the discussion paper make the point. The Australian Press Council said —

The costs incurred by media organisations that pursue FoI applications are prohibitive. Although the initial application fee is modest, additional charges are imposed for processing the application, including payment for locating documents and considering material in order to decide whether it should be released. When journalists or community groups are confronted with quoted amounts of several thousand, or even hundreds of thousands of dollars, for the

³⁸⁰ Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, p. 181.

³⁸¹ Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, p. 183.

³⁸² ALRC/ARC Report, p. 185.

processing of an FOI request, most will decide not to proceed with an application. This has given rise to speculation that the hefty payments demanded are imposed as a deliberate strategy to discourage FOI applications and thus protect governments from scrutiny.³⁸³

Gecko - The Gold Coast and Hinterland Environment Council, said —

It is far too expensive for non-government organisations and average people. The user pays system is out of control when taxes have already paid for services that should be delivered at no or little cost to bona fide groups. The public service in this instance no longer serves the public.³⁸⁴

The amount of money involved in FOI charges is miniscule, at least so far as agencies are concerned. According to the information provided in the annual reports of the Attorney-General, as collated in the Queensland Government response to the Panel's discussion paper, in 2005-06 application fees brought in just under \$140,000 while charges of \$173,000 were imposed.³⁸⁵ Those charges were slightly lower than in the previous few years. In 1999-2000, the cost of administering FOI in Queensland was estimated at \$7.5 million.³⁸⁶ In 2002-2003, the total cost of administering FOI by Government departments and agencies was almost \$9.3 million, while the revenue from fees and charges was just over \$0.25 million.³⁸⁷

While the charging regime under FOI may not collect much revenue, it does present real problems for administrators and requesters.

Three non-government agencies took up this issue in submissions.

The University of Southern Queensland said —

The costs to the University to search, examine and make decisions on FOI applications greatly exceeds the charges provided for in the FOI regulations. Whilst the University does not recommend increasing the charges, neither does it wish to see the charges removed as they do act as a deterrent to uncommitted, nuisance making or vexatious applicants.³⁸⁸

Queensland University of Technology said —

The operations of the FOI Act in relation to both cost and time make the FOI process onerous and time-consuming. Recovered costs do not come close to covering the actual cost of providing the service to applicants.³⁸⁹

³⁸³ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 5.

³⁸⁴ Gecko - The Gold Coast and Hinterland Environment Council submission to the FOI Independent Review Panel discussion paper, p. 1.

³⁸⁵ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 129.

³⁸⁶ LCARC, *Freedom of Information in Queensland*, Report No. 32, December 2001, p. 166.

³⁸⁷ LCARC, *Freedom of Information in Queensland*, Report No. 32, December 2001, p. 80.

³⁸⁸ University of Southern Queensland submission to the FOI Independent Review Panel discussion paper, p. 2.

³⁸⁹ Queensland University of Technology submission to the FOI Independent Review Panel discussion paper, p. 3.

The Queensland Law Society said the application of the present formula for calculating charges “can be time-consuming, unwieldy, imprecise and complicated.” It said it would prefer a scale based on the number of folios relevant to the request.³⁹⁰

Megan Carter said —

Since the Act was amended in 2001, the government has had much stronger powers to deal with generalised applications through the imposition of fees for processing FOI applications, subject to a financial hardship exemption. The Discussion Paper observes that fees and charges have been a substantial contributing factor to a reduction in the use of FOI legislation for purposes other than access to an applicant’s own personal information. Further, experience suggests that there is often a degree of inconsistency between agencies in relation to the application fees and charges regime which gives rise to inequities between, and confusion amongst applicants. Such disputes about fees and charges have the potential to unsettle the initial relationship between the applicant and an agency.³⁹¹

The Rockhampton City Council explained how it deals with some of the problems that arise under the current charging regime —

The issue with the charging regime is that in order to estimate the job, the FOI officer has to almost complete the task first to determine the size of the job. Also since the charging mechanism comes nowhere near the cost of processing a FOI, at Rockhampton City Council we tend to get the job done as quickly as possible and undercharge rather than take the extreme approach and look for every possible document that could fall within the request. We tend to discuss the findings with the applicant to check that what we have found will fulfil their request. We find this conciliatory approach assists us in completing the FOI request quicker.³⁹²

Different agencies apply different tests, costings per unit and strategies. This leads to inconsistencies, complexity and confusion. Disputes about proposed charges sometimes poison the relationship between requesters and agencies. Using the appeal mechanism to challenge proposed charges merely delays the possibility of getting the information that is being sought, and to that extent is counter-productive for some or most applicants.

John Doyle, FOI consultant to *The Courier-Mail*, wrote in his submission —

³⁹⁰ Queensland Law Society submission to the FOI Independent Review Panel discussion paper, p. 4.

³⁹¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 24.

³⁹² Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 13.

Rather than taking a practical approach, some agencies have now engaged in a game of tactics. The objective is to discourage the applicant by maximising costs and extending the processing time. One strategy is to include all conceivable documents that could come within the terms of the application, advise of the need to consult with all involved and claim that they will have to spend considerable time and effort in processing the application.

Agencies can now charge for all manner of things – including searching for documents, processing the application, consulting third parties, deleting information. The irony is that the applicant has to pay the agency to do this and also to write the argument as to why they cannot have the information.

It is not unusual for an estimate of charges, often in the thousands of dollars, to be presented to the applicant. On the basis of this scant information, applicants are invited to provide grounds to challenge the assessment. It's a simple message – pay up or go away.³⁹³

The Queensland Ombudsman summed up his experiences as Information Commissioner —

- overall, the current regime is too complicated and user-unfriendly;
- there should either be no application fee payable at all, or an application fee should be payable for all applications (personal and non-personal). The resolution of disputes about the meaning of “personal affairs” in order to determine whether or not an application fee is payable is time-consuming and a waste of resources, and can lead to a deterioration in relations with the applicant before the processing of an application has even begun;
- it is virtually impossible to determine the likely processing charges payable before making an application;
- both appeal rights and time limits need to be simplified;
- agencies do not apply the charging regime consistently and I am aware of situations where agencies underestimate the time spent on processing an application so as to avoid the administration and possible disputes associated with imposing charges;
- the introduction of a flat fee scaled by volume has merit as it means that an applicant does not pay for time spent in searching for documents where an agency's record-keeping practices may be deficient, or where an FOI decision-maker is inexperienced and takes additional time to make a decision and to prepare reasons for that decision.³⁹⁴

Finally, on the general issues raised, the submission of the Australian Press Council expressed the views of many of the groups that responded. It said —

Officials will often seek to justify the high fees charged on the premise that they are intended to offset the costs incurred by agencies in processing the

³⁹³ John Doyle submission to the FOI Independent Review Panel discussion paper, p. 9.

³⁹⁴ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 18.

applications. However, this argument fails to give weight to the role of FoI in ensuring accountability of government to the citizenry. Since the citizens pay taxes, they have in a sense already paid for the information that is sought through FoI, the media that publish information acquired by FoI are simply a vehicle for delivering that information to its ultimate consumers. While it may be appropriate to demand a modest fee to offset costs, it is not acceptable to make costs so high as to act as a disincentive to proceeding.

Critics of FoI have noted that there is a lack of consistency in the way in which fees are calculated. It has been suggested that one reason for the high amounts charged is that fees are based on the time spent searching and perusing files for the purpose of making a determination as to whether they may be released. Often, after paying the required fee, an applicant will only receive a modest amount of material (the balance being found to have been exempt), which may be redacted so that the bulk of information is blacked out. The 1995 ALRC report recommended that fees should be calculated according to the amount of information actually received by the applicant, and the Press Council endorses that proposal. In addition to reducing any disincentive for an applicant to proceed with an application, this would also create an incentive for agencies to improve the efficiency of their records management procedures. For similar reasons, applicants should receive a discount or a waiver of fees where there is a delay in the finalisation of their application.³⁹⁵

In mid-April 2008, LCARC tabled in Parliament its report on “The Accessibility of Administrative Justice”. In chapter 6, it presented its views on “Costs of Access – Freedom of Information Act”. Its conclusions were —

The submissions received by the committee called for simplification of the current multi-layered regime of costs for access to documents under the *Freedom of Information Act*. Such a complex regime, with many different administrative considerations, imposes far greater an administrative burden on departments and agencies than the original regime recommended by EARC and PCEAR. Unfortunately, the complexity of the current fees and charges legislation may have led also to a lack of uniformity between agencies in determinations regarding fees and charges.

The committee notes that full cost recovery will never be possible. Freedom of information, that is, access to government-held information, will always occur at a cost to government. Accordingly, any regime of costs set by legislation will have an element of artificiality.

However, in the committee’s view, the ideals must be for the freedom of information fees and charges regime to be:

- without charge for access to a person’s own personal affairs information;
- fair, with costs ensuring an application represents a genuine need or interest to access information, while at the same time, not prohibiting people with a genuine need or interest from accessing information; and

³⁹⁵ Australian Press Council submission to the FOI Independent Review Panel discussion paper, pp, 5-6.

- relative to the reasonable costs associated with applications for information.

The independent economic review of the United Kingdom freedom of information legislation conducted by Frontier Economics provided the United Kingdom Government, its Parliament and parliamentary committees, departments and agencies and the people of the UK with valuable information. The committee notes that the report was considered by the House of Commons Constitutional Affairs Committee prior to a finding that change to the existing costs regime was not justified economically.

In Queensland, the committee has not had the benefit of information from an independent economic review.

The committee recommends (**recommendation 7**) that the Attorney-General ensure simplification of the regime of costs under the *Freedom of Information Act* so as to reduce the current administrative burden. Personal information should continue to be available without charge.

In addition, we recommend an independent economic review of the impact of the *Freedom of Information Act*. An economic review will provide valuable data to inform legislative developments regarding the Act. Finally, the committee recommends that section 108 of the *Freedom of Information Act* be amended to require the provision of adequate and informative data, with the requirements for data to be determined following the independent economic review.³⁹⁶

The Panel agrees that there should be no charge when people seek their personal information. It agrees that the charging system needs to be simplified, and below it recommends a system that will achieve that end, and others that are identified below. In chapter 22 it deals with the problem of the adequacy of the data collected under s. 108 of the Act, and ways in which can be improved. It does not support the proposal that there should be an independent economic review of the FOI Act - not yet. The review in the United Kingdom to which LCARC referred, dealt primarily with an assessment of the way four different charging methods might affect access to the FOI regime, none of them directly relevant to the current or proposed practices in Queensland. An economic review would be useful, if the right questions were asked, but the Panel suggests it would be best conducted in association with a review of the new scheme that the Panel is proposing for FOI in Queensland, at least four years after its introduction.

One of the findings of the UK Review was that —

The benefits of FoI can be broken into three elements: the private benefit to an individual of the information they receive; the public benefit of that

³⁹⁶ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, pp. 84-85.

information being made available; and the aggregate benefits that derive from a more open and transparent decision-making process.³⁹⁷

The UK Review considered —

a more targeted fee aimed at recovering the costs of dealing with persistent and experienced requestors. These types of requestors tend in the majority of cases to be requestors who require information for commercial use: either journalists or businesses wishing to gather information about procurement options in order to create a commercial database.

Responding to requests from these requestors tends to cost substantially more than dealing with requests from more casual requestors. A fee for this type of user could overcome some of the concerns expressed above with respect to a flat rate fee for all users. However, this option is potentially susceptible to gaming, as under the Act, individuals do not have to prove their identities or the purpose of their request in order to make a request.³⁹⁸

It is undoubtedly true that different people and organisations use FOI for different purposes. The Redland Shire Council, for example, told the Panel —

In relation to FOI, our estimate is that the majority of the benefit is to the community because of the open and accountability aspects, however, a proportion greater than the current 5% is a direct personal benefit to the individuals concerned. Our estimate is between 10 and 15% relates to private benefits – such as when it is used to settle personal gripes, to try to win political points, or as indiscriminate “fishing expeditions” that serve little or no public benefit. Any information that is sought under FOI that provides the applicant with a private benefit should therefore be provided at actual cost.³⁹⁹

However the Panel does not believe it is desirable or necessary to breach one of the fundamental principles that has been adopted in most jurisdictions in relation to FOI, that simply set down basic principles about access to information, and are not concerned with the motive of the person seeking information. While in some jurisdictions a different principle is applied in relation to the imposition of charges, the Panel does not favour this deviation from the general philosophical approach that has been adopted in relation to FOI. It interferes with the legislative premise of a right to access and would likely lead to disputes, even gaming, and certainly complexities in the administration of the Act disproportionate to any injection of responsibility on requestors attending their rights. The Panel addresses special users in chapter 18 and vexatious and voluminous requests in chapter 15.

³⁹⁷ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 10.

³⁹⁸ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 10.

³⁹⁹ Redland Shire Council submission to the FOI Independent Review Panel discussion paper, p. 15.

Another reason for doubting the benefit of a full economic review of the charging regime for FOI is that, as LCARC has observed, full cost recovery will never be possible. Indeed it can be argued, and has been by EARC and others, that it is not desirable.

The Panel believes the problems of inconsistency, complexity and uncertainty, its invariable time-consuming impact, and the difficulties that both applicants and agencies have to face in coping with the charging regime, can be addressed by adopting something similar to the “new approach” mentioned in the ALRC/ARC Review. This was —

Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using. The scale should be developed by the FOI Commissioner in consultation with the Chief Government Information Officer and reviewed annually.⁴⁰⁰

The example provided by the ALRC/ARC Review involved a charge of \$30 for the first 20 folios, \$45 for the next 30 folios, and \$60 for the next 30 folios.⁴⁰¹ The Panel agrees that there should be a sliding scale, with the charge increasing with the number of folios provided to the requester. The Panel will suggest a slightly different scale, the maximum scale charge per page being applied when more than 1000 pages are requested. Adjusting for inflation since the ALRC/ARC report, the charges would be at least 50 per cent higher than those that it proposed in 1995.

The ALRC/ARC Review considered that charges should only be levied on documents that were released. It said this contrasts with the current system in which charges bear no relationship to whether the applicant actually receives any information.⁴⁰² The Panel would go further and propose that applicants should only be charged for full pages – that is, if any part of a page is blacked out, the applicant should not be required to pay for that page.

This removes any tactical opportunity agencies may have to penalise requesters by charging for pages potentially containing little material that has survived redaction (but enough to satisfy the terms of s. 32). It also repositions the costing incentive towards a default setting of disclosure, as required by the objects of the Act. In the end, this recalibration is insignificant in terms of revenue forgone to government – it would be a nonsense to suggest so – but the removal of this cost impost on individual requesters receiving partially deleted material could be significant, and is therefore of value to them.

The Panel considers that the system of charging for pages received, dovetails extremely well with the Panel’s recommendation in the previous chapter, that the first response of agencies to a request for access to documents should be to produce to the

⁴⁰⁰ ALRC/ARC Report, p. 187.

⁴⁰¹ ALRC/ARC Report, p. 185.

⁴⁰² ALRC/ARC Report, p. 185.

requester a schedule of documents that are relevant to the request. This would enable the requester to narrow the request if necessary, or alternatively to suggest there might be documents elsewhere that need to be discovered. It would encourage a constructive dialogue between the requester and the agency, something that every FOI reviewer recommends. It enables a requester to take some responsibility for the time and costs involved in processing their requests. The schedule is a useful tool in reducing both.

A further benefit of adopting this system is that it would allow the applicant, as well as the agency, to be able to estimate the cost of proceeding with the application. This would allow the elimination of the highly complex, time-consuming and unsatisfactory preliminary assessment notice (PAN) and final assessment notice (FAN) charging system detailed in Schedule 4 of the Act. It would give the applicant the information necessary to make an informed decision as to whether to proceed with the application.

In a submission to LCARC in 1999, the then Information Commissioner noted that the rationale for the fee was demand management rather than full cost-recovery and the sensitivity of demand to price increases was extremely high. He pointed out that some agencies might generate more and lengthier documents than others and hold on file multiple copies of the same document plus numerous telephone and file notes, which would increase the volume of documents but not the amount of useful information. As he then pointed out, this concern could be met by requiring the agency to consult the applicant to clarify the types of documents available and give the applicant an opportunity to refine the scope of the access application.⁴⁰³ This is what the Panel's proposal for the provision of a Schedule of Relevant Documents to the applicant would also achieve, though more transparently and as a matter of course.

The charge the Panel is proposing would mean that there should be no charge for search, retrieval or decision-making by agency FOI officers. Again, this removes any tactical options open to agencies to penalise requesters and subject them to inconsistent treatment across agencies. Instead, it provides an incentive for agencies to improve their own performance outcomes, these being matters within the control of the agencies.

In submissions mentioning the proposal for a fee based on what applicants receive, Megan Carter said —

From an applicant's point of view, the flat fee model is much fairer, as they only pay for what they get. (Ireland has a version of this in that their time-based processing costs are refunded proportionately if the documents are exempted). If the applicant requests 5000 documents which are all refused as exempt, they would pay nothing.

Of course the agency which spent 200 hours deciding the request would not see this as fair compared to the current system, where most applicants would have

⁴⁰³ Information Commissioner submission to the Parliamentary Legal, Constitutional and Administrative Review Committee Review of the *Freedom of Information Act 1992*, p. 65-66.

balked at paying the \$4000 and the 200 hours would not have been spent, or they would at least have collected \$4000 towards their costs. (Not that \$22 per hour covers the costs of employing an FOI Officer).

The present charging regime has proven complex and hard to administer for FOI officers, and for some requests the work involved in collecting the charges costs more than the charges themselves. One big advantage of the flat fee system is its simplicity and ease of calculation compared to the current time-based system.⁴⁰⁴

Rockhampton City Council said —

Perhaps a stepped fee could be introduced that had easy to apply charges. These could be 10, 20, 50, 100, ... etc documents and a flat fee for each level. Having a stepped fee would eliminate the assessment process, which takes as much time as processing the FOI request.⁴⁰⁵

The ALRC/ARC Review suggested that the imposition of an application fee should continue, but that it should be treated as a credit in respect of any charges that were then levied on the release of information.⁴⁰⁶ An alternative approach is to retain the application fee, but make no charge for the first 10 folios. The advantage of this approach is that the applicant would still receive a financial benefit if the agency failed to meet its obligation to process an access claim on time, entitling the applicant to the refund of the application fee.

The Panel considers that the charging regime it is proposing would better solve the problems identified by former Attorney-General Rod Welford when he introduced the legislation that brought the present system into being. The Minister told Parliament —

The current charging system 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 ...⁴⁰⁷

Waiver or reduction of charges

The present FOI law in Queensland provides —

⁴⁰⁴ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 24.

⁴⁰⁵ Rockhampton City Council submission to the FOI Independent Review Panel discussion paper, p. 14.

⁴⁰⁶ ALRC/ARC Report, p. 185.

⁴⁰⁷ Welford, R., Freedom of Information Amendment Bill 2001, Second Reading speech, Queensland Parliamentary Debates, 17 October 2001, p. 2910.

- applications taking less than two hours are free;
- there is no application fee or charges where the application concerns the applicant's personal affairs;
- any processing or access charge may be waived on financial hardship grounds for holders of a concession card or for non-profit organizations in financial hardship; and
- there is no charge for time spent searching for or retrieving a document.

In other jurisdictions there are provisions for remitting or reducing charges on public interest grounds, as well as for hardship, or because the applicant falls into one of a number of specified categories.

The Environmental Defenders Office (Qld) Inc. and the Environmental Defender's Office of Northern Queensland Inc. said in a submission —

Fees and charges should be removed or kept to an absolute minimum if FOI is intended to encourage open and accountable government. In particular, fees should be waived where information is sought for public interest purposes such as environmental issues by community groups or individuals. Currently such groups or persons are forced to depend on a broad interpretation of the financial hardship exemption to avoid oppressive FOI fees.⁴⁰⁸

Gecko - The Gold Coast and Hinterland Environment Council, said —

- It is far too expensive for non-government organisations and average people. The user pays system is out of control when taxes have already paid for services that should be delivered at no or little cost to bona fide groups. The public service in this instance no longer serves the public.
- The public has developed a mistrust in the whole process which includes applying, being informed of an initial cost, then a further cost for more detailed information, often only to find the relevant material has been exempted.⁴⁰⁹

The US FOI legislation has three different fee systems for different types of request. Mendel reports that requests for commercial use may be billed "reasonable standard charges for document search, duplication, and review". But where disclosure is in the public interest because it is, "likely to contribute significantly to public understanding of the operations or activities of the government", records must be provided without charge or at a lower charge than would otherwise be the case. This he says, is in effect, a waiver for the media, as well as for NGOs who can show a public interest use.

⁴⁰⁸ Environmental Defenders Office (Qld) Inc. and the Environmental Defender's Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 4.

⁴⁰⁹ Gecko - The Gold Coast and Hinterland Environment Council submission to the FOI Independent Review Panel discussion paper, p. 1.

Finally, no advance fee is charged unless the applicant has already failed to pay a fee or the agency decides the fee will exceed US\$250.⁴¹⁰

Megan Carter said —

(W)aiuers on the grounds of financial hardship and public interest exist in most jurisdictions. Queensland presently lacks a waiver on the ground of public interest and this makes the charging regime less balanced. The current approach to assessing financial hardship, by the possession of specified concession cards, is open to abuse (“rent a pensioner”). One solution to this is the provision in the Irish 2003 Fees Regulations section 5, that the decision maker can take into account whether the person is making the request concerned on behalf of some other person who, in the opinion of the head, is seeking to avoid the payment of a fee.⁴¹¹

The Redland City Council said —

The other aspect is where organisations or groups use the “financial hardship” provisions to avoid processing charges. We have had several large applications where the applicant, who holds a concession card and therefore pays no fees, is clearly acting on behalf of other parties and has sought large numbers of documents. We do not believe that the intention of providing free processing to individuals or groups suffering financial hardship was intended to be used in this way – surely it was about allowing financially disadvantaged people/groups to still access documents that they needed for a reasonable cost. At the least, a limit to the processing time required to be spent on applications lodged by financially disadvantaged people or groups needs to be in place, with discretion able to be applied by the agency where they are satisfied that the applicant’s need is genuine.⁴¹²

The Panel agrees that a measure should be introduced to try to prevent the abuse of the financial hardship waiver through “rent a pensioner”.

Except as noted below, the Panel does not consider there should be a change in the provisions relating to the waiver or reduction of fees, other than changing the reference to personal affairs to personal information. It believes the proposals it is putting forward have the potential to greatly reduce fees for most users by allowing them to identify more precisely those documents relevant to their inquiries. It should also reduce processing time, and therefore costs, for agencies, not least in removing the need for the preparation of what may be speculative, or at least subjective, PAN assessments and engaging in debates and reviews about costs.

Cape York Land Council Aboriginal Corporation raised a related issue in its submission. It said —

⁴¹⁰ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 150.

⁴¹¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 24.

⁴¹² Redland Shire Council submission to the FOI Independent Review Panel discussion paper, p. 16.

Cape York Land Council as a publicly funded organisation, similar in many ways to a “community” or not-for-profit organisation, submits that the grounds for waiver of charges should be clarified. Although Cape York Land Council meets the requirements in terms of not being carried on for the profit or gain of individual members, it has in the past experienced practical difficulties in responding to requests for “evidence of financial hardship” – whilst reference is made to a number of possible options for demonstrating financial hardship, an application for FOI (which was accompanied by copies of Cape York Land Council’s rules showing no profits to members, plus a tax exempt certificate based on Cape York Land Council’s charitable status) resulted in a request for production of further documents (certified copies of annual audited accounts, statements of revenue/earnings for the current and last financial year, statements of assets and liabilities for the current and last financial year, and bank statements from most recent accounting period). That information was difficult to put together at that time, based on the timing of our reporting requirements, and seemed unnecessary in light of the material already provided.⁴¹³

The request for detailed financial information would presumably have been based on the requirement in s. 35A, relevantly, that a non-profit organisation has to demonstrate that it is in financial hardship, and that requires consideration of such matters as its funding base and its liquid funds. No doubt there are some non-profit organisations that are very rich indeed, and the present Act is concerned to make a waiver only if the organisation is in financial hardship. Different agencies could reach different decisions on that matter. It seems more appropriate that an organisation should be able to apply to the Information Commissioner for fee waiver. If an organisation satisfies the Information Commissioner it qualifies for fee waiver, that status should apply for a set period (say, a calendar or financial year, depending on the time when the status is approved) and should apply to all agencies to which it makes FOI requests in that period.

The Panel has had a number of cases drawn to its attention where agencies have wrongly (for various reasons, for which they have not always been blameworthy) levied a particular charge, only to discover that it should have been slightly higher. In three cases of which the Panel is aware, the processing of a request was delayed until the applicant paid an amount that was less than a dollar.

At least some agencies appear to believe they have no discretion to waive the requirement for such charges to be met. Whether or not that is so, the Panel considers the issue should be put beyond doubt by inserting a provision in the Act or the regulations that permits an agency or Minister to waive the collection of part of a charge where the amount is so small that the cost of collection and/or of paying the charge would be greater than the additional charge. This would mean that an agency/Minister would not have to waste its time and resources chasing a charge of only a few dollars, and an applicant would not be penalised because the agency discovered it has undercharged by a very small amount.

⁴¹³Cape York Land Council Aboriginal Corporation submission to the FOI Independent Review Panel discussion paper, p. 7.

Charges for copying and access

At present, Queensland charges a small photocopying fee, or the actual cost of providing access to information provided (for example, a small charge for a computer disc). It also charges \$5.60 for ever 15 minutes where supervised access to a document is provided.

In a submission, Gecko - The Gold Coast and Hinterland Environment Council, said —

The supervision of people sourcing material needs to be dealt with in another way. Initially there was little supervision and Gecko believes that this trust was rarely abused. The cost of supervision is one reason that the overall cost has risen to such a level that average people cannot afford to use FOI. It should be enough that bags are left outside of the room in which documents are examined and a low cost photocopier should be made available for people to photocopy material in a manner similar to libraries.⁴¹⁴

The Panel believes that the Information Commissioner should provide facilities for requesters to access agency documents, if the agency cannot do so. The Panel considers that there should be no charge for the first four hours use of its computer facility. However there should be a charge of \$20 for the next four hours, and then a charge of \$50 a day for any continued use. And it should be a requirement that anyone wanting to use the Information Commissioner's facilities for more than a day should have to make a booking, in advance. The Panel considers that the photocopying charge should be continued, but that no charge should be made when requesters are prepared to accept data on a computer disc, or by email. To demonstrate the proposed costings, the Panel has prepared Appendix 7.

RECOMMENDATIONS:

Recommendation 61

The requirement for an application fee should be maintained for requests that do not seek personal information. It should be held at the present level and increased in line with cost of living increases.

Recommendation 62

There should be no charges for searching for, or retrieval of, documents, or for decision-making by FOI officers. There should be a charge based on the number of full pages (that is, pages where no information has been blacked out) provided to an applicant. The charge should be set out in the regulations, based on the

⁴¹⁴ Gecko - The Gold Coast and Hinterland Environment Council submission to the FOI Independent Review Panel discussion paper, p. 2.

recommendations of the Information Commissioner. Initially, the charge should be —

1- 10 folios	Free
11- 20 folios	\$20 for 20 folios (i.e. \$2 a page for each page in this bracket)
21-50 folios	\$20 plus \$2.25 a page for each page in this bracket.
51-100 folios	\$87.50 plus \$2.50 a page for each page in this bracket.
101-500 folios	\$212.50 plus \$2.75 a page for the each page in this bracket.
501-1000 folios	\$1312.50 plus \$3 a page for the each page in this bracket.
1000 folios (and more)	\$2812.50 plus \$5 a page.

Recommendation 63

The charge should be levied at the time the documents are ready for delivery. They should be made available as soon as the charge is paid.

Recommendation 64

The charge for photocopying should be retained. No charge should be made when information is provided on a computer disc, or by email.

Recommendation 65

No changes should be made to the present provisions for the waiver or reduction of fees, other than to provide that an agency/Minister should have power to waive charges or additional charges where the cost of levying and/or paying the amount would exceed the amount being claimed.

Recommendation 66

An amendment along the lines of the provision in the Irish legislation should be introduced to try to limit any abuse of the waiver for concession card holders (commonly referred to as “rent a pensioner”).

Recommendation 67

The Information Commissioner, rather than individual agencies, should determine whether a non-profit organisation qualifies for a waiver because of financial hardship. A determination by the Information Commissioner should be recognised by all agencies, and should remain current for the year in which it was assessed, unless there is a change in the relevant circumstances of the organisation.

Recommendation 68

There should be no public interest exemption from fees or charges introduced.

Recommendation 69

The Information Commissioner should make available a space for requesters to access information made available by agencies where agencies are unable to provide access, or where it would be more convenient for the requester to view the information in the office of the Information Commissioner than in the office of the agency. The Information Commissioner should also make available computer access for requesters in the office.

Recommendation 70

The Information Commissioner should provide these facilities at no charge, for the first four hours, and \$20 for the next four hours. The charge should then be \$50 a day, but the facility must be pre-booked by the requester.

Recommendation 71

The PAN/FAN system of assessing charges for accessing documents should be abandoned.

15 Vexatious and querulous applicants

Vexatious FOI applicants present a problem that cannot be ignored. As the Queensland Ombudsman, who had experience as Information Commissioner, said in a submission —

... a certain number of applicants display difficult, time-consuming behaviour and are variously described as vexatious or unreasonable. In virtually every review of FOI legislation that has been conducted around the world, the issue of how to deal with such applicants is raised and discussed, with varying proposals put forward as solutions. It is certainly not a problem unique to Queensland.

In my time as Information Commissioner, there was a small number of applicants who took up a disproportionate amount of the Office's resources, either through making multiple applications, or voluminous applications, or by refusing to negotiate or to make any concessions whatsoever during the course of their review, and thereby requiring written reasons for decision to be given in order to finalise each of their applications.

The difficulty in declaring an applicant vexatious or unreasonable has always been that it requires an examination of an applicant's motive for making an application. This is contrary to the well-established principle that there is no test of standing to gain access to documents under the FOI Act, and the motives of a particular applicant for seeking access to documents are to be disregarded (except to the extent that they may be relevant to the application of legal tests imposed by some exemption provisions). I agree with the comments made by Deputy Ombudsman Chris Wheeler of the NSW Ombudsman's Office where he said that, of the three key grounds that are usually used by courts to determine whether or not an applicant is vexatious (motive, conduct and content), it is far easier to demonstrate that the conduct and content criteria have been met.

I note that the UK Information Commissioner has expressed the view that, while he accepts that the overall scheme of the UK Act takes no notice of the identity or motive of the requester, the Commissioner considers that both are valid considerations in deciding whether a request is vexatious.

The problem is to try to identify a strategy for dealing with unreasonable users (who, I reiterate, make up only a very small proportion of overall users of the Act) that doesn't impact upon the important design principles of the Act that operate for the benefit of reasonable users of the FOI Act.

While I am mindful of the difficulties associated with making a declaration that an applicant is vexatious (and I have some lingering theoretical/philosophical concerns about the inclusion of such a power within an FOI regime) having seen the deleterious effect that difficult and unreasonable applicant behaviour can have on agencies, their resources, and upon the morale of officers who deal with them, I support the inclusion in the Act of a power to declare an applicant vexatious. I consider that the power

should be exercisable by an agency at first instance, with a right of appeal to whichever body exercises the external review function under the Act.

As to the form the provision should take, while I accept that s. 96A has not been widely used since its inclusion in the Act in 2005, I consider its basic structure is sound. However, I support expanding the existing criteria under s. 96A(4) to include the following criteria used by the UK Information Commissioner, namely:

- the application clearly does not have any serious purpose or value;
- it is designed to cause disruption or annoyance;
- it can otherwise fairly be characterised as obsessive or manifestly unreasonable.

I don't consider that any criteria regarding the size of the application, or the agency resources needed to process it should be included as criteria for a vexatious test, (except, perhaps, as evidence to establish any of the listed criteria) because that situation can be adequately dealt with under s. 29. I see no need to amend the current s. 29. In my experience, when agencies rely upon s. 29, they usually include in their reasons in support of the decision, estimates of the number of pages involved, and the days to process the application.⁴¹⁵

The Queensland Government submission said —

Large numbers of applications from particular applicants is an issue of concern to agencies. By way of example, in 2007, one portfolio fielded 75 applications from the same group and a local government agency received 77 applications from one individual.

“Repeat applicants” of this kind are an issue across a number of jurisdictions. Judge Kevin O'Connor, AM, President of the NSW Administrative Decisions Tribunal (which hears FOI appeals) recently stated that repeat applicants “will often file mountains of paper, will regularly arrive at the counter seeking attention or make numerous fax or phone calls. They may become personally abusive to staff.” Queensland's FOI experience is similar, with agencies reporting a very small number of applicants who lodge repeat applications, harass and intimidate staff, report individuals to oversight bodies such as the CMC and/or overwhelm agencies and Ministers with correspondence.

As to the criteria for declaring either an applicant or application vexatious, etc., sufficient guidance can currently be obtained from the general law. Volume would generally comprise one factor among many to be considered in determining the issue.

Voluminous requests are a substantial cause of delay in FOI administration. Ultimately, FOI applications fall to be decided by a single officer, and volume

⁴¹⁵Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, pp. 19-20 (footnotes omitted).

imposes considerable demands on decision-makers in dealing with FOI file loads. A common agency view is that the FOI Act limits the ability to manage large (potentially time consuming) applications. Many applications of this kind can be very resource-intensive to process, requiring detailed consideration of each page of information, supported by multi-layer checks to ensure effective quality control checks. These checks are particularly critical where the documents in question contain highly sensitive information such as the personal details of crime victims, witnesses or complainants.⁴¹⁶

The discussion paper pointed out —

The 2005 amendments to the *Freedom of Information Act 1992* included section 96A, a provision that allowed the Information Commissioner to declare that a person is a vexatious litigant. The provision has been ineffective. Few declarations have been sought by agencies and none has been made. The Panel is aware that more agencies would have sought declarations had there been any prospect of them being granted.

The section was inserted following a recommendation contained in the 2001 Report by LCARC, though it did not adopt the scheme proposed by LCARC ...

LCARC decided not to recommend a provision dealing with vexatious applications. It preferred a provision allowing an agency or Minister to refuse to deal with an application where an application had been previously made for the same documents or same matter on at least one previous occasion and there were not reasonable grounds for making the application again. These recommendations were in effect adopted by amendments made in 2005 to sections 29, 29A and 29B.

In addition s. 96A was introduced as a new measure, and contrary to LCARC's advice. Attorney-General Rod Welford explained it was intended to prevent abuse of the FOI regime by allowing the Information Commissioner to declare an applicant to be a vexatious applicant. "This would apply to individuals who have made repeated applications for the purpose of harassing or intimidating another person or unreasonably interfering with the operation of agencies."⁴¹⁷

As mentioned, the Government's decision to try to deal with vexatious applicants through amending the Act and inserting s. 96A was ineffective because the Information Commissioner decided not to apply its provisions, even though it was asked to do so by a number of agencies. The reasons for adopting this policy were explained by the Information Commissioner in its submission responding to the discussion paper.

The (former) Acting Information Commissioner said —

⁴¹⁶ Queensland Government submission to the FOI Independent Review Panel discussion paper, pp. 31-32 (footnote omitted).

⁴¹⁷ FOI Independent Review Panel discussion paper, pp. 147-148 (footnotes omitted).

As noted previously, this is a very difficult and complex issue and requires careful management to ensure the rights of all people to seek to access information are met in accordance with the FOI Act, whilst also minimising the adverse effect on individuals dealing with the applications and excessive use of resources.

The nature of applications in which these issues arise are such that they are particularly resource intensive and can detract from the ability to expeditiously progress all applications. Such applications are also difficult to progress as it is often the case that they involve numerous extensive submissions from the person, that are difficult to understand and specifically relate to the issues and documents in the external review.

The complexity of the issue requires that decision makers have a range of responses and tools to manage the situation while ensuring a person can exercise their rights of access under the FOI Act. I acknowledge the difficulties that an agency can experience in such situations, including very abusive behaviour towards staff, and the resource implications. This Office also experiences the effects of this situation. In relation to a particular applicant this Office tends to see a subset of the extent of applications received by an agency, however will also have a number of other reviews with a cross-section of agencies.

The 2005 amendments to the FOI Act introduced a number of additional tools to assist FOI decision makers to deal with such applications. For example, section 29B deals with specific circumstances where a later application requests documents previously sought by the applicant under the FOI Act and take into account whether there is a reasonable basis for again applying for the documents. Such tools can be useful as they require an assessment of the merits of the application rather than a broad approach.

To an extent section 77 of the FOI Act may apply on external review however this section is limited to certain circumstances. A small number of decisions have been made to not deal with, or further deal with, all or part of an application for external review under section 77 of the FOI Act. In most cases such decisions have related to a particular part of the application and the remainder of the application has been dealt with by the Office.

Section 96A of the FOI Act provides that the Information Commissioner may declare in writing that a person is a vexatious applicant. No decisions have been made by the Information Commissioner under section 96A of the FOI Act. I note that section 96A is a severe restriction on a person's right to otherwise access documents under the FOI Act, and accordingly could only be expected to apply in very limited circumstances. As noted above, there are a number of legislative and management tools that would be appropriately used before rights of access were limited or denied through a declaration under section 96A of the FOI Act.

It is considered that there are difficulties associated with the practical effect of

section 96A of the FOI Act. The independence of the Information Commissioner, in ensuring that external reviews and decisions taken on external review are able to be impartial and not subject to direction or otherwise influenced by any of the parties, is critical and is very important in achieving informal resolution. However, if a decision was made under section 96A of the FOI Act that a person was or was not a vexatious applicant, at least one party (applicant, agency or third party) to an ongoing or future external review may believe that the Office holds some bias towards certain parties and is not able to be independent, objective and impartial.

In this respect I note that recent legislative provisions proposed in Victoria, which are similar to section 96A, require that a decision as to whether to declare a person to be a vexatious applicant be made only by the President of the Victorian Civil and Administrative Tribunal, a Supreme Court judge. Further, an agency can only apply to the Tribunal for a declaration if they first satisfy the Attorney-General that it is the appropriate course of action.

It is important to note that it is the experience of this Office that, while the type of applicant behaviour initially experienced may be inappropriate in some cases, there can be real issues in how an application has been dealt with that clearly warrant external review. It can also become apparent that the applicant's level of frustration at how they have been dealt with has significantly contributed to the deterioration in the interaction between the agency and the applicant. In some cases once deficiencies in the FOI process and decision-making have been acknowledged and addressed, the applicant's behaviour can improve and the review progressed and ultimately resolved. It is also important to note that some applicants experience difficulty in participating in government processes such as FOI, including because they are unfamiliar with government processes and legislation, or they have an illness or disability affecting their ability to understand or process information being presented to them.

It is critical that every individual FOI application be considered on its merits, without pre-judgment based on who the applicant is. Even where an applicant may have made a number of internal or external review applications previously that have upheld the previous decision, this does not preclude a later application from raising real grounds for review.⁴¹⁸

The Panel understands these difficulties, but is not persuaded that they prevent the application of a provision such as s. 96A. It ought to be possible to insulate the decision-maker on vexatious applicants from the ordinary course of dealing with reviews so that the "office" cannot be said to hold "some bias towards certain parties and is not able to be independent, objective and impartial". These matters are processed satisfactorily in other FOI jurisdictions, and in the courts.

The Panel was informed in a letter dated 20 May 2008 from the (new) Acting Information Commissioner –

⁴¹⁸ Acting Information Commissioner submission to the FOI Independent Review Panel discussion paper, pp. 6-7.

The Office has received eight applications for s. 96A Declarations. One application has been dismissed and another seven are on foot ... (It would be useful to expand the application of s. 83 [“Conduct of reviews”] to the process for dealing with s. 96A declarations. Courts have an inherent jurisdiction and a statutory base to declare proceedings vexatious and to restrict access to justice. They do so while managing any perceived issue of conflict or bias when further matters come before the Court. The Commissioner can also exercise powers under s. 96A and continue to provide an external review function. The Commissioner’s power to delegate s. 96A decisions should be removed.⁴¹⁹

There are a number of changes to the system of dealing with vexatious or querulous applicants that should be made, however, some of them administrative. First, is the issue raised by Australia’s Right to Know (RTK) in its submission. It said —

RTK accepts abuse of FOI legislation can lead to frivolous, vexatious, repetitious or voluminous requests and supports measures to reduce the impact of these requests on effective administration. However, the decision to decide any applicant has engaged in such a manner should be reviewable by an appropriate court or tribunal.⁴²⁰

The Panel agrees and considers the appropriate tribunal would be the proposed new Queensland Civil and Administrative Tribunal.

Second, the Panel considers the Act should require the Information Commissioner to formally determine all applications that have been made by agencies for a particular person to be declared vexatious, in accordance with s. 96A, as amended. It may be that the Information Commissioner may be able to decide that a s. 96A declaration should not be made simply by considering the details of the agency’s application, and without calling on the person concerned to respond. In such cases, the Information Commissioner should notify the agency of the reasons for dismissing the application.

Third, as suggested by the Queensland Ombudsman, the criteria under s. 96A(4) should be expanded to include the criteria used by the UK Information Commissioner, namely

- the application clearly does not have any serious purpose or value;
- it is designed to cause disruption or annoyance; or
- it can otherwise fairly be characterised as obsessive or manifestly unreasonable.

Fourth, the Information Commissioner should develop detailed guidelines, based on the provisions in the Act, to assist agencies in deciding whether to apply for a declaration. The guidelines published by the UK Information Commissioner could be

⁴¹⁹ Acting Information Commissioner letter to the FOI Independent Review Panel, 21 May 2008, p. 2.

⁴²⁰ Australia’s Right To Know submission to the FOI Independent Review Panel discussion paper, p. 8.

used as a model.⁴²¹

Fifth, the Information Commissioner should develop a training program for agencies, based on those developed in NSW by the Ombudsman, to help agencies engage productively with requesters. The NSW Ombudsman has conducted extensive research in order to develop “practical strategies for dealing with unreasonable complainant conduct” and instituted training programs in Ombudsman offices throughout Australia.⁴²² Sometimes, the behaviour that may lead to an applicant being labelled as vexatious may have resulted from the way the agency dealt with a request, or series of requests – the problem may not always be the applicant’s fault. The training should include how agencies should deal with applicants who are reluctant to discuss the application they have made, particularly in relation to ways in which it might be made more specific or meaningful.

Sixth, one of the specific sections dealing with the applications made by some applicants seeking personal information needs to be fine tuned (and this may have to be dealt with also under privacy legislation). Section 29B is concerned with “Refusal to deal with application — previous application for same document”. A problem that has arisen concerns what is the “same document”. There are cases where an applicant keeps applying for the same document on a regular basis. The only change from the last time the application was made is that the document has been amended to record the applicant’s last application. The provision should be amended so that if the document is substantially the same, with the only difference being the recording of the applicant’s own activity, the request can be refused.⁴²³

Regarding the UK FOI Act that allows an agency to declare an application, rather than an applicant, to be vexatious, the Panel sees no particular advantage in this procedure - ss. 29 and 29B would deal with most of the issues that arise.

Journalists or MPs, as a class of requesters, are examined in chapter 18. The Panel’s view is that journalists and MPs should not be exempt, as a class, from the provisions concerning vexatious requests, nor from those dealing with voluminous requests.

RECOMMENDATIONS

Recommendation 72

The Information Commissioner must determine any application made by an agency to have a person declared vexatious under s. 96A.

⁴²¹ Information Commissioner’s Office, “*Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests*”, United Kingdom.

⁴²² Mueller, H., “Practical strategies for dealing with unreasonable complainant conduct”, Paper presented to the 6th National Investigations Symposium, 2 November 2006.

⁴²³ See chapter 16.

Recommendation 73

Section 96A(4) should be amended to include the following additional grounds for declaring a person vexatious —

- the application clearly does not have any serious purpose or value;
- it is designed to cause disruption or annoyance; or
- it can otherwise fairly be characterised as obsessive or manifestly unreasonable.

Recommendation 74

Section 96A should be amended to include a provision entitling a person declared vexatious under the section to appeal to the proposed Queensland Civil and Administrative Tribunal.

Recommendation 75

The Information Commissioner should develop detailed guidelines, based on the provisions in the Act, to assist agencies in deciding whether to apply for a declaration under s. 96A.

Recommendation 76

The Information Commissioner should develop a training program for agencies, based on those developed by the NSW Ombudsman, to help agencies engage productively with requesters, and share practical strategies for dealing with unreasonable requester conduct.

Recommendation 77

Section 29B should be amended so that if a document is substantially the same as a document that has been the subject of an earlier application by the applicant to the same agency or Minister, where the only difference is the recording of the applicant's previous application, the request can be refused.

16 FOI Applications for Access

Concerns about time, costs, responsiveness, complexity, inconsistency, not enough ICT enhancement and client service satisfaction levels all mark the Queensland FOI experience from the users' perspective.

16.1 “Documents”, drafts, emails and data

Under the *Freedom of Information Act 1992*, a person has a legally enforceable right to be given access to documents of an agency and official documents of a Minister whether under their possession or control, including a right to documents created or received in the agency.⁴²⁴

The *Acts Interpretation Act 1954*, section 36, defines a “document” as including -

- (a) any paper or other material on which there is writing; and
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
- (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).⁴²⁵

This is the definition of document (together with any copy and/or part thereof) which applies in processing an FOI application for access.⁴²⁶ It is a broader definition than the definition for “public records” meaning that an FOI application for access is entitled potentially to access more documents than the agency (or Minister) is required to keep under the *Public Records Act 2002*.

6 What is a public record

- (1) A **public record** is any of the following records made before or after the commencement of this Act —
 - (a) a record made for use by, or a purpose of, a public authority, other than a Minister;
 - (b) a record received or kept by a public authority, other than a Minister, in the exercise of its statutory, administrative or other public responsibilities or for a related purpose;
 - (c) a Ministerial record.
- (2) A public record includes—
 - (a) a copy of a public record; and
 - (b) a part of a public record, or a copy of a part of a public record.⁴²⁷

In the schedule to the *Public Records Act 2002*, a record is defined as -

⁴²⁴ *Freedom of Information Act 1992*, ss. 21, 7.

⁴²⁵ *Acts Interpretation Act 1954*, s. 36.

⁴²⁶ *Freedom of Information Act 1992*, s. 7.

⁴²⁷ *Public Records Act 2002*, s. 6.

record means recorded information created or received by an entity in the transaction of business or the conduct of affairs that provides evidence of the business or affairs and includes—

- (a) anything on which there is writing; or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons, including persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.⁴²⁸

Section 7 of the *Public Records Act 2002* requires public authorities to make and keep full and accurate records of their activities. A memorandum prepared by Queensland State Archives for the Panel says:

Identifying drafts as public records

Under the *General Retention and Disposal Schedule for Administrative Records* (QDAN249 v.2.1), drafts of reports, correspondence, routine calculations not circulated as final documents internally or externally, and drafts where a final draft has been produced and which becomes the record of the agency, do not need to be captured as a public record as they are defined as an ephemeral record (Reference Number 6.1.7).⁴²⁹ Also, those drafts which only document minor changes, such as for spelling/grammar corrections, or which do not record significant annotations or changes, could also be considered a draft document not requiring capture as a public record.⁴³⁰

Capturing drafts as public records

For documents which are prepared and then circulated within a work group for comment and feedback, the decision on whether this document needs to be captured within a recordkeeping system will depend on an assessment by the relevant personnel of the significance of this transaction (internal consultation) to the function or activity to which it relates. Drafts that show significant alterations to the context of the document, or which document an important stage in the development process, should be captured.⁴³¹ For a high risk or

⁴²⁸ *Public Records Act 2002*, Schedule 2.

⁴²⁹ Queensland State Archives, “Drafts as Public Records” 20 November 2007 referring to <www.archives.qld.gov.au/government/disposal>. Also, *GDA3 – General Disposal Authority for General Housekeeping Records* (Archives of New Zealand) states that Preparation of preliminary drafts or outlines of reports, correspondence, etc. prior to production of the final work should be retained until production of the completed work, then destroyed. <<http://www.archives.govt.nz/continuum/documents/publications/gda3/>> Accessed November 2007.

⁴³⁰ Queensland State Archives, “Drafts as Public Records” 20 November 2007 referring to National Archives of Australia, *Normal Administrative Practice Advice*. <<http://www.naa.gov.au/records-management/keep-destroy-transfer/NAP/index.aspx>>

⁴³¹ Queensland State Archives, “Drafts as Public Records” 20 November 2007 referring to State Records NSW, Guideline 8 *Normal Administrative Practice*.

significant activities such as a major capital project, development of legislation, or the drafting of contracts, draft documents may be regarded as significant enough to warrant recording in the recordkeeping system with all the metadata necessary to ensure that it provides adequate evidence of the transaction to which it relates.⁴³²

In other words, a draft should be captured if there is a business reason to do so. The criteria for capturing and not capturing drafts should be defined in organisational recordkeeping procedures and be communicated to relevant staff.⁴³³

In Sweden, every Swedish subject has a right to access “official documents”. Public authorities must respond immediately and requests can be in any form and anonymous. However, there is no obligation to keep non-official documents including internal documents such as drafts, memoranda and outlines unless they are filed and registered or contain new factual information that is taken into account in decision-making.⁴³⁴

By way of contrast, New Zealand’s *Official Information Act 1982* provides for access not to documents or records but to “official information”.⁴³⁵

With advances in information and communication technologies, drafts, emails, raw data and metadata have had a role in straining the FOI processing experience in according access rights to “documents”.

Nicola White’s recent research project of the New Zealand experience found that the “first and most difficult challenge” is posed by electronic information because it “pervades the whole of the state sector at a very basic level” with no obvious or simple solutions.⁴³⁶

<<http://www.records.nsw.gov.au/recordkeeping/guideline%5F8%5Fnormal%5Fadministrative%5Fpractice%5F7111.asp>>

⁴³² Queensland State Archives, “Drafts as Public Records” 20 November 2007 referring to *Best Practice Guide to Recordkeeping*, Queensland State Archives, Page 4. Also, *GDA3 – General Disposal Authority for General Housekeeping Records* (Archives of New Zealand) states that if there are identified recordkeeping needs to keep drafts due to significance of decisions made, or existence of significant changes not contained in the final form of the records. This includes drafts relating to legislation formulation, legislative proposals or amendments, drafts relating to policy development, providing evidence of processes involved and/or significantly more information than final versions, and drafts containing significant or substantial changes or annotations.

<<http://www.archives.govt.nz/continuum/documents/publications/gda3/>>

⁴³³ Queensland State Archives, “Drafts as Public Records” 20 November 2007 referring to State Records NSW, RIB 38 “Keeping publications and promotional materials as records”. <<http://www.records.nsw.gov.au/recordkeeping/rib%5F38%5Fkeeping%5Fpubs%5F3459.asp>>

⁴³⁴ Banisar, D. Privacy International, *Freedom of Information Around the World 2006: Global Survey of Access to Government Information Laws*, 20 September 2006, p. 141.

⁴³⁵ *Official Information Act 1982* (New Zealand), s. 4.

⁴³⁶ White, N., *Free and Frank: Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, Wellington, 2007, p. 239.

In any consideration of the status of draft documents, the first dimension is simply the number of different iterations that a document goes through in the course of preparation now, given the ease of editing, and the extent of consultation on drafts. If a paper goes through half a dozen or more iterations and it is sent to, say, 10 or 20 colleagues, both internally and externally, at several points in its development, then the number of copies and versions potentially floating around the system of government can grow rapidly. That number increases again if those being consulted circulate the document further to their own colleagues and staff, or if they create new versions with annotated comments marked or sections rewritten as part of their response. It is obviously very difficult to track and keep all of those different versions, and to attempt to do so would greatly increase the volume of information making up the public record, often with little benefit. In practice, it is inevitable that different agencies end up with partial records, and different versions in their file.

That practical reality raises several issues... One is the increased cost and effort involved in processing requests when the volume of information is simply much greater than it used to be... A full trawl through numerous drafts often seems pointless to those processing the requests, and there is suspicion that those requesting it will never go through it in detail either. That fuels cynicism about the Act, and reduces respect for responsibilities under it...

A second concern is that conspiracy theories are fuelled when the release of different departmental files reveals that the records of each are incomplete and differ from those of other agencies.⁴³⁷

On the question of drafts, White's research found that —

... commentators understood the inappropriateness of holding people to account for early drafts, while thoughts were still developing within an organisation. In common sense terms, some thought it was surprising that such early documents were filed and kept, but they were, either in hard copy or electronically.

One commentator summed up the core issue simply, "I think it comes down to some really hard thinking about what needs to be kept".⁴³⁸

At its best, advances in information and communication technologies have procured a new frontier in opening government by exposing internal machinations to a recorded activity where hitherto a phone call discussion (often now an email), a meeting to consult (also now tracked by email or metadata), or details of a document revision (including author, time and date now in "Word" metadata) would have occurred, often without public record.

⁴³⁷ White, N., *Free and Frank: Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, Wellington, 2007, p. 260.

⁴³⁸ White, N., *Free and Frank: Making the Official Information Act 1982 Work Better*, Institute of Policy Studies, Wellington, 2007, p. 126.

At its worst, these advances in technology enable the rapid, complex and voluminous production of documents that can flood a search response to an FOI application leaving the FOI decision-maker nearly overwhelmed with likely feelings of frustration and cynicism, and the FOI requester frustrated by a non-responsiveness akin to a room of “red boxes” right out of an episode of *Yes, Minister*.

Conflict about costs and inconsistencies might then arise, compounding the shared experience of complexity, client service and relationship dissatisfaction and ultimately again, non-responsiveness.

Non-responsiveness remains a key concern for users seeking access to raw data or metadata too.

There is no doubt in Queensland that raw data and metadata fall within the scope of “documents” to which there is a legally enforceable right of access. Moreover, as the Queensland Government submission highlighted —

... s.30(1)(e) of the FOI Act obliges agencies to interrogate databases containing information relevant to an FOI access application so as to create documents for production, where the means for doing so are “usually available” to the agency.⁴³⁹

The Queensland Government submission advised that the Government’s Information Standard on Metadata “does not address FOI issues”.

Information Standard 34 – Metadata (IS34) forms the central standard for the management of metadata schemes for Government information resources. Under IS34, agencies are required to have documented processes and procedures in place to ensure the capture, quality, accessibility, accuracy and currency of metadata. Metadata is not currently recorded when information is created or recorded on registers.

...

Generally, agency practice is not to include “metadata” – understood as “background” information to substantive documents (used for indexing or cataloguing purposes) – unless the applicant specifically requests same, so as to expedite processing and avoid the provision of unnecessary or unintelligible information.⁴⁴⁰

Rather than a burden of volume, the strain in FOI processing of raw data and metadata arises from the intrinsic nature of electronic information itself. For example, where-

- there is added workload involved in retrieving and/or managing interpretations of raw data;

⁴³⁹ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 23 (emphasis added).

⁴⁴⁰ Queensland Government submission to the FOI Independent Review Panel discussion paper, p.23 (footnote omitted).

- the agency regards the FOI application as needing it to “create” a document (and that such is “not required” under the *Freedom of Information Act 1992*) because of the extent of manipulation or translation of data required;
- managing access to electronic data is not capable of editing for exempt or non-relevant material;
- a requester asks for substantially the same metadata on a repeated basis (and technically the document is not the same even though the only changes have been the recording of the requester’s previous access to it); and
- software and requirements to convert the data to accessible form are obsolete.

In 2005, amendments to the *Freedom of Information Act 1992* reined in the requirement for agencies to search back-up systems in fulfilling obligations to conduct a reasonable search, in recognition of their primary purpose for disaster recovery.⁴⁴¹ The Panel notes however that some agencies still report uncertainties in responsibilities for retrieving old emails.

The Redland City Council submitted —

It must be recognised that agencies can have massive amounts of raw data on any particular matter, with systems designed to store, record and process that data to meet agency needs. Data should be available, however agencies should not have to meet FOI requests for data that is structured or processed in a way that is outside the agency’s normal requirements and that would require more than a very basic level of additional work by the agency.⁴⁴²

On what is reasonable, the Information Commissioner found in *Price and The Nominal Defendant* that —

The applicant is therefore entitled to access to a document that could be created by interrogating the Nominal Defendant's database to provide such information retained on the database as falls within part 5 of the applicant's FOI access application dated 1 April 1997, provided the applicant is prepared to pay the reasonable costs of access. Under s. 29(7) of the FOI Act and s. 11 of the FOI Regulation, the Nominal Defendant may require the Defendant to pay a 20% deposit before it undertakes the work in question.⁴⁴³

Of the United States’ much longer experience, Alasdair Roberts said —

For three decades, many federal officials resisted the idea that there could be any right under the *Freedom of Information Act* to information contained in government databases. As a technical matter, many databases were not designed with the possibility of public access in mind; they were built for internal use and lacked features that would allow data to be easily exported for use by nongovernmental organizations. In these cases, new computer

⁴⁴¹ *Freedom of Information Act 1992*, ss. 25(6), 25(7), 28(3), 28(4); and LCARC, *Freedom of Information in Queensland*, Report No. 32, pp. 60–61.

⁴⁴² Redland City Council submission to the FOI Independent Review Panel discussion paper, p. 11.

⁴⁴³ S97/97, 24 November 1999, OIC, para. 24.

programs had to be written to make possible the extraction of data. This meant added work for agency staff, and even more difficulties for smaller agencies who lacked the staff with the ability to do the programming.

...

Finally Congress stepped in, by amending the *Freedom of Information Act* in 1996 to make clear that departments had an obligation to extract bulk data from their databases and... an obligation to provide data in easily manipulable digital formats.

The 1996 changes – known as the Electronic Freedom of Information Act Amendments, or EFOIA – improved matters, but official balking at requests for electronic data also continued [with departmental resistance being subsequently overturned by the courts].⁴⁴⁴

Section 552(3)(B) and (C) of the United States' EFOIA requires that —

(3)(B) ... an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.⁴⁴⁵

In examining the nature of the FOI experience in processing FOI applications for access, the Panel has first considered whether the scope of the right of access in Queensland should be narrowed to “public records” or extended to “official information”.

The Panel concludes –

- in the absence of compelling arguments for change;
- with broader practical considerations (also cognisant of governments' anxieties about their ability to govern effectively); and
- in favour of the public interest in open and accountable government and an informed community,

that the existing entitlement to access “documents” as defined under the *Freedom of Information Act 1992* should remain unchanged.

However, the Panel recommends three key improvements to assist FOI responsiveness in the interests of both users and administrators.

⁴⁴⁴ Roberts, R. *Blacked Out: Government Secrecy in the Information Age*, Cambridge University Press, New York, 2006, pp. 204-205.

⁴⁴⁵ *The Freedom of Information Act* (United States), Title 5 United States Code, s. 552, (3)(B) and 3(C) as amended by Public Law No. 104-231, 110 Stat. 3048.

The first two improvements underscore the critical interrelationship with other public policies in the broader information policy sense (see chapter 3): namely in this instance, improving awareness, capabilities and compliance with the *Public Records Act 2002*.

In recognition of the low levels of understanding and compliance evident across the sector of the expectations under the *Public Records Act 2002* regime concerning drafts and emails as seen through the FOI experience, the Panel recommends –

(1) Clarity and accessibility

The Queensland State Archivist should review the existing Information Standards and best practice guidelines to ensure a plain English, comprehensive and detailed, self-contained, Queensland promulgation of the public records requirements and expectations in handling, keeping and destroying drafts and emails. Where practicable and appropriate, procedural and technical guidance should be included in illustrating expectations arising in typical examples. This review should include consultation (perhaps via focus groups) with representatives from the following stakeholders: FOI practitioners, records administrators, and a sufficient slice of agency functions such as policy officers, program administrators, field workers. (The Archivist’s information policy partners, the Information Commissioner and the Chief Information Officer, should also be consulted.)

(2) Improved awareness and compliance

The Queensland State Archivist (and the Information Commissioner) should actively promote the public records requirements widely and frequently, including training and information programs. The State Archivist should monitor compliance, and difficulties in compliance, to continuously improve awareness and capability and together with the Information Commissioner’s support and feedback, maintain the relevant standards and guidelines under regular review. As appropriate, the Chief Information Office should assist in assuring sector-wide systems’ capability in handling retention and disposal of drafts and emails in accordance with required standards. It would be important to emphasise also the sanctions consequent upon wrongful destruction of documents, supported by referral points and working assumptions⁴⁴⁶ to guide the decision-making that is made in practice everyday by public servants in what documents to keep.

Informed and proper compliance with *existing* public records retention and disposal parameters would see the volume of draft material, repetitive email strings and other such “ephemeral” material reduced in the information holdings of the public sector and therefore not a concern for FOI processing, and non-responsiveness.

This is part of the solution.

It is a more open approach than confining the scope of access rights to “public records” only. It does not change any existing legal entitlements. Rather, it seeks to change current *performance* in practice by improving compliance with the existing public records regime which is intended not to burden the public record with

⁴⁴⁶ In the style of the *Guidances* issued by the Department of Constitutional Affairs in the United Kingdom.

insignificant, ephemeral material that does not add meaningfully to the record of business transacted or affairs conducted by government.

(3) Requester can choose to opt out

However, notwithstanding a targeted and regular program of promotion and training, there will still be points in time where ephemeral drafts and emails exist as documents of an agency captured by the terms of an FOI application. The requester maintains their legally enforceable right to access that material but the Panel's recommended Schedule of Relevant Documents shared with the requester sooner rather than later in the FOI processing timeline (see chapter 13) will enable the decision-maker to notate that schedule indicating which documents the decision-maker clearly regards as ephemeral in nature only. This will inform the requester of that view prior to the requester confirming the documents on the schedule to which access is sought, and liability to costs is made.

If the decision-maker is uncertain whether a document on the schedule is merely ephemeral in nature, there is no requirement to notate the schedule. It is simply an administrative opportunity, when it is clear, to engage the requester in offering a choice, simply and quickly, whether to proceed with seeking access to that document or not.

On the questions concerning raw data and metadata, the Panel considers that the existing scope of legal entitlement to that material be maintained in favour of the public interest in enhanced open and accountable government and in the interests of the broader information policy advantages canvassed in chapter 3.

However, the Panel considers that it is reasonable to –

- exclude entitlement to metadata where the only difference to the same metadata requested by the same person previously has been occasioned by the recording of the requester's own activity;
- exclude metadata from the definition of document of an agency unless and until the requester specifically requests same in writing – this will provide clarity and legislative basis to the current practice and pragmatism which excludes it unless specifically requested;⁴⁴⁷
- reinforce in FOI training and awareness the *existing* entitlement to raw data and metadata and the mandatory obligation on agencies to interrogate databases within the scope of an FOI application so as to create documents for production, where the means for doing so are “usually available” to the agency;⁴⁴⁸ and
- expect agencies as part of the Government's broader information policy planning and delivery to plan its systems and make reasonable efforts to maintain its records in reproducible forms or formats. This echoes the United States' position and is consistent with the existing spirit in the *Freedom of Information Act 1992*⁴⁴⁹ that production of data is obliged where the means for doing so are “usually available”. It simply extends the obligation from a policy and planning

⁴⁴⁷ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 23.

⁴⁴⁸ *Freedom of Information Act 1992*, s. 30(1)(e).

⁴⁴⁹ *Freedom of Information Act 1992*, s. 30(1)(e); and consistent also with the expectation of accessibility in the *Electronic Transactions (Queensland) Act 2001*.

perspective to reasonably *anticipate* that such access will be sought so that it can be provided (subject to legitimate exclusions such as the protection of privacy) in the usual course of business.

The Information Commissioner, in concert with the Chief Information Officer and the State Archivist as appropriate, should promote and support planning and capability around these initiatives, including for example the provision of electronic access at dedicated reading room facilities enabling the requester to interrogate data as a compromise where conversion software has become obsolete, or where manipulation of data or production of the data is beyond the scope of what is “usually available” to the agency. This provides the requester with the choice to invest the time and effort. Agencies should seek advice and support from the Information Commissioner in determining what is reasonable and how to further its obligations under the Act, in the public interest.

16.2 E-FOI

The Panel’s discussion paper noted —

Users complain that even basic transactional business under the administration of freedom of information in Queensland has not kept pace with modest information and communications technologies, simple e-commerce that occurs elsewhere in government is not common practice for FOI: “I can pay my car registration and other government bills over the phone or the internet, but I must post a cheque to pay for my FOI request and wait the week or more for the department to receive and process my mail before the time limit to decision even starts to run”.⁴⁵⁰

The Queensland Government said in its submission that the “Government is open to suggestions as to how access rights might be modified to accommodate technological advances.”⁴⁵¹

Many submissions supported the good sense in sector-wide provision for electronic lodgment, payment and access methods for freedom of information. Some agencies and public authorities have moved to accept FOI applications for access by email and even electronic payment facility, but many have not.

The Queensland Government submitted that a “major concern” with receipt of electronic applications and fees was that “such methods are not appropriate in many situations involving requests for access to personal affairs information, given difficulties with security, privacy and electronic proof of identity”.⁴⁵²

⁴⁵⁰ FOI Independent Review Panel discussion paper, p. 118.

⁴⁵¹ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 23.

⁴⁵² Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 24.

The Panel considers that it is reasonable, as it is in other sectors of government operations, to work through any such issues to reach a resolution that enables an electronic capability.

In any event, there would appear no hurdle involved, other than the legitimate need for a coordinated and consistent e-FOI model to be developed, in introducing electronic lodgment of FOI applications, electronic payment and access methods for freedom of information as a matter of course and without delay.

As a minimum, electronic lodgment of applications should be accepted by email (as would be lawful currently in any event under the *Acts Interpretation Act 1954*⁴⁵³), and better still through the agency's website. Ideally, a single point of entry to Government enabling electronic lodgment of applications and payment of fees should be developed offering the most streamlined, user-friendly option.

16.3 FOI processing

The Panel's discussion paper⁴⁵⁴ noted —

In 1995 the ALRC/ARC Review stated “the success of the FOI Act depends in large part on the ability and willingness of agencies to assist and consult with applicants.” A little over 10 years later the Commonwealth Ombudsman wrote that “administrative problems are a continuing concern in FOI administration.” And he said, “A common finding in studies of this kind is that the vitality and success of the FOI scheme depends heavily on the way it is administered within agencies. Smooth and committed administration reduces problems and tensions, and supports a strong commitment to FOI and open government. The obverse is also true.”

The Ombudsman provided a guidance list.

He said:

It can generally be said that FOI administration in an agency will be more reasonable and efficient if the agency:

- maintains a good quality and current statement under s. 9 of the FOI Act and takes every opportunity to explain how an FOI request might be made
- scrutinises all incoming correspondence to see whether a correspondent is making or attempting to make an FOI request or seeking advice about how this might be done
- assists applicants to make valid applications
- (generally) maintains a centralised system, at least for the purpose of monitoring the receipt and progress of FOI requests and providing guidance to staff dealing with requests

⁴⁵³ *Acts Interpretation Act 1954*, s. 36, and *Freedom of Information Act 1992*, s. 25 – applications must be in writing.

⁴⁵⁴ FOI Independent Review Panel discussion paper, pp. 130-131 (footnotes omitted).

- prepares a set of procedures accessible by all staff (especially decision-makers and those who assist them) about the processing of FOI requests, including consultation processes and when, for example, it is proper to consult a Minister's office or to transfer a request
- issues guidance on the process and principles that should inform decisions about fees and charges
- encourages decision-makers to liaise with FOI applicants so as to understand their needs (and ensure that the agency's priorities are explained) and to avoid delay, complexity and formality
- checks decision letters so as to ensure that they identify the documents considered (in a schedule if there are more than a few) and the statutory and factual bases for any exemptions.

By contrast, an agency will experience difficulties if it:

- allows formal or informal FOI requests to remain un-actioned and unacknowledged
- imposes fees and charges on an inconsistent or unpredictable basis, or greatly overestimates charges (leading to justifiable suspicion about motives)
- allows decisions to be made on an ad hoc basis by untrained and unsupported staff without any scrutiny
- avoids any contact with the FOI applicants
- fails to advise applicants of review and complaint rights
- fails to identify in a statement of reasons the range of documents considered (eg the date range and whether electronic documents have been considered)
- makes decisions that simply assert, without amplification, the application of a specific exemption.

Submissions generally supported agencies adopting guidelines similar to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report. The Panel agrees.

The Panel also commends for further consideration the United Kingdom model which provides Codes of Practice and formal *Guidances* issued for Procedural, Technical, Sector Specific, and Exemptions.⁴⁵⁵

More on an expanded and proactive Information Commissioner's role to support a more responsive, consistent and greater client service satisfaction in the FOI experience for users, appears in chapters 19 and 20.

⁴⁵⁵ <www.ico.gov.uk> and <www.foi.gov.uk>.

RECOMMENDATIONS:

Recommendation 78

Clarity and accessibility

The Queensland State Archivist should review the existing Information Standards and best practice guidelines to ensure a plain English, comprehensive and detailed, self-contained, Queensland promulgation of the public records requirements and expectations in handling, keeping and destroying drafts and emails. Where practicable and appropriate, procedural and technical guidance is to be included in illustrating expectations arising in typical examples. This review should include consultation (perhaps via focus groups) with representatives from the following stakeholders: FOI practitioners, records administrators, and a sufficient slice of agency functions such as policy officers, program administrators, field workers. (The Archivist's information policy partners, the Information Commissioner and the Chief Information Officer, should also be consulted.)

Recommendation 79

Improved awareness and compliance

The Queensland State Archivist (and the Information Commissioner) should actively promote the public records requirements widely and frequently, including training and information programs. The State Archivist should monitor compliance, and difficulties in compliance, to continuously improve awareness and capability and together with the Information Commissioner's support and feedback, maintain the relevant standards and guidelines under regular review. As appropriate, the Chief Information Office should assist in assuring sector-wide systems' capability in handling retention and disposal of drafts and emails in accordance with required standards. It would be important to emphasise also the sanctions consequent upon wrongful destruction of documents, supported by referral points and working assumptions⁴⁵⁶ to guide the decision-making that is made in practice everyday by public servants in what documents to keep.

Recommendation 80

Requester can choose to opt out

Where the decision-maker clearly regards certain documents as merely ephemeral in nature, the decision-maker can annotate the Panel's recommended (chapter 13) Schedule of Relevant Documents accordingly enabling the requester to confirm to which documents access is sought, and liability to costs is made.

⁴⁵⁶ In the style of the *Guidances* issued by the Department of Constitutional Affairs in the United Kingdom.

Recommendation 81

The existing scope of legal entitlement to raw data and metadata be maintained, subject to –

- (1) excluding entitlement to metadata where the only difference to the same metadata requested by the same person previously has been occasioned by the recording of the requester’s own activity;
- (2) excluding metadata from the definition of document of an agency unless and until the requester specifically requests same in writing;
- (3) reinforcing in FOI training and awareness the *existing* entitlement to raw data and metadata and the mandatory obligation on agencies to interrogate databases within the scope of an FOI application so as to create documents for production, where the means for doing so are “usually available” to the agency; and
- (4) expecting agencies as part of the Government’s broader information policy planning and delivery to plan its systems and make reasonable efforts to maintain its records in reproducible forms or formats.

Recommendation 82

The Information Commissioner, in concert with the Chief Information Officer and the Queensland State Archivist as appropriate, should promote and support planning and capability around these initiatives, including for example the provision of electronic access at dedicated reading room facilities enabling the requester itself to interrogate and manage the production of data.

Recommendation 83

Electronic lodgment of FOI applications, electronic payment and access methods for freedom of information as a matter of course should be introduced in a consistent and coordinated way for all agencies and public authorities without delay.

Recommendation 84

The Information Commissioner should support a more responsive, consistent and enhanced client service in the FOI experience for users, including by –

- developing guidelines for agencies similar to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report; and
- considering beneficial initiatives harvested from the United Kingdom model which provides Codes of Practice and formal *Guidances* issued for Procedural, Technical, Sector Specific, and Exemptions.

17 Release of FOI documents

This chapter brings together a number of recommendations that are dealt with in other chapters, together with some new issues. It presents an overview of the way in which agencies should provide documents that have been processed through FOI to those who have applied for them, and make them available to a wider public.

17.1 Disclosure to the applicant

Watermark

Currently, documents that are released under FOI in Queensland are normally provided as paper documents, printed with a background “watermark”, identifying them as having been released under FOI. The main rationale for this appears to be to identify the documents as being a genuine reproduction of an official document that has been released under FOI. However if anyone were motivated to fake an FOI document it would be comparatively easy, these days, for them to print a document with similar markings to those on an authentic one.

If it were thought necessary or desirable to ensure that material cannot be improperly passed off as being sourced from an agency, it would also be necessary to provide some form of electronic “watermark” for information released digitally. However encrypting the material is probably undesirable. As the Queensland Government submission acknowledged, “No conditions or restrictions can be attached to documents disclosed under the FOI Act.”⁴⁵⁷ Information policy now encourages recipients of government information to make use of it for their own purposes.⁴⁵⁸

Fraudulent manipulation of FOI documents is unlikely to impact on agencies (they retain the original material that has been copied) but might be a concern for third parties. The release of documents with a “watermark” does not need to be mandated in the Act but has been generally regarded as good practice.

The Queensland Government submission said —

“Watermarking” is not a requirement under the FOI Act, but an administrative practice recommended by DJAG and adopted by agencies as a means of allowing agencies to track government documents released into the community. In any case, agencies ultimately recognise that the right of access contained in s. 30 of the FOI Act allows an applicant to request a “clean” copy of a document (by empowering applicants to request access in a particular form).⁴⁵⁹

⁴⁵⁷ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 25.

⁴⁵⁸ See FOI Independent Review Panel discussion paper, pp. 120-124, and chapter 3 of this report.

⁴⁵⁹ Queensland Government submission to the FOI Independent Review Panel discussion paper, pp. 25-26 (footnote omitted).

For other than personal information, this can also be achieved through more widespread publication of FOI documents, for example, on the agency's website.⁴⁶⁰

Non-paper documents

Increasingly, it will become more convenient for agencies and for FOI applicants, to deliver and receive documents other than in paper form. This may be done by the agency providing the material on a computer disc, uploading the material to the applicant's computer by email, or allowing the applicant to access a secure site on the agency's computer network. Moving away from paper documents will be cheaper for both agencies and applicants. The charging system recommended by the Panel will not have to be changed where the documents being accessed are based on original documents in page format. However, a new charging system will probably have to be developed (by the Information Commissioner), based on the quantum of the data accessed.

Generally, it should be for the applicant to determine the way in which FOI documents are to be provided.

Reasons

About 75 per cent of documents sought by applicants are provided as requested. The remainder are refused either in whole or in part. Agencies normally provide written reasons for not complying with any request, detailing each of the exemptions or exclusions or any other relevant part of the Act that prevents the document or part of it being provided. This will be even more necessary under the system proposed by the Panel that removes many of the exemptions from the Act and replaces them with a statute-based public interest test. It will be essential when any document is not provided because of the application of the public interest test that the agency should detail precisely the aspects of the public interest test that the FOI officer has taken into account in determining that disclosure, on balance, would be contrary to the public interest. This will allow the applicant to make a reasoned decision on whether to seek internal or external review of the decision, and, after consulting the public interest provision in the legislation, and the Time and Harm Weighting Guide, if appropriate, to argue that factors others than those stated in the notice should have been taken into account, or that a different weighting should have applied and a different result arrived at.

17.2 Publication to the world

In Mexico, dissemination of (non-personal) information requested under FOI takes place through the internet. The information is available for anyone that scans the website of the agency.⁴⁶¹ In the United States, if the same information is requested

⁴⁶⁰ See 17.2 – “Publication to the world”.

⁴⁶¹ “A citizen's request and the government's response must themselves be public, and agencies must make the resulting documents available to all in an accessible manner.” Doyle,

twice, the agency publishes it on what is called an “electronic reading room”⁴⁶² In Britain, requests for FOI are published on the Ministry of Defence’s website, before they are responded to, giving the date by which the information is due to be processed, and the information obtained is similarly published.⁴⁶³

In Britain, and separately in Scotland under its own FOI legislation, agencies have developed a sophisticated system of releasing information through what are called “disclosure logs”. As explained in a best practice guide issued by the Department of Constitutional Affairs (as it was) in December 2005 —

Disclosure logs provide online access (usually via the public authority’s website) to information released under FOI, grouped chronologically or thematically. Disclosure logs can be a useful way of making requested information available more widely, although there will be some circumstances in which it is not lawful to publish such information.⁴⁶⁴

It explains the benefits of a disclosure log in these terms —

The purpose of a disclosure log is to make individual releases of information under the FOI Act available to the widest possible public audience. The benefits of a disclosure log include:

- Providing the public with a user-friendly source of information disclosed under FOI/EIRs by a public authority;
- Allowing information disclosed to one requester to be made available to a wider public audience;
- Allowing information released to be accompanied with supporting information, explaining issues of public interest in greater depth;
- Giving the public greater understanding of what information the public authority holds, thus enabling the public to make better informed information requests in the future.

Disclosure logs provide easy, instant access to information released by public authorities. User-friendly, organised and extensive disclosure logs have benefits for both the public and for the public authority.⁴⁶⁵

The guidance explains that smaller agencies may wish to publish all information released in response to requests, while for agencies receiving a large volume of requests it might be more practical to publish only those requests of wider public interest. It suggests, as a minimum, that agencies should include a selection of the

K., “Mexico’s new Freedom of Information Law”, The National Security Archive, 10 June 2002.

⁴⁶² Bushell-Embling, D., “FOI – the international situation”, Australian Institute of Policy and Science, *Australian Quarterly*, Volume 78, Issue 6, November-December 2006, p. 32.

⁴⁶³ United Kingdom Ministry of Defence, “Requests Received”.

<<http://www.mod.uk/DefenceInternet/FreedomOfInformation/DisclosureLog/RequestsReceived/>>

⁴⁶⁴ Department of Constitutional Affairs, “Best Practice Guidance on Disclosure Logs”, December 2005, p. 1.

⁴⁶⁵ Department of Constitutional Affairs, “Best Practice Guidance on Disclosure Logs”, December 2005, p. 2.

most high profile information disclosures, and suggests repeated requests for similar information might be one way of judging this.⁴⁶⁶

It also suggests agencies should go beyond releasing information that has been requested, and include proactive information disclosures. It says normally information would not be added to the disclosure log until after it has been disclosed to the applicant, though agencies should consider simultaneous release of information to the applicant and through the disclosure log.⁴⁶⁷ As will be seen in chapter 18, the British Government strongly favours simultaneous disclosure.

The Panel, as explained in chapters 3, 18 and 24, favours the adoption of disclosure logs as a means of providing more information to the public, but it believes applicants should be given 24 hours of access to the information before it is made more widely available.⁴⁶⁸

The Panel agrees with the UK practice of publishing only the most interesting (to a wider public) material that has been requested, along with other material the agency might wish to present that explains the content of the requested material. However it also considers that agencies should publish an abstract of most other documents that have been requested. This will become easier as agencies adapt their EDRMS to regularly producing abstracts that can be placed in a future Information Asset Register. Publishing these abstracts will make it easier for agencies, as well as potential applicants, to discover whether documents have been the subject of previous FOI requests. Detailed guidelines should be drawn up by the Information Commissioner after reviewing the operation of the scheme in Britain and Scotland and applying it to local conditions.

In the United States, agencies such as the Central Intelligence Agency (CIA), the Federal Bureau of Investigation and the Defense Department, have developed websites that are virtual reading rooms (and they have real reading rooms as well). These make use of the FOI requests they receive to build files of information on specific issues of interest to the public, so that people can access the reading room material rather than needing to apply under FOI for information. The CIA lists on its website the 25 most requested files, and updates this every month. The volume of requests in the US makes any direct application in Queensland of American experience inapplicable, but there may be some techniques that could be applied by agencies in building their disclosure logs.

17.3 Publication absent requester

Section 31A deals with the situation where a person applies for and is granted access to a document, but does not, within 40 working days (or an additional approved period) seek to obtain access to it. The section provides that under those circumstances the requester's entitlement to access ends.

⁴⁶⁶ Department of Constitutional Affairs, "Best Practice Guidance on Disclosure Logs", December 2005, pp. 2-3.

⁴⁶⁷ Department of Constitutional Affairs, "Best Practice Guidance on Disclosure Logs", December 2005, pp. 3-4.

⁴⁶⁸ See recommendation 3.

The Panel considers that in these circumstances the agency should be able to include on its disclosure log a reference to the document and its contents on the expiry of 60 days. The agency would then be able to provide access to the document to anyone who sought it, so long as they paid any charges that the first requester had not paid. However, the agency also could put the document on its website for anyone to access.

Like others, the original requester would be able to obtain the document only by paying any unpaid access charge.

RECOMMENDATIONS

Recommendation 85

The Information Commissioner should develop guidelines and recommend to the Minister proposals for charges that should be levied for providing data other than from paper-sourced documents. The Minister may include these in the charges regulation made under the Act.

Recommendation 86

The Information Commissioner should provide detailed guidance for agencies on what they should include in a notice to an applicant who is denied access to a document, in whole or in part, where the agency has relied on public interest considerations, including the way the agency needs to comply with s. 27B of the *Acts Interpretation Act 1954*.

Recommendation 87

The Information Commissioner should draw up guidelines to assist agencies to develop the disclosure logs proposed in recommendation 3.

Recommendation 88

An agency should include on its disclosure log a reference to any s. 31A document it has processed. The agency may provide access to the document to anyone (including the original requester) who applies for it, provided they pay the access charge that the original requester had not paid plus any photocopying charge. However, the agency could put the document on its website for anyone to access.

18 Media and Opposition MPs

The media, MPs, academic researchers and some non-government organisations (NGOs) such as environmental groups, constitute a special class of user of FOI. They are not necessarily the most prolific users – private individuals are probably the largest users, and law firms, acting for clients, are also significant. But the media, MPs, academic researchers and NGOs such as environmental groups tend to make special claims for privileged use of FOI that are recognised in some jurisdictions. Three of these are evidenced in submissions made to the Panel, while a fourth emerges from what happens in Britain. These four relevant matters concern charges that are levied from them, the time in which their claims are processed, the volume of their requests and when/whether the material they have sought under FOI should be released by an agency to the world.

As to the issue of charges, Australia's Right to Know (RTK) said —

Costs and charges remain one of the major constraints to the media's effective use of FOI law in Queensland. Agencies can and do charge exorbitant costs, thwarting any realistic option for payment by individuals seeking to use FOI. Even relatively well-resourced media companies struggle to meet the costs which are imposed by agencies.

From the Fitzgerald Inquiry into corruption through to the so-called "Dr Death" hospitals commission, the media have been and remain the single most important external body to government in exposing failings, corruption and misadministration by Government. The media, while motivated by commercial reasons, performs a role in essential public interest through its scrutiny of the Government without fear or favour and at no cost to the public purse.

There should be recognition of the essential public interest in the media's performance of its watchdog role. RTK's view is that the cost of providing information about Government to inform the public should be borne by the Government, particularly as media organisations invest significant funds in training and employing journalists using FOI. Media organisations often receive little benefit from the investigations that produce no result.⁴⁶⁹

On the time taken to process applications, the Australian Press Council said —

If the FoI process is to be of any utility to journalists it must be capable of yielding results within a time frame that is much shorter and more predictable. The statutory period within which a response must be forwarded to the applicant should be shortened to fourteen days and the scope for extensions of time needs to be significantly reduced. Where information is released after the statutory period, the applicant's fee should be refunded. Most important, the

⁴⁶⁹ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 8.

information management practices of government agencies need to be streamlined in order to facilitate the faster processing of FoI applications.⁴⁷⁰

The volume of requests made sometimes raises issues about whether these applicants might be considered to be vexatious. Megan Carter said —

Greater care should be taken when assessing the sheer number of requests made in a period of time by a media or MP applicant, as their role requires them to make multiple FOI requests. Guidelines could assist so that agencies did not misuse the provision in this way. To exempt them may lead to the situation where their behaviour is indeed worthy of being called vexatious and the option to sanction this is not available.⁴⁷¹

She did not think they should be exempt from provisions concerning voluminous requests, but added —

However the fees and charges regime could recognise their special roles as gatekeepers by allowing more charges waivers in the public interest for requests as appropriate.⁴⁷²

Rhys Stubbs of the University of Tasmania said —

I do not think journalists and/or MPs should be exempt from provisions concerning vexatious requests. It is possible that such individuals may participate in bad practices in relation to FOI. However, their role in a healthy functioning democracy should be taken into consideration. In order to fulfil their different functions journalists and MPs may need to make frequent and often large requests for government-held information.⁴⁷³

The fourth issue, is concerned with whether the material obtained by journalists or MPs should be released directly to the world, and if so, when. In Britain, where agencies commonly post on their websites responses to FOI requests at the time they provide them to media organisations, the Government has rejected any suggestion that journalists should have the information quarantined for any period.

In a speech last year, the Lord Chancellor, Lord Falconer, said —

... the press has argued against the idea that information they receive is simultaneously released on departmental websites because it spoils, as they would say, a good scoop.

Where government discloses information it is right that it is available and accessible on websites for everyone. It should not be for the media's own

⁴⁷⁰ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 4.

⁴⁷¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 27.

⁴⁷² Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 27.

⁴⁷³ Rhys Stubbs submission to the FOI Independent Review Panel discussion paper, p. 45.

commercial interest, and it should not be for them to decide if it reaches the public.

It is undoubtedly in the interest of the press that officials spend time trawling through files, just in case there are things which might be of interest, only for the press to decide if and when to publish it.

That is not in the public interest. That is not good government. That wastes public resources...

The job of the Government is not to provide page leads for the papers, but information for the citizen. Freedom of information was never considered to be, and for our part will never be considered to be, a research arm for the media.⁴⁷⁴

On the other hand, journalists receive favourable treatment (in some respects) in the United States. There they are likely to be charged less for their FOI requests than most others,⁴⁷⁵ and they are supposed to have their requests dealt with more quickly. Increasingly, however, federal agencies have adopted a policy of posting on their websites material that might be sought by journalists. For example, the Department of Defense and the Federal Bureau of Investigation both have websites carrying their latest news material, including information that previously journalists would have had to use FOI to obtain.

According to Privacy International, an NGO, most countries keep track neither of actual numbers of requests nor of the users of FOI laws. "In those that do, journalists are not the largest users of freedom of information laws; in general they make up only 10 per cent to 20 per cent of requests."⁴⁷⁶

However, surveys in the US, Canada and UK suggest FOI usage by journalists in those countries is at the lower end of this scale, or even below it. In the USA, a survey of four federal agencies in the first six months of 2001 showed that a mere five per cent of requesters were journalists.⁴⁷⁷ In Canada they accounted for 10.6 per cent in 2005.⁴⁷⁸ In Britain, they account for about 10 per cent of requests.⁴⁷⁹ This survey

⁴⁷⁴ Falconer, "Lord Williams of Mostyn Memorial Lecture". London, 21 March 2007. <<http://www.dca.gov.uk/speeches/2007/sp070321.htm>>

⁴⁷⁵ ALRC/ARC Report, p. 184.

⁴⁷⁶ Banisar, D., *Legal protections and barriers on the right to information, state secrets and protection of sources in OSCE participating states*. Privacy International, London, May 2007, p. 4.

⁴⁷⁷ Tapscott, M. and Taylor, N., "Few journalists use the federal Freedom of Information Act", The Heritage Foundation, p. 1.

⁴⁷⁸ Glover, M. and others, *Freedom of Information: History, Experience and Records and Information Management Implications in the USA, Canada and The United Kingdom*, University College, London, October 2006, p. 38.

⁴⁷⁹ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 3.

found that while journalists made 10 per cent of the requests, they accounted for about 16 per cent of the costs of delivering FOI.⁴⁸⁰

The only statistics in Queensland deal not with requests, but with completed applications for external review. These represent only about three percent of all applications and are not necessarily representative of the requests that are made. They show that the public interest group that comprises journalists, lobby/community groups and politicians together made about eight percent of all external review applications in 2006/2007, but 15 per cent two years earlier.⁴⁸¹

18.1 A special charging regime?

The case for a lower charging regime for journalists was put by Australia's Right to Know, and extracted above. It is essentially based on a public interest argument. MPs, academic researchers and NGOs can mount a similar argument. In essence, it is that the use of FOI by these groups serves one of the main purposes of FOI, "to enhance public participation in debate on public interest issues."⁴⁸²

On the other hand, the Frontier Economics survey quoted above suggested the possibility of the introduction of —

... a more targeted fee aimed at recovering the costs of dealing with persistent and experienced requestors. These types of requestors tend in the majority of cases to be requestors who require information for commercial use: either journalists or businesses wishing to gather information about procurement options in order to create a commercial database.

Responding to requests from these requestors tends to costs (sic) substantially more than dealing with requests from more casual requestors. A fee for this type of user could overcome some of the concerns expressed above with respect to a flat rate fee for all users. However, this option is potentially susceptible to gaming, as under the Act, individuals do not have to prove their identities or the purpose of their request in order to make a request.⁴⁸³

The Panel does not consider the charging regime should be adjusted because of the special claims that any of these groups can mount. Some of them are among the more demanding users of FOI, seeking large volumes of documents. The new charging regime proposed by the Panel should result in almost all users paying less than they would under the current system. As indicated in chapter 14, the Panel believes the

⁴⁸⁰ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 3.

⁴⁸¹ Parliamentary Legal, Constitutional and Administrative Review Committee, "Accessibility of Administrative Justice Supplementary Issues", 2005, p. 9.

⁴⁸² Wheeler, C., "Dealing with repeat applications", *AIAL Forum No. 54*, September 2007, p. 77.

⁴⁸³ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 10.

only concessions available should be those already in the Act for people, or non-profit organisations, in financial hardship.

18.2 Preferential access?

The Panel also considers it undesirable that journalists or MPs should be able to queue-jump, and have their applications dealt with more quickly than other applicants for FOI. This is particularly so because requests from these groups can be more complex than those of ordinary citizens, who should not be forced to wait longer for their requests to be dealt with. Any regime that favoured one or more groups over the majority would lead to disputes that would waste the time and resources of agencies that would otherwise be spent processing applications. The need for special treatment should also be reduced as a “push” model, like the publication initiatives adopted in the United States and the United Kingdom, comes into effect in Queensland.

18.3 Volume of requests

In chapter 15, the Panel dealt with vexatious and voluminous requests and said journalists and MPs should, as a class, be treated no differently from other members of the public. That said, the Panel would adopt the advice provided by the UK Information Commissioner to agencies deciding whether a request fits the definition of vexatious —

Should requests from journalists be treated any differently?

Legally, under the FOIA, journalists are in the same position as any other person requesting information. From the nature of their work, as a group, they do send many requests for information to public authorities and, practically, public authorities are unlikely to ignore the fact that a request has been received from the media. However, journalists are expected to act responsibly in this regard...

Ultimately it would be open to an authority to consider the application of section 14, for example, where a journalist sends or circulates many requests without considering the resource implications for public authorities, Public authorities will recognise this as a sensitive area and no doubt will give careful consideration to contact with the media.⁴⁸⁴

18.4 Publication to the world

Under the heading, “Ensuring the Act works effectively”, the Frontier Economics survey of the UK *Freedom of Information Act* for the Department for Constitutional Affairs said —

Simultaneous release. Discussions with stakeholders have indicated that public bodies are expected to operate a policy of simultaneous release, such that information released under the FoI Act is made publicly available through

⁴⁸⁴ Information Commissioner’s Office, “*Freedom of Information Act Awareness Guidance No 22: Vexatious and repeated requests*”, United Kingdom, p. 14.

the body's website or other means. There should be greater proactivity and consistency in the approach to FoI publication. This should reduce the costs to public authorities of having to deal with the same requests, and should make it easier for requestors to access the information they require. Moreover, if a driver of demand for commercial requestors is the exclusivity of the information they receive, then implementing such an approach consistently could lessen the value of the information received and lead to a reduction in the volume of requests. Greater proactive release of information should also be encouraged.⁴⁸⁵

The Panel agrees with the last sentence, but not with the suggestion that publishing information at the same time as it is given to the requestor might be used to reduce the number of requests. It runs counter to an earlier statement in the same paper —

The benefits of FoI can be broken into three elements: the private benefit to an individual of the information they receive; the public benefit of that information being made available; and the aggregate benefits that derive from a more open and transparent decision-making process.⁴⁸⁶

In the Panel's view the benefits of FOI are far greater than this suggests – see, in particular chapter 6, Objects. It would be contrary to the aims of FOI to adopt a policy that was intended, at least in part, to discourage the use of FOI by journalists, MPs and others.

Though not directed to this issue, this extract from a brief submission by the Editor-in-Chief of the *Gold Coast Bulletin* makes the point that journalists do not have to use FOI —

Our opinion is that FOI has, in the last 10 years, been sabotaged overtly by bureaucrats who believe they are the overlords of public information. Their greatest accomplices are politicians who have systematically neutered FOI laws and general access to government information. Bureaucrats actually use the FOI laws to hide information on behalf of their political masters and therefore curry favour with them. It is a nasty and undemocratic scenario.

We have reverted to the old newspaper tactic of developing contacts and sourcing leaks of important information hidden by self-interested bureaucrats and politicians – always mindful not to be manipulated by the source of those leaks. It has come to the point where leaks are actually easier to get than official information which is barricaded by FOI and other anti-disclosure laws.⁴⁸⁷

⁴⁸⁵ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 11.

⁴⁸⁶ Frontier Economics Pty Ltd, *Independent Review of the Impact of the Freedom of Information Act*, report prepared for the Department of Constitutional Affairs, UK, London, October 2006, p. 10.

⁴⁸⁷ *Gold Coast Bulletin* submission to the FOI Independent Review Panel discussion paper, p. 1.

The Panel considers that if FOI is to achieve its goals and be effective, it needs to be properly used by journalists, MPs, academic researchers and NGOs. Adopting the UK practice of simultaneous publication of information obtained by requestors (even though the amount of such material put on agency websites only ranges from about 1 to 5 per cent of the total released)⁴⁸⁸ would be undesirable. A media organisation that may have paid thousands of dollars to obtain the information would undoubtedly consider itself badly done by if its competitors were to get the information simultaneously and for no cost. The material would not have become available but for the efforts of the organisation's staff in seeking it out, and the time as well as money it had spent on the particular FOI request. In a sense, they have invested intellectual capital in FOI and they are entitled to their reward.

The Panel considers that where an agency is going to publish on its website information that has been provided to a requestor, it should delay posting that information until 24 hours after the requestor has received it. A delay of this length is suggested by the nature of the 24 hour news cycle of most media organisations.

While this will have an important benefit for journalists, it is not intended that they should be singled out for special treatment. The delayed publication rule should apply generally, for all FOI applicants.

⁴⁸⁸ Gunderson, K., "Disclosure logs", UK Freedom of Information Blog, 30 January 2008. <<http://foia.blogspot.com/>>

19 FOI Review Processes

19.1 Internal review

The Panel's discussion paper noted⁴⁸⁹ that when a person seeks internal review, the Act specifies (in ss. 52 and 60) that the application must be dealt with by someone who is at least of the same seniority as the person who dealt with the original application. This means (and the section spells it out) that internal review is not available when a decision is made by the head of an agency or by a Minister. The person conducting the internal review is required to decide the application as if it was a fresh application. Internal review is available where a person is aggrieved by almost any decision made as a result of an application for access to a document, including a decision that the document is not held by an agency within the jurisdiction of the Act, or that a document is exempt under the Act, or as to whether a fee or charge is payable, and a refusal to amend a document.

The main advantages of internal review are that it is a —

cost effective, relatively quick and accessible form of merits review. It allows applicants, who ordinarily have little or no input into the initial agency decision, to submit new arguments and evidence for consideration by an agency.⁴⁹⁰

It has the advantage for agencies of allowing them —

to reconsider and, if necessary amend, decisions before those decisions are subject to external review. Concurrently, agencies can monitor the quality of their primary decisions, and identify and correct problems or inconsistencies in their decision-making processes.⁴⁹¹

The Report also said internal review could operate as an important tool in managing demand for external review, and that it assisted in inculcating a knowledge and understanding of FOI in agencies.⁴⁹²

There are a number of reasons why applicants may want to avoid internal review. They may feel they are unlikely to be successful in having the original decision overturned. They may have had some previous applications dealt with by the agency in this way and been unsuccessful, and thus may not trust the agency. In 2005-2006 the proportion of internal reviews favouring applicants was about 22 per cent for government agencies, and 10 per cent for local government.⁴⁹³ Applicants may also be concerned that the internal review process will simply delay, by another 28 days, the process of obtaining external review.

⁴⁸⁹ FOI Independent Review Panel discussion paper, pp. 122-123.

⁴⁹⁰ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 123.

⁴⁹¹ LCARC, *Freedom of Information in Queensland*, Report No. 32, pp. 123-124.

⁴⁹² LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 124.

⁴⁹³ Department of Justice and Attorney-General, *Freedom of Information Annual Report, 2005-06*, Appendix 1.9.

An argument that carried some weight with LCARC was that if internal review was not a prerequisite, there would be more pressure on the Information Commissioner, with more paperwork and delay. However most matters that are considered in internal review do subsequently pass for review by the Information Commissioner.

The LCARC Report recommended that internal review should remain mandatory. The ALRC/ARC Report said that internal review should not be a prerequisite for external review by the AAT.⁴⁹⁴

Submissions

Australia's Right to Know said —

Unfortunately, while internal review is cost effective and relatively quick, agencies are placed in a position of conflict-of-interest in considering whether their initial decision was flawed. The more politically sensitive the subject matter of the request, the less likely an agency is to substantially change its decision – although some less relevant documents may be released in an attempt to appear fair and balanced.

Applicants should have the option of bypassing internal review and proceeding directly to external review. Agencies need to place more emphasis on getting the decision right in the first instance.⁴⁹⁵

The Courier-Mail editor David Fagan said —

The decision process needs to allow for greater mediation even before the internal review phase. This is of benefit to both applicants and decision makers, allowing applicants to refine their search and decision makers to identify vexatious applications.⁴⁹⁶

The University of Queensland supported both the current internal and external review procedures in Queensland. It said —

The University views the internal review process as a mechanism for it to review the original decision, to amend the original decision and to ensure the correct decision has been made. The University would not support amendments to the FOI Act that would alter the current internal review provisions on the grounds that to do so may remove its ability to review original decisions.⁴⁹⁷

⁴⁹⁴ ALRC/ARC Report, p. 170.

⁴⁹⁵ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 10.

⁴⁹⁶ David Fagan submission to the FOI Independent Review Panel discussion paper, p. 5.

⁴⁹⁷ The University of Queensland submission to the FOI Independent Review Panel discussion paper, p. 10.

The Queensland University of Technology thought that a proposal allowing applicants to proceed directly to external review after the initial decision warranted further examination. It supported a further provision to allow departments and agencies “the discretion in certain cases to refuse applications for internal review, instead directing the applicant to apply directly for external review”.⁴⁹⁸

The Queensland Council for Civil Liberties said —

The Council’s view is that on balance internal review should remain. It does allow departments to correct mistakes and can be faster even in the Queensland based model with the Ombudsman or Information Commission conducting external reviews. This assessment of the usefulness of internal review is supported by the LCARC report⁴⁹⁹ where it is demonstrated that internal review resulted in a variation of the original decision in approximately 1/3 of the cases. Having taken into account the matters raised by the LCARC⁵⁰⁰ the Council at this stage would not support removing internal review as a prerequisite to external review.⁵⁰¹

The Office of the Information Commissioner said —

In terms of the impact on agency resources, an external review where there is no internal review decision or inadequate reasons were given in the internal review decision, necessarily requires the agency to provide submissions early in the process to set out such reasons, and answer a number of queries from this Office.

In such cases:

- it is often necessary for the agency to essentially undertake the work and provide this office with what they would prepare for making an internal review decision
- the extensive involvement of the agency in an external review is critical as the agency knows their business, the way the Department operates, when documents are created and where they are stored, and certain sensitivities that are relevant to claims for exemption.

Proceeding to external review too early is not efficient in such cases as the time taken by the agency to undertake initial work to search for and review documents, consider claims for exemption and other issues under the FOI Act significantly delays the external review process for the applicant.

Whereas, an internal review decision is made within 28 days and further documents can be released to the applicant at that time, or the applicant may

⁴⁹⁸ Queensland University of Technology submission to the FOI Independent Review Panel discussion paper, p. 10.

⁴⁹⁹ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 123.

⁵⁰⁰ LCARC, *Freedom of Information in Queensland*, Report No. 32, pp. 125-126.

⁵⁰¹ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 21.

be satisfied with the decision with the exception of a particular issue that they pursue through to external review, thereby focusing the scope of the review.⁵⁰²

The Queensland Ombudsman, who at one stage was also the Information Commissioner, said —

An option worth considering is to make internal review optional rather than mandatory, leaving it up to the applicant to decide whether or not they wish to pursue their application further with the agency, or to proceed straight to external review. My experience of internal review decisions was that many internal reviewers did not make a genuine attempt to re-consider the issues afresh, but simply rubber-stamped the initial decision. If an applicant feels that, perhaps judging from his or her experience in dealing with the agency to date, little is to be gained by applying for internal review (other than further delaying the progress of their application), then they may prefer bypassing that stage.

I also agree with Rick Snell's observation that it may lead to an improvement in the quality of agencies' initial decisions, and may encourage them to pay greater attention to the accuracy of all aspects of their decisions, if there is a greater possibility that the decision will end up before an external review tribunal. It may also lead to primary decision-making responsibilities being given to officers at a more senior level.⁵⁰³

The issues

The Panel believes that internal review should be optional. It seems desirable there should be some flexibility in the system to take account of the particular circumstances of the applicant or the application. There will be some cases, for example where sufficiency of search is in issue, where internal review would be highly desirable. There are others, for example if there is a legal issue in dispute, where there may be little to be gained from internal review. The problems recounted by the Information Commissioner in dealing with issues the Information Commissioner might want to raise on external review would not necessarily be resolved through internal review. In any event, the imposition of strict time limits on the initial stages of external review would mean the agency would be required to cooperate with the Information Commissioner, and there should be no net disadvantage to the applicant in proceeding directly to external review. Delay may be an important issue for the applicant. In terms of agency culture, if it is possible for an applicant to go straight to external review, this may make the agency more conscious of the desirability of getting the initial decision right.

⁵⁰² Acting Information Commissioner submission to the FOI Independent Review Panel discussion paper, p. 2.

⁵⁰³ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 15.

RECOMMENDATION:

Recommendation 89

Internal review should be retained, but it should be optional.

Fees

There is no charge for internal review in the current legislation. It is desirable that this remains the case if internal review is optional. Imposition of a charge would discourage applicants from using internal review.

RECOMMENDATION:

Recommendation 90

An applicant should not be required to pay a fee for internal review.

Time limits

The legislation provides that a decision on internal review must be made within 28 days of the receipt of an application. Otherwise, the agency is taken to have affirmed the original decision. The Act originally required internal review to be completed with 14 days. The time allowed was doubled on LCARC's recommendation.

Although many other jurisdictions have a 14 day limit for internal review, the Panel believes that the 28 day limit is appropriate, particularly if internal review is not mandatory. However the Panel believes the legislation should make it clear that agencies should make decisions on review as soon as is possible, rather than using the full time allowed to them. The time taken by agencies in making decisions should be monitored by the Information Commissioner. As noted earlier, the Panel believes that time limits should be expressed in working days.

RECOMMENDATION:

Recommendation 91

Internal review decisions should be made as soon as possible by agencies. If a decision is not made within 20 working days the agency shall be taken to have affirmed the original decision.

Recommendation 92

The Information Commissioner should monitor the time taken by agencies in making decisions on internal review.

Process

When applicants are first informed in the statement of reasons that they have been refused access to a document or part of a document, it would be desirable if they could also be informed how any application for internal review would be dealt with. This should either list the names of the people who might possibly be responsible for internal review of the decision, or at least the level in the agency at which it will be considered. This information may make it easier for the applicant to make an informed decision as to whether to make use of the internal review procedure. The openness of the FOI process would be enhanced if agencies listed on their websites the people who are members of their FOI teams and those who have the responsibility for conducting internal review.

RECOMMENDATION:

Recommendation 93

The statement to the applicant conveying reasons for decision should include information about who would conduct any internal review, specifying either the names of those authorised to conduct the review or the level of the agency at which the review would be conducted. Agency websites should list the names of people currently responsible for processing FOI applications and internal review.

Writing

The Act requires an application for internal review to be in writing and state an address to which notices may be sent to the applicant. There seems no reason why an applicant should not be able to use email to make a request for internal review. This would be a quicker and at least equally secure as a means of communication as ordinary mail. However it would be reasonable not to allow applications to be made by text or other digital means at present.⁵⁰⁴

⁵⁰⁴ See chapter 16.

RECOMMENDATION:

Recommendation 94

Applications for internal and external review should be able to be made by email, as well as in writing.

19.2 External review

The discussion paper provided this background information —

The primary requirement of external review is that the reviewer is and is seen to be independent of government. There are a number of models that have been adopted in Australia and overseas. In Canada, where the external review function is performed by an Information Commissioner, independence is secured through the appointment process which involves consultation with the leaders of all recognised political parties in both Houses of Parliament and the appointment is approved by a resolution carried by both Houses. In four Australian jurisdictions the external review function is conducted by a tribunal – at the Commonwealth level by the Administrative Appeals Tribunal, in NSW by the Administrative Decisions Tribunal, in Victoria by the Victorian Civil and Administrative Tribunal and in the Australian Capital Territory by the Administrative Appeals Tribunal. In three others, external review is the responsibility of an Information Commissioner – Queensland, Western Australia and the Northern Territory. In two the function is performed by the Ombudsman – South Australia and Tasmania.

Two jurisdictions are likely to change. The Western Australian Government wants to have appeals heard by State Administrative Tribunal rather than the Information Commissioner, though the latter would continue to have an important role in administering the FOI Act and in the conciliation of matters after internal review. The Commissioner will also have power to conduct reviews of the internal FOI processes of agencies. Legislation has been passed by the Legislative Assembly but not by the Legislative Council. The new Commonwealth Government is planning to replace the AAT as external reviewer by a new FOI Commissioner, who would also have an extensive role overseeing FOI generally. The FOI Commissioner would take over the function of the Ombudsman in investigating delays and complaints about FOI, as well as a series of functions recommended by the ALRC/ARC Report in 1995. Queensland began with a hybrid Information Commissioner/Ombudsman model but currently has an Information Commissioner, with FOI removed entirely from the Ombudsman's jurisdiction.

In November 2007, the Queensland Department of Justice and Attorney-General published a discussion paper on "Reform of civil and administrative justice". This included a list of courts and tribunals falling within the scope of

the study where reforms are being considered. The list included the Information Commissioner.

The first issue that arises is the way the external review should be conducted, and what kind of body is better adapted to undertake this task. Information Commissioners and Ombudsmen are generally considered to be able to provide quicker and cheaper adjudication than more formal judicial proceedings. However tribunals such as VCAT have proved that tribunal procedures can also be adapted to provide systems for dealing with FOI that match those of Information Commissioners. All review bodies have made increasing use of mediation. The proposed system in Western Australia will use the Information Commissioner as mediator and to help distil facts for decision by the State Administrative Tribunal if the matter has to be decided there. That Tribunal frequently decides matters on the papers.”⁵⁰⁵

Submissions

The Queensland Council for Civil Liberties said —

On the question of external review the Council’s general impression is that the model used in Queensland has been functioning well and we see no reason to adopt the tribunal model in Queensland.⁵⁰⁶

The Queensland Ombudsman said —

In my submission to LCARC, I explained why I was in favour of the establishment of a merits review tribunal in Queensland, similar to the Commonwealth AAT. I note that the Government recently announced (on 12 March 2008) that it intends to establish a civil and administrative review tribunal, and has formed an independent panel of experts to advise the Government on how best to implement the tribunal. The Office of the Information Commissioner is identified in material accompanying the announcement as one of the bodies whose determinative powers may be transferred to the new tribunal. I support that proposal. I am in favour of stream-lining administrative appeal rights in Queensland and vesting such rights within one body, made up of tribunal members with relevant expertise in the various areas of jurisdiction.

As the Panel has noted, tribunals such as VCAT have proved that tribunal procedures are able to be used successfully to hear FOI appeals. Today, tribunals are established with a view to being fast, cheap, relatively informal and more specialised than a court-based review system.⁵⁰⁷

⁵⁰⁵ FOI Independent Review Panel discussion paper, pp. 134-135.

⁵⁰⁶ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 21.

⁵⁰⁷ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 15 (footnote omitted).

Australia's Right to Know (RTK) said —

RTK supports the retention of a review capacity for the Information Commissioner in Queensland. However, applicants should have the alternate option of appealing directly to a Queensland Administrative Tribunal.

While Information Commissioners do have the capacity to assist with external review, the option of tribunal review is an important component of any effective scheme. A hearing in an independent tribunal would allow applicants to directly hold public servants accountable for FOI decisions in a public forum. The value of the AAT in the Federal jurisdiction in improving FOI through decisions has been significant in recent years.⁵⁰⁸

The University of Queensland said —

The University supports the status quo of external review applications being considered by the Information Commissioner. The main advantage with the Information Commissioner Model is that it is more flexible and less formal than a tribunal. A move towards a tribunal model for external review may have detrimental impacts on departments and agencies as well as applicants, with the main concern being the potential for significant increases in costs to access external review.⁵⁰⁹

The Environmental Defenders Office (Qld) submitted that either the Information Commissioner or the Ombudsman should conduct external review “with the focus on timeliness and simplicity of process”.⁵¹⁰

Megan Carter pointed out that she had worked with FOI regimes utilising all methods of external review mentioned in the Panel's discussion paper and several hybrid models. She said —

My personal preference has been for the Information Commissioner model as offering the most accessible, affordable review option for the applicant. Most tribunal systems become legalistic, with both sides frequently engaging legal representation (involving significant costs), and very formal rules and procedures. Both Ombudsmen and Information Commissioners avoid most of these problems and facilitate the ordinary citizen having access to justice.

Information Commissioners have the advantage of concentration of knowledge in the field of FOI ...⁵¹¹

⁵⁰⁸ Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 10.

⁵⁰⁹ The University of Queensland submission to the FOI Independent Review Panel discussion paper, pp. 10-11.

⁵¹⁰ Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. submission to the FOI Independent Review Panel discussion paper, p. 19.

⁵¹¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, pp. 22-23.

The Office of the Information Commissioner provided a description of the way the office conducts reviews.

The majority of applicants for external review are individuals (75%), with a small proportion of applications made by prisoners (9%), companies (7%) and lobby and community groups (2%). Most applications relate to access to documents (94%), with a small number relating to amendment of records (3%), and fees and charges (3%).

There has been an increasing trend of applications relating to whether searches undertaken by the agency have been sufficient. In many cases an application will involve both sufficiency of searches and refusal of access to documents. Where sufficiency of search issues are involved, there can be a significant increase in the work required by the OIC and parties in the review to ascertain whether further documents exist and should be located by the agency. Such reviews generally take a longer period of time to resolve, with numerous communications between the Office and parties in the review, particularly where new documents that are located during further searches undertaken by the agency and provided to an applicant raise further issues regarding additional documents that should exist. External review of applications is currently conducted on the basis of the documentation before the decision-maker, including correspondence from the parties and file notes of telephone conversations between staff of the OIC and parties to a review. While formal hearings are provided for in Part 5 (External review) of the FOI Act, external reviews do not currently involve formal hearings.

Informal resolution

As noted in the Discussion Paper, an important feature of the external review process is that the OIC attempts to informally resolve matters wherever practicable and appropriate. A large proportion (approximately 75%) of external review applications are resolved through informal resolution methods, including providing a preliminary view, either orally or in writing, of the strengths and weaknesses of a participant's case. The relative informality of the process, as compared to some other models in the Discussion Paper, is advantageous for individual participants who often are not familiar with government operations, processes and legislative processes. In this respect the Office has noted an increasing trend in external review applications by individuals that involve personal or sensitive documents held by government about people, such as information regarding adoption, relationships and health matters.

It is considered that the key issue for the effectiveness and efficiency of the OIC that would be associated with any alternative model, including amalgamation of the OIC with other tribunals and similar bodies is whether the external review body could continue to use existing informal resolution processes that have proven to be highly effective in resolving external reviews.

As noted above, a key disadvantage of amalgamation would be the loss of the ability to tailor processes to specifically address the needs of the issue dealt with by a single tribunal and the stakeholders who use the tribunal. The increased formality and adversarial nature of a general review body, is likely to reduce the effectiveness of the body in resolving issues in the majority of external reviews, particularly where an explanation to a party over the telephone or by correspondence of how the law applies may be all that is required to gain understanding and acceptance of the outcome. Further, the majority of applicants are not legally represented and many are not familiar with government processes and legal concepts.

Decision

As set out above, informal resolution is usually attempted at the outset of each external review and many, if not all, issues in an external review are often resolved informally. When it becomes apparent that informal resolution of all the issues in an external review will not be possible, any outstanding issues are resolved by a written decision which finalises the external review.⁵¹²

The issues

Since the publication of the discussion paper the Government has announced (as noted by the Queensland Ombudsman) that it intends to establish a civil and administrative tribunal. To that end it has established an independent panel of experts to provide advice on how best to implement the tribunal. One of the Terms of Reference includes providing advice on the precise scope of the tribunal's jurisdiction, including which of the 36 different bodies performing civil and administrative justice should remain outside the tribunal.

This Panel is also required by its Terms of Reference to report on the effectiveness of (among other matters) the review process under the FOI Act and the ways in which it can be streamlined and made more efficient and user-friendly.

The Panel, conscious of the possibility that the Information Commissioner is one of the tribunals that could be subsumed in the civil and administrative tribunal, has approached the issue on the basis of recommending the system it considers would best suit the administration of FOI and the adjudication of FOI disputes. The Panel's first preference would be for the Information Commissioner to continue to be the external review body in FOI matters. The Panel's second preference would be for a dual system of external review. This would use as a primary resource the specialist experience of the Information Commissioner. This would be supplemented by the ability of the tribunal in particular matters to hold hearings or make decisions on the papers and deliver decisions setting precedents that the Information Commissioner could apply in later cases. The third preference would be for the tribunal to take over the external review function, subject to the Information Commissioner maintaining a

⁵¹² Acting Information Commissioner submission to the FOI Independent Review Panel discussion paper, pp. 3-4.

role attempting to mediate disputes before they go before the tribunal, either for a hearing or for determination on the papers.

In the next chapter, the Panel discusses the roles it believes should be performed by the Information Commissioner. These include the role of FOI-monitor, recommended for the Commonwealth by the ALRC/ARC Report in 1995, that the new federal Labor Government has committed itself to implementing. The Information Commissioner's ability to perform those other functions would not be affected by the office continuing to be the external reviewer. Indeed they would be enhanced by the dual role. The Panel has taken care in allocating various functions within the office of the Information Commissioner to ensure there could be no perception of possible bias in the performance of the external review function. The aim is to ensure that the external review function informs the other functions of the office, but is not influenced by them. In that chapter, the Panel also takes into account the possibility, or even likelihood, that Queensland will adopt a legislative privacy regime that includes the appointment of a Privacy Commissioner.

The Panel considers the Information Commissioner should continue to exercise an external review function for the following reasons:

- It is a specialist body, completely conversant with the legislation and its administration.
- It should be able to provide the quickest and least expensive external reviews.
- It has most of the powers necessary to deal with appeals raised by applicants (though see below for one additional power it should be given and for some minor changes to existing provisions).
- The absence of court or tribunal-style trappings is an advantage for applicants and agencies. It provides a less confrontational and informal atmosphere and is far less likely to result in either side electing to be represented by legal counsel, thus reducing costs that might be incurred.
- It does not disadvantage applicants living outside the major cities as it can use telephone contact and allow submissions in writing or over the internet.
- It is also less expensive for the Government to support the Information Commissioner's office than it would be to fund a court or tribunal.
- Unlike the Ombudsman, it can provide binding determinations rather than mere recommendations.

As was noted in the discussion paper, one disadvantage of the external review function being given to the Information Commissioner is the possibility that it could lead to a perception of conflict of interest or a perception of bias. However, the Panel believes it is possible to isolate the mediation and review functions within the office so that these possible criticisms will have no foundation. (See the reference below, to the practice the Office of the Information Commissioner adopts, in the extract from a judgment by Helman J.) The proposed organisation of the Office of the Information Commissioner is dealt with in the next chapter.

The Office of the Information Commissioner says it does not now conduct formal hearings, but reaches decisions on the papers, where the review cannot be settled

through mediation. This may have advantages for many of the people seeking to review decisions by agencies. However, as submitted by Australia’s Right to Know, there are some applicants who want a formal hearing so that they can “directly hold public servants accountable for FOI decisions in a public forum”.⁵¹³ If the Information Commissioner is to retain the sole responsibility for external review, it should be prepared to use the powers given in section 83 and elsewhere to conduct public hearings in appropriate matters.

RECOMMENDATION:

Recommendation 95

External review should be carried out by the Office of the Information Commissioner. The review process should begin with mediation by the Office of the Information Commissioner.

The proposed Queensland Civil and Administrative Tribunal

As indicated above, the Panel considers that most aspects of FOI would be better dealt with by a reviewer expert in the field, than by a generalist tribunal.

As the discussion paper⁵¹⁴ and this report explain, FOI, unlike other administrative reform measures, operates in three dimensions – legal, bureaucratic and political. It is not just a purely legal exercise. The High Court has explained that the expression the public interest, “classically imports a discretionary value judgment to be made by reference to undefined factual matters”.⁵¹⁵

There are, however, several functions in relation to FOI that the Panel would like the proposed tribunal to exercise. The first, mentioned in chapter 15, is to determine appeals made against any decision by the Information Commissioner declaring an applicant vexatious.

The second and third matters arise from the Information Commissioner’s external review function and concern questions of law. In the present Act, s. 97 provides that the Commissioner may refer a question of law to the Supreme Court to hear and determine. The Panel considers this should be amended to allow questions of law to be referred to the new tribunal. The Panel also considers that applicants should be able to appeal any decision of the Information Commissioner to the tribunal, but only

⁵¹³ Australia’s Right to Know submission to the FOI Independent Review Panel discussion paper, p. 10.

⁵¹⁴ FOI Independent Review Panel discussion paper, p. 91.

⁵¹⁵ *O’Sullivan v. Farrer* (1989) 168 CLR 210, at 217, per Mason CJ. Brennan, Dawson and Gaudron JJ., quoting Dixon J., *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, at 505.

on a question of law. Judicial review to the Supreme Court will remain available, in appropriate circumstances, under the *Judicial Review Act 1991*.

RECOMMENDATIONS:

Recommendation 96

The proposed Queensland Civil and Administrative Tribunal should be given jurisdiction to —

- (1) Hear and determine questions of law referred to it by the Information Commissioner at the request of a participant in a review, or on the Commissioner's own initiative;
- (2) Hear and determine an appeal from a decision of the Information Commissioner, but only on a question of law;
- (3) Hear and determine an appeal from a decision by the Information Commissioner declaring a person a vexatious applicant.

Recommendation 97

The Information Commissioner would be bound by decisions of the tribunal and follow the interpretation of the law adopted by the tribunal.

Fees

There is currently no charge for an application for external review. It is sometimes suggested that a charge might be imposed as a demand management tool, to dissuade over-use of the system and in particular to make it less likely that frivolous or unworthy appeals are brought. The Panel considers there are other means by which a proper use of the review function can be achieved. In particular the Information Commissioner already has the power under s.77 to decide not to deal with an application if it is frivolous, vexatious, misconceived or lacking substance or the applicant has failed to cooperate in advancing the processing of the application.

Imposition of a fee or charge would be a blunt instrument likely to hurt genuine, worthy applicants, particularly as there is no provision for an order for costs against an agency if the applicant is successful.

RECOMMENDATION:

Recommendation 98

An applicant should not be required to pay a fee for external review.

Time limits

There are currently no time limits specified for the conduct of external review. The Information Commissioner, in conformity with a recommendation of the Strategic Management Review, has a target of resolving all incoming external reviews in a timely manner such that the median number of days to resolve or finalise an external review is 90 days. It believes it will meet this target in 2007-08.⁵¹⁶ Most Australian jurisdictions have no set time limits for external review, though Victoria, Tasmania and Western Australia specify a 28 or 30-day limit.

In response to a request from the Panel, the Information Commissioner provided a specific submission focussing on whether a time limit should be imposed on external review in Queensland. The Acting Information Commissioner noted the Western Australian and Tasmanian time limits but said —

that from practical experience of the external review process involved, a 30 day time limit for an external review process is in most cases not practicable, particularly as obtaining copies of documents, including exempt matter, to consider and obtain preliminary submissions can easily take 3-4 weeks. Similarly, if any searches are required before exemption claims can be considered, a 30 day time limit would not be possible.⁵¹⁷

The Acting Information Commissioner raised four main reasons why some external reviews took longer. The first was sufficiency of search. She said there had been an increase in the number of external review applications that involved issues relating to whether the searches undertaken by the agency have been sufficient, and that these took longer to resolve because there tended to be more steps involved. The second problem concerned multiple parties to a review. The third concerned requests for extensions of time made by agencies, applicants and third parties. The fourth concerned the complexity of certain reviews, including jurisdictional issues.⁵¹⁸

She summarised her position —

⁵¹⁶ Office of the Information Commissioner, Annual Report 2006-07, p. 18.

⁵¹⁷ Acting Information Commissioner letter to the FOI Independent Review Panel, 20 March 2008.

⁵¹⁸ Acting Information Commissioner letter to the FOI Independent Review Panel, 20 March 2008.

I consider that the most appropriate way of ensuring timeliness for external reviews is to maintain the various performance measures in place regarding timeliness, and reporting of achievement against these measures, as noted above, while the current performance measures have been in place, significant improvements in timeliness have been made. I do not consider that a legislative time limit on external reviews would improve timeliness, or assist applicants or other parties to an external review.⁵¹⁹

The Panel believes applicants should be entitled to know that a review of their application will be dealt with within a specified time frame, and not just that the median applications dealt with by the Information Commissioner in a particular year will be 90 days. This view is widely supported by the concerns of time frames at external review expressed in submissions to the Panel and in surveys and interviews conducted by the Panel. Inevitably, there will be some cases where an extension of time will be necessary for some of the reasons canvassed by the Acting Information Commissioner. However, applicants are entitled to expect that most cases will be dealt with within the specified period.

The Panel considers there would be some advantage in setting a two-stage timetable, the first to cover the mediation process, and the second the final determination of the application. The mediation process should be able to be completed within 20 working days. In recent years, mediation has been successful in resolving the dispute between the applicant and the agency in at least 70 per cent of all cases. Similar success rates are experienced in the Commonwealth's Administrative Appeals Tribunal and the Victorian Civil and Administrative Tribunal.⁵²⁰ Knowledge (on all sides) that there was a time limit might even help this process, and would be unlikely to hinder it. If the parties do not reach an agreement within 20 working days, or an extended period agreed to by them) the mediator should prepare a report noting those areas where the parties were able to agree and those where they differed, and preferably the parties should sign or witness this. This report should be made available to the person in the Office of the Information Commissioner who then becomes responsible for the resolution of the dispute.

The completion of that report should trigger the next stage of the determination. The parties should be allowed 10 working days to prepare written submissions and another 10 working days to reply to the submissions from the other side. If a question of law has been relevantly raised, the Information Commissioner should consider whether this should be referred directly to the tribunal.

The Panel believes the decision-maker should then have up to another 40 working days to prepare and present a determination. Throughout this period the parties should be able to request meetings to see whether they can negotiate a settlement, with the aid of the mediator or otherwise. However, unless one or other party was prepared to make some concession on its earlier position, there would be no

⁵¹⁹ Acting Information Commissioner letter to the FOI Independent Review Panel, 20 March 2008.

⁵²⁰ Administrative Appeals Tribunal Annual Report, 2006-07 at p. 124; Victorian Civil and Administrative Tribunal Annual Report, 2006-07 at pp. 14-15.

advantage in having such a meeting, and there could be the disadvantage of delay and inconvenience for other parties.

If the decision cannot be completed in the specified time, the person responsible for making the determination should inform the parties and explain why the deadline cannot be met. One possibility is that the decision-maker may have to use the powers given to the Information Commissioner to obtain further material from the agency. Under the present law, the Information Commissioner may require the agency to produce certain documents (s. 76), may require better reasons (s.82) and may obtain more information and documents and compel people to attend a hearing (s.85). The Panel believes that at this late stage of the matter (i.e. about three months after the review process has begun) the Information Commissioner should be able to use a further power not presently in the legislation, namely the power to enter premises and obtain documents. Under the Northern Territory *Information Act*, for example, the Information Commissioner “is entitled to full and free access at all reasonable times to the records of a public sector organisation” (s. 87 (2)(d)). Under the UK *Freedom of Information Act*, the Information Commissioner may obtain a warrant from a circuit judge to enter and search premises where it appears the public authority is failing to comply with a requirement of the law, including an information notice issued by the Commissioner (Schedule 3). The Scottish Information Commissioner has power to issue an information notice requiring an agency to provide the information necessary, and there are criminal sanctions if documents are destroyed. The present Scottish Information Commissioner, Kevin Dunion, considers that having been equipped with powers, it was not appropriate for him to decline to use them if this was to the detriment of any applicant or the public interest. He says that as a result of deciding that the demands of the legislation should not be quietly ignored or relaxed, the Scottish authorities “do strenuously attempt to meet the deadlines and in the vast majority of cases they do ...”⁵²¹

The Panel believes powers such as those available in the Northern Territory and United Kingdom jurisdictions might only need to be exercised in unusual circumstances where “sufficiency of search” problems have arisen and the agency has been unable to satisfy the Information Commissioner’s inquiries under the other powers available. It is unlikely the power would ever be used, but its existence would reinforce the Information Commissioner’s prospects of obtaining the cooperation of agencies.

The Panel considers that mandating timelines for external review in this way would provide a necessary and desirable incentive for the timely settlement of reviews. It would not be possible to provide such guidelines if external review was to be carried out by the civil and administrative tribunal. This is another reason why the Panel favours the Information Commissioner as the external reviewer.

The Acting Information Commissioner believes that the review process would also be assisted by making some relatively minor changes to existing sections 81, 85 and 88(2) of the Act. Section 81(1) says that on a review by the Commissioner, the agency or Minister that made the decision under review has the onus of establishing that the

⁵²¹ Dunion, K., Paper delivered at the 5th International Conference of Information Commissioners, Wellington, New Zealand, 29 November 2007, pp. 3-4.

decision was justified or that the Commissioner should give a decision adverse to the applicant. The Acting Information Commissioner says some applicants who raise sufficiency of search issues have refused to respond positively to requests to supply better and further particulars of their claim, arguing that the sole onus is on the agency/Minister. In a letter dated 20 May 2008, replying to a request for clarification of earlier submissions, the Acting Information Commissioner said on this issue —

... some refinements to the Act may improve timeliness and applicant's expectations. It may be useful to clarify s. 81 of the Act in plain English for literal applicants either by way of an explanatory note/example under the provision. A provision which clearly articulates a positive obligation on parties to assist the Information Commissioner during a review may improve understanding of the obligations of the parties and the accessibility of the legislation for applicants.⁵²²

The Acting Information Commissioner also suggested that s. 81 should be broadened to specify that the agency/Minister also bore the onus in s. 96A applications to declare a person a vexatious applicant.

Section 85 gives the Commissioner power to obtain information and documents and compel attendance. Section 88(2) gives the Commissioner power to require an agency to conduct further searches for a document. In relation to these sections, the (new) Acting Information Commissioner wrote —

Currently, s. 85 does not provide a clear power to issue a direction to require specific searches or other acts to be performed. While in the majority of cases agencies cooperate to conduct searches required by the Office, in some cases agencies refuse to conduct searches, do not carry out searches in a timely and cooperative manner, or do not provide sufficient information for the Office to determine the sufficiency of search efforts, despite the Office having carefully considered and determined what searches are necessary in the circumstances.

The Commissioner has a power under s. 88(2) to require an agency or Minister to conduct further searches for a document. It would be useful for this power to be clarified to ensure that it is understood the Commissioner may order specific searches or acts to be performed as opposed to a general search. Given the similarity of the nature of the powers under ss. 85 and 88(2) it may be useful to combine the provisions. This would bring the benefit of formalising the process under section 88(2) to one of a written notice with prescribed content and providing consequences for failure to do so under s. 94.

A clear power to issue a direction in such circumstances would:

- enable the Office to direct that specific searches be undertaken to improve effectiveness and efficiency;
- clarify the Commissioner's powers to order specific and general searches;
- minimise the resources expended by the parties;
- encourage cooperation with the objectives of the regulatory framework.

⁵²² Acting Information Commissioner letter to the FOI Independent Review Panel, 21 May 2008.

It would also be beneficial to ensure the Commissioner can direct that an agency or person can be required to produce a specific document to facilitate the review. For example, where a review involves an audio tape and the agency or another party claims exemptions over certain material but has not specifically identified the matter, it would facilitate the review to require the agency to prepare a transcript and specifically indicate by, for example, redacting the transcript, the specific matter it claims is exempt. Such an approach enables more precise submissions to be considered in decision-making in light of difficulties associated with referring to certain types of media. In some cases where such documents have been required by the Office, agency cooperation has not been forthcoming and has resulted in longer time frames.⁵²³

The Panel considers these changes would enhance the review process and recommends that the sections be amended accordingly.

RECOMMENDATIONS:

Recommendation 99

The following time limits and procedures should apply to external review conducted by the Office of the Information Commissioner:

- (1) Mediation should be completed within 20 working days of an application being made. The mediator should obtain the approval of the parties to a report explaining the extent to which they had reached agreement, and/or the differences that remained between them.
- (2) The parties should make submissions concerning any remaining issues that are in dispute within 10 working days.
- (3) The parties should have a further 10 working days to respond to those other submissions.
- (4) The Office of the Information Commissioner should make a determination within 40 working days of the conclusion of mediation.
- (5) If no determination has been made in the specified period, the parties must be notified of the reasons for any delay.
- (6) The Information Commissioner should be able to use enhanced powers of entry and search if it is considered necessary to resolve the dispute. These powers should be based on those in the Northern Territory.

⁵²³ Acting Information Commissioner letter to the FOI Independent Review Panel, 21 May 2008.

Recommendation 100

Sections 81, 85 and 88(2) be amended to clarify the obligation on parties to a review to assist the Information Commissioner; to extend the onus on an agency/Minister to cover proceedings under s. 96A; to clarify the powers of the Commissioner to order specific searches for documents; and to allow the Information Commissioner to order that documents be provided in a specified form.

Conduct of external reviews

The present legislation gives the Information Commissioner considerable discretion in the conduct of external reviews. Currently, the essential steps are these —

[19] ... First, the applicant must be given an opportunity to present the applicant's "views" to the Information Commissioner: see [s. 83\(3\)\(b\)](#). The most satisfactory way of presenting those "views" is to provide written submissions accompanied by any relevant statements of evidence in writing. Those submissions and accompanying statements will not come to the Commissioner in a vacuum because the Commissioner will have before him or her details of what passed between the applicant and the relevant agency or Minister. The second essential step will be for the Commissioner to provide a copy of any submission and any statement received from the applicant to the agency or Minister for comment or submission or provision of further statements. If no comment, or submission or statements are provided to the Commissioner by the agency or Minister, the Commissioner may then be in a position to conclude the review if there is no other participant in the review. If any comments, submissions or statements are received from the agency or Minister the Commissioner should then provide copies of them to the applicant for comment or submissions in reply, and then, after any further comments are received from the applicant, the Commissioner may be in a position to make his or her decision on the review. Any other participants must, of course, also have been accorded opportunities to present their views. All participants will then have been given the opportunity to present their views and to respond to those of other participants. The details of the way in which reviews are conducted will vary depending on the circumstances of individual cases, but, in the end, whatever variations there are in the procedure from case to case, whether they be informal or formal or a mixture, the review must be conducted in such a way as to ensure that all participants are heard. All participants must know what is said against them, and be given the opportunity to respond to what is said against them.

[20] ... The progress of the external review was stalled at the outset by the applicant's objection to the second respondent's expressing a preliminary view, insisting that it was entitled to a directions hearing, objecting to the timetable initially set by the second respondent, requesting an opportunity to attempt informal mediation, and by various other complaints including that concerning an apprehension of bias in the second respondent.

[21] It is clear that the second respondent was attempting at the outset to clarify or refine the issues on the external review, and to that end reached a preliminary view on one of the applicant's grounds based on the extensive argument already prepared by the applicant and set out in its solicitors' letter of 26 May 2006. Such a course was consistent with the requirement of [s. 72\(1\)\(b\)](#) that an external review be conducted as expeditiously as the requirements of the Act and a proper consideration of the matters before the Commissioner permits. It is a step often taken - and properly so - by judges in an effort to clarify issues and to test possible conclusions. At the beginning of the review process there was, in my view, no need to provide extensive reasons since the object of the expression of a preliminary view was to do no more than I have explained ... The second respondent's reaching a preliminary view did not signify a mind closed to persuasion to a contrary view and provides no proper basis for an apprehension of bias. In any event, at the hearing I was told ... that the future conduct of the external review will be by an Assistant Information Commissioner other than the second respondent and who has not previously been involved in the review ...

[22] [Section 72\(1\)\(a\)](#) provides that the procedure to be followed on an external review is, subject to the Act, within the discretion of the Information Commissioner ... The essential steps must be as I have described, and they can be followed easily without a directions hearing. The first step is to have the 'views' upon which the applicant relies. It is quite consistent with the Commissioner's powers and duties under the Act that a date be set by which that step must be taken ... There can be no objection to setting performance goals, which of course may not be achieved in all cases: it is a common practice in courts to set such goals to ensure the orderly progression and timely disposal of cases. Once an applicant's submissions, comments, and statements of evidence, if any, have been presented, a response obtained from those resisting the application, and any reply received from the applicant, the question of further directions may arise (including directions as to receiving oral evidence) ... It must be borne in mind that what is contemplated in the legislation is a procedure with lack of formality and technicality conducted with reasonable expedition, not an elaborate and costly legal proceeding.⁵²⁴

The procedure outlined above does not include a formal step of mediation of the kind the Panel is recommending. It would, however, be easily accommodated within it. The mediation process would also benefit from the practice mostly adopted by the Information Commissioner of providing the parties with its preliminary view of the grounds relied on in the application. Setting time limits, as the Panel proposes, would assist the Information Commissioner's task.

Guidelines

The Information Commissioner is given a great deal of flexibility by the legislation in its conduct of the external review function. The imposition of timelines would impose some restrictions but the Panel believes this would be beneficial for applicants

⁵²⁴ Helman, J., *Community Care Inc. v Taylor, Information Commissioner & ors* [2007] Qld Supreme Court 148 (19 June 2007).

and for agencies responding to them. It would also be useful and helpful if the Information Commissioner published guidelines explaining the way it conducts external reviews and made these available on its website.

RECOMMENDATION:

Recommendation 101

The Information Commissioner should publish detailed guidelines explaining the way external reviews are conducted.

Decisions and confidentiality

Section 89 of the present Act requires the Commissioner to provide a copy of any decision made, including the reasons for the decision, to each participant in the relevant review. It says the commissioner “may arrange to have decisions published”.

The Panel considers this provision needs to be amended in a number of ways.

The decisions of the Information Commissioner are a vital part of the administration of the Act. Yet, as noted earlier, the Commissioner in recent times has rarely made more than a very short summary of decisions available to the public, or to FOI administrators. This policy means that there is insufficient knowledge available about why the Information Commissioner is determining applications for review. It is not sufficient that, as currently occurs, the Information Commissioner explains that a particular exemption should or should not be applied. As the Panel has stressed, decisions on the application of public interest tests depend on particular fact situations. These need to be explained in detail so that the relevant decision can be properly appreciated.

There are probably many occasions when the Information Commissioner’s decision will depend on a reading of documents that are held to fall within an exemption. These, and arguments relating to them by the relevant agency, will not be able to be made public without revealing the content of the document. That should not be a bar to the publication of the remainder of the Information Commissioner’s decision. It is a common practice, for example, for the Administrative Appeals Tribunal to withhold parts of its decisions that concern material that is not being released.

The Panel considers that the Act should contain a specific provision requiring the publication of all decisions by the Information Commissioner, including the reasons for each decision, but that the Information Commissioner should have power to refrain from publishing those parts of the decisions that contain exempt or otherwise confidential material.

RECOMMENDATION:

Recommendation 102

Section 89 of the Act should be amended to require the Information Commissioner to publish decisions and reasons for decisions in all matters. However the Information Commissioner is not obliged to publish those parts of the decisions and reasons that contain exempt material, or where the reasons would reveal that material, or where the Information Commissioner considers material should be treated as confidential.

20 The Office of the Information Commissioner

Chapter 8 of the discussion paper dealt with the administration of FOI in Queensland, including the role of the Information Commissioner. As well as the Information Commissioner's role in external review,⁵²⁵ it canvassed a number of other functions that have been proposed for the Information Commissioner, many of which fall under the heading of FOI monitor, the description adopted by LCARC in 2001. Other reviews that made similar recommendations include the 1995 ALRC/ARC Report and the South Australian Legislative Review Committee Report in 2000. This chapter examines those proposals in more detail. It also takes into account two other important issues that were raised in chapter 8 of the discussion paper, namely information policy and the protection of privacy interests. The Panel considers both are directly relevant to the way in which the Office of the Information Commissioner should be structured and with its functions.

The present Act, in s. 101C, specifies the functions of the Information Commissioner as being "to investigate and review decisions of agencies and Ministers" of various types that are then detailed in the section. The Information Commissioner may also make declarations of vexatious applicants (s. 96A) and provide information and help to agencies and members of the public on matters relevant to the external review of decisions and the Information Commissioner's own office.

20.1 Other functions

The LCARC review considered the proposals made by the ALRC/ARC Report for the creation of an FOI Commissioner, and also considered functions variously proposed in the original report by the Electoral and Administrative Review Commission, by the WA Information Commissioner, Ireland's Information Commissioner and various members of the public.⁵²⁶ It proposed an FOI monitor be established as an independent entity with the following functions:

Monitoring functions –

- Conducting agency audits
- Preparing annual and other reports on the operations of Queensland's FOI regime
- Identifying and commenting on legislative policy issues.

Advice and awareness functions –

- Providing a general point of contact and central resource for agencies and citizens
- Promoting community awareness and understanding of the FOI regime
- Providing guidance on how to interpret and administer the Act
- Educating and training agencies and community groups.

⁵²⁵ The Panel's discussion of, and recommendations on, the Information Commissioner's role in external review are detailed in the preceding chapter of this Report, chapter 19.

⁵²⁶ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 30.

As mentioned in the Panel's discussion paper,⁵²⁷ the ALRC/ARC report proposed that the functions of the FOI Commissioner should include:

- auditing agencies' FOI performance
- preparing an annual report on FOI
- collecting statistics of FOI requests and decisions
- publicising the Act in the community
- issuing guidelines on how to administer the Act
- providing FOI training to agencies
- providing information, advice and assistance in respect of FOI requests
 - at any stage of an FOI request
 - at the request of the applicant, the agency or a third party
- providing legislative policy advice on the FOI Act.⁵²⁸

In South Australia, the Legislative Review Committee thought there should be an Information Commissioner/Ombudsman who would, beyond providing external review:

- monitor the performance of agencies by means of specific audits
- produce an annual report of performance
- monitor annual statements provided by agencies
- provide a general contact point or external resource for members of the public
- oversight training of public servants
- issue administrative guidelines in operating and interpreting the act
- provide a mediation and conciliation facility to assist communications between applicants and agencies.⁵²⁹

None of the above proposals has been implemented to date. However, the new Federal Government has undertaken to implement the ALRC's Open Government Report, "and create an independent statutory Freedom of Information Commissioner to act as a whole-of-government clearinghouse for complaints, oversight, advice and reporting for freedom of information and privacy matters".⁵³⁰

The response of the Queensland Government to the LCARC Report was provided by the Attorney-General, Rod Welford. He said —

The Government agrees in principle that there are a range of functions in relation to FOI requiring better co-ordination. The Government notes that many of the functions referred to by LCARC are currently undertaken by a range of agencies including JAG and the Information Commissioner. For instance, JAG produces an annual FOI report, which is tabled in Parliament, has conducted training for practitioners on FOI and publishes information

⁵²⁷ FOI Independent Review Panel discussion paper, p. 135-136.

⁵²⁸ ALRC/ARC Report, p. 71.

⁵²⁹ South Australian Legislative Review Committee, *Freedom of Information Act 1991*, September 2000, p. 50.

⁵³⁰ Executive Summary: Labor's Information Policy, p. 1.

about FOI for both practitioners and the public on its website. In addition, applicants who are aggrieved by the conduct of agencies in dealing with their FOI applications may complain to the Ombudsman.

The Government is not convinced, however that it is appropriate or effective to establish a separate body or for the Information Commissioner to perform these functions given the potential for conflicts of interest. The Government will further consider how co-ordination can be improved.⁵³¹

Subsequently, the Queensland Government did create the independent office of the Information Commissioner (previously, the Ombudsman had an additional role as Information Commissioner) and removed the Ombudsman's power to hear complaints concerning FOI. However, as was indicated earlier, the Act creating the office did not include any of the functions that LCARC proposed should be given to the Information Commissioner. To the extent that any of them was taken up, responsibility for their implementation fell on a unit within JAG – the Department of Justice and Attorney-General.

JAG provided the Panel with a memorandum which is reproduced as Appendix 3, outlining the way it functions as the lead agency for FOI coordination across Queensland agencies. The Panel's conclusion from that material and from interviews and other research it has conducted with FOI practitioners, is that the JAG unit is so under-resourced that it finds difficulty in meeting the relatively limited aims of the Cabinet's implementation plan. For example, after three years the Freedom of Information Guidelines the unit is producing is less than half complete. Its public awareness campaign seems to be limited to what appears on its website. Its main achievement is its training program for agencies, and that is mainly conducted by external trainers. It is probably sufficient to note that JAG's commitment to this lead agency role is restricted to two full-time equivalent officers at levels PO 5 and AO 7/6.

It appears that the Information Commissioner has not seen its role as supplementing the lead agency work of JAG. Unlike JAG, it has not attempted to maintain regular contact with FOI practitioners in agencies outside external review business. Nor has it provided them with on-going advice about its conduct of external reviews, other than through its annual report and by providing on its website a very small number of decisions made by the Information Commissioner and summaries of the remaining decisions. For example, between July 2007 and March 2008 it reported having made 29 decisions. Of these only one was printed in full, and most were reported in summary form, containing between two and six paragraphs. These decisions constitute a small part of its work in settling external reviews through mediation processes. The Office has —

also published a suite of "FOI Concepts" on the website to assist participants in external reviews understand key concepts that are discussed during an external review. Such concepts refer to relevant legislation and decisions of

⁵³¹ Welford, R., Ministerial Response to LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 3.

courts, tribunals and the Information Commissioner. The FOI Concepts may also provide assistance to agencies and applicants during the FOI process.⁵³²

Ron Fraser, who worked in the Commonwealth Attorney-General's Department FOI section, has commented on the ALRC/ARC Report's recommendation in this regard —

Most commentators agree that there is a need for a body with the functions of monitoring, auditing and promoting the consistent and efficient administration of the FOI Act. FOI is not an area in which government agencies can be left entirely to their own resources. This is because of the complexity of the legislation, the self-interest of agencies in non-compliance with the full rigour of the legislative requirements, and the difficulties of keeping FOI knowledge current without central assistance. In this respect the FOI Act has more similarities to the *Privacy Act* than to the AAT and ADJR Acts.

By facilitating consistency and best practice an FOI Commissioner would contribute significantly to a more open administrative culture, which virtually everyone agrees is the major need if FOI is to succeed. Such an authority could be expected to work in partnership with agencies in achieving routine and well-informed compliance with the often complex and frustrating provisions of the present Act, and help to identify ways it could be simplified. Training in FOI could become a requirement for officers administering FOI or making FOI decisions. It would provide what we now lack, a continuing player committed to the legal policy of the FOI Act.⁵³³

Submissions

The Queensland Council for Civil Liberties wrote —

In the Council's assessment, both on the basis of the experience of its members and on the review of all the relevant literature, one of the critical issues for the proper functioning of the FOI system is agency culture. It is our view that a statutory body separate from the Information Commissioner/Ombudsman should be established with the tasks of:

1. Collecting statistics;
2. Publicising the Act;
3. Providing training to agencies;
4. Auditing the performance of agencies;
5. Promoting community awareness.⁵³⁴

⁵³² Acting Information Commissioner submission to the FOI Independent Review Panel discussion paper, pp. 5-6.

⁵³³ Fraser, R., "Where to next with the FOI Act? The need for FOI renewal – digging in, not giving up", *AIAL Forum No. 38*, p. 57, at p. 61.

⁵³⁴ Queensland Council for Civil Liberties submission to the FOI Independent Review Panel discussion paper, p. 21.

Megan Carter wrote —

The supervisory/advisory functions described for the FOI Monitor are crucial for ensuring the success of FOI and yet are not performed in most jurisdictions.

For most of its history the WA Information Commissioner fulfilled many of the FOI Monitor's role at the same time as the external review function. With careful separation of the functions of advising and reviewing, it seems to have worked well for them. Again ... adequate resources are essential, as combining certain roles in the one person would not be an option to avoid conflicts of interest.⁵³⁵

The Office of the Information Commissioner wrote —

The independence of the Information Commissioner from all parties in an external review is critical. This means it is important that the Office is not in a position of providing advice to agencies, applicants or other potential parties in a future external review. If the Office were to provide advice on a situation to either an agency or applicant and later on external review form an alternative view once all information and evidence was before the decision-maker, the person would likely protest that the Office gave contrary advice. The other party in the review may feel that the Information Commissioner cannot come to the external review with an open mind because they have already expressed a view and "helped" the "opposing" party. Such inquiries are therefore appropriately dealt with by the FOI helpline operated by DJAG or respective legal advisors.

Similarly, if the external review body also performed a role promoting a policy position in relation to the extent of access to documents, it may not appear to be consistent with the role of the Information Commissioner to objectively apply the provisions of the FOI Act. It is important to note that parties other than agencies sometimes hold strong objections to release of documents concerning them, and it is possible they may perceive the Office to have conflicting roles in such a situation and that this may influence their outcome on external review.⁵³⁶

Former Information Commissioner and current Queensland Ombudsman David Bevan wrote —

If the Information Commissioner's Office is to continue to exist, but its determinative powers are removed, then it could perform solely an oversight/FOI Monitor role, and focus on the administration of the Act. (As mentioned above, it may also be an option to give it the same oversight/monitoring role in respect of privacy.) While I was Information Commissioner, I made an Assistant Commissioner responsible for providing

⁵³⁵ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 23.

⁵³⁶ Acting Information Commissioner submission to the FOI Independent Review Panel discussion paper, p. 6.

information and assistance. The Office provided training to agency decision-makers and co-ordinated the preparation of information sheets for applicants and detailed practice guidelines for decision-makers. As far as I am aware, the Information Commissioner's Office no longer carries out this responsibility. Although the Department of Justice and Attorney-General provides training sessions for FOI decision-makers from time to time, no agency is currently discharging this important advice and awareness role.

... When the Information Commissioner's Office was first given responsibility for providing an advice and awareness role, we were careful to refer to it as "information and assistance" rather than advice, and to inform applicants and agencies that we were unable to give advice about specific cases. As the ALRC noted in its report (in recommending that determinative powers remain with the Commonwealth AAT but that a federal Information Commissioner be established to take on an advice and awareness role), providing advice to parties to a review could give rise to a conflict of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers.

I would envisage the FOI Monitor/oversight role as encompassing the following types of functions:

- to provide independent advice and assistance – for example, by preparing guidelines, information sheets and case studies, keeping an online repository of FOI cases and providing training to agency decision-makers, so to assist applicants and decision-makers to understand and correctly apply the provisions of the Act;
- to publicise and promote the Act;
- to collect FOI statistics from agencies and prepare an annual report;
- to audit the performance of agencies and their compliance with the requirements of the Act;
- to identify, and report on, problems arising in the administration of the Act and in the legislation itself, and to provide legislative policy advice on the FOI Act;
- to provide a central point of contact and central resource for agencies and members of the public;
- to act as a facilitator between applicants, agencies and third parties;
- to facilitate the resolution of disputes among applicants, agencies and third parties.

This role could be discharged by a restructured Office of the Information Commissioner or, subject to appropriate additional funding, by the Ombudsman's Office.⁵³⁷

⁵³⁷ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, pp. 16-17.

The issues

The Panel, like almost every other independent external reviewer of the implementation of FOI, is convinced that an independent external body, such as the Information Commissioner, should have a range of duties and powers to enhance the understanding of freedom of information in the community and in government, and its delivery by agencies as required by the law. The experience of the past 15 years of the FOI Act in Queensland mirrors that in other jurisdictions in Australia and elsewhere. As LCARC concluded seven years ago —

- to be an effective monitor the entity must be independent of government departments and agencies. On occasions, it might be necessary for the monitor to criticise executive government regarding matters such as the administration of the Act, resourcing that administration, and amendments to the Act;
- there would be a conflict of interest for an entity within the DJAG to monitor the DJAG's (and its statutory authorities') compliance with the Act. This would also affect public perception of the FOI monitor's impartiality; and
- if the FOI monitor is placed with government, it is more likely to be affected by changing government policies...⁵³⁸

If FOI is to be implemented successfully, the range of functions that needs to be given to the Information Commissioner, and that the Information Commissioner has to successfully give effect to, is quite extensive. The Panel's proposals go further than those of LCARC or the ALRC/ARC Reports. This is because the experience of FOI jurisdictions around the world suggests that the role of an independent FOI monitor needs to be even more significantly enhanced than was considered necessary at the turn of the century.

Monitoring and reporting functions

Chapter 10 of the discussion paper dealt with the reporting requirements in s. 108 of the Act. The questions raised there are examined in some detail in chapter 22 of this report. It will be seen that the Panel proposes a significant role for the Information Commissioner, in effect taking over responsibility for the preparation of the s. 108 annual report. The Information Commissioner would be responsible for determining what statistical and other material should be reported by agencies, for ensuring that the material is accurate, and then collating and analysing the material and publishing it in an annual report.

LCARC recommended that the Information Commissioner should conduct FOI audits of agencies, examining their practices and administration to identify any systemic problems. It said such a function would enable the Information Commissioner to gain an understanding of the types of applications received by agencies and specific difficulties which particular agencies might face because of resourcing issues, the

⁵³⁸ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 37.

nature of the documents held and the applicants usually encountered.⁵³⁹ The Canadian Information Commissioner publishes report cards on agencies in its annual report, identifying those where the performance in meeting standards for timeliness in answering requests, for example, was not at an acceptable standard. A bad report card would normally be investigated by the relevant parliamentary committee. The Canadian Information Commissioner says the reviews help the Information Commissioner appreciate the entirety of an institution's performance rather than being limited to the narrower perspective that comes from investigating specific complaints; they encourage institutions to put FOI performance higher on their priorities; the report cards create and disseminate a wealth of information about best practice in administering the program; and they assist Parliament in playing a more targeted and focused oversight role.⁵⁴⁰

The Panel believes the publication of report cards could be extremely beneficial for the practice of FOI in Queensland, provided they were broadly based and gave qualitative as well as quantitative assessments of the way agencies handled FOI requests. By giving agencies a red, orange or green light, they would indicate to relevant senior officers when and where FOI performance needed to be improved. Agencies would be likely to respond to parliamentary and media pressure if their report cards were unsatisfactory. They would also prompt the Information Commissioner to provide recalcitrant agencies with more assistance to improve their performance.

A further function mentioned under this heading by LCARC is identifying and commenting on legislative policy issues.⁵⁴¹ As noted in the discussion paper (at p. 137), the Information Commissioner did perform this function in its initial annual reports but this practice was discontinued in recent years, possibly because of the lack of any legislative authority for it. The Information Commissioner should be an important resource for LCARC in its consideration of the law and practice of freedom of information, and any changes that are proposed. In addition, the Information Commissioner should be able to provide advice on policy and legislative issues to agencies at their request. One legislative matter which the Information Commissioner should monitor is the way "public interest" issues are determined under the legislation. The Information Commissioner should also consult with experts in the fields of law and public administration, where necessary, to recommend any further legislative guidelines for the application of relevant tests.

In chapter 22, the Panel considers the adequacy of the present system requiring agencies to make annual reports on their FOI activities and will make recommendations that should make the statistics that are provided more meaningful and useful for government and the public in assessing the health of FOI. These statistics, internally generated, will not provide a sufficient picture of how FOI is used, and how it is perceived by users and the community. The Information Commissioner should be encouraged to conduct research into whether and to what extent the Act is achieving its stated objectives. The Office will be unable to conduct much of this

⁵³⁹ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 31.

⁵⁴⁰ Information Commissioner, Canada, Annual Report 2006-07, p. 23.

⁵⁴¹ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 32.

research with its own resources, but it should be allowed to engage outside consultants, including universities, to design and conduct surveys and studies.

The Information Commissioner should also monitor the material published by agencies through their information schemes, and the nature of their proactive disclosure activities outside the FOI regime.

Advice and awareness functions

LCARC listed a series of functions under this heading, the first being to provide a general point of contact and central resource for agencies and citizens.⁵⁴² At present these functions are performed by JAG. However the Panel believes that members of the public would prefer to deal with an independent body, rather than a government department, when they wanted advice about how to access information held by government agencies and what alternatives they might have. It is also likely that agencies would prefer to receive advice from the Information Commissioner rather than JAG. If the Information Commissioner exercises the monitoring and reporting functions referred to above, it would undoubtedly be best equipped to act as a central resource for agencies across the whole gamut of FOI.

A second function suggested by LCARC was promoting community awareness and understanding of the FOI regime.⁵⁴³ It proposed an active program in the community through such outlets as public libraries, educational institutions and newspapers, using such means as posters, pamphlets and public speaking engagements. These would be in addition to maintaining a website where the material would also be available to the public in a passive way.

A third function was to provide guidance on how to interpret and administer the Act. JAG is currently preparing a loose-leaf folder, *Freedom of Information Guidelines*. However the amount of explanatory or analytical material that is available to agencies and applicants is relatively limited. The Panel believes the Information Commissioner should be responsible for publishing (and making available on its website) a range of materials that would assist agencies to provide better and more consistent decision-making and would enable requesters to be better informed about the FOI process. These should include administrative guidelines and a commentary on recently decided matters determined on external review – at present the Information Commissioner publishes on its website a very brief summary of the main issue decided in significant matters it has determined.

A fourth function would be to provide education and training for agencies and community groups. This would help improve the quality of decision-making, and improve the consistency of decision-making across government. The Information Commissioner should also coordinate forums for FOI officers to discuss problems and exchange information. LCARC suggested it should also produce a regular newsletter covering significant FOI decisions and other relevant developments.⁵⁴⁴

⁵⁴² LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 32.

⁵⁴³ LCARC, *Freedom of Information in Queensland*, Report No. 32, p. 33.

⁵⁴⁴ LCARC, *Freedom of Information in Queensland*, Report No. 32, pp. 33-34.

At present, under the Act the Information Commissioner may provide “information and help to agencies and members of the public on matters relevant” to the external review of decision and to the Office of the Information Commissioner. (s. 101C (3)(d)). The ALRC/ARC Report recommended that the FOI Commissioner’s functions should include —

- providing information, advice and assistance in respect of FOI requests
- at any stage of an FOI request
- at the request of the applicant, the agency or a third party.⁵⁴⁵

The Panel considers this broader role is appropriate and necessary.

Investigative and complaints handling functions

In its discussion paper the Panel asked —

*Should there be a power to receive and investigate complaints about the administration of FOI in Queensland? Should that power include “own motion” investigation, and be given to the Ombudsman or a FOI monitor-styled body?*⁵⁴⁶

The Government response to this question was —

The Queensland Ombudsman is empowered to both review complaints regarding administrative actions, and conduct own-motion investigations. Applicants who are dissatisfied by the conduct of agencies in dealing with their FOI application may complain to the Ombudsman.⁵⁴⁷

The Panel did not understand this answer, believing that s. 107 (b) of the *Freedom of Information Act* had effectively removed the Ombudsman’s jurisdiction. Section 107 says —

107 Application of Ombudsman Act

The *Ombudsman Act 2001* does not apply to—

- (a) the Information Commissioner; or
- (b) decisions that could be the subject of review by the Information Commissioner under this Act.⁵⁴⁸

In response to a letter from the Panel concerning this issue, the Queensland Ombudsman wrote —

⁵⁴⁵ ALRC/ARC Report, p. 71.

⁵⁴⁶ FOI Independent Review Panel discussion paper, pp. 138-139.

⁵⁴⁷ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 29.

⁵⁴⁸ *Freedom of Information Act 1992*, s. 107.

As you have correctly noted, the Ombudsman's role in FOI matters is limited because of the application of s.107(b) of the *Freedom of Information Act 1992* Qld (the FOI Act) which prevents my Office from investigating complaints about decisions that could be the subject of review by the Office of the Information Commissioner (OIC).

The statistics collected by my Office indicate that, since 30 June 2006, we have declined to investigate 60 FOI complaints on the basis that they were "out of jurisdiction" (because of the application of s.107 of the FOI Act). However, that number represents only the complaints where the central issue was an FOI matter over which we did not have jurisdiction. My Office receives a number of complaints where FOI is a peripheral issue rather than the central topic of complaint. Examples include complaints that may raise "sufficiency of search" issues (regarding the adequacy of an agency's record-keeping) or issues about the accuracy of information held by agencies. Where an FOI-type issue is peripheral to the complaint, rather than comprising the substance of the complaint, it is not identified separately for the purposes of my Office's complaint-handling statistics. I am therefore unable to provide you with accurate data regarding the total number of complaints received by my Office that include an FOI element.

Own motion investigations

My Office has not conducted any own-motion investigations into the way in which agencies deal with or process FOI access applications. There has been no evidence in the complaints received by my Office relating to an aspect of FOI to suggest that there are systemic administration problems within agencies that would warrant such an investigation.

When I held the position of Information Commissioner, any problems or deficiencies that were identified regarding the way in which agencies were handling applications were dealt with during the course of the external review process, and also were incorporated into the OIC's training plan (as part of the information and assistance function), so that targeted training could be delivered to those agencies requiring assistance in particular areas. We also put considerable effort into preparing practitioner guidelines which proved highly successful in educating agencies about their obligations under the FOI Act. I am unsure as to how the OIC currently handles such issues, but I understand that training is no longer offered by the OIC to agencies.

Moreover, my experience of the types of problems that occurred regarding the processing of FOI applications was that they usually arose because of resourcing problems within agencies, or inexperience on the part of the FOI decision-maker, rather than there being any question of maladministration on the part of agencies.⁵⁴⁹

⁵⁴⁹ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, pp. 1-2 of the covering letter dated 20 March 2008.

Submissions

Megan Carter wrote —

Since the separation of the role of the Information Commissioner from the Ombudsman, there would be no reason why the Queensland Ombudsman could not perform the same functions as the Commonwealth Ombudsman in regard to FOI. It should include “own motion” investigations. Even if there were an FOI Monitor, the Ombudsman could still perform this function with regards to FOI as it does for all other government administrative functions.⁵⁵⁰

The University of Queensland said it —

strongly supports a recommendation that the Ombudsman or FOI monitor be granted the power to receive and investigate complaints about the administration of the FOI Act. In the University’s opinion, the Ombudsman is the likely candidate to respond to these types of complaints as it would complement its function in other areas.⁵⁵¹

The Queensland Ombudsman, in his formal response to the discussion paper, wrote —

As to which body should have jurisdiction to investigate complaints made about FOI administration by agencies, that function could be performed by the Ombudsman’s Office, as currently occurs in the Commonwealth sphere and in NSW, or by a restructured Information Commissioner’s Office. If my Office were to be given that role, it would need appropriate additional funding. It would also necessitate my Office being given exempt status under the FOI Act as it would not be workable for a body that is subject to the FOI Act to be the complaint resolution body for complaints made under the Act.

As I mentioned above with respect to privacy, my Office is well-equipped to take on the complaint investigation role and the oversight role, which fit nicely within the established dual role of the Ombudsman, which is to investigate complaints about government maladministration and to make recommendations for the improvement of administrative processes and procedures. My Office has the necessary independence and an established profile and reputation in the community as a complaint resolution body and a growing profile in the public sector as a provider of advice and training on good decision-making.⁵⁵²

⁵⁵⁰ Megan Carter submission to the FOI Independent Review Panel discussion paper, pp. 23-24.

⁵⁵¹ The University of Queensland submission to the FOI Independent Review Panel discussion paper, p. 11.

⁵⁵² Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 17.

The Acting Information Commissioner wrote —

If the Review reaches the conclusion that there are widespread cultural barriers within agencies concerning the administration of the FOI regulatory framework, there may be a place to broaden the Commissioner’s powers in reporting to Parliament through the Speaker or Parliamentary Committee under s. 101. A specific power permitting the Commissioner to name agencies which breach their obligations, do not fully cooperate with the Office or which have a pattern of not dealing with applications in a timely manner may have the effect of focussing attention on the performance of that function within agencies. There has been a great increase in the number of “deemed decisions” this year and the inclusion in a report to Parliament of an agency’s performance in that respect may provide a useful incentive.⁵⁵³

Issues

The Panel believes the FOI system would be improved if the Information Commissioner was able to receive and investigate complaints about its administration, in much the same way as the Ombudsman does in relation to public administration generally (though not FOI). Not all complaints can be resolved through the internal/external review process. They may concern not the result of a request for information but the way it was dealt with by the agency. If the Information Commissioner was able to receive and investigate such complaints it would provide a further window through which the Office could see how the system is operating.

The Information Commissioner should also have the power to conduct “own motion” investigations of the way the system is operating. The exercise of such powers in other jurisdictions has provided valuable insights into problem areas, and helped result in improvements – see, for example, the Commonwealth Ombudsman’s report on *Scrutinising government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*.

RECOMMENDATION:

Recommendation 103

The following functions should be conferred on the Information Commissioner —

- (1) Monitoring and reporting, including the determination of what statistical material should be provided by agencies for an annual report, similar to that currently required under s. 108, ensuring the accuracy of the information, collating, analysing and publishing that information; conducting audits of agencies and publishing the results; identifying and commenting on legislative and administrative changes that would improve FOI; monitoring the way

⁵⁵³ Acting Information Commissioner letter to the FOI Independent Review Panel, 21 May 2008, p. 3.

“public interest” issues are determined by agencies and under review, consulting experts on its application and keeping agencies informed; and monitoring agencies’ information schemes and proactive disclosure activities outside FOI.

- (2) Advice and awareness, including providing a central reference point on FOI for agencies and people; promote community awareness and understanding of FOI; provide guidance on the interpretation and administration of the Act; provide education and training for agencies and community groups; provide information and assistance to people and agencies at any time during the processing of FOI claims; and develop and publish guidelines covering proactive disclosure and information schemes.
- (3) Investigative and complaints handling, including complaints about FOI processes and other matters that would, in relation to government administration generally, fall within the jurisdiction of the Ombudsman; and the power to conduct “own motion” investigations.
- (4) Commission outside research and obtain advice on the design of surveys to monitor whether the legislation and its administration are achieving its stated objectives.

20.2 Privacy

Chapter 4 of this report dealt with the relationship between freedom of information and privacy and the issue of personal information. The Panel recommended there that, in the event that privacy legislation is introduced in Queensland, requests for personal information should be processed under that law, rather than under freedom of information. This part of the report is concerned with the way the privacy and freedom of information regimes might be administered.

The ALRC/ARC Report, in recommending the creation of an FOI Commissioner, questioned whether an existing organisation could perform the role.⁵⁵⁴ It examined suggestions that the Attorney-General’s Department, the Ombudsman, a parliamentary committee, Australian Archives, the AAT, the Privacy Commissioner, the Chief Government Information Officer or the Auditor-General might do so. It rejected all these proposals though the one to which it paid most attention was that of Privacy Commissioner – an office already in existence at the Commonwealth level. It pointed out that a combined position operated in several Canadian provinces. “This approach is attractive in so far as it would require a single individual to resolve any tensions between FOI and privacy.”⁵⁵⁵ However, the Review concluded —

Given the tendency to date for agencies to favour secretiveness over openness and the fact that the overwhelming majority of FOI requests are for applicants’ personal information, there is a risk that FOI would become the “poor cousin”

⁵⁵⁴ ALRC/ARC Report, at pp. 75-78.

⁵⁵⁵ ALRC/ARC Report, at p. 77.

if the Privacy Commissioner were given responsibility for the role of FOI Commissioner.⁵⁵⁶

While recommending there be a separate statutory office of FOI Commissioner, the Report said there was sufficient connection between the FOI Act and the *Privacy Act* and the need for close liaison between the two statutory officers for them to share (with the Ombudsman) premises and corporate support.

In the decade and more since that report was completed, quite a number of jurisdictions have established FOI and privacy regimes, many of them with a single commissioner acting in the capacity of both Information Commissioner and Privacy Commissioner. That is the case in Britain, Ireland and the Northern Territory. This may be contrasted with the position in New Zealand, where external review of FOI is conducted by the Ombudsmen, and there are three statutory officers (a Chief Ombudsman and two other Ombudsmen) handling FOI, while privacy issues (where most FOI requests concerning personal affairs are handled) come under the jurisdiction of another statutory officer, the Privacy Commissioner, who works closely with the Ombudsmen.

In Canada, there has been a debate running for over a decade about whether the offices of the Information Commissioner and the Privacy Commissioner should be combined, as occurs in some Canadian provinces. The proposal has been rejected each time it has been considered.

In a recent speech the Information Commissioner in England and Wales, Richard Thomas, dealt with the question, “Can the Commissioner cover both freedom of information and data protection at the same time? Is there not a conflict between the two subject areas – with one focussed on openness and transparency and [the] other on privacy and confidentiality?”⁵⁵⁷ He said —

Sometime culturally it is difficult for any organisation to be protective of information and to be open at the same time, and it can sometimes be difficult for my office as the regulator to strike the right balance between two apparently competing cultural approaches. But the approaches can be reconciled in the sense that one area of regulation safeguards *personal* information and the other seeks greater transparency for *official* information. Section 40 of the *Freedom of Information Act* dovetails and reconciles the two approaches. To summarise that complex section, information is not disclosable under the *Freedom of Information Act* if it is personal data and the disclosure of that personal data would breach one of the Data Protection Principles. As the Commissioner responsible for both Acts I believe that I am well-placed to ensure that both strands of public policy are fully ventilated and balanced in those difficult cases where public disclosure may unduly threaten individual privacy.⁵⁵⁸

⁵⁵⁶ ALRC/ARC Report, at pp. 77-78.

⁵⁵⁷ Thomas, R., “Freedom of Information and Privacy – the regulatory role of the Information Commissioner” Address to the Centre for Regulated Industries, 9 January 2008, p. 4.

⁵⁵⁸ Thomas, R., “Freedom of Information and Privacy – the regulatory role of the Information Commissioner” Address to the Centre for Regulated Industries, 9 January 2008, p. 6.

The Panel assumes that Queensland will adopt a legislative privacy scheme⁵⁵⁹ and that as a consequence, it will want to appoint a Privacy Commissioner. A restructuring of the Office of the Information Commissioner needs to take that prospect into account.

20.3 Information policy

The issue of information policy and records management in relation to FOI and more generally was discussed in chapter 3. It was demonstrated that more direction and/or coordination is needed in this area in Queensland. The Panel considers that the Information Commissioner can play an important role in strategic development and coordination of information policy, along with the Queensland State Archivist and the Chief Information Officer.

The Queensland Ombudsman, in his submission, wrote —

To my mind, the challenges arising out of electronic forms of communication and associated record-keeping issues concerning their storage, retention, disposal and retrieval in terms of the FOI Act are deserving of special attention. To give meaningful and informed consideration to the various issues, I recommend the formation of a specialist committee, comprising a selection of agency FOI decision-makers, IT officers and document management specialists, including the State Archivist, and chaired by the head of whichever agency has the FOI Monitor role.

The Committee would be tasked with the job of identifying the relevant issues concerning the treatment of electronic data under the FOI Act and proposing suitable strategies for dealing with it. Based on the Committee's recommendations, its chairperson would issue to agencies appropriate directions or guidelines regarding the handling and disclosure of electronic data under the FOI Act. There should be periodic meetings of the Committee, and periodic reviews of the directions/guidelines, so as to keep pace with emerging technology issues.⁵⁶⁰

As was indicated in chapter 3, the Panel believes the committee need not be as large as that suggested by the Ombudsman although it could draw on this model as and when the topic might require.

20.4 Structure of the Office

There are a number of options in structuring the Office of the Information Commissioner to perform the roles that have been proposed in the last chapter and here. It would be possible to follow the Northern Territory model where the one person, as Information Commissioner, has overall responsibility for information management, for freedom of information and for privacy. In a system as large as that

⁵⁵⁹ See chapter 4.

⁵⁶⁰ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 13.

in Queensland, it would be inevitable that some of those functions would have to be delegated to deputies, not least to avoid the kind of conflict of interests between FOI and privacy referred to in the ALRC/ARC Report that is quoted above in 20.2.

The Panel believes the structure should emphasise the importance of both FOI and privacy and the independence of their respective administrations. The best way to do this would be for these officers to be statutory appointments. However, the Panel considers there should also be an Information Commissioner who would be responsible for the general administration of the office and for the functions outlined in 20.1 and the information policy role. While it is possible to envisage the three acting as a troika, the Panel considers that in practice the system would work best if the Information Commissioner was ultimately responsible for the operations of the Office, while the FOI Commissioner and the Privacy Commissioner were effectively the deputies of the Information Commissioner.

RECOMMENDATIONS:

Recommendation 104

The Office of the Information Commissioner be headed by a statutory officer, the Information Commissioner.

Recommendation 105

Two Deputy Information Commissioners, also statutory officers, be appointed. One would be designated as FOI Commissioner, the other as Privacy Commissioner.

20.5 Independence – appointment and conditions

The Leader of the Opposition, Lawrence Springborg, made the following submission on this issue —

Independence must not only be a reality, but it must be seen to be a reality. As the *Fitzgerald Report* highlighted, in relation to special appointments, the State Opposition should always be consulted prior to an appointment so that any personal and political connections of an appointee can be raised and discussed.

The personal and/or past political involvement of a possible appointee should never preclude that person from appointment or lead to an automatic assumption that the person cannot be impartial and professional. But failure to consult and failure to address any issues of concern, can lead to a perception, real or otherwise, that the independence of the appointee is not guaranteed. This doesn't serve public confidence, government credibility or the appointee's professional standing.

Sometimes it is not the actual appointment that is flawed, but rather the process which is.⁵⁶¹

The Panel considers it is essential that the statutory officers it proposes should be and be seen to be independent of government. This requires an appointment process that is transparent and informed. There are a number of different models that have been adopted by Queensland for the appointment of statutory officers such as the Chair of the Crime and Misconduct Commission and the Auditor-General. The CMC appointment is made after consultation with the relevant parliamentary committee and “only if the nomination is made with the bipartisan support of the parliamentary committee.”⁵⁶² The Parliamentary committee’s role in the appointment of the Auditor-General is limited to being consulted – the Opposition does not have a veto as it does with the CMC Chair. The process for the appointment of the Auditor-General is the process currently used for the appointment of the Information Commissioner. Section 101H requires the Minister to consult with the Parliamentary Committee about

- (i) the process of selection for appointment; and
- (ii) the appointment of the person as commissioner.

The Panel considers this appointment process should remain in place and be adopted for the appointment of all three statutory officers, that is, the Information Commissioner and the two deputies, the FOI Commissioner and the Privacy Commissioner.

This process will continue to allow for political input by the Opposition and provide transparency, without giving the Opposition a veto over the appointment of any particular person.

A second aspect of independence is the term of appointment. Tenure should be long enough to allow the officers to influence the development of the system. The present legislation limits the term of office of a commissioner to three years (s. 101I). Elsewhere appointments to such offices are usually for five to seven years, with eligibility for re-appointment. The Panel considers the first Information Commissioner appointed if the reforms recommended in this report are adopted would need a term of at least five and preferably seven years to introduce the changes to the FOI regime that are proposed and to ensure that they become part of the new culture that is needed. However, the Panel believes that no Information Commissioner should serve for more than 10 years – after that period the office would probably benefit from new ideas and a change of administration.

Similar considerations apply to any Deputy Information Commissioners – that is, FOI and Privacy Commissioners. However, it would be desirable that the terms of the three holders of these offices should not be co-extensive, but should be staggered to ensure continuity and the retention of corporate memory.

⁵⁶¹ Lawrence Springborg submission to the FOI Independent Review Panel discussion paper, p. 3.

⁵⁶² *Crime and Misconduct Act 2001*, s. 228.

The Panel will be proposing in chapter 25 that a review of the new Act should be scheduled to be conducted by the parliamentary committee at the same time as the next strategic review under s.108A of the present Act. The timing of the review should be such that it is concluded about a year before the conclusion of the first term of the Information Commissioner to include the review in its proper assessment of whether an extension of the term is desirable.

RECOMMENDATIONS:

Recommendation 106

In making appointments to each of the three statutory offices the following procedure should apply.

The position should be widely advertised, and the Minister should consult the Parliamentary Committee about—

- (i) the process of selection for appointment; and
- (ii) the appointment of the person.

The Information Commissioner and the Deputy or Deputies should be appointed for a term of seven or five years, with the option of the term being extended for a further period, but none should hold an office for a total period of more than 10 years.

20.6 Relationship with Parliamentary Committee

The current Act provides in s. 108C that the parliamentary committee (the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly – LCARC) has the following functions under the Act –

- (a) to monitor and review the performance by the commissioner of the commissioner's functions under this Act;
- (b) to report to the Legislative Assembly on any matter concerning the commissioner, the commissioner's functions or the performance of the commissioner's functions that the committee considers should be drawn to the Legislative Assembly's attention;
- (c) to examine each annual report tabled in the Legislative Assembly under this Act and, if appropriate, to comment on any aspect of the report;
- (d) to report to the Legislative Assembly any changes to the functions, structures and procedures of the office of information commissioner the committee considers desirable for the more effective operation of this Act;

- (e) the other functions conferred on the parliamentary committee by this Act.⁵⁶³

These functions ensure that the Information Commissioner's performance can be kept under appropriate scrutiny by the Parliamentary Committee. They focus on the Commissioner, and even where in s. 108C(d) they also appear to give LCARC a mandate to report on possible legislative changes these are in fact limited to changes in the functions, structures and procedures of the Office of the Commissioner. LCARC also has a role in the appointment of a person to conduct a five-yearly strategic review of the Commissioner, a review that includes the Commissioner's functions and the Commissioner's performance of those functions in a manner that is economical, effective and efficient (s. 108A).

It would be useful to expand LCARC's functions in several respects. First, it is desirable that the Act should specifically provide the Information Commissioner with a means of ensuring that the Parliament is properly informed about the way the Act generally is being used and administered. This could be achieved by providing that the Parliamentary Committee should receive and examine reports from the Commissioner about the operation of the Act generally, and that it should report to the Parliament on any changes it considers necessary or desirable. Second, as mentioned above, the Parliamentary Committee should have a role in the appointment of the two Deputy Information Commissioners in the Office of the Information Commissioner, as well as its current role in the appointment of the Information Commissioner.

The Panel has recommended above that the Information Commissioner should take over the reporting requirement of s. 108 of the Act. LCARC is already required to examine this report – s. 108C(c). It should, in addition, require the Information Commissioner to consult with it on the data collection and reporting by agencies required under s. 108.

These expanded functions of the Parliamentary Committee should help it consolidate the independence of the Information Commissioner while overseeing the structure and performance of the FOI regime.

⁵⁶³ *Freedom of Information Act 1992*, s. 108C.

RECOMMENDATION:

Recommendation 107

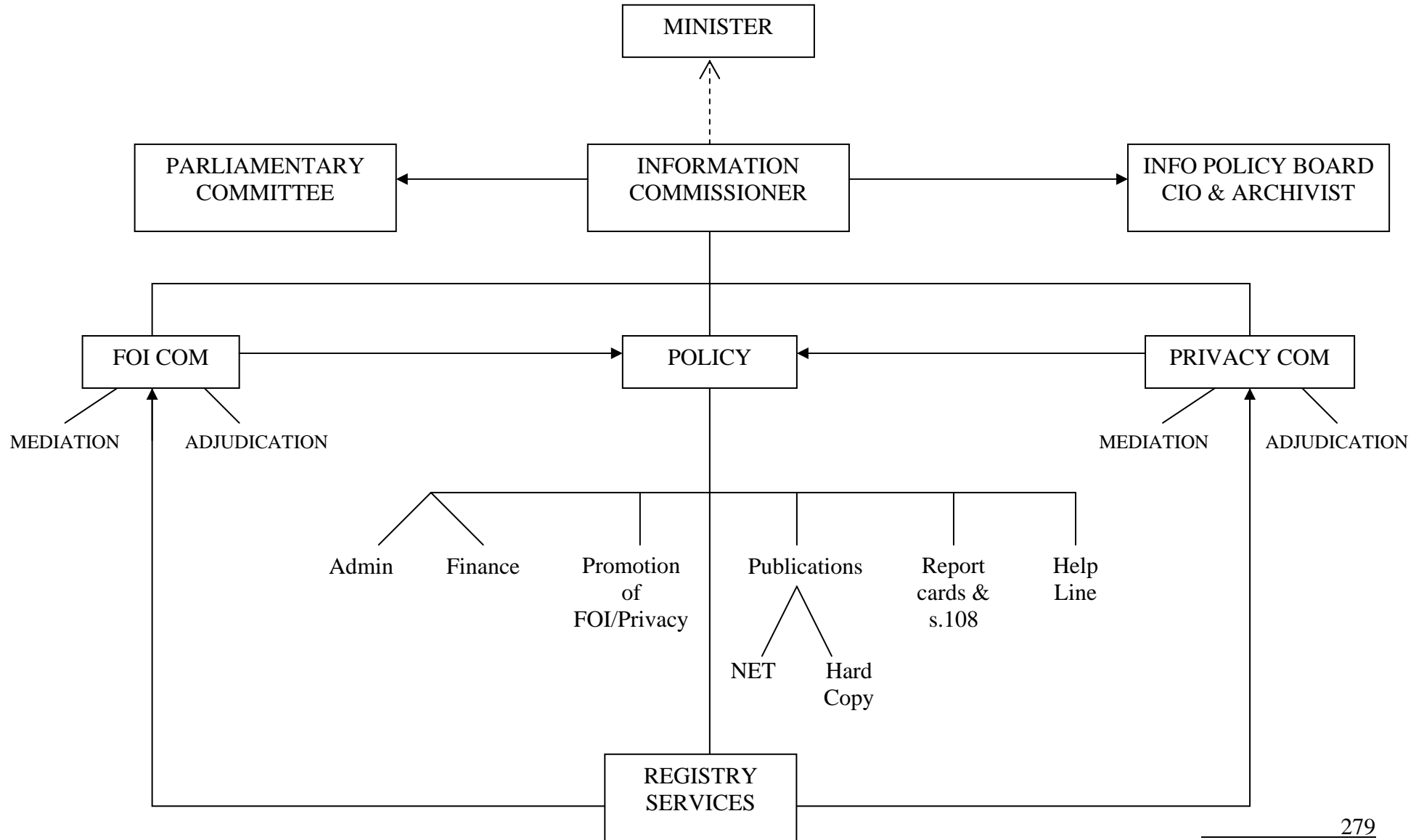
The Parliamentary Committee's functions should be broadened to include –

- a role in the appointment of the two Deputy Information Commissioners;
- the power to consult with the Information Commissioner on the data collection and reporting requirements of agencies required by s. 108; and
- the power to receive and examine reports by the Information Commissioner on the operation of the Act, and to make recommendations on such changes as it sees fit.

Organisation

The Panel has considered the way in which the Office of the Information Commissioner should be organised so that its functions as external reviewer are kept separate from the FOI monitor and advisory functions that are proposed. The scheme illustrated below also picks up the need for the Privacy Commissioner to be the external reviewer for personal information matters. The Office would provide a registry service in relation to both FOI and Privacy reviews.

Figure 20.1 Proposed structure of the Office of the Information Commissioner



21 Agency publications

In the discussion paper, the Panel noted —

The Queensland FOI Act requires, in s. 18, that agencies publish at least every year, an up-to-date statement of the affairs of the agency, including:

- A description of the agency's structure and functions and the ways they affect members of the community;
- A description of various documents that are held by the agency including those that are available for inspection, or for purchase, and those that are free;
- The way the agency gives access to documents concerning personal affairs and how contact can be made with the agency; and
- Any reading room and publications made available for the public.

Most agencies publish considerably more information than this on their websites, and many try to keep their information genuinely up-to-date.

...

The Queensland and federal legislation have more detailed requirements than the other jurisdictions. The UK law is more limited, being restricted to information published by an agency, rather than held by it. However the UK provision also allows the Information Commissioner's Office to provide model schemes on which agencies should base their publication statements. The Victorian Freedom of Information Amendment Bill 2007 includes a provision allowing the Minister to set publishing standards to be observed by agencies.

The UK also encourages agencies to develop an Information Asset Register of unpublished information (IAR) on their own website, which links into the whole of Government IAR managed by the Office of Public Sector Information. IAR aims to cover vast quantities of information held by all government departments and agencies. This includes databases, old sets of files, recent electronic files, collections of statistics and research. The IAR concentrates on information resources that have not yet been, or will not be, formally published. Similar data bases exist in the US (Government Information Locator Services – GILS) and Canada (Info Source).

Commonwealth agencies publish a considerable amount of information at the direction of the Senate, made under its standing order 164.128 For example, the Senate has a permanent order requiring the production of indexed lists of government files. Another order requires departments and agencies to publish on the internet lists of contracts valued at \$100,000 or more, with statements of reasons for any confidentiality clauses or claims. Another order requires

the production of statements giving details of all government advertising campaigns costing \$100,000 or more.⁵⁶⁴

The discussion paper questioned whether more information should be provided by agencies, whether the statement of affairs was the best format for publishing the information and whether the Information Commissioner and/or the Minister should be able to direct agencies about what they should include in the statement, or whether some other means should be adopted.

The Queensland Government submission said —

Statements of affairs are intended to inform the community of their rights of access and assist them to exercise those rights. A comprehensive statement of affairs could facilitate greater transparency in relation to information and records management practices of agencies and support open and accountable government. There is in practice little demand from the community for access to statements of affairs.⁵⁶⁵

Megan Carter said —

The UK and Scottish Information Commissioners have issued extensive guidance on what should be included in the publication schemes. A review of the websites of most UK government agencies reveals more published documents than is the case for the corresponding Australian agencies. For example, the level of detail disclosed in publication of financial details such as travel and other expenses or contracts is typically much greater. Another initiative is that of Disclosure Logs: publication on the government agency's website of material made available under an FOI request.

With web-based publication, it is much easier to keep material up to date. All agencies should keep their websites up to date on a regular basis – at least monthly. Significant information (fees and charges, statutory or administrative deadlines, changes in application requirements etc) should be amended as soon as the change takes effect.

Since most of the Australian FOI Acts were drafted, internet technology has advanced dramatically. The use of government websites to publish, rather than hard-copy publication methods, should be the default. For clients without web access, web pages or PDF files could be printed and mailed out.

On websites, the greatest challenges are those of ease of location and access to information on the site. The UK Information Commissioner studied a number of government websites and found that on some, users had to drill down up to 30 levels to locate documents. Improving search engines, better control of terminology and indexing, and redesign of websites structure and navigation are some of the solutions, though they involve significant resources. Savings in

⁵⁶⁴ FOI Independent Review Panel discussion paper, pp. 56-57 (footnote omitted).

⁵⁶⁵ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 8.

terms of phone enquiries and complaints would almost certainly be able to offset much of the expense of such improvements.⁵⁶⁶

Carter considered that both the Minister and the Information Commissioner should be able to require publication of additional information, particularly information unique to one agency which may not have been specified sufficiently in the general guidelines on publication.

She agreed that an Information Standard would probably be the most appropriate method of providing this guidance.

The Queensland University of Technology said —

QUT has an extensive website which provides a great deal of information on its structure and activities. The University's policy and procedures manual is also publicly available. Information provided in the statement of affairs is mostly a duplication of information already provided on the QUT website, so its value in adding to transparency and accountability is questionable for the University.

The statement of affairs should be updated as required rather than on an annual basis, but as a document providing broad information on the structure and organisation of a department or agency, it should not require updating on a weekly or monthly basis.

From QUT's perspective, the statement of affairs is not the best format for publication of information. The University's strong preference would be to be exempt from the requirement to maintain a statement.⁵⁶⁷

Brisbane City Council said it had only received three applications in 15 years to access its statement of affairs, and it considered the information and once yearly update adequate. However it pointed out that statement of affairs was not the only publication that agencies relied on to keep the public informed. It said its website and 24 hour contact centre were also available to the public.⁵⁶⁸

The Panel extensively reviewed the Queensland Government's information policies, particularly as they related to FOI, in chapter 3. One of its conclusions was —

The Panel recommends that Government can move beyond the fifteen years old, not-in-demand, Statement of Affairs model of publishing general categories of information holdings to a more useful, contemporary, internationally practised, ICT-enabled publication of EDRMS metadata with search capability. Ideally, online access would be through a single entry point. Pending availability of the next round of new ICT systems budget to replace

⁵⁶⁶ Megan Carter submission to the FOI Independent Review Panel discussion paper, pp. 3-4.

⁵⁶⁷ Queensland University of Technology submission to the FOI Independent Review Panel discussion paper, p. 3.

⁵⁶⁸ Brisbane City Council submission to the FOI Independent Review Panel discussion paper, p. 1.

existing EDRMSs, agency-based pilot programs would also be a sensible and pragmatic first step with appropriate learning and feedback loops for the sector-wide endeavour.⁵⁶⁹

As several of the submissions made clear, the Statement of Affairs is no longer of any relevance for most people seeking information about the agency. There is no doubt that most agencies publish material on their websites that is far more extensive and useful than the raw data required by s. 18. For example, the Queensland Government response to the discussion paper revealed that from 1 January 2008, the State Procurement Policy requires agencies to publish details of all awarded contracts and standing offer arrangements with a value of \$100,000 or more on the Queensland Government Chief Procurement Office website.⁵⁷⁰

While the Statement of Affairs model can be abandoned, it is desirable that agencies should continue to be required to make public specified information about their affairs. What has been demonstrated in the past decade and a half is that it is desirable that both the content of the statement (or its equivalent) and its means of delivery or its availability, need to be flexible, so that they can be adjusted to changes in what information should be required to be made available, and how that happens.

The discussion paper questioned whether the Minister should exercise, or the Information Commissioner should be given, the power to require the publication by agencies of information additional to that required by s. 18 and also whether there would be any advantage in allowing adjustments to what agencies must publish to be determined through Information Standards.

The Panel has decided that using an Information Standard is not the best way to establish a new scheme. Information Standards owe their force to the authority given to the Treasurer in s. 46L of the *Financial Administration and Audit Act 1977* to make what are described in the section as “financial management standards”. While standards have been made about record keeping and, with Cabinet’s authority, privacy, it seems preferable that the authority for publication schemes should be contained within the FOI legislation, as was the provision dealing with Statement of Affairs.

As noted above, the Panel considers the Statement of Affairs mandated by s. 18 should be abolished, and replaced by a system that encourages agencies to publish information mainly on their websites. Information would continue to be provided also through the annual reports that most government agencies are required to produce.

As proposed in Recommendation 108, the Panel considers the freedom of information legislation should impose a mandatory obligation on agencies and public authorities to develop and implement a publication scheme taking into account the public interest in access to the information it holds.

The publication schemes would have to be approved by the Information Commissioner in a similar model to that operating in the United Kingdom which

⁵⁶⁹ See chapter 3.

⁵⁷⁰ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 9.

recognises flexibility and capacity building imperatives in the system. It includes development of model publication schemes by the Information Commissioner for different classes of public body such as for local government, the health sector and education.

The present system is too rigid and may place unnecessary burdens on some agencies.

The Information Commissioner should be responsible for auditing the performance of agencies and also for encouraging agencies to develop procedures and practices that proactively publish information beyond the minimum standards.

RECOMMENDATIONS:

Recommendation 108

The requirement in s. 18 for agencies to publish a Statement of Affairs should be replaced by the adoption of a publication scheme, modelled on that operating in the United Kingdom.

Recommendation 109

The Information Commissioner should develop model publication schemes for different classes of agencies, such as for local government, the health sector and education, on which agencies can base their own schemes.

Recommendation 110

The Information Commissioner should be responsible for the approval of any agency scheme.

Recommendation 111

The Information Commissioner should be responsible for auditing and reporting on the performance of agencies in conforming with the requirements of their publication scheme.

Recommendation 112

The Information Commissioner should consult with the Parliamentary Committee when preparing the model publication schemes and should report to the Parliamentary Committee on the implementation by agencies of their publication schemes.

22 Data collection and reporting

The Panel's Terms of Reference require it to consider —

The effectiveness and adequacy of current reporting and data collection requirements, to inform public understanding about the operation and administration of the FOI Act.⁵⁷¹

As the discussion paper noted —

Under s. 108 of the FOI Act, the Minister is required to present an annual report to Parliament on the operation of the Act, including such matters as the number of applications made to each agency and Minister, the numbers of preliminary and final assessment notices, the number of decisions not to give access and the relevant exemption together with information about internal review decisions, applications for amendment, fees and charges collected and various other matters.⁵⁷²

The discussion paper noted that some FOI practitioners were very critical of the information published in the annual report, “complaining that much of the statistics collected are meaningless as a guide to the effectiveness of FOI for practitioners, Parliament or the general community.”⁵⁷³ One problem concerns the statistics that are required to be collected, including their relevance and sufficiency, while another concerns the fact that most of them are not analysed. The annual reports contain more than 100 pages of raw data, but it appears to be no one's responsibility to examine the data and discover what it shows about the administration of FOI in Queensland.

The discussion paper also noted —

In 2001 LCARC recommended that an FOI monitor should make recommendations about the categories of information that should be included in s. 108 reports and should issue guidelines regarding the interpretation of the categories to ensure that agencies took a consistent approach in the collection of data.

The Government rejected the idea of an FOI monitor. However it said —

The Government recognises the importance of the s. 108 Annual Report as it enables the Parliament and the public to know how well the FOI Act is being administered. It is acknowledged however, that the s. 108 reporting requirements are onerous and require considerable information, which may not be used for any purpose other than completing the report.

JAG will review the reporting requirements of s. 108 in consultation with the Information Commissioner and other relevant stakeholders to

⁵⁷¹ FOI Independent Review Terms of Reference, para. 8(d).

⁵⁷² FOI Independent Review Panel discussion paper, p. 154.

⁵⁷³ FOI Independent Review Panel discussion paper, p. 154.

determine appropriate categories of information for inclusion in the s.108 Annual Report. Any new categories will be compatible with the FOIonLine system.

Some changes were subsequently made to s. 108. However the information made available through this process still does not provide the mechanism desired to inform public understanding about the operation and administration of the Act.⁵⁷⁴

In 2008, LCARC revisited this issue in its Report on *The Accessibility of Administrative Justice*. In relation to the assessment of the FOI fees and charges regime relative to costs of delivery, it proposed that s. 108 “should be amended to require the provision of adequate and informative data”.⁵⁷⁵

Of interest to the Panel was a quotation from the Queensland Government submission to LCARC. It said —

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.⁵⁷⁶

Another submission quoted by LCARC was from Susan Heal, an experienced FOI practitioner, who said —

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 (e.g. 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.⁵⁷⁷

⁵⁷⁴ FOI Independent Review Panel discussion paper, p. 156 (footnotes omitted).

⁵⁷⁵ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, recommendation 7, p. 85.

⁵⁷⁶ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, pp. 78-79.

⁵⁷⁷ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, p. 78.

The Panel on several occasions sought further statistical information from JAG as the lead agency on FOI. It noted that a past report had included some figures on the timeliness with which agencies dealt with applications for FOI. However, it was informed that the Department held no historical data of this kind. But the Department said —

Amendments to the FOI Act passed in October 2007 now require agencies to notify applicants where agencies have failed to make a decision within the statutory “appropriate period” and a “deemed decision” results (see sections 27(5A) and 57(3), regarding access and amendment applications respectively). Requiring agencies to report upon the number of notices issued under these provisions would appear to provide a mechanism for the capture of timeliness data, at least in respect of initial access and amendment decisions. The Panel may wish to consider this issue further in the course of its review.⁵⁷⁸

Another communication from JAG provided the Panel with an analysis of out-of-time applications in 18 government agencies, the volume of documents involved (divided into those where there were fewer than 10 pages, those between 11 and 100, those from 101 to 1,000, and those over 1,000), and the FOI staffing levels for those agencies. This was based on raw data sought from agencies by the Department and by the Panel in separate questionnaires.

The discussion paper mentioned another area where statistical information would be very useful, namely, who uses FOI. As mentioned in chapter 18, the 2008 LCARC report contains a table of data from the Information Commissioner, that identifies as a single group, the number of public interest applications for external review from journalists, lobby/community groups and politicians, expressing this as a percentage of applications for each of the last eight reporting years.⁵⁷⁹ No comparable data is collected in Queensland for access applications.

Among the submissions responding to the Panel’s discussion paper was one from Megan Carter, who has had extensive interstate, national and international experience of FOI regimes. She said —

The data required for collection under s.108 in Queensland is more extensive than any other Australian jurisdiction – I would venture to say, than any international jurisdiction with which I am familiar. The fact that virtually no one has ever used the data to evaluate the effectiveness of FOI in Queensland does not make the data of no value. While I am mindful of the work involved in collecting the data, and some of the technical problems, I support collection of the entire range of data as at present.⁵⁸⁰

In answer to some of the various questions the Panel posed, she said that either the Information Commissioner or the FOI Monitor should be given responsibility for

⁵⁷⁸ Director-General, Department of Justice and Attorney-General letter to the FOI Independent Review Panel, 11 April 2008.

⁵⁷⁹ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, p. 62.

⁵⁸⁰ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 27.

analysing the data and publishing information about the way FOI operates in Queensland, based on that analysis, that the Information Commissioner should be responsible for ensuring that the data required under s. 108 is appropriate, and that the Information Commissioner or FOI monitor should use the data to benchmark the performance of individual agencies “with appropriate and carefully developed guidelines to allow for genuine performance differences”.⁵⁸¹

The Australian Press Council said in its submission —

In order to make accurate and meaningful assessments as to the effectiveness of FoI, it is necessary to make a distinction between different classes of applicant, different categories of information sought, and the purposes for which that information is sought. These categories then need to be correlated against the rates of refusal and the reasons for the refusal, including the categories of exemption cited. But this information is not freely available. To its credit, Queensland publishes some statistical information regarding applications in the Information Commissioner’s Annual Report and, to this extent, provides more information than some other jurisdictions. However, the data provided are not sufficiently detailed to enable a thorough assessment of the operation of FoI in Queensland. As a minimum, statistics should be published that indicate what proportion of applications seek non-personal information and the rate of refusal for such applications.⁵⁸²

The Panel does not propose to make specific recommendations for new sets of data that agencies should be required to provide. It is mindful of the comment by JAG, quoted earlier, that —

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.⁵⁸³

It does, however, need to respond to the issue posed in its Terms of Reference and quoted at the head of this chapter —

The effectiveness and adequacy of current reporting and data collection requirements, to inform public understanding about the operation and administration of the FOI Act.⁵⁸⁴

There are four major issues. The first is about the purpose of the exercise. The second concerns its analysis. The third concerns its reliability. The fourth is the nature of the data that is collected.

⁵⁸¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 27.

⁵⁸² Australian Press Council submission to the FOI Independent Review Panel discussion paper, pp. 9-10.

⁵⁸³ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, pp. 78-79.

⁵⁸⁴ FOI Independent Review Terms of Reference, para. 8(d).

Purpose

The purpose suggested in the Terms of Reference, “to inform public understanding about the operation and administration of the FOI Act”,⁵⁸⁵ is a central reason for collecting and publishing relevant data. But it should not be the only one.

As suggested in chapter 20, the data should also be used by the Information Commissioner to prepare an annual report on the performance of agencies, so that their performance can be properly monitored by government, by the parliamentary committee, and by the public. The publication of data also enables agencies – from CEOs through to those involved directly in handling FOI – to evaluate their own performances, to discover where they are falling below what is expected of them, and to show where they need to improve.

Another vital purpose is to provide government with the information it needs to improve FOI legislation where deficiencies are shown to exist, and to provide it with the information or evidence it needs to develop appropriate policies.

Analysis

Pages 14 to 79 of the 2006-2007 report by the Attorney-General required by s. 108 of the FOI Act contain a great deal of data,⁵⁸⁶ but little readily available information about the operation of FOI. The Australian Press Council said in its submission, above, “statistics should be published that indicate what proportion of applications seek non-personal information and the rate of refusal for such applications”.⁵⁸⁷ In fact, that material is provided, but making it meaningful takes time. An analysis of the data from the previous reporting year, for example, showed that in terms of the number of pages considered by agencies in relation to requests, for personal information 71.8 per cent were provided in full, 16.2 per cent in part and 12.8 per cent were refused. The respective percentages for non-personal information requested were 75.8 per cent provided in full, 8.7 per cent in part and 15.5 per cent rejected.

The data can be mined to provide a considerable amount of information, but if it is to be useful, and particularly if it is to be useful for the purposes suggested above, the analysis has to be carried out (or directed to be done) by someone whose function it is to pursue those objects. The Panel considers that this should be the responsibility of the Information Commissioner.

Reliability

This is, in part, a matter of agencies having the right technical equipment and the right attitude. Asked how the integrity of the data could be improved, Megan Carter said “I believe electronic tools for collection of the data exist, but any tool can benefit from review and standardisation. An e-FOI scheme would ideally have reporting built in

⁵⁸⁵ FOI Independent Review Terms of Reference, para. 8(d).

⁵⁸⁶ Department of Justice and Attorney-General, Freedom of Information Annual Report 2006-07.

⁵⁸⁷ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 10.

(automated)”.⁵⁸⁸ Agencies would also be more careful with the data they provide if they were conscious that it was going to be analysed and might be audited by the Information Commissioner and that the results would be used in report cards that would be published about the agencies. In any event there should be, as Susan Heal suggested to LCARC, “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”.⁵⁸⁹

Data

What data needs to be collected is determined by the purposes for which it is required. The previous and present Acts, LCARC in 2001 and 2008, and government agencies have specified or suggested various matters that agencies should report. This has turned out to be somewhat hit and miss. At the moment, for example, most of what s. 108 requires concerns the number of applications. However most of the data published concerns the number of pages. There is no correlation between the two.

The Panel believes the Information Commissioner should obtain professional advice (for example, from government statisticians or academic researchers) on what data should be collected and how it should be analysed, after first deciding for what purposes the information is intended to be used. The Information Commissioner would also need to consult with agencies, to ensure that their information systems are able to provide the relevant data.

These purposes, and the data, may change, as information systems change, as the use by applicants of FOI changes and as the administration of the system by agencies changes. This suggests that flexibility should be built into the system that mandates the data that agencies should collect and report. Rather than setting out the reporting requirements in a section of the Act, as s. 108 does at present, it would be better if the Act enabled the Minister to recommend to the Executive Council regulations that do so. The Minister should be advised by the Information Commissioner, who should consult with the Parliamentary Committee.

RECOMMENDATIONS:

Recommendation 113

The Act should include a provision in the same terms as the first three subsections of s. 108 of the Act —

- (1) The Minister administering this Act shall, as soon as practicable after the end of each financial year, prepare a report on the operation of this Act during that year and cause a copy of the report to be tabled in the Legislative Assembly.
- (2) The report is to include details of the difficulties (if any) encountered during the year by agencies and Ministers in the administration of this Act.

⁵⁸⁸ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 27.

⁵⁸⁹ LCARC, *The Accessibility of Administrative Justice*, Report No. 64, p. 78.

- (3) Each responsible Minister must, in relation to the agencies within the Minister's portfolio and in relation to the Minister's official documents, comply with any prescribed requirements concerning that information and the keeping of records for the purposes of this section.

Recommendation 114

The Act should include a provision allowing for the making of regulations setting out the data that agencies should provide each year for inclusion in the annual report by the Minister on the operation of the Act.

Recommendation 115

The Information Commissioner should consult with experts in statistical analysis and policy research to advise on the data that agencies should be required to report for inclusion in an annual report on FOI to be prepared by the Minister.

The Information Commissioner, after consulting with agencies and the Parliamentary Committee, should prepare a recommendation for the Minister concerning the data that agencies should provide.

The Information Commissioner should be responsible for having the data provided by agencies audited, and should consult with agencies concerning any deficiencies in the provision of information that are detected.

The Information Commissioner should be responsible for having the data analysed and for preparing a report to the Parliamentary Committee and the Minister.

23 Other issues

The Panel has considered a number of other issues concerning the present legislation and related matter. Many of these were raised either directly in submissions or in response to a survey conducted by the Panel of FOI practitioners in agencies. They are discussed in this chapter. Those issues that have prompted the Panel to make a specific recommendation are considered first. Appendix 9 lists a number of other matters that have been raised that form a checklist of drafting issues in the current legislation.

23.1 Machinery of government changes

The discussion paper raised —

... a specific problem arising under the Act where FOI decision-making resources cannot be shared across “agencies” in exceptional circumstances of peak demand, extended leave or where changes in administrative responsibilities arise when machinery of government alterations are made. Transitional arrangements probably need to be written into section 33 for machinery of government changes but what considerations should be worked through on the question of cross-agency support in processing FOI requests?⁵⁹⁰

Several recommendations were also made by agency FOI officers in response to the Panel’s survey. They agreed that the current provision in s. 33 allowing CEOs to delegate across to another agency within the same ministerial portfolio had worked well. However they suggested the legislation should be changed to allow delegation between different portfolios. This could be more cost effective and it would benefit smaller agencies that had limited trained staff available.

The Panel agrees with these comments. A more flexible arrangement should also assist agencies to cope with a sudden flood of FOI applications, well beyond what they would normally receive. However the ability to delegate across agencies would also have to take account of restrictions currently in IS 42, restricting the transfer of personal information between agencies. This standard is likely to be incorporated in a new Privacy Act. Both that Act and the FOI Act should contain provisions excluding the delegation across agencies of the processing of requests for personal information, or the amendment of documents containing personal information, to be permitted despite the general rule.⁵⁹¹

⁵⁹⁰ FOI Independent Review Panel discussion paper, p. 138.

⁵⁹¹ This proposal is in addition to the recommendations made in chapter 13.4 concerning centralised and/or delegated FOI decision-making in which the Panel proposed that the Information Commissioner should investigate options for the provision of FOI services to smaller agencies that are unable to develop the necessary expertise to deal adequately with FOI requests. The proposal here concerns government departments that would have established FOI resources.

RECOMMENDATION:

Recommendation 116

Section 33 of the Act should be amended to allow a Chief Executive Officer of an agency to negotiate and sign a formal Memorandum of Understanding with the CEO of another agency or agencies in a different portfolio agency, to delegate the power to deal with an FOI application to that other agency. This delegation power would include the power to deal with applications concerning personal information.

23.2 Parliamentary Secretaries

Early in 2008, the Government introduced legislation to ensure that Parliamentary Secretaries should, like the Ministers they assist, be subject to the provisions of the *Public Records Act 2002*. This meant that unlike other members of Parliament, they would be obliged to keep and eventually pass on to Queensland Archives, their official records. The new legislation did not deal with any obligations they might have under the *Freedom of Information Act 1992*.

On 15 April 2008, an advice from Crown Law on whether the legislation would have any detrimental effect on access to documents under the FOI Act was tabled in the Parliament. In it, Crown Law concluded that the documents of a Parliamentary Secretary are currently documents of an agency for the purposes of the FOI Act and are subject to access under the Act.⁵⁹² Crown Law also considered that documents submitted to or received by a Parliamentary Secretary from a Minister could fall within the scope of an official document of a Minister.⁵⁹³

To clarify the position of Parliamentary Secretaries under the FOI Act, the Panel considers that three amendments are desirable. First, the definition section, s. 7 should be amended to include a definition of “official document of a Parliamentary Secretary or official document of the Parliamentary Secretary” to mirror the equivalent definition of documents of a Minister. Second, the right of access provision, s. 21, should be amended to include a reference to “official documents of a Parliamentary Secretary”. Third, s. 33 which deals with persons who are to make decisions for agencies and Ministers should be amended to give a Parliamentary Secretary the same delegation power as is given to a Minister.

⁵⁹² Cranwell, G. Principal Lawyer, Crown Law, Department of Justice and Attorney-General letter to the Department of Public Works, 7 April 2008, p. 6, tabled by Schwarten, R. in the Queensland Legislative Assembly on 15 April 2008.

⁵⁹³ Cranwell, G. Principal Lawyer, Crown Law, Department of Justice and Attorney-General letter to the Department of Public Works, 7 April 2008, p. 5, tabled by Schwarten, R. in the Queensland Legislative Assembly on 15 April 2008.

RECOMMENDATION:

Recommendation 117

- (1) The definition section of the Act (currently, s. 7) should be amended to include a definition of “official document of a Parliamentary Secretary or official document of the Parliamentary Secretary”.
- (2) The right of access section of the Act (currently, s. 21) should be amended to include a reference to “officials documents of a Parliamentary Secretary”.
- (3) The section providing for persons who are to make decisions for agencies and Ministers (currently s. 33) should be amended to give a Parliamentary Secretary the same delegation power as is given to a Minister.

23.3 Administrative release

In chapter 3 and elsewhere, the Panel has advocated the proactive release of information by agencies, and the release of information to applicants outside the FOI system through what is referred to as administrative release. As the discussion paper noted in relation to the formal arrangements for defined information sets, some agencies “publish policy statements to clarify these arrangements and provide advice on how to access information via these schemes. Access may be provided either free or for a fee.”⁵⁹⁴ These agencies include Queensland Health and the Department of Education, Training and the Arts (DETA).

The discussion paper pointed out —

Section 14 of the FOI Act provides that the Act is not intended to prevent or discourage the publication of or access to information via other arrangements, for example administrative access arrangements, if this can be done (and is permitted by law).

Section 15 of the FOI Act requires that the Act operates in conjunction with other legislation that provides for access to information. An example is the *Public Records Act 2002* which provides for access to public records still in a restricted access period through either an FOI application or with the written approval of the agency responsible for the records.

Access to information through administrative access arrangements can be quicker, cheaper and easier than FOI access. People seeking access to information through FOI may have their applications refused under s. 22 of the FOI Act where the information is available elsewhere.

⁵⁹⁴ FOI Independent Review Panel discussion paper, p. 56.

...

Information may also be released other than through a scheme at the discretion of a Minister or Director-General. The extent of decision-making on release of documents in this way varies widely across agencies. Officers handling FOI applications rarely consider whether they might release information other than through formal FOI procedures.

One limitation on the provision of information outside FOI is that the information and the agency may not have the legal protection provided by FOI in the event that the information is, for example, defamatory or a breach of confidence – see sections 102-104.⁵⁹⁵

There appeared to be a considerable amount of unease within agencies about the use of administrative release, other than through defined schemes. Some officers were unsure about whether they could release parts of a document, while others were hesitant about stepping outside the safety of the protection provided by the FOI Act.

The Panel believes there are many occasions when an application to access documents through FOI is unnecessary, and if the relevant protections were available to officers dealing with requests, applicants could quickly have their requests met. Providing those statutory legal protections is an essential first step in promoting the use of administrative release.

The Information Commissioner should encourage agencies to develop administrative access schemes, and also administrative release outside defined schemes. The Information Commissioner should provide guidance to agencies on when administrative release might be appropriate, on what matters can be released, on record keeping and on the circumstances where it is advisable for the FOI regime to be applied. To encourage the use of administrative release, the FOI statistics should include a category showing the quantum of information released administratively (where reasonably quantifiable).

RECOMMENDATIONS:

Recommendation 118

The Act should be amended to provide legal protection similar to that currently provided under ss. 102, 103 and 104, for information provided to an applicant under administrative release, where the officer has the delegated authority of a Director-General or a Minister and acts in good faith and not recklessly in releasing the information.

⁵⁹⁵ FOI Independent Review Panel discussion paper, p. 56-57.

Recommendation 119

The Information Commissioner should provide agencies with guidance on the development by agencies of administrative access schemes, and also on the circumstances generally when administrative release might be provided, on what can be released, and when it is more appropriate that the FOI system be used.

Recommendation 120

The Information Commissioner should advise agencies of the statistics that should be provided on administrative release and should include these in the annual report on FOI.

Recommendation 121

The training provided by the Office of the Information Commissioner to FOI officers should include training on administrative release.

23.4 Identity check

Section 105 of the Act says in part —

If an application is made under section 25 for documents that relate to the personal affairs of a person, and the documents contain matter that would be exempt matter if the application was made by a person other than the first person or the person's agent, an agency or Minister—

(a) must not give access to the information unless the agency or the Minister is satisfied of the identity of the applicant ...⁵⁹⁶

The system this establishes is for evidence of identity only to be provided when the documents are ready to be given to the applicant or the applicant's agent. There are several problems with this approach. First, time can be wasted locating documents that are not released because the applicant does not provide the necessary identity evidence. Second, an applicant by purporting to be someone else could obtain personal information about that other person without obtaining the actual documents. The example provided to the Panel was of an applicant lodging an application for documents concerning HIV treatment – simply by making a decision on the documents located, and without handing them over, the agency might confirm the HIV status of the person.

The FOI Guidelines published by the Department of Justice and Attorney-General recommend that evidence of identity be obtained when the application is made, but acknowledges that this is not what the section says.⁵⁹⁷

⁵⁹⁶ *Freedom of Information Act 1992*, s. 105.

⁵⁹⁷ Department of Justice and Attorney-General, "Freedom of Information Guidelines", p. 60.

The Panel believes the section should be amended to require an applicant for personal information at the time they make their application to identify themselves as the applicant or to produce evidence that they are the applicant's agent.

RECOMMENDATION:

Recommendation 122

Section 105 should be amended to require applicants for personal information to produce at the time they make their application satisfactory evidence of their identity or to produce evidence that they are the applicant's agent.

23.5 Neither confirm nor deny

A similar problem arises where a person applies directly for access to another person's personal affairs records – for example, for HIV or mental health records. While the applicant cannot be given the records because they are exempt under s. 44, the fact that the person is told they are exempt could act as confirmation that the records exist.

The “neither confirm nor deny” provision of s. 35 currently only applies to the Cabinet, Executive Council, law enforcement and security exemptions.

In chapters 9 and 10, the Panel decided that the personal affairs exemption already subject to the public interest should instead form part of the general public interest test. Therefore, as s. 35 relates only to some class exemptions, a new provision to protect the relevant privacy interests should provide that if a request under FOI seeks access to “personal information”, and that information would be exempt following consideration of the public interest, then the decision-maker may respond neither confirming nor denying that the information exists.

The Panel has also proposed that most requests for personal information should be processed under a new Privacy Act. The Panel considers that that legislation should contain a provision like s. 35 that would allow a “cannot confirm nor deny” response to some requests.

RECOMMENDATION:

Recommendation 123

- (1) The proposed new Privacy Act should contain a provision allowing an agency to respond to a request for personal information by neither confirming nor denying that the information exists.

- (2) In an application for personal information of another person under the FOI Act, an agency may respond by neither confirming nor denying the existence of that type of document as a document of the agency or Minister.

23.6 Whistleblowers

Whistleblowing is only indirectly a mechanism for disclosing information held by government (see the Panel's Terms of Reference, 9 (g)). However, it does have implications for the provision of information by government and for FOI. Whistleblowing is likely to prompt applicants (particularly journalists and MPs) to lodge applications focussing on the area of concern of the whistleblower. Whistleblowing should prompt CEOs and Ministers to ensure that relevant files are scrutinised and proactively made publicly available for scrutiny, in the public interest.

The framework for the new legislation proposed by the Panel is consistent with the existing whistleblower legislation.

23.7 Fear of intimidation or harassment

Some concern was expressed in the survey material about the tests in s. 42 that provide an exemption where disclosure of the matter sought

could reasonably be expected to—

...

- (c) endanger a person's life or physical safety; or
- (ca) result in a person being subjected to a serious act of harassment or intimidation ...⁵⁹⁸

A submission suggested that protection of staff identities appeared to be limited to cases where there was evidence of prior harassment or intimidation, rather than there being the likelihood or possibility that it will occur.

The Panel considers that the use of the term "could reasonably be expected" makes it clear that that the section is dealing with the likelihood or possibility of serious harassment or intimidation, and would not necessarily require evidence of prior harassment or intimidation.

⁵⁹⁸ *Freedom of Information Act 1992*, s. 42.

24 Culture

24.1 Leadership

Perhaps somewhat provocatively, the discussion paper included a question asking for comment on which of the administrative compliance behaviours described in a table developed by Rick Snell applied in Queensland.⁵⁹⁹ Snell's table listed various types of behaviour under a number of headings, ranging from "malicious non-compliance" through "adversarialism", "administrative non-compliance" and "administrative compliance" to "proactive compliance". Examples of "malicious non-compliance" included shredding, use of sticky labels to avoid FOI and manipulating the fees regime to discourage requests. "Adversarialism" included "automatic resort to exemptions", us versus them mentality and significant delays in processing. At the other end of the scale, listed under "proactive compliance" were high priority being given to processing requests, exemptions waived if no substantial harm in release, and the objective of maximum release outside FOI.

Megan Carter, answering the question, "Which of the administrative compliance behaviours described in Table 8.1 are practised in Queensland? – typically?, infrequently?" said —

Almost all of the behaviours described in Table 8.1 have been practised in Queensland at some time, sometimes simultaneously within the same agency. (I should add that I am aware of jurisdictions which are much worse than Queensland in this regard). It is true that where the majority of FOI requests are for personal information, even where there are problems (such as vexatious and voluminous requests), there is a greater degree of administrative and proactive compliance. However even in such otherwise compliant agencies, requests for sensitive policy/deliberative documents give rise to the non-compliant behaviours. Part of this is that such requests have to be dealt with or referred to more senior officials for decisions (or approval of the more junior officers' decisions). Such requests are usually known to the Minister's office and as such, subject to greater scrutiny and potential involvement of Ministerial staffs in the decision-making process.⁶⁰⁰

While, as Carter says, there are jurisdictions worse than Queensland, there is no reason to believe that there have not been instances in Queensland of all of the non-compliance approaches, including malicious non-compliance. The Panel is aware of allegations of FOI officers being dismissed or transferred for failing to obey instructions not to release material, and allegations of others being made so unwelcome within an agency that they moved to another agency and a job away from FOI. It is also aware of allegations concerning shredding of public records.

It is only necessary to quote some of the conclusions of former Court of Appeal judge Geoff Davies AO, who conducted a Commission of Inquiry into the so-called Dr Death scandal —

⁵⁹⁹ FOI Independent Review Panel discussion paper, p. 104.

⁶⁰⁰ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 15.

Successive governments followed a practice of concealment and suppression of relevant information with respect to elective surgery waiting lists and measured quality reports. This, in turn, encouraged a similar practice by Queensland Health staff.

Queensland Health itself, by its principal officers Dr Buckland and Dr Fitzgerald, implemented a policy of concealment and suppression of events, the exposure of which were potentially harmful to the reputation of Queensland Health and the government.

The conduct of officers of Queensland Health, together with its strict approach to surgical budget targets enforced by penalties, led to similar practices in hospitals, especially with respect to complaints about quality of service and it also led to threats of reprisal in some cases. These caused suppression of complaints which ought to have been exposed earlier.

In my view it is an irresistible conclusion that there is a history of a culture of concealment within and pertaining to Queensland Health.⁶⁰¹

Media organisations who are among the regular users of FOI have no doubt there are (at least) pockets of those who can be labelled as non-compliant in some agencies.

Australia's Right to Know (RTK) submitted —

In 2007 RTK commissioned an independent audit into freedom of speech in Australia. The audit was chaired by Ms Irene Moss AO. As part of its review, the audit considered the extent to which State and Federal laws limit public access to information held by Government bodies. The audit found in relation to FOI laws that:

- “A continuing culture of secrecy is evident in some areas of government.” The experience of the members of RTK is that this culture continues to pervade many layers and areas of government, including in Queensland. FOI decision-makers are resistant to making information publicly available, because of an emphasis on the short-term political consequences of doing so, rather than the long-term policy objective of open accountable government. Rudimentary and flawed notions that release of information could be harmful, because the information will not be understood, or will be misinterpreted, or taken out of context, remain pervasive.
- “Political intervention, or the significance that may be attached to political considerations in the course of decision-making, gives rise to a perception that in some cases these factors outweigh the public interest in disclosure.” The comments made above apply to this finding.
- “The laws in most instances do not require a pro-disclosure bias in making decisions on access. Often technical legal considerations override the objectives and the spirit and intention of legislation.”

⁶⁰¹ Davies AO, Hon. G., *Queensland Public Hospitals Commission of Inquiry Report*, November 2005, p. 519.

In RTK's submission legislative amendment is required to strengthen the public interest in disclosure and the underlying policy benefits of a pro-disclosure approach to the administration of FOI laws. While Section 4 provides that the object of the Act is to extend as far as possible the right of the community to access information held by the Queensland Government, this object is not reflected in the drafting of many exemptions or the approach to administration of the Act.

The history of the QLD FOI Act, introduced following recommendations of the Fitzgerald Report, shows the progressive tightening of disclosure, higher costs and an increase in exempt organisations. Amendments to the QLD FOI Act in 1994 and 1997 reduced the scope of FOI in relation to government-owned corporations, with agencies allowed to recover some costs for FOI administration following the 2001 amendment to the QLD FOI Act. Other amendments to the QLD FOI Act in 2004 and 2005, once again, further reduced the scope of the FOI Act.

Every amendment has fostered a culture within the Queensland Government which is antithetical to the objects of FOI. There can be little surprise that agencies adopted an anti-disclosure ethos.

RTK believes that since the introduction of FOI legislation in Queensland, the scope and efficiency of the QLD FOI Act have been progressively reduced, almost inevitably to protect the Government's political interests and conceal public service failings and incompetence. This has occurred despite the overwhelming evidence proffered in the Discussion Paper on the importance of FOI to open and transparent government and the importance of the rights of citizens of access to information.⁶⁰²

The Australian Press Council said —

Analysts and critics of FoI in Australia have observed that government agencies are often characterised by a culture of secrecy. Similarly, it has been observed that when dealing with applications for access under FoI, agency lawyers have a tendency to “deny and defend”, taking an adversarial approach that is antithetical to the spirit of FoI. While legislative amendments are necessary to improve the success of FoI, such amendments will ultimately fail to achieve improvements in FoI unless they are supported by fundamental shifts in the attitudes of government officers.

Three measures should be taken in order to promote changes in organisational culture within government agencies. First, FoI legislation should include an objects clause that emphasises that the aim of the legislation, in so far as it relates to the release of public interest material, is to facilitate accountability in government and public participation in policy formulation. Secondly, it is necessary to institute thorough training of all officials, both as part of the induction of new recruits and as part of regular reinforcement to all staff, in

⁶⁰² Australia's Right to Know submission to the FOI Independent Review Panel discussion paper, p. 3.

the principles of open government. Thirdly, it is important that Ministers and senior officers periodically issue statements that confirm their own commitment to the aims of open government.⁶⁰³

Submissions were also received from participants in the FOI process with a different perspective, but who reached similar conclusions. The University of Queensland said there was no dispute that there were some cultural problems in departments and agencies in Queensland. Like some other submitters, it said questions relating to the culture of departments and agencies were unlikely to be cured by legislative reform alone.⁶⁰⁴ It said —

Reform in these areas must flow from the top down and for government, from the Ministers all through to staff at the coal face. It cannot be forgotten that there are occasions when secrecy obligations are imposed on public sector employees which must also be considered when discussing public service culture. In particular, public sector employees face pressures from the following:

- the *Whistleblowers Protection Act 1994*;
- codes of conduct;
- privacy policies.

It is not difficult to understand employees in the public sector taking precautionary approach to the disclosure of information whereby, in some instances, disclosure of the information may result in proceedings for breaches of one or more of the above instruments. The University contends that one approach to this cultural imbalance is through educating public sector employees and discussing ways of reconciling the competing interests of freedom of information and secrecy.⁶⁰⁵

The Ombudsman said —

In order to achieve a truly successful FOI regime in Queensland, it is first necessary to overcome the agency culture that operates in favour of secrecy and information protection. It is pointless to reform the FOI Act so as to make it one of the most liberal and progressive in the world if decision-makers in agencies (or, more commonly, those senior managers to whom they report) have a basic distrust of FOI and are hostile towards its objectives. The goal of cultural change can only be achieved with strong leadership - by leaders at the most senior levels demonstrating a commitment towards open and transparent government and an understanding and acceptance of the philosophy of FOI. It is important that officials who hold information and power within the executive branch of government recognise that they do so on behalf of the

⁶⁰³ Australian Press Council submission to the FOI Independent Review Panel discussion paper, pp. 8-9.

⁶⁰⁴ The University of Queensland submission to the FOI Independent Review Panel discussion paper, p. 8.

⁶⁰⁵ The University of Queensland submission to the FOI Independent Review Panel discussion paper, p. 8.

people of Queensland, and tailor their management practices with respect to government information accordingly.

In the Commonwealth sphere, as far back as 1985, Cabinet issued directions that agencies should not refuse access to non-contentious material only because there were technical grounds of exemption available under the Commonwealth FOI Act. I have already noted above, the success of the New Zealand regime, which operates on the basis that information is to be made available unless there is a good reason for withholding it.

On the other hand, my experience as Information Commissioner led me to the view that it was the practice of some Queensland agencies to claim certain exemptions (for example, Cabinet and legal professional privilege) whenever available, regardless of individual circumstances or considerations. As I have noted above, the Cabinet exemption provision is in need of immediate amendment. As the Panel itself has noted at page 80 of its report, the very existence of this “bolt-hole” sends the wrong message to public servants about the desirability of openness. It is difficult to envisage cultural change occurring in those circumstances.

...

Although it has never been implemented in Queensland, I remain of the view that the performance appraisal idea has merit and would go some way towards forcing a cultural shift within agencies. In addition to that proposal, I support many of the others discussed in the Discussion Paper at pp. 100-102, specifically:

- circulation by the Premier of a memorandum directing agencies not to claim exemption over technically exempt material unless there is good reason;
- elevating the status of FOI decision-makers, including appointment at an appropriate mid to senior level, and providing appropriate training, resources and support;
- actively promote awareness of FOI within the agency and train staff on their obligations under the Act, particularly in the area of records management, retention and disposal.

I also support the introduction of an FOI Monitor role (as recommended by LCARC in 2001) (I will discuss this proposed role in more detail below). The role would entail responsibility for (among other things) auditing an agency’s compliance with the Act in terms of individual requests, as well as reviewing the agency’s document management and processing procedures.⁶⁰⁶

Before addressing some of the proposals that have been suggested in these submissions and others, and in the discussion paper, it should be noted once again that

⁶⁰⁶ Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, pp. 12-13.

the fact that some agencies develop a problematic culture is not confined to Queensland, nor to Australia. According to Toby Mendel —

In most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, the right to information depends on changing this culture since it is virtually impossible to force civil servants to be open, even with the most progressive legislation. Rather, longer-term success depends on convincing public officials that openness is not just an (unwelcome) obligation, but also a fundamental human right, and central to effective and appropriate governance. A range of promotional measures may be needed to address the culture of secrecy and to ensure that the public are aware of the right to information and its implications for them.⁶⁰⁷

On the question of how to achieve cultural change, Carter said —

There are many excellent suggestions outlined in the Discussion Paper. There is no one quick fix, so a wide range of measures is best. The importance of top-level support for FOI concepts and good FOI behaviour cannot be overstated and it is very difficult to achieve. Strong statements of support for openness from the Premier, Ministers and CEOs would be a great start. Including FOI as a performance measure for senior managers is useful, although the tendency has been towards the quantifiable aspects of FOI performance (meeting statutory deadlines, rates of reviews etc) as it is difficult to evaluate and pay bonuses on the more qualitative, less tangible aspects.

Sanctions are an unpleasant but necessary element to achieve the change. Information Commissioners rarely if ever invoke their powers in this regard, not only in Queensland but internationally. (The example from India was startling as almost unprecedented). As a trainer I have often wished for just one salutary example where an official was fined for destroying documents, or obstructing a proper decision, to convince any sceptics on the training course.

Ongoing support for FOI Officers, through training, advice and network meetings, is essential. Some initiatives employed elsewhere include accreditation of FOI officers (South Australia) and the creation of the role of Information Rights Professional (Canada) so that the FOI Officers are given more authority and respect for the work they do. Professional programs of study, supported by government, to upgrade the skills of FOI Officers, have been set up at the University of Alberta and the University of Northumbria.⁶⁰⁸

The discussion paper detailed a number of proposals that have been made by Rick Snell to address administrative compliance shortfalls.

⁶⁰⁷ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 33.

⁶⁰⁸ Megan Carter submission to the FOI Independent Review Panel discussion papers, p. 15.

First —

Leadership endorsement of the letter and intent of the legislation (from both political and administrative branches of government). Reportedly, the circulation of the then U.S. Attorney-General Janet Reno's Memorandum (*"Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a [FOI] requester unless it need be"*), endorsed by President Clinton, produced a significant cultural change in the handling and determination of FOI requests in the United States.⁶⁰⁹

The Panel endorses this suggestion, though, like the Commonwealth Ombudsman, would also add the legislative branch to those who should emphasise the importance of providing information to requesters.

Second —

A careful consideration of the level, type and power of the position to which FOI decision-making is assigned to within an agency. Snell says "The allocation of FOI duties to low level officers, with little status or experience and no career path is a recipe designed to foster weak compliance".⁶¹⁰

The Panel agrees. The need for experienced officers to be responsible for FOI will increase with the Panel's proposed restructuring of the FOI system. This will apply in particular to the assessment of the public interest in those areas where previously officers tended to rely on the fact that a document appeared to be covered by an exemption to avoid any serious consideration of whether the public interest nevertheless required that it be disclosed.

Third —

The position of an FOI officer should be gazetted or have explicit statutory delegations of authority. FOI decisions should be, and be seen to be, the responsibility of statutory powers by an independent officer.⁶¹¹

The Panel is not convinced of the need for gazettal. It considers that the possibility that FOI officers should have a form of accreditation after completing a proper training program and working in the position in an agency should be explored by the Information Commissioner. This would need to take into account the provision of continuing education. In any event the Panel considers that each agency should publish on its website the names of those people within the agency who have statutory delegations from the CEO to make FOI decisions.

Fourth —

Publicity and awareness of FOI should not be seen as a short term necessity but

⁶⁰⁹ FOI Independent Review Panel discussion paper, p. 100.

⁶¹⁰ FOI Independent Review Panel discussion paper, p. 100.

⁶¹¹ FOI Independent Review Panel discussion paper, p. 101.

as a long term strategic commitment by governments to the legislation.⁶¹²

The Panel has addressed this problem, in part, by proposing that the functions of the Information Commissioner should be expanded to include a promotional role as the “champion” of FOI and a policy role collaborating with the Queensland State Archivist and Chief Information Officer, and reporting through the relevant CEO Steering Committee. The Information Commissioner, through continuing contact with agencies and the Parliamentary Committee, will need to find ways of reminding government of the importance of FOI. Those who use FOI, like the media, will similarly have to encourage government to remain committed to its proper implementation.

Fifth —

The training and resourcing of FOI officers must be done on the basis that the original corps of officers will eventually be replaced. Beyond the ongoing function and priority of education and training of FOI officers, Western Australian FOI officers developed a series of performance standards and measures against which their, and the agency’s, compliance with FOI could be judged.⁶¹³

The Western Australia literature is impressive. The Information Commissioner should adapt it for use in Queensland and apply its principles when preparing annual report cards on the way agencies administer FOI.

Sixth —

Adoption of the Australian Law Reform Commission and Administrative Review Council proposal for an ‘auditing’ or monitoring role to be undertaken by an independent body to the agency. The role would include audits of the handling of previous FOI requests, as well as a role to work as a circuit breaker/honest broker where FOI requests have deteriorated into adversarial disputes.⁶¹⁴

The Panel has proposed this in chapter 20.

Seventh —

Institute an annual awards program that publicly rewarded or recognised significant agency achievements in compliance and active pursuit of the objectives of an FOI Act.⁶¹⁵

This would be consistent with the adoption of the Panel’s recommendation (in chapter 20) for the Information Commissioner to be responsible for publishing an annual score card for agencies, signaling to the public, government and the parliament, those

⁶¹² FOI Independent Review Panel discussion paper, p. 101.

⁶¹³ FOI Independent Review Panel discussion paper, p. 101.

⁶¹⁴ FOI Independent Review Panel discussion paper, p. 101.

⁶¹⁵ FOI Independent Review Panel discussion paper, p. 101.

agencies that are meeting the aims of FOI and those that need to improve their performance.

Eighth —

The recommendations of a Canadian task force —

- responsibilities related to access to information and information management to be included in the job description of officers and managers;
- objectives related to access to information and information management to be part of the accountability agreement and performance reviews of all managers;
- government institutions to discuss their performance on access to information on a regular basis at management meetings;
- when new programs are established, an access to information component to be included from the outset as an integral part of the program;
- access to information goals to be integrated in annual corporate plans for government institutions.⁶¹⁶

The Panel considers these issues need to be addressed through information policy governance arrangements. As explained in chapters 3 and 20, the Panel believes the Information Commissioner should have a significant place in the development of a broader strategic information policy. Cultural change in these areas will affect FOI.

Ninth —

LCARC proposed —

In principle, performance agreements of senior public officers should impose a responsibility to ensure efficient and effective practices and performance in respect of community access to government-held information whether that access is granted under the Act or otherwise.

The FOI Monitor should consider and make recommendations to the Attorney-General about the particular performance indicators to apply.⁶¹⁷

The Panel has previously indicated it does not favour the use of performance bonuses for senior executives relating to FOI, preferring instead the more public assessment by the Information Commissioner of the performances of each agency. The latter would be more holistic and qualitative. It would avoid problems that could arise through senior executives emphasising that their officers should deliver outcomes that inflate their statistical FOI successes, but would be misleading in terms of the information that is made public by the agency. In particular, performance criteria would be unlikely to favour the release of information through the “push” model that the Panel indicated in chapter 3 should be developed across all agencies.

⁶¹⁶ FOI Independent Review Panel discussion paper, p. 102.

⁶¹⁷ FOI Independent Review Panel discussion paper, p. 102.

Tenth —

There is a suggestion there should be sanctions for non-compliance. The discussion paper reported —

Banisar commented that sanctions are a necessary part of every law to show the seriousness of failure to comply although there is general reluctance by government bodies to sanction their own employees for following their general policies.

Evidently in India, Information Commissioners have begun personally fining Information Officers who refused or unduly delayed releasing information under India's Right to Information Act.

Consideration might be given to other sanctions against agencies such as refunding all fees and charges on a request that was decided over the time limit.⁶¹⁸

In relation to the final suggestion, the Panel has made a recommendation in chapter 13 that there should be a refund of the deposit when the time limit for processing is exceeded.

As to the suggestion there should be other penalties against an agency, or an officer within the agency, the comment of Toby Mendel in the latest edition of his international survey of FOI, should be noted —

An important tool to tackle the culture of secrecy is to provide for penalties for those who wilfully obstruct access to information in any way, including by destroying records or inhibiting the work of the oversight body. The Joint Declaration⁶¹⁹ specifically refers to sanctions for those who obstruct access. Such penalties may be administrative, civil or criminal in nature, or some combination of all three. In some countries, for example, there is general provision for damage claims for losses suffered as a result of a breach of the law. The experience with criminal penalties in some countries with longer-standing right to information laws suggests that prosecutions tend to be rare but that these rules still send an important message to officials that obstruction will not be tolerated. Other means that have been tried to address the culture of secrecy include providing incentives for good performers and exposing poor performers, and ensuring legislative oversight of progress through annual reports on the performance of public bodies in implementing the right to information.⁶²⁰

In the course of the survey, Mendel notes the sanctions available under the Indian Right to Information (RTI) law —

⁶¹⁸ FOI Independent Review Panel discussion paper, pp. 102-103.

⁶¹⁹ Joint Declaration of the United Nations Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

⁶²⁰ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 34.

The RTI Law includes a developed regime of sanctions. Pursuant to section 20, where an Information Commission is of the view that an information officer has, without reasonable cause, refused to accept a request, failed to provide information within the specified timelines, denied a request in bad faith, knowingly given incorrect, incomplete or misleading information, knowingly destroyed information which was the subject of a request, or obstructed in any manner access to information, it shall impose a penalty of Rs 250/day until the information has been provided, up to a maximum of Rs 25,000. Presumably, where the problem cannot be remedied, for example because the information has been destroyed, the maximum would apply automatically. Before imposing such a sanction, the Commission shall give the information officer a reasonable opportunity to be heard. The section states that the burden of proving that he or she acted ‘reasonably and diligently’ shall be on the information officer, although the offence only stipulates a lack of reasonable cause, and not a lack of diligence, as a constituent element. For persistent offenders, the Commission shall recommend disciplinary action. The list of wrongs outlined in this section is extremely comprehensive.⁶²¹

Mendel also said that the Indian RTI law enables proceedings to be instituted against an officer or agency that has “acted arbitrarily or capriciously” with respect to the withholding of information.⁶²²

The Roman Catholic archdiocese of Brisbane submitted —

In the event of a failure by a department/agency to behave properly in complying with an individual’s request for information under the FOI Act, the legislation also must reinforce the individual’s right of review via an independent body such as the Ombudsman’s Office. The powers of the Ombudsman could be strengthened, including their powers to recommend “penalties” in the form of public disclosure to parliament or the waiving of a complainant’s costs incurred in seeking information should be encouraged if a department/agency or their designated officers breach their respective obligations under the FOI Act. Such practices would provide the impetus needed for departments/agencies to achieve the desired levels of proficiency and professionalism in dealing with FOI Act requests.⁶²³

Megan Carter said —

[I]t could be said that FOI Officers also need protection from the internal consequences of disclosures which have the effect of embarrassing their agencies or Ministers. One option may be to give the Information Commissioner a role to accept complaints from FOI Officers about threats and

⁶²¹ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 61.

⁶²² Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 133.

⁶²³ Roman Catholic Archdiocese of Brisbane submission to the FOI Independent Review Panel discussion paper, pp. 3-4.

reprisals in an FOI context, similar to the support sometimes given in cases of whistle-blowing.⁶²⁴

The Panel considers the task of FOI decision-makers is difficult enough, without them having to be concerned about whether their superiors will put pressure on them to make decisions that are contrary to those they believe should be made on a proper interpretation of the legislation. There are two answers to this problem that address the issue. The first is to make it an offence for an officer to require an FOI decision-maker to make a decision that the decision-maker believes is not a decision required by the Act, or to direct an officer to act contrary to the requirements of the Act. The incorporation of such a provision would create an important shield of independence for FOI officers. The second is to remind senior officers that if they disapprove of a decision that might be made, they have the ability to revoke the delegation to the decision-maker for the purpose of making the particular decision, and make the decision themselves. This will mean that there can be no internal review of the decision – any challenge would be by way of external review. It will also mean that it will be apparent to the requester that the “principal officer” (Chief Executive) has not accepted the decisions proposed by the agency’s FOI officer.

The Queensland Government submission made no comment about most of the questions raised on the issues discussed in this chapter. However it said —

The Government is obviously keen to ensure that the highest standards in meeting public records and FOI obligations are met. Training conducted by DJAG addresses these issues and inclusion of FOI and public records training in induction courses contributes to a broad awareness of FOI principles across the public sector.

Behaviours described as ‘malicious non-compliance’ in Table 8.1 of the Discussion Paper – such as shredding and ‘deconstruction of files’ – would likely comprise a breach of agency codes of conduct and statutory obligations (such as those obtaining under the *Public Records Act 2002*), and feasibly amount to official misconduct as defined in the *Crime and Misconduct Act 2001*.

Section 96 of the FOI Act requires the Information Commissioner to refer evidence of breaches of duty or misconduct in the administration of the Act to the principal officer of a relevant agency.⁶²⁵

No such action has ever been taken by the Information Commissioner since the office was created as a separate entity in February 2005.⁶²⁶ Subsequently, the Acting Information Commissioner advised the Panel –

Recently allegations have been made that a public service officer has provided the Office of the Information Commissioner with false or misleading information, an offence if proven under the Act. Allegations of this nature

⁶²⁴ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 3.

⁶²⁵ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 23.

⁶²⁶ Acting Information Commissioner letter to the FOI Independent Review Panel, 16 April 2008.

practically must be referred to the principal of the agency for investigation at the time the allegations arise. The Commissioner has no power to investigate and is unlikely to obtain evidence of that offence in the course of her duty.⁶²⁷

The Panel is aware that there are specific provisions in the *Public Records Act* that make it a criminal offence to dispose of a public record, without an authority provided by the Archivist. It considers that the FOI Act should contain a similar provision or a reference to the criminal sanction under the *Public Records Act* for improperly disposing of a public record.

Eleventh —

A number of problems were drawn to the attention of the Panel when it surveyed FOI co-ordinators in government and local government agencies, though they were not always recognised as problems. An important issue arises over the use of s. 22 of the Act, which says –

22 Documents to which access may be refused

An agency or Minister may refuse access under this Act to—

- (a) a document the applicant can reasonably get access to under another enactment, or under arrangements made by an agency, whether or not the access is subject to a fee or charge;
- (b) a document that is reasonably available for public inspection under the *Public Records Act 2002* or in a public library; or
- (c) a document that—
 - (i) is stored for preservation or safe custody in the Queensland State Archives; and
 - (ii) is a copy of a document of an agency.⁶²⁸

It is unnecessary to discuss the ways in which this section has been applied to disadvantage applicants. What is apparent to the Panel, however, is that agencies need to adopt a positive approach to the application of this provision, rather than simply using it as an excuse for avoiding providing the information that is being sought. What is important is that if an FOI officer decides that the relevant information (or part of it) is otherwise available, the applicant should be notified immediately that the information may be accessed outside the FOI process, and where that access is available. At the very latest this should be done when the application is acknowledged and the applicant is sent a copy of the Schedule of Relevant Documents. Otherwise, the FOI officer should provide the applicant with the information directly, not under FOI but through administrative access. The FOI officer must recognise that the relevant section of the Act does not require a rejection of an FOI application where documents are otherwise available, it makes this an

⁶²⁷ Acting Information Commissioner letter to the FOI Independent Review Panel, 21 May 2008

⁶²⁸ *Freedom of Information Act 1992*, s. 22.

option (“agency or Minister may refuse access”). The way in which this provision is applied by an agency may be an important indicator to the Information Commissioner of the agency’s culture.

Twelfth —

There are occasions when the FOI officer may not have the necessary resources, information or training to deal with a particular application. For smaller agencies, particularly those outside Brisbane or regional cities, there may be a problem for the officer in obtaining advice from cohorts. The Information Commissioner’s office should have a section that is available to direct the officer to relevant material (such as prior decisions, or sections in the manual, or other information). This would need to be provided in a way that would not compromise the Information Commissioner if a challenge was later mounted against the particular decision of the FOI officer. (See, structural protections against allegations of apprehended bias in chapter 19.)

RECOMMENDATIONS:

Recommendation 124

The Premier and the Director-General of the Department of the Premier and Cabinet should publicly, as well as by formal memorandum,

- (a) endorse the principles of the FOI legislation;
- (b) express their desire that agencies should administer its provisions to achieve its Objects; and
- (c) direct agencies to maximise the amount of information that is given to those who request it. They should also affirm the desirability of agencies adopting “push” models to disseminate information held by agencies.

Recommendation 125

At the beginning of each new Parliament, the Parliamentary Committee should prepare a statement to be considered by the Parliament renewing its commitment to the principles of the legislation.

Recommendation 126

CEOs should ensure that officers assigned to make decisions on FOI applications have the seniority and experience appropriate for the task.

Recommendation 127

CEOs should foster agency cultures consistent with the objects of the FOI legislation and ensure that staff induction programs and other appropriate agency-wide staff opportunities include FOI and commitment to its principles.

Recommendation 128

The Information Commissioner should explore the possibility of implementing an accreditation system for FOI officers who have satisfactorily completed training programs.

Recommendation 129

Agencies should publish on their websites the names of officers who have been delegated power to make FOI decisions.

Recommendation 130

The Information Commissioner should promote greater awareness of FOI in the community, and within government.

Recommendation 131

The Information Commissioner should develop a set of purposeful performance standards and measures, for use in the annual report cards on the FOI activities of agencies. These should be consistent with the broader strategic information policy imperatives.

Recommendation 132

It should be an offence for an officer to direct an FOI decision-maker to make a decision that the decision-maker believes is not the decision required to be made under the Act, or to direct an officer to act contrary to the requirements of the Act. If a CEO believes a decision-maker is going to make the wrong decision, the CEO should revoke the delegation to the decision-maker and the CEO should make the decision.

Recommendation 133

The FOI Act should contain a reference to the provision in the *Public Records Act* that makes it an offence to destroy public records other than in accordance with the provisions of the *Public Records Act*.

Recommendation 134

When a decision-maker decides that a requested document is a document of the kind described in s. 22, the applicant should be immediately informed of where it is available and how it can be accessed. If the decision-maker has ready access to the document it should be provided to the applicant.

Recommendation 135

The Information Commissioner should provide a help-line service for FOI officers.

24.2 Contentious issues management

A matter that has been raised by a number of respondents, and particularly by the media, comes under what has been described in the FOI literature as contentious issues management. The Australian Press Council expressed these concerns —

Some journalists have also expressed frustration at the tendency of politicians to release information to the general public at the same time as, or even before, releasing it to the applicant, who may have expended a good deal of time and money pursuing the application and appeals. It is not clear whether this practice is motivated purely by malice or is a deliberate attempt to discourage journalists from using FoI. What is clear is that it robs the applicant of any benefit, whereas fellow journalists who have not expended a comparable amount of time or money are able to benefit from the use of the information released. A journalist thus obstructed once is unlikely to be enthusiastic about making further FoI applications, and publishers are understandably reluctant to fund appeals against refusals. It would be appropriate that the applicant be given 24 hours in which to examine and report upon information received through FoI before that information is released to the general public.⁶²⁹

The submission by John Doyle, FOI consultant to *The Courier-Mail*, details the way Queensland Health, the Queensland Police Service and the Department of the Premier and Cabinet apply “damage control” or deal with sensitive issues.⁶³⁰ Included in the material is the following statement by an officer of the Premier’s Office —

It has become reasonable to expect that FOI applications from political or media applicants may require further responses in the public domain. Planning for these eventualities is a normal function of any Ministerial office.

The specific process would involve a Ministerial staff member contacting a staff member from the Office of the Premier to discuss the issues covered by the FOI application. Alternatively, a Ministerial staff member may choose to show the documents to a staff member in the Office of the Premier as part of the discussion. There would be no reason in these circumstances for the Office of the Premier to retain those documents of another agency and the nature of the consultation would not constitute any transfer or formal consultation that might affect the provision of those documents to an applicant.

Instruction or Recommendations

Documents are not held concerning instructions recommendations, advice, guidelines or procedures given to Ministers. Agencies would be responsible for administering their own procedural instructions in accordance with the *Freedom of Information Act 1992*, so agency or CEO related documents would be held by agencies.

⁶²⁹ Australian Press Council submission to the FOI Independent Review Panel discussion paper, p. 4.

⁶³⁰ John Doyle submission to the FOI Independent Review Panel discussion paper, pp. 11-14.

No instructions are given prior to the release of documents during a normal application process. Any sighting of documents intended for release occurs purely as described and not to affect the outcome of the FOI release process.⁶³¹

Doyle then commented —

This information is inconsistent with an article published in *The Courier-Mail* on 2 September 2004 concerning an application to the Department of Primary Industries:

FOI reveals land report cover-up

.... On August 27, Mr Beattie put out a press release, entitled “State Government release reaffirms vegetation research flawed”, to pre-empt the Opposition’s examination of FOI documents dispatched that day but not received until August 31.

It was at least the third time Mr Beattie had opted to publicly release his interpretation of FOI documents – which would not otherwise have been released – before they had been received by the Opposition or the media.⁶³²

The discussion paper included the following observation by Alisdair Roberts —

The promise of increased openness has been undercut by the development of administrative routines designed to centralize control and minimize the disruptive potential of the FOI law. Special procedures for handling politically sensitive requests are commonplace in major departments. Information technology has been adapted to ensure that ministers and central agencies are informed about difficult requests within days of their arrival. Communications officers can be closely involved in the processing of these requests, developing “media lines” and other “communication products” to minimize the political fallout of disclosure.

These practices are largely hidden from public view. Nevertheless, they play an important role in shaping the substance of the right to information in Canada.⁶³³

Rick Snell, in an article that was highly critical of the practice of “contentious issues management” in some areas, said –

... the active involvement of ministerial minders or press units in the determination and processing of FoI requests is unacceptable. The differential

⁶³¹ John Doyle submission to the FOI Independent Review Panel discussion paper, p. 13.

⁶³² John Doyle submission to the FOI Independent Review Panel discussion paper, p. 14.

⁶³³ Roberts, A., “Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada”, *Public Administration*, Volume 83, No.1, 2005, p. 4.

treatment of requesters is a major threat to the fair administration of FoI laws.⁶³⁴

Snell also commented —

The problem with extending Contentious Issues Management to FoI is not the notification or preparation of briefing materials for Ministers. The problem is the subjecting of the processing and final determination of the request to political and information management considerations instead of the legal and public interest considerations required by the legislation.⁶³⁵

The Panel agrees. There are two aspects of the behaviour associated with this issue, one acceptable and one not. As was indicated earlier in this chapter, it is totally unacceptable for a superior officer (or a ministerial officer or media advisor) to try to influence a decision by an FOI officer whose responsibility is to apply the law.

However, it is inconceivable that any government would not want to know about requests for documents that might result, when released, in the government having to deal, unprepared, with a contentious issue. Freeing up information for an applicant does not require that the government be kept in ignorance of the process that its own agency is undertaking to provide the information.

The real issue is what is acceptable conduct for the government in dealing with any political or administrative problems that might arise as a result of providing the document(s).

A frequent complaint by government is that the information that is being provided will be taken out of context and will/could result in misleading the recipient or the public generally. Whether or not that is a real problem, the government is entitled to release to the applicant and to the world any additional information that would put the particular document(s) in context. The whole point of FOI is to encourage governments to release as much information as is possible. One aim of FOI is to encourage informed debate. The more information in the public arena, the better. The government cannot be criticised for releasing more material than was specifically requested, so long as the applicant does not have to pay for the additional material.

Included in this report as Appendix 5 is an example from the United Kingdom of how a “contentious” request can be dealt with. The applicant sought a very specific piece of statistical information about the release on bail of people charged with murder/manslaughter. The letter in response includes the answer to the request, but also put it in a proper context.

A recent analysis of the way FOI is managed in Scotland makes the valid point that —

⁶³⁴ Snell, R., “Contentious Issues Management – The Dry Rot in FOI Practices”, *Freedom of Information Review*, Issue No. 102, 2002, p. 1.

⁶³⁵ Snell, R., “Contentious Issues Management – The Dry Rot in FOI Practices”, *Freedom of Information Review*, Issue No. 102, 2002, p. 2.

FOI is embedded within a political context and there are sound and legitimate reasons for active engagement on the part of press offices and politicians, not least in complex cases by providing the requestor with a more readily understood response that might otherwise be the case. This segmentation of requests suggests the need for a level of transparency regarding the reasons for, and nature of, that involvement in specific cases, however.⁶³⁶

Different agencies have different administrative plans to deal with requests for contentious information. In principle, there seems to be no reason why a CEO or Minister, or their senior advisors, should not be informed of FOI requests at any stage of their processing by the FOI officer up to and including the decision on what documents will be provided, so long as no improper pressure is applied on the officer to produce a particular result. The agency or minister is entitled to prepare a response and make ready other material for release. However the provision of the material requested by the applicant should not be delayed to allow that to be done.

The Panel considers that agencies should follow the UK and US practice of publishing on their websites information provided to an applicant for FOI that would be of general interest. However the Panel considers that the applicant, who normally will have had to pay for access, should have a clear 24-hour period to use the information before it is made public by the agency. This is the period recommended by the Australian Press Council in its submission. The need for there to be a brief period in which the applicant has exclusive use of the documents applies particularly to media applicants, and also to NGOs that might want to use information to advance their own causes.

RECOMMENDATION:

Recommendation 136

Agencies should publish on their websites documents that have been provided under FOI where the agency considers that the document would be of interest to the public, or where the agency receives a second request for the same document(s). This material should not be published until at least 24 hours after it has been provided to the applicant under FOI.

24.3 Investigating complaints

Earlier in this chapter, submissions from the Roman Catholic Archdiocese of Brisbane and from Megan Carter mentioned raised the issue of complaints about the handling of FOI. The Panel has proposed a new offence in relation to that problem - recommendation 132. It is also necessary to deal with the investigation of complaints.

⁶³⁶ Burt, E. and Taylor, J., “Managing Freedom of Information in Scottish Public Bodies: Administrative Imperatives and Political Settings”, *Open Government – a journal on freedom of information*, Vol. 4, Issue 1, April 2008, p. 10.

At present, s. 96 of the Act, dealing with “disciplinary action”, requires the Information Commissioner to bring to the attention of a Minister or the principal officer of an agency, any evidence that an agency’s officer has committed a breach of duty or misconduct in the administration of the Act. The Information Commissioner’s obligation to do this arises only “at the completion of a review”.

Subsequently, the (new) Acting Information Commissioner advised the Panel –

Recently allegations have been made that a public service officer has provided the Office of the Information Commissioner with false or misleading information, an offence if proven under the Act. Allegations of this nature practically must be referred to the principal of the agency for investigation at the time the allegations arise. The Commissioner has no power to investigate and is unlikely to obtain evidence of that offence in the course of her duty.⁶³⁷

The Panel considers the Information Commissioner’s powers should be broadened in two ways.

First, the Information Commissioner should be able to investigate complaints about an officer breaching their duty or engaging in misconduct at any stage of the processing of an application for access, and not just when a review is completed.

Second, the Information Commissioner should be able to refer any evidence, or any allegation, to the Crime and Misconduct Commission.

RECOMMENDATION:

Recommendation 137

Section 96 should be amended to provide that —

- (1) The Information Commissioner should have power to investigate complaints about an officer breaching their duty or engaging in misconduct at any stage of the processing of an application for access, and not just if a review is initiated and completed.
- (2) The Information Commissioner should be able to refer any evidence of breach of duty by an officer or of misconduct, or any allegation of breach of duty by an officer or of misconduct, to the Crime and Misconduct Commission, or to a Minister or to the CEO of an agency.

⁶³⁷ Acting Information Commissioner letter to the FOI Independent Review Panel, 21 May 2008.

25 Conclusion and a new beginning

When the Premier, Anna Bligh, announced the appointment of the Panel to conduct a review of the *Freedom of Information Act 1992* and to prepare a report and recommendations, she said the Terms of Reference were “what in any assessment could only be described as the widest possible Terms of Reference to look at best practice around Australia and to look at best practice around the world”. She also said, “We’ll be looking at the entire Bill, a complete overhaul. So we’re not looking at a set of amendments to the current legislation, I’m looking at an entirely new *Freedom of Information Act*.”⁶³⁸

This report has concentrated on the central issues of FOI and includes recommendations of such a nature that their implementation would be best achieved through a new Act. The existing legislation has been amended frequently, and it shows, not only through the numbering system that has been required to insert sections in their proper place (for example, sections 11A, 11B, 11C, 11CA, 11D and 11E, between ss. 11 and 12) but also through the emergence of drafting problems where there appear to be conflicting or unclear provisions. The Panel has not attempted to undertake a complete study of the latter problems, but in Appendix 9 it details many of those that have been drawn to its attention, mainly as a result of its survey of agency FOI officers, but also in submissions and a helpful commentary provided by experienced FOI practitioner Ms Susan Heal, in conjunction with the Department of Justice and Attorney-General. This may assist the Office of the Queensland Parliamentary Counsel when a new Bill is prepared.

The Panel’s recommendations would result in a very different law, with improvements for users and agency administration, and more certainty for government. It should introduce a new era of open government, but this would not be at the expense of good government – rather it should promote it. The exemptions protecting the individual and collective responsibility of Ministers should provide certainty in preserving the requisite integrity and confidentiality of specified categories of essential advice. The fact that the advice may become public after 3 or 10 years, depending on the exemption, should in no way inhibit the conduct of government.

A great deal more information held by government should become public, but this will mostly occur through the proactive release of information by agencies and ministers. The FOI and privacy regimes should result in more information being released through a more informed and sympathetic administration of the public interest test. But the floodgates will not be forced open.

25.1 Implementation

Resources. The Panel’s proposals are likely to impact most on the Office of the Information Commissioner and on Queensland State Archives. The Information Commissioner will take on a much more active role, as “FOI champion”. This would involve the functions currently performed by the Department of Justice and Attorney-General as the lead agency in FOI, to which it has in recent years assigned two full-time equivalent staff. (See the material provided by DJAG to the Panel, printed as

⁶³⁸ Bligh, A. M., Press Conference, 17 September 2007.

Appendix 3.) The Panel's proposals envisage the Information Commissioner would have a significantly more active role in FOI matters than was actually performed by DJAG, and this implies a further increase of staffing beyond the two nominal positions from DJAG. Also, in supporting implementation of the new access to information regime, the Information Commissioner would be responsible for leading a change management framework for the public sector, including performance of its own roles under new provisions such as for publication schemes, as well as in setting guidance for the public sector or in contributing to whole of government strategic information policy direction.

The Panel considers the Information Commissioner should have as a deputy, an FOI Commissioner, who would be directly responsible for the two external review functions of mediation and adjudication. These functions need to be isolated and kept separate from the other administrative and promotional FOI functions of the Information Commissioner to avoid a conflict of interest and any possibility of a perception of bias.

The Office of the Information Commissioner would need to provide registry-like services for both FOI and privacy, but these should require no additional resources to those already needed by the Information Commissioner.

There is likely to be created a Privacy Commissioner, whom the Panel considers should be located in the Office of the Information Commissioner, again at the level of a deputy to the Information Commissioner. Both the FOI Commissioner and the Privacy Commissioner should be statutory officers and would have similar mediation/adjudication roles in their different fields.

Appendix 4 contains a checklist of the new roles and responsibilities for the Office of the Information Commissioner.

The Panel's proposals also would require additional resources for the Queensland State Archivist. Any reduction in the 30-year rule would presumably require additional archivists to be deployed, at least for a transitional period. The Panel has also recommended the Queensland State Archivist should have a more active role in auditing and improving the compliance of government agencies with information Standards and guidelines, and that would require additional staffing. The Panel has not discussed these resource issues with the Queensland State Archivist.

For most agencies, there should be no additional demand on staffing created by the proposed changes. Indeed for most, changing the charging regime should ease the burden, by reducing the time taken handling requests. Time taken in handling requests should be further assisted in the early provision of a Schedule of Relevant Documents to applicants who can then select which documents in particular are sought. As many agencies usually prepare a schedule of documents in any event, this is not an additional resource impost, only its use and timing change – for time and resource savings to follow.

The Panel's proposals to allow cross-agency support will allow some smaller agencies to make arrangements that should improve their capability to handle FOI and privacy without increasing resources. *Ex ante* decision-making is a small investment in time,

returning later time savings and better decision-making. Investment in proactive disclosure mechanisms will also return FOI savings over time.

Legislation. The Panel assumes that responsibility for liaising with the Office of the Queensland Parliamentary Counsel in preparing legislation would be based in the Department of Justice and Attorney-General, or in the Department of the Premier and Cabinet, or both. Given the origins of this review, and the importance placed on it by the Premier, and its role in a new strategic direction in the State's information policy, it would seem essential that the Department of the Premier and Cabinet should have a continuing and leading part in the development of new legislation.

A parallel might be drawn with developments at the Commonwealth level, where the new Government is committed to introducing major changes to its FOI law. There the responsibility for the changes has been taken over by the Cabinet Secretary, Senator John Faulkner, who is responsible directly to the Prime Minister, and is supported by his Department.

The Panel suggests that the implementation team should also be able to access a reference body made up of FOI officers from agencies other than those from which the team is drawn, and it should do so on a regular basis.

To assist with the drafting of new legislation, the Panel has prepared Appendix 2, which is a drafting commentary. Importantly, the drafting commentary is subject to the Panel's recommendations and any necessary redrafting for renumbering purposes.

25.2 Strategic review and review of the Act

In chapter 20, the Panel mentioned the desirability of reviews of the Office of the Information Commissioner and of the new legislation being conducted before the expiry of the term of the first Information Commissioner appointed under the new Act.

The present Act requires that a strategic review of the Office of the Information Commissioner should take place at least every five years. The last such review reported in April 2006. If a new Act was to come into effect in 2009, the Panel believes it would be appropriate for a new strategic review to be conducted four years after the commencement of the Act to enable time for implementation of the new regime as well as a reporting time for the new Information Commissioner to respond before the end of the Information Commissioner's first term.

The Panel also considers it desirable that there should be a review of the new Act conducted about four years after it comes into effect. This would be before the expiry of the term the Panel has proposed for the first Information Commissioner appointed under the new Act (at least five years and no more than 10 years – see recommendation 140).

25.3 Transitional arrangements

The changes in the FOI regime the Panel is proposing are of such magnitude that it will be essential there be a managed transition from the old to the new system. Requests made under the old Act should continue to be run under its provisions,

through to external review, until such time as the new Act comes into force. Requests made under the new Act should then apply to all documents with just two exceptions. The Panel considers that documents created before the enactment of the new Act that would have been covered by the Cabinet and Executive Council exemptions in ss. 36 and 37 of the *Freedom of Information Act 1992*, should continue to be exempt. This will require a transitional arrangement preserving ss. 36 and 37, but only in relation to those “old” documents. The new exemptions will apply to documents created after the Parliament passes the new Bill. The Panel is concerned that the new Act should be looking to the future, and that its advent should not be used to overturn arrangements arrived at under the old Act.

There will be no need to make transitional arrangements for documents covered by other exemptions, even those that will not appear in the new Act. This is because the exemptions that will not appear as such in the new Act were all subject to a public interest test.

The commencement of the new Act may need to be delayed to allow for the new structure of the Office of the Information Commissioner to be readied, and the process of appointing an Information Commissioner and an FOI Commissioner carried through to an appropriate stage. It might be considered desirable for the Part of the new Act dealing with the appointment of these officers to commence before the remainder of the Act, though that would also require the repeal of the relevant part of the 1992 Act.

25.4 A new name for the Act?

The discussion paper suggested that if there was to be a new approach to FOI proposed by the Panel, as well as a new Act, there might be some advantage in giving that Act a new name. It said, “This would have obvious symbolic importance, not least because to some critics the present law has been characterised as a freedom from information law. But it would also stress a new beginning in the way the law is to be applied by agencies.”⁶³⁹ It asked whether a new Act should be called something other than the *Freedom of Information Act*, and if so, what would be the best title.

Most of those who responded did not favour change, though the Queensland Government submission left the issue open. It said —

“Freedom of Information” as a concept is widely recognised in the community and across multiple jurisdictions. Conversely, it may be that the name of the Act could be reframed to better reflect the Act’s key purposes, which include not only access to but amendment of information. In any case, the benefits to be obtained by any proposal to change the name of the Act would need to be balanced against potential for community confusion and administrative and transitional costs.⁶⁴⁰

⁶³⁹ FOI Independent Review Panel discussion paper, pp. 161-162.

⁶⁴⁰ Queensland Government submission to the FOI Independent Review Panel discussion paper, p. 33.

Megan Carter said —

While it is probably true that “FOI” is not an accurate title, it has the enormous advantage of being recognizable on both a national and an international level as performing the function of providing access to information. The majority of FOI Acts in the English speaking world have “FOI” as the title.

If it were to be changed, the best option would be: “Access to Information Act”.⁶⁴¹

The Queensland Ombudsman said —

While I can understand the Panel’s desire to signal a new era in FOI in Queensland by changing the name of the Act, a name change will be seen as window dressing unless the main deficiencies in the Act are addressed – for example, the Cabinet exemption provision.

Overall, I tend to think that the perceived symbolic benefits of changing the name of the Act would not outweigh the associated costs and administrative requirements. I also think there is significant value in retaining the universally known concept of “FOI”.⁶⁴²

Rhys Stubbs, from the University of Tasmania, said —

The title I think is most suited for the legislation is *Access to Information*. This is primarily because the name asserts the central rationale for the legislation. It does not declare cuddly things like “freedom”, but clearly states that the aim is ACCESS, pure and simple.⁶⁴³

John Pyke, a senior lecturer in law at QUT said —

I submit that *if* there is to continue to be a separate Act dealing with *access* to public records, the name should remain Freedom of Information Act. It may be true that over the years some cynicism has developed about the concept, and that it is referred to as freedom *from* information, but this is not the fault of the short title, it is the fault of successive governments that have shown public servants by example that, any time they lose a challenge to their right to withhold information, they will have the Act amended to increase bureaucrats’ rights and diminish the people’s rights. The remedy is not to change the short title, the remedy is

⁶⁴¹ Megan Carter submission to the FOI Independent Review Panel discussion paper, p. 28.

⁶⁴² Queensland Ombudsman submission to the FOI Independent Review Panel discussion paper, p. 33.

⁶⁴³ Rhys Stubbs submission to the FOI Independent Review Panel discussion paper, p. 47.

- (i) to toughen the Act up, so as to make the object even more obvious than it is at present, and
- (ii) for the government to make it clear that it is never again going to ask the legislature to water the Act down. To repeat the point above, the government's slogan should be 'FOI – here to stay!'⁶⁴⁴

Rick Snell, senior lecturer in law at the University of Tasmania, argued in a submission to the LCARC review of the FOI Act in 2000 that the name should be changed to "Access to Information".⁶⁴⁵ In an article comparing Australian and New Zealand FOI laws, he made an important point about the importance of an FOI law —

Is it simply an optional linear law reform measure that is expected to have an important but transitory impact or a much more complex, variable and transformative process (is it a Dog Control Act or one akin to the Human Rights Act?). Does the fact that FOI deals with information – one of the basic fundamentals of any political, legal, economic and social system – elevate its importance?⁶⁴⁶

The Panel agrees that the importance of the FOI law in the terms suggested by Snell is not appreciated, particularly by those who are charged with its administration. The term, FOI, rolls off the lips easily enough, but conveys very little. Freedom of Information is, as several submissions concede, a somewhat misleading term.

For the present, however, it has history on its side. It is the most common title given to this kind of legislation, though New Zealand opted more than 15 years ago for the more accurate description for its law, the *Official Information Act 1982*, and more recently the Northern Territory called its law (which additionally deals with Archives and privacy), the *Information Act*.

In moving towards a better future in the State's relationship with its citizens and information, however, the term FOI comes with too much negative baggage, and has lost too much respect.

Elsewhere there are changes. Toby Mendel, in the second edition of his study of FOI around the world, said —

the terminology is starting to change. The term "freedom of information" has historically been common usage and this is reflected in the title of this book, retained from the first edition. However, the term "right to information" is now increasingly being used not only by activists, but also by officials. It is, for example, reflected in the title of the 2005 India law granting access to information held by public bodies. This version of the book, while retaining

⁶⁴⁴ John Pyke submission to the FOI Independent Review Panel discussion paper, p. 2.

⁶⁴⁵ Snell, R. and Walker, P., submission to the Parliamentary Legal, Constitutional and Administrative Review Committee Review of the *Freedom of Information Act 1992* (QLD), p. 5

⁶⁴⁶ Snell, R., "Using Comparative Studies to Improve Freedom of Information Analysis. Insights from Australia, Canada and New Zealand", p. 24.

the original title, consistently refers to the right to information rather than freedom of information.⁶⁴⁷

The Panel itself has noted during its extensive literature review that leading commentators such as Alasdair Roberts and many others have come to use the term Right to Information (RTI) more frequently and, instead of FOI. Certainly the expressions have become interchangeable in the literature and it would seem that there is an international trend, as Mendel suggests, favouring RTI with at least one recent new law adopting it as its title.

There is no doubt that for many years to come FOI will remain the generic term that is used for legislation of this kind. That does not mean, however, that the law should retain that title.

The Panel knows that changing the title is not a “remedy” of itself but the Panel’s recommended redesign of the Act’s architecture is significant and directed to remedying many layers of problems with the current FOI experience. So too, the Panel’s related information policy recommendations in favour of a “push” model. The name change is an important part of the change package, and a minor administrative effort to communicate an important message of difference.

There would be considerable advantage in using a new title to indicate to users and to government that Queensland is entering a new era, with legislation that is far easier to use than earlier models, and more productive of information. It could help bring about the cultural change that is needed. And if the right title is chosen it could strengthen the message.

The Panel does not favour the title “Access to Information” because of the Panel’s broader recommendations for a whole of government strategic information policy that heralds proactive disclosure by agencies as a foundational principle. *Access* to public sector information under the new proposals would be occurring more as a matter of course, proactively, and without the need for a formal application for access to be made under the Act. To this extent, “Access to Information” could be misleading by suggesting that application under the Act is *the* way to access information rather than a last resort.

There is an immediately practical reason too for a name change. As mentioned above, the changes the Panel is proposing will mean special transitional arrangements will be required in moving from the old Act to the new. That task will create less confusion if the new legislation has a different name from the old.

The Panel has considered a number of title suggestions, all of them borrowed from overseas. They include the *Official Information Act* (New Zealand), the *Access to Information Act* (Canada) and the *Right to Information Act* (India). Like Toby Mendel and an increasing number of experts and commentators, it prefers Right to Information.

⁶⁴⁷ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed. UNESCO, Paris, 2008, p. 3, referring to the *Right to Information Act 2005* (India).

The right to information conveys the best message.

RECOMMENDATIONS:

Recommendation 138

The Queensland *Freedom of Information Act 1992* should be replaced by a new Act, the *Right to Information Act*.

Recommendation 139

Sections 36 and 37 of the *Freedom of Information Act 1992* should continue to apply to matter created before the enactment of the *Right to Information Act*.

Recommendation 140

A strategic review of the Office of Information Commissioner should be conducted four years after the commencement of the new Act in time for the new Information Commissioner to respond prior to expiry of that officer's term, in tandem with an operational review of implementation of the new Act across the sector. Both reviews should be subject to Parliamentary Committee oversight. Subsequently strategic reviews should take place every five years.

Recommendation 141

The Premier should retain responsibility for the development of the new Act and for its initial implementation.

Appendix 1 Report recommendations

Recommendation 1 (p. 34)

As a priority, the Queensland Government should develop a whole of government strategic information policy that posits government information as a core strategic asset in the Smart State vision, addressing the lifecycle of government information and interconnecting strategically with other relevant public policies. Freedom of information, privacy, public records, ICT governance and systems would constitute some of the elements of this overarching information policy, and would benefit from policy consistencies and cross-leveraging results.

Recommendation 2 (p. 34)

Pending completion of the whole of government strategic information policy (Rec. 1), the Queensland Government should in the interim recast FOI's place in the government information experience as the Act of last resort moving the existing "pull" model to a "push" model where government routinely and proactively releases government information without the need to make an FOI request.

Recommendation 3 (p. 34)

The following elements should form part of the more highly evolved "push" model in Queensland and should be provided for in the freedom of information legislation, and supported by guidelines, sufficient legal protections, and the active monitoring efforts and collaborative approach of the Information Commissioner in a revamped role (more in chapter 20):

- publication schemes and proactive decision-making processes that routinely release as much information as practicable (including documents themselves or public editions thereof) at large, or to specific interest sectors, as enabled by a range of ever-improving ICT features;
- disclosure logs that provide online access to information already released under freedom of information (subject to lawful exceptions) no sooner than 24 hours after release to the requester (with supplementary contextual information providing greater balance or depth to the issue(s) that the Government considers necessary);
- greater administrative release through the exercise of executive discretion in good faith and in the appropriate circumstances (with sufficient legal protection) rather than the current tendency to refer all requests for documents to be managed through the longer and more expensive FOI processing model; and
- administrative access schemes for appropriate information sets only.

Specifically, the freedom of information legislation would impose a mandatory obligation for agencies and public authorities to develop and implement a publication scheme taking into account the public interest in access to the information it holds.

The publication schemes must be approved by the Information Commissioner in a similar model to that operating in the United Kingdom which recognises flexibility

and capacity building imperatives in the system and includes development of model publication schemes by the Information Commissioner for different classes of public body such as for local government, the health sector and education.

Published information should be made available electronically wherever possible.

Recommendation 4 (p. 35)

The Public Records *Information Standards* (currently Nos. 31, 40, 41) should be accorded a significantly greater profile and priority in government requiring an increased monitoring and compliance effort, through-

- development of whole of government strategic information policy (Rec. 1) supported in governance terms by the collaborative efforts of the Information Commissioner, the Queensland State Archivist, and the Chief Information Officer, overseen by the Strategic Information and ICT CEO Committee, and reporting to the Parliamentary Legal, Constitutional and Administrative Review Committee through the Information Commissioner;
- sector-wide mandatory audit to assess the current standard of records management;
- deliver targeted capacity building strategies (informed by audit results) such as training and ICT solutions to compliance and systems issues; and
- periodic audits on an ongoing basis to monitor and support continuous improvements in compliance, development of standards and guidelines, and responses to emerging ICT challenges.

Recommendation 5 (p. 36)

Ex ante decision-making rules, legal protections and support mechanisms should be introduced as a strategy in routine and proactive disclosure where documents that can be released without difficulty and those that might need specific consideration are identified at the outset. As a first stage, select pilot programs would assist preparations to transition the wider public sector to a consistent, well-planned *ex ante* decision-making standard that integrates well with EDRMS versions across the sector and is supported in its wider roll-out by user-friendly, agency specific guidelines.

Recommendation 6 (p. 36)

Proactive publication of EDRMS metadata (such as document title, subject, author, date of creation) with search capability should be pursued, at least in select pilot form pending ICT capability and governance. The recommended model would be similar to the United Kingdom's "inforoute" and Information Asset Register and would deliver a single point of access to the publication of metadata listing unpublished information resources of government. An information portal capability for opening documents tagged (*ex ante*) "yes" for release should also be pursued.

Recommendation 7 (p. 36)

Other ICT-enabled strategies for further consideration in publication schemes include:

- Topic-specific mailing lists or discussion groups/forums to which the public could subscribe at no cost.

- Websites dedicated to specific topics/developments and not merely to the Department or agency as a whole (eg. <GoldCoastMotorway.qld.gov.au>, <fluoridation.qld.gov.au>, <conservation.qld.gov.au>). The public could subscribe for email notifications of additions or changes.
- Blogs with Really Simple Syndication feeds that would allow interested parties to subscribe to releases on a particular topic.

Recommendation 8 (p. 36)

The governance arrangements supporting a new strategic information policy framework should include the Information Commissioner collaborating with the Chief Information Officer and the Queensland State Archivist overseen by the relevant CEO steering committee.

Recommendation 9 (p. 36)

The Information Commissioner, in collaboration with the Chief Information Officer and the Queensland State Archivist, should consider whether the UK's "Click-Use" licence initiative with the developments on the GILF and IS 33 and advise on Crown copyright reuse.

Recommendation 10 (p. 37)

The Information Commissioner should take a leadership role in the change management involved in implementing a new information policy adopting a "push" model. The Information Commissioner should also guide consistency in implementation, and be alert and responsive to the support needs of smaller public authorities and local government.

Recommendation 11 (p. 47)

Access and amendment rights for personal information should be moved from freedom of information to a privacy regime, preferably to a separate Privacy Act.

Recommendation 12 (p. 47)

There should be a Privacy Commissioner appointed to oversee the system providing for access and amendment of personal information.

Recommendation 13 (p. 53)

In FOI and privacy legislation the term "personal information" should replace the term "personal affairs".

Recommendation 14 (p. 54)

If a new privacy regime is adopted, attention should be given to amending the Public Service Regulations 2007 to reflect its standards and practices unless those standards and practices were able to be sufficiently detailed in the Privacy Act.

Recommendation 15 (p. 58)

Where an agency receives personal information from a third party in confidence, the agency in considering the public interest and an applicant's right of access, should provide the applicant with a summary of the information (unless information can not be "de-identified") and/or provide the information through an independent intermediary.

Recommendation 16 (p. 61)

The contents of information standard 38 should be widely publicised by agencies and regularly brought to the attention of employees using government-supplied equipment such as computers, and facilities such as email and internet.

Recommendation 17 (p. 76)

The Act should contain a section under the heading "Reasons for enactment of Act" stating —

Parliament recognises that in a free and democratic society —

- (i) there should be open discussion of public affairs;
- (j) information held by government is a public resource;
- (k) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community;
- (l) openness in government enhances the accountability of government;
- (m) openness in government can increase the participation of citizens in democratic processes leading to better informed decision-making;
- (n) freedom of information legislation can contribute to a healthier representative, democratic government and enhance its practice;
- (o) freedom of information legislation can improve public administration, and the quality of government decision-making; and
- (p) freedom of information legislation is only one of a number of measures that should be adopted by government to increase the flow of information that the government controls to citizens.

Recommendation 18 (p. 77)

The Objects section of the Act should say —

(1) The object of this Act is to provide the right of access to information held by the Government unless, on balance, it is contrary to the public interest to provide that information.

(2) The Act should be applied and interpreted to further the object stated in (1).

Recommendation 19 (p. 77)

The Act should contain a Preamble stating —

This Act replaces the *Freedom of Information Act 1992*. It emphasises and promotes the right to information and involves a new commitment to providing information. It brings a different approach to FOI, one based on a principled approach to determining what information should be made available and when.

Recommendation 20 (p. 89)

All bodies that are established or funded by the government or are carrying out functions on behalf of government, should be covered by FOI, unless it is in the public interest that they should not be covered.

Recommendation 21 (p. 89)

Sections 11A and 11B and Schedule 2 should be repealed.

Recommendation 22 (p. 89)

In section 11(1) subsections (m), (n), (r), (s) and (t) should be repealed.

Recommendation 23 (p. 89)

As recommended in chapter 9, the harm factors included in the public interest test should include a reference to a possible prejudice to the competitive commercial activities of a Government Business Enterprise that could result from the release of information.

Recommendation 24 (p. 90)

The definition of “public authority” in s. 9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.

Recommendation 25 (p. 96)

The FOI legislation should include a Part dealing with access to the documents of organisations that are not agencies.

Recommendation 26 (p. 97)

Where a private organisation contracts to perform functions that were once performed by government and/or are considered generally to be the responsibility of government to deliver to the public, FOI should be extended to cover the documents of that organisation in relation to any such function. Those documents that relate directly to the performance of their contractual obligations would be deemed by the FOI legislation to be the documents of the relevant agency, for the purposes of FOI.

Recommendation 27 (p. 99)

The Part of the FOI legislation dealing with access to the documents of organisations that are not agencies, should include a section relating to organisations that receive funding assistance, including in-kind support, from government. The FOI law should contain a provision deeming that documents in a recipient's possession that relate directly to the performance by the function subsidised by the government be documents in the possession of the agency, and hence subject to FOI.

Recommendation 28 (p. 100)

Private bodies with public regulatory functions that would otherwise be required to be exercised by government should be subject to FOI in relation to their performance of those functions.

Recommendation 29 (p. 104)

The sub-sections (x) and (y) of s. 11(1) should be repealed.

Recommendation 30 (p. 104)

That sections 11CA, 11D and 11E and Schedule 3 be repealed.

Recommendation 31 (p. 105)

That personal information in the form of a risk assessment document relating to an offender should be able to be provided to a lawyer, acting as the offender's agent, rather than to the offender. A provision to this effect should be included in the proposed Privacy Act.

Recommendation 32 (p. 121)

Cabinet decisions, Cabinet submissions and Cabinet Briefing Notes, whether final or in draft form, and all other matter that would, if made public, compromise the collective ministerial responsibility of Cabinet under the Constitution, should be exempt documents. Those exempt Cabinet documents would include minutes or notes of Cabinet decisions and discussions, briefs for Ministers attending Cabinet meetings, the Cabinet agenda and pre-Cabinet consultations between officials and Ministers and among Ministers. This exemption applies only to documents brought into existence for the purpose of submission to Cabinet. Cabinet includes Cabinet committees.

Recommendation 33 (p. 121)

Factual/statistical material that is extracted from a report and detailed within a Cabinet submission should be covered by the exemption, because to release it could indicate the nature of the submission, and hence compromise collective ministerial responsibility. The cover sheet and body of a Cabinet Submission is not to be interrogated in deciding application of the exemption (disclosure would compromise collective responsibility of Cabinet). However, any attachments including whole reports of factual/statistical material attached or annexed to Cabinet submissions, would not normally be covered by the exemption unless disclosure would compromise collective responsibility of Cabinet requiring proof that any such attachment was prepared for the purpose of submission to Cabinet.

Recommendation 34 (p. 122)

The Premier, as Chair of Cabinet, in consultation with the Cabinet secretariat, or their delegates, should decide weekly after Cabinet meetings, what Cabinet material should be released proactively. They should also release an edited version of the Cabinet agenda and a summary of those Cabinet decisions that it was no longer necessary to treat as confidential.

Recommendation 35 (p. 123)

An exemption for Executive Council documents be retained.

Recommendation 36 (p. 128)

To preserve and promote individual ministerial responsibility —

- incoming ministerial briefing books (“red/blue books”) for when a Minister is appointed to the portfolio;
- annual parliamentary estimates briefs for when the Minister must account to Parliament for the ministerial portfolio’s past and planned expenditure of parliamentary appropriations; and
- parliamentary question time briefs (“PPQs”) for when the Minister must account to Parliament in question time,

(and any drafts or topic lists of those documents) should be exempt from disclosure under FOI.

Recommendation 37 (p. 129)

To maintain the constitutional convention that protects the confidentiality of communications by or with the Sovereign or her representative, documents that are communications between the Sovereign and the Governor, and between the Sovereign and the Premier, and between the Governor, representing the Sovereign, and the Premier, and documents recording any such communications, should be exempt from FOI.

Recommendation 38 (p. 130)

Section 28 should be amended to clarify its meaning by adding two words, “grant or”, so that it reads, “An agency or Minister may grant or refuse access to exempt matter or exempt documents.”

Recommendation 39 (p. 137)

The exemptions contained in sections 42, 42A, 43, 46 (1)(a) and 50 continue to apply, with no public interest test. The exemption in s. 47A should be removed from the Act.

Recommendation 40 (p. 137)

Section 42 should be amended to include an exemption for matter that consists of information obtained or created by the State Intelligence Group, the State Security Operations Group or Crime Stoppers.

Recommendation 41 (p. 149)

Only one form of public interest test should be used in the legislation.

It should be in the following form —

“Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.”

Recommendation 42 (p. 155)

The legislation should contain a non-exhaustive list of the factors that should be considered by decision-makers when applying the public interest test, and factors that should not be considered. The factors should be those listed above, in this chapter of the report. The legislation should make it clear that these are not the only factors that may be considered in a particular case.

Recommendation 43 (p. 155)

The Information Commissioner should make publicly available, on the website and elsewhere, guidelines on the application of the public interest test, including examples of the way it should be and has been applied.

Recommendation 44 (p. 155)

Section 6 of the present Act (amended as proposed by the Panel in chapter 4) should be placed at the beginning of the Part of the Act that lists the factors to be taken into account in assessing the public interest. A similar provision should be included in the Privacy Act.

Recommendation 45 (p. 157)

Sections 39(2) and 48 and Schedule 1 should be repealed.

Recommendation 46 (p. 160)

The disclosure harms concerned with the present “exempt/public interest” categories in the Act, namely sections 38, 39, 40, 41, 42AA, 44, 46(1)(b), 47, 48 and 49, together with section 45, to which at present a public interest test applies in part only, be moved to the Time and Harm Weighting Guide in the new Act. The harm is no longer an “exemption” subject to a public interest test, but a “harm factor” accorded its due weight within a public interest test. Consideration of the harm those provisions were designed to counter is preserved but reframed with the benefit of legislative guidance as to relative weightings in the public interest.

Recommendation 47 (p. 166)

The Time and Harm Weighting Guide detailed above should be a schedule to the Act.

Recommendation 48 (p. 166)

An agency or affected third party may apply to the Information Commissioner to extend the time specified in the schedule for any particular document, on public interest grounds.

Recommendation 49 (p. 169)

The provisions allowing the Attorney-General to issue conclusive certificates under the FOI Act should be removed from the Act.

Recommendation 50 (p. 176)

The maximum period for supplying documents in response to an application for access should be reduced from 45 calendar days to 25 working days. The legislation should be amended to require agencies to supply documents as soon as possible, but no later than 25 working days.

Recommendation 51 (p. 178)

When acknowledging receipt of an FOI request, a Schedule of Relevant Documents, including an indication of those documents that are considered to be ephemeral, should be provided.

Recommendation 52 (p.178)

The Information Commissioner should issue guidelines to agencies to assist consistency in the production and management of Schedules of Relevant Documents (e.g. Schedule format).

Recommendation 53 (p. 179)

The Information Commissioner should have the power to consider and report on complaints about the way an agency deals with applications for access, including the

timeliness of its process. The Information Commissioner should have the power to conduct own-motion inquiries in relation to such issues.

Recommendation 54 (p. 180)

The Information Commissioner should conduct audits of agency performance of FOI and produce annual report cards on agencies for examination by the parliamentary committee.

Recommendation 55 (p. 181)

The Information Commissioner should investigate options for the provision of FOI services to smaller agencies that are unable to develop the necessary expertise to deal adequately with FOI requests.

Recommendation 56 (p. 181)

The Information Commissioner should encourage larger agencies to increase the number of officers authorised and qualified to handle FOI matters.

Recommendation 57 (p. 181)

The Information Commissioner should ensure that all agencies and their FOI sections are made aware of the latest technological advances applicable to FOI, and of the way agencies in Queensland are applying them.

Recommendation 58 (p. 182)

FOI should be considered as part of the mainstream function of government agencies and superior performance by officers should merit official recognition.

Recommendation 59 (p. 182)

Where an agency fails to meet deadlines specified in the Act for the provision of information to requesters, the requester is entitled to a refund of the FOI application fee.

Recommendation 60 (p. 183)

Section 27B should be redrafted to provide that an agency or Minister may keep working on a request beyond the time when there is a deemed refusal, so long as they have asked the applicant for an extension of time in writing and the applicant has not refused that request, and not taken advantage of the deemed refusal to apply for external review. If a request for an extension of time is granted, the applicant is bound by the new time limit. The agency or Minister must stop processing the request if they are informed the applicant has sought external review or the applicant has refused the request for an extension.

Recommendation 61 (p. 198)

The requirement for an application fee should be maintained for requests that do not seek personal information. It should be held at the present level and increased in line with cost of living increases.

Recommendation 62 (p. 198)

There should be no charges for searching for, or retrieval of, documents, or for decision-making by FOI officers. There should be a charge based on the number of full pages (that is, pages where no information has been blacked out) provided to an applicant. The charge should be set out in the regulations, based on the recommendations of the Information Commissioner. Initially, the charge should be —

1- 10 folios	Free
11- 20 folios	\$20 for 20 folios (i.e. \$2 a page for each page in this bracket)
21-50 folios	\$20 plus \$2.25 a page for each page in this bracket.
51-100 folios	\$87.50 plus \$2.50 a page for each page in this bracket.
101-500 folios	\$212.50 plus \$2.75 a page for the each page in this bracket.
501-1000 folios	\$1312.50 plus \$3 a page for the each page in this bracket.
1000 folios (and more)	\$2812.50 plus \$5 a page.

Recommendation 63 (p. 199)

The charge should be levied at the time the documents are ready for delivery. They should be made available as soon as the charge is paid.

Recommendation 64 (p. 199)

The charge for photocopying should be retained. No charge should be made when information is provided on a computer disc, or by email.

Recommendation 65 (p. 199)

No changes should be made to the present provisions for the waiver or reduction of fees, other than to provide that an agency/Minister should have power to waive charges or additional charges where the cost of levying and/or paying the amount would exceed the amount being claimed.

Recommendation 66 (p. 199)

An amendment along the lines of the provision in the Irish legislation should be introduced to try to limit any abuse of the waiver for concession card holders (commonly referred to as “rent a pensioner”).

Recommendation 67 (p. 199)

The Information Commissioner, rather than individual agencies, should determine whether a non-profit organisation qualifies for a waiver because of financial hardship. A determination by the Information Commissioner should be recognised by all agencies, and should remain current for the year in which it was assessed, unless there is a change in the relevant circumstances of the organisation.

Recommendation 68 (p. 199)

There should be no public interest exemption from fees or charges introduced.

Recommendation 69 (p. 200)

The Information Commissioner should make available a space for requesters to access information made available by agencies where agencies are unable to provide access, or where it would be more convenient for the requester to view the information in the office of the Information Commissioner than in the office of the agency. The Information Commissioner should also make available computer access for requesters in the office.

Recommendation 70 (p. 200)

The Information Commissioner should provide these facilities at no charge, for the first four hours, and \$20 for the next four hours. The charge should then be \$50 a day, but the facility must be pre-booked by the requester.

Recommendation 71 (p. 200)

The PAN/FAN system of assessing charges for accessing documents should be abandoned.

Recommendation 72 (p. 207)

The Information Commissioner must determine any application made by an agency to have a person declared vexatious under s. 96A.

Recommendation 73 (p. 208)

Section 96A(4) should be amended to include the following additional grounds for declaring a person vexatious —

- the application clearly does not have any serious purpose or value;
- it is designed to cause disruption or annoyance; or
- it can otherwise fairly be characterised as obsessive or manifestly unreasonable.

Recommendation 74 (p. 208)

Section 96A should be amended to include a provision entitling a person declared vexatious under the section to appeal to the proposed Queensland Civil and

Administrative Tribunal.

Recommendation 75 (p. 208)

The Information Commissioner should develop detailed guidelines, based on the provisions in the Act, to assist agencies in deciding whether to apply for a declaration under s. 96A.

Recommendation 76 (p. 208)

The Information Commissioner should develop a training program for agencies, based on those developed by the NSW Ombudsman, to help agencies engage productively with requesters, and share practical strategies for dealing with unreasonable requester conduct.

Recommendation 77 (p. 208)

Section 29B should be amended so that if a document is substantially the same as a document that has been the subject of an earlier application by the applicant to the same agency or Minister, where the only difference is the recording of the applicant's previous application, the request can be refused.

Recommendation 78 (p. 221)

Clarity and accessibility

The Queensland State Archivist should review the existing Information Standards and best practice guidelines to ensure a plain English, comprehensive and detailed, self-contained, Queensland promulgation of the public records requirements and expectations in handling, keeping and destroying drafts and emails. Where practicable and appropriate, procedural and technical guidance is to be included in illustrating expectations arising in typical examples. This review should include consultation (perhaps via focus groups) with representatives from the following stakeholders: FOI practitioners, records administrators, and a sufficient slice of agency functions such as policy officers, program administrators, field workers. (The Archivist's information policy partners, the Information Commissioner and the Chief Information Officer, should also be consulted.)

Recommendation 79 (p. 221)

Improved awareness and compliance

The Queensland State Archivist (and the Information Commissioner) should actively promote the public records requirements widely and frequently, including training and information programs. The State Archivist should monitor compliance, and difficulties in compliance, to continuously improve awareness and capability and together with the Information Commissioner's support and feedback, maintain the relevant standards and guidelines under regular review. As appropriate, the Chief Information Office should assist in assuring sector-wide systems' capability in handling retention and disposal of drafts and emails in accordance with required standards. It would be important to emphasise also the sanctions consequent upon wrongful destruction of documents, supported by referral points and working

assumptions⁶⁴⁸ to guide the decision-making that is made in practice everyday by public servants in what documents to keep.

Recommendation 80 (p. 221)

Requester can choose to opt out

Where the decision-maker clearly regards certain documents as merely ephemeral in nature, the decision-maker can annotate the Panel's recommended (chapter 13) Schedule of Relevant Documents accordingly enabling the requester to confirm to which documents access is sought, and liability to costs is made.

Recommendation 81 (p. 222)

The existing scope of legal entitlement to raw data and metadata be maintained, subject to –

- (1) excluding entitlement to metadata where the only difference to the same metadata requested by the same person previously has been occasioned by the recording of the requester's own activity;
- (2) excluding metadata from the definition of document of an agency unless and until the requester specifically requests same in writing;
- (3) reinforcing in FOI training and awareness the *existing* entitlement to raw data and metadata and the mandatory obligation on agencies to interrogate databases within the scope of an FOI application so as to create documents for production, where the means for doing so are "usually available" to the agency; and
- (4) expecting agencies as part of the Government's broader information policy planning and delivery to plan its systems and make reasonable efforts to maintain its records in reproducible forms or formats.

Recommendation 82 (p. 222)

The Information Commissioner, in concert with the Chief Information Officer and the Queensland State Archivist as appropriate, should promote and support planning and capability around these initiatives, including for example the provision of electronic access at dedicated reading room facilities enabling the requester itself to interrogate and manage the production of data.

Recommendation 83 (p. 222)

Electronic lodgement of FOI applications, electronic payment and access methods for freedom of information as a matter of course should be introduced in a consistent and coordinated way for all agencies and public authorities without delay.

⁶⁴⁸ In the style of the *Guidances* issued by the Department of Constitutional Affairs in the United Kingdom.

Recommendation 84 (p. 222)

The Information Commissioner should support a more responsive, consistent and enhanced client service in the FOI experience for users, including by –

- developing guidelines for agencies similar to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report; and
- considering beneficial initiatives harvested from the United Kingdom model which provides Codes of Practice and formal *Guidances* issued for Procedural, Technical, Sector Specific, and Exemptions.

Recommendation 85 (p. 227)

The Information Commissioner should develop guidelines and recommend to the Minister proposals for charges that should be levied for providing data other than from paper-sourced documents. The Minister may include these in the charges regulation made under the Act.

Recommendation 86 (p. 227)

The Information Commissioner should provide detailed guidance for agencies on what they should include in a notice to an applicant who is denied access to a document, in whole or in part, where the agency has relied on public interest considerations, including the way the agency needs to comply with s. 27B of the *Acts Interpretation Act 1954*.

Recommendation 87 (p. 227)

The Information Commissioner should draw up guidelines to assist agencies to develop the disclosure logs proposed in recommendation 3.

Recommendation 88 (p. 227)

An agency should include on its disclosure log a reference to any s. 31A document it has processed. The agency may provide access to the document to anyone (including the original requester) who applies for it, provided they pay the access charge that the original requester had not paid plus any photocopying charge. However, the agency could put the document on its website for anyone to access.

Recommendation 89 (p. 239)

Internal review should be retained, but it should be optional.

Recommendation 90 (p. 239)

An applicant should not be required to pay a fee for internal review.

Recommendation 91 (p. 239)

Internal review decisions should be made as soon as possible by agencies. If a decision is not made within 20 working days the agency shall be taken to have affirmed the original decision.

Recommendation 92 (p. 240)

The Information Commissioner should monitor the time taken by agencies in making decisions on internal review.

Recommendation 93 (p. 240)

The statement to the applicant conveying reasons for decision should include information about who would conduct any internal review, specifying either the names of those authorised to conduct the review or the level of the agency at which the review would be conducted. Agency websites should list the names of people currently responsible for processing FOI applications and internal review.

Recommendation 94 (p. 241)

Applications for internal and external review should be able to be made by email, as well as in writing.

Recommendation 95 (p. 247)

External review should be carried out by the Office of the Information Commissioner. The review process should begin with mediation by the Office of the Information Commissioner.

Recommendation 96 (p. 248)

The proposed Queensland Civil and Administrative Tribunal should be given jurisdiction to —

- (1) Hear and determine questions of law referred to it by the Information Commissioner at the request of a participant in a review, or on the Commissioner's own initiative;
- (2) Hear and determine an appeal from a decision of the Information Commissioner, but only on a question of law;
- (3) Hear and determine an appeal from a decision by the Information Commissioner declaring a person a vexatious applicant.

Recommendation 97 (p. 248)

The Information Commissioner would be bound by decisions of the tribunal and follow the interpretation of the law adopted by the tribunal.

Recommendation 98 (p. 249)

An applicant should not be required to pay a fee for external review.

Recommendation 99 (p. 253)

The following time limits and procedures should apply to external review conducted by the Office of the Information Commissioner:

- (1) Mediation should be completed within 20 working days of an application being made. The mediator should obtain the approval of the parties to a report explaining the extent to which they had reached agreement, and/or the differences that remained between them.
- (2) The parties should make submissions concerning any remaining issues that are in dispute within 10 working days.
- (3) The parties should have a further 10 working days to respond to those other submissions.
- (4) The Office of the Information Commissioner should make a determination within 40 working days of the conclusion of mediation.
- (5) If no determination has been made in the specified period, the parties must be notified of the reasons for any delay.
- (6) The Information Commissioner should be able to use enhanced powers of entry and search if it is considered necessary to resolve the dispute. These powers should be based on those in the Northern Territory.

Recommendation 100 (p. 254)

Sections 81, 85 and 88(2) be amended to clarify the obligation on parties to a review to assist the Information Commissioner; to extend the onus on an agency/Minister to cover proceedings under s. 96A; to clarify the powers of the Commissioner to order specific searches for documents; and to allow the Information Commissioner to order that documents be provided in a specified form.

Recommendation 101 (p. 256)

The Information Commissioner should publish detailed guidelines explaining the way external reviews are conducted.

Recommendation 102 (p. 257)

Section 89 of the Act should be amended to require the Information Commissioner to publish decisions and reasons for decisions in all matters. However the Information Commissioner is not obliged to publish those parts of the decisions and reasons that contain exempt material, or where the reasons would reveal that material, or where the Information Commissioner considers material should be treated as confidential.

Recommendation 103 (p. 270)

The following functions should be conferred on the Information Commissioner —

- (1) Monitoring and reporting, including the determination of what statistical material should be provided by agencies for an annual report, similar to that currently required under s. 108, ensuring the accuracy of the information, collating, analysing and publishing that information; conducting audits of agencies and publishing the results; identifying and commenting on legislative and administrative changes that would improve FOI; monitoring the way “public interest” issues are determined by agencies and under review, consulting experts on its application and keeping agencies informed; and monitoring agencies’ information schemes and proactive disclosure activities outside FOI.
- (2) Advice and awareness, including providing a central reference point on FOI for agencies and people; promote community awareness and understanding of FOI; provide guidance on the interpretation and administration of the Act; provide education and training for agencies and community groups; provide information and assistance to people and agencies at any time during the processing of FOI claims; and develop and publish guidelines covering proactive disclosure and information schemes.
- (3) Investigative and complaints handling, including complaints about FOI processes and other matters that would, in relation to government administration generally, fall within the jurisdiction of the Ombudsman; and the power to conduct “own motion” investigations.
- (4) Commission outside research and obtain advice on the design of surveys to monitor whether the legislation and its administration are achieving its stated objectives.

Recommendation 104 (p. 274)

The Office of the Information Commissioner be headed by a statutory officer, the Information Commissioner.

Recommendation 105 (p. 274)

Two Deputy Information Commissioners, also statutory officers, be appointed. One would be designated as FOI Commissioner, the other as Privacy Commissioner.

Recommendation 106 (p. 276)

In making appointments to each of the three statutory offices the following procedure should apply.

The position should be widely advertised, and the Minister should consult the Parliamentary Committee about—

- (i) the process of selection for appointment; and

- (ii) the appointment of the person.

The Information Commissioner and the Deputy or Deputies should be appointed for a term of seven or five years, with the option of the term being extended for a further period, but none should hold an office for a total period of more than 10 years.

Recommendation 107 (p. 278)

The Parliamentary Committee's functions should be broadened to include –

- a role in the appointment of the two Deputy Information Commissioners;
- the power to consult with the Information Commissioner on the data collection and reporting requirements of agencies required by s. 108; and
- the power to receive and examine reports by the Information Commissioner on the operation of the Act, and to make recommendations on such changes as it sees fit.

Recommendation 108 (p. 284)

The requirement in s. 18 for agencies to publish a Statement of Affairs should be replaced by the adoption of a publication scheme, modelled on that operating in the United Kingdom.

Recommendation 109 (p. 284)

The Information Commissioner should develop model publication schemes for different classes of agencies, such as for local government, the health sector and education, on which agencies can base their own schemes.

Recommendation 110 (p. 284)

The Information Commissioner should be responsible for the approval of any agency scheme.

Recommendation 111 (p. 284)

The Information Commissioner should be responsible for auditing and reporting on the performance of agencies in conforming with the requirements of their publication scheme.

Recommendation 112 (p. 284)

The Information Commissioner should consult with the Parliamentary Committee when preparing the model publication schemes and should report to the Parliamentary Committee on the implementation by agencies of their publication schemes.

Recommendation 113 (p. 290)

The Act should include a provision in the same terms as the first three subsections of s. 108 of the Act —

- (1) The Minister administering this Act shall, as soon as practicable after the end of each financial year, prepare a report on the operation of this Act during that year and cause a copy of the report to be tabled in the Legislative Assembly.
- (2) The report is to include details of the difficulties (if any) encountered during the year by agencies and Ministers in the administration of this Act.
- (3) Each responsible Minister must, in relation to the agencies within the Minister's portfolio and in relation to the Minister's official documents, comply with any prescribed requirements concerning that information and the keeping of records for the purposes of this section.

Recommendation 114 (p. 291)

The Act should include a provision allowing for the making of regulations setting out the data that agencies should provide each year for inclusion in the annual report by the Minister on the operation of the Act.

Recommendation 115 (p. 291)

The Information Commissioner should consult with experts in statistical analysis and policy research to advise on the data that agencies should be required to report for inclusion in an annual report on FOI to be prepared by the Minister.

The Information Commissioner, after consulting with agencies and the Parliamentary Committee, should prepare a recommendation for the Minister concerning the data that agencies should provide.

The Information Commissioner should be responsible for having the data provided by agencies audited, and should consult with agencies concerning any deficiencies in the provision of information that are detected.

The Information Commissioner should be responsible for having the data analysed and for preparing a report to the Parliamentary Committee and the Minister.

Recommendation 116 (p. 293)

Section 33 of the Act should be amended to allow a Chief Executive Officer of an agency to negotiate and sign a formal Memorandum of Understanding with the CEO of another agency or agencies in a different portfolio agency, to delegate the power to deal with an FOI application to that other agency. This delegation power would include the power to deal with applications concerning personal information.

Recommendation 117 (p. 294)

- (1) The definition section of the Act (currently, s. 7) should be amended to include a definition of “official document of a Parliamentary Secretary or official document of the Parliamentary Secretary”.
- (2) The right of access section of the Act (currently, s. 21) should be amended to include a reference to “officials documents of a Parliamentary Secretary”.
- (3) The section providing for persons who are to make decisions for agencies and Ministers (currently s. 33) should be amended to give a Parliamentary Secretary the same delegation power as is given to a Minister.

Recommendation 118 (p. 295)

The Act should be amended to provide legal protection similar to that currently provided under ss. 102, 103 and 104, for information provided to an applicant under administrative release, where the officer has the delegated authority of a Director-General or a Minister and acts in good faith and not recklessly in releasing the information.

Recommendation 119 (p. 296)

The Information Commissioner should provide agencies with guidance on the development by agencies of administrative access schemes, and also on the circumstances generally when administrative release might be provided, on what can be released, and when it is more appropriate that the FOI system be used.

Recommendation 120 (p. 296)

The Information Commissioner should advise agencies of the statistics that should be provided on administrative release and should include these in the annual report on FOI.

Recommendation 121 (p. 296)

The training provided by the Office of the Information Commissioner to FOI officers should include training on administrative release.

Recommendation 122 (p. 297)

Section 105 should be amended to require applicants for personal information to produce at the time they make their application satisfactory evidence of their identity or to produce evidence that they are the applicant’s agent.

Recommendation 123 (p. 297)

- (1) The proposed new Privacy Act should contain a provision allowing an agency to respond to a request for personal information by neither confirming nor denying that the information exists.

- (2) In an application for personal information of another person under the FOI Act, an agency may respond by neither confirming nor denying the existence of that type of document as a document of the agency or Minister.

Recommendation 124 (p. 312)

The Premier and the Director-General of the Department of the Premier and Cabinet should publicly, as well as by formal memorandum,

- (a) endorse the principles of the FOI legislation;
- (b) express their desire that agencies should administer its provisions to achieve its Objects; and
- (c) direct agencies to maximise the amount of information that is given to those who request it. They should also affirm the desirability of agencies adopting “push” models to disseminate information held by agencies.

Recommendation 125 (p. 312)

At the beginning of each new Parliament, the Parliamentary Committee should prepare a statement to be considered by the Parliament renewing its commitment to the principles of the legislation.

Recommendation 126 (p. 312)

CEOs should ensure that officers assigned to make decisions on FOI applications have the seniority and experience appropriate for the task.

Recommendation 127 (p. 312)

CEOs should foster agency cultures consistent with the objects of the FOI legislation and ensure that staff induction programs and other appropriate agency-wide staff opportunities include FOI and commitment to its principles.

Recommendation 128 (p. 313)

The Information Commissioner should explore the possibility of implementing an accreditation system for FOI officers who have satisfactorily completed training programs.

Recommendation 129 (p. 313)

Agencies should publish on their websites the names of officers who have been delegated power to make FOI decisions.

Recommendation 130 (p. 313)

The Information Commissioner should promote greater awareness of FOI in the community, and within government.

Recommendation 131 (p. 313)

The Information Commissioner should develop a set of purposeful performance standards and measures, for use in the annual report cards on the FOI activities of agencies. These should be consistent with the broader strategic information policy imperatives.

Recommendation 132 (p. 313)

It should be an offence for an officer to direct an FOI decision-maker to make a decision that the decision-maker believes is not the decision required to be made under the Act, or to direct an officer to act contrary to the requirements of the Act. If a CEO believes a decision-maker is going to make the wrong decision, the CEO should revoke the delegation to the decision-maker and the CEO should make the decision.

Recommendation 133 (p. 313)

The FOI Act should contain a reference to the provision in the *Public Records Act* that makes it an offence to destroy public records other than in accordance with the provisions of the *Public Records Act*.

Recommendation 134 (p. 313)

When a decision-maker decides that a requested document is a document of the kind described in s. 22, the applicant should be immediately informed of where it is available and how it can be accessed. If the decision-maker has ready access to the document it should be provided to the applicant.

Recommendation 135 (p. 313)

The Information Commissioner should provide a help-line service for FOI officers.

Recommendation 136 (p. 317)

Agencies should publish on their websites documents that have been provided under FOI where the agency considers that the document would be of interest to the public, or where the agency receives a second request for the same document(s). This material should not be published until at least 24 hours after it has been provided to the applicant under FOI.

Recommendation 137 (p. 318)

Section 96 should be amended to provide that —

- (1) The Information Commissioner should have power to investigate complaints about an officer breaching their duty or engaging in misconduct at any stage of the processing of an application for access, and not just if a review is initiated and completed.
- (2) The Information Commissioner should be able to refer any evidence of breach of duty by an officer or of misconduct, or any allegation of breach of duty by an officer or of misconduct, to the Crime and Misconduct Commission, or to a Minister or to the CEO of an agency.

Recommendation 138 (p. 326)

The Queensland *Freedom of Information Act 1992* should be replaced by a new Act, the *Right to Information Act*.

Recommendation 139 (p. 326)

Sections 36 and 37 of the *Freedom of Information Act 1992* should continue to apply to matter created before the enactment of the *Right to Information Act*.

Recommendation 140 (p. 326)

A strategic review of the Office of Information Commissioner should be conducted four years after the commencement of the new Act in time for the new Information Commissioner to respond prior to expiry of that officer's term, in tandem with an operational review of implementation of the new Act across the sector. Both reviews should be subject to Parliamentary Committee oversight. Subsequently strategic reviews should take place every five years.

Recommendation 141 (p. 326)

The Premier should retain responsibility for the development of the new Act and for its initial implementation.

Appendix 2 Drafting commentary

Section	Drafting commentary
Preamble	New
Long Title	Redraft – see chapter 25.
1	Redraft as Right to Information Act – see chapter 25.
2	Redraft as necessary.
3	Redraft as necessary.
4	Redraft – see chapter 6.
6	Relocate to lead the Part dealing with the public interest factors.
7	Redraft – see chapter 23.
8	Retain.
9	Redraft – see chapter 7.
9A	Retain if necessary.
10	Redraft/or provide a transitional provision to account for certain documents (saving the application of the current s. 36 and s. 37 in relation to relevant documents prior to the enactment of the new legislation) – see chapter 25.
11	Redraft – see chapter 7.
11A	Repeal – see chapter 7.
11B	Repeal – see chapter 7.
11C	Retain.
11CA	Repeal – see chapter 7.
11D	Repeal – see chapter 7.
11E	Repeal, but redraft s. 44 to include risk assessment documents of offenders (as currently defined under s. 11E(2)) being provided to a nominated and approved legal practitioner – see chapter 7.
12	Retain.
13	Retain.
14	Retain, but see related extensions concerning publication schemes – see chapters 3 and 21.
15	Retain, but see related extensions concerning publication schemes – see chapters 3 and 21.

Note: This appendix is to be used as an aid only. The Panel’s recommendations are contained in the report. All drafting commentary is also subject to necessary redrafting for renumbering purposes.

16	Redraft in part – see chapter 9.
17	Retain, but <i>Public Records Act 2002</i> will require amendment.
18	Repeal – see chapters, 3, 20 and 21.
19	Redraft – see chapters 3, 20 and 21.
20	Repeal – see chapter 21.
21	Redraft – see chapter 23.
22	Redraft - see chapters 3, 13 and 23.
23	Retain.
24	Retain.
25	Redraft – see chapter 16. Also see Appendix 6.
25A	Redraft – see chapters 13 and 16. Also see Appendix 6.
26	Retain.
27	Redraft – see chapters 13 and 16. Also see Appendix 6
27A	Redraft – see chapter 13 and 16. Also see Appendix 6
27B	Redraft – see chapter 13.
28	Redraft –see chapter 8.
28A	Retain.
29	Redraft - see Appendix 6.
29A	Redraft – see Appendix 6.
29B	Redraft - see Appendix 6.
30	Redraft – see chapter 16.
31	Retain.
31A	Redraft - see chapters 13 and 17. Also see Appendix 6.
32	Redraft – see chapter 12.
33	Redraft – see chapter 23.
34	Retain.
35	Redraft – see chapter 23. Also refer to privacy legislation.
35A	Redraft – see chapter 14.

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35B	Redraft - see chapter 14.
35C	Redraft - see chapter 14. Also see Appendix 6.
35D	Redraft –see chapter 14.
35E	Redraft where necessary.
36	Redraft – see chapter 8. Repeal s. 36(3) – see chapter 12.
37	Redraft – see chapter 8. Repeal s. 37(3) – see chapter 12.
38	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
39	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
40	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
41	Repeal, but refer to public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
42	Retain all of s.42 as a class exemption. However where the exceptions to the exemption are listed (s. 42(2) and s. 42(3B)) they are made subject to the public interest test as proposed in chapter 9 - see chapters 8 and 9. Repeal 42(3) - see chapter 12.
42AA	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
42A	Retain – see chapter 8. Repeal s.42A(4) see chapter 12.
43	Retain - see chapter 8.
44	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 4, 9, 10 and 11.
45	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
46	S.46(1)(a) is retained an exemption and retain s. 46(2) as part of this. See public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
47	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
47A	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
48	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
49	Repeal, but see public interest factors and Time and Harm Weighting Guide – see chapters 8, 9, 10 and 11.
50	Retain – see chapter 8.
50A	Refer to privacy legislation.
51	Retain. Also see Appendix 6.
52	Redraft – see chapter 19.
52A	Redraft – see chapter 19.

Note: This appendix is to be used as an aid only. The Panel’s recommendations are contained in the report. All drafting commentary is also subject to necessary redrafting for renumbering purposes.

53 - 60	Refer to privacy legislation.
72	Redraft – see chapter 19.
73	Redraft – see chapters 13 and 19.
73A	Retain.
74	Retain.
75	Retain.
76	Retain - see chapter 19. Also see Appendix 6.
77	Retain.
78	Retain.
79	Retain. Also see Appendix 6.
80	Retain.
81	Retain.
82	Redraft – see chapter 19.
83	Redraft – see chapter 19.
84	Repeal – see chapter 12.
85	Redraft – see chapter 19.
86	Retain.
86A	Retain.
87	Retain.
87A	Redraft to provide for personal information – see chapter 4.
88	Redraft – see chapter 19. Also see Appendix 6.
89	Redraft – see chapter 19.
89A	Retain.
90	Redraft. – see chapters 12 and 20.
91	Retain.
92	Retain.
93	Retain.
94	Retain.
95	Retain.

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96	Retain.
96AA	Add a new offence provision that makes it an offence to direct an officer not to comply with the provisions of the Act – see chapter 24..
96A	Redraft – see chapter 15.
96B	Retain.
97	Redraft – see chapter 19.
98	Retain.
99	Retain.
99A	Retain.
100	Retain.
101	Redraft – see chapter 20.
Part 5A	Redraft – see chapter 20 and Appendix 4.
102 - 104	Redraft - see chapter 23. Also see Appendix 6.
105	Redraft - see chapters 4 and 23.
106	Retain.
107	Retain.
108	Redraft – see chapters 20 and 22.
108A	Redraft – see chapter 25.
108AA	Redraft – see chapter 25.
108AB	Redraft – see chapter 25.
108C	Redraft – see chapter 20.
109	Redraft.
111 - 125	Repeal and draft necessary transitional provisions.
Schedules 1 - 4	Repeal.

Note: This appendix is to be used as an aid only. The Panel’s recommendations are contained in the report. All drafting commentary is also subject to necessary redrafting for renumbering purposes.

Appendix 3 FOI coordination – Department of Justice and Attorney-General

Introduction

The Department of Justice and Attorney-General (the department) is the lead agency for FOI co-ordination across Queensland agencies.

In 2001 the Legal, Constitutional and Administrative Review Committee of Parliament (LCARC) reported on Freedom of Information (FOI) in Queensland. The Government responded to this report by committing to both legislative change and to non legislative initiatives. The former was achieved by amendments to the FOI Act in 2005 and the latter were to be mostly achieved by revitalising the department's lead agency Whole of Government FOI Coordination role.

Strategies for this role were developed following wide consultation across government and were set out in an Implementation Plan, approved by Cabinet in February 2005. The Implementation Plan focused on four key areas: Education and Training, Information and Support, Community Strategy and Policy and Legislation. These strategies are being maintained by the department's FOI and Privacy Unit as part of its core business.

Currently, three staff are involved in lead agency work:

SO2 – Manager, FOI & Privacy (the Department & lead agency FOI & Privacy)

PO 5 – Information and advice (1 EFT FOI)

AO 7 – Information, advice and training (.5 EFT FOI & .5 EFT Privacy)

AO 6 – Training & training administrative support (.5 EFT FOI & .5 EFT Privacy)

Education and Training

The FOI and Privacy Unit offers full and half-day courses and short workshops on the operation of the FOI Act, dealing with matters such as the processing of FOI applications, assessing fees and charges for FOI applications, and applying exemption provisions. Courses are designed for FOI decision-makers and other officers from agencies, including local government. They are intended to —

- Improve FOI decision-making.
- Provide FOI practitioners with flexible, targeted, training opportunities.
- Support FOI in-house awareness training.

Courses are conducted throughout Queensland in response to the level of demand.

Since the 2005 amendments, the FOI and Privacy Unit has delivered 32 training sessions, which equates to 224 hours of training. Approximately 500 officers from government, councils and statutory bodies in Brisbane and regional Queensland have attended these sessions, which have been conducted in centres including Mackay, Cairns, Rockhampton, Townsville, Cooloola and Toowoomba.

Specialised training courses dealing with 'high demand' exemption provisions (personal affairs, legal professional privilege, matter communicated in confidence) have also been delivered or are currently under development. Workshops on children's applications under the FOI Act are also delivered in response to demand and have been well attended.

Information and Support

The department, through the FOI and Privacy Unit, aims to provide easy access to high-quality information and advice on FOI for both public sector FOI practitioners and the general community.

One of the major achievements in relation to Information and Support has been the development of FOI processing guidelines, which were published in May 2007 and have been made available to public sector FOI officers. These guidelines comprehensively address best practice in FOI processing and promise to be a valuable tool for public sector FOI officers. They address the remaining non-legislative initiatives in the former Attorney-General's response to LCARC's report on FOI in Queensland.

Information about all the exemption provisions of the Act is currently under development to be distributed in tandem with training sessions.

Other initiatives include:

Website

FOI Queensland web page, providing access to FOI information and training resources www.foi.qld.gov.au. This page links to the Information Commissioner's web page, agency web pages and to FOI resources in other jurisdictions.

Networks

Supporting public sector FOI practitioners through both State and Local Government FOI Networks, including a range of public authorities which meet every 2 months. These meetings provide a forum for networking and information sharing as well as workshopping FOI processing issues and issues relating to the exemption provisions. They are a valuable mechanism for the FOI and Privacy Unit to consult with the network on a broad range of FOI issues.

Resources

- Publication of a range of information sheets available to FOI practitioners
- Providing 'template letters' and other proforma documents to relevant agencies, in the form of a 'starter kit' on request.

- Publication of a general FOI brochure for the community. The FOI and Privacy Unit is currently considering translation of this brochure into community languages.
- Provision of an FOI help line through the FOI and Privacy Unit, which enables timely telephone and email advice to be provided to both FOI practitioners and members of the community. The FOI and Privacy Unit fields between 20 and 30 calls per day, from public sector FOI decision makers, public servants, and members of the public.
- Providing information sessions to the community (eg the Law Society) about amendments to the FOI Act.

Community Strategy

Community engagement has been furthered by way of the FOI Queensland website, publication of informational materials noted above, and delivery of targeted advice and assistance via the department's telephone hotline and email.

Policy and Legislation

The Strategic Policy Branch of the department is responsible for FOI policy and legislation. The FOI and Privacy Unit liaises with Strategic Policy to provide content expertise where policy and legislation proposed by other portfolios impact on the FOI Act. The Unit maintains a register of FOI policy and legislative issues as identified through training and liaison with FOI practitioners.

The Unit also briefs the Attorney-General, and the Department of Premier and Cabinet, on FOI issues, and coordinates whole-of-government consultation and communication on FOI policy and legislative issues on an ad hoc basis.

The Unit also provides a central point for the Office of the Information Commissioner to engage with the sector and regular meetings are held between the Manager, FOI & Privacy and the Information Commissioner.

Statutory responsibilities

In addition to the above non-legislative initiatives, the department also has specific responsibilities under the FOI Act - including preparing the annual report to Parliament on the operation of the FOI Act under s.108 of the FOI Act for the Attorney-General. This report is prepared by the FOI & Privacy Unit.

Section 108 Reporting

Summary of Process

Annual statistics are requested and collated for the above report by:

1. Letter to Directors-General of all departments providing preliminary advice about the compilation and scheduling of the annual report.

2. Training is provided to agencies at the FOI Coordinators network meeting before the request is forwarded to the agencies.
3. Email to all agencies including statutory authorities and local government offices asking for statistics for the reporting year. Guidelines are provided to the agencies to help them better understand what is required for the report.
4. Agencies return statistical data from their relevant agency.
5. DJAG FOI unit consults and confirms accuracy of statistics provided.
6. Draft annual report prepared by the Department.
7. Presentation of report to Attorney-General for tabling in Parliament.

FOIonline – database

This database was developed in 2001/02 for use by whole-of-government for section 108 reporting to enable the department to download information directly from other departments. This was not successful as there were problems with the limitation of the database such as the validity of the data, version control and the complexity of developing reports.

Agencies were not happy with the system and looked for alternative systems to meet the requirements of their agencies as well as produce the data for the section 108 report.

Queensland Treasury developed an access data base known as TRAMS (Tracking, Reporting and Management System) which seems to accommodate most agencies needs in relation to collating statistical data for the report. Larger agencies such as Queensland Transport developed a system to suit the needs of their agency which integrates with other functions.

Queensland Treasury has made this database available to agencies at a nil cost and testing is currently being undertaken by the FOI and Privacy Unit with the intention of implementing the database.

Appendix 4 **New or revised roles and responsibilities for the Information Commissioner**

Central to the new Information Commissioner’s role will be its responsibility to **lead a public sector change management framework** for implementation of a new *Right to Information Act* (chapter 25, p. 315).

The Information Commissioner will need to be both “FOI monitor” and “FOI champion” (chapter 20, pp. 261).

The Panel has identified the following revised or new roles and responsibilities in leading the necessary cultural change, and in implementing the new Act (page numbers not necessarily an exhaustive list):

Role/responsibility	Chapter Reference	Page Reference
Adopt the “lead agency” role (function transferred from the Department of Justice and Attorney General) and provide a general point of contact and central resource for agencies and citizens.	20	260 265 , 266
Provide advice and assistance at any stage of an FOI request and at the request of the applicant, the agency or a third party, including- <ul style="list-style-type: none"> • running a telephone “helpline” service. 	20 24 1	266-267 312 , 313 8
Provide education and training for agencies and community groups, including- <ul style="list-style-type: none"> • coordinating forums for FOI officers to discuss problems and exchange information; • producing a regular newsletter covering significant FOI decisions and other relevant developments; • training to agencies on administrative release; • training programs for agencies based on those developed in NSW by the Ombudsman to help agencies engage productively with requesters and share practical strategies for dealing with unreasonable requester conduct; and • training and awareness of the <i>existing</i> entitlement to raw data and metadata and the mandatory obligation on agencies to interrogate databases to create documents where the means for doing so are “usually available” to the agency. 	20 23 15 16	266 295 207 217-218
Provide guidance on how to interpret and administer the Act, including publishing (and on website) materials that would assist agencies to provide better and more consistent decision-making and would enable requesters to be better informed about the FOI process.	20	266
Such materials would include publishing- <ul style="list-style-type: none"> • administrative guidelines to assist FOI processing (complete and augment the existing draft <i>Freedom of Information</i> 	20	266

<p><i>Guidelines</i> produced by DJAG;</p> <ul style="list-style-type: none"> • guidelines to assist agencies in the consistent production and management of Schedules of Relevant Documents; • guidelines for agencies on what they should include in a decision denying access where the agency has relied on public interest considerations, including compliance with s.27B of the <i>Acts Interpretation Act 1954</i>; • guidelines explaining the way external reviews are conducted; • as many external review decisions as possible and a commentary on recently decided external review matters; • guidelines on the application of the public interest, providing examples of the way some of the factors might be (or have been) applied; • user-friendly, agency specific guidelines on <i>ex ante</i> decision-making; • guidelines to assist agencies in deciding whether to apply for a s.96A declaration; and • guidelines to support a more responsive, consistent and enhanced client service in the FOI experience for users similar to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report, and considering beneficial initiatives from the UK model including Codes of Practice and formal <i>Guidances</i> issued for Procedural, Technical, Sector Specific, and Exemptions. 	<p>13</p> <p>17</p> <p>20 20</p> <p>9</p> <p>3</p> <p>15</p> <p>16</p>	<p>178</p> <p>224</p> <p>256</p> <p>143, 155</p> <p>26-27</p> <p>206-207</p> <p>219-220, 222</p>
<p>Promote awareness and understanding, including –</p> <ul style="list-style-type: none"> • maintaining a website; • ensuring all agencies are aware of the latest technological advances applicable to FOI, and their use; • active program in the community (libraries, educational institutions, media, public speaking fora), and within government; and • promoting and supporting agency planning and capability around the existing requirement for provision of raw data and metadata including the provision of electronic access at dedicated reading room facilities. 	<p>20</p> <p>13</p> <p>20 24</p> <p>14, 16</p>	<p>264</p> <p>181</p> <p>266, 313 305</p> <p>198, 218, 222</p>
<p>Be an active guide, advocate, monitor and partner in implementing the “push” information policy model, including –</p> <ul style="list-style-type: none"> • encouraging proactive release of information by agencies; • developing guidelines for the provision of information additional to that requested, so as to ensure balanced context is provided in contentious issues management; • approving agency publication schemes (and subsequent collaboration in extending schemes and monitoring performance); • developing model publication schemes for different classes of public body; • developing a web-based channel to gather and assess requests 	<p>3</p> <p>20</p> <p>1</p> <p>3</p> <p>3</p>	<p>16 (and following) 266</p> <p>5</p> <p>19-22, 34-35</p> <p>19-22, 34-35</p>

<p>for publication of public sector information;</p> <ul style="list-style-type: none"> • developing guidelines and support for agency disclosure logs; • developing guidelines and support for agencies on administrative access schemes, and when administrative release might be appropriate, on what matters can be released, on recordkeeping and on the circumstances where it is advisable for the FOI regime to be applied; • considering the UK’s “Click-Use” licence initiative; and • considering further options for proactive release of information by agencies such as - <p>...apart from posting on websites (with references on the What’s New/What’s Changed pages), options would include:</p> <ul style="list-style-type: none"> ○ Topic-specific mailing lists or discussion groups/forums to which the public could subscribe at no cost. ○ Websites dedicated to specific topics/developments and not merely to the Department or agency as a whole (eg. <GoldCoastMotorway.qld.gov.au>, <fluoridation.qld.gov.au>, <conservation.qld.gov.au>). The public could subscribe for email notifications of additions or changes. ○ Blogs with RSS [Really Simple Syndication] feeds that would allow interested parties to subscribe to releases on a particular topic. 	<p>3</p> <p>17, 20</p> <p>3</p> <p>3</p> <p>23</p> <p>3</p> <p>3</p>	<p>21</p> <p>225-227, 19, 22 219 292</p> <p>31-32, 36</p> <p>30, 36</p>
<p>Have a broader more substantive role in whole of government information policy in partnership with the Queensland State Archivist and Chief Information Officer, and as part of the relevant sector-wide governance arrangements such as the CEO Steering Committee.</p>	<p>3</p>	<p>26</p>
<p>Monitor, advise and assist government on agency performance and legislative policy issues and ensure that the parliament is properly informed about the way the Act generally is being used and administered, including –</p> <ul style="list-style-type: none"> • providing annual agency report cards reviewing the way agencies meet their obligations under the Act, for tabling in the parliament and overview by LCARC; • monitoring the time taken by agencies at original and internal review; • developing a set of purposeful performance standards and measures for use in the annual report cards. These should be consistent with the broader strategic information policy imperatives; • using performance information gained during annual agency report card process, data collected, complaints and “own motion” investigations, and in its advisory role, to inform its priorities in focusing its responsibilities and resources; • exploring the possibility of implementing an accreditation system for FOI officers who have satisfactorily completed training programs (and continuing education); 	<p>20</p> <p>13</p> <p>19</p> <p>24</p> <p>13</p> <p>24</p>	<p>265-266 179, 182</p> <p>239</p> <p>313</p> <p>182</p> <p>305, 313</p>

<ul style="list-style-type: none"> investigating options for the provision of FOI services to smaller agencies that are unable to develop the necessary expertise to deal adequately with FOI requests; developing guidelines and recommending to the Minister charges for providing data other than from paper-sourced documents (in the regulations); and supporting the Queensland State Archivist in actively promoting the public records requirements including training and information programs and supporting the Queensland State Archivist’s regular review of relevant standards and guidelines. 	13	180-181
	17	224 , 227
	16	216 , 221
Receive and investigate complaints and conduct “own motion” investigations into the <i>administration</i> of the Act and FOI.	20	267-271 , 267-268
	13	179
Investigate complaints about an officer breaching their duty or engaging in misconduct at any stage of the processing of an application for access, and not just if a review is initiated and completed – and refer any evidence to the Crime and Misconduct Commission, or to a Minister or to the agency CEO.	24	311
Make a formal determination on all applications made for a declaration that an applicant is vexatious under s.96A.	15	206 , 207
Collect data and ensure that the material is accurate and then collate and analyse the material before publishing it in an annual report (take over s.108 responsibility), including- <ul style="list-style-type: none"> seeking expert advice to design and conduct surveys and studies; consulting with agencies, to ensure that their information systems are able to provide the relevant data; and consulting with LCARC on the data collection and reporting requirements. 	20	277
	22	290
	22	290
	22	290-291
	20	276-277
Oversee the operations of the two deputies holding statutory offices of Freedom of Information Commissioner and Privacy Commissioner (and ensure appropriate division of responsibilities to avoid any perceptions of bias), including new FOI requirements for- <ul style="list-style-type: none"> completing prescribed mediation within 20 working days of an application prior to external review; deciding in appropriate cases to use powers to conduct public hearings; making a determination within 40 working days of the conclusion of mediation, otherwise providing notice of the reasons for delay; considering use of enhanced powers of entry and search if considered necessary to resolve the dispute; being bound by decisions of the Queensland Civil and Administrative Tribunal and following the interpretations of 	20	278 271-273
	19	248 , 251 , 254 , 256
	19	246
	19	250-252
	19	250-252
	19	247

<p>the law adopted by the tribunal; and</p> <ul style="list-style-type: none">• deciding, on application of agency or affected third party, whether to extend the time period stated in the <i>Time and Harm Weighting Guide</i> in individual circumstances of a case.	11	162 , 166
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Appendix 5 Contentious question example



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Room 5.03
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www.justice.gov.uk

22nd February 2008

Dear...

Request for information

Thank you for your e-mail of the 18th January 2008, in which you asked for the following information:

In the first two weeks of January 2008 how many people in England and Wales charged with murder or manslaughter were out on bail?

The most up to date figures I can provide to you are a 'snapshot' count of the number of defendants who were facing a murder or manslaughter charge in the Crown Court and who were out on bail awaiting trial at 31 January 2008. These figures are shown in the table below, along with figures covering all cases in the Crown Court.

They are taken from the Crown Court Electronic Records System (CREST) used to record case information in the Crown Court. The figures exclude a small number of cases where information on remand status is not held centrally, or the where issue of bail does not apply (e.g. defendant is a company rather than an individual).

Remand Status	Murder Defendants		Manslaughter Defendants		All cases in the Crown Court	
	Number	Percentage	Number	Percentage	Number	Percentage
Bail	60	13%	35	85%	22,563	68%
Custody	395	87%	6	15%	10,475	32%
Total	455		41		33,038	

Defendants charged with murder are much less likely to be granted bail than those charged with manslaughter. Only 8% of the 496 defendants shown in the table above were charged with manslaughter rather than murder, but they account for more than a third of all those granted bail.

The figures in the table count all outstanding cases where the defendant has faced a murder or manslaughter charge at any point during the case. However, it is possible for the charges to be amended as the case progresses and for the defendant to face a less serious charge at his or her trial. There are also a number of reasons why criminal court cases can be

discontinued. As the table relates to cases which are by definition still in progress, it should be recognized that not all of the defendants charged with murder or manslaughter will necessarily end up standing trial for either of these offences, still less convicted of the charges.

Analysis of court records suggests that, in most cases where a murder or manslaughter defendant is granted bail, there will have been period of remand in custody before bail is granted. The granting of bail in such cases is also typically subject to rigorous conditions which can include several of the following:

- To live and sleep each night at certain address
- To provide a financial surety
- Not to contact prosecution witnesses directly or indirectly
- Not to come within a certain location, except to see a solicitor by prior written appointment or to attend court
- Passport to be surrendered to the police
- Report to police station at certain specified times.
- Not to apply for any travel documents.
- To observe a curfew between certain hours

The judicial decision on whether to grant bail or remand a defendant in custody is made, in each case, in line with the statutory framework primarily set out in the Bail Act 1976. This sets out a general presumption of bail, reflecting the principle that a defendant is innocent until proven guilty. However, it also acknowledges, by way of certain specified exceptions, that in some cases the public interest requires the defendant to be held in custody pending the outcome of proceedings.

Under the 1976 Act (as amended) the court may withhold bail if it is satisfied that there are substantial grounds for believing that, if released on bail the defendant would:

- abscond,
- commit an offence, or
- interfere with witnesses or otherwise obstruct the course of justice.

In making its decision the court must consider all the circumstances of the case as appear to be relevant. This will include the nature and seriousness of the alleged offence, the weight of evidence against the defendant, the defendant's character, antecedents, associations, community ties and past record of complying with bail.

I hope that this letter answers your request. However, if you are unhappy with the result of your request for information, you may request an internal review within two calendar months of the date of this letter by writing to Access Rights Unit, The Ministry of Justice, Post Point 6.17, Selborne House, 54 Victoria Street, London SW1E 6QW.

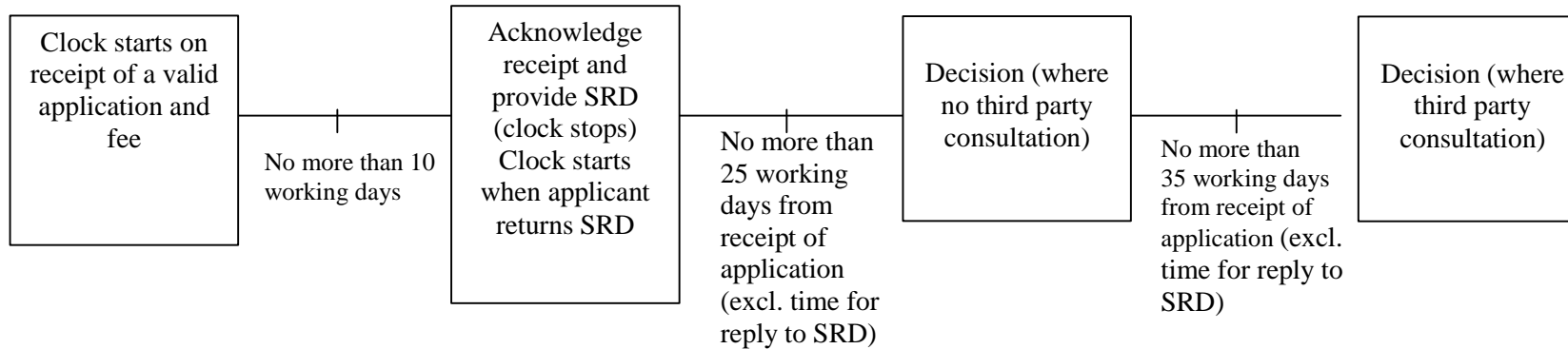
If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Yours sincerely

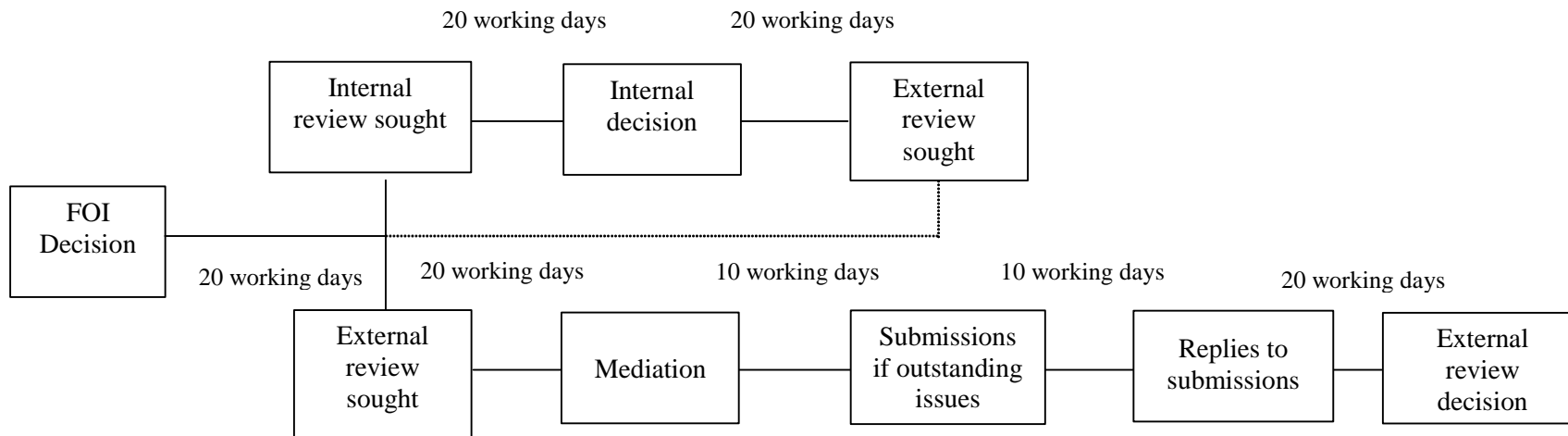
Ministry of Justice

Appendix 6 Model time frame for processing an FOI application

Model time frame for processing an FOI application



Model time frame for the review of an FOI decision



Notes:

SRD is Schedule of Relevant Documents – see chapter 13.

This figure does not include time frame arising in event of agency seeking an extension of time.

Appendix 7 Proposed Costings

There should be no charges for searching for, or retrieval of, documents, or for decision-making by FOI officers.

There should be a charge based on the number of pages provided in full to an applicant (that is, only for pages where no information has been blacked out/partially exempt).

The charge should be set out in the regulations, based on the recommendations of the Information Commissioner.

Initially, the charge should be —

Number of folios	Fee
1- 10 folios	Free
11- 20 folios	\$20 for 20 folios (i.e. \$2 a page for each page in this bracket)
21-50 folios	\$20 plus \$2.25 a page for each page in this bracket
51-100 folios	\$87.50 plus \$2.50 a page for each page in this bracket.
101-500 folios	\$212.50 plus \$2.75 a page for the each page in this bracket.
501-1000 folios	\$1312.50 plus \$3 a page for the each page in this bracket.
1000 folios (and more)	\$2812.50 plus \$5 a page.

The charge should be levied at the time the documents are ready for delivery. They should be made available as soon as the charge is paid.

The charge for photocopying should be retained. No charge should be made when information is provided on a computer disc, or by email.

Appendix 8: Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information



ATLANTA DECLARATION AND PLAN OF ACTION FOR THE ADVANCEMENT OF THE RIGHT OF ACCESS TO INFORMATION

We, over 125 members of the global access to information community from 40 countries, representing governments, civil society organizations, international bodies and financial institutions, donor agencies and foundations, private sector companies, media outlets and scholars, gathered in Atlanta, Georgia from February 27-29, 2008, under the auspices of the Carter Center and hereby adopt the following Declaration and Plan of Action to advance the passage, implementation, enforcement, and exercise of the right of access to information:

PREAMBLE:

Recognizing that Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant of Civil and Political Rights, Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and People's Rights provide for a right to "seek, receive and impart information," and Article 10 of the European Convention on Human Rights establishes a similar right to "receive and impart information;"

Emphasizing that the Inter-American Court of Human Rights in the case of *Claude Reyes v. Chile* found that Article 13 of the American Convention on Human Rights recognizes a general right of access to information and that states must provide a system for exercising that right;

Considering that the Council of Europe, the Organization of American States, and the African Commission on Human and People's Rights have adopted clear statements and declarations on the right of access to information, that there are important right to information initiatives underway at the Organization for Economic Cooperation and Development, and that the recent United Nations Convention Against Corruption calls on all states to ensure that the public has effective access to information;

Acknowledging that the right of access to information is a foundation for citizen participation, good governance, public administration efficiency, accountability and efforts to combat corruption, media and investigative journalism, human development, social inclusion, and the realization of other socio-economic and civil-political rights;

Appreciating that the right of access to information promotes efficient markets, commercial investment, competition for government business, fair administration and compliance of laws and regulations;

Convinced that political commitment to the right of access to information is necessary for adoption and full implementation and enforcement of access to information legislation and instruments;

Stressing that although there have been great advances in the right of access to information over the past decade, there remain many challenges including the absence of national legislation, widely varying levels of implementation, and continued political resistance;

FINDINGS:

The assembled conference hereby finds that:

1. The fundamental right of access to information is inherent in all cultures and systems of government.
2. A lack of access to information disproportionately affects the poor, women and other vulnerable and marginalized people, and as such the right should be guaranteed to all sectors of society.
3. The right of access to information is fundamental to human dignity, equity and peace with justice.
4. Transparency is a necessary and powerful instrument for promoting human and state security.
5. New technology offers a great potential for facilitating access to information, yet factors that limit access and data management practices have prevented many from benefiting from its full potential.
6. Enacting a comprehensive law is essential, but insufficient, to establishing and sustaining the right of access to information.
7. Equally important is constructing an appropriate institutional framework and developing public administration capacity to manage and provide information.
8. It also is critical to raise public awareness of the right of access to information, ensure capacity to exercise the right including through public education, and foster support for transparency among all sectors of society.
9. A free and independent media is a fundamental component to the establishment and full enjoyment of the right of access to information.

PRINCIPLES:

Further to these findings, we set out the following key principles:

1. Access to information is a fundamental human right.
2. All states should enact legislation to give effect to the right of access to information.
3. The right of access to information applies to all intergovernmental organizations, including the United Nations, international financial institutions, regional development banks, and bilateral and multilateral bodies. These public institutions should lead by example and support others efforts to build a culture of transparency.

4. The right of access to information should be entrenched in international and regional instruments as well as national and sub-national laws and should respect the following tenets:
 - a. Access to information is the rule; secrecy is the exception;
 - b. The right of access to information should apply to all branches of government (including the executive, judicial and legislative bodies, as well as autonomous organs) at all levels (federal, central, regional and local) and to all divisions of the international bodies listed above;
 - c. The right of access to information should extend to non-state actors under the conditions enumerated in principle 5 below;
 - d. The right of access to information should include a right to request and receive information, and a positive obligation on public institutions to disseminate information related to their core function;
 - e. The right to request information is independent of a personal interest in that information, and there should never be a need to provide a justification or reason;
 - f. The instrument or law should include procedures designed to ensure the full implementation and ease of use, with no unnecessary obstacles (such as cost, language, form or manner of request) and with an affirmative obligation to assist the requester and to provide the requested information within a specified and reasonable period of time;
 - g. Exemptions to access to information should be narrowly drawn, specified in law, and limited only to those permitted by international law. All exemptions should be subject to a public interest override, which mandates release of otherwise exempt documents when the public benefit of release outweighs the potential public harm;
 - h. The burden of proof to justify a denial should always fall on the holder of information;
 - i. The instrument should mandate full disclosure, after a reasonable period of time, of any document that was classified as secret or confidential for exceptional reasons at the time of its creation;
 - j. The instrument should include clear penalties and sanctions for non-compliance by public officials; and
 - k. The requester should be guaranteed a right to appeal any decision, any failure to provide information, or any other infringement of the right of access to information to an independent authority with the power to make binding and enforceable decisions, preferably an intermediary body such as an Information Commission(er) or Specialist Ombudsman in the first instance with a further right of appeal to a court of law.

5. The right of access to information also applies to non-state actors that: receive public funds or benefits (directly or indirectly); carry out public functions, including the provision of public services; and exploit public resources, including natural resources. The right of access to information extends only to the use of those funds or benefits, activities or resources. In addition, everyone should have the right of access to information held by large profit-seeking corporations where this information is required for the exercise or protection of any human right, as recognized in the International Bill of Rights.

6. States and international organizations should ensure a system of implementation that provides for:
 - a. The equitable exercise of the right of access to information;
 - b. Training of all public officials on the practice and application of the right;
 - c. Public education and training to empower persons to make full use of the right;
 - d. Allocation of necessary resources to ensure efficient and timely administration;
 - e. Strengthening of information management to facilitate access to information;
 - f. Regular monitoring and reporting on operation of the law; and
 - g. Review of the operation and compliance with the law, by legislative and key oversight bodies.

7. Companion legislation that would further promote the right of access to information and provide a supportive legislative framework should be enacted, including: laws compelling disclosure of political party and campaign financing; lobbying disclosure; archiving legislation; whistleblowing protection; and professional public administration laws. Moreover, contradictory provisions, such as those contained within an Official Secrets Act, should be repealed.

PLAN OF ACTION

To give effect to the Findings and Principles, the following action plan should be undertaken:

For the International Community:

1. Intergovernmental organizations - including the United Nations and all of its bodies, Council of Europe, Organization of American States, African Union, the Organization for Economic Cooperation and Development and international financial institutes, regional development banks, and trade bodies - and international and domestic non-governmental organizations should give effect to the right of access to information in accordance with the findings and principles enumerated above.
2. As the first intergovernmental institution to formulate a specific convention on the right of access to information, the member states of the Council of Europe should ensure that the above findings and principles are respected in the future "European Convention on Access to Official Documents."
3. During the World Bank Group's forthcoming review of its Policy on Disclosure of Information, the Bank should engage in an open and consultative process to bring its policy into line with the findings and principles enumerated above. Other international governmental organizations also should take steps to adopt or bring their information policies into line with the findings and principles.
4. International and regional bodies should:
 - a. take measures to ensure that all states have effective mechanisms to promote and protect the right of access to information;
 - b. develop instruments on the right of access to information;
 - c. conduct ongoing monitoring of compliance with this right, through formal and informal follow-up mechanisms such as peer review.

5. International donors should support countries' efforts to establish, implement and enforce the right of access to information by providing technical assistance and sufficient long-term funding, including through new aid modalities such as program-based and sector-wide approaches.
6. Donor funding agreements should require that donors and recipients provide access to information regarding the amount and use of international funds.
7. Regional and international bodies considering the establishment of right of access to information instruments should ensure that they consult fully with civil society and with experts in the right of access to information. A panel of experts should be convened to support these efforts.
8. Passage and implementation of access to information laws should be prioritized as essential to reporting on progress toward and achievement of the Millennium Development Goals.
9. Donors should provide funding to support monitoring, analysis and assessment of the implementation and impact of the right of access to information, including through scholarly research, the development of appropriate indicators and practical evaluation tools.

For States:

10. Every state should provide for the right of access to information in keeping with the findings and principles enumerated above.
11. States should integrate promotion of the right of access to information into their own national development and growth strategies and sectoral policies.
12. States should seek multi-stakeholder partnerships to enhance their capacity to implement the right of access to information in practice.
13. States should establish independent enforcement mechanisms, such as Information Commissions, that provide for accessible, affordable, and timely appeal remedies. Where appropriate these bodies should have the power to make binding decisions and order disclosure of information.
14. States should put in place effective information management policies and systems, which facilitate their ability to properly create and maintain records and discharge their right to information obligations.
15. Effective training methods should be developed for officials charged with the responsibility of providing access to information along with structures for the sharing of best practice from around the world, and support from non-governmental organizations and donors should be sought.

16. To give effect to the right of access to information held by profit-seeking corporations, states should establish rules which ensure minimal administrative burdens, exemptions in accordance with general principles governing the right of access to information, and a threshold test for size to define which entities are subject to this duty.
17. Access to information regimes should incorporate some mechanisms for monitoring and evaluation, including quantitative and qualitative measurement, collection of statistics, and mandatory annual reporting.

For Corporate, Professional and Civil Society Organizations:

18. Multi-national corporations and large domestic businesses should establish voluntary commitments to proactively disclose information in the public interest, and such efforts should be encouraged and supported.
19. Technology innovators should develop and share new methods for the promotion of the right of access to information.
20. Additional scholarship and study on the right of access to information, implementation of relevant laws, socio-economic impact, politics of compliance, exercise of the right, its enforcement, and how it changes peoples' lives should be undertaken.
21. Right of access to information advocates should focus further efforts to develop and update guidelines on the drafting of right to information instruments and national laws, as well as on their implementation. These guidelines should be widely disseminated with a view to promoting right to information regimes that conform to the above principles.
22. All stakeholders should engage in the monitoring and assessment of the implementation and impact of the right of access to information, including through the development of appropriate indicators and practical evaluation tools.
23. Civil society should ensure full enjoyment of the right of access to information by demanding and using public information, and promoting and defending the right.
24. A free and independent media should be developed and promoted, and journalists should be trained in use of the right to information.
25. The access to information community should strive to build solidarity with a full range of stakeholders who share a common transparency agenda.
26. The Carter Center will work with others to disseminate the Atlanta Declaration, through high level communications, publications, conferences and meetings.

We call upon all states, international and regional bodies, and the global access to information community to establish, develop and nurture the right of access to information across the world, in accordance with the findings and principles enunciated in this Declaration and to commit to the plan of action in furtherance of our common objective.

Appendix 9 Checklist of drafting issues

Section	Checklist
25	Consider amendment to 25(2)(c) to refer to “an address” for consistency.
25A and 27A	Consider amendment to reword to “notice is given” (received by the applicant) in all cases.
27	Consider amendment to 27(3) to provide for giving access to “a copy of the document”.
29	Consider amendment to S.29(3) to change wording to “refuse to deal with application”.
29A	Consider amendment to change heading to “refusing to deal with application under s. 29(1)”. Consider amendment to s. 29A(3) to also provide for the option of withdrawal of the application.
29B	Consider amendment to 29B(2) to provide for withdrawal of part of an application. Consider amendment to include in s. 29B(4), a decision granting access, or a refusal of access under s.50A.
31A	Consider amendment to replace “Person who applies for access” with “applicant”. Consider amendment to 31A(2)(a) to include a reference where access has been deferred under s.51(2)(e).
35C	Consider amendment to s. 35C(3) to include a reference to “prescribed persons” for the decision in relation to non profit organisations.
51(3)	Consider amendment to define the term “sibling”.
76(1)	Consider amendment to correct the text of this section referring to exempt document or exempt matter.
79	Consider amendment to the list of deemed refusal decisions to include s.52(6).
88(3)	Consider amendment regarding the scope of the powers of the commissioner on review.
102 - 103	Consider amendment to protect s.44(3) decision makers or s.44(5) disclosers.

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