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3 February 2017

The Honourable Yvette D'Ath MP
Attorney-General and Minister for Justice
Minister for Training and Skills
RTI and Privacy Review
Department of Justice and Attorney-General

By email: FeedbackRTIandprivacy@justice.qld.gov.au

Dear Attorney

Submission to the 2016 Consultation on the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009*

Thank you for the opportunity to make a submission about the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009* (the Acts).

I note that the paper addresses several detailed issues regarding the operation of the Acts. I will address my comments only to those areas of the review relevant to my role.

Question 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?

I strongly support a single point of access under the RTI Act for both personal and non-personal information.

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

I submit that this Office's complaints handling and investigative material, including reports about investigations, should be exempt from both right to information and information privacy access. This class based exemption should not extend to financial, human resources, policy related or any other type of document held by this Office.

Freedom of information legislation in both New South Wales and Victoria provides an exemption from access to complaints handling and investigative material, including reports about investigations, of the Ombudsman in those states. Such a class based exemption reflects the very real difficulties created by the amenability of this material to access. For the sake of brevity, I will refer to this class of material as investigative material.

The *Ombudsman Act 2001* requires that the Ombudsman, when conducting an investigation, must conduct the investigation in a way that maintains confidentiality (s.25(2)(a)). Accordingly, like most Ombudsmen, this Office conducts its investigations without public hearings or involvement. There are a number of cogent reasons why this should be so, and why confidentiality should be maintained upon conclusion of any

preliminary inquiry or investigation, something which is not guaranteed under the current right to information/information privacy regime.

It is vital to the maintenance of public confidence in this Office that appropriate control be maintained over confidential information. The appropriate restrictions on disclosure of information included in the Ombudsman Act are undermined by the absence of an exemption from right to information and information privacy applications. The restrictions in the Ombudsman Act encourage disclosures, including public interest disclosures, about maladministration and facilitate the cooperation of witnesses. They reduce the risk of damage to the reputations of public officers the subject of unsubstantiated allegations. They also protect against the inappropriate release of sensitive government information which may be provided to the Ombudsman during the course of an investigation.

Leaving aside this Office's investigations into systemic issues, the overwhelming preference expressed by complainants and agencies is for complaints processes and investigations to be finalised as quickly as possible. Timeframes for the finalisation of the assessment of complaints and investigations are key performance indicators for this Office. Almost all of this Office's investigations are conducted informally, that is, without recourse to the powers available under Part 4 of the Ombudsman Act ('Powers and procedures for investigations'). In addition, most investigations are finalised without the giving of a report and recommendation under s.50 of the Ombudsman Act. Against a statutory background which includes obligations to cooperate, and overrides the obligations of agencies to maintain secrecy, agencies are generally prepared to respond to informal requests for information and to enter into discussions with this Office with a view to resolving complaints as soon as possible.

The effectiveness of this Office relies upon the full and frank disclosure of information by agency staff, including sometimes confidential and highly sensitive information. I am concerned that the current possibility of access to this Office's investigative material gives priority to access by individual complainants over the public interest in full and frank disclosure by agencies not only in individual cases but in every case investigated by this Office.

The current availability of access also defeats the discretion given by s.57 of the Ombudsman Act, which provides that 'If the ombudsman investigates administrative action because of a complaint, the ombudsman must, as soon as possible, inform the complainant, in the way the ombudsman considers appropriate, of the result of the investigation'. My officers are keenly aware of the need to provide reasons for decisions, and complainants may request an internal review if they are dissatisfied with a decision.

As a general rule, this Office will not accept an investigation of a complaint unless a complainant has exhausted the relevant agency's internal complaints process. To put it another way, this is an Office of last resort. There is a public interest in every complaints process having an endpoint. I am concerned that the amenability of this Office's finalised complaints and investigative files to right to information and information privacy applications undermines the finality of complaints processes.

The Ombudsman is an officer of the Parliament and the Legal Affairs and Community Safety Committee is responsible for oversight of this Office's work. Anyone may raise any concern about this Office with the Committee, including about complaints handling and investigations.

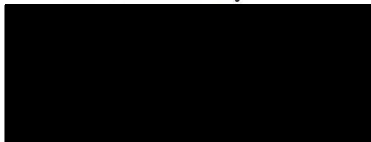
Separate to reports to the Assembly on the Ombudsman's initiative and on Parliamentary reference, the Office's annual report and reports in relation to particular cases are only published with the Speaker's permission (s.54 of the Ombudsman Act). The Speaker's

control over what the Ombudsman releases into the public domain is diluted by the ability of complainants and others to apply to access reports under right to information and information privacy legislation.

I am committed to this Office providing appropriate information about its operations in formats which are accessible to a wide range of community members. To this end a very significant amount of information about how this Office works, including its complaints handling and investigative processes, is published on this Office's recently updated website at www.ombudsman.qld.gov.au. This website includes de-identified case examples, reports published with the permission of the Speaker and links to tabled reports. The functionality, accessibility and content of the website will be continuously reviewed and refined.

Thank you again for the opportunity to make a submission about the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009*. I will be happy to provide any further detail required to fully consider my proposals.

Yours sincerely



Phil Clarke
Queensland Ombudsman