

CONSULTATION PAPER
RTI and IP Briefing Practices in Queensland Government Departments
The Development of a Model Protocol

Background

Identifying and briefing on contentious access applications has always required careful balancing between ministerial responsibility and public sector accountability for its statutory decision-making role. As was observed in the Solomon Report:

... it is totally unacceptable for a superior officer (or a ministerial officer or media advisor) to try to influence a decision by an FOI officer whose responsibility is to apply the law. However, it is inconceivable that any government would not want to know about requests for documents that might result, when released, in the government having to deal, unprepared, with a contentious issue.¹

In a context broader than Right to Information (RTI) and Information Privacy (IP), the interaction between Ministers, their advisers and the public sector have been the subject of considerable public controversy. For example, in Queensland, the Crime and Misconduct Commission has investigated specific complaints in relation to sporting grants and called for protocols to provide further and detailed administrative guidance to ministerial staffers and public servants.² The Queensland Ombudsman has also been critical of the quality and accuracy of briefs provided to the Minister in relation to the Hendra Virus.³

More specifically, RTI and IP briefing practices have attracted criticism in this and other jurisdictions and community perceptions of political intervention in access applications can serve to undermine the aims of transparency measures.⁴ Recent newspaper articles have been critical of public service briefs to Ministers about the impact of the disclosure of information where the briefs appear more responsive to the political interests of the government of the day rather than the public interest.

¹ "The Right to Information: Reviewing Queensland's Freedom of Information Act" Report by the FOI Independent Review Panel June 2008, page 316.

² See Recommendation 1, *Report on an investigation into the alleged misuse of public monies and a former ministerial adviser* (the Rugby Union report) December 2010 accessed at <http://www.cmc.qld.gov.au/research-and-publications/publications/misconduct/report-on-an-investigation-into-the-alleged-misuse-of-public-monies-and-a-former-ministerial-adviser> on 24 April 2012.

³ See pages 183 to 185 of *The Hendra Virus Report: An investigation into agency responses to Hendra virus incidents between January 2006 and December 2009* November 2011 accessed at http://www.ombudsman.qld.gov.au/Portals/0/docs/Publications/Inv_reports/Hendra/Hendra_Virus_Report_web_V1.pdf on 24 April 2012.

⁴ For example, in Canada, complaints about the process led to identification that the handling of contentious applications took at least three weeks longer than ordinary applications and that contentious applications were more likely to become deemed refusals. See Roberts, A. "Is there a double standard on access to information?" *Policy Options* (2002) pages 49-55 at pages 52 and 53. For a detailed case study of difficulties that can be encountered with contentious issues management see the 2009 NSW Ombudsman report relating to the Roads and Traffic Authority. NSW Ombudsman "Investigation into the Roads and Traffic Authority regarding the handling of two applications under the *Freedom of Information Act 2009*" 24 February 2009. The Ombudsman's investigation was critical of briefing practices which sought comment from the Minister's office on draft FOI determinations. The Ombudsman concluded that the process resulted in interference in the decision-making, unreasonable delays and deemed decisions on internal review.

The Office of the Information Commissioner (**OIC**) has observed a range of RTI and IP briefing practices during the conduct of agency specific compliance reviews.⁵ RTI and IP briefing practices observed include aggregate and individual reports to the Minister, the principal officer, senior executives and other internal stakeholders. OIC has not made particular findings with regards to briefing practices in part because there is a lack of agreed standards and good practice guidance on this issue.

The Queensland Government's policy platform includes commitments to:

- restore accountability in government and establish a real Ministerial Code of Conduct
- promote a permanent and professional public service that provides frank and fearless advice
- act to restore Ministerial accountability for departments.⁶

In keeping with this commitment OIC is seeking to develop appropriate performance measures in consultation with agencies and guidance material on best practice to improve service to those seeking access.⁷ This consultation paper aims to:

- outline the elements of an appropriate model protocol for briefing practices derived from the existing public service framework
- seek input from agencies about an appropriate model protocol
- encourage sharing of current good practices.

Existing framework

The model protocol will supplement existing frameworks governing agency executive and ministerial briefing practices.

Ministerial responsibility

Under the Westminster Convention of Ministerial Responsibility the Minister is responsible to the Parliament for the administration of the agency.⁸ Ministers are entitled to request and have access to information in the possession of an agency to perform their ministerial duties.⁹ Ministers are entitled to be briefed on any or all access applications made to the agency insofar as they are relevant to the Minister's responsibilities. The obligations in the *Information Privacy Act 2009* concerning storage, use and disclosure of such information apply to the Minister.

Interactions with public servants

The *Public Service Act 2008* establishes that the departmental Minister may direct an agency head in managing the Department but not with respect to decisions about particular individuals or which are subject to another Act.¹⁰

⁵ Conducted under the Information Commissioner's performance monitoring functions under section 131 of the *Right to Information Act 2009* and section 135 the *Information Privacy Act 2009*.

⁶ Liberal National Party website policy announcement on 22 March 2012 "LNP to deliver a public service that serves Queensland" accessed at <http://lnp.org.au/news/leader-of-the-lnp/lnp-to-deliver-a-public-service-that-serves-queensland> on 30 March 2012.

⁷ These functions and powers are set out in section 131 and 132 of the *Right to Information Act 2009* and section 135 the *Information Privacy Act 2009*.

⁸ For a discussion on differences between public accountability and ministerial responsibility see *Terms of Trust: Arguments over ethics in Australian government*, John Uhr, University of New South Wales Press, 2005.

⁹ The Minister's entitlement is subject to any equitable obligation of confidentiality that may be breached, the provisions of the *Information Privacy Act 2009* and any confidentiality provisions in specific portfolio legislation. For further information see the Department of Premier and Cabinet resource: *Ministerial Offices Privacy of Personal Information Guide* available at <http://www.premiers.qld.gov.au/publications/categories/plans/privacy-plan.aspx>.

¹⁰ See section 100 of the *Public Service Act 2008*: in making decisions about particular individuals, the chief executive(a) must act independently, impartially and fairly; and(b) is not subject to direction by any Minister.

The *Public Sector Ethics Act 1994* imposes a positive obligation on all public servants to promote the public good. The obligation is to be responsive to both the requirements of government and the public interest.¹¹

The *Ministerial and Other Office Holder Staff Act 2010* confirms that ministerial staff have no power of direction over public service employees in their own right, although they may communicate a direction on behalf of their Minister in certain circumstances.¹² The supporting *Code of Conduct Ministerial Staff Members* requires that ministerial staff must:

- not direct, or attempt to direct, a public service employee unless acting under the express direction or expressly on behalf of a person with authority to direct a public service employee.¹³

In addition the Code also requires that ministerial staff manage information as openly as practicable within the legal framework and ensure proper use of official information while complying with transparency requirements of the *Right to Information Act 2009*.¹⁴

The *Protocols for communication between ministerial staff members and public service employees*¹⁵ further clarify that, if there is any doubt, public service employees should ask the ministerial staff member for confirmation that a direction is being relayed with the authority of a Minister.¹⁶ Formal ministerial directions should be provided in writing to the Director-General where practical. Urgent matters may be communicated verbally or provided to an alternative Senior Officer in the Director-General's absence subject to later confirmation in writing to the Director-General.¹⁷

Right to information and information privacy

In the *Right to Information Act 2009 (RTI Act)* and the *Information Privacy Act 2009 (IP Act)*, the Parliament gives the power to make decisions on agency access applications to the principal officer or their delegate, not another person.¹⁸ Generally speaking, the relevant agency decision-maker is publicly accountable for individual access decisions through external review bodies.

For applications made to an agency, the Minister will not have a legislative power to direct an agency decision-maker and, consequently, ministerial staff will also not have any such power to communicate a direction on behalf of a Minister.

In dealing with personal information¹⁹ government agencies must comply with their obligations under the Information Privacy Principles (**IPPs**) and for Queensland Health, the National Privacy Principles (**NPPs**). The obligations include that agencies should generally not disclose the personal information of an individual to anyone outside of the agency.²⁰ Section 38 of the IP Act clarifies that an agency does not contravene the IPPs or the NPPs in the circumstance of providing personal

¹¹ See section 6 of the *Public Sector Ethics Act 1994*. For a detailed discussion of the history behind the legislation, see *Terms of Trust: Arguments over ethics in Australian government*, John Uhr, University of New South Wales Press, 2005, in particular pages 131 to 137.

¹² See section 15 of the *Ministerial and Other Office Holder Staff Act 2010*. Also see the Premier's Communiqué on the interaction between ministerial staff and public servants available at <http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/integrity-and-accountability-reform/assets/premier-communication-min-public-interactions.pdf>

¹³ *Code of Conduct Ministerial Staff Members* 1 November 2011 page 11 available at <http://www.premiers.qld.gov.au/right-to-info/published-info/assets/code-of-conduct-ministerial-staff.doc>

¹⁴ Principle 2 on page 9 and required standard of conduct on page 10.

¹⁵ *Protocols for communication between ministerial staff members and public service employees* effective 8 February 2012 available at <http://www.premiers.qld.gov.au/right-to-info/published-info/assets/protocols-communication-between-min-staff-public-service-employees.doc>.

¹⁶ See clause 5.6.

¹⁷ See clause 5.7.

¹⁸ An application to a Minister may be dealt with by the person the Minister directs to deal with the application: see section 31 of the *Right to Information Act 2009*.

¹⁹ Personal information is any information about an identifiable person. See section 12 of the *Information Privacy Act 2009*.

²⁰ IPP 11 and NPP 2.

information to Minister to inform him or her about matters relevant to the Minister's responsibilities in relation to the Minister.

It is an offence to direct a person to make a decision the person believes is not the decision that should be made.²¹ It is also an offence to direct an employee or officer of the agency or Minister to act in way contrary to the legislative requirements.²² For example, a direction to delay a decision could constitute an offence if it resulted in statutory timeframes not being met. A direction may be made orally or in writing.

The RTI Act expressly sets out how an access application is to be processed and the grounds on which decisions to give or refuse access must be based.²³ The RTI Act explicitly states that decision-makers are required **not** to take account of factors such as possible embarrassment to the Government or loss of confidence in the government, or whether the applicant may be mischievous with any disclosed information.²⁴

Administrative law

Decision-makers are required to apply the law to each access application. The exercise of any powers by a delegate is subject to the common law and other principles. For example, administrative law prohibits decisions made:

- in the absence of a direction but in deference to the views of senior management²⁵
- acting out of a sense of obligation based on another's conclusions²⁶
- deferring to the policy of another;²⁷ or,
- acting under pressure or automatically giving effect to the direction of another.²⁸

Discretion to release

The RTI Act makes it clear that access can be given other than by application under the Act. Item 2 of the RTI Preamble emphasises that applications under the Act should be a last resort and section 4 makes it clear the Act is not intended to prevent or discourage access to information even if the information could be exempt from disclosure. Section 44 specifically outlines Parliament's intention that access decisions be made with a pro-disclosure bias and that agencies and Ministers may give access even if there exist grounds upon which access could be refused.

Proposed elements of a model protocol

To build on the existing framework, OIC is proposing a model protocol containing five related elements:

1. clear processes for making and recording decisions
2. clear processes for identifying applications which require briefing
3. clear roles and communication pathways
4. clear separation of consultation and briefing processes
5. clear processes for exercising the discretion to release information which could otherwise be refused.

²¹ See sections 30 and 175(1) of the *Right to Information Act 2009* and sections 50 and 184(1) of the *Information Privacy Act 2009*.

²² See section 175(3) of the *Right to Information Act 2009* and section 184(3) of the *Information Privacy Act 2009*.

²³ See section 44 and 47 of the *Right to Information Act 2009*.

²⁴ See Schedule 4, Part 1 of the *Right to Information Act 2009*: Factors irrelevant to deciding the public interest

²⁵ Halsbury's Laws of Australia [10-2230].

²⁶ *Evans v Donaldson (1909) 9 CLR 140*.

²⁷ Another decision-maker's policy could be a relevant consideration which the administrator may or is bound to take into account; *H Lavender & Son Ltd v Minister of Housing and Local Government [1970] 1 WLR 1231*; *Bread Manufacturers of New South Wales v Evans (1981) 38 ALR 93; 56 ALJR 89*

²⁸ *Bread Manufacturers of NSW v Evans (1981) 180 CLR 404 at 418 per Gibbs CJ*.

Element 1– Clear processes for making and recording decisions

A model protocol must include explicit procedures for decision-making that protect the integrity of the agency in its application of the law. In circumstances where the principal officer disagrees with a proposed decision, procedures will include the steps for a principal officer to personally make the decision. The model protocol will include complete record keeping of the decision-making process to demonstrate a robust process free from inappropriate direction or pressure. The model protocol would aim to integrate with other agency policies and procedures for maintaining integrity in public administration and safe-guarding against misconduct.

Questions for discussion: *Are the requirements of the decision-making framework set out above, commonly known to all people involved in RTI/IP processing? If decision-makers are required to brief on a proposed decision, is the purpose of this process clear? Is record keeping adequate to demonstrate decision-making is made independently? What resolution options are available if concerns are raised about interference with decision-making?*

Element 2 – Clear processes for identifying applications which require briefing

Ministers, principal officers and senior executives may have different briefing requirements and reporting systems. Generally speaking, Ministers and principal officers require a briefing system that will identify access applications that concern sensitive issues as soon as practicable from the RTI/IP processing area, a brief concerning the issue from the operational area and notification of what, if any information will be disclosed.

From an issue management point of view, it is reasonable to expect that the broad content and timing of expected disclosures are known in advance. To ensure maximum disclosure wherever possible, it will sometimes be prudent or necessary to release additional contextual information to ensure requested information is accurately interpreted and represented.

The Minister's office and principal officers will be best placed to set criteria for deciding which applications require briefing. Alternatively, standard information can be provided on all applications and briefs can be requested on a case-by-case basis or a combined approach taken in which senior executives are advised of all applications and take responsibility for managing the liaison with the Minister's office on any further briefings.

Questions for discussion: *Does your agency have a process and criteria for identifying applications which require briefing? Who decides which applications will be briefed on? How regular are the briefings? What information is contained in the briefings?*

Element 3 – Clear roles and communication pathways

The RTI Act requires applications for information to be dealt with by an agency's principal officer or their delegate.²⁹ If the principal officer is concerned about a possible decision, the legislation provides explicitly that they can revoke the delegation and make the decision themselves.³⁰ It is appropriate for the decision-maker to keep the principal officer abreast of developments while processing an access application. The principal officer should retain responsibility for any briefings to the Minister's office or affected senior executive.

²⁹ See section 30 of the *Right to Information Act 2009*.

³⁰ The RTI and IP Acts both reference section 27A(2) of the *Acts Interpretation Act 1954*, which provides that a delegation can be revoked wholly or partly by a delegator before a decision is made.

Care needs to be taken to avoid inadvertently creating communication pathways that could lead to a perceived or actual breach of the legislative provisions in the RTI Act which prohibit giving a direction to the RTI decision-maker. It is important that the briefs from RTI/IP units are for information only.

If an application is made to the Minister, the Minister may direct a person to deal with the application.³¹ In practice the person directed is often the head of the agency's RTI/IP unit. In these circumstances it may be appropriate for a greater degree of consultation between the RTI decision-maker and the Minister's office to identify what documents are held by the Minister's office that are responsive to the application. Specific communication practices will need to be documented as part of the model protocol to ensure clarity and separation of consultation and briefing processes for applications made to the Minister.

Questions for discussion: *Does your agency define the roles and responsibilities of each officer in the RTI application process? Does the description of roles differentiate between applications made to the agency or to the Minister? Is it made clear that briefs from RTI/IP units are for information only? How are briefing processes managed to avoid impacting on statutory timeframes for finalising access applications?*

Element 4 – Clear separation of consultation and briefing processes

Business units will usually first learn about an access application concerning their area when they receive a request from the RTI/IP Unit to produce documents. Agency line managers may also need to be consulted by RTI decision-makers to seek or clarify information and to give the operational area the opportunity to identify information that it wishes the decision-maker to consider may be exempt or what public interest factors may need to be balanced.

This consultation needs to be managed separately from briefing processes to avoid confusion about the different purposes of consultation and briefing. A model protocol should make it clear that the RTI decision-maker is responsible for keeping a record of consultation questions and responses under section 7 of the *Public Records Act 2002*.

A model protocol should distinguish between appropriate input about the existence of legitimate public interest factors or other information relevant to exemptions and exclusions and the inappropriate expression of negative views about pending decisions or action to forestall proper decision-making.

If the access application concerns an issue which line management is not already aware of, which is not already in the public domain and which may be in the public domain if a decision is made to disclose the information, the agency line manager can at this stage provide briefing material. The line manager in the operational area who is concerned about the potential impact of disclosure is best placed to bring these impacts to the attention of the principal officer through a briefing note rather than through the consultation process.

Questions for discussion: *Does your agency provide guidance to officers who are consulted during the RTI application process about the nature of input sought and the independence of the decision-maker? Does your agency's consultation process support the decision-maker to understand the business and relevant public interest factors? Is this consultation managed separately from briefing processes?*

³¹ See section 31 of the *Right to Information Act 2009*.

Element 5 – Clear processes for exercising the discretion to release information which could otherwise be refused

The model protocol will support the exercise of agency discretion to release information that could lawfully be withheld. The model protocol will include guidance on considering and authorising the exercise of this discretion. It will be important that all aspects of the model protocol will be accessible and understandable to access applicants.

Questions for discussion: *Does your agency have written policies on exercising the discretion to release information? If so, is consideration of this option encouraged through the consultation and briefing processes? If information is released prior to an access decision being made, is the applicant given an opportunity to access the information at an earlier point than the general public?*

Next steps

OIC is seeking agency feedback on this consultation paper and examples of current good practices. Please provide feedback to info@oic.qld.gov.au or arrange to discuss with Mr Justin Toohey, Acting First Assistant Information Commissioner, or Julie Kinross, Information Commissioner, by calling (07) 3405 1111. It would be appreciated if you could provide your feedback by 22 June 2012.

Superseded: for background only