Submission by the

Office of the Information Commissioner

Economics and Governance Committee

MINERAL AND ENERGY RESOURCES (FINANCIAL PROVISIONING) BILL 2018

March 2018

The Queensland Office of the Information Commissioner (OIC) is an independent statutory authority. This submission does not represent the views or opinions of the Queensland Government.

The statutory functions of the Information Commissioner under the *Right to Information Act 2009* (Qld) (**RTI Act**) include commenting on issues relating to the administration of right to information in the public sector environment. OIC's role includes assisting in achieving the goal of open and transparent government by promoting better and easier access to public sector information and improving the flow of information to the community. OIC welcomes the opportunity to comment on the Mineral and Energy Resources (Financial Provisioning) Bill 2018 (**the Bill**).

Queensland's RTI Act recognises that government-held information is a public resource and that openness in government enhances accountability. The RTI Act represents a clear move from a 'pull' model' to a 'push model', emphasising proactive and routine release of information and maximum disclosure of information unless to do so would be contrary to the public interest. The RTI Act states that a formal application for government-held information under the RTI or IP Act should only be made as a last resort.

OIC notes that the Bill establishes a financial provisioning scheme to provide the 'State with access to a source of funds in relation to environmental management and rehabilitation related costs, while adopting a risk assessment approach, so that the costs to the holder reflect the potential risk for government'.[1] OIC further notes that the Bill replaces the 'current financial assurance requirements for resource activities under the *Environmental Protection Act 1994* (**EP Act**) with a financial provisioning scheme, including a Financial Provisioning Fund (**scheme fund**), surety arrangements and the appointment of scheme manager to manage the scheme'.[2]

This submission raises concerns that the approach taken in amending the RTI Act is inconsistent with the scheme of the legislation, the stated objective of the amendments, the extent of the proposed confidentiality provision in the Bill, the conclusions of the recent comprehensive review of the RTI Act tabled in Parliament by the Attorney-General in October 2017, and the Solomon Report. The RTI legislative framework is also sufficient to protect sensitive documents, including business and financial information. However, an alternative legislative exemption option to achieve the stated objective is identified that is consistent with how other confidentiality provisions are treated under

[1] Explanatory Notes, p3
[2] Explanatory Notes, p1

the RTI Act where Parliament considers it is, on balance, not in the public interest to disclose the type of document.

OIC also notes that details of individual environmental security bond amounts for major mines in the Northern Territory are now publically available online, and that Queensland should adopt a proactive disclosure approach, consistent with the RTI Act, to such information where at all possible.

AMENDMENT OF RTI ACT – EXCLUSION PROVISIONS

The Bill proposes to introduce additional categories of documents and entities to which the RTI Act does not apply. Specifically:

- Clause 217 of the Bill amends Schedule 1 of the RTI Act to exclude a document created, or received, by the scheme manager under Part 3 of the Bill from the operation of the RTI Act; and
- Clause 218 amends Schedule 2, part 2 of the RTI Act to exclude the scheme manager in relation to the scheme manager's functions from the operation of the RTI Act.

The Explanatory notes state (p99):

> *'The exemptions respond to significant concerns raised by industry stakeholders about the potential for disclosure of sensitive financial and business information and documents which would ordinarily only be provided to financial institutions for obtaining financial assurance under the current arrangements under the EP Act. These exemptions will allay holders' concerns that their confidential corporate and financial documents (including potentially details of their joint venture arrangements) provided to the scheme manager could otherwise be publicly available'.*

While the explanatory notes refer to the proposed amendments to the RTI Act as 'exemptions', they are in fact 'exclusions' not 'exemptions' as they would exclude the relevant documents and the scheme manager from the operation of the legislation as a whole. Exemptions are provided for in Schedule 3 of the RTI Act and only operate in relation to the decision making process for formal access applications for documents.

Exclusions are used sparingly in the RTI Act given the impact of such a provision and the capacity of the legislative framework to protect sensitive information from disclosure, for example using exemptions or the public interest test. Since commencement of the RTI Act in 2009, exceptionally few amendments have been made to Schedule 2.

The Attorney-General tabled the Report on the *Review of the Right to Information Act 2009* and the *Information Privacy Act 2009* (Review Report) in Parliament in October 2017 following a comprehensive review including public consultation. This Review Report recommended there be no further exemptions or exclusions and, in fact, recommended the removal of an existing exemption (**Recommendation 6**).[3] The Review Report concluded that 'the RTI Act already contains sufficient exemptions and exclusions and the flexible public interest balancing test allows for adequate protection of information where required. To add 'tailored' exemptions or exclusions directed at certain documents or agency functions may suggest that the RTI Act does not adequately protect other types of information'. [4] The proposed amendments are therefore inconsistent with the recent Review Report.

In June 2008 the report on the wide ranging review of the FOI Act by an independent panel chaired by Dr David Solomon AM was delivered (the Solomon Report). The Solomon report recommended an overhaul of Queensland's FOI laws including very limited exclusions and fewer legislated exemptions under the new Right to Information Act. In the Solomon Report, the Panel specifically argue against including exclusions to allay concerns about disclosure where exemptions or the public interest test can easily protect sensitive information.[5]

A right to information law that strikes an appropriate balance between the right of access and limiting that right of access on public interest grounds is critical to both a robust, accountable government and an informed community. This is clearly reflected in the reservations made about the scope of exclusions and exemptions by the above reviews. It is critical that individual legislative proposals are considered in the context of the broader policy and departures from such are clearly justified. In this case the explanatory notes do not provide a compelling case to justify an exclusion from the operation of the RTI Act contrary to recent policy expressed by the Attorney-General's Review Report.

Alternative options

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[3] The only changes to exemption provisions were an amendment to an exemption provision to increase disclosure, and removal of the investment incentive scheme exemption.

[4] Report on the review of the *Right to Information Act 2009* and *Information Privacy Act 2009*, October 2017, p20 viewed at http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T2014.pdf

[5] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, (The Solomon Report), at pages 100-104. Available at: http://www.rti.qld.gov.au/__data/assets/pdf_file/0019/107632/solomon-report.pdf

Firstly, it is important to note, as stated in the Review Report, that the RTI Act has a sufficient legislative framework to protect sensitive documents including business and financial information. Schedule 3 of the RTI Act sets out the type of information which Parliament has considered to be 'exempt information' because its disclosure would, on balance, be contrary to the public interest. Where exemptions do not apply, a decision maker considers public interest factors favouring disclosure and non-disclosure and subsequently balances such interests. The identified concerns are relevant to some factors favouring nondisclosure in the public interest in Schedule 4 Part 3.

OIC notes the Confidentiality provision contained in Part 5 of the Bill appears to address identified concerns raised by stakeholders about protecting the confidentiality of commercially sensitive documents provided to the scheme manager from disclosure or publication. However, we also note that there are exceptions to the scope of the confidentiality provision. Accordingly, it is OIC's view that the proposed amendment of the RTI Act to provide a blanket exclusion for documents created, or received, by the scheme manager and the scheme managers functions appears unnecessary and is broader than provided for in the confidentiality provision in the Bill.

However if an amendment is considered necessary, provision exists in the RTI Act for information to be exempt where disclosure is prohibited by an Act. Schedule 3 of the RTI Act sets out the type of information which Parliament has considered to be 'exempt information' because its disclosure would, on balance, be contrary to the public interest. If Parliament considered that disclosure of the relevant information would, on balance, be contrary to the public interest, the outcome being sought by the proposed amendments to the RTI Act contained in clauses 216, 217 and 218 of the Bill could be achieved by prescribing the relevant elements of the confidentiality provision regarding commercially sensitive documents in Schedule 3, section 12 of the RTI Act.

PUBLICATION OF TOTAL AMOUNTS OF FINANCIAL ASSURANCE

As noted previously, Queensland's RTI Act recognises that government information is a public resource and that openness in government enhances the accountability of government. Parliament's reasons for enacting this legislation, as set out in the Preamble, recognised that in a free and democratic society - there should be open discussion of public affairs and openness in government enhances the accountability of government. It was Parliament's intention to emphasise and promote the right to government information; and to provide a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to provide the information.

It appears unclear from the reporting provisions contained in the Bill, as currently drafted, whether the total amount of financial assurance will be published.

The Explanatory Notes state (page 3):

> *The Bill provides for transparency in relation to the operation of the financial provisioning scheme by including requirements for both a published annual report by the scheme manager and periodic actuarial reviews. An actuarial investigation of the scheme must be carried out five years after commencement and every subsequent three years*.

OIC notes that the Department of Environment and Science's environmental authorities register currently provides details about licences (environmental authorities) issued for resource activities (mining and petroleum and gas) and prescribed activities issued under the EP Act. The environmental authorities include conditions requiring the developments to conduct these activities in an environmentally responsible manner.

Accordingly, it is important that any proposed amendments contained in the Bill to support introduction of the revised financial provisioning scheme do not result in any unintended consequences, including the public not being able to access information currently available on existing public registers.

OIC further considers that publication of the total amount of financial assurance is an important transparency and accountability measure. Publication will ensure the accountability of the scheme manager for financial assurance determinations and decisions to enhance transparency of agency operations and contribute to informed community debate on the sufficiency of financial assurance. Shortfalls in environmental rehabilitation expenses at relevant sites are met out of public funds. Disclosure of the total amounts of financial assurance allows the public to apprise itself of this amount and assess the adequacy of the same – an important matter of public interest given that any shortfall would, ultimately be met by the public.

OIC notes that the details of individual environmental security bond amounts for nine major mines in the Northern Territory are now publically available following changes by the Northern Territory Government in September 2017.[6] The changes mean that the amount of security held against individual authorised mining activities projects will be disclosed. A system is currently being developed to publish total amounts for all authorised mining activities. Securities held against

[6] https://dpir.nt.gov.au/mining-and-energy/mines-and-energy-publications-information-and-statistics/authorised-mining-sites/mining-securities

individual mining Authorisations can be obtained on written application addressed to the Manager Mining Register.

Proactive disclosure through online listing of the total amount of financial assurance for mining projects in Queensland, modelled on the Northern Territory disclosure regime, would demonstrate a commitment to openness, accountability and transparency. Proactive disclosure is an important RTI measure, increasing the flow of information by pushing information out into the community without the need to make a formal application under the RTI Act. The RTI Act supports and encourages proactive disclosure.

OIC remains available to provide any assistance to the Committee with regards to its Inquiry.