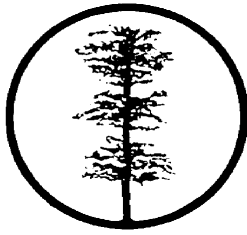


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31 March 2009

Information Policy and Legislation Reform
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Dear Sir/Madam

Feedback on the *Right to Information Bill 2009 (Qld)* (public consultation draft)

The Environmental Defender's Office-Queensland ("EDO-Qld") and Environmental Defender's Office of Northern Queensland Inc. ("EDO-NQ") ("EDOs") welcome the opportunity to provide feedback on the public consultation drafts of the *Right to Information Bill 2009 (Qld)* and *Right to Information Regulations 2009 (Qld)*.

The EDOs are community legal centres which specialise in public interest environmental law in Queensland. We frequently advise community member clients on their rights to access information through particular environmental statutes or, where no such rights exist, through the current freedom of information process as set out in the current *Freedom of Information Act 1992 (Qld)*.

Should you have any queries about any part of this submission please do not hesitate to contact us.

Yours faithfully
Environmental Defenders Office (Qld) Inc. and
Environmental Defender's Office of Northern Queensland Inc.

Jo-Anne Bragg
Principal Solicitor
EDO Qld

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EDO Submission in response to:

1. *Right to Information Bill 2009 (Qld)* (public consultation draft); and
2. *Right to Information Regulations 2009 (Qld)* (public consultation draft)

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Introduction

In March 2008, the Environmental Defenders Office (Qld) Inc. (“EDO Qld”) and the Environmental Defenders Office of Northern Queensland Inc. (“EDONQ”) (collectively referred to in these submissions as the “EDOs”) lodged submissions with the Freedom of Information Independent Review Panel in response to “Enhancing Open and Accountable Government”, a discussion paper on the review of Queensland’s *Freedom of Information Act 1992* (Qld). The EDOs refer to, and repeat and rely upon, those submissions. The **Appendix** contains the executive summary from that earlier submission.

In addition to, and consistent with, those earlier submissions, the EDOs make the following submissions in relation to the following:

1. *Right to Information Bill 2009* (public consultation draft);
2. *Right to Information Regulation 2009* (public consultation draft).

Summary of EDOs' concerns

The concerns raised by the EDOs in our March 2008 submission on the discussion paper regarding exemptions, costs and timeframes for FOI applications remain unaddressed by the draft legislation.

We are particularly concerned that the draft RTI Bill and Regulations:

1. Maintains many of the exemptions in the current *Freedom of Information Act 1992* (Qld) ("FOI Act"). We are especially concerned at the Cabinet exemption which, while reduced to 10 years, retains the broad definitions of "Cabinet" and "consideration" by Cabinet and appears to expand the documents covered by the exemption by listing Cabinet agendum, notes of Cabinet discussions, and factual reports or statistical information attached to Cabinet material. The EDOs advocate for removal of the blanket Cabinet exemption and instead making these documents subject to the public interest test in proposed Schedule 4 of the draft legislation; and
2. Do not reduce the cost of accessing documents under the current FOI Act (i.e. there has been no reduction in application fee, or processing or access charges).

We are also concerned at the following aspects of the RTI Bill:

1. The assessment by the information commissioner of whether a particular non-profit organisation has "financial hardship status" is done without reference to the any actual or potential application fee, or processing or access charges which may apply to a potential or actual access application.
2. Any decision in a charges estimate notice (or a "further charges estimate notice") under section 36 of the proposed RTI Bill is to be excluded from either internal or external review.
3. Allowing agencies absolute discretion to set the fees which they will charge for access to their documents other than through an access application.
4. The inclusion of 'deemed' withdrawal provisions in Chapter 2, Part 4 of the proposed RTI Bill ("Refusing to deal with access application").

The EDOs support these aspects of the draft legislation:

1. We strongly support removal of the exemption from FOI for government-owned-corporations and making government-owned-corporations subject to the new legislation. We also note with approval that the breach of confidence exemption has been slightly narrowed, and the deliberative process exemption has changed from being based on the public interest to a test of whether its release would constitute a breach of confidence¹.
2. The EDOs strongly support the listing of factors relevant to deciding whether the public interest favours release of a document (in section 48 and Schedule 4 of the proposed legislation). As mentioned above, we would like to see this public interest test applied to all documents in place of the blanket exemption for certain classes of documents that the proposed legislation retains.

¹ Although we note that proposed item 8(2) of Schedule 3 is confusing in its wording, and seems to be in conflict with proposed item 4 of Schedule 4 which discusses deliberative process documents in the context of the public interest favouring non-disclosure.

3. That access to the broadly defined “official document of a Minister”² may only be refused on “public interest grounds” if access is shown to be *contrary* to the public interest, and not merely if the applicant has not positively shown that access *will* be in the public interest (section 46(b) of the proposed RTI Bill). This reversal of the onus in relation to ‘public interest’ considerations is important and applauded.
4. The proposal to delete “exempt material” from documents before providing access, rather than an alternative proposal to deny any access to documents containing “exempt material”.
5. The prescription in the RTI Regulations of the following factors in relation to the proposed public interest test:
 - a. Factors which are irrelevant to the proposed public interest test;
 - b. Factors which favour disclosure; and
 - c. Factors which favour non-disclosure.

In conclusion, whilst there have been some good gains made in the FOI Review, the EDOs are disappointed that more was not made of the opportunity which the FOI Review presented:

1. To reduce exemptions from FOI;
2. To better promote a culture of disclosure and transparency in relation to Governmental decision-making and other affairs; and
3. To make more information more readily (and freely) available to the public, particularly on issues of public interest.

In the EDOs’ view, with some thoughtful amendments to the proposed RTI Bill and RTI Regulations, those objectives could still be further pursued through this review.

The EDOs’ more detailed submissions on the proposed RTI Bill and RTI Regulations appear on the following pages.

² *official document, of a Minister, means a document, other than a document of an agency or a document to which this Act does not apply, under the control of the Minister that relates to the affairs of an agency, and includes—*

(a) a document to which the Minister is entitled to access; and
(b) a document under the control of a member of the staff of, or a consultant to, the Minister in the person’s capacity as member or consultant.

EDOs' submissions on *Right to Information Bill 2009* (Qld) (public consultation draft) ("RTI Bill")

EDOs' submissions appear below under respective headings which have been copied from the RTI Bill (in italics).

Chapter 1: Preliminary***Part 2: Interpretation***

The EDOs' original submissions included a submission that in order to promote a culture of disclosure and transparency, it is imperative that information be readily available to the public, particularly on issues of public interest. In our view, amendments should be made to Chapter 1, Part 2 of the RTI Bill to further promote and encourage that culture. At present, the "documents to which this Act does not apply" and the "exempt documents" dealt with in the RTI Bill run contrary to that culture.

"Documents to which this Act does not apply"

The EDOs are concerned that the Schedule 1 definition of "Documents to which this Act does not apply" includes the following documents, the result therefore being that the proposed *Right to Information Bill* ("RTI Bill") will not apply to them:

"any of the following documents under the Biodiscovery Act 2004—

- (a) a benefit sharing agreement;*
- (b) a record kept by a department about a benefit sharing agreement or proposed benefit sharing agreement;*
- (c) a record kept by a department about a collection authority;*
- (d) a biodiscovery plan;*
- (e) a record kept by a department about a biodiscovery plan;*
- (f) a document identifying the holder of a collection authority under which a sample of native biological material was given to a receiving entity"*

These types of documents should be available in the public interest, as resources which are collected under the *Biodiscovery Act 2004* are collected from public lands and information regarding their collection and sharing should therefore remain in the public domain.

The EDOs therefore submit that this exclusion be removed from the RTI Bill entirely.

Exempt documents

The EDOs strongly support removing the exemption from FOI for government-owned-corporations and making government-owned-corporations subject to the new legislation. We also note with approval that the breach of confidence exemption has been slightly narrowed, and the deliberative process exemption has changed from being based on the public interest to a test of whether its release would constitute a breach of confidence³.

³ Although we note that proposed item 8(2) of Schedule 3 is confusing in its wording, and seems to be in conflict with proposed item 4 of Schedule 4 which discusses deliberative process documents in the context of the public interest favouring non-disclosure.

However, many of the exemptions in the current *Freedom of Information Act 1992* (“FOI Act”) have been maintained, and indeed in some cases has been expanded, in the proposed RTI Bill.

Of particular concern is the maintenance of the Cabinet and Executive Council documents exemption. We acknowledge and support the contraction of the Cabinet exemption period to 10 years for Cabinet documents, and the removal of Ministerial certificates deeming matter to be exempt Cabinet material, but are very concerned at:

- the inclusion of a new class of exempt document of “Cabinet information”, which includes Cabinet agenda and notes of Cabinet discussions and which can include factual reports or statistical information attached to Cabinet submissions/briefings/agenda/notes/minutes/decisions;
- maintenance of the broad definition of Cabinet “consideration” to include noting without discussion and ‘for information’ only; and
- maintenance of the definition of “Cabinet” to include “a Cabinet committee or subcommittee”.

The EDOs advocate for removal of the blanket Cabinet exemption and instead making these documents subject to the public interest test in proposed Schedule 4 of the draft legislation:

- The EDOs’ strong view is that the Cabinet exemption should be tightened or removed entirely. (*As a model for comparison, New Zealand’s cabinet documents are routinely released in response to requests without delay. We suggest that a similar “consequential” approach be adopted in Queensland where the focus is on the likely consequences of disclosure, as opposed to the current “categorical” approach used in Queensland.*)
- The EDOs’ firm view is that instances of public interest freedom of information (“FOI”) access should be expanded. Currently, a public interest test is not applied to many exemptions, such as for Cabinet or Executive Council documents which are class exemptions lacking a public interest balancing test. The presumption that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility is of great concern to the EDOs.
- The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public.

Note: In this regard the EDOs are pleased to see that Part 1 of Schedule 4, which sets out factors which are irrelevant to deciding the ‘public interest test’ (namely, whether a relevant “document comprises information the disclosure of which would, on balance, be contrary to the public interest”), specifically includes the following factors:

1. *Factor 1:* Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government.
2. *Factor 4:* The person who created the document containing the information was or is of high seniority within the agency.

However, this test does not apply to Cabinet or Executive Council documents.

- A ‘public interest’ test should balance any withholding or exemption interest against public interest to disclose that information. Information should be released that is clearly in the public interest even if it causes some harm to the public body releasing it.

Note: In this regard the EDOs are pleased to see that the RTI Bill contains an attempt to deal with this balancing of interests by measures including the following:

1. *Prescribing the 'public interest test' in section 48 of the RTI Bill;*
2. *Including a Schedule 4 which prescribes the public interest test factors under the following headings:*
 - a. *Part 1: Factors irrelevant to deciding public interest test*
 - b. *Part 2: Factors favouring disclosure*
 - c. *Factors favouring non-disclosure*
 - d. *Factors favouring nondisclosure having additional weight because of particular harm in disclosure.*

However, this test does not apply to Cabinet or Executive Council documents.

- A default setting [that documents are “confidential”] should be removed and information should be made available unless there is a good reason for withholding it.

Note: *This is dealt with to a certain extent by the inclusion of the public interest test referred to above. However, this test does not apply to Cabinet or Executive Council documents.*

The EDOs further submit that the proposed provisions relating to “Documents to which this Act does not apply” and exempt documents, as referred to above, narrows rather than broadens the scope of the legislation and does so at the expense and to the detriment of transparent and accountable government. We submit that this runs contrary to the purpose of the FOI review.

Chapter 2: Disclosure other than by application under this Act

We are concerned at the ability of agencies (other than prescribed entities under section 16) to set charges when making documents available other than by application. Whilst we appreciate the opportunity for documents to be made available other than through a formal application, we are concerned that:

1. some such documents will be made available at a charge when they should be made available for free (e.g. documents which are currently made available for free may only be made available by charge in the future); and
2. there is no limit on the charges which may be imposed on access for these classes of documents, and there is no manner prescribed in the RTI Bill (or elsewhere that we are currently aware of) for the calculation of any such charges.

Therefore the cost for access to them without application *could* potentially be more than what it would be for access under the proposed RTI Bill.

Chapter 3: Disclosure by application under this Act

Part 1: Legally enforceable right to access

We have already expressed our concern about the breadth and extent of exemptions. In that regard, we refer to our previous submissions and the submissions contained elsewhere in this document.

Part 2: Access application*Waiver of application fee and who may make access application*

In relation to section 23 (“Making access application”) and the payment of an application fee, we submit that:

1. The application fee referred to in section 23(2)(a) should be waived if it is shown that the applicant would face financial hardship if it was required to be paid; and
2. Therefore, proposed section 23(3) should be removed so as to remove the prohibition on the application fee being waived.

We further submit that the restriction in section 23(5) on who may be an agent for an applicant either be removed, or broadened to expressly include a solicitor acting on behalf of a client. In its current form, it is arguable that section 23(5) will not allow a duly appointed solicitor to make an access application on behalf of a client even though expressly instructed to do so. A client should be able to instruct his or her solicitor to make an access application under the RTI Bill on their behalf, and section 23(5) should be amended accordingly. If it is considered that section 23(5) is presently drafted in such a manner so as to contemplate that situation, then the examples following section 23(5) should be amended to specifically include it.

Agencies to which access application may not be made (exempt organisations)

In relation to the proposed exclusions in proposed section 24, we refer to and rely upon our previous submissions.

Application to “post-application documents”

Proposed section 25(3) appears to be nonsensical and illogical, and should properly be removed. The same rules as to processing and access charges, and reviews of relevant decisions in particular, should apply equally to these documents as they do to documents which were in existence at the time of the relevant application.

Application not for backup system documents

We are concerned about proposed section 27 for reasons including the following:

1. Ministers, agencies and/or departments may conceivably decide to *only* store documents on their “backup system”, or to store all documents older than, say for example, a year on their “backup system”; and
2. Therefore, because of section 27 would operate to make those documents inaccessible through an access application, it is possible that Ministers, agencies and/or departments may seek to utilise their “backup systems” as a way to ‘hide’ documents (i.e. make them unavailable through an access application).

Part 3: Dealing with application*Division 3 Contact with applicant after application (or purported application)*

There should be a time limit included in section 32 for contact with an applicant. The time limit should properly be 10 business days, being consistent with the time limit in section 33(2).

Likewise, there should properly be time limits inserted into subsections 33(3) & (4) so as to increase accountability and efficiency. Otherwise, the matter may continue on indefinitely and become open to abuse by decision-makers and staff.

Division 4 Consultation

The only section in Division 4, Part 3 (Consultation) is section 37. Section 37 is concerning as there is no definition for the term “substantial concern” which is used in subsection 37(1). The RTI Bill would be benefited, as would any end-users and relevant agency or Ministerial staff, if it included a definition of, or at least some guidance on, the term “substantial concern”.

Part 4: Refusing to deal with access application

The effect of subsections 42(3), (5) and (6) when read together is to effectively force the applicant to take one of the two following options during the “consultation period” lest the application will be deemed to have been withdrawn:

1. Amend the relevant application; or
2. Confirm it.

Section 41(a)(iii) prescribes that the “consultation period” is the period being 10 business days after the day the applicant is given a notice under section 41 advising that the relevant agency or Minister intends to refuse to deal with the application. To call the relevant period a “consultation period” in the above circumstances is a misnomer.

Further, the effect of failing to either amend or confirm the relevant application during the “consultation period”:

1. Should not be that the application is withdrawn, as that will leave the applicant without any rights to review and will effectively see the
2. Should be that the application is deemed to have been refused, thereby giving the applicant rights to review which are contained elsewhere in the RTI Act.

Part 5: DecisionRefusal of access as being “contrary to the public interest”

The EDOs:

1. Support the view espoused in section 46(b) that access to the broadly defined “official document of a Minister”⁴ may only be refused on “public interest grounds” if access is shown to be *contrary* to the public interest, and not merely if the applicant has not positively shown that access *will* be in the public interest. This reversal of the onus in relation to ‘public interest’ considerations is important.
2. Support the approach set out in section 46(b) and 48 of the RTI Act to determine whether disclosure of requested information would be, on balance, contrary to the public interest.

Our submissions in relation to the factors set out in Schedule 4 of the RTI Bill appear later in these submissions. Those Schedule 4 factors include:

1. Factors which are irrelevant in deciding public interest test case;

⁴ *official document, of a Minister, means a document, other than a document of an agency or a document to which this Act does not apply, under the control of the Minister that relates to the affairs of an agency, and includes—*

(a) *a document to which the Minister is entitled to access; and*

(b) *a document under the control of a member of the staff of, or a consultant to, the Minister in the person’s capacity as member or consultant.*

2. Factors which favour disclosure; and
3. Factors which favour nondisclosure.

In relation to ‘public interest’ considerations, the EDOs have previously submitted that exemptions in freedom of information legislation be subject to a ‘public interest test’ (i.e. that certain exemptions, such as those related to Cabinet documents, do not apply where disclosure would be in the public interest).

In light of the approach that is being proposed in sections 46(b) and 48 of the RTI Act, the EDOs submit that the same approach be applied to the classes of “exempt information” set out in Schedule 3, sections 1 to 4 inclusive and section 11 of the RTI Bill.

Refusal of access – nonexistent or unlocatable

We repeat our concerns regarding the potential misuse of the “backup system” to avoid disclosure of documents to which access has been sought. As a consequence, in relation to proposed section 49 we submit that subsection 49(2) be re-drafted to read as follows:

“(2) Before an agency or Minister may be satisfied under subsection (1)(a) that a prescribed document does not exist, a search for the document from a backup system is required unless the agency or Minister considers on reasonable grounds that the document:

- (a) has not been kept in the backup system; and
- (b) is not retrievable from the backup system.”

Part 6: Processing charges and access charges

Division 1 Preliminary

The EDOs support both the duty of the relevant agency or Minister as prescribed in section 55, and the expression of that duty in the RTI Bill via that section 55.

Division 2 When charges to be paid

The EDOs support the inclusion of a “refund of excess payment” provision in section 58, which requires an applicant to be refunded when they pay an amount to the relevant agency or Minister which is more than what the ultimate charge(s) is.

Division 3 When charges may be waived

The EDOs object to the provisions in section 62(b) and 63 of the RTI Bill which deal with declarations to be made by the information commissioner as to the “financial hardship status” of non-profit organisations, for reasons including, but not limited to, the following:

1. The previous relevant test for non-profit organisations was dependent upon, and linked to, the charges which were proposed to be imposed in relation to the relevant FOI request. The test was expressed in section 35A(2) of the FOI Act, as follows (note section 35A(2)(b) in particular):
 - “(2) Whether a non-profit organisation is in **financial hardship** depends on--
 - (a) the nature and size of the organisation's funding base; and
Example for paragraph (a)--
The fact an organisation receives significant government funding may indicate its finances are strictly limited.
 - (b) the amount of the original charge compared to the organisation's financial position, having regard especially to the organisation's liquid funds.

Example for paragraph (b)--

A charge of up to \$100 would normally not be beyond the means of an organisation unless its financial position was extremely limited.”

2. The test which is being proposed in sections 62(b) and 63 of the RTI Bill has no such link to the estimated amount of the charge.
3. Whether the imposition of the charge will cause the relevant organisation financial hardship is a valid and relevant consideration, and we submit should be expressed as such in the proposed RTI Bill.
4. Whilst the financial position of the relevant organisation prior to, or at the time of, making a ‘freedom of information application’ *may* be relevant to whether the organisation is able to pay the estimated (or actual) charges, the manner in which the ‘financial hardship’ test in the RTI Bill is expressed does not allow proper consideration to be given to any of the following valid issues:
 - a. The effect that payment of the estimated (or actual) charges may have upon the financial position of the relevant organisation.
 - b. Whether payment of the same would cause the organisation to suffer ‘financial hardship’ if it had to pay those estimated (or actual) charges.
5. Any assessment approach which fails to take these matters into account is illogical and irrational, at the very least.
6. The RTI Bill provides no factors which the information commissioner *must* consider when determining whether a non-profit organisation has “financial hardship status”.
7. We submit that the RTI Bill should be amended so as to:
 - a. abandon the current proposals to:
 - i. assess whether a non-profit organisation has “financial hardship status” without having any reference to an actual access application under the RTI Bill; and
 - ii. have such assessments last for one (1) year from the date of the assessment; and
 - b. ensure that the information commissioner *must* consider what impact the payment of estimated or actual charges in relation to an actual access application will have upon the relevant non-profit organisation.
8. Further, the obligations which are imposed via section 63(6) of the proposed RTI Act are potentially oppressive for organisations which are deemed to have “financial hardship status”.

Division 4 Miscellaneous

The EDOs object to the proposal in section 64 for any decision in a charges estimate notice (or a “further charges estimate notice”) under section 36 of the proposed RTI Bill being excluded from either internal or external review.

In our submission:

1. There is no logical or rational reason for such exclusion; and
2. The EDOs submit that this section should be removed so as to restore these avenues of review.

Part 7: Giving accessDivision 1 Giving access to applicant*Default maximum time limits for access*

The EDOs object to the default maximum time limits on access of 40 business days as set out in section 66 of the RTI Bill. We submit that if maximum time limits on access are to be set (which we do not support), then such maximum time limits should be increased to 60 business days.

Proof of identity and authorisation

The EDOs support the requirements in relation to proof of identity and authorisation set out in section 66 of the RTI Bill and section 3 of the proposed *Right to Information Regulation 2009*, before allowing access to requested documents.

The EDOs also support the requirement for appropriate precautions as set out in section 67.

Deletion of “irrelevant information” and “exempt material”

The EDOs object to the inclusion of section 69 to allow the relevant agency or Minister to delete *irrelevant information* from documents which access must otherwise be given pursuant to an access application.

Applications for access are applications for access to documents, and there is no requirement in the RTI Bill to disclose the *purpose* of the application.

It is therefore patently wrong and unfair to allow an agency or Minister to unilaterally determine whether information contained in a document which falls within the description of documents in the relevant application for access by essentially speculating whether or not the subject information is “relevant to the access application for the document”. Whether such information is relevant to the access application is for the applicant to consider, not the agency or Minister.

Having said that, the EDOs do support the deletion of *exempt material* (as distinct from “irrelevant material”) from documents as provided for in section 70 of the RTI Bill.

Division 2 Giving access to others

The EDOs support the creation of “disclosure logs” as set out in section 75 of the RTI Bill.

Part 8: Internal review*Decisions excluded from internal review*

We repeat our objections to decisions about charges (whether in an estimated charges notice or a further charges estimate notice) not being subject to internal review. There is simply no logical or rational basis for such exclusion, and the EDOs therefore submit that, in addition to our previous submissions in this regard, section 78(2)(d) of the RTI Bill be removed. Indeed, the inclusion of 78(2)(d) is incongruent and inconsistent with section 79(2)(i) which is included in the definition of a “person aggrieved by a decision”.

Who may apply for internal review – an “aggrieved person”

We support the expansion of the definition of “aggrieved person” in sections 79(4) & (5) to include persons who may not necessarily be the applicant in relation to the relevant access application.

Part 9: External reviewDivision 1 Preliminary

We support the onuses of proof which are prescribed in section 85 of the RTI Bill, and we support their prescription in the RTI Bill so as to avoid an unnecessary confusion or conflict over those matters.

Division 2 Application

No comments.

Division 3 After application made

No comments.

Division 4 Conduct of external review*Requirement to assist during review*

Whilst we agree that each participant should be reasonably cooperative during an external review, we would object to section 96(2)⁵ of the RTI Bill being used in a manner which was to reverse an onus prescribed under section 85.

Conduct of reviews

We submit that, in relation to section 98(4)⁶, it should be expressed that the information commissioner will not unreasonably withhold approval for a participant to be represented by another person (including a legal representative) in the event that the information commissioner gives a participant an opportunity to appear before the commissioner. The reasons for our submission in that regard include (but are not limited to) the following:

1. There is nothing in the proposed RTI Bill to similarly restrict representation of the agency or Minister in appearances before the commission.
2. The agency and the Minister will often have legal representatives and/or experienced staff available to them on any such appearances, and would presumably utilise their availability.
3. Arguments or submissions in relation to the grounds relied upon to seek an external review may involve complex legal arguments, and the applicant should have the benefit of an appropriate representative (including a lawyer) to assist where necessary.
4. Although the grounds relied upon by an applicant to seek an external review may be good, the applicant may not have the skills, experience or confidence to argue those grounds as fully as they deserve to be argued, and we therefore submit that the applicant should have the benefit of an appropriate representative (including a lawyer) to assist where necessary.

Restrictions under other laws not applicable

We support the exceptions to the usual privileges which are set out in sections 104(1) & (2).

Division 5 Decision on external review

No comments.

⁵ Section 96(2) provides that a participant in an external review must, if requested under section 96(1), assist the information commissioner even if relevant participant does not have the onus of proof under section 85.

⁶ Which provides for the information commissioner to allow a participant to be represented by another person before the commission if the information commissioner so allows.

*Division 6 Miscellaneous**Costs of external review*

We support section 110 of the RTI Bill, which ensures that no costs order will be made against an access applicant who becomes a participant to an external review.

Schedule 1: Documents to which this Act does not apply

We repeat and rely upon our comments earlier in these submissions in relation to this Schedule 1, and also our previous submissions in relation to documents to which freedom of information legislation (such as the proposed RTI Bill) should and should not apply.

Schedule 3: Exempt information

We repeat and rely upon our comments earlier in these submissions in relation to this Schedule 3, and also our previous submissions in relation to information to which freedom of information legislation (such as the proposed RTI Bill) should and should not apply.

Schedule 4: Public interest test factors

The EDOs strongly support the listing of factors relevant to deciding whether the public interest favours release of a document (in section 48 and Schedule 4 of the proposed legislation). As mentioned elsewhere in this submission, we would like to see this public interest test applied to all documents in place of the blanket exemption for certain classes of documents that the proposed legislation retains.

Part 1: Factors irrelevant to deciding public interest test

We support the inclusion of these factors as those which are irrelevant to deciding whether disclosure of information contained in a document would, on balance, be contrary to the public interest. We particularly commend the review for including the following as factors:

1. Factor 1: Disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government.
2. Factor 4: The person who created the document containing the information was or is of high seniority within the agency.

Part 2: Factors favouring disclosure

We support the inclusion of these factors as those which favour disclosure when considering whether the disclosure of information contained in a document would, on balance, be contrary to the public interest, and commend the review for those proposed inclusions, particularly:

1. Factor 1: Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability.
2. Factor 2: Disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest.

3. Factor 3: Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.
4. Factor 5: Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.
5. Factor 6: Disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.
6. Factor 10: Disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.
7. Factor 11: Disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.
8. Factor 12: Disclosure of the information could reasonably be expected to reveal that the information was—
 - incorrect; or
 - out of date; or
 - misleading; or
 - gratuitous; or
 - unfairly subjective; or
 - irrelevant.
9. Factor 13: Disclosure of the information could reasonably be expected to contribute to the protection of the environment.
10. Factor 14: Disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.

Part 3: Factors favouring nondisclosure

Whilst we acknowledge the clarity provided by including factors which favour nondisclosure, we are concerned that there is no guidance on the weight to be given to these factors, particularly:

1. Factor 1: Disclosure of the information could reasonably be expected to prejudice the collective responsibility of Cabinet or the individual responsibility of members to Parliament.
2. Factor 2: Disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of individuals or entities.
3. Factor 12: Disclosure of the information could reasonably be expected to prejudice the economy of the State.

We particularly support the inclusion of Factor 11 as a factor which favours nondisclosure when considering whether the disclosure of information contained in a document would, on balance, be contrary to the public interest.

Factor 11: Disclosure of the information could reasonably be expected to impede the protection of the environment.

Further, we support factors favouring disclosure numbered 13 and 14 which are set out in schedule 4, part 2 of the proposed RTI Act.

Factor 13: Disclosure of the information could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.

Factor 14: Disclosure of the information could reasonably be expected to prejudice intergovernmental relations.

Part 4: Factors favouring nondisclosure having additional weight because of particular harm in disclosure

However, we are concerned about the existence of factors favouring nondisclosure numbered 1 and 4 which are set out in schedule 4, part 3 of the RTI Act.

Factor 1: Affecting relations with other governments

Factor 4: Disclosing deliberative processes

EDOs' submissions on *Right to Information Regulation 2009 (Qld)* (public consultation draft) ("RTI Regulations")

Part 3: Fees and charges

We support the inclusion of regulations 5(3) & (4) in the RTI Regulations, to exclude, from the calculation of a "processing charge" in relation to an access application, certain types of time spent by the agency or the Minister.

We note with much concern that the cost of accessing documents under the proposed RTI Bill and RTI Regulations is the same as under the current FOI Act (i.e. there has been no reduction in application fee, or processing or access charges).

Part 4: Requirements for annual reports

We support the list of matters in regulation 7 of the RTI Regulations which must be included in the annual report (for each financial year) to the Queensland Legislative Assembly.

Appendix - Executive summary from March 2008 EDO submission in response to the ‘Enhancing Open and Accountable Government’ Discussion Paper

Summary of EDO concerns

This submission by the Environmental Defenders Office (Qld) Inc. and the Environmental Defenders Office of Northern Queensland Inc. (“the EDOs”) responds to relevant Discussion Questions contained in the Discussion Paper compiled by the Freedom of Information Independent Review Panel in the *Freedom of Information Act 1992* (Qld) (“the Act”) review process.

We welcome a comprehensive review of the Act which challenges core legislative presumptions and current paradigms in the administration of freedom of information (“FOI”). We are pleased that this reform aims to provide a number of key improvements for effective FOI legislation to underpin accountability mechanisms for a healthy democracy.

In order to promote a culture of disclosure and transparency, it is imperative that information be readily available to the public, particularly on issues of public interest. Timely supply of information at minimal cost promotes open and accountable government and improves decision-making processes. In this submission we stress the need to make FOI more affordable and to improve access to information by preventing the abuse of exemptions to disclosure.

A number of proposals are necessary for improving upon the current system, including legislative amendments to achieve consistency and certainty, which are outlined in this submission. We agree with the Premier’s statement (Discussion Paper page 16) that the legislation needs a complete overhaul to follow best practice examples from Australia and around the world to encourage open and accountable government.

We also commend the Panel for raising ways in which government could make more information available without resort to FOI processes. The EDOs support the UK model, where government and government-funded agencies are required to publish an annual state of affairs online along with an Information Asset Register of unpublished information (Discussion Paper page 57).

Exemption Provisions

- The EDOs acknowledge the importance of exemption provisions in balancing the objective of providing access to government information against legitimate claims for protection. The Discussion Paper states that the application of exemptions represents the core business of FOI as nearly all contested access requests centre on whether an agency has correctly invoked an exemption. In order to maximise availability of information to the public in accordance with the object of the Act, these exemptions must be strictly regulated and monitored.

In the EDOs’ experience, existing exemption provisions are routinely abused, in particular the Cabinet exemption. The Queensland FOI provisions exempting Cabinet matter must be amended to disallow a Minister from taking documents into the Cabinet room for no purpose other than to avoid them being accessible through FOI (such as by invoking the “noting without discussion” provision). The EDOs’ strong view is that the Cabinet exemption should be tightened or removed entirely.

As a model for comparison, New Zealand’s cabinet documents are routinely released in response to requests without delay. We suggest that a similar “consequential” approach be

adopted in Queensland where the focus is on the likely consequences of disclosure, as opposed to the current “categorical” approach used in Queensland.

- The EDOs’ firm view is that instances of public interest FOI access should be expanded. Currently, a public interest test is not applied to many exemptions, such as for Cabinet or Executive Council documents which are class exemptions lacking a public interest balancing test. The presumption that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility is of great concern to the EDOs. The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public. We are also concerned and agree with the Panel that there is a risk that FOI officers may neglect to consider the public interest test because a request falls within an exemption.

We suggest that public interest considerations be given a greater role in determining whether information is released, similar to the New Zealand legislation. In New Zealand, unless information falls within a very limited number of exemptions, agencies must show that the information satisfies one of a number of criteria and then apply a test balancing the harm of releasing the information to determine whether this outweighs the public interest in keeping the information confidential.

Time and Costs of Applications

- Since the Act was amended in 2001, the government has had much stronger powers to deal with generalised applications through the imposition of fees for processing FOI applications, subject to a financial hardship exemption. The Discussion Paper observes that fees and charges have been a substantial contributing factor to a reduction in the use of FOI legislation for purposes other than access to an applicant’s own personal information⁷. Further, experience suggests that there is often a degree of inconsistency between agencies in relation to the application fees and charges regime which gives rise to inequities between, and confusion amongst applicants. Such disputes about fees and charges have the potential to unsettle the initial relationship between the applicant and an agency.
- The EDOs strongly believe that accessing documents through FOI needs to be more affordable. The current fees and charges need reviewing given the Panel’s evidence that they act as a hindrance or deterrent to FOI applicants. Fees and charges should be removed or kept to an absolute minimum if FOI is intended to encourage open and accountable government. In particular, fees should be waived where information is sought for public interest purposes such as environmental issues by community or conservation groups or individuals. Currently such groups or persons are forced to depend on a broad interpretation of the financial hardship exemption to avoid oppressive FOI fees.
- The current FOI legislation is impeded by unnecessary complexities and time delays in processing applications. The EDO commends the Panel on its proposals to speed up and simplify the application process.

⁷ For FOI requests lodged with a Queensland government agency or Minister, the application fee is \$33.50 unless the documents requested relate to the “personal affairs” of the FOI applicant, in which case there is no application fee. The agency has a discretionary power to impose a charge of \$5 per 15 minutes in relation to the time taken to search for the requested documents and the time taken to supervise inspection if the requested documents do not relate to the personal affairs of the FOI applicant. However, special consideration is given to non-profit organisations and these organisations can apply to have fees waived if it can be shown that the fee will cause financial hardship.