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RTI and Privacy Review
Department of Justice and Attorney-General
GPO Box 149
Brisbane Qld 4001
Sent via email: FeedbackRTIandprivacy@justice.qld.gov.au

Dear Department

**Submission to review of Right to Information Act 2009 and Information Privacy Act 2009**

Thank you for the opportunity to make a submission on the review of the Right to Information Act 2009 and Information Privacy Act 2009

This submission is made on behalf of Brisbane Residents United, Brisbane's peak body for community resident actions groups. Whose purpose is to:

- • Represent Brisbane and surrounding district residents and provide them with a united voice Governments on matters pertaining to urban planning and development.

- • Act as a resource centre, facilitating information sharing across established and start-up local resident associations.

The Department has invited submissions addressing the review of the Right to Information Act 2009 and Information Privacy Act 2009. In the advocacy work that Brisbane Residents United does, on behalf of its members, the quality and quantity of both the private and public information readily accessible is vital. Without easy access to information behind government processes and decision making, there is an increased risk of corruption growing in governance, and loss of the benefit that open, accountable governance through encouraging an informed public can provide to assisting democracy and good decision-making. *As they say: sunlight is the best disinfectant!*

The protection of the privacy of our citizens in an age changed dramatically and unexpectedly in unforeseen ways by technology is also an important issue for the public and Government at all levels. Australians' trust in government has fallen over the past year from 45% to 37% according to a **recent survey**. Improving the transparency and accountability of Government at all levels can only serve to improve this situation

The Right to Information Act 2009 and its successful implementation are essential so that the work our organization does can continue to assist the community in obtaining the best planning and development outcomes from all levels of our government. We also state from the outset that we believe that all Government information should be freely available to its citizens and there should be a very limited range of information that we should have to request and pay for under Freedom of Information.

## 1. Are the objects of the RTI Act being met? Is the push model working? Are there ways in which the objects could be better met?

### 1.1. We support the Governments stated commitment to the 'push model', favouring proactive disclosure of information, unfortunately it is not currently being adequately implemented – more action must be taken across government to proactively provide the public with information to avoid the need for RTI applications

The preamble to the RTI Act specifically recognises that 'information in the government's possession or under the government's control is a public resource', the benefits to a free and democratic society of releasing information in ensuring accountable governance and better quality decision making, and the government's commitment to proactively releasing information unless there is a good reason not to. These principles are part of the ***'push model'*** suggested by the Solomon Report, a Report undertaken by an independent panel, chaired by Dr David Solomon Am to review the previous *Freedom of Information Act 1992* (Qld) which the RTI Act replaced in response to the Solomon Report.

*In our experience:*

- *inadequate action is being taken by most government departments to actively provide the public with the information needed to ensure transparency and accountability in governance;*
- *much more frequently than not, the public must apply to access information they seek, actively, repeatedly pursue their request with the public office to which they applied and await lengthy delays while applications are being decided, often to the point of making the information redundant due to the delay; and*
- *decisions under RTI applications are often not in favour of disclosure, usually citing vague grounds of commercial-in-confidence, or broadly ongoing government deliberations.*

Government departments and local government authorities are not making all their information freely available. Data storage is comparatively cheap and this should mean that we should be able to see superseded (even if it is in an archived section of the site) as well as current information.

Government websites with the notable exception of the ABC are not well designed and information even when the information you want is there, is very difficult to find and sometimes is in a form that is difficult for the layman to interpret.

We as an organisation often provide submissions on Government policy, Acts etc. We have been very surprised to find that certain Government Departments refuse to provide what we consider to be pertinent public information.

Example One:

The Department of Infrastructure, Local Government and Planning. This department is currently conducting a complete overhaul of the planning system in Queensland and yet not one public or government submission for the whole process appears on its website or is freely available to the public. In contrast you can however see the submissions that were made to the Infrastructure, Planning and Natural Resources Parliamentary Committee about the Planning Act 2016.

We consider that the submissions that were made to the Parliamentary Committee provided very important information to our organisation on the type of advice that had been provided to the Government from various organisations and members of the public. This was particularly important is this case as there was very little community consultation about the Planning Act 2016 as most of the previous input into it had been done by industry and local government. The community who are actually paying for the legislation and who would be most affected by it were effectively excluded from the actual consultation process.

We have made numerous requests during the subsequent consultation process for other planning instruments, that the submissions received are made public. These requests have been refused with the excuse that the Department would compile a list of all the issues and make this publically available. There are two issues with this. The first being everyone should know who providing submissions to Government and the second is being how are we to judge that the department has properly compiled and weighted the issues. We have already seen such issue lists and they very rarely truly reflect the issues and are often presented in such a biased way that the information will only support an established conclusion.

Example Two:

Issues with Planning at both the State and Local Government levels. We believe the issues raised will be reflected in other areas and with other departments. Increasingly both Local and State Government Departments are making do with less staff. In the case of Local Government this has led to a decrease in the fully qualified and experienced planning staff and the necessary compliance staff to ensure that conditions attached to development applications are accurately and completely adhered to.

Local government is the level of government where corruption can have the biggest pay off and it is very difficult to prove. Planning is an area where the Crime and Corruption Commission has identified many issues and one of the major areas for complaints to them.

All development applications without exception should have to be fully documented, right down to the last phone call. This documentation should appear clearly and in a timely manner on a public website such as PD online. Developers should be fined if they submit reports that fail to clearly identify impacts of their proposed developments or provide false information about those impacts.

Reasons for decisions are good from SARA, however they miss the point of ensuring accountability to the advice of specialist agencies. Suggest reasons must include how a technical advice agency's advice has been integrated, or reasons why not.

Example Three:

It is vital to our member organisations that the information provided to all levels of Government is accurate and easily available. Politicians talk about transparent processes all the time. To us this means an open and honest process that does not attempt to hide secrets. This is we suspect not what politicians mean. Increasingly our access to information that allows us to defend our civil and legal rights is denied us.

Recently a community group was denied the accepted legal process of discovery in the Planning and Environment Court. Discovery as you are well aware is the legal practice of allowing both sides in a court case to ask the other side for access to any evidence relating to the case.

The Judge in this case accepted the Brisbane City Council (BCC) and the developer's submission that all the information required could be found on the BCC website on PD online, the Councils development application documentation website. If the group wished to pursue the process of full discovery they could argue it in court and be liable for the legal costs of the Council and developer in addition to their own if they lost.

This highlights several issues; the information now provided by developers on PD online is becoming less detailed. A lot of the important documentation of a development application is never put on PD online. This legal action ensures that over time less information would be available on PD online for accessible public scrutiny.

The Brisbane City Council in every court case it undertakes should be observing procedures that ensure fair and honest dealings with resident groups. These groups are generally undertaking these legal actions with very limited experience using after tax resources against experienced and well-resourced developers for whom the case is a tax deduction. All levels of government should always be acting in the best interests of their constituents.

Dirty deeds occur more easily in the dark and they take longer to discover. Increasingly the State planning legislation and the BCC town plan work to ensure that the planning process has become tortuous and less open to public scrutiny. Even planning professionals are finding the Brisbane City plan a nightmare to deal with.

All levels of government seem unable to deal with those that deliberately flout planning rules and regulations as demonstrated in the demolition of several of our timber and tin homes.

The BCC seems increasingly incapable of monitoring or enforcing conditions it placed on development approvals. Transparent processes and full disclosure in a timely manner are our only hope at both a political and legal level.

We are also distressed by the overuse of cabinet in confidence information where documents are sent through this process only as a means of protecting the Government of the day from proper scrutiny. We do not believe that once a contract is signed on the Governments behalf that there is any longer any need for commercial in confidence arrangements. How can the community judge if the Government or local authority is providing good value for money if it can never see the detail of how that money is spent?

We also believe that State Ministers and Members of Parliament should have published Diaries that truly reflect who they have meet every single day they hold office and this document needs to be updated daily on the relevant departments website.

### 1.2 All essential documents, such as copies of environmental licences and monitoring data, need to be made available to the public by legislation on a public register to avoid need for RTI applications

The 'push model' should inherently mean documents relevant to the public interest should be provided proactively by the departments as part of their 'publication schemes'. However, this has not been adequately undertaken to date. Therefore, it is necessary to ensure that legislation requires that documents such as licences, permits, authorities and similar, and any monitoring data generated by proponents when undertaking their activities must be published by departments on their websites.

Many documents of this nature are required to be on registers and made available to the public, however these are not always in an easily accessible form and frequently the applicant is required to actively pursue a department to obtain the documents. Also, there are frequently gaps in registers where essential documents aren't listed, such as monitoring data undertaken by a proponent in compliance with their environmental authority, however which was not required to be provided to the Department except if the Department requests it. All monitoring data generated by a proponent to determine whether they are complying with their relevant permits must be accessible by the public as it is in the public interest to understand the impact proponents are having on the public's health and the environment.

This would be greatly assisted by a central website for which all permits, authorities etc for each company/ project are listed to assist the public in understanding and assisting in a watchdog role in the compliance with relevant permits, authorities etc.

### 1.3 Too much weight is put in favour of non-disclosure, more weight should be provided to the public interest of disclosing information, as committed to in the Preamble to the Act:

- **Improve the balance of in decision making; and**
- **Narrow the number of considerations for when non-disclosure should be favoured**

When considering on balance whether to disclose documents requested through a RTI application, too often exemptions such as the commercial considerations of third parties, or

deliberations of government, are given more weight than the recognised public interest in disclosing documents, for example:

- for the protection of the environment;
- to reveal environmental or health risks;
- to contribute to promoting open discussion of public affairs and enhancing government accountability; or
- to ensure effective oversight of expenditure of public funds, for example for major projects.

*In our experience, often decisions made under the RTI Act have not adequately identified, considered or weighted the factors favouring disclosure in the public interest. This is not assisted by the fact that there are far more 'factors favouring non-disclosure' required to be considered under the Act (see Schedule 4). The drafting of the Act must be amended to ensure that disclosure is favoured in the public interest, to support the principle of open access to information to support accountable, transparent governance. Also, exemptions and the factors favouring non-dislosure must be more clearly defined.*

## 2. Is the privacy object of the IP Act being met? Is personal information in the public sector environment dealt with fairly? Are there ways that this object could be better met?

No. A lot of the information gathered by Government departments and entities at all levels is gathered for data collections sake rather than the strict collection of just the data that is actually required. This is expensive to gather and can easily be misused when cross referenced with other Government Departments. Increasingly this data has been shown to at risk of hacking and other criminal practices.

Government Departments should not be able to sell private information of any description without the expressed permission of the person.

## 3. Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs, statutory bodies with commercial interests and similar entities be changed? If so, in what way? Is there justification for treating some GOCs differently to others?

Yes all information from these GOCs, statutory bodies with commercial interests and similar entities should be freely available to the public as it all at its heart relates to asset management and expenditure on behalf and for the benefit of the public.

## 4. 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?

Yes. All interactions with Government are undertaken on behalf of the people of Queensland and as such should be able to be scrutinized by them.

## 5. Should GOCs in Queensland be subject to the Queensland's IP Act, or should they continue to be bound by the Commonwealth Privacy Act?

Both

## 6. Does the IP Act deal adequately with obligations for contracted service providers? Should privacy obligations in the IP Act be extended to sub-contractors?

Yes subcontractors should be required to comply with the privacy principles.

## 7. Has anything changed since 2013 to suggest there is no longer support for one single point of access under the RTI Act for both personal and non-personal information?

No

## 8. Noting the 2013 response, should the requirement to provide a schedule of documents be maintained?

The schedule should be maintained and used only if required. If agencies and applicants can reach mutual agreements without it this is obviously preferable.

## 9. Should the threshold for third party consultations be changed so that consultation is required where disclosure of documents would be 'of substantial concern' to a party?

**To decrease the processing time of applications, a higher threshold should be applied to consultation with third parties and third parties should not have ability to pause the time for considering an application**

Currently under the RTI Act, third parties are consulted where any RTI application may 'reasonably to be expected to be of concern' to that party. This is a very low threshold that is frequently triggered, causing more delays to decision-making processes and an increased amount of challenges being brought by third parties to applications. Third party consultation also currently causes a pause in the time for processing an application. The only choices an RTI applicant has is to withdraw its application, receive a 'deemed refusal' of its application or otherwise await for the department to complete consultation to re-start the processing clock.

*In our experience, third party consultation has caused lengthy and unnecessary delays without adequate explanation. Frequently a notification will be provided that the applicant must either allow an extension of time to consider an application (in some cases multiple extensions) or the application will be deemed refused; this is unfair and does not favour the public interest of disclosure. The threshold for consultation needs to be higher and strict time limits for consultation also need to apply.*

## 10. Although not raised in 2013, is the current right of review for a party who should have been but was not consulted about an application of any value?

The amount of information that has to be accessed under RTI applications should be minimal and so the current right of review in exceptional cases should not be onerous. These exceptions need to be very clearly defined.

## 11. Are the exempt information categories satisfactory and appropriate? Are further categories of exemption needed? Should there be fewer exemptions?

**Yes, the ability to refuse documents due to potential implications to commercial interests and deliberative processes must be better defined and restrained to ensure they are not abused, for example confidence of commercial interests should be limited to 'trade secrets', particularly for major projects effecting the environment and community**

Currently there is insufficient guidance provided as to when possible harm may be claimed to warrant favouring non-disclosure of documents.

*In our experience, many of the arguments raised by third parties, and put forward by agencies, regarding the detriment that might be suffered if information was released are speculative in nature and relate mainly to the private commercial interests of proponents or also broadly-considered 'deliberative processes'.*

To support the pro-disclosure bias intended to be promoted by the RTI Act, more detailed guidance must be provided to specify when possible harm favouring non-disclosure may be relied upon to justify non-disclosure, particularly in regard to commercial interests. We recommend that exemptions to disclosure relating to commercial interests should be limited to trade secrets as far as intellectual property rights or similar are applicable.

'Deliberative processes' must be better defined and narrowed in scope. This exemption is often relied on for the purpose of ensuring public servants are not hampered from being honest in the decision-making processes of governance. If the government encouraged a true culture of open, accountable, transparent governance in the public interest, honest internal debate would be recognised as a legitimate and healthy part of decision-making processes and should be celebrated, rather than feared at the risk of stepping out of whatever political opinion may be being dictated at the time.

Decision-makers must remember that the government is acting on behalf of the public, and in the interest of the public, with public tax money; any commercial activities and deliberations of the government are inherently in the public interest and should be open to the public.

We do not believe that once a contract is signed on the Governments behalf that there is any longer any need for commercial in confidence arrangements. How can the community judge

if the Government or local authority is providing good value for money if it can never see the detail of how that money is spent?

## 12. Given the 2013 responses, should the public interest balancing test be simplified; and if so how? Should duplicated factors be removed or is there another way of simplifying the test?

Yes duplicate factors should be removed and the whole test simplified. It does not serve the public's interest to discredit or cause harm to innocent people however the protections put in place must ensure that the guilty and corrupt are not shielded by legislation meant to protect the innocent.

The balance of the decision must always be weighted to disclosure. It is too easy for government departments and staff within them to deny the public a right to the information they own for spurious reasons. This must be avoided at all cost.

## 13. Should the public interest factors be reviewed so that (a) the language used in the thresholds is more consistent; (b) the thresholds are not set too high and (c) there are no two part thresholds? If so, please provide details.

Yes, the public interest factors should be reviewed and the threshold should be set to a low rather than a high threshold. For example much is made of having access to financial documents and budgets and yet these are the basic documents of government and should be available for public scrutiny and oversight.

## 14. Are there new public interest factors which should be added to schedule 4? If so, what are they? Are there any factors which are no longer relevant, and which should be removed?

As above

## 15. Are there benefits in departmental disclosure logs having information about who has applied for information, and whether they have applied on behalf of another entity?

Yes

## 16. Have the 2012 disclosure log changes resulted in departments publishing more useful information?

Yes

## 17. Should the disclosure log requirements that apply to departments and Ministers be extended to agencies such as local councils and universities?

Yes

**18. Is the requirement for information to be published on a disclosure log 'as soon as practicable' after it is accessed a reasonable one?**

Yes

**19. Do agency publication schemes still provide useful information? Or are there better ways for agencies to make information available?**

.Yes until it is superseded by all data being readily available. Data storage is comparatively cheap and this should mean that we should be able to see superseded (even if it is in an archived section of the site) as well as current information.

Government websites with the notable exception of the ABC are not well designed and information even when the information you want is there, is very difficult to find and sometimes is in a form that is difficult for the layman to interpret.

Information should be provided in the simplest most complete form that is easy to find and understand.

**20. Should internal review remain optional? Should the OIC be able to require an agency to conduct an internal review after it receives an application for external review?**

Yes but not required prior to moving to an external review.

**21. Should applicants have a right to appeal directly to QCAT? If so, should this be restricted to an appeal on a question of law, or should it extend to a full merits review?**

Yes and it should extend to a full merits review of the decision.

**22. Should the OIC have additional powers to obtain documents for the purposes of its performance monitoring, auditing and reporting functions?**

Yes, some government departments have a silo mentality and this needs to be discouraged. The OIC should have the powers to perform their function in a though, frank and fearless manner.

**23. Is the information provided in the Right to Information and Privacy Annual Report useful? Should some of the requirements be removed? Should other information be included? What information is it important to have available?**

Yes as it can be used to track the progress or lack thereof of these legislative bodies.

**24. What would be the advantages and disadvantages of aligning the IPPs and/or the NPPs with the APPs, or adopting the APPs in Queensland?**

It would cut down on compliance costs and make it easier for all affected groups to be aware and compliant with privacy legislation.

## 25. Should the definition of 'personal information' in the IP Act be the same as the definition in the Commonwealth Act?

We should adopt whichever definition offers the most protection for the consumer or patient.

## 26. Does the IP Act inappropriately restrict the sharing of information? If so, in what ways? Do the exceptions need to be modified? Would adopting a 'use' model within government be beneficial? Are other exceptions required where information is disclosed?

It is beneficial for agencies and government departments to share information however this must always be undertaken in the spirit of the original use for which the information was provided. If for example an agency is privatized that does not entitle it to sell or otherwise trade on information provided for use by a government organization.. Therefore we support adopting the 'use model' within government.

## 27. Does section 33 create concerns for agencies seeking to transfer personal information, particularly through their use of technology? Are the exceptions in section 33 adequate? Should section 33 refer to the disclosure, rather than the transfer, of information outside Australia?

There should be no exceptions if information leaves Queensland it should be subject to section 33 of the IP Act.

## 28. Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged? How should this be approached?

Yes

## 29. Should there be a time limit on when privacy complaints can be referred to QCAT?

No

## 30. Are additional powers necessary for the Information Commissioner to investigate matters potentially subject to a compliance notice under the IP Act?

Yes, they should match those available for its external review process.

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

Yes the Commonwealth provision provides a useful model. Please make allowances for the changes in technology.

## 32. Should IPP 4 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?

No, an agency should have to ensure that information in a document is protected against loss and misuse.

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

No

## 34. Are there other ways in which the RTI Act or the IP Act should be amended?

**Given the importance of access to information to ensuring open, accountable governance, free of corruption, more consultation should be undertaken as part of this review**

We commend the Government for undertaking this statutory review. It is unfortunate that it has been undertaken over a period including Christmas, when many people are on leave and unable to provide the review the attention it deserves. It is also unfortunate that there were not more proactive attempts to inform the public the review was being undertaken, including contacting all those who have previously made applications under the RTI and IP Acts.

We recommend that public hearings be undertaken as part of the review. Meaningful consultation requires diverse forums for the public to convey to the government their experience with the legislation under consideration, including opportunities for further discussion to support written submissions as this will garner far more insight to inform improvements to the Acts.

We call on the Queensland government to give serious consideration to our concerns to ensure that Queensland is moving towards the best State and Local Government governance system in Australia; one that through transparency and accountability truly inspires confidence and certainty from all stakeholders and empowers our communities to meaningfully participate in all levels of government. Should you require any further information I can be contacted on [redacted].

Yours sincerely

Elizabeth Handley
President Brisbane Residents United Inc