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Submission on the Review of the Right to Information Act 2009 and Chapter 3 of the Information Privacy Act 2009 Discussion Paper

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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).*

I believe 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 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 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, I consider that it is not necessary for the application form to remain compulsory, as some might interpret.

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 when in my former role at Treasury with the Department of Premier and Cabinet, who was 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 provided 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 that sufficient information is provided to identify the documents and current contact details for the applicant were included.

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 agencies to have an application form sent to them by post. This is an unnecessary strain on the scarce public resources. 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.

Agencies 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. I question the validity of having a compulsory application form when applications of this nature are regularly received by agencies.

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. This places an unnecessary strain on the scarce public resources.

Under the repealed FOI Act, agencies had the discretion of creating their own application form which contained specific information about the agency's documents and had key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

I am sure most agencies 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.

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. Given that the aim was to allow applicants the opportunity to identify documents they wish (or do not wish) to seek access to on no occasion, to my knowledge, has any applicant taken advantage of this. However, as indicated in the discussion paper significant time is spent 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 the requirement should be abolished.

6.13 Should the threshold for third party consultations be reconsidered?

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

Under the repealed FOI Act the threshold only required agencies to consult if disclosure of the documents in issue may reasonably be expected to be of substantial concern to another agency or third party. As a result of the RTI reforms the threshold for third party consultations was amended to only require agencies to consult when disclosure may reasonably be expected to be of concern to another agency or third party.

This significant reduction in the threshold for consultation requires agencies 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 agencies.

The decision to consult is subjective, in that the decision-maker decides what may be of concern to a third party. Further, if the documents contain sensitive information, there is a reasonable expectation that the agency or Minister would be obliged to consult with the relevant third party.

Because of this lower threshold for consultation, third parties who may not be considered by an agency 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 agency’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, places 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 agency 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.

I believe that the threshold for consultation under the RTI and IP Acts be increased so that only those third parties who may have a substantial concern with the release of documents are consulted. In this respect, consideration should be given to only requiring third party consultation when the document is that of the third party and provided by it to the agency.

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 agencies 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 being referred to. 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 fails 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. An example of this can be clearly seen when one considers the *Judicial Review Act 1991*. One of the main reasons why an agency might received a Judicial Review application is because the agency did not explain properly in the first place, or not at all, why they might have changed their policy in a particular matter.

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 my 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."

I submit 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 provide for confidentiality obligations being imposed upon the contractor, subject to carve outs including disclosures required by law. The difficulty for an agency 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.

I submit 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 agencies for internal review be considered?

I am of the view that the optional internal review process should not remain. 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 the having applications completed. None of the perceived reasons for the optional model, as recommended in the Solomon Report, have proved effective. Moreover the notion that decision-makers should be more conscious 'of getting the decision right the first time' is deceptive where in reality most decision-makers are thorough and hard working public servants. A decision can either be supported or it cannot, and it is only in the rare instances of complex legal points where decision-makers might seek legal advice from in-house lawyers or external lawyers.

Mandatory internal review should be reinstated and the option of providing a power for the Information Commissioner to remit matters to agencies 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 servant, because experience has shown that is how the public will see it.

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?

As part of the review of the RTI and IP Acts, I consider 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.

I consider that the inclusion of a longer processing period provision for internal review decisions would be beneficial for agencies, especially with small processing areas. Larger agencies with substantially larger RTI Units may have enough decision-makers at the appropriate officer level to undertake their internal review decisions, however small agencies are often tasked with finding internal review decision makers from other areas of the agency and usually these decision-makers are required to be at a senior executive level.

It may take smaller agencies up to a week after an internal review application is received to allocate an internal review officer due to the current workloads of an agency's delegated internal review officers as they are all at senior executive level and these positions typically have 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, initial discussions between the original decision-maker and the internal review officer are still 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 until halfway through the 20 business day period.

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 an in making the internal review decision. In addition it is not that 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, agencies should be afforded the benefit of an appropriate processing period which in turn would also benefit the community through agencies 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, I consider that because public resources are constantly 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 to agencies for implementing and administering the RTI Act and IP Act be addressed.

In view of the Commission of Audit recommendations and the contestability framework, I consider that the current arrangements need to be completely examined.

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

The discussion paper makes no mention of the true costs incurred by agencies as a result of implementing and maintaining the fundamental objectives of the RTI and IP Acts (i.e. pro-disclosure bias). Agencies 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. I believe 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.

Further, I am concerned about the conflicting role of the Office of the Information Commissioner Queensland (OIC) and believe their role needs to be reviewed.

As a result of the RTI reforms the OIC has dual functions. Their first (my firm view it should be their only role) role is to be an independent adjudicator of decisions made

by agencies concerning RTI and IP applications. However, their second role is to provide high-level policy advice, monitoring, audit, and guidance to agencies on matters concerning the processing of RTI and IP applications. The OIC is also responsible for the provision of training and advice to agencies in the administration of the Acts while at the same time adjudicating agencies in relation to decisions and other required activities under the RTI and IP Acts.

It is my view that this issue be further explored with a view to having the training and advice function situated within an entity independent of the OIC, such as the Department of Justice and Attorney-General. Most of the RTI training is actually provided by a well known external consultant, and has been for many years The question of audit should clearly sit with the Auditor General's (AG) Office consistent with all other areas of governance. It was not uncommon for audits by the AG's Office to be carried out with agencies from time to time during the period of FOI. In the end it is the responsibility of Principal Officer of an agency to ensure their agency is complying with the Act, and the Information Commissioner is there to provide guidance. The flow-on effect would be a substantial reduction in the costs associated with the OIC, which has tripled in the past four years. RTI Policy Officer positions could be created within the Department of Justice and Attorney-General with minimal costs compared with the current costs within the OIC.

I am of the view that all RTI decision-makers should be required to hold accreditation in order to make decisions. What tends to happen with some agencies is new people move into the area, go on the next available course, and then are expected to be instant decision makers without any real experience, or write decisions even if they haven't done so for some considerable time. An effective way of using an accreditation system is to have RTI decision-makers attend a refresher workshop to ensure standards are maintained. This could occur every two years or as deemed appropriate in consideration of this review and would not be an administrative burden on agencies but maintaining a level of expertise and good service delivery.

One of the reasons why there is a marked increase in applications for external review is the perceived quality of decision making. Its relatively easy to decide not to release information because the view of the decision maker is that certain material should not be released either because its exempt or contrary to public interest, which deals with the legal side of the decision, but applicants often become frustrated and aggrieved because issues are not properly explained in plain language. These issues are often discussed during basic training but appear to be sometimes forgotten when officers return to their respective agency or in some cases the perception might be that its just a matter of getting the decision out of the door and move onto the next one without proper regard to efficient service delivery. A decision-maker accreditation requirement should be included in the legislation to ensure that all agencies comply and maintain standards. This would assist in delivering the government's policy to make government processes clear, straightforward and accountable. A good flow-on effect would be the issue of recruitment of RTI positions in agencies. If an applicant holds accreditation then it would assist agencies in having the right people working for them.

Submission on the Review of the Information Privacy Act 2009: Privacy Provisions Discussion Paper

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 agency. This contrasts with the very detailed processes specified for applications for access to and amendment of personal information held by an agency. While many agencies have implemented their own procedures for handling privacy complaints that are received by the agency, I consider that there would be benefits to having a section in the IP Act specifying how a privacy complaint should be processed. These specifications should include:

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

By amending the IP Act to include the above processes for agencies when dealing with a privacy complaint, will allow for a standardised process to be followed and will result in a consistent approach across government which would also contribute to the efficient use of scarce public resources.

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 for an agency to deal with a privacy complaint is often difficult to meet for some agencies especially when the complaint is complex or is part of another grievance (i.e. a workplace dispute).

I 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 agency about their complaint within the 45 business days, then the complainant would be entitled to lodge a complaint to the OIC.

However, if an agency 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 the in that instance, the OIC should allow the agency to resolve the complaint at the agency level and if the complainant is not satisfied with

the agency's decision on the privacy complaint, they can lodge a complaint with the OIC.

For the efficient and effective processing of privacy complaints to occur, I believe the IP Act should be amended to include a section similar to the 'Longer processing period' section contained in the RTI Act. Agencies would have more flexibility and would be able 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 agency must take reasonable steps to ensure information is protected against loss and misuse?

I support the amendment of IPP4 to ensure it is consistent with the other IPPs within the IP Act. I consider 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 agency 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 agency would be liable for despite the agency taking all possible measures to ensure the personal information is protected.

I 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?

I support 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.