

**INFORMATION COMMISSIONER'S REFLECTIONS ON THE FIRST TWO YEARS OF THE
*Right to Information Act 2009 AND Information Privacy Act 2009.***

'Are we there yet?'

1 July 2011

Executive Summary

The *Right to Information Act 2009* and the *Information Privacy Act 2009* ("the legislation") commenced on 1 July 2009. Now that two years have passed, people are asking, "Are we there yet?"

Guided by the legislation the Office of the Information Commissioner (OIC) fulfills its role by publishing guidelines, providing awareness, education and training activities, undertaking research, commenting on legislation, resolving privacy complaints and external reviews, and monitoring and reporting on agency compliance with the legislation.

Two years post-implementation the reorganized and expanded OIC is functioning efficiently and effectively. Successful performance is reflected in the OIC's Annual Reports and the office presents itself for accountability to the Legal Affairs, Police, Corrective Services and Emergency Services Committee. These factors, coupled with record breaking performance in managing higher-than-ever numbers of external reviews and privacy complaints, indicate that the OIC itself is largely "there".

In terms of RTI reforms as a whole it is important to identify its two key objectives: (i) increasing the flow of information to the community; and (ii) changing the presumption from all documents being closed to all documents are open.

Some key findings identified in the Information Commissioner's analysis of the past two years include:

- In 2009-10 the OIC received more external review applications than ever before. The number of applications would have likely increased again in 2010-11 were it not for the effect of the natural disasters during the first quarter of 2011.
- In 2009-10 the OIC resolved a record 91% of external review applications and in 2010-11 the Office closed a record 394 external review applications. In 2010-11 the OIC also closed the last matter relating to the *Freedom of Information Act 1992 (Qld)*.
- The OIC's report "*Agency Progress on the Right to Information Reforms*" shows 72% full or partial implementation of the reform's 185 obligations across all agencies and 94% full or partial implementation by Queensland government departments.

The overall assessment is that agencies, and departments in particular, have done more than at any previous time to open up the Queensland government. Whilst positive progress has been identified it must not be forgotten that significant steps must still be taken. Thus, we are not quite "there" yet, but we can certainly see it from here.

The Information Commissioner provides breadth and depth to her analysis of progress in Queensland's implementation of the RTI and IP Act, including consideration of quantitative and qualitative data to assess the OIC's performance, agencies' compliance with the legislation, the flow of information to the community and the overall success of RTI reforms.

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Office of the Information Commissioner

Under the legislation, the Office of the Information Commissioner provides the following services:

- Provide independent, timely and fair review of decisions made under the legislation;
- Provide an independent and timely privacy compliant resolution service;
- Foster improvements in the quality of practice in RTI and Information Privacy in Queensland Government agencies;
- Promote the principles and practices of RTI and Information Privacy in the community and within government

These services are provided in a number of different ways. The Office publishes guidelines, provides awareness, education and training activities, undertakes research, comments on legislation, resolves privacy complaints and external reviews and monitors and reports on agency compliance with the legislation.

As far as the Office itself is concerned, the answer to the question "Are we there yet?" is largely 'yes'. Our expanded role under the legislation required significant reorganisation and expansion, which has been completed and two years post implementation, the Office is functioning effectively and efficiently. Our performance is reported in our annual reports published on our website and we are regularly scrutinised by our parliamentary committee. From this year, we are accountable to the Legal Affairs, Police, Corrective Services and Emergency Services Committee.

These two years have been record breaking. In 2009-10 the Office received more external review applications than ever before. 2010-11 would likely have broken this new record if not for the dampening effect of the natural disasters during a three month period. In 2009-10 we resolved 91% of external review applications, a record resolution rate, followed by 84% in 2010-11. In 2010-11, the Office finalised a record number of external review applications (394). We received and processed Queensland's first privacy complaints made to an independent agency. In 2010-11 we closed the last matter relating to the Freedom of Information Act 1992 (Qld). In 2010-11 we completed five performance monitoring reports for tabling in the Legislative Assembly.

Perhaps our biggest challenge over the last two years has been the significant increase in applications for external review- approximately 60%. We think the increase has

primarily arisen from the policy change of removing mandatory internal review making it solely an election of the applicant. That is, an access applicant who is dissatisfied with an agency decision under the legislation can now elect to ask for an internal review by the agency or ask for an external review by the Office. Other reasons for the increase are the increased number of reviewable decisions and the Office's new responsibility for deciding financial hardship applications from non-profit organisations.

It is not just the increased volume of external review applications which have affected the Office. The nature of the applications has also changed. Under the Freedom of Information legislation, the Office summarily dismissed a third of applications for external review for various reasons including the application not being in the jurisdiction of the Office. Under the new legislation (and because of it) the 'rejection' rate has dropped to less than 20%. Taken together, this means that not only has there been a significant increase in the number of external review applications, but also in the resources they require. There are far more applications and far more are substantive applications, requiring more time and more resources to finalise.

The RTI and IP reforms

The answer to the question "Are we there yet?" with respect to the impact of the reforms can largely be drawn from the activities of our performance monitoring and reporting team and other research. Evaluation of the impact of FOI/RTI is in its infancy worldwide. In Queensland we can look at the activities of the Office's performance monitoring and reporting team and the research we have commissioned as a start in answering this question.

The Preamble to the legislation sets out the reasons for its enactment. Means of assessing each of these aims are put forward by Hazell, Worthy and Glover in their book, "The Impact of the FOI Act on Central Government in the UK. Does FOI work?"¹

In Queensland reforms were based on the work of the Independent FOI Review Panel. One of the key barriers to the effective implementation of the FOI Act it identified was the closed culture of the public sector. One of the key findings of the Independent FOI Review Panel was that the objective of the FOI Act, an informed community which can effectively participate in democratic processes, had not been achieved. Overcoming the former and achieving the latter were goals of the new legislation. Put another way, two objectives of the RTI reforms are (i) the increase in the flow of information to the community; and (ii) a change in presumption from all documents are closed to all documents are open. This presumption requires a culture change.

If possible, it would be worthwhile measuring the success of these two objectives. OIC as a part of its monitoring role is gathering performance data on these two objectives from a number of sources: Agencies self reported audit results, media analysis conducted by UQ School of Journalism and Communication, surveys of public servants and households conducted by the Office of Economical and Statistical Research, analysis of external review processes, and the legislation itself.

The overall assessment is that agencies, departments in particular have done more than at any previous time to open up the Queensland government and public authorities. The

¹ Hazell, R., Worthy, B., and Glover, M., "The Impact of the Freedom of Information Act on Central Government in the UK. Does FOI Work?", 2010. Palgrave Macmillan, Hampshire.

implementation required much work and for departments, was carried out at the time of significant other public sector reform.

Is the public sector culture becoming more open?

The short answer is: significant steps have been taken with significant change still required.

Government information is required to be released administratively as a matter of course, unless there is a good reason not to, with access applications being necessary only as a last resort. Of particular note, the legislation introduced and supported by the Government explicitly states that embarrassment to the Government or loss of confidence in the Government is not a good enough reason to withhold information. It is clear that openness comes first; this is both policy and the law requires of agencies.

While it is easy to express, putting it into practice represents a difficult transition for agencies and public servants. They are moving from the old stance of, "Is there a way we can withhold the information because it will embarrass the Department or the government?" to: "The information is open to the public, no matter how it makes us look". Fully achieving this requires culture change.

Culture change can be measured by level of compliance; together with media analysis; perceptions of public servants and the public. Reports on the latter two issues have been presented to the Chair of the Parliamentary Committee and can be publicly released in August after their tabling in the Legislative Assembly. The media analysis undertaken by the UQ will be completed and released later this year. The reports for release later this year support the view that agencies, particularly departments have embraced the proactive disclosure culture.

Compliance with legislation

The Office's report "Agency Progress on the Right to Information Reforms" shows 72% full or partial implementation of the reform's 185 obligations across all agencies. Queensland government departments had a strong reported performance with 94% full or partial implementation of the reform obligations.

Given the scale of change required in agencies, I regard this as a positive indicator of a change in the culture of the public sector. The level of compliance largely reflects the commitment of CEOs to implementing the reforms and the strong early efforts have paid off. I look forward to 100% compliance when the next survey is run about two years after the last survey period.

There is evidence that agencies are responding positively to OIC's performance monitoring.

Here are two examples:-

1. After sending regional councils our desktop report in August 2010, the regional council websites in April 2011 and found that

- 39 out of 63 local government websites (62%) had improved. 23 of the 39 local governments who had improved had both a publication scheme and a disclosure log.
- 25 of the 63 websites were identifiably Resolute IT websites. Of these, 18 Resolute IT websites had improved the local government's compliance with the RTI and IP Act.

- This indicates that OIC's discussions with Resolute IT, to build compliance into the website template, had an impact for 18 local governments.

2. When we followed up the go card report, TransLink and QPS advised they had fully implemented our recommendations, and they described activities that represented full compliance, and even activities beyond what OIC had recommended. These findings will be reported to Parliament later this year.

The extent to which requests for information are handled administratively using RTI as a last resort may be a measure of a cultural change. I'm not aware of any systems in place to measure this. Anecdotally agencies are reporting an increase in releasing information administratively.

To a lesser degree, the extent to which RTI and IP decision making is upheld in internal review and external review is also a measure of culture change. It shows the extent to which departments' approaches to RTI/IP requests are consistent with the legislative requirements.

Table 1. Indicators of the degree of compliance by Qld agencies with the legislative requirements

	08-09 %	09-10 %	10-11 %
Internal review upholding original decision	46	53	n/a**
% of applications seeking IR	3.2	0.68*	n/a**
OIC decision upholding original decision	57	23	47

*The drop in the % of applications seeking IR from 08-09 to 09-10 reflects the policy change from mandatory internal review to applicant's choosing either internal or external review

**Information is sourced from the RTI Annual Report produced by DJAG. At the time of writing the Report had not been released

On external review, the Office only affirmed agency decisions in only 23% of external reviews in 2009-10. All of the affirmed decisions occurred on FOI files. It would be easy at first glance to attribute the high rate of overturning agency decisions in the first year of the operation of the new legislation to a lack of familiarity with the new regulatory environment. However as 32 of the 35 decisions which were not affirmed were also made under the FOI Act, this cannot be the case. That is, the high degree of non-compliance occurred with respect to agency decisions made under the old legislation. The reason for the drop from the result in the previous year or 57% is not immediately clear. It should be noted that the sample is a very small sample, particularly considering the numbers of daily decisions made by agencies. In any case the 2010-11 results show a marked improvement which I hope will continue, and improve in coming years.

A common method of measuring compliance under the FOI Act was the timeliness of processing access applications. It was an indicator of the importance agencies gave to the administration of the legislation through resource allocation. This may not be the case under the RTI reforms where agencies are expected to resource the 'push model' with formal access applications being used as a last resort. It may be preferable to monitor the effectiveness of an agency's publication scheme as a proxy measure of culture change.

Has the flow of information to the community increased?

The Office believes so but there is little quantitative evidence.

We can quantify from disclosure logs the amount of additional information released that would not have previously been published to the world.

There do not appear to be systems in place to quantify the amount of new information released administratively on request or proactively through publications schemes. Departmental officials anecdotally report that more information is being released administratively.

The Office undertook a desktop audit of agency publication schemes. The results show that departments performed strongly with all having significantly compliant publications schemes with weaker performance in some of the other sectors. Future audits by the Office will include a component identifying available datasets that could be published and datasets the community would find useful.

From the perspective of external review, it is our observation that over the past two years agencies are a lot more willing to embrace informal resolution. They are more receptive to 'out of the box' solutions to the issues on external review and in some cases, such as a couple of external reviews with Queensland Health, the agency has suggested a method of informal resolution before our Office has considered that alternative. Furthermore, local governments are also increasingly willing to have direct communication with applicant, such as face to face meetings, to resolve RTI issues without the need for an external review process. This willingness to explore other avenues for the release of information to applicants ultimately supports the contention that there is a growing 'prodisclosure attitude' among RTI Officers.

Further information to be released in the media analysis and two surveys previously mentioned will provide further supporting evidence that the flow of information to the community has increased as a result of the RTI reforms.

All in all, the reforms have made a real impact in agencies with some further work to do. We are not there yet, but we have made significant progress to getting there.