Right to information

Explanatory guide

Right to Information Bill 2009
Information Privacy Bill 2009

Queensland Government

Right to information – Explanatory guide – Right to Information Bill 2009 – Information Privacy Bill 2009

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Have your say

The Queensland Government would like to hear your comments, ideas and suggestions about:

- the Right to Information Bill and Regulation; and
- the Information Privacy Bill.

You can tell us what you think by writing to us at the postal address below. Comments may also be emailed to the email address provided below.

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(marked 'Attention: Right to Information Review')

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The closing date for submissions is 31 March 2009.

Confidentiality

The Queensland Government may refer to or quote from submissions in future publications. If you do not want your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992 (Qld)*.

Any information you provide in a submission will be used only for the purpose of the Queensland Government's review of freedom of information and privacy legislation. It will not be disclosed to others without your consent.

This document is designed as an explanatory guide to the two consultation draft Bills – the Right to Information Bill and the Information Privacy Bill. It provides a brief overview of the Bills and outlines some of the key concepts in the Bills. The Consultation Draft Bills will not necessarily pass into law in this form, as final decisions about the drafting and content of the Bills will only be taken after the consultation process is complete.

Copies of this document and the Right to Information Bill, the Right to Information Regulation and the Information Privacy Bill are available on the Right to Information website at www.qld.gov.au/righttoinformation.

Alternatively you may contact (07) 3235 4838 to obtain a copy.

1. Introduction

In September 2007, the Premier of Queensland commissioned an independent panel, chaired by Dr David Solomon AM, to undertake a comprehensive review of Queensland's freedom of information legislation.

The report by the FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008), proposed a complete rethink of the framework for access to information in Queensland. It contained 141 recommendations for information policy and legislation reform.

The Queensland Government released its response to the Right to Information Report (RTI Report) in August 2008, supporting in full 116 of the report's recommendations and either partially or in principle supporting another 23 recommendations. Two recommendations were not supported.

The RTI Report made recommendations for a new legislative framework for access to information, namely:

- a Right to Information Act, with a clearly stated object of providing a right of access to information held by the government unless, on balance it is contrary to the public interest to provide that information; and

- privacy legislation, to provide for privacy obligations in relation to the collection and handling of personal information and to provide for access and amendment rights for personal information.

As part of its response, the Queensland Government undertook to develop a new Right to Information Bill and a new Information Privacy Bill, for release as consultation drafts by December 2008.

The Queensland Government has also started implementing of some of the practical recommendations made in the RTI report, including:

- Release of information about recent matters considered by Cabinet (**www.cabinet.qld.gov.au**).

- Introduction of online FOI applications (in addition to current ways of applying for information under the *Freedom of Information Act 1992*).

- Development of department publication schemes and disclosure logs, for inclusion on each Queensland government department's website from early 2009.

The Queensland Government is continuing to review, enhance and build on these initiatives to promote increased openness, transparency and accountability for the Queensland Government.

This document invites comment on the two consultation draft Bills, that are proposed to replace the *Freedom of Information Act 1992 (FOI Act)* and the Information Privacy Standards (IS42 and IS42A) that currently form the basis for Queensland's administrative privacy regime. Key features of the draft Bills are explained below.

2. Summary of the Right to Information Bill (RTI Bill)

2.1 Overview of the RTI Bill

The Preamble and Objects clauses of the RTI Bill state that the object of the Bill is to provide a right of access to information under the government's control unless, on balance it is contrary to the public interest. Government information should be released administratively as a matter of course, unless there is good reason not to, with applications under the RTI Bill being necessary only as a last resort.

The RTI Bill creates a legally enforceable right of access to documents of an agency and official documents of a Minister.

As flagged in the Queensland Government's response to the RTI Report, the RTI Bill will implement the following changes to the new legislative framework:

- extending the coverage of the legislation to cover non-government entities with regulatory functions (as prescribed by Regulation) and Government Owned Corporations (GOCs) which do not operate in competition with other private sector corporations;
- a reframing of the grounds on which access to information may be refused, with a reduced number of 'true' exemptions and a list of public interest factors to be considered in deciding whether the disclosure would on balance be contrary to the public interest, including a specific list of factors favouring non-disclosure which are to be given additional weight in assessing the public interest;
- new procedures and timeframes for receiving and determining applications for documents and reviews of decisions;
- a new offence to direct a decision-maker to make a decision the person believes is not the decision required under the Act or to act contrary to the requirements of the Act;
- expanding the functions and powers of oversight (including monitoring and performance reporting) for the Information Commissioner; and
- creating jurisdiction for the proposed Queensland Civil and Administrative Tribunal to hear referred questions of law, appeals on questions of law and appeals from declarations that a person is a vexatious applicant.

Who and what is captured by the RTI Bill

Chapter 1, Part 2 of the RTI Bill outlines the key concepts and definitions in the Bill, which assist in understanding the scope of the RTI Bill and the application of its provisions. It provides guidance on what is captured by the RTI Bill (documents to which the Bill does and does not apply) and who is captured by the Bill (a Minister or agency). 'Agency' is defined to include a department, local government, government owned corporation or public authority.

Consistent with the Queensland Government's response to the RTI Report, GOCs are subject to the provisions of the RTI Bill, except in circumstances where capturing a GOC would jeopardise the competitive interests of the GOC. Clause 24 provides a limited list of excluded GOCs to which an application for information under the RTI Bill may not be made, apart from applications in relation to their community service obligations (CSO) activities. For documents which do not relate to the CSOs of those GOCs and for which no application may be to the GOC, such documents may nevertheless be accessed if they are in the possession or control of an agency or Minister, unless there are grounds on which access may be refused under RTI Bill.

Schedules 1 and 2 of the RTI Bill list the documents and entities to which the RTI Bill will not apply. This includes listed documents (e.g. security documents or documents under the *Crime and Misconduct Act 2001*), listed entities (e.g. a commission of inquiry) or a particular function of a listed entity (e.g. a tribunal's judicial or quasi-judicial functions).

Chapter 2 makes it clear that information may be accessed other than by application under the RTI Bill (for example it may be made administratively or commercially available by an agency or may be available for public inspection).

To facilitate the administrative release of information, Chapter 2 of the RTI Bill also requires that agencies must implement a publication scheme setting out the classes of information the agency has available and the terms on which it

will make the information available, including any charges. The content of publication schemes will need to comply with guidelines published by the Minister responsible for the Act.

In addition, Chapter 3, Part 6 requires that, where a decision has been made to grant access to a document containing non-personal information, a copy of the document may be published in the agency's disclosure log or, if not reasonably practicable, details identifying the document and information about how to access that information may be included in the agency's disclosure log. However, nothing about the document may be put on the agency's disclosure log until at least 24 hours after the applicant accesses the document.

How an application is dealt with

A single application form will be available for applications to agencies or Ministers for access to information under both the RTI Bill and the Information Privacy Bill. Under the RTI Bill, the application fee ($38) must be paid before the application will be processed. Applications may be electronically submitted and paid online. Applicants may still apply by post or in person.

Although the RTI Bill is primarily concerned with access to non-personal information, access to personal information can occur where there is a mixed access application. A mixed access application is an application for a combination of the applicant's personal information and another person's personal information or the applicant's personal information and non-personal information (for example, information about the agency). The Information Privacy Bill will only deal with applications that are expressed to be for the applicant's personal information.

The processing period for an application is 25 business days. This may be extended with the applicant's agreement. If the agency or Minister is required to consult with a third party – for example where the documents sought contain the personal information of that third party – then an extra 10 business days is added to the processing period.

Initial contact with the applicant is required within 10 business days of receipt of the application in order to acknowledge its receipt and advise the applicant of certain matters, such as that the application will be dealt with under the Information Privacy Act, that the application has been transferred to another Minister or agency, or that access is available through an avenue other than under the Act.

A schedule of relevant documents held by the agency or Minister in relation to the application must be provided to the applicant before the end of the processing period. The schedule will set out a brief description of the classes of documents held and the number of documents in each class. The requirement for provision of a schedule may be waived by the applicant. This could be appropriate where, for example, the agency contacts the applicant to notify him/her that the documents are only of a very small number and that access is intended to be given to all the documents.

The provisions in the FOI Act concerning deemed refusals (to be known as 'deemed decisions') have been carried over to the RTI Bill. The deemed decisions provisions state that if an agency or Minister does not decide an application within the processing period, the application is taken to have been refused. Internal and external review rights flow from a deemed decision. A refund of the application fee is also made.

Consistent with existing provisions in the FOI Act, an agency or Minister may refuse to deal with an application that falls within the scope of the RTI Bill for two reasons only. Firstly, given the nature of the application it would have a substantial and unreasonable affect on the agency's or Minister's functions. In such a case, the applicant is given the opportunity to refine the scope of his or her application. Secondly, in certain circumstances an agency or Minister may refuse to deal with an application if it is for access to documents the subject of an earlier application.

An agency or Minister may refuse access to a document sought on the basis of grounds set out in clause 46 (these are described in greater detail under 2.2 below).

A decision to refuse or allow access is communicated in writing to the applicant, together with details of how access may be made and the associated charges. Payment is required prior to access. Proof of identity is required prior to access where information to be provided is personal to the applicant. The ways in which proof of identity may be provided are set out in the RTI Regulation. These requirements will be replicated by regulation for the Information Privacy Bill.

2.2 Grounds on which access may be refused

An agency or Minister may refuse access to a document if:

- *the document comprises exempt information under Schedule 3* (e.g. it is Cabinet information, Executive Council information, subject to legal professional privilege, is law enforcement or public safety information or information disclosure of which is prohibited by certain listed Acts);

- *disclosure of the information would be contrary to the public interest*, having regard to factors favouring disclosure or nondisclosure under Schedule 4. Part 4 of Schedule 4 lists factors favouring nondisclosure that must be given additional weight in assessing whether disclosure would be contrary to the public interest (e.g. affecting relations with other governments, disclosing deliberative processes of government, disclosing personal information or disclosing trade secrets or information about commercial or business affairs);

- *the document is otherwise available*, for example from a public library or in an agency's disclosure log or is reasonably available for public inspection under the *Public Records Act 2002*; or

- *the document is not able to be located or does not exist*, where all reasonable steps have been taken to find the document but the document can not be found.

2.3 Charges

In its response to the RTI report, the Government indicated that it was concerned that the charging model proposed in the Solomon Report could lead to unintended but significant increased costs in many instances. The Queensland Government indicated that it would consider options for an appropriate charging regime that does not lead to significantly increased costs for applicants, and is seeking submissions on options for alternative charging models as part of the consultation process on the RTI Bill.

The approach proposed in the draft RTI Bill and RTI Regulation reflects the current charging regime under the *Freedom of Information Act 1992*. However, a new clause has been included in the RTI Bill, that imposes a duty on an agency or Minister to incur only reasonable costs and, to the extent practicable, to minimise incurring costs when providing access to a document.

As under the FOI Act, processing and access charges may be waived if the applicant is the holder of a concession card or is a non-profit organisation in financial hardship. Under the RTI Bill the latter status is determined by the Information Commissioner rather than the agency or Minister. The application fee cannot be waived.

An estimate of the processing and access charges will be provided, usually with the schedule of relevant documents mentioned above. At this point there is an opportunity for the applicant to amend the scope of the application, for example, to reduce the number of documents sought. The final amount payable may be reviewed by the Information Commissioner upon the applicant's request.

2.4 Reviews of decisions (internal and external)

The RTI Bill provides for an optional internal review of access decisions by the agency or Minister. The RTI Bill also provides for an external review by the Information Commissioner who must make all reasonable endeavours to mediate the complaint.

The Information Commissioner may, at the request of a participant in an external review or of the Commissioner's own initiative, refer a question of law to the Supreme Court (following the commencement of the Queensland Civil and Administrative Tribunal - QCAT, referral will be to QCAT). A participant in an external review may also appeal to QCAT on a question of law.

2.5 Office of the Information Commissioner – Right to Information Commissioner

The RTI Bill vests a range of powers in the Information Commissioner which will be capable of delegation to a Right to Information Commissioner, established as a deputy to the Information Commissioner.

These functions include:

- decision-making functions (e.g. applications from non-profit organisations for financial hardship status or making declarations about vexatious applicants);
- external review functions;
- performance monitoring functions (e.g. monitoring and reporting on agencies' compliance with the Act and, at the request of the parliamentary committee, auditing agencies' compliance with the Act); and
- providing information and help to agencies, Ministers, applicants and third parties about the operation and administration of the Act.

The Information Commissioner may also issue guidelines about a matter in connection with any of the Information Commissioner's functions.

3. Summary of the Information Privacy Bill

3.1 Overview of the Information Privacy Bill

The RTI Report presupposed that Queensland will enact separate privacy legislation and recommended that "access and amendment rights for personal information should be moved from freedom of information to a privacy regime, preferably to a separate Privacy Act". The Queensland Government supported this.

The object of the Information Privacy Bill (IP Bill) is to govern access to and amendment of a person's own personal information held by relevant public sector agencies and to provide legislative safeguards to the handling of personal information by those agencies. The IP Bill codifies, with minor amendments, the current administrative privacy regimes (*Information Standard 42: Information Privacy and Information Standard 42A: Information Privacy for the Queensland Department of Health*).

IS42 sets out Information Privacy Principles (IPPs) governing the collection, storage, use and disclosure of personal information based on the IPPs in the *Privacy Act 1988* (Cth). In view of the different standard of confidentiality required for health information and the desirability of maintaining consistency with regulation of the private health sector, Queensland Health is exempt from IS42 and is subject to IS42A, which sets out National Privacy Principles (NPPs), also based on NPPs in the *Privacy Act 1988* (Cth).

The IP Bill will:

- provide a mechanism by which individuals can access and amend their own personal information held by relevant public sector agencies;
- set out (as schedules to the Act) the privacy principles to which public sector agencies must adhere; and
- establish an office of Privacy Commissioner (as a deputy to the Information Commissioner), who will be responsible for oversight of Queensland's privacy regime.

Who and what is captured by the IP Bill

The IP Bill will apply to State government agencies. Ministers and local governments will also be subject to the IP Bill in respect of access and amendment rights to personal information.

Privacy legislation currently applies to local governments in New South Wales, Victoria, Tasmania and the Northern Territory. It is understood that Western Australia's proposed Privacy Bill also includes coverage of local governments. The Queensland Government is currently considering whether to extend the application of the Information Privacy Principles under the IP Bill to local governments. Consultation with local governments will be undertaken on this issue during the consultation period.

The IP Bill exempts certain entities from all or part of the privacy principles and also exempts law enforcement agencies from the privacy principles relating to collection, use and disclosure of personal information limited to the context of defined law enforcement activities.

As the *Privacy Act 1988* (Cth) applies to Corporation Act entities government owned corporations are also exempt from the IP Bill.

3.2 Relationship to RTI Bill

The IP Bill and the Right to Information (RTI) Bill will operate in parallel. The procedural requirements for applications to access and amend personal information under the IP Bill mirror the access provisions of the RTI Bill except for the requirement to produce a Schedule of Relevant Documents. Both the IP Bill and the RTI Bill provide that access applications requesting a mixture of personal and non-personal information will be dealt with under the RTI Bill. A single application form is used for access applications under both Bills.

The IP Bill provides that access may be refused if the documents will not be released under the RTI Bill. This means the grounds for refusal under the RTI Bill may be utilised by decision makers for applications for access and amendment under the IP Bill. These provisions are not replicated in the IP Bill.

3.3 Privacy Principles – Information Privacy Principles and National Privacy Principles

Information Privacy Principles (IPPs)

Principles dealing with the uses and disclosure of personal information

The IPPs detail the circumstances under which personal information may be collected, used, stored and disclosed by agencies. IPPs 1 -11 are incorporated as a schedule to the IP Bill with some refinements to the IPPs to address operational deficiencies identified with the current scheme.

Where use or disclosure of personal information is proposed in regard to a threat to personal or public health, safety or welfare, the IP Bill requires the threat to be serious, rather than imminent.

The IP Bill also clarifies that agencies have the discretion to determine when it is reasonably necessary to disclose personal information.

The IP Bill adopts an additional exception to allow for the use or disclosure of personal information for research purposes under specified conditions.

The IP Bill requires decision makers to take steps to protect personal information before disclosing it if they reasonably believe the recipient of the information will use it to market directly to an individual.

National Privacy Principles (NPPs)

The IP Bill retains the application of the NPPs to Queensland Health. The NPPs are incorporated as a schedule to the IP Bill with some refinements to address operational issues in the current scheme.

3.4 Contracted service providers

The proposed Bill will specify the circumstances in which some service providers which are contracted to deliver services on behalf of government agencies will be required to comply with the privacy principles. It is proposed that government agencies will be obliged to require these service providers to comply with the privacy principles through a contract. The requirement will only apply to contracts entered into after the commencement of the Act.

The Bill distinguishes between contracted service providers performing the contracted services on behalf of the agency and those service providers that simply receive funding from an agency but do not act as the agency in relation to the handling of personal information. In particular, the proposed Bill specifies that the requirements of the proposed Bill will apply in cases where the service provider is contracted by a government agency to provide services on behalf of the agency, and:

- the service provider will deal with personal information on behalf of the contracting agency; or
- the agreement or contract relates to the provision of services involving the transfer of personal information directly to the contracting agency or to third parties on behalf of the contracting agency.

This requirement will not apply where all of the following apply:

- the service provider is the recipient of funding from the contracting agency;
- the service provider is not collecting personal information on behalf of the contracting agency;
- the service provider is not the recipient of any personal information from the contracting agency for the purposes of discharging the service provider's functions; and
- the service provider is not required to give any personal information it collects in discharging.

Contracted service providers to Queensland Health will apply the NPPs while contracted service providers for all other agencies will apply the IPPs.

In the event an agency does not bind a contracted service provider to the privacy principles but should have done so, any breach of the privacy principles in the provision of the contracted services will become the responsibility of the contracting agency.

3.5 Access and amendment applications

How an application is dealt with

The IP Bill provides a mechanism for access to and amendment of a person's own personal information. The procedural requirements for applications to access and amend personal information under the IP Bill mirror the access provisions of the RTI Bill. However, there is no requirement to produce a Schedule of Relevant Documents.

The IP Bill will only deal with applications that are expressed to be for the applicant's own personal information. Both the IP Bill and the RTI Bill provide that access applications requesting a mixture of personal and non-personal information or requesting another person's personal information will be dealt with under the RTI Bill. A single application form will be available for applications to agencies or Ministers for access to information under both Bills.

The processing period for an application is 25 business days. This may be extended with the applicant's agreement. If the agency or Minister is required to consult with a third party – for example where the documents sought contain the personal information of that third party – then an extra 10 business days is added to the processing period.

Initial contact with the applicant is required within 10 business days of receipt of the application in order to acknowledge its receipt and advise the applicant of certain matters, such as, that the application will be dealt with under the RTI Bill, that the application has been transferred to another Minister or agency, or that access is

available through an avenue other than under the Act (for example: an existing administrative process).

Consistent with existing provisions in the FOI Act, an agency or Minister may refuse to deal with an application that falls within the scope of the IP Bill; for example, if the work involved in dealing with the application would substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions or if the application would substantially and unreasonably interfere with the Minister's functions. An intention to refuse or allow access is communicated in writing to the applicant, and the applicant will have an opportunity to make the application in a way that would remove any ground for refusal (for example: by narrowing the scope of the application).

3.6 Charges – no application fee payable

There are no charges for applications to access or amend a person's own personal information, however agencies may recover actual costs incurred in providing access to personal information (for example: reproducing non-paper sourced information). The applicant must be advised of the costs involved with providing the information and access to the documents will not be provided until such costs are paid.

3.7 Reviews of decisions (internal and external)

The IP Bill provides for an optional internal review of access and amendment decisions by the agency. The IP Bill also provides for an external review by the Information Commissioner who may review the application in full and uphold or vary the agency's decision. Should a person disagree with the Information Commissioner's decision following external review, the matter may be referred to QCAT in limited circumstances. These provisions mirror the review of decisions regime for the RTI Bill.

Privacy complaints

In the event a person is aggrieved about the handling of their personal information generally by an agency, they may make a complaint to the agency in accordance with the agency's complaint handling procedures. If the agency is unable to satisfy the person's complaint, a complaint may be made to the Privacy Commissioner who must take all reasonable steps to mediate the complaint.

If mediation is unsuccessful, unresolved complaints are referred to QCAT for hearing. The IP Bill confers jurisdiction on QCAT to hear complaints and make orders for a range of remedies for breaches of the privacy principles.

3.8 Office of the Information Commissioner – Privacy Commissioner

The IP Bill vests a range of powers in the Information Commissioner which will be capable of delegation to a Privacy Commissioner established as a deputy to the Information Commissioner.

Such functions include:

- overseeing the privacy regime including receiving and mediating complaints about breaches of the privacy principles;
- conduct of reviews of systemic privacy issues;
- issuing compliance notices to agencies found in breach of the privacy principles; and
- approval of Public Interest Determinations and Temporary Public Interest Determinations to vary application of the privacy principles.

The Privacy Commissioner will be responsible for best practice leadership and advice including undertaking privacy education and training initiatives. The Privacy Commissioner is also able to issue compliance notices where there is a series of or flagrant breach of the privacy principles.




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