SUNSHINE COAST HOSPITAL AND HEALTH SERVICE

NAMBOUR GENERAL HOSPITAL

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Response to Department of Justice
RTI Consultation Paper

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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?

Yes. I think that the current structure is not sensitive to the needs of applicants. Many applicants have not had experience interpreting legislation and there are various legal grounds for refusal. There are enough legal concepts for an applicant to understand without overlaying the interaction of two Acts.

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?

Yes. As the decision-maker is awaiting an action by the applicant, the processing period should be suspended.

3.2 Should the requirement for an agency to again consider whether the application can be made under the IP Act be retained?

Section 54(5)(b) could be deleted. However section 54(5)(a) will need to be amended to specify that the applicant has changed their application so that they have met the criteria specified for an application under the *IP Act.*

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?

Yes.

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?

If a person applies under the RTI Act, no identification is required, unless the applicant is applying for their own personal information. The question of identity goes to the decision made. Whether the identification supplied is sufficient to identify the person to whom the information may be released, appears to be at the discretion of the decision-maker. The question of who may be the recipient of another person's personal information under the RTI Act, is equally important to the question of the identity of an applicant under the IP Act.

Yet under the IP Act, the Act seems to indicate a high level of identification required according to the examples provided in the Regulation.

Whereas the Office of the Information Commissioner minimises evidence of identity requirements, stating on its web-site:

> *"Both the agent and the applicant must provide the agency9 with evidence of their identity.10 The term **evidence of identity** is defined in the Right to Information Regulation 200911 and the Information Privacy Regulation 200912 (**the Regulations**). The Regulations do not distinguish between evidence of identity required for an applicant and that required for an agent…. ….The list of documents set out in the Regulations is not exhaustive and other documents may also satisfy the evidence of identity requirements. For example, in some cases, a letter printed on the law firm's letterhead and signed by the principal of the firm may be sufficient to verify a legal representative's identity."*

This statement by the OIC that I may accept an application on letterhead seems to bring back the former position via the back-door. Formerly a decision-maker could decide if they were reasonably satisfied as to the identity of the applicant. In my experience it was usual to require certified evidence of identity for the public and an application on letterhead for a solicitor. The requirements for certified evidence of identity could be waived by the decision-maker when the circumstances were warranted.

Perhaps this position should be re-instated to overcome barriers to applications, particularly for disadvantaged applicants.

Queensland apparently has a large rural population. It is often possible to identify an applicant in a number of ways, including by requiring additional documents for identification and marrying up contact details between the application and what is held on file. I do not know if specifying other people to certify documents such as a doctor, dentist or Police Officer, will be of assistance to an isolated person and you do have not have to go far in Queensland to be isolated.

The legislation needs to be clear about evidence of identity requirements including whether the regime is mandatory or discretionary. If it is meant to be discretionary, the evidence of identity examples could be extended in the Regulations.

6.4 Should agents be required to provide evidence of identity?

See above. The former Act worked well.

6.5 Should agencies be able to refund application fees for additional reasons? If so, what are appropriate criteria for refund of the fee?

No. Refunds of application fees impose additional administrative and financial burdens on agencies and this will show in longer timeframes for processing applications. The cost of raising and cancelling an invoice is likely to be greater than the application fee. More attention needs to be paid to the fee structure itself. It would be better for agencies if small application fees did not have to be collected, as the cost of collecting a small fee is greater than the costs of processing it.

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

Generally speaking yes. If a distinction between applying on behalf of child is to be made, this needs to be specified in the legislation.

At present, the legislation specifies that an application may be made ‘‘for the child by the child's parent". "For" has a number of meanings (using the dictionary as a source) and does not necessarily mean "on behalf of". If it is only intended that parents be able to apply on behalf of a child, where the parents are only acting in alignment with the interests of their child, then the words "on behalf of" may be introduced.

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?

It should be added to the end of the original processing period. This gives the applicant an understanding of the reality of the extension time being sought.

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?

Yes, this is consistent with the fact that the OIC may give an extension for a decision to be made.

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

I think the CEN system generally is sound in that it notifies applicants of potential costs and gives applicants an opportunity to examine their requirements.

Later I suggest adopting a flat fee approach as mentioned in the discussion paper. Due to the fact that it can be difficult to assess the time to be taken, in my experience applicants are regularly undercharged using the CEN system and a time-based system is harder to justify to applicants who may not understand the length of time taken to process applications.

A flat fee system can work within the context of the current CEN system if applicants are notified of the approximate number of pages and likely costs capped according to the number of estimated pages.

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

No, I have not had an applicant require a schedule up-front. I have been able to provide enough information about the general content of the documents sought to enable an applicant to make a decision about the scope of their application. A schedule is not necessarily going to address this question.

If an applicant insisted on a schedule, then the documents would need to be counted. Due to the variable types of documents held in a medical record, counting is not possible without copying them.

At most, an estimate of time/pages ought to be required. If a flat fee charging regime was introduced, an estimate of pages would work as an applicant would not be charged for additional pages under the CEN.

6.13 Should the threshold for third party consultations be reconsidered?

Yes, the public interest balancing test has been tipped in favour of disclosure and the lower threshold can run counter to this principle. If a third party is not available for consultation because release may be of 'reasonable concern', the information may be withheld on this lower threshold on the basis that the third party has not been consulted and that disclosure may impinge on their privacy.

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

No. Under the general application of the Privacy Principles, the applicant ought to be consulted before contact is made with a third party. If the applicant does not want their identity revealed to a third party (and almost always it would be impossible to consult effectively without revealing the identity of the applicant), then the applicant can remove the matter in issue from the scope of their application. I am of the opinion that this process works and is adequate.

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

1. Reverting to a single Act will make decisions easier to understand.
2. Amend section 54 so that all applicants are not warned that their information may be published. It is unnecessary to warn applicants that the release may be published when the release does not qualify for publication in a disclosure log.

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?

There should be no minimum information required to be provided, as every situation surrounding an application is not foreseeable. The section is designed to avoid harm and it should remain effective and unencumbered. This section is of particular use where the application itself is intrusive and accommodating changes to this section may result in an intrusion on the rights of an innocent person.

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?

No. These sections appear quite different with the latter specifying the criteria to meet a public interest harm. All that would change in the decision is the name of the section number and I doubt this will be of significant value to an applicant.

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?**

The public interest factors are not exhaustive. Amendment of legislation is not necessary to educate decision-makers and the public about recognised public interest factors can be done via the OIC web-site for example.

It may be of educational benefit to specify public interest factors for the public. For consumer matters, amending legislation may not be necessary, as decision-makers will easily identify a consumer in the context of an application and identify the relevant public interest.

The appropriate threshold should be applied (high or low) that will satisfy the public policy aim.

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

Yes. It is not necessary to legislate to back-up unusual situations and it is redundant to legislate for every new situation when the general principles under the Act cover the situation very well.

Rather than legislating, it is preferable to use the system that is already working, including education via the OIC web-site. Decision-makers need to have the skills to apply law to various situations and this is not the function of legislation.

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?

The discussion paper states that “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.”

I doubt that you are implying that access ought to be refused on the basis of individual circumstances related to the history of a matter, as rarely will a decision-maker be in possession of any material that will indicate that one person is completely right and that the other person is a “bully”. At agency level consideration of these types of issues is likely to inflame any situation and likely to last in long-running reviews at the expense of the public purse and further difficulties in the agency as people seek to be vindicated.

There is enough guidance for decision-makers regarding whether or not information ought to be released in relation to recruitment and selection to allow fairly clear-cut decisions to be made.

If contentious situations are so common that it is considered that the public interest ought to be drawn more in favour of privacy of successful officers, then this should be a blanket change via legislation applicable to all successful officers.

For example, under Schedule 10(1) information may be refused during an investigation, on the basis that it gives the applicant an opportunity to interfere with the investigation. There is no need to make a finding that the applicant intends to interfere with the investigation.

Either release or non-release can be used against another employee. In the absence of compelling evidence of harassment (for which a section already exists) this is really a management issue and not a release of information issue.

During the Right to Information process the decision-maker acts as an intermediary and no direct exposure occurs between the applicant and the person consulted. Release of information is no threat to a person appointed correctly and there is an important public interest factor in accountability of the government.

In my opinion the legislation does not need to change as the balance of disclosure is fair concerning the public interest factors. I am not opposed to this balance being changed by legislation as long as the criteria is privacy rather than any consideration of the individual merits of any grievance or dispute.

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

I note that the fees for access to court documents apply to all applicants. According to the Family Court web-site fees for the Court Registry to provide documents to an applicant is $ 30.00 plus 20 cents per page.

The Solomon Report refers to the Electoral and Administrative Review Commission (EARC) Report which stated that:

> *"FOI" is not a utility…which can be charged according to the amount used by individual citizens…".*

The Solomon Report reviewed a number of submissions and I note that the following information was provided by the Queensland Ombudsman as Information Commissioner:

> *"…there should be either be no application fee payable at all, or an application fee should be payable for all applications (personal and non-personal). The resolution of disputes about the meaning of "personal affairs" in order to determine whether or not an application fee is payable is time-consuming and a waste of resources, and can lead to a deterioration in relations with the applicant before the processing of any applications have ever begun.*

The Queensland Ombudsman recommended abolishing the difference in application fees between personal and non-personal applications.

In the Solomon Report it argued by various participants that access to government held information is a democratic right and it is important that the accountable for its decision-making process. A distinction was drawn between personal and non-personal information on the basis that a person has a right to access their own personal information.

There are many rights in society that can be said to be fundamental, such a right to exercise a legal right. This is also fundamental democratic right that is not free in many cases. Little importance seems to be attached to the public interest (or value to the individual) in the disclosure of the information sought in proportion to the cost to the government.

The Sunshine Coast Hospital and Health Service is very clear to applicants about their rights and applicants often choose to exercise their rights to access full records. The fact that access to information is free does seem to initiate a desire in some applicants for access for full-records after initially seeking only a portion of documents for a specific purpose (eg. for Court).

At present, the only demand mechanism available to decision-makers for personal applications under the IP Act, is the time that it will take to process a large application. (The OIC Negotiation Training Course has been

utilised). If an applicant does not mind how long it may take, then the organisation must comply with the application.

It could be argued that the public interest in release of information is dependent on the circumstances of each individual case, regardless of whether or not the information is personal information. Is it of greater value to have access to information about potential government corruption or for a person to be able to peruse their information for their own personal satisfaction or a personal injuries case?

Although demand management has been criticised as a euphemism for reduced access, practically speaking, a charging regime could give applicants pause to consider what is most important to them without barring access.

Continued unencumbered access is likely to result in rising demand and an assessment may need to be made about the rising demand and the impact on overall access to information for all applicants. Some agencies may not be able to provide information within a reasonable amount of time and longer processing times may result in prejudice to applicants.

Is there a case for distributing the cost more evenly between applicants and keeping costs to a minimum?

I note that the charging regime of private hospitals is more closely aligned to the fees mentioned in justice system. A broad fee charging system that distributes charges more evenly between applicants with appropriate concessions may reduce costs overall and result in more equitable access.

If fees are to be charged for access under the Information Privacy Act, then fees ought to be charged under the Administrative Access Scheme. Applicants cannot help the type of information held on their record and sometimes a decision cannot be made under Administrative Access and must be referred for a decision under the *IP Act*. Persons having different types of personal information ought not to be charged at different rates.

In the Solomon Report, the Australian Press Council said –

> "*The costs incurred by media organisations that pursue FoI applications are prohibitive. Although the initial application fee is modest, additional charges are imposed for processing the application, including payment for locating documents and considering material in order to decide whether it should be released…"*

It was recommended in the Solomon Report that charges be reduced to per page fully released under the RTI Act. Whilst I agree with a per page formula, the cost ought to refer to the number of pages considered that are within the scope of the application. This means that the applicant has more control over the cost by excluding open-ended time-based work such as the time for making a decision or searching for documents. Charges will be evenly applied across the State and do not depend on the discretion of the decision-maker. Charges per page sought will encourage applicants to consider the extent of their application.

A remark was made in the Solomon Report that if only fully released pages are charged:

> *"This removes the tactical opportunity that agencies may have to penalise requestors by charging for pages potentially containing little material that has survived redaction…"*

Decision-makers acting properly are not influenced to make decisions, based on how much they may charge an applicant. In many cases, as observed by the Queensland Ombudsman above, agencies make strong efforts to maintain relationships, often under-charging in the CEN system.

If the government does adopt a charging regime similar to that for access to court documents, I can only give some observations about the type of system that may be implemented.

A flat fee regime would simplify the administration of applications. This charging regime would be easier to justify to applicants and give them control over the cost of their application - in particular how many documents they wish the agency to review. Applicants seeking information to their own personal information, such as a medical record, will have few pages redacted.

There is always a balance to be kept between the exercise of rights and the cost to the community.

The Gold Coast and Hinterland Environment Council submitted in the Solomon review that: "The "user pays" system is out of control." I would agree. Many submissions will suggest that access to personal information remain free. I will be surprised if charges are acceptable to the community generally and more so given the widespread publicity about the current right to information regime.

If the government does introduce charges similar to that for access to court documents:

- Charges ought to be kept to a minimum for applicants and costs distributed between all applicants for personal and non-personal information.
- There ought to be no cost where the cost of charging the applicant is uneconomical. For example, waiver of costs for personal information up to a certain number of pages (e.g. 120 pages) on the basis that it is uneconomical to charge (eg at 50 cents per page).
- An increase in photocopy charges rather than an up-front application fee so that applicants are not discouraged from applying for information.
- If it is decided to introduce an up-front fee then I would suggest that it reflects the Family Law Scheme of a $ 30.00 fee and a low fee per page (e.g. 20 - 30 cents). This reflects the importance of the right to access to information.
- It is acknowledged that costs are not a recovery basis, but if costs are introduced, their ought to be some relationship between the resources used and the costs charged.
- Accordingly, per page fees within the scope of the application reflect the extent of the work undertaken by an agency that is required to search, retrieve, copy and decide upon individual documents. A charge based on fully released page bears no relationship to the burden placed on the agency. Applicants can receive guidance from decision-makers about the scope of their application and where information is likely to be held.
- Concessions by way of nominal or waived fees and charges may be made for certain individuals and organisations (to meet the needs of bona fide community groups) on the basis of financial hardship.
- The charging system for discs may be changed. As many agencies maintain paper-based record keeping systems, records must be copied onto paper and transferred to disc. Waiving access charges for discs, does not take into account that the documents have to be copied first.
- A complete concession for copying to disc is currently being provided to people who have access to a computer and no concession to applicants who do not have access to a computer and who do not qualify for a waiver of charges.
- If discs are the preferred method of distribution, a moderate incentive to accept discs would be more equitable.

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?

It costs just as much to process an application fee as the application fee itself. I believe that it is unnecessary and does not serve any public benefit – not even as a demand mechanism as it is small.

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?

The OIC should be able to refer a matter for internal review.

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?

The time for an internal review should be allowed to be extended by agreement of the applicant and the agency. The OIC should also be able to extend the time for an internal review upon an application by an Agency if an application for an extension is refused – to avoid unnecessary deemed internal review decisions.

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?

Yes, the agency ought to specify in writing the matter that it agrees to release and perhaps give a basic outline for rescinding its decision for example, because of information gathered by the OIC. Protection from liability for the decision needs to be provided as if it is an original decision.

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

No reviews ought to go direct from an agency to QCAT as this will involve legal costs when many issues could be sorted at lower review levels. At present, original decision-makers are only expected to operate at an AO5 level and legal qualifications are not mandatory. Intermediary steps between QCAT and the original decision-maker is a more logical process as issues can be resolved at a lesser cost and the system would be appropriately graduated from the skills of the decision-maker. If direct reviews are permitted, attention may need to be given to the standard of qualifications expected of decision-makers.

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?

There are a number of applicants who are not experienced in evidentiary matters and do not understand what is likely to be useful evidence, even though guidance is provided about the general content of a record. In my experience this can be a factor in repeat applications.

Altering the charging regime for original decisions is likely to have a measurable impact on the scope of applications by focussing applicants on what is most important to them. This will have a flow-on effect by reducing the work-load for subsequent tiers of review.

10.3 Should the Acts provide additional powers for the OIC to obtain documents in performance of its performance monitoring, auditing and reporting functions?

Yes, as the OIC requires documents for these purposes.

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?

No, the quality of the functions is paramount. The public expect the highest standards of the OIC and this requires stringent quality control.

11.1 What information should agencies provide for inclusion in the Annual Report?

Only information that has value. For example, only the number of documents 'considered' is collected. This excludes documents identified as 'out of scope'. The number of documents identified as 'out of scope' represents additional time spent identifying and characterising documents. It can take the same amount of time to mark a document 'out of scope' as it can to redact it.

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?

Yes. Section 187 of the *Child Protection Act 1999* that is applied pursuant to schedule 3 section 12(1) of the *RTI Act* applies to:

> *"a public service employee, a person engaged by the chief executive, or a police officer, performing functions under or in relation to the administration of this Act…"*

Section 187 further states:

> …..

"(b) in that capacity acquired information about another person's affairs or has access to, or custody of, a document about another person's affairs.
(2) The person must not use or disclose the information, or give access to the document, to anyone else.
Maximum penalty—100 penalty units or 2 years imprisonment."

Section 69 of the *Hospital and Health Boards Act 2011* states:

"A health service employee is employed under this Act and not under the *Public Service Act 2008*."

I suggest that the failure to include health service employees means that information of the same character held by a Hospital and Health Service is not included in this exemption. I am not aware of whether this is an intended consequence or due to the changes in the structure to the former Queensland Health.

With respect to children's information, the IP and RT Act may operate to produce a different line of reasoning for the same information.

An application may be made on behalf of the child for information that includes documents submitted by a Hospital and Health Service to the Department of Child Safety. Often this type of information will be part of a medical record. However, as the medical record is predominantly medical information about the child, the application falls under the *IP Act*.

On the other hand, it appears that records held by the Department of Child Safety and other departments could fall under the RTI Act in the same circumstance. The content of those records may not be about the child but about the standard of care provided by parents and care-givers. In that case, it may be possible to treat the application by parents as an application that is not made on behalf of a child but rather as individual application for records that includes a substantial amount of information about other people.

Whether or not an application is processed under the IP Act or the RTI Act could have different consequences for the same information considered.

In the Office of Information Commissioner guidelines, it is stated that the child is the applicant under section 45 of the *Information Privacy Act 2009.* There are a number of provisions that are referred to in the Guidelines including section 186 of the *Child Protection Act 1999* which applies to information:

- "*that would identify a person who has notified the government agency, an authorised officer or a police officer that a child* [10] *has been, is being or is likely to be harmed* (OIC Guidelines).

Section 12(2) provides an exception "*Information is not exempt information under subsection (1) in relation to an access application if it is personal information for the applicant".*

Under the IP Act, the child is the applicant and under the RTI Act, the child is not the applicant. Section 12(2) could possibly be relevant under the IP Act, meaning that as the child is the applicant, the information may not be exempt.

I am not aware of any decisions dealing with this issue. It appears that information relating to the identity of notifiers may not be exempt under the IP Act due to the operation of section 12(2) of the RTI Act, Unlike section 187 of the *Child Protection Act 1999,* section 186 contains no provision for releasing information to applicants when is about them. The IP Act appears to modify the operation of section 186 of the *Child Protection Act.*

If this is correct, a decision-maker may still able to make a decision about the best interests of a child under the IP Act. In the OIC Guidelines, the Information Commissioner states:

"However further consideration will need to be given to whether disclosure may be contrary to the child's best interest in certain circumstances, e.g., the child is older or where the child is estranged from the parent. Particular care should be exercised where it is clear the child and parent have distinctly different interests…"

A situation where a parent is under investigation could be described as one where “the child and parent have distinctly different interests”. In addition, it appears that the law enforcement exemption could also be considered and finally, the provisions generally about the public interest.

If my analysis of both sections above is correct, I submit that it may be preferable to alter the legislation (where possible) so that the sections 186 and 187 of the *Child Protection Act 1999* exempt the same information uniformly under both the IP and RTI Acts. I am of the opinion this is likely to be a better reflection of public policy. If the analysis of these sections is not correct or if the current situation is considered satisfactory, further guidelines on making these types of decisions could be issued by the OIC.#

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11 November 2013
These comments represent my own views from my experience as a decision-maker and do not reflect the views of the Sunshine Coast Hospital and Health Service.