Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*

Discussion paper

August 2013
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Minister’s Foreword

Information is the new currency, and this Government is fully committed to making as much information as possible available to the community. The Open Data Revolution, which allows more public access to Government information collected in all regions, in all kinds of formats, for all kinds of reasons,\(^1\) is just one example of the Government’s approach to information sharing.

We are committed to crafting a new integrity system for the state as we move towards making the government the most open and accountable in the nation. We want to make government processes clear, straightforward and accountable. Our Open Government Policy Forum is part of this process as is this review of the Right to Information Act.

The Right to Information Act 2009 (the RTI Act) plays a critical role in achieving this commitment and promoting openness and transparency in Government. It was introduced after an independent committee chaired by Dr David Solomon, AM, conducted a wide-ranging review of Queensland’s Freedom of Information Act 1992. Its object is to provide a right of access to information in the government’s possession or under the government’s control, unless it is contrary to the public interest to give the access.

This right of access results in thousands of applications being made to departments, statutory bodies (such as universities) and local councils each year. The RTI Act also establishes disclosure logs (parts of agency websites which make information released under RTI available to a wider public audience). Departments and Ministers are now required to publish more information than ever before on disclosure logs.

The RTI Act has now been operating for over four years, and a review must be conducted to ensure it is achieving its objects. It is not surprising that a number of operational issues and policy questions have been identified during this time. I am committed to addressing these issues and questions and working out the best possible solutions.

The review presents a unique opportunity for Queenslanders to have their say about how we can further the objectives of the RTI Act and improve its operation for the greatest public benefit.

I look forward to their contributions to this important debate.

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\(^1\) See the Premier’s press release of 9 November 2012.
Introduction

Background

The Right to Information Act 2009 (Qld) (RTI Act) and the Information Privacy Act 2009 (Qld) (IP Act) commenced on 1 July 2009. The RTI and IP Acts provide for a review of the Acts. Under the Acts the objects of the review include:

- deciding whether the primary objects of the Acts remain valid;
- deciding whether the Acts are meeting their primary object;
- deciding whether the provisions of the Acts are appropriate for meeting their primary objects; and
- investigating any specific issues recommended by the Minister or the Information Commissioner.

Terms of reference

The review’s terms of reference were endorsed by the Premier and are attached (Appendix 1).

Purpose of this discussion paper

The purpose of this discussion paper is to identify key issues and challenges raised by implementation of the legislation and seek the views of interested persons, agencies or organisations about these issues. It covers the RTI Act and Chapter 3 of the IP Act - those parts of the legislation dealing with access to information and amendment of personal information. Unless otherwise specified, a reference to the IP Act in this discussion paper is a reference to Chapter 3 of the IP Act. The other provisions of the IP Act, which regulate the collection, storage, use and disclosure of personal information by government, are addressed in a separate discussion paper.

How to have your say

All comments or submissions must be made in writing. In providing comments or a submission please refer to the relevant question number and provide reasons and supporting details or data for your response. Please feel free to comment on other issues about the RTI Act and Chapter 3 of the IP Act which are not raised in the discussion paper.

Please provide any comments or submissions by 15 November 2013.

- by email: FeedbackRTIandprivacy@justice.qld.gov.au
- by post: RTI and Privacy Review
  Department of Justice and Attorney-General
  GPO Box 149
  Brisbane QLD 4001
Privacy statement

Any personal information in your comment or submission will be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of undertaking the review under section 183 of the RTI Act and section 192 of the IP Act. DJAG may contact you for further consultation on the issues you raise, and your submission and/or comments may be provided to others with an interest in the review, for example, the Parliamentary Legal affairs and Community Safety Committee.

Submissions provided to the DJAG in relation to this Discussion Paper will be treated as public documents. This means that in all but exceptional cases, they may be published on the DJAG website, together with the name and suburb of each person making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the RTI Act, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Next steps

The report on the review must be tabled in Parliament by the Minister as soon as practicable after the review is finished.2

The issues in this paper and the discussion of possible actions or alternatives do not represent Queensland Government policy.

2 Section 183(3) of the RTI Act and section 192(3) of the IP Act.
RTI and IP Legislation – History

Before the RTI Act and the IP Act commenced in July 2009, the Freedom of Information Act 1992 (Qld) (the repealed FOI Act) had been in force for more than 15 years but comprehensively reviewed only once. The changes recommended by the Independent Review Panel, chaired by Dr David Solomon (the Solomon Report) led to the enactment of the RTI Act and the IP Act, and were the most significant in the history of freedom of information in Queensland.

The information access provisions in Chapter 3 of the IP Act commenced immediately for Local Governments, but provisions relating to privacy only commenced for Local Governments on 1 July 2010. Local Government had not previously been subject to any privacy laws or policies, although State Government departments had been required to comply with Information Standard 42, an administrative policy containing Information Privacy Principles similar to those now contained in the IP Act. The delayed commencement for Local Governments allowed them to implement processes for the appropriate collection and handling of personal information before having to comply with the privacy principles set out in the IP Act.

The RTI Act has been amended several times since commencement to clarify ambiguities, to reflect changes in other legislation and to introduce exemption provisions for information relating to asset sales and certain Brisbane City Council processes.

On 29 November 2012, Parliament passed the Right to Information and Integrity (Openness and Transparency) Amendment Bill 2012. The RTI amendments contained in that Amendment Act commenced in February 2013, providing new disclosure log requirements for RTI applications made to departments and Ministers.

Recent National Developments

A number of Australian jurisdictions have recently reformed their freedom of information legislation. The Commonwealth, New South Wales and Tasmania have now enacted legislation similar to Queensland’s RTI Act, and Victoria has established an independent Freedom of Information Commissioner. Each of these reform jurisdictions, like Queensland, has enacted legislation seeking to create a culture of proactive disclosure of government information, containing an overriding public interest test for the release of information, and making it mandatory to publish certain classes of information.

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3 The Parliamentary Legal Constitutional and Administrative Review Committee tabled report No 32, Freedom of Information in Queensland in December 2001. The then Queensland Government’s response was tabled in August 2002. It supported, in whole, part or principle over half its 176 recommendations. However, the changes supported by the then Government were not implemented until 2005.


5 Section 202 of the IP Act.
Issues for consideration

Part 1 - Objects of the Act - ‘Push Model’ strategies

The primary object of the RTI Act, and the access and amendment provisions in the IP Act is to:

Give a right of access (and amendment) to information in the government’s possession or under the government’s control, unless, on balance, it is contrary to the public interest to give the access (or allow the amendment).\(^6\)

The primary ways in which the objects of the RTI Act and the IP Act are to be realised is through implementing what is known as the ‘push model’ of making information available to the public, and introducing a ‘pro-disclosure bias’ in decision-making under the RTI Act. Section 39 (3) and 44(4) of the RTI Act state Parliament’s intention that the Act ‘be administered with a pro-disclosure bias.’

The ‘push model’ requires agencies to comply with the policy stated in the RTI Act’s preamble that:

‘Government information will be released as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.’

The ‘push model’ is supported by section 21 of the RTI Act (requiring agencies to maintain publication schemes)\(^7\) and section 78 of the RTI Act (which provides for agencies to maintain disclosure logs).\(^8\)

Sections 48 and 49 of the RTI Act provide that when an application for access is made, the agency must decide to give access to the documents, unless, on balance, disclosure would be contrary to the public interest.

The Office of the Information Commissioner (OIC)\(^9\) is required to monitor and report on agency performance and compliance with legislative and policy requirements of the RTI Act to implement the ‘push model’.\(^10\) The Annual Report prepared by the Department of Justice and Attorney-General for the 2010/2011 financial year and tabled in Parliament in January 2013 does not reveal a marked increase in the number of documents released. However, this may be because, for example, additional documents are released outside of the formal structures of the RTI Act and IP Act.

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<th>Is the Act’s primary object still relevant? If not, why not?</th>
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\(^6\) Section 3 of the RTI Act and section 3(b) of the IP Act.

\(^7\) Publication schemes set out the kinds of information an agency has available, the terms on which the information will be made available to the public and any charges that may apply.

\(^8\) Disclosure logs enable agencies to publish information released as the result of access applications under the RTI Act.

\(^9\) Unless otherwise specified, the ‘Information Commissioner’ includes the Information Commissioner’s delegates.

\(^10\) Section 131 of the RTI Act.
Part 2 - Interaction between the RTI and IP Acts

The RTI Act creates a general right of access to documents of an agency or Minister,\(^{11}\) while the IP Act provides a more limited right, allowing individuals access to their personal information. Section 40 of the IP Act provides that:

(1) Subject to this Act, an individual has a right to be given access under this Act to—
   (a) documents of an agency to the extent they contain the individual’s personal information; and
   (b) documents of a Minister to the extent they contain the individual’s personal information.

‘Personal information’ is defined in section 12 of the IP Act 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.’

This legislative framework implemented the Solomon Report recommendation that access and amendment rights for personal information be moved into a privacy regime, preferably a Privacy Act, rather than continue to be provided for in a Freedom of Information Act.\(^{12}\)

The grounds to refuse access to information, the time frames and all other processes (for example, consultation) are the same under both Acts. The only practical distinction for applicants is that an application fee and processing charges (charges associated with the agency’s work in dealing with the application)\(^{13}\) are payable under the RTI Act but not the IP Act.\(^{14}\)

There is a single mandatory form for all access applications under the two Acts. Applicants are not required to state on the form which Act they are applying under. If a decision-maker identifies that an access application could have been made under the IP Act, when on its face, it appears to have been made under the RTI Act (or vice versa), they must contact the applicant to assist them to make an application under the appropriate Act.\(^{15}\)

To be consistent with the objects of the RTI Act and the IP Act, the process of applying for information should be as uncomplicated and as efficient as possible, but the duplication in the current framework causes confusion for applicants and agencies.

Deciding whether the application is for personal information

Determining whether information is personal information may be complex and difficult, requiring an assessment that the individual’s identity is ‘apparent, or can reasonably be ascertained’ from the information, and a decision that the information is about an individual.

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\(^{11}\) See section 23 of the RTI Act. Unless otherwise specified, where used in this discussion paper ‘agency’ includes a reference to a Minister.

\(^{12}\) Section 44 of the IP Act allows an individual who has had access to a document of an agency or a Minister to apply to amend their personal information which they claim is inaccurate, incomplete, out of date or misleading.

\(^{13}\) See Glossary for further explanation of the application fee, and access and processing charges.

\(^{14}\) Access charges can however be imposed under the IP Act by the agency at the actual cost of providing access to a document, e.g. printing a photo, or are $0.20 per page for black and white photocopies. See section 4 of the Information Privacy Regulation 2009.

\(^{15}\) Section 34 of the RTI Act and section 54 of the IP Act.
Where a person’s name or photo appears in a document (for example, a driver licence) an individual’s identity is clearly apparent from the information. It is less clear though in what circumstances an individual’s identity is reasonably ascertainable from the information. For example, is the identity of a property owner ‘reasonably ascertainable’ from a Lot Number?

Inconsistent interpretations - scope of applications for personal information

The words ‘to the extent’ in section 40 of the IP Act give rise to different interpretations. Can an applicant only apply under the IP Act for those parts of a document which are their personal information? Or can they access whole documents containing their personal information?

The Information Commissioner’s role includes giving information and help to agencies and the public on matters relevant to the RTI Act, in particular by giving guidance on its interpretation and administration. The Information Commissioner has interpreted the phrase to the extent in section 40 of the IP Act to mean that the right of access is to whole documents, as long as each of the documents sought contain the applicant’s personal information. The fact the documents also contain other information (as well as the applicant’s personal information) does not prevent them being considered under the IP Act. The Information Commissioner’s guideline suggest that the words ‘to the extent’ should essentially be read as ‘which’, so the right of access in section 40 is to documents which contain the applicant’s personal information. Despite the guideline, there is concern that a contrary interpretation remains open. On this interpretation applicants can only apply to access those parts of a document containing their personal information, with the remainder of the information in the document outside the scope of the IP Act, with the result that agencies have no jurisdiction (no legislative authority) to consider and make a decision about the other parts of the documents.

These conflicting interpretations may result in inconsistencies between agencies. An applicant may make the same application to several different agencies and find that one processes it under the IP Act and another insists it be made under RTI.

Duplication of legislation, including grounds of refusal

Having a right of access under both Acts means the legislative processes are set out twice. Chapter 3 of the IP Act ‘Disclosure and amendment by application under this Act’ contains 66 pages of legislation dealing with issues such as the right of access and amendment, how applications are made and processes for dealing with applications, which duplicate provisions in the RTI Act. Many definitions in Schedule 6 of the RTI Act are also duplicated in Schedule 5 of the IP Act to explain the terms in Chapter 3.

The grounds on which an agency may refuse access to personal information are prescribed in the RTI Act rather than the IP Act, so extensive cross-referencing is also required. It can be difficult and time consuming for agencies to explain to applicants how the Acts interact. Written reasons for decisions have therefore become much longer than under the repealed FOI Act (See Appendix 2 for an indication of additional information which must be included).

This duplication may delay the processing of applications and granting access to documents. The Information Commissioner’s guidelines explain the procedures agencies must take when an application has been made under the wrong Act, but the process is administratively burdensome for agencies and applicants.

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18 Office of the Information Commissioner, Dealing with an IP application which is not limited to personal information, Guidelines – Access and amendment (13 July 2012) <http://oic.qld.gov.au/information-and-resources/guidelines-ip/ip-application-not-limited-to-personal-information>
2.1 Should the right of access for both personal and non-personal information be changed to the RTI Act as a single entry point?
Part 3 - Applications not limited to personal information

Section 54 of the IP Act sets out the process for agencies where an application should have been made under the RTI Act because it is for access to a document ‘other than to the extent it contains personal information.’ It allows an agency to advise the applicant that the application cannot be made under the IP Act and consult with them to either (i) make an application under the IP Act by changing the application, or (ii) have the application dealt with under the RTI Act by paying the application fee.

Extra time

Once an agency has advised the applicant that their application cannot be made under the IP Act they must give the applicant a reasonable opportunity to respond.

If the agency believes the application should have been made under the RTI Act, and the applicant pays the RTI Act application fee, the application is dealt with under the RTI Act with the application being taken to have been made, and the processing period (the time in which the agency must make a decision on the application) starting when the fee is paid. However, if the applicant chooses to change the terms of their application so they may continue under the IP Act, the processing period does not stop, and the agency or Minister has no extra time to process the application, even though they have spent time consulting with the applicant.19

If the applicant has not responded after consultation, or neither changes the application nor pays the fee, then the agency ‘must again consider’ whether the application can be made under the IP Act and advise the applicant within 10 calendar days of the decision. (This is the only place in the RTI or IP Act where a time frame does not specify ‘business days’, indicating that the reference is to calendar days). However, if an agency has decided the application cannot be made under the IP Act, it is unlikely to change its decision at a later time. If the application is solely for documents containing the applicant's personal information, it should be processed under the IP Act. If not, it should be processed under the RTI Act. The OIC advises that applications are not intended to be ‘split’20 so it is not appropriate for agencies to process parts of an application under the RTI Act and part under the IP Act.

| 3.1 | Should the processing period be suspended while the agency is consulting with the applicant about whether the application can be dealt with under the IP Act? |
| 3.2 | Should the requirement for an agency to again consider whether the application can be made under the IP Act be retained? |
| 3.3 | Should the timeframe for section 54(5)(b) be 10 business days instead of calendar days, to be consistent with the timeframes in the rest of the Act? |

19 Section 34 of the RTI Act mirrors section 54 of the IP Act, and applies when an application under the RTI Act could have been made under the IP Act because it is for the applicant’s personal information. Similar issues may arise if, after consultation under section 34, the applicant asks for the application to be dealt with under the IP Act.

20Office of the Information Commissioner, Dealing with an IP application which is not limited to personal information (undated).
Part 4 - Scope of the Acts

Documents of an agency and a Minister

The right of access created by the RTI Act and IP Act extends to ‘documents of an agency’ and ‘documents of a Minister.’ Essentially, these are documents in the possession or under the control of the agency or Minister, including those the agency or Minister is entitled to access. Sections 12 and 13 of the RTI Act (and section 13 and 14 of the IP Act) define ‘document of an agency’ and ‘document of a Minister’ as follows:

12 Meaning of document of an agency
In this Act, document, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency, and includes—

(a) a document to which the agency is entitled to access; and

(b) a document in the possession, or under the control, of an officer of the agency in the officer’s official capacity.

13 Meaning of document of a Minister
In this Act, document, of a Minister, means a document, other than a document of an agency or a document to which this Act does not apply, in the possession, or under the control, of the Minister that relates to the affairs of an agency, and includes—

(a) a document to which the Minister is entitled to access; and

(b) a document in the possession, or under the control, of a member of the staff of, or a consultant to, the Minister in the person’s capacity as member or consultant.

Most access applications are for documents in the physical possession of an agency, which are easily identifiable as documents of an agency or Minister. However, sometimes applicants seek access to documents which do not fall within the above definitions. Applicants may mistakenly seek documents not held by an agency - for example, they might apply to Queensland Health for medical records held by a private medical practitioner. They may also seek documents held by a Minister, which do not ‘relate to the affairs of an agency’, for example, party political documents held by a Minister in his or her capacity as a Member of Parliament (see definition of document of a Minister, above). Normally this is resolved when the agency contacts the applicant to explain that the documents are outside the scope of the RTI or IP Act. However, some applicants are not prepared to withdraw their applications, or cannot be contacted before a decision is required.

Agencies and Ministers must also sometimes decide whether a document is under the agency or Minister’s control. A document ‘under the control’ of an agency is one it has a present legal entitlement to access, for example, documents sent to a document management company for archiving, or documents sent to a solicitor for the purpose of obtaining advice. However, applicants sometimes apply for documents which are not in the agency or Minister’s control, for example, documents created by a company contracted to write a report for government. The report itself is likely to be a document under the control of an agency, but other documents created by the company are not.

No refusal mechanism if not a document of the agency or Minister

The RTI and IP Acts do not provide a basis for agencies to either refuse to deal with an application or refuse access to documents on the basis that documents are not ‘documents of an agency’ or ‘documents of a Minister’.
Section 32 of the RTI Act (discussed below) allows an entity to advise an applicant that an application is ‘outside the scope of the Act’ because, among other reasons, the document is a document to which the Act does not apply. This decision can be reviewed. However, section 32 does not apply to a decision that the document is not a document of an agency or Minister. Similarly a decision that a document is not a document of an agency or Minister is not a ‘reviewable decision’ in the exhaustive list of ‘reviewable decisions’ in schedule 6 of the RTI Act.

4.1 Should the Act specify that agencies may refuse access on the basis that a document is not a document of an agency or a document of a Minister?

4.2 Should a decision that a document is not a ‘document of the agency’ or a ‘document of a Minister’ be a reviewable decision?

Applications outside the scope of the Act

If an applicant applies for a document to which access may be refused under section 32 (for example, certain coronial documents) or applies to an entity to which the Act does not apply (for example, an active Commission of Inquiry) the agency or entity to which they apply is not required to consider whether information is exempt, or whether there are other reasons to refuse access. They may simply advise of their decision (that the Act does not apply to the document, or that the entity is outside the scope of the Act) by providing prescribed written notice to the applicant within 10 business days. These decisions can be reviewed.

Difficulties with part applications

The RTI Act does not provide for cases where an application is for some documents which fall outside the scope of the Act, and some documents which do not. In addition, under section 32(2), an agency has 10 days to make a decision that documents are outside the scope of the Act. However, there is a processing period of at least 25 business days in relation to the remainder of the application. These differing timeframes create complex jurisdictional issues in relation to review rights. In addition, ten days is a very short timeframe for what can be a complex decision. For example, determining whether documents were created or received as part of a court’s judicial functions, or as part of the community service obligations of a Government Owned Corporation.

4.3 Should the timeframe for making a decision that a document or entity is outside the scope of the Act be extended?

Ambit of the Act

The object of the RTI Act is to provide a right of access to documents in the possession or under the control of ‘the government’ (section 3). While the definition in section 14 makes clear that the Act extends to departments, local councils, and statutory bodies, there is continuing debate about which bodies are, and should be, caught by the Act’s provisions. For example, City North Infrastructure (CNI) is a proprietary limited company registered under the Corporations Act 2001 (Cth) and established by the Queensland Government to help deliver infrastructure projects. In 2011, the Supreme Court held that CNI was not a public authority for the purposes of the RTI Act because it was not established by government under an Act of the Queensland Parliament.

21 Section 11 and Schedule 1 of the RTI Act.
22 Schedule 1 clause 7 of the RTI Act.
23 Schedule 1, Part 1, clause 4 of the RTI Act.
24 Davis v City North Infrastructure Pty Ltd [2011] QSC 285; QLR 17/3/12.
Government Owned Corporations (GOCs)

Eleven entities fall within the definition of a ‘government owned corporation’. Some are specifically excluded from the operation of the RTI Act and the IP Act for all their functions, except so far as they relate to community service obligations. Some have no community service obligations and so applications for access to documents cannot be made to these GOCs.

4.4 Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs be changed? If so, in what way?

4.5 Should corporations established by the Queensland Government under the Corporations Act 2001 be subject to the RTI Act and Chapter 3 of the IP Act?

Documents of contracted service providers

Only documents in the physical possession of an agency, or those which an agency has a legal entitlement to, are subject to the Acts. There is no right of access to documents held by non-government organisations (private companies and community groups) even if those bodies have been contracted to perform functions that are considered to be government responsibility. Applications may be made for documents created by contracted service providers and held by an agency. However, documents not provided to an agency remain outside the scope of the Acts.

The trend for government agencies to contract private sector bodies to provide services to the public on behalf of government may mean a degree of accountability is lost. Where problems arise with the provision of a service by a non-government body, members of the public are unlikely to be able to find out why and how the problem occurred or seek redress as they are not a party to the contract. However, allowing documents held by private sector entities to be subject to an information access regime may have a detrimental effect on legitimate business interests. The cost of complying with any information access regime may also impose an unreasonable cost and administrative burden on these entities and those costs could be passed on the consumer.

4.6 Should the RTI Act and Chapter 3 of the IP Act apply to the documents of contracted service providers where they are performing functions on behalf of government?

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26 A GOC’s community service obligations (CSOs) are obligations which are not in its commercial interests to perform and do not arise because of the corporatisation principles. Examples of CSOs are the requirement for electricity authorities to provide services on a uniform pricing basis across the States, and discounted fares provided by Queensland Rail to students and pensioners.

27 See also the Information Commissioner’s decision in Kalinga-Wooloowin Residents Association Inc and Department of Employment, Economic Development and Innovation, City North Infrastructure Pty Ltd (Third Party) (310542) in relation to whether documents are held by an agency.
Part 5 - Publication schemes

Requirement for a publication scheme

Agencies are required to have a publication scheme setting out the classes of information they have available and the terms on which they will make the information available, including any charges. Publication schemes must comply with any guidelines published by the Minister. Ministerial Guidelines set out the classes of documents which must be published, the key criteria for deciding which documents to include in a publication scheme, and guidance on how to operate a publication scheme.

Publication on websites

Section 21 of the RTI Act does not expressly require agencies to have their publication scheme on a website, although Ministerial Guidelines provide that the information (in a publication scheme) should be simple to access through the agency website or be easily and quickly sent out by an officer of the agency. Website-based publication schemes may make information easily available to the community. However, some small agencies, including some local and indigenous councils, may not have websites and may not have resources to develop them.

More guidance on publication schemes

There are many sources of information for developing compliant and effective publication schemes, but agencies may benefit from more specific guidance on this matter, for example in relation to the difference between ‘websites’ and ‘publication schemes’.

5.1 Should agencies with websites be required to publish publication schemes on their website?
5.2 Would agencies benefit from further guidance on publication schemes?

Making more government information available

The requirements in the RTI Act to maintain publication schemes and disclosure logs assist in ‘pushing’ government information into the public domain.

In this context, the Premier has indicated the Government’s determination, through the open data revolution, to change the culture of the Queensland Government to be more open by allowing more public access to Government information collected in all regions, in all kinds of formats, for all kinds of reasons.

5.3 Are there additional new ways that Government can make information available?

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28 Section 21 of the RTI Act.
30 Premier’s press release 9 October 2012.
Part 6 - Applying for access or amendment under the Acts

Valid applications

For an access application to be valid (‘compliant’) it must be in the approved form, provide sufficient information concerning the document sought to enable the agency to identify it, and state an address to which notices may be sent.\(^{31}\) RTI Act applications must also be accompanied by the application fee.

An application for access or amendment must be in the approved form.\(^{32}\) Applicants can download and complete application forms and send them by post, electronically, or via fax to the agency which holds the documents they are seeking. Alternatively, an online form is available for applications to Queensland State Government departments. The requirement to apply on a form (rather than by letter, as in other jurisdictions) imposes an additional step for applicants who need to locate and download or submit a form. This has been criticised as unnecessarily bureaucratic - creating ‘red tape.’

If an application is not compliant the agency must make reasonable efforts to contact the applicant within 15 business days of receiving the application and inform them why their application does not comply. Agencies must assist applicants to make their application compliant.\(^{33}\)

While the time an agency has to process an application does not start until an application is valid, agencies spend much time dealing with non-compliant applications. Some applicants find the application form confusing and not ‘user friendly.’

No other Australian jurisdiction requires a form to make an application; they simply require applications to be in writing, contain an address to which notices can be sent, and provide a certain amount of detail about the documents or information requested. Many jurisdictions and individual agencies provide an optional form to assist the applicant. The New South Wales, South Australian, and Commonwealth FOI legislation require that a written application state that the application is being made under the relevant legislation. This may assist agencies in determining whether the applicant wishes their application to be processed under a formal legislative scheme.

There is also a form to be used when a person applies to amend their own personal information. Similar arguments apply in relation to this form.

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<td>6.2</td>
<td>Should the amendment form be retained? Should it remain compulsory?</td>
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A person who applies for access to, or amendment of personal information must provide evidence of their identity.\(^{34}\) The RTI and IP Regulations contain a non-exhaustive list of documents which verify identity including\(^{35}\) a passport, a copy of a birth certificate or extract, a driver’s licence, a statutory declaration from an individual who has known the person for at least one year, or a copy of a prisoner’s identity card that is certified by a corrective services officer. Copies of identification documents must be certified by a qualified witness. A qualified witness is a lawyer or notary public.

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\(^{31}\) Sections 24 RTI Act and section 43, IP Act.

\(^{32}\) Section 24(2)(a) of the RTI Act, sections 43(2)(a) and 44(4)(a) of the IP Act.

\(^{33}\) Section 33 of the RTI Act and section 53 of the IP Act.

\(^{34}\) Section 24(3)(a) of the RTI Act, sections 43(3)(a) and 44(5)(a) of the IP Act.

\(^{35}\) Section 3 of the Right to Information Regulation 2009 and the Information Privacy Regulation 2009.
a commissioner for declarations or a justice of the peace. It can be difficult for applicants seeking access to documents, particularly in rural or remote areas or overseas, to access qualified witnesses.

Where someone applies for personal information on behalf of another person (as an agent), the agent must provide both evidence of their authority to act on the applicant’s behalf and evidence of their own identity for the application to be valid. The Acts do not specify what evidence is sufficient to show someone has authority to act on another person’s behalf.

Identity checks are important to ensure that personal and other sensitive information is only received by the person it is intended for, and to reduce the risk of agencies breaching the Privacy Principles. However, the requirement to provide evidence of identity may be seen as burdensome, particularly for legal practitioners, who may make frequent applications to the same agency.

Application fee refund

An application fee must be paid for an application under the RTI Act to be valid and cannot be waived. The RTI Act only provides for the application fee to be refunded where an agency fails to make a decision within the processing period, and is therefore taken to have made a decision refusing access to documents (a ‘deemed decision’) or the application could have been made under the IP Act (which does not require an application fee).

There are circumstances, apart from those prescribed in the RTI Act, where refunding application fees may be appropriate, for example, if an applicant mistakenly applies for documents under the RTI Act which are available under another scheme.

| 6.3 | Should the list of qualified witnesses who may certify copies of identity documents be expanded? If so, who should be able to certify documents for the RTI and IP Acts? |
| 6.4 | Should agents be required to provide evidence of identity? |
| 6.5 | Should agencies be able to refund application fees for additional reasons? If so, what are appropriate criteria for refund of the fee? |

Applications by and for children

Section 25 of the RTI Act and section 45 of the IP Act allow an access application to be made for a child (an individual under 18) by the child’s parent. A parent is defined as the child’s mother; the child’s father; a person who exercises parental responsibility for the child, including someone who is granted guardianship of the child, or exercises parental responsibility under a court order; and a person who, under Aboriginal or Torres Strait Islander custom, is regarded as the child’s parent. There are no criteria to guide agencies in determining the status of parents from these cultures.

Section 24 of the RTI Act provides that evidence of authority includes evidence that an agent is a person’s parent. A person applying on behalf of a child under section 25 of the RTI Act only needs to provide evidence they are the child’s parent and state they are applying on behalf of a child. However a parent might be acting in their own interests, rather than acting on the child’s behalf, and be applying for information about the child, rather than for the child. Agencies must generally accept that an application is made on behalf of a child, process the application and then make the sometimes complex decision whether the release of the information to the parent is in the child’s best interests.

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36 Section 3(3) of the RTI regulation and the IP Regulation.
37 Section 24(2)(a) of the RTI Act.
The agency may refuse access to the documents, or parts of the documents on the ground that providing the information would not be in the child’s best interests (section 50). There are also public interest factors listed in schedule 4 of the RTI Act which agencies may consider when deciding whether to release information to the child’s parent.

Deciding whether to give a parent access to a child’s information also raise issues about when it is appropriate to consult with the child. The legislation requires consultation if disclosure is likely to be ‘of concern’ to a person, which would include a child. While disclosure to a parent is not likely to be ‘of concern’ to a small child, children aged 16 or 17 years may be concerned if their personal information is released to parents.

The OIC’s Guidelines Applications by and for children provide some Guidance.

6.6 Are the Acts adequate for agencies to deal with applications on behalf of children?

Longer processing period

Section 18 of the RTI Act and section 55 of the IP Act set out the ‘processing period’ for an application - initially 25 business days but this may be extended in some circumstances. At any time before the end of the processing period an agency or Minister may ask the applicant for more time to process the application (a further specified period). The agency or Minister can continue to process the application if (i) they have asked the applicant for a further specified period before the processing period has expired, and (ii) the applicant has not refused the request and (iii) the agency or Minister has not received notice that the applicant has applied for review on the basis that the agency is ‘deemed’ to have refused access by not meeting the timeframes.

It is not clear whether a further specified period should be added on the end of the processing period, or whether it starts as soon as agency makes the request.

If an agency asks for a longer processing period and the applicant initially does not respond but later refuses after the processing period, it is not clear whether the agency has the additional processing time for the period it is waiting for the applicant’s response, or whether it has no extra time at all.

6.7 Should a further specified period begin as soon as the agency or Minister asks for it, or should it begin after the end of the processing period?

6.8 Should an agency be able to continue to process an application outside the processing period and further specified period until they hear that an application for review has been made?

Charges estimate notices (CENs)

Agencies must provide applicants with an estimate of the amount of charges likely to be payable for an application (the Charges Estimates Notice – CEN) and a schedule of relevant documents before the end of the processing period. An applicant can agree to waive the requirement for a schedule of relevant documents, but the requirement to provide a CEN cannot be waived, even if an agency

38 Section 37 RTI Act
39 Section 35 of the RTI Act and section 55 of the IP Act
40 See Glossary, page 39 for an explanation of the application fee and the different types of charges.
41 Section 36(1)(b)(i) of the RTI Act.
decides that charges are not payable, for example, where it spends less than five hours processing the application.

After receiving the CEN, an applicant can then consult with the agency to either (i) confirm they wish to proceed with their application in its original terms and agree to pay the estimated fees; (ii) narrow their application with a view to reducing the amount of charges; or (iii) withdraw their application. This must be done within 20 business days of receiving the CEN or the application is taken to have been withdrawn.

There appears to be an inconsistency between section 36(5) of the RTI Act (which provides that only two CENs may be issued) and section 37(7) (which requires applicants to be given advice with both the first and second CEN that they may confirm, narrow or withdraw their application). Narrowing the second CEN would require a third CEN to be issued.

While an applicant cannot question the amount of time it takes an agency to locate and make a decision on documents and the resulting total of charges imposed, they can challenge a decision to impose charges on the basis that (i) the agency has decided the application is not solely for personal documents, and must be processed under the RTI Act; (ii) the application will take more than five hours to process; or (iii) an application for waiver of charges on the ground of financial hardship is refused.

The RTI Act does not provide a structured system for exercising the rights to have a decision about charges reviewed. If an applicant receives a CEN, including a decision that charges are payable, then they may apply for review of that decision at that time. The RTI Act does not make clear whether agencies should continue to process the application and make a decision on access, or whether the applicant must exhaust their review rights and receive a final decision on whether charges are payable before the application can progress.

### 6.9 Is the current system of charges estimate notices beneficial for applicants? Should removing the charges estimate notice system be considered?

### 6.10 Should applicants be limited to receiving two charges estimate notices?

### 6.11 Should applicants be able to challenge the amount of the charge and the way it was calculated? How should applicant’s review rights in this area be dealt with?

### Schedule of relevant documents

As noted an agency must set out and describe classes of documents covered by the terms of an application in a written schedule provided to an applicant. The aim of the schedule is to allow applicants to identify documents they wish (or do not wish) to seek access to. It can be difficult for agencies to balance the significant time spent preparing the schedule with providing enough information to make it a useful tool for applicants.

Applicants may waive the requirement for a schedule of relevant documents, but they are not always immediately contactable and processing may be delayed while waiting for a response. Agencies report that applicants do not often reduce the scope of their applications on the basis of the schedule. A more effective way of refining the terms of an application to deliver the best result for the applicant may be to consult with them direct.

### 6.12 Should the requirement to provide a schedule of documents be maintained?

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42 Section 36(2).
43 Section 36(3)
44 Section 36 of the RTI Act.
Consultation

Agencies and Ministers must consult with third parties (individuals, corporations and government) where they are considering releasing information and disclosure of the information may reasonably be expected to be of concern to the third party. This ensures individuals and others can provide their views to the agency making the decision on access.

Under the repealed FOI Act, the obligation to consult with third parties only arose where disclosure of the information could reasonably be expected to be of substantial concern to a third party. The lower threshold in the RTI Act and IP Act has resulted in a significant increase in the number of third party consultations (including with other agencies). This creates an administrative burden for the decision-making agency, the agency being consulted, consulted parties and the OIC.

Disclosing the identity of applicants and third parties

It can be difficult for agencies to decide whether to disclose the identity of the applicant to a third party being consulted, and sometimes vice versa. Making this decision requires an agency to balance the requirements of procedural fairness against the privacy implications of disclosing personal information to another person. Section 37 of the RTI Act and section 56 of the IP Act do not provide any guidance on these issues, and agencies make this decision on a case by case basis. If the third party knows who the applicant is, they are able to make a more informed decision about release of the information. However, this is not appropriate in every situation. (Disclosure log provisions requiring an applicant’s name to be published only apply after access has been given).

The OIC guideline on processing applications provides it is preferable for the agency or Minister to seek applicants’ consent to have their identity disclosed to the third party, or to discover any reasons why their identity should not be revealed.

To disclose the identity of the applicant without the applicant’s consent and not be in breach of the privacy principles, the agency or Minister needs to show that it cannot effectively consult with the third party without disclosing the applicant’s identity. The OIC processing guideline describes the procedural fairness considerations in third party consultations as follows:

A person is consulted because they have a concern about disclosure of the information sought by the applicant. The difficulty in suppressing the applicant’s identity arises because the agency will not necessarily know whether the identity of the applicant is of material concern to the third party or not, unless it is disclosed. Third parties may be able to argue further grounds for exemption upon becoming aware of the identity of the applicant e.g. a competitor in past and future commercial activities.

6.13 Should the threshold for third party consultations be reconsidered?
6.14 Should the Acts set out the process for determining whether the identity of applicants and third parties should be disclosed?

Transferring applications

An agency may only transfer an application to another agency where the documents sought are not in the first agency’s possession but are, to its knowledge, in another agency’s possession; and the other agency consents to the transfer.

45 Acts Interpretation Act 1954, section 36.
46 Section 37 of the RTI Act and 56 of the IP Act.
47 Office of the Information Commissioner, Processing access applications, 2010, para 20.2
48 Section 38(2) of the RTI Act and section 57(2) of the IP Act.
Under the repealed FOI Act, an agency could also transfer an application where it held a document but the document was more closely related to the functions of the other agency. The second agency was still required to consent to the transfer.

6.15 If documents are held by two agencies, should the Act provide for the agency whose functions relate more closely to the documents to process the application?

Notifying decisions and reasons

Agencies and Ministers must give prescribed written notice of their decision about an access application. Sections 191 of the RTI Act and 199 of the IP Act specify the required contents of the prescribed written notice, including advice about the decision, processing and access charges, review rights, and, if access to information is refused, the provisions relevant to the refusal.

Agencies have expressed concern about the length and complexity of reasons for decisions they must provide to applicants with letters containing the written notice sometimes being up to 15 pages.

6.16 How could prescribed written notices under the RTI Act and IP Act be made easier to read and understood by applicants?

Information about the existence of certain documents

In some situations, revealing the existence of documents may cause the damage or harm an exempt information provision is designed to protect. An example would be where someone applies for access to all documents relating to a particular covert investigation by the Queensland Police Service monitoring a certain person. Confirming the existence of documents matching this description would confirm that the person was, in fact, under investigation by the Police. The Acts do not require an agency or Minister to give information about such documents. They allow agencies and Ministers to neither confirm nor deny the existence of documents containing ‘prescribed information’ when to do so would cause the harm intended to be prevented by certain exempt information provisions.

Agencies and Ministers do not have to comply with the requirements to provide reasons for their decision if an access application is made for prescribed information. However agencies question how much information is sufficient to give an adequate notice decision notice. The provisions themselves do not appear to require anything further than a decision stating that the agency or Minister neither confirms nor denies the existence of that type of document as a document of the agency or document of the Minister, but assuming the existence of the document, it would be a document to which access would be refused to the extent it contained prescribed information.

Stating that the agency neither confirms nor denies the existence of documents in this way allows the agency to preserve the secrecy in the relevant documents and guard against causing the kinds of harm intended to be protected by the prescribed information provisions. However, it may be difficult for an applicant to accept a decision which does not acknowledge the existence of documents and provides no reasons for refusing access. In a decision regarding section 55 of the RTI Act, the Information Commissioner stated:

49 Section 54 of the RTI Act and section 68 of the IP Act
50 Section 55 of the RTI Act and section 69 of the IP Act.
51 This is defined to mean exempt information mentioned in schedule 3, sections 1, 2, 3, 4, 5, 9 or 10 – including cabinet information and national and state security information - and personal information if its disclosure would be contrary to the public interest.
52 Contained in section 191(a) and (b) of the RTI Act, and section 199(a) or (b) of the IP Act – see section 55 of the RTI Act and section 69 of the IP Act
53 Phyland and Department of Police (Unreported, Queensland Information Commissioner, 31 August 2011)
If an agency relies on section 55 of the RTI Act, it means that the agency is not required to give information as to the existence or non-existence of documents containing ‘prescribed information’. However, when relying on section 55 of the RTI Act to neither confirm nor deny the existence of documents, an agency must demonstrate that the information sought by the applicant is ‘prescribed information’ as that term is defined in the RTI Act.

The OIC guideline, ‘Neither confirm nor deny the existence of documents’ includes a template letter for providing advice to applicants. However, clarification in the legislation may still be of benefit.

| 6.17 | How much detail should agencies and Ministers be required to provide to applicants to show that information the existence of which is not being confirmed is prescribed information? |

No review of notation to amended personal information

An object of the IP Act is to provide a right of access to, and amendment of, personal information in the government’s possession or under its control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.\(^{54}\) This means that a person may apply to amend documents containing their personal information if it is inaccurate, incomplete, out-of-date or misleading.\(^{55}\)

Under section 74 of the IP Act, an agency can amend a document by either (a) altering the personal information or (b) adding ‘an appropriate notation’ to it. The notation must state how the information is inaccurate, incomplete, out of date or misleading and include whatever is necessary to complete the information or bring it up to date.\(^{56}\) If an agency refuses to amend personal information, then the applicant has the right of internal review or external review.\(^{57}\)

In addition, if the agency refuses to amend the personal information under section 74 (as noted above), the applicant may, under section 76, require the agency to add a notation to the document setting out how the applicant believes the information is inaccurate, incomplete, out of date or misleading, and adding additional information where necessary.\(^{58}\) The only right of review in relation to this section is where the agency has decided that the information is not the type of information which can be amended (section 76(5)), essentially, the applicant’s personal information.

However if the agency has made a notation under section 74, but the applicant is not satisfied with the content of the notation, the applicant has no review rights. This is because making a notation is not a refusal to amend, but a way of making an amendment. Schedule 5 of the IP Act defines a reviewable decision to include ‘a decision refusing amendment of a document under section 72.’

| 6.18 | Should applicants be able to apply for review where a notation has been made to the information but they disagree with what the notation says? |

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\(^{54}\) Section 3(1)(b) IP Act.

\(^{55}\) Section 41(1) IP Act.

\(^{56}\) Section 75 IP Act.

\(^{57}\) Schedule 5, IP Act.

\(^{58}\) Section 76(2) IP Act.
Part 7 - Refusing access to documents

Access to documents may be refused because the RTI Act does not apply to the documents sought or the entity applied to; or on the basis of other grounds specified in the section 47. These are discussed further below.

The Act does not apply to the document or entity

The RTI Act does not apply to documents listed in Schedule 1 of the RTI Act. Schedule 1 sets out a range of excluded documents, including, for example, documents created or received in carrying out activities under the Terrorism (Preventative Detention) Act 2005 (clause 3); documents created under part 5A of the Police Service Administration Act 1990 (clause 5); and coronial documents (for the time when a coroner is investigating the death to which a document relates -clause 8)).

The RTI Act also does not apply to certain entities, or certain entities in relation to particular functions, as mentioned in Schedule 2. The range of excluded entities is broad and most were ‘carried over’ from the repealed FOI Act. Under Schedule 2, the RTI Act does not apply to, for example, the Governor, a member of the Assembly, or a parents and citizens association. Neither does it apply to, for example, the judicial functions of courts and tribunals.

If an entity receives an application for a document to which the RTI Act does not apply, it is not required to consider whether access may be refused on the basis of exemptions in the Act – rather, it may refuse access to the whole document. The decision to refuse access on this basis is reviewable. In general, the fact that a document or an entity is excluded from the RTI Act provides greater ‘certainty’ than an exemption provision for the relevant agency that the documents will not be disclosed under RTI.

7.1 Do the categories of excluded documents and entities satisfactorily reflect the types of documents and entities which should not be subject to the RTI Act?

Agencies and Ministers can refuse access to documents on the grounds set out in section 47 of the RTI Act and section 67 of the IP Act, ie (a) to the extent the document comprises exempt information; (b) to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest; (c) where an application is made by or for a child and comprises the child’s personal information, but disclosure would not be in the child’s best interests; (d) where disclosure of the applicant’s healthcare information would be prejudicial to the physical or mental health or wellbeing of the applicant; (e) where the document does not exist or cannot be located; and (f) because other access to the document is available.

Exempt information

Access to certain categories of information can be refused because the information can be characterised as ‘exempt’ information. Exempt information includes categories such as Cabinet information, information which could damage national security and law enforcement and public safety information. The exempt information provisions are similar to those of other Australian jurisdictions and recognise that despite the presumption that government information should be accessible to the public, some kinds of information should not be released to protect essential public and private interests.

59 Section 11
60 Section 17
61 Sections 47(3)(a)-(f) of the RTI Act.
62 Section 47(3)(a) of the RTI Act.
Agencies do not need to apply a public interest test if information is exempt. This is because Parliament has already decided that it would be contrary to the public interest to release documents which comprise such information.\(^{63}\) Although agencies and Ministers may refuse access to exempt information, it is clear that they may also release it.\(^{64}\)

There are 14 categories of exempt information set out in schedule 3 of the RTI Act. These provisions set out the requirements for establishing whether information falls into these categories. Some information is exempt because it falls into a certain category of information (eg information created for consideration by the Cabinet). Some categories require an assessment of the likely harm which would occur if the information were disclosed, (eg where release would prejudice a person's fair trial or the impartial adjudication of a case). Other types involve the application of a common law test (e.g. where information is subject to legal professional privilege).

### 7.2 Are the exempt information categories satisfactory and appropriate?

#### Disclosure contrary to the public interest

If information is not exempt, agencies must apply a public interest balancing test, which requires them to balance relevant public interest factors favouring disclosure and non-disclosure. Information can only be withheld where the factors favouring non-disclosure outweigh the factors favouring disclosure. Most FOI legislation encompasses the concept of the ‘public interest’, which generally refers to something common to all members of the community, or a substantial number of people, and for their benefit. The public interest is different to purely private or personal interests. Some public interest factors may benefit individuals in particular cases, but generally the public interest factors raised will need to relate to some benefit of the public as a whole.

The Solomon Report recommended a new, single public interest test and the public interest test in the RTI Act now operates with a presumption in favour of disclosure. Agencies and Ministers must consider that the release of the information in question is contrary to the public interest to decide to withhold the information. Schedule 4 of the RTI Act contains 4 Parts, which are lists of public interest factors. Part 1 lists factors irrelevant to deciding the public interest; Part 2 lists factors favouring disclosure in the public interest; Part 3 lists factors favouring non-disclosure in the public interest, and Part 4 lists factors favouring non-disclosure in the public interest because of the public interest harm in disclosure. There is a significant amount of overlap between some of the Part 3 and 4 factors, and it is not clear how they work together.

Section 49 of the RTI Act explains how the public interest test is to be applied. It is essentially a process where relevant public interest factors in Parts 1 to 4 must be identified, compared and weighed up so that a decision can be made whether release of the information in question is contrary to the public interest. Section 49 of the RTI Act makes clear that the balancing process is not a neutral one. Where the competing factors are equal, access must be given.

Applying the public interest test can be complex and difficult to explain to applicants. Simplifying it would reduce the time taken in decision making and improve the level of community understanding and acceptance of the process. One way to simplify it might be to condense schedule 4 parts 3 and 4 into a single list of factors favouring non-disclosure.

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\(^{63}\) Section 48 of the RTI Act.  
\(^{64}\) Section 48(3) of the RTI Act.
7.3 Does the public interest balancing test work well? Should the factors in Schedule 4 Parts 3 and 4 be combined into a single list of public interest factors favouring non-disclosure?

Schedule 4 Harm factors – broad scope

The scope of some harm factors contained in schedule 4, part 4 of the RTI Act is very broad. For example, Schedule 4, Part 4, items 1, 2, 3, 9 and 10 of the RTI Act use the following words:

Disclosure of the information could reasonably be expected to cause public interest harm if disclosure could …. (have the listed consequences)

This means that if there is any possibility that disclosure of the information in question could have one of the specified consequences, then the public interest harm factor will apply. This contrasts with the wording used in the repealed FOI Act that ‘matter is exempt matter if its disclosure could reasonably be expected to …’ have the listed consequences.

Public interest factors – high thresholds and two part factors

Some public interest factors listed in Schedule 4 have thresholds that are difficult to meet. For example, one public interest factor favouring disclosure reads ‘disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds’ (emphasis added). ‘Ensuring effective oversight’ is a very high threshold. Disclosure of the information in question might show where government money has been spent, a useful outcome but one which does not reach the threshold.

Some public interest factors require that two relevant requirements be met in order to apply, e.g. a public interest factor favouring disclosure will apply where disclosure of the information in question could reasonably be expected to contribute to positive and informed debate. This means that if disclosure of the relevant information would not contribute to ‘positive’ as well as ‘informed’ debate, the public interest factor would not apply.

A new factor favouring disclosure

The public interest factors listed in the schedules are not exhaustive and agencies may rely on public interest factors not listed in the RTI Act. Several factors favouring non-disclosure protect private commercial business, but the public interest in informed consumers is not expressly recognised, even though it can be argued that a pre-condition of effective competition is an informed market. Factors which support informed consumer choices (and drive effective and competitive markets) could be included in Part 2 (factors favouring disclosure in the public interest). The Information Commissioner has already found this to be a factor in a series of decisions.

7.4 Should existing public interest factors be revised considering

- some public interest factors require a high threshold or several consequences to be met in order to apply
- whether a new public interest factor favouring disclosure regarding consumer protection and/or informed consumers should be added
- whether any additional factors should be included?

Protection based on specific classes of information

Although the RTI Act contains a range of exemptions and exclusions and a public interest balancing test which agencies may consider in deciding whether information should be released, questions are sometimes raised about whether, in addition to existing exemptions and exclusion, specific
types of information should have additional protection. Questions are also raised as to whether all the exemptions or exclusions are necessary.

Communications between Ministers and Departments

To enable Government to function effectively, it is important that Ministers and departmental staff, whether they are outposted to Ministers offices (departmental liaison officers) or otherwise, are able to communicate freely. The RTI Act already provides an exemption for information briefing incoming Ministers (as discussed below) and many documents prepared by departmental staff for consideration by Cabinet e.g. Cabinet submissions and agendas. Other exemptions protect a range of communications in various circumstances, for example, possible Parliamentary Questions have been held to be exempt on the basis that their disclosure could be infringe the privileges of Parliament. In addition, documents which pass between departmental and Ministerial staff may fall within a range of other exemptions available to all agencies, for example, if their disclosure would prejudice a person's fair trial. There are also factors favouring non disclosure in the public interest which may apply – for example, section 20 of Part 3 and section 4 of Part 4 both apply where disclosure of the information could reasonably be expected to prejudice a deliberative process of government.

Neither the Commonwealth Freedom of Information Act 1982 nor equivalent legislation in other jurisdictions has a more specific exemption provision protecting communications between Ministers and Departments.

7.5 Does there need to be additional protection for information in communications between Ministers and Departments?

Information Briefing Incoming Ministers

Information briefing incoming Ministers (information provided to new Ministers to inform them of the issues, policy agenda and resources in their Departments at the point they assume responsibility) is exempt under section 4, Schedule 3 of the RTI Act:

Information is exempt information for 10 years after the appointment of a Minister for a department if the information is brought into existence by the department to brief an incoming Minister about the department.

The Solomon Report recommended these briefs (and drafts thereof) be exempt on the basis that their purpose is to inform the new Minister of what is happening in their area of Ministerial responsibility to ensure good governance through accountability and to prevent the Minister from giving a misleading answer to Parliament through ignorance. It argued there was a risk that if these documents were subject to disclosure before 10 years had expired, they would only contain bland and non-controversial advice and which did not equip Ministers with the information allowing them to be fully informed and meet their constitutional obligations.

However, no other jurisdiction has a specific exemption to protect this information, and it could be argued that these documents make a significant contribution to public debate. In other States,
some Incoming Government briefs may fall within other exemptions - for example, the Victorian Freedom of Information Act 1982 section 8(1)(ba) exempts ‘a document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet’. By contrast, following the 2010 Federal election, thirteen Commonwealth Government Departments published these briefs on their websites, with information deleted only on the basis of existing exemptions.

7.6 Should incoming government briefs continue to be exempt from the RTI Act?

Commissions of Inquiry

Documents created and received by a Commission of Inquiry established under the Commissions of Inquiry Act 1950 include a wide range of material, including public submissions, administrative documents, legal advice and sensitive personal information. While some of this material may be innocuous, other material may be more contentious. Commissions of Inquiry also publish many documents, on websites and in other reports, during their term.

Part 1, item 4 of Schedule 2 of the RTI Act (Entities to which this Act does not apply) provides that the RTI Act does not apply to a Commission of Inquiry issued by the Governor in Council, whether before or after the commencement of this schedule.

Partly because Schedule 2 refers to entities, rather than documents, there is a view that this exclusion only operates while a Commission is operational. This means that although RTI and IP applications for documents cannot be made to a Commission while it exists, the exclusion does not continue once the Commission ceases, and applications can be made for a Commission’s documents at that time. Under the Public Records Act 2002, another agency must become the ‘responsible public authority’ in relation to records of a Commission which has ceased. RTI applications may then be made to that other agency. While these documents may be subject to a restricted access period under the Public Records Act, the Public Records Act permits access applications to be made for such documents under the RTI Act.

A Commission may order that evidence produced before it, and the contents of books, documents, writing and records produced at the inquiry, not be published. While such an order would protect the content of some documents for the life of the Inquiry, they may not be effective after a Commission ceases to exist.

7.7 Are the current provisions in the RTI Act sufficient to deal with access applications for information created by Commissions of Inquiry after the commission ends?

7.8 Is it appropriate or necessary to continue the exclusion of Commission documents from the RTI Act beyond the term of the Inquiry?

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70 However it is noted that the Parliamentary Crime and Misconduct Committee (PCMC) took a contrary view - that the RTI Act does not apply to documents of a commission of inquiry at any time, even after the commission ceases. See the PCMC report, Inquiry into the CMC’s release and destruction of Fitzgerald Inquiry documents, Report No 90, April 2013, p63; and the Queensland Government Response to the report at http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2923.pdf

71 Section 16 of the Commissions of Inquiry Act 1950.
Mining safety information

The Department of Natural Resources and Mines (NRM) holds a range of information concerning mine safety. A media report recently indicated that NRM was considering disclosing documents containing a transcript of a conversation between a mining safety inspector and a union official. The report suggested that releasing the documents sought under RTI would compromise the safety of mine workers, because workers would feel unable to make complaints about unsafe working conditions if they could not do so in a confidential manner. No documents had been released at the time the media report was published.

Workers in other industries regularly make confidential complaints to Government about workplace issues. Applications for this information are regularly made under the RTI Act, which already has provisions to protect this information. For example, section 10 of Schedule 3 of the RTI Act states that

> Information is exempt information if its disclosure could reasonably be expected to:
> (b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained.

However, it could be argued that adding a factor favouring non-disclosure to Schedule 4 of the RTI Act – for example, that disclosure of the information could reasonably be expected to affect safety in the mining industry in Queensland – would provide additional security.

| 7.9 Are provisions in the RTI Act sufficient to deal with access applications for information relating to mining safety in Queensland? |

Information about successful applicants for public service positions

It is not uncommon for a person who has unsuccessfully applied for a public service position to seek information under the RTI Act about the panel’s selection process and decision. Documents sought may include résumés, statements addressing selection criteria, referee reports, shortlisting and interview scores, notes made by members of the selection panel and the panel’s final report comparing short-listed candidates and recommending who should be appointed.

The OIC prepared advice for agencies about access to this information under the repealed FOI Act. While the OIC states this information is no longer current because the RTI Act has now superseded the FOI Act, some of the OIC comments arguably still apply under RTI. For example, the OIC noted disputes over access to the selection panel documents:

> involve clashes between some significant interests, notably the privacy interests of job applicants and the public interest in accountability of public sector agencies for adherence to merit and equity principles in selection processes, in selection panels obtaining candid assessments by referees as to the suitability of a candidate and the public interest in unsuccessful applicants receiving meaningful and effective feedback.

Every RTI application must be considered on its merits, but some general approaches to disclosure of information created or considered by selection panels are applied consistently across jurisdictions. This approach generally provides that personal details (such as home addresses and mobile phone numbers) are highly likely to be deleted in documents disclosed. However, it also

provides that a substantial amount of information concerning the successful applicant is likely to be disclosed from their résumés and their statements addressing selection criteria. The approach under RTI is not dissimilar. Some non-identifying information concerning unsuccessful applicants may also be released.

It can be confronting for a person who has successfully obtained a public service position to be approached by an agency decision maker for consultation purposes and advised that someone is seeking information about them. While the person may advise the agency of their concerns about release, and will have the review rights prescribed under the RTI Act, it is likely that this information will be released, consistent with the approach adopted by review bodies under the repealed FOI Act, and continued under RTI. Conflict in workplaces is not uncommon. An application could be made for documents concerning a co-worker, where there has been a history of harassment or bullying. Even if access is ultimately refused, the process of consultation may impose distress on the person concerned.

7.10 Are the current provisions in the RTI Act sufficient to deal with access applications for information about successful applicants for public service positions?
Part 8 - Fees and charges

Adequacy of fees and charges

The Glossary (page 39) provides some detail about fees and charges for access applications under the RTI Act and Chapter 3 of the IP Act. In summary:

- application fees (currently $41.90) must be paid for applications under the RTI Act, but not the IP Act;
- processing charges (currently $6.45 per 15 minutes or part thereof) are payable for applications under the RTI Act but not the IP Act, but there is no RTI processing charge if the agency spends no more than five hours processing the application. (Effectively people can access their own personal information at lower cost than other information); and
- access charges (including 20c per page for black and white photocopies, no cost for a CD (because providing access by way of CD imposes minimal costs on agencies – a large number of applicants choose this option). Agencies may also charge for the actual cost of providing access - for example, the cost of transporting a document from one location to another.

There is no distinction between charges to individuals and charges to others (for example, corporations, journalists or the media). Application fees cannot be waived but in some circumstances, processing and access charges do not have to be paid.73

The Solomon report recommended a flat fee structure, where, as an alternative to processing fees, a fee based on the number of documents released to an applicant be imposed. It also recommended that charges for photocopying be retained. The ‘flat fee’ system was not implemented, but photocopying charges continued.

Costs recovered under the RTI and IP Acts are only a small proportion of the actual costs spent by agencies in administering the legislation. The costs to applicants for access to information under the RTI Act and Chapter 3 of the IP Act are much lower than comparable fees for access to information held by courts. For example, transcripts of legal proceedings in Supreme, District and Magistrates’ Courts are available at a cost of $77.50 for the first copy of the first 8 pages74 and copies of other records in these courts are available at a cost of $2.30 for each page of a first copy (up to a maximum of $61) and 50c for each page of an additional copy (up to a maximum of $24.30).75 For the Queensland Civil and Administrative Tribunal, fees for black and white copies of records of proceedings are $1.75 per page (for less than 20 pages); $1.45 per page (for 20 to 50 pages) and $1.00 per page (for more than 50 pages).76

It has been suggested that, in recognition of the work involved in providing access, RTI and IP fees and charges should be more closely aligned with those across the justice system more generally.

8.1 Should fees and charges for access applications be more closely aligned with fees, for example, for access to court documents?

73 For example, charges may be waived for an applicant in financial hardship (section 66(2) RTI Act; section 82(2)IP Act); or if the agency considers it is uneconomical to charge (section 64 of the RTI Act and section 81 of the IP Act).
74 Recording of Evidence Regulation 2008, schedule 1.
75 Justices Regulation 2004, schedule 3; Criminal Practice (Fees) Regulation 2010; Uniform Civil Proceedings (Fees) Regulation 2009.
76 QCAT Regulation 2009, schedule 2.
8.2 Should fees and charges be imposed equally on all applicants? Or should some applicants pay higher charges?

Waiver of charges – financial hardship status for non-profit organisations

Non-profit organisations may apply to the Information Commissioner for a declaration of financial hardship status.\(^{77}\) If organisations apply successfully, they are entitled to a waiver of processing and access charges for one year after the date of the Information Commissioner’s decision. If a non-profit organisation makes an access application, and later applies for financial hardship status, it would need to withdraw its access application and apply again once the financial hardship application has been decided. If the organisation wishes to have its financial hardship status determined and not withdraw its access application, the processing period for the agency may expire before the Information Commissioner makes a decision.

The Information Commissioner’s guideline on making a financial hardship status application makes clear that non-profit organisations apply to the Information Commissioner before making an access application but this does not always occur.

8.3 Should the processing period be suspended when a non-profit organisation applicant is waiting for a financial hardship status decision from the Information Commissioner?

Waiver of fees for multiple applications made to Queensland Health.

Application fees cannot be waived.\(^{78}\) If someone applies under the RTI Act for information held by two different agencies, they pay two application fees. Even if only part of an application is transferred to a second agency, the applicant must pay a second application fee.

There is no fee for applications under the IP Act which provides a right of access to documents to the extent they contain the applicant’s personal information (section 43). If a person applies for information about another person (eg about a relative who has died), they must apply under the RTI Act and incur the fee.

The Hospitals and Health Boards Act 2011 established Hospital and Health Services (HHSs) to deliver public sector hospital and other health services in Queensland from 1 July 2012. HHSs are established as separate legal entities to devolve operational management for public hospitals to the local level. Where applicants apply under the RTI Act for information held in more than one HHS (eg where the deceased relative referred to above has been treated within different HHSs) they will have to pay an application fee for each HHS they apply to. Previously, they paid only one fee because all HHSs were part of a single agency (Queensland Health) under the RTI Act.

8.4 Should the RTI Act allow for fee waiver for applicants who apply for information about people treated in multiple HHSs?
8.5 If so what should be the limits of this waiver?

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\(^{77}\) Section 67 of the RTI Act
\(^{78}\) Section 24(4) of the RTI Act.
Part 9 - Reviews and appeals

Optional internal review

Applicants who are dissatisfied with an agency’s decision have a right of ‘internal review’ – to have the decision reviewed within the agency by an officer not less senior than the original decision-maker. Under the repealed FOI Act this internal review step was mandatory before an applicant could apply for an external review by the Information Commissioner. Under the RTI Act, an applicant need not have applied for internal review before applying for external review.\(^{79}\)

One of the primary reasons for the Solomon Report’s recommendation to make internal review optional was to provide some flexibility in the review process to take account of the individual circumstances of the application.\(^{80}\) For example, where an applicant believes the agency has not located all the documents within the terms of their application, it may be beneficial to apply for internal review. On the other hand, where the basis of an application for review is dispute over a complex legal point, internal review may not always be desirable. A second reason for supporting optional internal review was to encourage decision-makers to be more conscious of ‘getting the decision right the first time’ rather than at external review.

9.1 Should internal review remain optional? Is the current system working well?
9.2 If not, should mandatory internal review be reinstated, or should other options such as a power for the Information Commissioner to remit matters to agencies for internal review be considered?

Internal review available on ‘sufficiency of search’ matters

Under the repealed FOI Act, applicants dissatisfied with a decision of the agency could apply for a review of almost all kinds of decisions made about their application. The RTI Act and the IP Act limit the kinds of decisions which are ‘reviewable’ by providing an exhaustive list of ‘reviewable decisions’.\(^{81}\) Sections 80 and 85 of the RTI Act and sections 94 and 99 of the IP Act provide the basis on which applicants may apply for internal and external review.

The term ‘sufficiency of search’ is used to describe situations where applicants do not consider that all the documents which they are seeking have been located in response to their application. This term is not used in the RTI Act or IP Act.

If an agency has made a decision that documents are non-existent or unlocatable under section 52 of the RTI Act, but the applicant believes there are further documents in existence, this is a reviewable decision listed in the schedules to the Acts and the applicant may apply for review.

However, it is not clear that there is a right of internal review where an applicant either:

- has been granted access to a document under their initial application which refers to another document that they did not receive. (For example, a printout of an email refers to an attached document, but the attached document is not provided); or

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\(^{79}\) Section 85 of the RTI Act and section 99 of the IP Act.

\(^{80}\) Solomon Report, p238.

\(^{81}\) See dictionary in schedule 5 of the RTI Act and schedule 6 of the IP Act.
• believes that there are more documents (perhaps because the applicant has provided the information to the agency or another person informed them that it exists) but the agency has not stated the documents are non-existent or unlocatable.

Unlike agencies, the OIC may accept external review applications where sufficiency of search is the only issue in the review. Section 105 of the RTI Act and section 118 of the IP Act give the Information Commissioner a general power to review any decision that has been made by an agency in relation to the access or amendment application, and decide any matter which could have been decided, under the RTI or IP Act, by the agency. This means that applicants may challenge the sufficiency of the agency’s searches. However, external review is not always the most efficient forum to determine whether all the documents have been located. Once an application is on external review, the process becomes more formal and time consuming than an internal review.

9.3 Should applicants be entitled to both internal and external review where they believe there are further documents which the agency has not located?

Longer processing period for internal review

An agency may seek an extension of time to process an application in certain circumstances and with the applicant's agreement. Where an agency fails to make a decision on the initial application within the processing period, and the applicant applies for external review, the agency may seek further time from the Information Commissioner to deal with the application. If the Information Commissioner grants further time, the agency continues to process the initial application.

However, the legislation does not provide for agencies to request extensions of time so that they can continue to deal with internal reviews. A decision on an internal review application must be made as soon as possible, but not later than 20 business days after the internal review application is made. Although internal reviews should be quick and easily accessible, in some situations it would benefit the applicant for agencies to have additional time to process internal reviews. For example during the Queensland floods in January 2011, many agencies were unable to access their premises and staff numbers were significantly reduced. Alternatively, an agency may estimate it will take only an additional week to finalise an internal review application. Because the Acts do not permit any extension of time, the decision will be ‘deemed’ to be a refusal of documents if it is not made by the original due date. An applicant must then apply for external review which can take significantly longer than a week.

9.4 Should there be some flexibility in the RTI and IP Acts to extend the time in which agencies must make internal review decisions? If so, how would this best be achieved?

Early resolution of external reviews

The Information Commissioner must identify opportunities and processes for early resolution of external review applications. The Information Commissioner must also promote settlement of external review applications. The term ‘informal resolution’ is used to describe the methods used by the Information Commissioner to resolve applications, or particular issues raised in applications on an informal basis. If all issues in the external review cannot be resolved informally, the Information Commissioner will issue a written decision regarding any remaining issues.

82 Section 18(2)(b) of the RTI Act and section 22(2)(b) of the IP Act.
83 Section 83 of the RTI Act and section 97 of the IP Act.
84 Section 90 of the RTI Act and section 103 of the IP Act.
Agencies may however be reluctant to release documents, or parts of documents during the early resolution process. If there is no written decision, they may be unsure about their protection under the RTI Act. Some agencies are subject to other legislation which contains confidentiality provisions which may apply to the information to be released as part of the informal resolution.

The Acts provide protection from actions of breach of confidence, defamation and liability for criminal offences if access to information is given or published where it is required or authorised under the Acts. However, giving access to documents as part of the informal resolution process is not expressly authorised or required under the Acts and as a result decision-makers are not protected by the relevant provisions. This issue is highlighted in the Information Commissioner’s decision of *Moon and Department of Health*.

9.5 Should the RTI Act specifically authorise the release of documents by an agency as a result of an informal resolution settlement? If so, how should this be approached?

Right of direct appeal to Queensland Civil and Administrative Tribunal (QCAT)

The RTI Act and IP Act provide a right of internal review and an applicant may also apply to the Information Commissioner for an external review, either following an internal review or direct. Under section 119 of the RTI Act an appeal to QCAT is then possible on a question of law only. The issue is whether the RTI Act should provide a right of direct appeal to QCAT from an agency’s decision.

Such an option is unlikely to reduce the time taken for a review to be finalised. The OIC’s 2011-12 Annual Report states the office achieved an average (median) rate of 90 days to finalise a review against a target of 90 days and that it finalised 457 reviews during financial year 2010 – 2011 against a target of 300. There would also be a cost to this option, both for applicants and for QCAT.

There is a right of direct appeal to a tribunal in NSW and Victoria. Information Commissioners in NSW, Queensland and the Commonwealth have a merits review function. In addition RTI and IP appeals to QCAT are only in relation to a question of law whereas the Information Commissioner can conduct a full merits review.

The Commonwealth Information Commissioner has a discretion not to review a decision under the Commonwealth *Freedom of Information Act 1992* and instead refer the matter to the Administrative Appeals Tribunal.

9.6 Should applicants have a right to appeal directly to QCAT? If so, should the Commonwealth model be adopted?

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85 Chapter 5, part 1, of the RTI Act and Chapter 6, part 1, of the IP Act.
86 Unreported, Queensland Information Commissioner, 12 August 2010.
Part 10 - Office of the Information Commissioner (OIC)

In research conducted over a nearly five year period,\textsuperscript{87} the OIC found that 'repeat applicants'\textsuperscript{88} consumed a disproportionately large amount of OIC’s resources. This was due to their high numbers of external review applications; the need for strategies to deal with unreasonable conduct; the extra time involved in achieving informal resolution and the extra work required to issue a decision. This is not a new problem or unique to Queensland and has a similar impact on agencies.

An agency may refuse to deal with an application, or part of an application, where a previous application has been made for the same documents.\textsuperscript{89} Additionally, agencies can refuse to deal with an application where processing it would substantially and unreasonably divert their resources. On external review, the Information Commissioner can decide not to review, or further review, an application where it is frivolous, vexatious, misconceived or lacking in substance. The same applies where the applicant fails to comply with a direction given by the Commissioner, the applicant has failed to cooperate in progressing the review, or where the applicant can no longer be contacted.\textsuperscript{90} Agencies do not have the same ability to decide not to process an application although they can apply to the Information Commissioner for an applicant to be declared vexatious.

The Information Commissioner has made one vexatious applicant declaration since the Acts commenced.\textsuperscript{91} In this context, the Parliamentary Committee has recommended that the Information Commissioner should have a power to name vexatious applicants.\textsuperscript{92} The Government’s response to this report, supporting this recommendation, has been tabled in Parliament. There may however be other strategies that may be appropriate for dealing with repeat applicants.

\begin{tabular}{|l|}
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10.1 Are current provisions sufficient to deal with the excessive use of OIC resources by repeat applicants? \\
10.2 Are current provisions sufficient for agencies? \\
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\end{tabular}

Powers to enable performance of monitoring, auditing, reporting and requiring agency compliance

The OIC has a wide power to obtain documents from agencies in the performance of its external review functions. This power provides the Information Commissioner with full and free access at all times to documents of the relevant agency, including those protected by legal professional privilege.\textsuperscript{93} This provision is necessary to allow the OIC to access documents which may otherwise be the subject of statutory, common law and contractual obligations to keep documents confidential. However, the OIC has no specific power to obtain documents of an agency in the conduct of its monitoring, auditing, reporting or privacy compliance notice functions.

\begin{tabular}{|l|}
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10.3 Should the Acts provide additional powers for the OIC to obtain documents in performance of its performance monitoring, auditing and reporting functions? \\
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\textsuperscript{87} OIC. External Reviews Involving Repeat Applicants Research paper No1 of 2010/11, 8.
\textsuperscript{88} The OIC defines a repeat applicant as one who makes a relatively large number of applications, submits applications in short bursts of activity and engages in 'unreasonable conduct'.
\textsuperscript{89} Section 41 of the RTI Act, and section 60 of the IP Act
\textsuperscript{90} Section 94 of the RTI Act and section 107 of the IP Act.
\textsuperscript{91} Section 114 of the RTI Act and section 127 of the IP Act. See Applicant - University of Queensland - Declaration date 27 February 2012.
\textsuperscript{92} Legal Affairs and Community safety Committee, Report no 7, Oversight of the Office of the Information Commissioner.
\textsuperscript{93} Section 100 of the RTI Act and section 113 of the IP Act.
Timeliness

The OIC has met its performance targets for timeliness during a significant increase in its workload.\textsuperscript{94} Its guideline on External Reviews states that on average an external review takes four to five months to complete.\textsuperscript{95} However, there are currently no timelines within which the OIC must complete external reviews. Imposing timeframes would have resource implications for the OIC which are unlikely to be met in the current environment. No other jurisdiction in Australia has timeframes for external review.

10.4 Should legislative time frames for external review be reconsidered? Is it appropriate to impose timeframes in relation to a quasi-judicial function?

10.5 If so, what should the timeframes be?

\textsuperscript{94} Office of the Information Commissioner, Annual Report, 2011-12, p3.

Part 11 - Annual Reporting Requirements

Section 185 of the RTI Act and section 194 of the IP Act provides that the Minister administering the Act must prepare an annual report on the operation of the Act and arrange for it to be tabled in Parliament. Section 8 of the RTI Regulation and section 6 of the IP Regulation set out the details of what must be included in the annual report. These sections include, for each agency, matters such as numbers of access and amendment applications, refusals to deal with applications, documents included in a disclosure log, and internal and external review applications received. It is not clear the extent to which the current annual report information is of interest to the community.

Preparing the annual report imposes a significant burden on reporting agencies, and on the agency which collates the information. There are clear interests in having meaningful data available that will provide scrutiny of the effectiveness of the legislation and whether it is achieving its objectives but the usefulness of the information agencies report on is unclear. In Queensland, annual reports currently provide more information than the regulation requires – for example, they list the total number of documents released by agencies each year, and the percentage of pages released in full and or part.

11.1 What information should agencies provide for inclusion in the Annual Report?
### Part 12 - Other issues?

<table>
<thead>
<tr>
<th>12.1</th>
<th>Are there any other relevant issues concerning the operation of the RTI Act or Chapter 3 of the IP Act that need to be changed?</th>
</tr>
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</table>
Glossary

Access charges – charges imposed for accessing a document released under the Right to Information Act 2009 or the Information Privacy Act 2009. Access charges include the actual cost of providing a document (see below), or 20 cents per page for black and white photocopies. They also include engaging another entity to search for and retrieve a document; relocating a document to allow access to it to be given; any written transcription of the words recorded or contained in a document (see section 68(1)(e) of the Act); creating a written document and otherwise giving access to the document. Access charges must not include the actual cost of an email (if access is given by emailing the document) or a disc (if access is given on a disc).

Application fee – fee required for making an application under the Right to Information Act 2009. The current fee is $41.90.

Disclosure log - a list of documents (and sometimes the documents themselves) released following a decision about an application for access under the RTI Act, which is published on an agency’s website. 96

Processing charges – refers to charges imposed for ‘processing’ an application under the Right to Information Act 2009. This includes searching for and retrieving documents, and making or doing things related to making, a decision on the application. The current charge is $6.45 per 15 minutes.

Pro-disclosure bias – where an access application is made under the Right to Information Act 2009 or the Information Privacy Act 2009, it is parliament’s intention that when deciding whether to giving access to documents would be contrary to the public interest, agencies should employ a pro-disclosure bias. When deciding applications under the Right to Information Act 2009 or the Information Privacy Act 2009, the starting position is to release documents the subject of the application.

Public interest test - the process under section 49 of the Right to Information Act 2009 that requires competing public interest considerations to be compared and considered so a decision can be reached about whether disclosure would, on balance, be contrary to the public interest. 97

Publication scheme – sets out the kinds of information that an agency has available and the terms on which it will make the information available to the public, including any charges that may be necessary.

Push model – refers to government maximising access to government information by proactively making information available, and releasing requested information administratively where possible. Publication schemes and disclosure logs are ‘push model’ strategies regulated by RTI Act.

APPENDIX 1 - Terms of Reference

REVIEW OF THE RIGHT TO INFORMATION ACT 2009 AND INFORMATION PRIVACY ACT 2009

Background

The introduction of the Right to Information Act 2009 (RTI Act) and the Information Privacy Act 2009 (IP Act) followed an extensive overhaul of the State’s freedom of information laws by a panel of experts chaired by Dr David Solomon.

The legislation includes provisions that require a review of the Acts. These reviews are to examine the practical application of the legislation and identify and resolve issues arising during implementation. While focusing on operational issues, the review will consider issues of efficiency and effectiveness, and whether there are opportunities to reduce the regulatory burden on agencies without compromising the objects of the Acts.

Purpose of the review

Section 183(1) of the RTI Act and section 192(1) of the IP Act provide for a review of the two Acts.

The purpose of the review is set out in section 183(2) of the RTI Act and section 192(2) of the IP Act respectively and is to:

(a) decide whether the primary objects of the Acts remain valid;
(b) decide whether the Acts are meeting their primary objects;
(c) decide whether the provisions of the Act are appropriate for meeting their primary objects; and
(d) investigate any specific issue recommended by the Minister or the information commissioner.

The Minister must table a report about the outcome of the review in Parliament.

Objects of the Acts

Section 3 of the RTI Act states its primary object as:

… to give a right of access to information in the government’s possession or under the government’s control unless, on balance, it is contrary to the public interest to give the access.

Section 3 of the IP Act sets out the objects of that Act, to provide for:

(a) the fair collection and handling in the public sector environment of personal information; and
(b) a right of access to, and amendment of, personal information in the government’s possession or under the government’s control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.

Conduct of the review

The review is being conducted by the Department of Justice and Attorney-General (DJAG), as agency with administrative responsibility for the legislation, with oversight by a steering committee of senior representatives from relevant departments.
As required by section 183(2)(d) of the RTI Act and section 192(2)(d) of the IP Act, the Information Commissioner will be consulted throughout the review.
APPENDIX 2 – Additional information required to be included in a decision letter to explain
the interaction of the RTI Act and IP Act

‘Section 40 of the IP Act gives the individual the right of access to documents of an agency to the
extent they contain the individual’s personal information, which is defined under the Act as being:

‘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.’

Access may be refused to documents requested in an Information Privacy application under section
67 of the IP Act. Section 67 allows for the refusal of access of information using the provisions of
section 47 of the Right to Information Act 2009 (RTI Act).

67 Grounds on which access may be refused IP Act
(1) An agency may refuse access to a document of the agency and a Minister may refuse
access to a document of the Minister in the same way and to the same extent the agency
or Minister could refuse access to the document under the Right to Information Act,
section 47 were the document to be the subject of an access application under that Act.

47 Grounds on which access may be refused RTI Act
(3) On an application, an agency may refuse access to a document of the agency and a
Minister may refuse access to a document of the Minister—

(a) to the extent the document comprises exempt information under section 48;
(b) to the extent the document comprises information the disclosure of which would, on
balance, be contrary to the public interest under section 49’