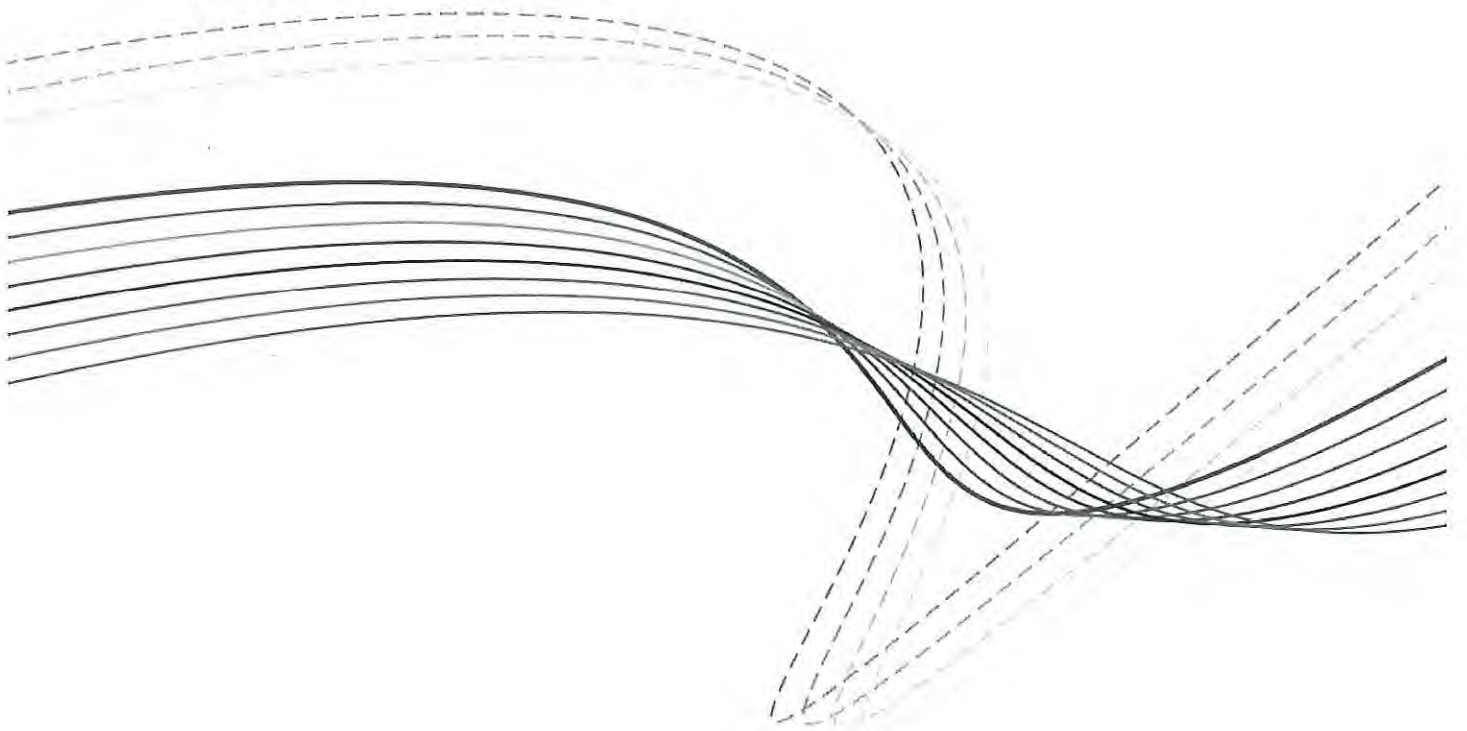


QUEENSLAND TREASURY

Submission - 2016

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

Date: February 2017





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1.0 Introduction

The *Right to Information Act 2009* (RTI Act) and the *Information Privacy Act 2009* (IP Act) commenced on 1 July 2009.

The RTI Act and the IP Act require the Minister to review the Acts. These reviews are to examine the practical application of the legislation and identify and resolve issues arising during implementation. While focusing on operational issues, the review will consider issues of efficiency and effectiveness, and whether there are opportunities to reduce the regulatory burden without compromising the Acts.

In December 2016, the Department of Justice and Attorney-General released the 2016 Consultation on the Review of the *Right to Information Act 2009* and *Information Privacy Act 2009* (2016 Consultation Paper).

The purpose of this review of the RTI Act and IP Act respectively is to:

- (a) decide whether the primary objects of the Acts remain valid;
- (b) decide whether the Acts are meeting their primary objectives;
- (c) decide whether the provisions of the Act are appropriate for meeting their primary objectives; and
- (d) investigate any specific issue recommended by the Minister or the Information Commissioner.

2.0 Queensland Treasury's Submission

2.1.1 General Comments

Queensland Treasury has been invited to make a public submission regarding the operation of the RTI Act and IP Act in response to the 2016 Consultation Paper.

We welcome this opportunity to provide comments regarding the interaction of these Acts with Queensland Treasury's portfolio responsibilities.

2.1.2 Key considerations

In sections 3.0 to 14.0, Queensland Treasury outlines its response to various matters raised in the 2016 Consultation Paper.

Queensland Treasury has identified the matters outlined below as key considerations from its perspective.

Queensland Treasury:

- supports amendments to the RTI Act to ensure the confidentiality of the State's budget process (See section 7.0);
- supports renewed consideration of the application of the RTI Act to commercial information of third parties dealing with the Queensland Government (See section 7.0); and
- does not support the application of the RTI Act and Chapter 3 of the IP Act to the documents of contracted service providers or subcontractors (See section 3.0).

3.0 RTI Act - Contracted Service Providers

Questions 4 and 6

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

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

Response

Queensland Treasury does not support the proposals to amend the RTI Act with respect to contracted service providers, either by requiring contract service providers (CSPs) to receive and process access applications or by way of adopting the approach in section 6C of the *Freedom of Information Act 1982 (Cth)*. Queensland Treasury considers the above proposals would place unnecessary regulatory and administrative burdens on CSPs.

Section 35 of the IP Act deals with compliance by the CSPs with the privacy principles of the IP Act. Queensland Treasury considers that section 35 provides significant guidance for agencies to ensure that Parts 1 or 2 and 3 of the IP Act are complied with by CSPs and, by extension, any subcontractors that may be engaged by CSPs.

Queensland Treasury's practice is to place contractual obligations on CSPs in compliance with Chapter 2, Parts 1 or 2 and 3 of the IP Act. Additionally, any employees or subcontractors of CSPs are required to comply with the contractual obligations of CSPs. We consider the current approach of the IP Act to be both practical and appropriate.

4.0 IP Act - Application to GOCs

Question 5

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

Response

The *Privacy Act 1988 (Cth)* applies to GOCs and their subsidiaries because they are companies, unless excluded by the *Privacy Act 1988 (Cth)*. The 2016 Consultation Paper states that "it may be easier for those interacting with GOCs and their subsidiaries to have their rights provided for under state legislation."

Queensland Treasury supports retaining the application of the *Privacy Act 1988 (Cth)* to GOCs and their subsidiaries on the following basis:

- the current position is consistent with the policy intention that the GOCs and their subsidiaries, as commercial businesses, are subject to the same regulatory framework as private sector companies;
- it may cause confusion for persons who are familiar with interacting with companies to have their rights provided for under state legislation; and
- it would impose an administrative burden and cost on the GOCs and their subsidiaries to update their privacy compliance programs.



5.0 Single point of access

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?

Response

Experience suggests that having to choose between two pieces of legislation to apply for access to information is confusing to decision makers and applicants. Valuable resources are expended in training decision makers and explaining to applicants the difference between the IP Act and the RTI Act. Given this, Queensland Treasury suggests that consideration be given to a single point of access for both personal and non-personal information.

6.0 Third party consultation threshold

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 third party?

Response

The RTI Act obliges decision makers to consult with third parties where disclosure could reasonably be expected to be of concern to a third party. Decision makers and applicants have raised concerns that there is uncertainty regarding the scope of the obligation to consult with third parties under the RTI Act. Queensland Treasury considers that the phrase "substantial concern" has a well understood meaning and would provide more certainty as to the scope of the obligation to consult with third parties.

Queensland Treasury supports the proposal to change the threshold for third party consultations so that agencies are only required to consult where disclosure of the documents would be 'of substantial concern' to a third party.

7.0 Third party right of review when not consulted

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?

Response

Queensland Treasury supports maintaining the right of review for third parties who should have been consulted but were not consulted by an agency about a RTI application.

In circumstances where documents have already been released and are also published on the agency's disclosure log, if a third party is aggrieved about not being consulted, the third party should be provided with the current avenue for review to ensure that proper process has been followed by the agency.

8.0 RTI Act - Exempt categories

Question 11

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

Response

Queensland Treasury supports retaining the current exemptions and considers that it is appropriate to extend the categories of exemptions to include the following:

(a) *Schedule 3, section 8(1) – information disclosure would found an action for breach of confidence*

In order to successfully make out the breach of confidence exemption, it is necessary to initially show that "Information is exempt information if its disclosure would found an action for breach of confidence."

Queensland Treasury considers that this test excludes contractual obligations of confidentiality owed to third parties because an action for breach of contract is not the same as an action for a breach of an equitable duty of confidence.

Most commercial contracts that the State enters into provide for confidentiality obligations being imposed upon the contractor, subject to exceptions such as disclosures authorised or required by law. The difficulty for an agency is that unless the confidential information also meets the test of an equitable duty of confidence, then the confidential information is subject to the RTI Act. Third parties have expressed concerns regarding the potential disclosure of their genuine confidential information under the RTI Act.

Queensland Treasury submits that this exemption should be amended to provide that:

"Information is exempt information if its disclosure would found either an action for breach of confidence or the breach of a contractual confidentiality obligation."

(b) *Budgetary process*

Queensland Treasury is concerned that the existing exemption for information brought into existence in the course of the State's budgetary processes is not being applied consistently by agencies. Disclosure of sensitive budget information may significantly impact the integrity of the State budget process.

To address this issue:

- Queensland Treasury requests the consideration of an amendment to section 37 of the RTI Act to include a section stipulating that where a document contains budget information (as defined by Schedule 3, section 2(1)(c) of the RTI Act), and is subject to an access application (regardless of the origins of the document) that consultation with Queensland Treasury is required before access to a document is provided to an applicant; and
- The exemption for budgetary information is contained in the Cabinet exemption provision. Queensland Treasury recognises that this exemption relates to the protection of the confidentiality of the Cabinet process and operations. However, Queensland Treasury considers that this budget process exemption is sufficiently important to be a stand-alone exemption and requests that the existing section 2(1)(c) of Schedule 3 of the RTI Act be removed from section 2(1) and become a stand-alone exemption provision.

(c) *Exemption for access applications made in duplication of discovery processes*

The RTI Act has been used as a means to undertake discovery in the context of pre, during or post-litigation, without the control and protection of the courts. Accordingly, public resources are

being expended on what is largely an exploratory exercise which would otherwise be prohibited by a court in any legal proceedings.

Queensland Treasury requests the consideration of an exemption for circumstances where documents have already been provided to a party pursuant to a discovery process in legal proceedings or where the agency is aware of potential litigation.

(d) *Exemption for Mineral Resources Act 1989 and the Petroleum and Gas (Production and Safety) Act 2004*

Section 12(1) of Schedule 3 of the RTI Act provides that information is exempt from disclosure if its disclosure is prohibited by one of the legislative provisions listed in that section. Part 8 of the *Taxation Administration Act 2001* (TAA), which provides that an official under that Act must not disclose confidential information acquired by that official in an official capacity, is included in section 12(1) of Schedule 3 of the RTI Act in so far as it applies to "personal confidential information" under the TAA.

Under the TAA, "personal confidential information" means confidential information that -

- (i) identifies, or is likely to identify, the person; or
- (ii) discloses matters about the person's affairs.

Part 5 of the *Petroleum and Gas (Production and Safety) Act 2004* (PG Act) and part 4 of the *Mineral Resources Act 1989* (MR Act) contain similar provisions to part 8 of the TAA with respect to confidential information but have not been included in section 12(1) of Schedule 3 of the RTI Act.

Queensland Treasury requests consideration be given to the same exemption applying to part 4 of the MR Act and part 5 of the PG Act as is provided to part 8 of the TAA, in so far as these sections apply to "personal confidential information" as defined under those Acts.

9.0 Disclosure log

Question 18

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

Response

Queensland Treasury has not experienced any difficulties in meeting the requirement to publish information in the disclosure log 'as soon as practicable'. However, Queensland Treasury does recognise that the volume of the applications it receives is minimal compared to other larger agencies. The requirement is flexible and workable in that an agency has the discretion to determine when it will publish information in the disclosure log. Queensland Treasury updates its disclosure log every Friday and this works well for all stakeholders.

10.0 Reviewing decisions

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?

Response

Queensland Treasury considers that internal review should remain optional because there may be legitimate reasons why the applicant has applied directly for an external review after receiving the agency's decision (e.g. the applicant may not want to have the agency deal with it as an internal review).

11.0 IP Act - Alignment with the APPs

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?

Response

Queensland Treasury considers that adopting the APPs would assist in providing certainty and consistency for privacy matters from a business and community perspective in dealing with the Queensland Government. The 2016 Consultation Paper recognises that there are significant differences between the IPPs and/or the NPPs, with the APPs. Given this, further consideration and advice is required to understand the practical implications of this proposal, before a final decision could be made.

12.0 IP Act - Sharing of personal information

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?

Response

Queensland Treasury supports the introduction of the 'use' model for all agencies (including departments), as this model would provide significant benefit to the Queensland Government and the community.

13.0 Timeframes for privacy complaints

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?

Response

If an individual makes a privacy complaint to an agency, the individual is required to allow the agency 45 business days to deal with the complaint before the applicant can progress their complaint to the OIC. The individual may progress the matter to the OIC once the 45 business days has expired, regardless of whether the agency responds to the privacy complaint within the 45 business days.

The 45 business day requirement seems unnecessary in situations where the agency has responded within the 45 business day period and may be frustrating for individuals wishing to progress their privacy complaint to the OIC. Queensland Treasury suggests that if an agency provides the complainant with a response to the complaint within the required timeframe, then that response should be taken to be the agency's determination of the complaint and the individual should then be given



20 business days from the date of the agency's response to submit the matter to the OIC. If the agency does not provide a complainant with a response within 45 business days, then the complainant's period to submit their complaint to the OIC should commence after the 45 business day period. This approach would be consistent with the current right of review requirements for RTI and IP access applications.

Question 29

Should there be a limit on when privacy complaints can be referred to QCAT?

Response

Queensland Treasury supports the IP Act providing a reasonable time limit on when privacy complaints can be referred to QCAT. While Queensland Treasury appreciates that complainants should be afforded enough time to make an application to QCAT as this is the last form of redress for complainants regarding a privacy complaint, it is practical and appropriate to include a reasonable timeframe, such as 40 business days from the date the complainant was advised of the outcome from the OIC. A timeframe of 40 business days would give sufficient time for complainants to consider whether they wish to refer their complaint to QCAT.

14.0 IP Act – Generally available publication

Question 31

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

Response

Queensland Treasury considers that the Commonwealth definition of 'generally available publication' contains additional explanatory information that may assist in clarifying the meaning of the phrase. For example, it provides that a publication which requires the payment of a fee is regarded as a 'generally available publication'. Treasury considers that adopting the Commonwealth provision would be beneficial.

15.0 IP Act – Amendments to IPPs 2 and 3

Question 33

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

Response

IPPs 2 and 3 have been drafted deliberately to apply to situations where agencies 'ask for' (i.e. solicit) personal information from the individual that is the subject of the information. The requirements of IPPs 2 and 3 are appropriately tailored to the circumstances where the agency has solicited the personal information directly from an individual, as the agency is required to notify the individual about certain matters. IPPs 2 and 3 do not apply to circumstances where the personal information is not solicited directly from the individual, as there is no contact with the individual in order to comply with the notification requirements of IPPs 2 and 3. The remaining IPPs apply regardless of whether the information is solicited directly from the individual to ensure appropriate protection of an individual's personal information.

If there are concerns regarding the collection of unsolicited personal information, Queensland Treasury suggests that a new IPP be included to address these concerns. Alternatively, clarification could be provided in the IP Act by way of a Drafter's Note with examples in relation to the examples mentioned in the 2016 Discussion Paper (e.g. CCTV footage).

