



PORT of  
TOWNSVILLE

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Ref: Freedom of Information

19 September 2013

RECEIVED  
23 SEP 2013  
BY: [Signature]

RTI and Privacy Review  
Department of Justice & Attorney-General  
GPO Box 149  
BRISBANE QLD 4001

Dear Sir/Madam,

**REVIEW OF THE RIGHT TO INFORMATION ACT 2009 (RTI ACT) AND CHAPTER 3 OF THE INFORMATION PRIVACY ACT 2009 (IP ACT)**

We refer to the discussion paper released by the Department of Justice and Attorney-General on the review of the RTI Act and IP Act.

Port of Townsville Limited (POTL) is a Government Owned Corporation (GOC) established under the *Corporations Act 2001* (Cth). It is responsible for the management of the Port of Townsville and the Port of Lucinda.

POTL has reviewed the discussion paper and provides the following response in relation to those matters that have particular relevance to POTL:

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

Commercial Activities

Under the previous *Freedom of Information Act 1992* (Qld) (FOI Act) documents received, or brought into existence, by a port GOC in carrying out its "commercial activities" were excluded from the operation of the FOI Act.

POTL is a company that operates and transacts on a commercial basis with various private industry partners, including its customers, lessees, suppliers and tenderers. Consequently, POTL generates and also receives information concerning the operations of its private industry customers, lessees, suppliers and tenderers which is commercial in nature both POTL and its private industry partners.

Private industry response since the inception of the RTI Act has not been positive in POTL's experience due to an increased reluctance by its private industry partners to provide information to POTL due to the possibility that such information may be accessed under the RTI Act. For example, in 2012 information relevant to the commercial operations of a number of POTL's private industry customers was accessed under the RTI Act. This has adversely affected the level of openness of some of POTL's customers in their commercial dealings with POTL. Some customers have even gone so far as to request that no minutes be taken of meetings held with POTL in order to prevent disclosure of commercial information. This in itself creates a circumstance which circumvents the objects and intent of the RTI Act and its sister legislation, the *Public Records Act 2002* (Qld), which requires port GOCs to make and keep accurate records of its activities.

POTL undertakes various competitive processes amongst its customers, lessees and suppliers in order to foster competition and achieve value for money. The RTI Act does not provide port GOCs with any specific protection to prevent people from applying for details of other tenderer's bids and other aspects of their

tenders. This in itself presents a risk of undermining the competitive process which port GOCs undertake and may ultimately affect the profitability of port GOCs and public confidence in port GOCs tendering processes.

As part of POTL's statutory functions to manage and make land available for port users, POTL is also involved in making commercial bids on land for sale that is strategically positioned close to POTL's ports. Again there is no specific protection afforded to port GOCs that could prevent another bidder from applying for information regarding port GOCs commercial activities when bidding for land and using that information to obtain an unfair advantage over port GOCs, particularly given there is no corresponding obligation upon private enterprise to disclose information regarding their commercial activities to port GOCs.

POTL also manages a marina and various small craft facilities which are in competition with other privately operated marinas located in Townsville. Again, there is no specific protection afforded to port GOCs that could prevent private marina operators from applying for information regarding port GOCs commercial activities in the management of its marinas and small craft facilities.

Finally, the RTI Act was enacted at a time when no Queensland ports were privatised or were proposed to be privatised. The current definition of "competitive commercial activity" only refers to activity at the time of the relevant assessment being made, not potential competition where there is a new entrant to the relevant market. Based on the current definition POTL is afforded relief from disclosing information regarding its competitive commercial activities between it and other privatised ports in Queensland. However, the same relief is not available in respect to information regarding POTL's commercial activities with other non-privatised Queensland ports, even though some of these ports may or may not be privatised in the future.

Overall POTL supports the rights of the public to access and alter personal information held by government agencies. However, based on the issues identified above POTL is of the view that the protection that existed under the previous FOI Act in respect of documents received, or brought into existence, by a port GOC in carrying out its "commercial activities" be excluded from the operation of the RTI Act to prevent information concerning POTL's commercial operations and its transactions with its customers, lessees, suppliers and tenderers being access under the RTI Act.

### Litigation

Since the inception of the RTI Act, POTL has received a total of three RTI Applications (not including Third Party consultations).

Except for one RTI Application, which resulted in the release of information commercial to some of POTL's customers, the RTI Applications were lodged by applicants as a means of providing them with an unfair advantage over POTL in potential or actual litigation proceedings by requesting access under the RTI Act to information held by POTL relevant to the dispute prior to the 'discover process' in the proceedings. Historically, under the old FOI Act regime potential and actual litigants also used the FOI Act as a means of gaining an unfair advantage over POTL in potential or actual proceedings.

This strategy provides litigants with an unfair advantage over port GOCs as they are able to gain access information held by port GOCs well before to the discovery process in the proceedings commences. It also places an additional administration burden on port GOCs as it results in port GOCs having to not only process the access application, therefore diverting its resources from defence of the litigation, but also then having to go through a second disclosure process as part of the actual proceedings.

POTL recommends that the RTI Act be amended to provide specific protection to port GOCs from private individuals and enterprise gaining access to information subject to potential or actual legal proceedings to prevent them from having an unfair advantage as discussed above, particularly given that there is no corresponding obligation upon private individuals and enterprise to disclose information in their possession concerning the dispute prior to the commencement of the discovery process in the proceedings.

6.9 Is the current system of charges estimate notices beneficial for applicants?

POTL is of the view that the timing of the provision of a charges estimate notice and schedule of relevant documents be revised such that the notice and schedule is provided at the time of giving the decision on the application. This will reduce the administrative burden of having to give multiple notices and schedules throughout the processing period. These changes would also provide applicants with more certainty as to what information they will gain access to together with more certainty as to the charges to be paid.

POTL acknowledges that the current requirement to provide a charges estimate notice and schedule of relevant documents prior to the end of the processing period (but before a decision is made on the application) is intended to provide applicants with a tool to determine whether to narrow or proceed with the application.

It is POTL's view that applicants generally narrow their application on the basis of cost when not otherwise requested to do so by the processing agency for a reason permitted under the RTI Act. Accordingly, if such a tool continues to be useful to applicants, POTL would also recommend that an initial charges estimate notice be required to be given within 10 business days of a government agency receiving the application and all documents that may be relevant to the application have been identified by the government agency. This will provide the applicant with an initial indication of the charges that will be imposed and provide them with a tool to assist them in determining if they want to narrow the application to reduce the charges prior to the processing agency commencing its formal assessment of the documents retrieved.

POTL does not consider it appropriate for a schedule of relevant documents to be provided at this stage also as there is a risk that some documents identified during initial search may not be relevant to the application (which is not picked up until the official assessment is undertaken) and, as noted in your discussion paper, government agencies report that applicants do not often reduce the scope of their applications on the basis of the schedule.

We are pleased to be able to provide the abovementioned comments that we trust will be of assistance during your review. Should you have any queries in relation to the above comments, please do not hesitate to contact the writer directly on [REDACTED] at your convenience.

Yours sincerely

[REDACTED]  
**MANAGER GOVERNANCE & LEGAL SERVICES**