SUBMISSION BY

THE UNIVERSITY OF QUEENSLAND

ON

REVIEW OF THE RIGHT TO INFORMATION ACT 2009 AND CHAPTER 3 OF THE INFORMATION PRIVACY ACT 2009

November 2013

Notes:

1. This submission must be read in conjunction with the Discussion Papers on the Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*. For clarity, the submission adopts the same numbering system as the Discussion Papers.
2. The University has only responded to questions that directly impact or relate to its administration of the *Right to Information Act 2009* or the *Information Privacy Act 2009.*

REVIEW OF THE RIGHT TO INFORMATION ACT 2009 AND CHAPTER 3 OF THE INFORMATION PRIVACY ACT 2009

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

No comment.

1.2 Is the 'push model' appropriate and effective? If not, why not?

The push model should be reviewed in light of the Queensland Government's 'open data' revolution. The question arises is whether the 'open data' revolution has superseded the push model under the RTI Act. The policy principles that underpin the open data revolution are[1]:

- *Government data will be available for open use.*
- *Government data will be available free.*
- *Government data will be in accessible formats and easy to find.*
- *Government data will be released within set standards and accountabilities.*

The relationship between 'open data' and the obligations on agencies under the RTI Act to release information as a matter of course requires further consideration and is unclear to the University. Indeed, it seems that the open data initiative of the Queensland Government may be the single most important initiative that supports the 'push model' under the RTI Act.

As an aside, the University is supportive of the 'open data' revolution and provides large quantities of data available to the public via the University's Reportal, including data concerning staff, students and research.

[1] The Queensland Government's Open Data Revolution, available from: http://cabinet.qld.gov.au/documents/2012/dec/open%20data/the%20queensland%20governments%20open%20data%20revolution.doc.

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?

There is little doubt that the duplication of the access regime in the RTI Act and IP Act can be confusing not only to the general public but to agency personnel. It also raises questions for both the applicant and RTI/IP practitioner surrounding which Act should be applied to a given application. In this respect, the University would support the simplification of the legislation by transferring the access and amendment provisions of the IP Act into the RTI Act.

Irrespective of whether the right of access provisions are consolidated into one Act, further clarification of an individual's right to access their personal information is required. The discussion paper highlights that section 40 of the IP Act gives an individual the right to access a document of an agency to the extent the documents contain the individual's personal information. The discussion paper rightly highlights that:

> *The Information Commissioner has interpreted the phrase to the extent in section 40 of the IP Act to mean that the right of access is to whole documents, as long as each of the other documents sought contain the applicant's personal information. The fact the documents also contain other information (as well as the applicant's personal information) does not prevent them being considered under the IP Act.*

While the University agrees with the view of the Information Commissioner, clarification around how agencies are to deal with the information that is not personal to the IP applicant would be helpful. The University considers clarification of the application of section 88 (deletion of irrelevant information) to withhold/delete information that is not personal to the IP applicant would:

(a) further the objectives of the IP Act, by granting an individual access to documents to the extent they contain the individual's personal information;
(b) streamline the application process by enabling a decision-maker to withhold/delete information that is not relevant to the applicant rather than having to consider and apply the various exemption provisions or the public interest test;
(c) simplify decision letters by removing the requirement to apply complex exemption provisions or balancing the public interest.

If an individual sought access to the information that was not personal to them, the individual would then be required to apply under the RTI Act, which attracts statutory fees and charges. This recognises that access to general information should be available on a user pays basis whereas access to an individual's personal information is without charge.

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?

In short, yes. Agencies must process applications within 20 business days and any delays in clarifying the whether or not an application can be dealt with under the IP Act can have significant implications on the agency's ability to process the application within that period. It is acknowledged that an agency may seek a longer processing period[2], this can only be granted with the consent of the applicant.

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

There are some inherent challenges in clarifying with applicants the scope of the application and whether the application should be processed under the RTI or IP Acts. The University is supportive of any mechanism to enable the decision-maker to consider again, following consultation with the applicant, whether or not an application under the IP Act can be retained. Furthermore, there is a clear need for a mechanism to 'stop the clock' while these procedural issues are finalised.

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?

The University notes the inconsistency with section 54(5) and the remainder of the RTI Act with respect to the calculation of time periods. Accordingly, the University would be supportive of an amendment to bring section 54 in line with the remainder of the RTI Act by prescribing business days rather than calendar days.

[2] Section 35 of the RTI Act.

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

The University would support the inclusion of an additional ground for refusal in section 47(3) of the RTI Act on the basis that the document is not a document of an agency.

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

If a specific power to refuse access to a document on the basis that a document is not a document of an agency was to be introduced into the RIT Act, the University considers that this is a decision that should be reviewable, both internally and externally to the Information Commissioner.

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

As discussed in section 4.1, the University argues that an additional ground for refusal in section 47(3) of the RTI Act should be introduced on the basis that the document is not a document of an agency. The introduction of this additional ground in section 47 would require the timeframe for making a decision that a document or entity is outside the scope of the Act to be aligned with the timeframe for making a decision on an application. This approach would also assist decision-makers in deciding applications that request access to documents of the agency as well as documents that are outside scope of the RTI Act.

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

No comment.

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

The University does not object to the government policy decision to include corporations established by the Queensland Government under the RTI Act and Chapter 3 of the IP Act. However, these corporations were established as separate legal entities to undertake commercial activities on behalf of the government. Subjecting these corporations to the accountability mechanisms under the RTI Act and Chapter 3 of the IP Act may compromise the corporation's activities and undermine the purpose of the corporation. Furthermore, these corporations would be at a distinct disadvantage to its competitors as a result of the cost of compliance with the RTI and Chapter 3 of the IP Act.

A further complication that may arise by including corporations established by the Queensland Government under Chapter 3 of the IP Act is the potential conflict of the access regime under the IP Act and under the Commonwealth *Privacy Act 1988.* Australian Privacy Principle 12.1 provides[3]:

> *12.1 If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.*

If Chapter 3 of the IP Act was to apply to corporations established by the Queensland Government, how would the IP Act operate in respect to APP 12.1? If an individual wanted to access their personal information held by the corporation, would they apply for access to the information under the IP Act or the *Privacy Act 1988*?

Indeed, the above implications would confront the University in the event the RTI Act and Chapter 3 of the IP Act were to apply to University controlled entities. For example, the University has established Uniquest as the main commercialisation company of the University whose charter is to identify, package and commercialise university technologies, expertise and facilities to benefit the community, industry and government. Applying the RTI Act and Chapter 3 of the IP Act to Uniquest would have an unreasonable impact on Uniquest's commercialisation activities.

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

The implications discussed in section 4.5 equally apply to the question whether the RTI Act and Chapter 3 of the IP Act should apply to documents of contracted service providers. The University considers that further consideration be given to how the RTI Act and IP Act would interact with other state and federal legislation before any support can be provided to extend the operation of the Act to contracted service providers.

5.1 Should agencies with websites be required to publish publication schemes on their website?

5.2 Would agencies benefit from further guidance on publication schemes?

The University maintains the publication scheme on its website and considers that, in this information age, it is appropriate and reasonable to expect information of this nature to be available on the internet.

The University considers the current guidance on the content of publication schemes to be reasonable.

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

No comment.

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?

6.2 Should the amendment form be retained? Should it remain compulsory?

The current application form has been developed and refined to assist applicants with making a compliant RTI or IP application. Furthermore, the hard copy application provides the basis for

[3] See Schedule 1 of the *Privacy Act 1988* (Cth)

the electronic application. The University's response to the application for access to documents equally applies to an application for an amendment of information under the IP Act.

While the University supports the use of approved application forms, they may add an extra layer of complexity for applicants. The value of the form is eroded in circumstances where the University receives a request for documents that is not made on the approved form that clearly articulates the documents requested. In these circumstances, the processing of the application is delayed until the applicant makes the application in the approved form.

Accordingly, the University would support an amendment to the RTI and IP Acts making the use of the approved form voluntary. The onus would then fall back to the agency to consider whether the request complies with the application requirements under section 24 of the RIT Act.

6.3 Should the list of qualified witnesses who may certify copies of identity documents be expanded? If so, who should be able to certify documents for the RTI and IP Acts?

6.4 Should agents be required to provide evidence of identity?

The University is satisfied with the current provisions of the RTI and IP Acts as they relate to certification of proof of identity documentation. However, there may be other means of verifying identity of an individual and it would support an amendment to both Acts to import some flexibility for agencies.

For example, the University provides all students with a designated email account and it is the responsibility of all students to:

- to check their University email account on a regular basis;
- to maintain appropriate security measures regarding email passwords;
- to use email in accordance with University policies;
- to prevent the use of University email accounts by persons not authorised by the University.

Students are informed that the University relies on email as the primary communication method with students. It would be advantageous for the University to rely on formal emails from the

designated student email account to confirm identity of applicants. Incorporating flexibility into the IP Act would enable the University to streamline processes so that students would not be required to attend in person or obtain a certified copy of their relevant identification.

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

No comment

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

No comment

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

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

The University has at times been required to rely on sections 18 and 35 to request a longer period in which to process RTI applications. Reliance on this provision is the exception rather than the rule and all attempts are made to process the application as soon as possible.

While these provisions are necessary to ensure the effective operation of the RTI and IP Acts, they should provide a simple mechanism to extend the processing period. The University is satisfied with the current provisions where an agency can continue to process an application unless the applicant has lodged an application for review under the Act.

In relation to the specific questions, the University is of the view that the longer processing period commences after the end of the statutory processing period. This seems to be the most logical application given an applicant may lodge a review only after the statutory processing period has expired. Furthermore, an agency that has issued a notice to an applicant requesting a longer processing period should be entitled to continue processing the application outside the processing period until an application for review is made.

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

While the University does not deal with a large volume of applications under the RTI Act, the experience to date has been that the charges estimate notice process is beneficial to both the University and the applicant. It provides a mechanism where applicants become aware of the estimated cost of processing the RTI application. Accordingly, the University would not support the removal of this system under the RTI Act.

However, the University considers the current charges estimate notice process can be improved be removing the requirement for agencies to issue a charges estimate notice where it is clear to the agency that no processing charges would be payable in relation to an application. It is absurd to require agencies to issue a charges estimate notice in circumstances where no additional processing charges would be payable with respect to the application.

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

In short, yes. There can be a significant cost in preparing the charges estimate notices and it would be unreasonable to require agencies to issue an unlimited number of notices to an applicant. It is the University's view that:

- the first charges estimate notice should provide an option to the applicant to reduce the scope of the application, which in turn will reduce the cost;
- the second charges estimate notice provides an estimate of the cost to process the application based on advice from the applicant to reduce the scope of the application.

Upon receipt of the second charges estimate notice, the applicant should be in a position to decide whether or not to proceed with the application. Limiting the number of charges estimate notices that an agency can issue will:

- make applicants more accountable for the scope of their applications;
- reduce the number of applications seeking access to unreasonable quantity of documents;

- reduce the overall cost to agencies in dealing with applicants who make unreasonable applications to agencies.

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

A strong argument could be made to support a right of review of a charge imposed under the RTI Act based on the concept that the way in which a charge is made should be fair and reasonable. The University would not object to an amendment to the RTI Act that introduces a right of review of a charge.

However, introducing a right of review will impose a cost on the agency undertaking the review, whether that is the agency that processed the application or the Information Commissioner. The most obvious body to undertake a review of a charges estimate notice is the Information Commissioner.

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

The University agrees with the comments in the discussion paper that there is a direct cost associated with compiling the schedule of documents for a charges estimate notice. The University also agrees with the observations of other agencies that in practice, applicants do not often reduce the scope of an applicant based on the schedule of documents.

Even without a schedule of documents, section 36(2) imports some obligation on agencies to assist applicants with the narrowing of the application to reduce the applicable charges. This may be achieved by providing a schedule of documents or in another way, for example, by grouping documents into categories/subjects. The inherent difficulty in this process is that the best way for an applicant to narrow an application will depend on the original application and the documents requested. This will not necessarily require the production of a schedule of documents.

The University would support an amendment to the RTI Act to replace the requirement for agencies to produce a schedule of documents with an obligation on agencies to assist applicants with reducing the scope of the application, and in turn the applicable charges.

6.13 Should the threshold for third party consultations be reconsidered?

There is little doubt that the RTI Act and IP Act lowered the threshold to consult relevant third parties, compared to the *Freedom of Information Act 1992* (**FOI Act**), and this has had a direct impact on the costs to agencies in administering the Acts. The University would support any amendment to the RTI and IP Acts that would reduce the administrative costs associated with the Acts.

However, in practice there may be little difference in applying the tests under the RTI/IP Act and the FOI Act in determining whether or not an agency is required to consult a relevant third party. Unless there is a definite cost savings to agencies in increasing the threshold, the University considers the status quo as satisfactory.

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

Indeed, the decision-making process in deciding whether or not to disclose the names of applicants and third parties is both difficult and complex. As the majority of applications are processed under the IP Act, matters concerning personal privacy must be balanced against the providing enough information to third parties to enable them to usefully respond to the consultation.

Given the complexities surrounding this issue, the University is of the view that the RTI and IP Acts remain silent with respect to this issue and decision-makers rely on advice/guidelines issued by the Information Commissioner. This will enable each case to be assessed on its merits. Furthermore, the Information Commissioner's advice service could be extended to assist agencies when complex issues arise in the consultation process.

In practice, the University informs all applicants that their identity may be released to parties subject to consultation under the RTI/IP Act. This puts the applicant on notice that it is the University's usual practice to disclose their identity as the applicant and to discuss any concerns with the decision-maker. This practice also reflects the majority of applications processed under the IP Act rather than the RTI Act, where it is argued the identity of the applicant is more important when parties are responding to a consultation.

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

No comment.

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

The length and complexity of decision notices and reasons for decision are not a result of section 191 of the RTI Act or 199 of the IP Act; it is a consequence of applying the public interest test to the documents responsive to the application. The University considers that amending these sections will not address the concerns about the length and complexity of reasons for decisions.

One option to improve the clarity of reasons for decision is for decision-makers to be given training in writing decision letters. However, this will not address the complexity of reasons for decisions nor the length of the reasons provided in a decision letter. It must also be noted that decision-makers deal with complex concepts when applying the public interest test under the RTI Act and as a consequence an element of complexity will flow into the reasons for the decision.

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

No comment.

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

The requirements of justice and fairness would suggest that an applicant have the right to seek a review of a decision with respect to the content of a notation of a record. The University would support an amendment to the IP Act along these lines.

However, the University has dealt with a number of amendment applications and has decided to add a notation written by the applicant to the relevant document. This generally takes the form of a letter or email, which have been attached to the physical record. In this case, there would be little requirement for a review on the basis that the applicant wrote the notation. It is acknowledged that challenges may arise with respect to adding a notation to an electronic record or database and the form that the notation takes.

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

No comment

7.2 Are the exempt information categories satisfactory and appropriate?

A limited number of the exemption provisions, as set out in Schedule 3 of the RTI Act, are applicable to the University operations. It is noted that there are specific exemptions for Brisbane City Council Establishment and Coordination Committee and certain classes of Local Government documents.

The University understands and acknowledges the RTI Act is viewed as "a part of the administrative law landscape in Australia and a key component of the system of government."[4] However, there are concerns within the governing body that confidential minutes of a closed session of Senate (UQ's governing body), may be disclosed under the RTI Act. The University considers a specific exemption of documents which are official deliberations or decisions of a closed meeting of a University should be introduced into the RTI Act. The Victorian Government has adopted this approach to protect official deliberations or decisions of a closed meeting of a local Council from being released under the *Freedom of Information Act 1982* (Vic).[5]

[4] Lane W & Young S, *Administrative Law in Queensland*, Lawbook Co, Prymont NSW, 2001 at 161.
[5] See section 38A.

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?

There is little doubt that applying the public interest test can be complex and difficult to explain to applicants. Applying the public interest test properly results in lengthy and detailed reasons that may be repetitive and difficult for applicants to understand. These complexities arise as a result of balancing the public interest and it would be difficult to simplify the process while maintaining a general public interest test.

Furthermore, combining parts 3 and 4 of Schedule 4 would not simplify the public interest balancing test. Part 4 comprises a list of exemptions under the FOI Act that were intended to be considered as part of the general public interest balancing test. For example, section 1 of Part 4 of Schedule 3 is a modified version of the section 38 exemption under the FOI Act.

While the relationship between parts 3 and 4 of Schedule 4 is unclear, there is merit in maintaining Schedule 4 in its current form. Decision-makers considering a factor in part 4 of Schedule 4 can refer to previous decisions on the respective FOI exemption to assist in understanding the purpose of the exemption and the outer limits that were imposed under the FOI Act. The old FOI decisions can provide a valuable source of information to determine the harm that may arise as a result of disclosing the information, and in applying the public interest balancing test. Combining these 'harm factors' into one schedule will remove the previous body of law available to decision-makers when applying the public interest test.

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 comply**
- **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 University is of the view that the current list of factors set out in Schedule 4 of the RTI Act are adequate and relevant to applying the public interest test. However, it may be helpful to introduce a note to Schedule 4 to clearly articulate that the public interest factors in the schedule

are not exhaustive. Furthermore, the Information Commissioner could provide guidance on other factors that the Commissioner finds relevant in carrying out the eternal review function and make that list available to the community.

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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 University agrees with the interpretation adopted in the discussion paper that a substantial amount of information concerning a successful applicant to a public service position would be released under the RTI Act, in a similar way the information would have been disclosed under

the repealed FOI Act. Indeed, this also seems to be the approach under the Commonwealth *Freedom of Information Act 1992*[6].

The challenge is to strike the balance between accountability in public sector agencies compliance with selection processes and protecting personal privacy of successful applicants for public service positions. There may be a range of documents received during the appointment process that unsuccessful applications could apply to access. In the interests of transparency and accountability of the selection process, it may be reasonable to make particular documents available to unsuccessful applicants, subject to the deletion of information that is inherently personal, for example the application and resume of the successful candidate, while exempting the remaining information.

In limiting the amount of information made available to unsuccessful applicants, the Parliament would not only be protecting the personal privacy of successful applicants, it would cut 'red tape' by enabling agencies to respond to these requests in a quick and efficient manner. Indeed, there may even be scope to introduce an administrative access scheme for these documents, which would again further the objects of the RTI Act.

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

8.2 Should fees and charges be imposed equally on all applicants? Or should some applicants pay higher charges?

The University considers the current fee structures under the RTI and IP Acts are reasonable and relevant. The University considers the processing fee should continue to be applied to the actual time taken by the entity to process the application. The University is therefore opposed to any proposal to adopt a flat fee for these applications.

However, the University considers the current charging rates should be increased to better reflect the cost of processing RTI applications. For example, no processing fees can be imposed in circumstances where an application takes less than 5 hours to complete. In such a case, the only

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6 See *Hanna and Australian Trade Commission* [2002] AATA 624 (22 July 2002)

fee imposed by the applicant is the $41.90 application fee and results in agencies being compensated for processing the application at a rate a little over $8 per hour.

The University is of the view that the threshold for processing fees should be reduced to 2 hours, at which point the statutory processing fees are levied. Coupled with this, agencies should be exempt from issuing a charges estimate notice where the total processing charge is estimated to be $51.60, which represents 2 hours additional processing time. This would reduce the regulatory costs of administering the RTI Act while enabling agencies to recover reasonable costs associated with processing the applications.

Finally, the University is of the view that the fees and charges should be applied equally to all applicants under the RTI Act. Imposing higher fees on some applicants, such corporations, may have unforeseen consequences and increase the difficulty of administering the RTI Act. For example, if organisations paid higher fees, then an organisation may seek to circumvent the application of higher fees by having staff apply for documents in their name rather than in the name of the organisation. Agencies would then be required to assess the identity of the real applicant before considering whether not the proper fees were imposed or paid.

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

No comment

8.4 Should the RTI Act allow for fee waiver for applicants who apply for information about people treated in multiple HHSs?

No comment

8.5 If so what should be the limits of this waiver?

No comment

9.1 Should internal review remain optional? Is the current system working well?

9.2 If not, should mandatory internal review be re-instated, or should other options such as power for the Information Commissioner to remit matters to agencies for internal review be considered?

The University is of the view that the current provisions in the RTI Act making it optional for an application to seek internal review before external are appropriate and working well. Over the past year, the University received 1 internal review application and decided to refused to deal with this application on the grounds that it was made outside the statutory 20 business days after the original decision. In the same period, 4 decisions were appealed to the Information Commissioner, with the Commissioner upholding one decision and settling another (the other two external reviews remain outstanding).

The University considers an optional internal review mechanism provides flexibility to the applicant on the process to review a decision on an application. Invariably, there will be a portion of applicants who will avoid internal review and apply directly to the Information Commissioner for external review of an original decision. In these cases, it is unlikely that the applicant would accept a decision on internal review and would end up applying for external review to the Commissioner. The current provisions provide this flexibility.

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

In short, yes. Sufficiency of search issues are commonly raised on internal and external review applications and it would be absurd to prevent an agency from considering additional documents on internal review. The University considers that the internal review powers are broad enough to capture 'sufficiency of search' issues; a reviewable decision is, among other things, a decision refusing access to a document under section 47. Section 47 of the RIT Act specifically deals with the existence, or lack thereof, of documents subject to an RTI application.

Indeed, the University has taken the view that if additional documents are identified on internal review, the internal reviewer will consider whether or not to release those documents on internal

review. This approach best supports the objects of the RTI Act, which are to give a right of access to information in the government's possession unless it is contrary to the public interest.

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 University has completed most internal review decisions within the statutory period of 20 business days. However, the University would be supportive of an amendment to the RTI and IP Acts to enable an internal review decision–maker to extend the time to make an internal review decision. Any amendment to the RTI and IP Acts should be simple and require the consent of the applicant to extend the period for an agency to decide an internal review application.

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?

The primary object of the RTI Act is "to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest." If the Information Commissioner is able to informally resolve an application, it follows that the agency disclosing any further documents is afforded the protections set out in Chapter 5, Part 1 of the RTI Act.

The University is of the view that the protections set out in Chapter 5, Part 1 of the RTI Act provide sufficient protection where an agency discloses information subject to informal resolution by the Information Commissioner. If the Department considers there is any ambiguity with respect to the interpretation of these provisions, the University would support any amendment to clarify how and when the protections apply.

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

The University supports the status quo of external review applications being considered by the Information Commissioner before QCAT. The main advantage with the Information Commissioner Model is that it is more flexible and less formal than a tribunal. The University

considers that giving an applicant a right to appeal directly to QCAT will significantly increase the costs to agencies in responding to these appeals.

However, the University acknowledges there may be circumstances where the Information Commissioner may consider it desirable to refer an external review application directly to QCAT for determination, which is the process adopted in the Commonwealth *Freedom of Information Act 1982*. The University would be supportive of a similar process being introduced into the RTI Act.

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?

The discussion paper pointed out that the Information Commissioner has made one vexatious applicant declaration since the Acts commenced, and the University of Queensland was the applicant seeking the declaration. In fact, the Information Commissioner has only made one vexatious applicant declaration since the introduction of vexatious applicant provision in the FOI Act in 2005, and that was in 2012.

It is worth mentioning that the University made an earlier application to the Information Commissioner in 2007 to declare a different applicant vexatious. In that submission, the University had clear evidence that the dominant purpose of the applicant making FOI applications was to harass and frustrate University staff. The Commissioner took over 17 months to acknowledge the University's submission and in the end the University decided to abandon its efforts to have the applicant declared vexatious.

The University's experience is that the bar has been set "too high" for section 127 to be useful in dealing with vexatious applicants. Furthermore, Solomon[7] made the following observation about the similar provision in the FOI Act:

> *…the Government's decision to try to deal with vexatious applicants thorough amending the Act and inserting s. 96A was ineffective because the Information Commissioner*

[7] Solomon, The Right to Information; Reviewing Queensland's Freedom of Information Act, 2008 at p.203

decided not to apply its provisions, even though it was asked to do so by a number of agencies.

The University considers questions need to be raised with the Information Commissioner on the number of applications under section 127 (Vexatious applicant). It is noted that in the 2012-13 Annual Report, the Information Commissioner did not receive a single application under section 114 of the RTI Act or section 127 of the IP Act[8]. Is this indicative of agencies not having any vexatious applicants or a result of how the Information Commissioner administers this section of the RTI and IP Act?

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

No comment

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

No comment

10.5 If so, what should the timeframes be?

No comment

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

The contents of the report to Parliament on the operation of the RTI and IP Acts are set out in the relevant sections of the Acts and Regulations. The University is of the view that the annual report should contain information contained in the Acts and Regulations only and no further information.

[8] Office of the Information Commissioner, 2012-13 Annual Report, page 80.

12.1 Are there other relevant issues concerning the operation of the RTI Act or Chapter 3 of the IP Act that need to be changed?

No further issues.

SUBMISSION BY

THE UNIVERSITY OF QUEENSLAND

ON

REVIEW OF THE INFORMATION PRIVACY ACT 2009: PRIVACY PROVISIONS

November 2013

Notes:

1. This submission must be read in conjunction with the Discussion Paper on the Review of the *Information Privacy Act 2009:* Privacy Provisions. For clarity, the submission adopts the same numbering system as the Discussion Paper.
2. The University has only responded to questions that directly impact or relate to its administration of the Privacy Provisions, as set out in the *Information Privacy Act 2009.*

REVIEW OF THE INFORMATION PRIVACY ACT 2009: PRIVACY PROVISIONS

1.0 What would be the advantages and disadvantages of aligning the IPPs with the APPs, or adopting the APPs in Queensland?

The question of nationally consistent privacy laws has been a topical issue in the regulation of personal information handing in Australia. The Australian Law Reform Commission[1] has outlined the advantages and disadvantages of nationally consistent privacy laws and it is not necessary to duplicate these in this submission.

However, a move towards adopting the Australian Privacy Principles would assist in lessening the compliance burdens of the University contracting with the Commonwealth Government. It would also simplify the contracting process with respect to the handling of personal information. The University would be supportive of any initiative to simplify the cost of doing business with the Commonwealth Government. Furthermore, a move to align the IPPs with the APPs would also remove the inconsistency in privacy regulation between the University and its subsidiaries (a number of which are subject to the Commonwealth *Privacy Act 1988*).

2.0 Does the IP Act inappropriately restrict the sharing of information? If so, in what ways? Do the exceptions need to be modified?

The University is required to share personal information with various state and federal agencies and considers the current expectations in the IP Act are appropriate and adequate to facilitate the data sharing exercises. The University does not consider the exceptions in the IP Act require modification.

3.0 Should the definition of personal information in the IP Act be amended to bring it into line with the definition in the Commonwealth Privacy Amendment Act 2012?

As discussed above, the University would be supportive of a move to align the IPPs with the APPs. It follows that the University would also be supportive of aligning key definitions and scope of the IP Act with its Commonwealth counterpart. The University also agrees that

[1] Australian Law Reform Commission, For your Information: Australian Privacy Law and Practice (ALRC Report 108), Part 3 – Achieving National Consistency

modernising the definition of personal information, by aligning it with the definition in the *Privacy Act 1988*, would not significantly change the scope of personal information in Queensland.

4.0 Should government owned corporations in Queensland be subject to the Queensland's IP Act, or should they continue to be bound by the Commonwealth Privacy Act?

No comment

5.0 Should section 33 be revised to ensure it accommodates the realities of working with personal information in the online environment?

The focus of section 33 in 'transferring' personal information outside Australia has been problematic for the University. The University maintains registers of all graduates of the University as a matter of public record, in the form of graduation booklets, which are available for inspection in UQ's library and via an online verification of qualifications database (**electronic register**). The Privacy Commissioner has expressed the view that the University's electronic register may technically be in breach of the IP Act in relation to the transfer of personal information outside Australia through the use of the internet on the basis that students have not 'consented' to the transfer.

The Australian Government has, in the new Australian Privacy Principle 8 (to become effective in March 2014), shifted away from the use of the term 'transfer of personal information' to 'disclosure of personal information.' The University recommends a similar amendment to section 33 be adopted in Queensland. This would remove situations where agency's disclose personal information pursuant to the IP Act, but in turn may technically breach section 33 by making the disclosed personal information available on a website or other database that is accessible outside Australia.

6.0 Does section 33 present problems for agencies in placing personal information online?

7.0 Should an accountability approach be considered for Queensland?

The University has not experienced any difficulties with complying with section 33 in the procurement of cloud solutions. The University considers section 33 provides adequate measures to protect personal information held in the cloud. However, the University's discussion on question 5 (above) remains relevant to the problems section 33 presents in the online environment.

The University considers amending section 33 so that it applies to the 'disclosure' of personal information outside of Australia would overcome the challenges this section poses to publishing information on the internet. If this approach was adopted, there would be no requirement to introduce an accountability approach to the management of personal information outside Australia.

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

The University considers the current provisions in the IP Act relating to privacy complaints to be adequate. The requirements of the IP Act must be flexible to enable privacy complaints to be managed within the agencies broader complaints management system, which is a requirement for agencies under Public Service Commissioner Directive 13/06 Complaints Management Systems. Providing more detail about how complaints are to be managed in the IP Act may have a significant impact on an agencies existing complaints management system.

The University is of the view that the existing mechanisms are adequate and provide each agency with the flexibility to tailor the complaints processes to meet the individual needs of the agency. There are real concerns that increasing the prescriptiveness of the IP Act with respect to how privacy complaints are managed would introduce an additional layer of regulation.

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

The diverse nature of privacy complaints cannot be underestimated. A relatively simple complaint could be resolved within a week whereas a more complicated complaint may take up to 4 months. The University considers the provisions of the existing IP Act provide the flexibility in how the OIC deals with privacy complaints. Section 168 of the IP Act empowers the Privacy Commissioner to decline to deal with a complaint where the Commissioner is of the view that an agency has not yet had an adequate opportunity to deal with the complaint. Furthermore, the Privacy Commissioner could rely on the mediation powers to progress the more complicated complaints.

The University would be supportive of an amendment to the IP Act that would enable a complainant to refer a complaint to the Privacy Commissioner within the 45 business day period where an agency has responded and finalised the individual's privacy complaint. It is inherently unfair to require a complainant who has received a response from an agency to wait for the expiry of the 45 business day period before being able to refer the outcome of the complaint to the Privacy Commissioner for mediation.

10.0 Are additional powers for the Information Commissioner to investigate matters potentially subject to a compliance notice necessary?

No comment

11.0 Should a parent's ability to do things on behalf of a child be limited to Chapter 3 access and amendment applications?

The University is in a unique position where a representative number of students enrolled at the University are just under the age of 18. In dealing with these students, and their parents, the University takes all reasonable measures to protect the privacy of the student. This includes seeking the student's consent before disclosing any personal information about their studies at the University to a parent or guardian.

The University would be supportive of an amendment in the IP Act to limit a parent's ability to do all things on behalf of their child to Chapter 3 access and amendment applications. This amendment would strike a balance between parent's right to access information about their children and protecting the personal privacy of children, particularly those nearing adulthood.

12.0 Should the definition of 'generally available publication' be clarified? Is the Commonwealth provision a useful model?

The University is supportive of amending the definition of 'generally available publication' to the definition used in the Privacy Amendment Act. The University is supportive of any attempt to clarify definitions in the IP Act and considers the Commonwealth approach provides greater clarity on the type of document and whether or not access is subject to a fee.

Also, the concerns of the university with the current wording of section 33 of the IP Act (see the University's response to question 5.0) may also be overcome by clarifying that information in a publication can be in print, electronic or both. The amendment would put it beyond doubt that the University's online verification of qualifications database is a generally available document to which the privacy principles do not apply.

13.0 Should the reference to 'documents' in the IPPs be removed; and if so how would this be regulated?

No comment

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?

The practical application of IPP4 is that agencies would take reasonable steps to ensure personal information is protected against loss, unauthorised access, use, disclosure or other misuse. This is set out in subsection (2) to IPP4 which provides the "protection … must include the security safeguards adequate to provide the level of protection that can be reasonably be expected to be provided." The University would be supportive of an amendment that clarifies only reasonable steps are required to protect personal information from unauthorised access, use, disclosure or other misuse.

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

No comment