LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

01 February 2017

RTI and Privacy Review
Department of Justice and Attorney-General
GPO Box 149
Brisbane QLD 4001
Email: FeedbackRTIandprivacy@justice.qld.gov.au

Dear Sir/Madam

Thank you for the opportunity to provide a submission to the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009.*

The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association set up solely to serve councils and their individual needs. The LGAQ has been advising, supporting and representing local councils since 1896, allowing them to improve their operations and strengthen relationships with their communities. The LGAQ does this by connecting councils to people and places that count; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional and political excellence.

The LGAQ commissioned King & Company Solicitors to prepare comments on the questions posed by the Consultation Paper which are of interest or concern to local government. A copy of the advice is enclosed. It draws on King & Company's dealings with councils in relation to the operation of the RTI Act and IP Act. The views expressed in the enclosed advice should be taken as the views of the LGAQ for the purpose of this review.

King & Company's experience in advising councils regarding RTI access applications indicates that councils have a strong commitment to the primary object of the RTI Act 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 to give the access".

However, as discussed throughout the enclosed advice, there are some minor issues posed by the wording of certain provisions of the RTI Act, as well as the administration of the RTI Act, which are potentially making it more difficult for council officers to efficiently process access applications, including the:

a) Unnecessary existence of two points of access to documents of an agency under both the RTI Act and the IP Act (discussed further at paragraphs 24 to 28);

b) Requirement for a schedule of relevant documents to be provided in response to an RTI access application (discussed further at paragraphs 29 to 33);

c) Low "concerned" threshold set by the section 37 of the RTI Act for when third parties are required to be consulted in relation to documents the subject of an RTI access application (discussed further at paragraphs 34 to 37); and

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d) Unaddressed potential for the public interest balancing test which applies to RTI access applications to be simplified (discussed further at paragraphs 47 to 50).

As discussed further in the response to Question 17 of the Consultation Paper (see paragraphs 55 to 60), a mandatory requirement for councils to publish disclosure logs may have an adverse impact on the resources of councils by consuming additional office time which could otherwise be spent processing access applications. In the LGAQ's view, the additional workload outweighs the potential benefit of councils being required to maintain a disclosure log.

Please do not hesitate to contact [redacted], Principal Advisor – Intergovernmental Relations (email [redacted], phone [redacted]) should you have any questions about the submission.

Yours sincerely

[redacted]

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CONSULTATION PAPER – DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL REVIEW OF THE *RIGHT TO INFORMATION ACT 2009* AND *INFORMATION PRIVACY ACT 2009*

We refer to the Local Government Association of Queensland's request for our advice regarding the Consultation Paper published by the Department of Justice and Attorney-General in December 2016 entitled "2016 Consultation on the Review of the *Right to Information Privacy Act 2009* and *Information Privacy Act 2009*" ("**the Consultation Paper**").

Background

1. The Consultation Paper seeks the views of interested people, agencies and organisations regarding many of the questions posed by the Discussion Papers[1] produced by the Department in 2013 as part of the ongoing review of the *Right to Information Act 2009* ("**RTI Act**") and *Information Privacy Act 2009* ("**IP Act**"), as well as other issues not raised in the 2013 Discussion Papers.

2. The LGAQ has asked us to provide comments on the questions posed by the Consultation Paper which are of interest or concern to local government, particularly in relation to:

   (a) Whether the primary objectives of the RTI Act and IP Act remain valid, and how existing provisions may be improved to better meet those primary functions;

   (b) Question 17 of the Consultation Paper which asks: *"should the disclosure log requirements that apply to departments and Ministers be extended to agencies such as local councils and universities?"*; and **(REDACTED BY AUTHOR)**

[redacted]

3. Our advice below discusses our views in relation to questions contained within the Consultation Paper which we consider are of interest or concern to local governments. Our comments should be read in conjunction with the background material relevant to each question included within the Consultation Paper. Where relevant, we also provide general comments regarding difficulties and concerns previously addressed by us directly to various Councils, in relation to the operation of the RTI Act and IP Act.

[1] Queensland Government, Department of Justice and Attorney General, August 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009* and the August 2013 Discussion Paper: Review of the *Information Privacy Act 2009*: Privacy Provisions.

Advice

Question 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?

4. Our experience in advising Councils regarding RTI access applications indicates that Councils have a strong commitment to the primary object of the RTI Act 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 to give the access"*.[2]

5. However, as discussed throughout this advice, there are some minor issues posed by the wording of certain provisions of the RTI Act, as well as the administration of the RTI Act, which are potentially making it more difficult for Council officers to efficiently process access applications, including the:

   (a) Unnecessary existence of two points of access to documents of an agency under both the RTI Act and the IP Act (discussed further at paragraphs 24 to 28 below);

   (b) Requirement for a schedule of relevant documents to be provided in response to an RTI access application (discussed further at paragraphs 29 to 33 below);

   (c) Low "*concerned*" threshold set by the section 37 of the RTI Act for when third parties are required to be consulted in relation to documents the subject of an RTI access application (discussed further at paragraphs 34 to 37 below); and

   (d) Unaddressed potential for the public interest balancing test which applies to RTI access applications to be simplified (discussed further at paragraphs 47 to 50 below).

6. Section 2 of the "Preamble" to the RTI Act establishes what the Department describes as the "Push Model" for providing access to government documents in Queensland, and provides that:

   "The Government is proposing a new approach to access information. Government information will be released as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort".

7. There has previously been recognition in both the Discussion Paper published by the Department in August 2013 entitled "Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*",[3] and in the submissions made in response by the Office of the Information Commissioner Queensland ("**OIC**")[4] that the "Push model" is supported well by:

   (a) Section 21 of the RTI Act which has the effect that agencies (including Councils) must maintain "Publication Schemes" on their websites containing certain information regarding how they process access applications; and

   (b) Section 78A of the RTI Act which has the effect that agencies (other than departments and Ministers) *may* keep a "disclosure log", generally kept on an agency's website, which contains details of certain documents which the agency has decided to release to applicants.

8. Previous discussions we have had with Council officers indicate that prospective applicants frequently contact them before making an access application. Officers have made comments to the effect that the publication scheme information on Council websites is practical because officers can easily refer applicants to the website to read important information concerning the making and processing of applications, and the fact that many documents they are considering access to are available on Council's website (e.g. Council meeting minutes) or by contacting Council (e.g. for access to planning documents

[2] See section 3(1) of the RTI Act.
[3] See page 7.
[4] See pages 26 and 29 of OIC, November 2013 Submission to Department of Justice and Attorney–General Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*.

available for inspection and purchase under the *Sustainable Planning Act 2009*). This "publication scheme" information sometimes avoid applications unnecessarily being made for documents which are already on Council's website or by applicants who are not willing to comply with other requirements for making a valid RTI application (e.g. pay the required application fees).

9. We also consider that the "Push Model" would be further supported by the RTI Act and IP Act being amended as previously proposed by the OIC to include a mechanism "*...which will allow an agency time to clarify the scope of a valid application prior to commencement of the processing period*".[5] We consider that this would further support the "Push Model" in a local government context because past feedback we have received is that officers sometimes receive applications which are worded in a way which are incomprehensible or ambiguous and which need to be clarified with the applicant before processing of the application can commence.

10. However, as discussed further in our response to Question 17 of the Consultation Paper below (see paragraphs 55 to 60 below), a mandatory requirement for Councils to publish disclosure logs may have an adverse impact on the resources of Councils by consuming additional officer time which could otherwise be spent processing access applications.

Question 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?

11. Section 3(1) of the IP Act provides that its primary object is to "*provide for the fair collection and handling in the public sector environment of personal information*".

12. In our experience, Council management, officers and councillors frequently have need to consider the Information Privacy Principles ("**the IPPs**") contained within the IP Act which apply to the collection, keeping, use and disclosure of personal information.

13. However, as discussed throughout this advice, there are some issues posed by the wording of certain provisions of the IP Act, as well as the administration of the IP Act, which are potentially inhibiting the ability of Councils to operate in a manner consistent with its objects, including the:

(a) Low "*concerned*" threshold set by section 56 of the IP Act for when third parties are required to be consulted in relation to documents the subject of an IP access application (discussed further at paragraphs 34 to 37 below);

(b) Unaddressed potential for the public interest balancing test which applies to IP access applications to be simplified (discussed further at paragraphs 47 to 50 below);

(c) Cumbersome definition of "personal information" contained in section 12 of the IP Act (discussed further at paragraphs 70 and 71 below);

(d) Difficulties sometimes posed by IPPs 10 and 11 for the sharing of information between agencies (e.g. Council to Council, Council to Queensland Government department or other statutory authority) (discussed further at paragraphs 72 to 77 below);

(e) Potential to implement a revised definition of "generally available publication" which would provide greater certainty for agencies when applying this important exception to the IPPs (discussed further at paragraph 81 below);

(f) Potential for IPP 4 to place an unreasonable burden on agencies in relation to protecting against loss and misuse of personal information (discussed further at paragraphs 82 to 85); and

[5] See pages 103 and 104 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act* 2009 and Chapter 3 of the *Information Privacy Act* 2009".

(g) Need for legislative clarification of whether IPPs 2 and 3 apply to both direct and indirect collection of personal information by agencies (discussed further at paragraphs 86 to 89 below).

Question 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?

14. The RTI Act and IP Act do not currently apply to documents of contracted service providers performing government functions (e.g. a successful tenderer for a Council contract). That being the case, as the OIC noted in its submission to the 2013 Discussion Paper[6] documents held by contractors "*...can be sought from a government agency under the RTI Act if the agency also has possession of the documents or has a legal right to retrieve the documents. A government will not always have a legal right to the documents and determining whether or not a legal right exists can be time consuming, as can actually receiving the documents from the contractor.*"

15. The Consultation Paper notes at page 14 that the current approach of the Act in relation to contracted service provider documents "*...may mean a degree of accountability is lost because there is no statutory right of access to documents held by service providers*" and suggests two alternative options for addressing this potential risk:

(a) Option 1: Contracted service providers becoming "agencies" required to process access applications requirements of the RTI Act and IP Act (e.g. requirements to prepare publication schemes); or

(b) Option 2: Adopting the approach provided for by section 6C of the *Freedom of Information Act 1982* (Cth) where if a freedom of information application is made to an agency for documents held by the contracted service provider, the service provider is required to provide the documents to the relevant government agency, who is responsible for processing the application.

16. The OIC's submission to the 2013 Discussion Paper stated that it was opposed to the implementation of option 1 because it may result in an unreasonable cost and administrative burden on non-government bodies, but also did not positively recommend option 2 noting further investigation was required in relation to whether this amendment was required.[7]

17. We agree with the statement made in the Consultation Paper and with the OIC's 2013 submission that making contracted service providers responsible for deciding an access application may result in an unreasonable cost and administrative burden on these non-government bodies. However, we also note that making contracted service providers "agencies" would also carry with it the additional risk of contractors potentially releasing information to applicants without having engaged in proper consultation with third parties affected by the release of the information, including Councils. This may result in adverse outcomes for Councils, given that some documents held by contractors may contain commercial information which they have agreed to keep confidential or other security sensitive information (e.g. security sensitive building plans).

18. We also foreshadow that a significant workload would be placed on local governments if option 2 was implemented including:

(a) The time Council officers will need to spend drafting requests to contracted service providers requesting that they search for and provide relevant documents;

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[6] See page 40 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act* 2009 and Chapter 3 of the *Information Privacy Act* 2009".

[7] See pages 39 and 40 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*".

(b) The time involved in Council officers following up contracted service providers who do not comply with requests to provide documents by a stated deadline, or do not provide all documents requested; and

(c) Council officers having to deal with internal review applications and/or respond to OIC external reviews in relation to documents provided by contracted service providers, especially review applications alleging that searches for documents performed by contractors were insufficient in circumstances where Councils have no direct control over the sufficiency of the searches performed.

19. None of the material contained within the Consultation Paper, the 2013 Discussion Papers or the OIC submissions substantiates that the current legislative approach towards this issue is resulting in applicants not being able to seek access to documents central to ensuring the accountability and transparency of government contractors. Given this, we consider that there is currently no sound basis for concluding that there is a need to implement either option 1 or 2, especially given the significant administrative burden their implementation would place on agencies.

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

20. Section 35 of the IP Act sets out the requirements for when and how agencies are required to bind a contracting service provider to certain IPPs. The OIC has produced a useful guideline and a "Contracted service provider checklist" to assist agencies in complying with their contracted service provider related privacy obligations.[8]

21. However, we consider that any extension of privacy obligations to sub-contractors would carry with it additional legal and administrative burden for Councils. It would do so by necessitating the development of service arrangements and contracts which seek to ensure that either the use of sub-contractors is prohibited or exclude liability for any non-compliance by the sub-contractor with the applicable IPPs.

22. We have not seen any arguments (or other evidence) to suggest why it is necessary to consider making this amendment as it was not raised in the 2013 Discussion Papers.

23. Even if this amendment is necessary, we consider that any amendment of the IP Act to bring sub-contractors within its jurisdiction ought minimise the legal and administrative burden posed to contracting local government agencies by expressly providing that:

(a) any head contractor who has been successfully "bound" to comply with the IPPs by a contracting agency under section 35 of the IP Act is wholly responsible for ensuring compliance with any requirements to bind a "sub-contractor" they engage to comply with the IPPs and for any privacy breach by the sub-contractor should they fail to bind the sub-contractor; and

(b) that a contracting agency bears no liability whatsoever for a privacy breach by a sub-contractor unless it fails to ensure that the head contractor is bound by the IPPs.

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

24. We consider that the answer to this question is "no".

25. Comments we have received from Council officers responsible for deciding access applications made under the RTI Act and IP Act indicate that they would support a single point of access under the RTI Act for both personal and non-personal information.

[8] Copies of this Guideline and Checklist is accessible at: https://www.oic.qld.gov.au/guidelines/for-government/guidelines-privacy-principles/contracted-service-providers

26. A starting point in explaining why is to note that when a Council receives an access application seeking access to documents either under the RTI Act or the IP Act, responsible officers must go through the often time intensive process of:

(a) Establishing whether the access application should have been made under either the RTI Act or IP Act;

(b) If the access application has been incorrectly made under the IP Act, complying with the process provided for by section 54 of the IP Act for transferring the application to the RTI Act;

(c) If the access application has been incorrectly made under the RTI Act, complying with the process provided for by section 34 of the RTI Act for transferring the application to the IP Act; and

(d) In some circumstances, being required to make a reviewable decision under section 54(5)(b) of the IP Act that an access application purportedly made under the IP Act does not seek personal information and therefore cannot be dealt with under the IP Act.

27. Determining whether an access application ought to be processed under the IP Act or RTI Act can be complex depending upon the nature and number of the documents at hand. As the OIC noted in its submission to the 2013 Discussion Paper, *"Section 40 of the IP Act creates a right of access to documents "to the extent they contain the applicant's personal information". OIC has interpreted this section as creating a right of access to an entire document, so long as it contains some amount of the applicant's personal information, and not as a right of access only to the personal information within the document This means that access to both personal and non-personal information is available under the RTI and the IP Act."*[9] In this regard, we have previously dealt with matters where Council officers responsible for processing and deciding applications have been confused as to whether to apply the RTI Act and IP Act to particular access applications and subsequently sought our advice concerning which Act applies. These difficulties also stem from the cumbersome definition of "personal information" provided for by section 12 of the IP Act (discussed further at paragraphs 70 and 71 below).

28. We also agree with the OIC's submission to the 2013 review that retaining the separation of access rights between the RTI Act and IP Act makes little practical sense given that:

"..The RTI and IP Acts prescribe how an access application is to be processed. Apart from Charges Estimate Notice (CEN) and Schedule of Documents obligations in the RTI Act these provisions are essentially identical. Identical review rights are set out in both Acts, as are the processes to be followed for the reviews. The RTI Act and the IP Act both set out when an agency can refuse to deal with an application and what processes it must first follow; these provisions in the IP and RTI Acts are again, effectively identical...

The RTI Act sets out when access to a document can be refused. The IP Act does not; instead it refers IP Act decision-makers back to the RTI Act and requires them to use it to make their IP Act access decision. This can be confusing for applicants and can add unnecessary complexity to both the decision making process and to communicating the reasons for decision". [10]

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

29. Our experience in advising Councils in relation to RTI access applications tends to support the removal of the requirement in section 36 of the RTI Act for agencies to provide applicants with a schedule of relevant

[9] See page 30 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*".
[10] See page 31 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*".

documents. There is no requirement to provide a schedule of relevant documents for an IP Act access application.

30. A schedule of relevant documents is only required to give a brief description of the classes of documents (e.g. letters, emails, reports, etc) an agency has located relevant to the application and set out the number of documents in each class. One intended function of these schedules to provide applicants who have been issued with a Charges Estimate Notice with an indication regarding the classes of documents the agency has located in response to their application, with a view to applicants being able to elect to "narrow the scope" of their application to reduce the applicable charges.

31. However, we agree with the OIC's submission in response to the 2013 Discussion Paper that: *"...Generally most applications relate to a specific subject matter or entity, rather than to specific kinds of documents, and applicants may not be aware of which agency documents may contain the information they are seeking. As such, a Schedule of Documents that lists how many of what type of documents relate to a broad subject may be of limited assistance to the applicant in narrowing the scope of their application".*[11]

32. In this regard, we note that applicants frequently contact Council officers seeking additional information regarding particular documents included within a schedule of relevant documents, only to be advised for a range of reasons (e.g. due to potential third party objection, the existence of personal information in relevant documents) that the only information Council can presently provide in relation to the documents is included within the schedule provided.

33. Despite their apparent limited utility, we have frequently been informed by Council officers that preparing a schedule of relevant documents can be time consuming as this task requires officers to peruse each and every document which falls within the scope of the application and manually draft the schedule to ensure that the number of relevant documents recorded in each class is accurate.

Question 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?

34. We agree with the submissions made to the 2013 review that the threshold for when a third party is required to be consulted concerning a document requested by an access application should be amended from "*concerned*" to "*substantially concerned*".

35. Section 37 of the RTI Act and section 56 of the IP Act currently provide that an agency may only give access to a document which contains information the disclosure of which could reasonably be expected to be of concern to a third party if it has first taken the steps that are reasonably practicable to obtain the views of the relevant third party about whether:

(a) the document is a document to which the Act does not apply; or

(b) contains exempt or contrary to the public interest information.

36. In our experience, this low "*concerned*" threshold for when a third party is required to be consulted has resulted in decision-makers within Councils taking the justifiably cautious approach of consulting with a third party in all cases where a document being considered for release makes any mention of a third party's name or could be used to identify the third party and the applicant has not indicated that they are willing to accept copies of released documents containing deletions of personal information. Taking this justifiably cautious approach has potentially resulted in:

(a) An overall increase in the number of third parties being consulted by Council officers;

[11] See page 54 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*".

(b) Third parties being consulted even where the Council decision-maker has formed a strong preliminary view that they will decide to release the document notwithstanding any objection as no exempt or contrary to the public interest information is contained within the document;

(c) Third parties being concerned by and spending time on drafting responses to third party consultation letters in circumstances where the Council decision-maker is likely to release the information despite their objection, and the OIC is likely to uphold this decision in any subsequent external review; and

(d) In some cases, applicants waiting many months for documents (subject to deferred access due to third party objection) to be released, pending the objecting third party exercising all of their internal and external review rights against the Council's decision.

37. Ultimately, amending the RTI Act and IP Act to only require consultation with a third party who may reasonably be expected to be "*substantially concerned*" by the release of a document may result in agencies taking a less cautious approach to third party consultation, and eventually decrease the potential negative consequences of third party consultation outlined at paragraph 36 above. However, we consider that any change to the test should be accompanied by a statutory guideline or other advisory guideline produced by the OIC which clearly specifies the criteria to be considered by agencies when deciding if a document can reasonably be expected to be of "substantial concern" to a third party.

Question 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?

38. We consider that the answer to this question is "no" for two reasons.

39. Firstly, whilst we have never advised a Council regarding an internal or external review application against a decision to disclose a document on the basis that the agency did not seek the views of a third party, we apprehend that the existence of this review right may have exacerbated the potential overuse of third party consultation identified at paragraph 36 above.

40. Secondly, we agree with the observation made within the Consultation Paper at page 16 that this review right is rarely utilised and/or of little practical benefit because third parties who are not consulted either never hear about the decision or hear about a decision to release a document after it has already been provided to the applicant.

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

41. On balance, we consider that the exempt information categories provided for by Schedule 3 of the RTI Act are satisfactory and appropriate and consider that no exemptions should be added or removed given that:

(a) Guidelines and decisions produced by the OIC have developed which in many cases provide clear guidance for agencies on how to apply the exemptions as currently worded; and

(b) The OIC's submissions to the 2013 review provide evidence to suggest the current exemptions can generally be applied effectively by agencies and the OIC without giving rise to ambiguity or unnecessary complexity, and without undermining the purpose or objects of the RTI Act or IP Act.

42. We have specifically considered whether the "deliberative processes" public interest harm factor provided by section 4 of Schedule 4, Part 4 of the RTI Act (which sometimes applies to decisions concerning whether release a documents made by Councils) ought be an exemption to the release of documents under the RTI and IP Acts.

43. Section 4(1) of Schedule 4, Part 4 of the RTI Act provides, subject to certain exceptions, that:

"...disclosure of the information could reasonably be expected to cause a public interest harm through disclosure of—

(a) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(b) *a consultation or deliberation that has taken place; in the course of, or for, the deliberative processes involved in the functions of government.*

Examples of information of the type mentioned in subsection (1)—

(a) *a document prepared by an agency about projections of future revenue for the State*

(b) *a document prepared to inform a decision by an agency about potential road routes, where disclosure of all potential routes, including those that are subsequently rejected, could have a negative impact on property values or cause community concern".*

44. If this public interest harm factor was an exemption, Councils would be able to refuse access to any "deliberative process" information, even if the application of the public interest balancing test would not otherwise allow the conclusion that release of deliberative process information would be contrary to the public interest.

45. In support of this factor being an exemption is that disclosure of deliberative process information may mean that good, but contentious policy ideas are not considered further and pursued by Council officers out of concern that documents pertaining to these deliberative processes will be released to the public and councillors.

46. However, we consider it very unlikely that the State Government would amend the Act to provide for a "deliberative processes" exemption, with any submission that it ought be an exemption rather than a public interest harm factor likely to be viewed as undermining the pro-disclosure bias and public interest objects of the Act. In this regard, the OIC's submissions to the 2013 review objected to the creation of a "deliberative processes" exemption with the following persuasive argument:

"OIC considers that deliberative process scenarios can vary and therefore the public interest test is more likely to be suitable due to its flexibility than an exemption information provision with set criteria. In OIC's experience public interest factors favouring disclosure of deliberative processes information are closely and strongly aligned with the stated policy outcomes of open, accountable and participatory government that accompanies the now repealed FOI Act and with Parliament's stated reasons for enacting the RTI Act.

Scrutiny of government decisions, and the reasons and background material behind them, has and remains one of the primary purposes of RTI legislation. It would therefore be particularly difficult to achieve an appropriate balance in creating an exempt information provision to deal with a differing range of circumstances (footnotes omitted)".[12]

Question 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?

47. Our discussions with Council officers indicate that the various components of the public interest balancing test provided for by section 49 and Schedule 4 of the RTI Act are understood by officers, with officers frequently having need to consider the factors irrelevant to the public interest, factors favouring disclosure in the public interest, factors favouring non-disclosure and the public interest harm factors.

[12] See page 72 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*".

48. We agree with the OIC's submission to the 2013 review that "*The primary difficulty associated with the public interest test in its current form is the existence of two lists of factors favouring non-disclosure: the part 3 factors favouring non-disclosure and the part 4 harm factors....OIC considers that having two list of factors favouring non-disclosure is not required to ensure the test operates as intended. When applying the test, the weight attributed to the various factors depends on the nature of the information sought and the circumstances of the particular application. A factor is not given additional weight simply because it happens to be a harm factor in schedule 4, part 4*".[13]

49. Accordingly, we consider that removing the distinction between the Part 3 and Part 4 factors (while retaining the substance of each of these factors in a consolidated list) would reduce the likelihood of confusion and error in the application of the public interest balancing test.

50. This proposed amendment is supported by previous discussions we have had with a Council acting under the misapprehension that if a Part 4 harm factor applied to information contained within a document it is less likely to be required to be released than if a Part 3 public interest factor favouring non-disclosure applied to the information. However, nothing in the RTI Act or IP Act supports this conclusion, with a decision-maker required to weigh all Schedule 4 public interest factors equally.

Question 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.

51. The Consultation Paper is correct in that it notes that certain Schedule 4 public interest factors contain higher thresholds than others and contain two part thresholds. However, we apprehend that there is no compelling reason for the Schedule 4 factors which Council officers have become familiar with to be amended given that:

(a) the factors are not intended to be an exhaustive list of the public interest considerations of a decision-maker can take into account; and

(b) the existing factors reflect the parliament's intention regarding the key public interest considerations which are required to be taken into account.

52. The effect of the Schedule 4 factors being non-exhaustive is illustrated by the example of a decision-maker considering whether the following public interest factor favouring disclosure contained within Schedule 4, Part 2, section 1 of the RTI Act applies to information contained within a document:

"Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability".

53. In order for this factor favouring disclosure to apply, the decision-maker will need to be satisfied that disclosure could reasonably be expected to promote both the open discussion of public affairs and enhance the government's accountability. However, a decision-maker is not precluded from taking into account matters relevant to this public interest factor just because both of the requirements necessary for this public interest factor to apply cannot be satisfied. Indeed, the fact that the Schedule 4 factors are non-exhaustive means that the decision maker can still take into account that the disclosure of the information could reasonably be expected to result in only one of these outcomes (i.e. promote open discussion of public affairs or enhance the government's accountability).

[13] See pages 65 and 66 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*".

Question 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?

54. On the basis of our previous experience in advising Council officers regarding the application of the public interest balancing test, we do not consider that any public interest factors should be removed or that any public interest factors should be added, especially given that the factors stated in Schedule 4 are a non-exhaustive list.

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

55. A mandatory requirement to maintain a disclosure log will place a significant additional administrative burden on local governments, particularly smaller rural and remote Councils.

56. In general terms, a disclosure log can be described as a list of documents released in response to RTI access applications and is generally published on an agency's website.

57. Section 78A of the RTI Act currently provides Councils and other agencies (other than departments and Ministers) with discretion as to whether or not they maintain a disclosure log. If an agency who has a disclosure log makes a decision to give access to a document that does not contain the personal information of the applicant which is accessed by the applicant during the access period, the agency may include a copy of the document in the disclosure log (if this is reasonably practicable) or otherwise include details in the disclosure log identifying the document. Even if a document has not been accessed by the applicant within the access period, an agency may include in its disclosure log details of a document it has released, including any applicable charges for accessing the document. Importantly, before copies of documents or identifying information about a document can be included within the disclosure log the agency must first delete any information from the document/identifying information required to be deleted under section 78B of the RTI Act (e.g. information the publication of which is prevented by law, defamatory information, information amounting to an unreasonable invasion of an individual's privacy or which would cause substantial harm to an entity).

58. However, section 78 of the RTI Act imposes a mandatory requirement for departments and Ministers to keep a disclosure log. In addition to the requirements for what is required to be published on a disclosure log kept by other agencies should they elect to establish one, departments and Ministers are also required to:

(a) Publish on their disclosure log as soon as practicable after each application is made, details of the information being sought by the applicant and the date the application was made; and

(b) In cases where they are authorised to publish a copy of a released document on the disclosure log, also publish on the disclosure log the applicant's name and the name of any entity for whose benefit access to the document was sought as soon as practicable after the document is accessed (subject to the redaction of information mandated by the exclusions within section 78B).

59. A potential benefit of Councils being required to maintain a disclosure log is that it would enable Council officers who receive enquiries from a prospective applicant to give the applicant access to a previously accessed document (or part thereof) under the disclosure log provisions. In addition, Council officers who receive RTI access applications seeking access to documents published or identified on a disclosure log may be able to refuse access to the documents on the basis that they are available through the disclosure log provisions, pending giving the applicant access to the document under the disclosure log provisions of the RTI Act.[14]

[14] See section 53(a) of the RTI Act.

60. However, imposing a mandatory requirement for Councils to establish disclosure logs in the form currently required to be kept by departments and Ministers will result in an additional workload which outweighs these benefits given that:

(a) Some Councils may need to upload many documents to their websites which will require officers to complete the time consuming task of the redacting of information from each document they are required to delete under section 78B;

(b) Council decision-makers needing to consider whether it is appropriate to identify the name of a person or an entity (e.g. company or business) who made the application in its disclosure log having regard to section 78B (e.g. whether disclosing the name of an entity would amount to an unreasonable invasion of an individual's privacy or substantially harm an entity). This may lead to complaints being made to Councils, especially in rural and remote areas where many people know each other/there are small numbers of businesses. These persons/business owners may not wish for it to be common knowledge that they made an access application seeking certain information or obtained access to certain documents; and

(c) Some Councils needing to devote additional information technology resources towards the establishment of disclosure logs on their websites in addition to the current requirements for them to maintain a publication scheme.

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

61. We consider that publication schemes are useful and should be retained for the reasons outlined at paragraph 8 above.

Question 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?

62. A requirement for mandatory internal review or a new power for the OIC to direct that an agency complete an internal review would likely increase the workload of local governments.

63. In this regard, mandatory internal review would likely lead to an overall increase in the number of internal review applications as in our experience many applicants currently choose to proceed straight to external review without seeking an internal review presumably on the basis that they believe that the internal reviewer (typically the Chief Executive Officer) will be reluctant to change the original decision. This would place an additional burden on the time of Council management staff because applicants are required to be provided with a detailed prescribed written notice which fully explains the internal review decision and the reasons for the decision.

64. In addition, in our experience it is fairly common for applicants to be dissatisfied with internal review decisions in respect of access applications and subsequently seek an external review by the OIC. Mandatory internal review would not obviate the need for Councils to fully comply with all requests for information and submissions made by the OIC during the course of the external review process.

Question 21: Should applicants have a right of 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?

65. A right of appeal directly to QCAT against decisions made by an agency in relation to access applications ought be opposed by agencies on the basis that:

(a) Applicants already have a direct right of appeal to the OIC, a statutory body with specialised expertise in relation to access applications, including in determining complex questions of law raised by the RTI Act and IP Act; and

(b) Any such amendment may result in additional administrative and legal costs for agencies (including Councils) than the current direct right of external review to the OIC, especially if QCAT requires appearances by Council officers at the Tribunal and/or grants leave for parties to be legally represented in the appeal proceedings.

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

66. The OIC currently has broad powers to access documents from agencies (including documents subject to legal professional privilege) during an external review. However, we are unable to identify any cogent reason to justify agencies having to disclose documents subject to important rights of legal professional privilege (e.g. legal advice Councils obtain in relation to RTI and IP access applications) to the OIC for monitoring, reporting, auditing or performance monitoring purposes not associated with an external review.

Question 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?

67. Local governments are currently required to comply with the IPPs contained within Schedule 3 of the IP Act.[15]

68. The Consultation Paper notes at page 26 that the key differences between the IPPs and the Australian Privacy Principles (APPs)[16] governing agencies subject to the *Privacy Act 1988* (Cth) ("**Commonwealth Privacy Act**") include:

(a) The APPs have a privacy principle addressing direct marketing;

(b) The APPs require that all entities under the Act have a privacy policy;[17]

(c) The APPs require sensitive information (defined to include personal information about an individual's race or ethnic origin, political opinion, and health information) to be distinguished from other personal information, and given a higher level of protection); and

(d) The APPs also use different terminology to the IPPs.

69. The additional requirements for Councils to develop an APP Privacy Policy, deal with "sensitive information" in accordance with the APPs and other substantive and terminology changes,[18] would result in additional legal and administrative burdens for local governments which the OIC cautioned against in their submission to the 2013 review when they stated:

"OICs experience is that agencies have worked hard over the last four years to develop a strong familiarity, and corresponding high level of compliance, with their existing privacy obligations, particularly local government, which had not previously been subject to privacy regulation. As

[15] Only "Health agencies" are required to comply with the National Privacy Principles ("NPPs"). Therefore, the NPPs need not be considered further.

[16] Contained within the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

[17] Compared with the current more general obligations in IPP 5 to take reasonable steps to provide persons with information concerning how council deal with, use and manages access to documents containing personal information. Many councils have "Privacy Policies" or "Privacy Plans". However, these do not necessarily currently comply with the prescriptive requirements set out in APP 5 concerning the information an APP "Privacy Policy" must contain.

[18] For example, under IPP11, an agency must not disclose personal information to another person, body or agency unless certain exceptions apply including: the individual concern is reasonably likely to have been aware, or made aware under IPP2, that information of that kind is usually passed to that person, body or agency or the individual has consented to the disclosure. In contrast, under IPP 10, if an agency has collected personal information for a purpose, it must not use that information for another purpose unless an exception applies (i.e. consent from the individual or if the purpose is directly related to the purpose for which the information was obtained).

agencies move to new avenues of service delivery and explore new business methods they are readily incorporating privacy principles into their new working practices....OIC suggests that, at this time, a move to adopt the APPS would impose an administrative burden on agencies as they would have to develop a similar familiarity with the new principles, and adapt them to their new working practices, without the extensive guidance OIC is currently able to provide":[19]

Question 25: Should the definition of "personal information" in the IP Act be the same as the definition in the Commonwealth Act?

70. We consider that the answer to this question is "yes".

71. Council officers have previously suggested to us that the current definition of "personal information" contained in section 12 of the IP Act is cumbersome in that it consists of one long sentence without sub-paragraphs, and that it is hard to identify the elements of what constitutes personal information. Amending the current definition of personal information to the definition of "personal information" contained in section 6 of the Commonwealth Privacy Act would simplify the definition by removing the outdated and unnecessary reference to a "database", and separating the elements of the definition into sub-paragraphs.

Question 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?

72. The IPPs sometimes have the effect of preventing useful sharing of information between agencies (e.g. Council to Council, Council to Queensland Government Department or statutory authority) directed towards serving a particular public interest purpose. In this regard, the Consultation Paper notes at page 28 the following fairly restrictive requirements of IPP 10 and 11 in this context:

(a) IPP 11 allows for information to be "disclosed" (from one agency to another) in circumstances that include where the individual has expressly or impliedly agreed to the disclosure; disclosure is necessary to lessen a threat to life, health or safety; disclosure is authorised or required by law; or disclosure is necessary for law enforcement reasons; and

(b) IPP 10 allows information to be "used" for a purpose other than the purpose for which it was collected where the individual has agreed to that use, its use is necessary to lessen or prevent a serious threat to life, health, safety or welfare; the other use is authorised or required under a law; the agency is satisfied that use is necessary for law enforcement purposes; the other purpose is directly related to the first purpose; or the use is necessary for research in the public interest.

73. We agree that potential barriers posed by the IPPs to the effective sharing of information between agencies may be minimised by the implementation of the "*use model*" proposed by the Consultation Paper at page 29 under which "*a department [i.e. agency] which obtains information for a particular purpose would be able to give that information to another department if it was to be used for the particular purpose for which it was collected or another purpose that was directly related to the purpose for which it was obtained*". This would enable Councils to share information it has collected for a particular purpose with other agencies (without an exception to IPP 11 applying e.g. express or implied consent from the individual concerned), whilst still safeguarding against the use of personal information for an unrelated purpose the individual concerned may not expect it to be used for. If a "*use model*" was implemented, Councils might also benefit through receiving additional information from other agencies.

[19] See page 12 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Information Privacy Act 2009*".

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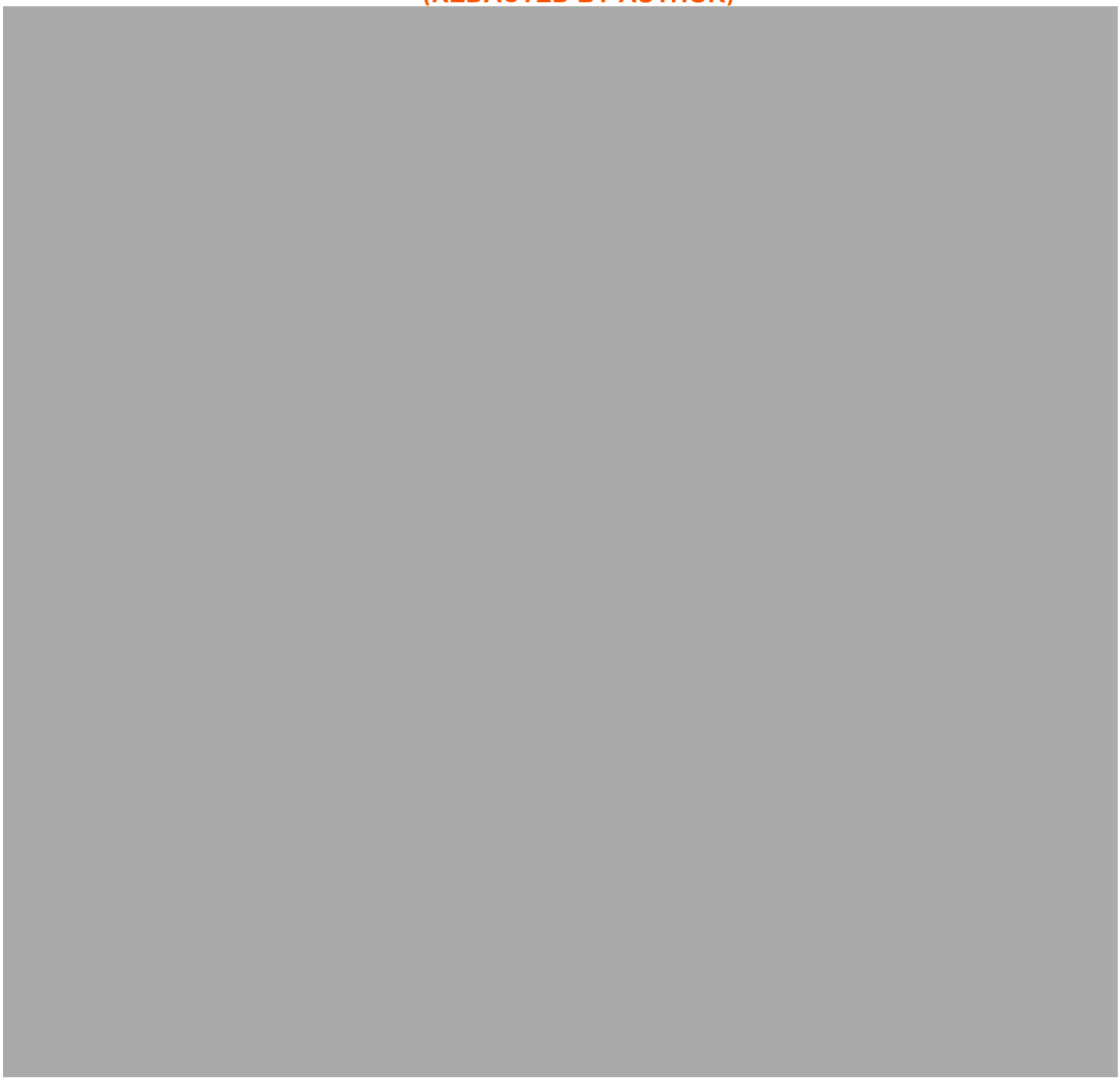

Question 28: Should the IP Act provide more flexibility about the timeframe for complaints to the OIC to be lodged? How should this be approached?

78. The Consultation Paper notes at page 27 that section 166(3) of the IP Act currently has the effect that an individual must not make a complaint to the Privacy Commissioner unless they have made a complaint to the agency, the complaint has not been resolved to the individual's satisfaction and at least 45 business days has elapsed since the complaint was initially made to the agency.

[20] The merits of which we have not been asked to advise on.
[21] See IPP 10(1)(c), Schedule 3 of the IP Act.

79. Councils sometimes find it difficult to resolve privacy complaints in this relatively short 45 business day period given other demands. For this reason, no requirement should be imposed for agencies such as local governments to be required to decide privacy complaints sooner.

80. However, if it is proposed that the OIC will have a discretion to accept privacy complaints before 45 days has elapsed, any amendment must be accompanied by protections to ensure that the individual is still required to make an initial complaint to the agency and to ensure that the OIC can decline to accept a privacy complaint if the agency has dealt with or is adequately dealing with the complaint, or has not yet had a reasonable opportunity to deal with the complaint.

Question 31: Should the definition of "generally available publication" be clarified? Is the Commonwealth provision a useful model?

81. We consider that Council officers would find the implementation of the Commonwealth Privacy Act definition of "generally available publication" useful, including in advising members of the public of this important exception to Council's obligations under the IPPs. The Commonwealth definition may be particulary useful since it includes both electronic and printed publications, and makes clear that a publication can be "generally available" even if the publication is only available on payment of a fee.

Question 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?

82. We consider that the answer to this question is "yes".

83. IPP 4(1) currently requires an agency that controls a document containing personal information to ensure that the information is protected against loss, unauthorised access, use, modification or disclosure, and any other misuse. IPP 4(2) builds upon this definition by requiring the protections in IPP 4(1) to include security safeguards adequate to provide the level of protection for personal information that could reasonably be expected to be provided. While IPP 4(2) introduces a requirement for security safeguards of personal information to be what the public could reasonably expect to be provided, IPP 4(1) has no such reasonableness test.

84. Accordingly, IPP 4(1) potentially requires Councils to guard against every privacy breach or loss of personal information, rather than requiring that Councils take reasonable steps to protect personal information having regard to the resources available to them and their knowledge of the particular security or data issue.

85. We agree that IPP 4(1) should be amended to provide that an agency must only take "*reasonable*" steps to ensure that personal information is protected against loss and misuse. As the OIC noted in their submission to the 2013 review,

> *"...the lack of a reasonableness test has the potential to place an unreasonable burden on agencies, potentially making them responsible for a privacy breach that occurs despite the agency making every reasonable effort to protect the information".*[22]

Question 33: Should the words "ask for" be replaced with "collect" for the purposes of IPPs 2 and 3?

86. IPP 2 has the effect that agencies are required to provide certain information to an individual when they "ask for" their personal information. IPP 3 also imposes additional obligations in terms of what personal information can be "asked for" by an agency (e.g. ensuring that the personal information collected is complete and up to date).

[22] See page 28 of the OIC's November 2013 "Submission to the Department's 2013 Discussion Paper: Review of the *Information Privacy Act 2009*".

87. The focus on "asking" for personal information emphasised by IPPs 2 and 3 has the potential to create uncertainty as to whether IPPs 2 and 3 apply only when an agency actively obtains information on a personal level (i.e. at Council's office or at a residents house during a Council inspection of a property), or whether it also includes direct collection, for example through online agency forms.

88. The OIC has previously expressed the view that IPP2 and IPP3 apply to both direct and indirect collection of personal information.

89. Consistent with the OIC's interpretation, we have seen Council forms which include a statement providing the information about the collection required of personal information by IPP2 (e.g. the purpose of the collection, whether it is authorised or required by law etc.) If the OIC's interpretation of IPP2 and IPP3 is correct, it would increase certainty for Council officers applying these provisions if the provisions referred to "collecting" rather than "asking for" personal information.

We trust the above review is of assistance to you. Please do not hesitate to contact us if you require anything further.

Yours faithfully,
KING & COMPANY

[redacted]

Contact: [redacted]
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