Seqwater's submission on the Review of the Right to Information Act 2009 and Chapter 3 of the Information Privacy Act 2009 Discussion Paper

1.1 Is the Act's primary object still relevant? If not, why not?

The primary object of the RTI Act (section 3), and the access and amendment provisions of the IP Act (section 3(b)) 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).*

Seqwater believes that the primary object of both the RTI and IP Acts is still relevant and valid.

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?

Since the introduction of the RTI and Privacy legislation in 2009 experience has shown that the process has proven to be overly complex for applicants and often a considerable burden on agencies and statutory bodies (entities) for the reasons discussed in the discussion paper.

It would be far simpler and more practical for both agencies and applicants if all applications for information to be made under the RTI Act. Much like the old FOI Act the issue of whether an application fee is applicable should be dealt with based on what information is being sought i.e. personal information or non-personal information.

6.1 Should the access application form be retained? Should it remain compulsory? If not, should the applicant have to specify their application is being made under legislation?

While there may be some merit to having a whole of government access application form, Seqwater considers that it is not necessary for the application form to remain compulsory, as some might consider.

The current wording of section 24 of the RTI Act implies that the application form isn't compulsory as subsection 2 states that the application must '*be in the approved form*' and not '*on the approved form*'. One could argue that if an applicant submitted their application in a letter format providing all the information that is required had they completed the application form, then the application has been correctly made. This raises the question as to whether there is the need for the application form to be compulsory. This was discussed at length with the Department of Premier and

Cabinet, the lead agency with the introduction of the RTI Act and Information Privacy Act, and they agreed that the correct interpretation of the Act was that the use of the actual form was not compulsory. Many RTI practitioners across agencies accept applications without using the form if all of the information required is provided.

Under the repealed *Freedom of Information Act 1992* (FOI Act), the only requirements when submitting an access application were that it must be in writing and with sufficient information provided to identify the documents with current contact details for the applicant.

The current 'Right to Information and Information Privacy Access Application Form' is a four page document that must be completed in order to access documents held with Queensland Government agencies and statutory bodies. There is also an online version of the application form (2-3 web pages to complete) where the application fee (if required) can be paid online via credit card. From experience, both forms are often confusing for applicants to complete and unnecessary given the current wording of section 24(2) of the Act.

Some applicants don't have access to a computer, let alone the internet and will often contact entities to have an application form sent to them by post. Applicants should be able to have the choice to either use the application form (either hardcopy or online) or to simply complete their application in the form of a letter as what was previously done under the repealed FOI Act.

Entities often receive applications where the application form has been completed as a formality and attached to the application form is a document detailing the information/documents required. This document is often referred to as 'Attachment A' or 'Annexure A' and is often from private law firms or private organisations. Seqwater questions the validity of having a compulsory application form when applications of this nature are regularly received.

The form is regularly revised to reflect the scheduled increases to the application fee (now removed completely from the form) and to keep the form current with the legislation.

Under the repealed FOI Act, entities had the discretion of creating their own application form which contained specific information about the entity's documents and had key fields that assisted both applicants and agencies/statutory bodies.

Seqwater would be open to the possibility of having the application form retained but being optional for applicants to complete and allowing applicants to submit their own application provided their own submission complied with the current requirements under the Act. However, Seqwater acknowledges that providing an option can still lead to confusion and suggests that a simplified position of an application in writing as with the old FOI regime would operate best to avoid possible confusion.

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

Since the introduction of the RTI Act, experience has shown that no benefit has been gained in providing a schedule. As indicated in the discussion paper significant time is spent and costs incurred in preparing schedules which would be best served providing a service to the applicant by contacting them direct to refine the terms of an application.

The use of a schedule can sometimes be useful during a review process but has no benefit otherwise and Seqwater submits that the requirement should be abolished.

6.13 Should the threshold for third party consultations be reconsidered?

Seqwater is of the firm belief that the threshold for third party consultations be considered as part of this review.

This significant reduction in the threshold for consultation requires entities to undertake additional consultations compared to the amount of consultations that may have been conducted under the repealed FOI Act. As a result, a considerable amount of public resources are being utilised to undertake these consultations, especially when these consultations are between government entities.

Because of this lower threshold for consultation, third parties who may not be considered by an entity to be a concerned third party have developed this perception that they are "entitled" to be consulted because they may have had some involvement in a document at some stage of its inception, however, the entity's RTI decision-maker has considered, based on the sensitivity of the information and the nature of the documents involved, that the there is no requirement to consult the third party.

This perceived entitlement, may place an unreasonable workload on RTI decision-makers as they are required to consult all third parties who had some involvement in a document regardless of whether the entity feels that the disclosure will be of concern to the third party. It also requires additional public resources being utilised to unnecessarily consult with third parties.

This concern does however need to be balanced against the legitimate interests of parties whose interests may be affected by the release of information. Removing or significantly reducing the rights of such parties to be consulted may adversely impact on the relationship between the private and public sector and in some instances, could lead to private sector entities seeking injunctive relief or other litigious remedies against government entities.

Seqwater supports the threshold for consultation under the RTI and IP Acts being reviewed so that only those third parties who may have a reasonable concern with the release of documents are consulted.

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

While some entities might express concern about the length and complexity of reasons of decisions the reality is that when working with legislation, reference must be made to the provisions of the legislation. It then follows that whilst dealing with the legal aspects of whether information should be released, it is of utmost importance that plain language be used in dealing with various aspects of the material being considered to assist applicants understand clearly what is being said. Decision making is a skill that has to be learnt and there is no room for taking short cuts which fail to deliver client service.

Experience has shown that if a decision maker merely relies on the various provisions of the Act in their decision but fails to properly explain matters clearly to applicants, it often follows that a review is requested. This can be clearly seen when one considers the *Judicial Review Act 1991*. One of the main reasons why an entity might receive a Judicial Review application is because the entity did not explain properly in the first place, or not at all, why they might have changed their policy in a particular matter.

The length and complexity of decisions is clearly an issue for both entities and applicants. This complexity has resulted in substantial cost to entities with significant investment in training for relevant staff, increased resourcing and, in many cases, external legal fees being incurred or external advisers being engaged at significant cost to the entity. This is particularly an issue for smaller entities where applications are less frequent and staff are not as familiar with the detailed requirements of the Act.

7.2 Are the exempt information categories satisfactory and appropriate?

Schedule 3, section 8(1) – information disclosure would found action for breach of confidence.

It is Seqwater's submission that the confidential information exemptions needs to be amended. The current model is based on the equitable doctrine of confidentiality and is inconsistent with modern business practice.

In order to successfully make out the breach of confidence exemption, it is necessary to initially show that "Information is exempt information if its disclosure would found an action for breach of confidence."

It is Seqwater's submission that this test excludes contractual obligations of confidentiality because an action for breach of contract is not the same as an action for a breach of an equitable duty of confidence.

Most commercial contracts that the State enters into contain confidentiality obligations. The difficulty for an entity is that unless the confidential information also meets the test of an equitable duty of confidence, then the confidential information is liable to be released under RTI. It is a significant concern that an entity may be placed into breach of a contractual duty by virtue of the application of the RTI Act. Disclosure of information provided by a third party under a contractual requirement of confidentiality could clearly be damaging to the relationship between the parties and prejudice the ability of entities to enter into such contracts in the future.

Seqwater submits that this exemption should be amended to provide that:

"Information is exempt information if its disclosure would found either an action for breach of confidence or the breach of a contractual confidentiality obligation."

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 entities for internal review be considered?

Seqwater is of the view that the internal review process should not remain optional. Since the introduction of the RTI Act, which replaced the FOI Act, the number of applications for external review have increased by a large degree and often creates unnecessary delays in having applications completed. None of the perceived reasons for the optional model, as recommended in the Solomon Report, have proved to be justified. Seqwater does not support the notion that decision-makers should be more conscious 'of getting the decision right the first time.' Decision-makers are thorough and hard working public sector employees who are conscious of their responsibilities under the Act. Mandatory internal review should be reinstated and the option of providing a power for the Information Commissioner to remit matters to entities for internal review would be unwise as it will create even more confusion for applicants. Experience has shown that applicants like to know exactly who they are dealing with and what the processes are without the confusion or a perception that they are being given a referred accountability by another public sector employee, because experience has shown that it may not satisfy public expectations.

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

As part of the review of the RTI and IP Acts, Seqwater considers that a provision of a longer processing period, very similar to the existing provision set out in section 35 of the RTI Act and section 55 of the IP Act be introduced for internal review decisions. The existing provision as outlined in section 35 of the RTI Act and section 55 of the IP Act both states:

Longer processing period

(1) At any time before a deemed decision is taken to have been made in relation to an access or amendment (IP Act only) application, the agency or Minister may ask the applicant for a further specified period to consider the application.

(2) Additional requests for further specified periods may be made under subsection (1).

(3) The agency of Minister may continue to consider the application and make a considered decision in relation to it only if —

(a) the agency of Minister has asked the applicant for a further specified period under subsection (1); and

(b) the applicant has not refused the request; and

(c) the agency or Minister has not received notice that the applicant has applied for external review under this Act.

(4) If a considered decision is made, the considered decision replaces any deemed decision for the purposes of this Act.

Seqwater considers the inclusion of a longer processing period provision for internal review decisions would be beneficial for entities, especially with small processing areas. Larger entities with substantially larger RTI Units may have enough decision-makers at the appropriate officer level to undertake their internal review decisions, however small entities are often tasked with finding internal review decision makers from other areas of the entity and usually these decision-makers are required to be at a senior executive level. It may take smaller entities some time to allocate an internal review officer due to the workloads of delegated internal review officers as they are generally senior with very demanding work schedules.

Once an internal review officer has been allocated, even though they may already have a basic understanding of the RTI and IP Acts, discussions between the original decision-maker and the internal review officer are required to ensure the internal review officer is apprised of all the issues concerning the internal review and what is required of them when considering an internal review application and making an internal review decision. Due to an internal review officers existing work schedule, having these discussions may not occur for some days.

Further, some applications for internal review involve complex matters, especially where the original decision exempted information as it was subject to legal professional privilege or is information its disclosure is prohibited by law. Therefore, the allocated internal review officer will be required to liaise with other areas to obtain further advice or clarification on matters raised as part of the internal review and to have certain complex matters explained to assist them consult in making the internal

review decision. In addition, it is not uncommon for internal review officers, who may not entirely agree with the original decision maker, to formally consult an external third party, with the need for a reasonable time for the consulted party to respond. Again, these discussions all take up a considerable amount of time and in these instances the benefit of having a provision in the RTI and IP Acts for a longer processing period would allow internal review officers more flexibility and time to have all matters clarified regarding particularly complex internal reviews.

As a considerable amount of public resources are being expended to conduct an independent and thorough internal review, entities should be afforded the benefit of an appropriate processing period which in turn would also benefit the community through entites given proper processing periods to conduct internal reviews and provide well prepared and considered decisions.

12.1 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?

While the issue described below is not directly relevant to the operation of the RTI Act and Chapter 3 of the IP Act, Seqwater considers that because public resources are being expended in order to meet the requirements of the RTI Act and IP Act, it is important that as part of the review that the issue concerning the overall costs for implementing and administering the RTI Act and IP Act be addressed.

It is understood that this issue has been raised previously. In view of the Commission of Audit recommendations and the contestability framework, Seqwater considers that the current arrangements need to be completely examined.

While Seqwater acknowledges that both the RTI and IP Acts are intended to provide as much information as possible either through the publications scheme, disclosure log or through RTI and IP applications, it must also be acknowledged that substantial costs are incurred in ensuring that these mechanisms are maintained.

The discussion paper makes no mention of the true costs incurred as a result of implementing and maintaining the fundamental objectives of the RTI and IP Acts (i.e. pro-disclosure bias). Entities have incurred substantial costs in ensuring that they are complying with both the Acts, yet as part of this review, other cost effective methods do not appear to be under consideration in an effort to reduce costs to government which effectively reduces costs to the community. Seqwater considers that cost effective options should be a consideration for the discussion papers.

It is suggested that as part of this review, detailed consideration be given to the costs involved in adopting any of the recommendations that arise from this review and whether there are better ways to administering the RTI Act and IP Act while balancing those costs against other costs that are currently affecting the government and the community as a whole.

One of the reasons why there has been a marked increase in applications for external review is the perceived quality of decision making. Given the complexity of

the RTI Act, RTI decision-makers must be provided with significant training (at substantial cost to the entity) to enable them to be sufficiently skilled to discharge their roles. If this investment does not happen, it can adversely affect the quality of decision making and service delivery. Seqwater requests that the requirement for, and the cost of providing, adequately skilled and experienced officers to discharge the responsibilities under the Act be considered as part of the review.

8.0 Should the IP Act provide more detail about how complaints should be dealt with?

The IP Act does not specify how a privacy complaint must be handled within an entity. This contrasts with the very detailed processes specified for applications for access to and amendment of personal information held by an entity. While Seqwater has implemented its own procedures for handling privacy complaints that are received by the entity, Seqwater considers that there may be benefit in having a section in the IP Act specify how a privacy complaint should be processed. These specifications should include:

- requirements for lodgement of a privacy complaint to any entity (e.g. written, director to a particular officer, outlines particular points to be addressed, etc.)
- timeframes for management of the complaint (including provision for extended timeframes where complaint is complex, etc.)
- particular actions that must be undertaken (e.g. acknowledgement of complaint, investigation of circumstances raised by complainant, formal response to complainant).

9.0 Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged?

The statutory 45 business day timeframe to deal with a privacy complaint is often difficult to meet when the complaint is complex or is part of another grievance (i.e. a workplace dispute).

Seqwater would support an amendment of the IP Act to include more flexibility about the timeframe for complaints to the OIC to be lodged. If for example, a complainant has not received any correspondence from the entity about their complaint within the 45 business days, then the complainant would be entitled to lodge a complaint to the OIC.

However, if an entity requires more time to resolve the complaint and has sought an extension from the complainant, however the complainant has refused and has complained to the OIC, then in that instance, the OIC should allow the entity to resolve the complaint and if the complainant is not satisfied with the decision on the privacy complaint, they can lodge a complaint with the OIC.

For the efficient and effective processing of privacy complaints to occur, Seqwater considers the IP Act should be amended to include a section similar to the 'Longer processing period' section contained in the RTI Act. This would allow more flexibility and ability to make well-prepared and considered determinations in relation to privacy complaints which ultimately benefits the community.

14.0 Should IPP4 be amended to provide, in line with other IPPs, that an entity must take reasonable steps to ensure information is protected against loss and misuse?

Seqwater supports the amendment of IPP4 to ensure it is consistent with the other IPPs within the IP Act. Seqwater considers that the current wording of IPP4, particularly the use of the words 'must ensure' is very restrictive and essentially unrealistic in the sense that an entity may have extremely stringent protocols in place to ensure that the personal information they maintain is protected from loss, misuse or unauthorised access, however there may be an instance where an employee accesses the personal information for personal use. This is a breach of the IP Act which the entity would be liable for despite taking all appropriate measures to ensure the personal information is protected.

Seqwater would support IPP4 being amended to replace the words 'must ensure' with the words 'must take reasonable steps'. This would allow for an element of 'reasonableness' and would also be consistent with the wording of other IPPs within the IP Act.

15.0 Should the words 'ask for' be replaced with 'collect' for the purposes of IPPs 2 and 3?

Seqwater supports IPPs 2 and 3 being amended to replace the words 'ask for' with 'collect'. This amendment would make the wording of IPPs 2 and 3 consistent with other jurisdictions' privacy legislation (e.g. Victoria, NSW and the Commonwealth) and it would encompass the variety of methods of collecting personal information including solicited and unsolicited personal information.