

10 October 2024

Ms Jasmina Joldić PSM
Director-General
Department of Justice and Attorney-General
Office of the Director General

By email only: DGs.Office@justice.qld.gov.au, PrivacyandRTIreforms@justice.qld.gov.au

Dear Ms Joldić

Consultation Paper — Review of the Right to Information Regulation 2009 and Information Privacy Regulation 2009

Thank you for your correspondence inviting feedback on the *Consultation Paper – Review of the Right to Information Regulation 2009 and the Information Privacy Regulation 2009 (Consultation Paper)*.

On 13 September 2024, the Honourable Yvette D’Ath MP, Attorney-General and Minister for Justice, Minister for the Prevention of Domestic and Family Violence wrote to me seeking OIC’s feedback on the Consultation Paper.

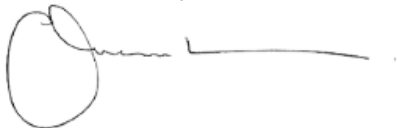
On 27 September 2024, I responded providing OIC’s comments on the Consultation Paper.

OIC reiterates its earlier comments made in response to the Consultation Paper, as set out in **Attachment 1**.

I note your letters dated 30 September 2024 state that is not proposed to publish submissions in response to the Consultation Paper. Please note that I propose to publish a copy of the OIC’s submission on our website in line with our usual practice.

If your Department has any queries or requires further information, please contact the OIC on 07 3234 7373 or by email at administration@oic.qld.gov.au.

Yours sincerely



Joanne Kummrow
Information Commissioner

Attach. Attachment 1–OIC Feedback

ATTACHMENT 1 — OIC Feedback

| Item No | Consultation Issue | OIC Comments/Suggestions |
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| Part A. Matters currently dealt with under the Regulations | | |
| Issue one: Questions for consultation | | |
| | 1. Do you support the preferred option – Option 3, that Australia Post staff should be able to certify copies of identity documents | Yes. OIC supports the recommendation. However, we suggest additional changes be made as set out in response to Question 2 below. |
| | 2. If not, what changes, if any, should be made to evidence of identity requirements? | OIC suggests the Department of Justice and Attorney-General consider amending section 3 (Evidence of identity—Qd5, section 24(5), definition of ‘evidence of identify’) of the <i>Right to Information Regulation 2009 (RTI Regulation)</i> to provide that if the original document verifying the person’s identity is a driver licence stored on the digital licence app that is approved under the <i>Transport Planning and Coordination Act 1994</i> called Digital licence app, a copy of the driver licence may only be in the form of a printed document generated by the app. |
| Issue two: Questions for consultation | | |
| | 3. Do you support the preferred option — Option 1, make no change to fees and charges? | No, for the reasons set out below in response to Question 4. |
| | 4. If not, what changes should be made? | <p>OIC recommends amending section 6(1)(a) of the RTI Regulation to provide that the access charge under section 57 of the RTI Act in relation to an access application for a document is the total of ‘the reasonable cost’ incurred by the agency or Minister rather than the ‘actual cost incurred’.</p> <p>OIC is aware of instances where agencies are contracting out the editing of recordings to third party service providers (CCTV and body worn cameras (BWC)) and advising applicants that they have to pay the cost charged by the contractor – which may often be considerable and, in practical terms, can amount to a <i>de facto</i> refusal of access through prohibitive access costs and charges.</p> <p>When agencies started using technology which creates documents (CCTV and BWC recordings), OIC’s position was that, as part of implementing and using the technology, it was reasonable to expect that the agency should ensure it has the capacity and ability to edit and provide copies of the documents it was creating under RTI. OIC considers that this remains a reasonable expectation.</p> <p>For agencies that are subject to frequent requests to access recordings, costs will be minimised (as required by section 58) due to having in-house editing tools and expertise. However, for other agencies where applications for recordings are relatively infrequent, the agency may attempt to minimise its overall costs by contracting out. In the latter case, OIC suggests that it would be reasonable to expect</p> |

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| | | <p>that the agency bear some of the costs of contracting out, given it is choosing not to have in-house capability to edit its own documents. Nonetheless, OIC is increasingly noticing agencies preferring to avoid using any of their resources on editing recordings and, instead, choosing to contract out and seeking to pass the full, actual cost of doing so on to an applicant.</p> <p>Further, in the event the current position is to be retained, then OIC notes that by letter dated 17 February 2022, we wrote to the Attorney-General and Minister for Justice canvassing issues arising from use of the undefined term 'photocopy' in, relevantly, section 6(1)(b) of the RTI Regulation, and suggested amendments to address these issues. OIC again recommends that the relevant issue be addressed.</p> <p>As an additional issue, OIC notes that it is difficult, if not impossible, for prisoners incarcerated outside of Queensland to make a valid application for their personal information.</p> <p>As noted in the discussion paper, the regulations require evidence of identity to be certified by a qualified witness. The only exception is:</p> <p style="padding-left: 40px;">if the person is a prisoner within the meaning of the Corrective Services Act 2006—a copy of the person's identity card from the department administering that Act that is certified by a corrective services officer within the meaning of that Act.</p> <p>People incarcerated in other Australian jurisdictions are not 'prisoners' within the meaning of the <i>Corrective Services Act 2006</i>. In most cases, this means they have no way to satisfy the identity requirements. They require agency decision makers to exercise significant discretion, which may put the decision maker in the position of processing applications which may not be compliant technically with the RTI Act and Regulations.</p> <p>OIC suggests amendments are required to account for people incarcerated outside Queensland. This could be done by expanding the above exception to include people who are prisoners, identity cards, and corrective service officers under an equivalent Act of another State or Territory.</p> |
| Issue three: Questions for consultation | | |
| | <p>5. Do you support the preferred option — Option 3, to require new reporting as a result of OIC's new responsibilities, to better reflect OTC's workload and to permit agencies to be identified in certain cases?</p> | <p>Yes. OIC supports Option 3 to require new reporting as a result of OIC's new responsibilities, to better reflect OIC's workload and to permit agencies to be identified in certain cases.</p> |

| Item No | Consultation Issue | OIC Comments/Suggestions |
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| | 6. If not, what changes, if any, should be made to the preferred option, and to OIC's reporting obligations? | |
| Issue four: Questions for consultation | | |
| | 7. Do you support the preferred option — Option 5- requiring reporting on amended current requirements, national metrics and numbers of pages considered? | OIC supports Option 5 to amend the requirements. Summary issue 4 Statistics.docx However, we suggest amending section 8(1)(a) of the RTI Regulation to also capture all applications that an agency received in the relevant period, not only valid applications. OIC is aware that for some agencies a considerable amount of time and resources can be spent dealing with RTI applications that are not compliant/valid. OIC considers that section 8(1)(a) should capture these statistics. |
| | 8. If not, are there particular aspects proposed above which should be omitted, for example, because they would be particularly burdensome for agencies, or do not provide much benefit? | |
| | 9. Would there be any value in reporting on the total number of full-time equivalent employees to whom the agency has delegated the authority to make decisions in relation to information access applications made under the RTI Act and privacy complaints under the IP Act? | Yes. OIC considers this data provides transparency in relation to each agency's resourcing of its RTI and privacy functions. |
| Issue five: Questions for consultation | | |
| | 10. Do you support the preferred option – Option 2 – changes to proposed requirements? | OIC generally supports Option 2, subject to our comments below. |
| | 11. If not, what changes, if any, would you suggest in relation to reporting on privacy complaints? | References to 'applicant' should be replaced with 'complainant'. The suggested 'heads' of reporting at dot points 2 and 7 are ambiguous and imprecise. Agencies do not have a power to 'decline to deal' with a privacy complaint eg. on grounds the complaint is vexatious or frivolous. |

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| | | <p>Agencies field complaints and will presumably either reject a complaint on the basis the complaint does not satisfy the requirements in new section 166A (including where a complaint is made more than 12 months after an alleged privacy breach – ie. ‘old’), or deal with the complaint, and decide that the alleged privacy breach the subject of the complaint is not substantiated. Given this, OIC suggests reporting could be simplified:</p> <ul style="list-style-type: none"> • reporting the number of complaints not dealt with, on basis the complaint was not compliant with section 166A - and the subsection of section 166A relied on (ie subsection 166A(1)(d) – made more than 12 months after becoming aware of alleged breach); • reporting the number of complaints dealt with, but not accepted as substantiated (eg. no breach of QPPs established, or complaint concerns an allegation outside of the IP Act, not the responsibility of the agency etc). <p>Regarding reporting on complaints resolved by way of agreement, OIC supports this proposal in principle but, as foreshadowed in the Consultation Paper, agrees that the concept of ‘agreement’ will require definition. ‘Agreement’ could be defined to encompass only those circumstances where the complainant has given the agency express (potentially binding) agreement to resolve the complaint.</p> <p>OIC also suggests that agencies report on the outcomes to accepted complaints/those resolved by way of agreement: eg. apology, payment of compensation, change in agency practice/additional training.</p> <p>Regarding MNDB reporting, OIC recommends that proposed reporting should be amended to read ‘actual or suspected data breaches that the agency assessed as not an ‘eligible data breach’.</p> <p>OIC also considers that, in the interests of transparency and accountability, MNDB reporting could be extended to require reporting by agencies of Eligible Data Breaches of an agency, including:</p> <ul style="list-style-type: none"> • where agency has relied on an exemption to notification; and • the exemption provision relied upon on.¹ |

¹ OIC notes that we should have access to the total number of Eligible Data Breaches (**EDB**) experienced by a given agency, as a result of notification to us (unless the EDB is a ‘fully exempt’ EDB, requiring notification to neither particular individuals nor OIC). Public accountability and transparency would also be served by this matter also being the subject of public annual reporting (as is currently the case with the number of external review applications made to OIC of agency information access/amendment decisions – a matter which is known to OIC, but nevertheless the subject of annual agency reporting). Additionally, and as alluded to above, it is also the case that there may exist a number of ‘fully exempt’ EDBs not subject to notification, the existence of which may not be readily accessible absent the exercise of OIC review or investigative powers.

| Issue seven: Questions for consultation | | |
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| | 12. Do you support the preferred option - Option 1 — remove the requirement to report on efforts to further the objects of the Act? | Yes. |
| | 13. If not, what benefits do you see in continued reporting? | |
| Part B. New matters which may or must be prescribed | | |
| Issue eight: Questions for consultation | | |
| | 14. Do you support the preferred option — Option 1 - no additional information prescribed for publication schemes? | Yes. |
| | 15. If not, what information should be prescribed, and should there be any further limitation on the information? | |
| Issue nine: Questions for consultation | | |
| | 16. Do you support the preferred option — Option 1 — prescribing as outlined above? | OIC supports preferred Option 1 to prescribe as receiving agencies, all agencies, other than excluded entities under the IP Act and prescribe the Registry for Births, Deaths and Marriages and the Department of Transport and Main Roads as disclosing entities. |
| | 17. If not, which agencies should be prescribed as disclosing agencies or receiving agencies? | |
| Issue ten: Questions for consultation | | |
| | 18. Do you support the preferred option — Option 1 — not to prescribe further agencies? | OIC supports preferred Option 1. |
| | 19. If not, which other agencies - not covered by (a) or (b) of the definition of prescribed agency - should be prescribed under section 199 of the IP Act? | |

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| Issue eleven: Questions for consultation | | |
| | 20. Does your agency have any concerns with the proposed consequential amendments proposed above? | No. |
| | 21. Are there any other amendments to the Regulations or other subordinate legislation which are required as a consequence of IPOLA Act amendments? | |
| Issue twelve: Question for consultation | | |
| | 22. Does your agency have any other issues to raise about the regulations? | No. |

Issue 4

Requirements for the annual report under section 185(1) of the RTI and section 194(1) of the IP Act on the operation of the Acts (section 8 RTI Regulation; section 6 IP Regulation) - general requirements

ISSUE FOUR: QUESTIONS FOR CONSULTATION

7. Do you support the preferred option - Option 5- requiring reporting on amended current requirements, national metrics and numbers of pages considered?
8. If not, are there particular aspects proposed above which should be omitted, for example, because they would be particularly burdensome for agencies, or do not provide much benefit?
9. Would there be any value in reporting on the total number of full-time equivalent employees to whom the agency has delegated the authority to make decisions in relation to information access applications made under the RTI Act and privacy complaints under the IP Act?

DJAG's Commentary

Option 5 - Preferred option - require reporting on current requirements (amended based on review report recommendations, as outlined on page 19-20) national metrics and the number of pages considered by decision-makers.

This is the preferred option. It would involve requiring that the annual report include the information currently prescribed as well as the national metrics under the National Action Plan. It would also include the minimal changes outlined in Option 2.

Option 2 - Minimal change to the annual reporting requirements - to reflect the changes required by the IPOLA Act and streamlining of annual reporting requirements as recommended in reports.

This option is not preferred. It would involve making minimal changes to the annual reporting requirements, to:

- make IPOLA Act required changes, including omitting annual reporting requirements in section 6 of the IP Regulation providing for the total number of access and amendment applications and their outcome (providing for these matters in the RTI Regulation);
- amend section 8(c) of the RTI Regulation and the IP Regulation to remove the requirement for the annual report to include, for each agency and Minister, the number of refusal provisions relied on (counted on a per page basis), and instead require agencies to report on the total refusal provisions used for an application as a whole; and
- remove the requirement for agencies to report on external review applications (as this is already dealt with in OIC annual reports).

This would have reduced operational impact for agencies but would allow the above issues raised in reviews and reports to be addressed. These changes could however be considered in combination with other amendments.

DJAG's Commentary

The Review Report recommended:

- removing the requirement for agencies to report on the number of refusal provisions used on each page and instead require agencies to report on the total refusal provisions used for an application as a whole;
- requiring reporting on the numbers of privacy complaints made to agencies, including the outcome of these complaints;
- requiring reporting on applicant type (for example, member of the public, lawyer/agent, private business, media, community organisation, Member of Parliament); and
- removing the requirement for agencies to report on details of external review applications made from their decisions as the OIC is already required to report on the number of external review applications received.

To assist our response, we have captured the requirements in the following table, which identifies current requirements, and DJAG's proposed amendments by source reference.

Summary Option 5

Amended current requirements

| Option 2 | Review report | National metrics | Other | OIC comment |
|--|---|------------------|-------|-------------|
| make IPOLA Act required changes, including omitting annual reporting requirements in section 6 of the IP Regulation providing for the total number of access and amendment applications and their outcome (providing for these matters in the RTI Regulation) | | | | |
| amend section 8(c) of the RTI Regulation and the IP Regulation to remove the requirement for the annual report to include, for each agency and Minister, the number of refusal provisions relied on (counted on a per page basis), and instead require agencies to report on the total refusal provisions used for an application as a whole | removing the requirement for agencies to report on the number of refusal provisions used on each page and instead require agencies to report on the total refusal provisions used for an application as a whole | | | Support |
| remove the requirement for agencies to report on external review applications (as this is already dealt with in OIC annual reports). | removing the requirement for agencies to report on details of external review applications made from their decisions as the OIC is already required to | | | Support |

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| | report on the number of external review applications received | | | |
| | requiring reporting on the numbers of privacy complaints made to agencies, including the outcome of these complaints | | | Support |
| | requiring reporting on applicant type (for example, member of the public, lawyer/agent, private business, media, community organisation, Member of Parliament) | <ol style="list-style-type: none"> 1. number of applications by applicant type (Queensland agencies do not currently report on this, but would have the information to be able to do so if required); 2. number of valid applications received per 1000 population (this could be calculated by the OIC, ie agencies would not need to address it); 3. percentage of decisions on formal applications where access was granted in full or part (not currently required, but agencies would have sufficient information to calculate this); 4. percentage of all decisions made on formal applications where access was refused in full (not currently required, but agencies would have sufficient information to calculate this); | | Support <ul style="list-style-type: none"> • OIC will calculate Metrics 2 and 6. • OIC will calculate the percentages under Metrics 3-5, requiring the agencies to report the number of: <ul style="list-style-type: none"> ○ Formal applications where access was granted in full or part ○ Formal applications where access was refused in full ○ Number of decisions made within the statutory timeframe |

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| | | <p>5. percentage of all decisions made within the statutory timeframes; and</p> <p>6. percentage of applications received which are reviewed by the jurisdiction's Information Commissioner/Ombudsman (this could be calculated by the Information Commissioner).</p> | | |
| | | | Number of pages considered by decision-makers | Support |

The OIC also supports the requirement of reporting the total number of full-time equivalent employees to whom the agency has delegated the authority to make decisions in relation to information access applications made under the RTI Act and privacy complaints under the IP Act.

| Details of DJAG's proposed Regulation for annual statistical reporting (Option 5) | | |
|---|---|---|
| Source of reporting requirement | | Proposed change |
| CURRENT RTI REGULATION | | |
| 8 | Report to Assembly on Act's operation—Act, s 185 | |
| (1) | For section 185(2) of the Act, details of the following matters must be included in a report under section 185(1) of the Act in relation to the financial year to which the report relates— | Retain |
| (a) | the number of valid access applications received by each agency or Minister; | Retain |
| (b) | for each agency or Minister— | Retain |
| (i) | the number of refusals to deal with an access application under section 40 of the Act; and | Retain |
| (ii) | the number of refusals to deal with an access application under section 41 of the Act; and | Retain |
| (iii) | the number of refusals to deal with an access application under section 43 of the Act; | Retain |
| (c) | for each agency or Minister—the number of refusals of access under each paragraph of section 47(3) of the Act and any other particular provision of the Act relevant to the refusal; | Amend – refusals by application and not per page |
| (d) | for each agency or Minister—the number of documents included in a disclosure log under section 78 of the Act; | Retain |
| (e) | for each agency or Minister— | Retain |
| (i) | the number of deemed decisions under section 46 of the Act; and | Retain |
| (ii) | the number of decisions on internal review taken to have been made under section 83(2) of the Act; | Retain |
| (f) | for each agency or Minister— | Retain |
| (i) | the number of internal review applications received; and | Retain |
| (ii) | for each application, whether the decision on the internal review was different from the decision subject to internal review, and how it was different; | Retain |
| (g) | for each agency or Minister— | Amend – OIC to report |
| (i) | the number of external review applications made in relation to a decision of the agency or Minister; and | Amend – OIC to report |

| Details of DJAG's proposed Regulation for annual statistical reporting (Option 5) | | |
|---|--|-----------------------|
| Source of reporting requirement | | Proposed change |
| (ii) | the number of external review applications where there was no preceding internal review application to the agency or Minister; and | Amend – OIC to report |
| (iii) | the number of decisions on external review that affirmed the decision of the agency or Minister; and | Amend – OIC to report |
| (iv) | the number of decisions on external review that varied the decision of the agency or Minister; and | Amend – OIC to report |
| (v) | the number of decisions on external review that set aside the decision of the agency or Minister and made another decision in substitution for the decision of the agency or Minister; | Amend – OIC to report |
| (h) | any disciplinary action taken against an officer in relation to the administration of the Act; | Retain |
| (i) | any proceedings brought for an offence against section 175(1) or (3) of the Act; | Retain |
| (j) | for each agency or Minister—the amount of fees and charges received under the Act; | Retain |
| (k) | any other relevant fact indicating an effort by an agency or Minister to further the object the Act. | Remove |
| (2) | In this section— valid access application means an access application that complies with section 24 (2) and (3) of the Act . | Definition |
| CURRENT IP REGULATION | | |
| 6 | Report to Assembly on Act's operation— Act, s 194 | Remove |
| REVIEW REPORT RECOMMENDATION | | |
| | requiring reporting on applicant type (for example, member of the public, lawyer/agent, private business, media, community organisation, Member of Parliament); | New |
| | requiring reporting on the numbers of privacy complaints made to agencies, including the outcome of these complaints | New |
| CROSS REFERENCED TO ISSUE 5 in DJAG's CONSULTATION PAPER – DETAILS OF PROPOSED REPORTING ON PRIVACY COMPLAINTS | | |
| | privacy complaints received and the relevant QPP alleged to have been breached | New for agencies |

| Details of DJAG's proposed Regulation for annual statistical reporting (Option 5) | | |
|---|--|---|
| Source of reporting requirement | | Proposed change |
| | privacy complaints the agency or Minister has declined to deal with (perhaps where the complaint is old or the complaint is frivolous or misconceived); | New for agencies |
| | privacy complaints withdrawn by the applicant | New |
| | privacy complaints resolved with the applicant's agreement | New for agencies |
| | privacy complaints referred to another agency or Minister | New for agencies |
| | privacy complaints the agency accepted | New for agencies |
| | privacy complaints the agency did not accept and the reasons for the decision, including where a complaint is over 12 months or is not within jurisdiction | New |
| | In addition, reporting would be required on: suspected data breaches that the agency assessed as not an 'eligible data breach.' | New |
| NATIONAL METRICS | | |
| 1 | number of applications by applicant type | New |
| 2 | number of valid applications received per 1000 population | OIC to provide |
| 3 | percentage of decisions on formal applications where access was granted in full or part | New – agencies provide numbers and OIC calculates percentages |
| 4 | percentage of all decisions made on formal applications where access was refused in full | New – agencies provide numbers and OIC calculates percentages |
| 5 | percentage of all decisions made within the statutory timeframes | New – agencies provide numbers and OIC calculates percentages |
| 6 | percentage of applications received which are reviewed by the jurisdiction's Information Commissioner/Ombudsman | OIC to provide |
| OTHER, INCLUDING SUGGESTED POSSIBLE INCLUSION | | |

Details of DJAG's proposed Regulation for annual statistical reporting (Option 5)

| Source of reporting requirement | | Proposed change |
|--|---|------------------------|
| | number of pages considered by decision-makers | New |
| | number of full-time equivalent employees to whom the agency has delegated the authority to make decisions in relation to information access applications made under the RTI Act and privacy complaints under the IP Act | New |