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Overview of the *Right to Information Act* (Qld) and the *Freedom of Information Act* (Cth)

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Agenda

- RTI and FOI Acts:
 - Key Concepts
 - Processes and Procedures
 - Exemptions
 - Internal and External Review

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Key Concepts

The RTI Act

Key Concepts

The RTI access regime is established by:

- RTI Act and RTI Regulation
 - For accessing non personal information
- IP Act and IP Regulation
 - For accessing personal information of the applicant
- Specific consultation requirements are established to ensure that an application is made under the appropriate Act

The RTI Act

Key Concepts

- The RTI Act establishes a statutory right to access documents and information held by Government entities
- No threshold standing requirements
- Section 23 of the RTI Act creates a legally enforceable right of access to:
 - "documents of an agency"; and
 - "documents of a Minister".
- Section 23(2) of the RTI Act provides that generally this right of access to documents applies regardless of when the relevant document was created or received (i.e. it has retrospective operation)

The RTI Act

Key Concepts

- The IP Act establishes a statutory right for an applicant to access personal information held by Government entities
- Chapter 3 of the IP Act establishes the personal information access regime
- This regime mirrors the requirement of the RTI Act in so far as the information is the personal information of the applicant
- Key difference is fees with no application fee or processing charge payable where the application is made under the IP Act

The RTI Act

Key Concepts

- The term "document of an agency" is defined in s.12 of the RTI Act:
 - A document in the possession or control of an agency;
 - Whether brought into existence or received in the agency;
- The term "document of a Minister" is defined in s.13 of the RTI Act to mean a document, other than a document of an agency, in the possession, or under control, of the Minister that relates to the affairs of an agency including:
 - A document to which the Minister is entitled to access;
 - A document in the possession, or under the control, of a member of the staff of, or a consultant to the Minister

The RTI Act

Key Concepts

- The term "agency" is defined in s.14 of the RTI Act and covers a broad range of entities:
 - Departments
 - Local Governments
 - Public Authorities
 - GOC's and GOC subsidiary
 - See *City North Infrastructure Pty Ltd v Information Commissioner* [2010] QCATA 60
 - Clarifies the position of Corporations Act companies under the RTI Act

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Processes and Procedures

The RTI Act

Processes and Procedures

- The processes and procedures for receiving, processing and determining/deciding an RTI access application are highly prescribed
- The key aspects include:
 - Making/receiving an RTI access application
 - Providing a Schedule of Relevant Documents and Charges Estimate Notice
 - This is not required under the IP Act
 - Third Party Consultation
 - Determining an RTI access application

The RTI Act

Processes and Procedures

- Making/receiving an RTI access application
 - An applicant may apply to an agency or Minister seeking access to a document of an agency or official document of a Minister (s.24). The access application must:
 - Be in the approved form and accompanied by the application fee;
 - Give sufficient information to enable the identification of the documents sought; and
 - State an address where notices issued under the RTI Act are to be sent.
 - See s.43 of the IP Act

The RTI Act

Processes and Procedures

- Section 25 of the RTI Act includes specific processes where the application is made on behalf of a child (see s.45 of the IP Act)
- An RTI access application must be processed within 25 business days

The RTI Act

Processes and Procedures

- Schedule of Relevant Documents and Charges Estimate Notice
 - On receipt of an access application, an agency must (s.36):
 - Consider whether a processing charge or access charge is payable in relation to the application; and
 - Before the end of the processing period (25 business days from receipt of the application by the agency (s.18)), give the applicant:
 - A Schedule of Relevant Documents for the applicant (unless this requirement is waived by the applicant); and
 - A Charges Estimate Notice.

The RTI Act

Processes and Procedures

- Other requirements include:
 - Section 37 of the RTI Act sets out third party consultation rights (see s.56 of the IP Act):
 - An agency or Minister must consult third parties where the disclosure of the document may reasonably be expected to be of concern to a government, agency or person
 - Section 54 of the RTI Act prescribes what a decision notice must include (see s.68 of the IP Act)

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Exemptions

The RTI Act

Exemptions

- **Section 47 of the RTI Act** - an applicant has a right of access to a requested document unless access is refused under s.47(3) of the RTI Act because:
 - Information contained in the requested document constitutes "exempt information" within the meaning of s.48 and Schedule 3 of the RTI Act
 - Disclosure of the information contained in the requested document would, on balance, be contrary to the public interest under s.49 and Schedule 4 of the RTI Act

The RTI Act

Exemptions

- The document is sought by or for a child and comprises the child's personal information, the disclosure of which would be contrary to the best interests of the child
- The document comprises the applicant's healthcare information the disclosure of which might be prejudicial to his/her physical or mental health or wellbeing
- The requested document is non-existent or un-locatable as per s.52 of the RTI Act

The RTI Act

Exemptions

- Other access to the doc. is available or can be accessed under other arrangements as per s.53 of the RTI Act
- Focus of today will be the "Exempt Information" exemption and the Public Interest Test Exemption
- Sections 47(3)(a) and 48 and Schedule 3 of the RTI Act establishes the "absolute" or "true" exemption prescribed under the RTI Act
- Section 49 and Schedule 4 of the RTI Act establishes the Public Interest Test Exemption

The RTI Act

Exemptions

- Schedule 3 of the RTI Act establishes the following exemptions:
 1. Cabinet matter created before commencement of RTI Act
 2. Cabinet information created on or after commencement of RTI Act
 3. Executive Council information
 4. Information briefing an incoming Minister
 - 4A. BCC Establishment and Coordination Committee Information
 - 4B. Budgetary Information for Local Governments
 5. Information revealing particular Sovereign communications

The RTI Act

Exemptions

6. Information disclosure of which would be contempt of Court or Parliament
7. Information subject to legal professional privilege
8. Information disclosure of which would found an action for breach of confidence
9. National or State security information
10. Law enforcement or public safety information
11. Investment incentive scheme information
12. Information disclosure of which is prohibited by an Act

The RTI Act

The Public Interest Test

- The revised and uniform public interest test in the RTI Act is one of the most significant changes to the FOI regime
- The relevant public interest factors capture the elements of the exemptions in the FOI Act that contained a public interest test component
- Section 49 of the RTI Act sets out the process to be adopted when applying the public interest test exemption

The RTI Act

The Public Interest Test

- Schedule 4 of the RTI Act prescribes the factors to be considered when applying the public interest test exemption to determine whether the disclosure of a particular document or information, would, on balance, be contrary to the public interest

The RTI Act

The Public Interest Test

- Schedule 4 of the RTI Act is broken into 4 parts:
 - Part 1 - Factors irrelevant to deciding the public interest;
 - Part 2 - Factors favouring disclosure in the public interest;
 - Part 3 - Factors favouring nondisclosure in the public interest; and
 - Part 4 - Factors favouring nondisclosure in the public interest because of public interest harm in disclosure.
- Applying the public interest test exemption is an extremely complex process and will require the decision maker to have regard to over 50 factors

The RTI Act

Public Interest Test

- Section 49 of the RTI Act provides that none of the factors prescribed in Schedule 4 of the RTI Act are to automatically receive additional weight in applying the public interest test exemption

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Internal and External Review

The RTI Act

Internal and External Review

- A "reviewable decision" made under the RTI Act may be challenged by internal (s.80) or external review (s.85)
- The application for internal or external review may be made by an applicant or a third party (s.37)
- Choice between external or internal review - no longer a requirement to apply for internal review first
- May review part of a decision (eg. a decision in relation to a particular document) or the entire decision

The RTI Act

Internal and External Review

- Internal review
 - Application for review must be made within 20 business days after the date of the written notice of the decision or within the further time the agency allows
 - New decision
 - Must not be decided by—
 - the person who made the reviewable decision
 - a person who is less senior than that person

The RTI Act

Internal and External Review

- External Review by the Information Commissioner
 - Application must be made within 20 business days from the date of the written notice of the decision, or within the longer period the information commissioner allows
 - Onus is on the agency to show that the decision was justified (s.87)
 - Commissioner may affirm, vary or set aside the decision and make a substitution for the decision (s.110)
 - Appeals to QCAT on questions of law (s.119)

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The FOI Act

The FOI Act

- The FOI Act is the information access legislation applicable to Commonwealth Government agencies (such as Departments and prescribed authorities)
- There is no equivalent stand alone personal access and amendment regime as found in Chapter 3 of the IP Act other than the information privacy principles found under the Privacy Act (Cth) and the amendment / annotation regime under Part V of the FOI Act
- The FOI Act is a similar regime to the RTI Act in terms of establishing an entitlement to access Commonwealth Government held documents

The FOI Act

- Document of an agency:
 - Anything that contains a record of information
 - Can include images or recordings that are capable of being reproduced
 - Can include copies of information stored electronically - e.g., pages drawn down from a data base
- Consider 'document of an agency' - documents in possession of the agency *and* documents that the agency is entitled to physical possession of

The FOI Act

- Section 15 of the FOI Act set out the requirements in making an access application:
 - Must be in writing
 - State that the request is an application for the purposes of the FOI Act
 - Provide sufficient information to enable the recipient entity to identify the document/s requested
 - Provide a means by which notices issued under the FOI Act can be sent to the applicant (this can be, for example, by email)
- The application may be made by post, delivery or by electronic communications

The FOI Act

- The FOI Act contains a fee / charging regime similar which provides that:
 - There is no charge for making an application to an agency or Minister for access to a document under Part III of the FOI Act
 - There is no charge for making an application for an Internal Review or Information Commissioner review of a decision
 - Charges are payable for processing an application covering activities such as search and retrieval of documents; time spent in determining an application including examining documents, consulting with third parties and making redactions to documents (See the FOI Charges Regulation)
 - The FOI Act affords discretion in the application of charges

The FOI Act

- Exemptions
 - . The FOI Act draws a distinction between 'exempt' and 'conditionally exempt' documents (see section 11A)
 - . 'Exempt' documents will be wholly exempt from disclosure
 - . 'Conditionally exempt' documents must be disclosed unless access to the document would be 'contrary to the public interest'

The FOI Act

- Documents that are wholly exempt:
 - National security, defence and international relations (s 33)
 - Cabinet documents (s 34)
 - Law enforcement and public safety (s 37)
 - Documents subject to secrecy provisions (s 38)
 - Legal professional privilege (s 42)
 - Material obtained in confidence (s 45)

The FOI Act

- Information that is wholly exempt:
 - Contempt of Parliament or Court (s.46)
 - Trade secrets and commercially valuable information (s.47) and
 - Electoral Roll (s.47A)

The FOI Act

- Conditionally exempt documents
 - Conditionally exempt documents subject to a balancing test - document must be disclosed unless the disclosure of the document, on balance, is contrary to the public interest
 - Section 11B guides this balancing test
 - Lists public interest factors that favour disclosure and factors that must not be considered

The FOI Act

- Conditionally exempt documents
 - Section 11B(3): Factors favouring access to a document in the public interest include whether disclosure would:
 - Promote the objects of the FOI Act
 - Inform debate on a matter of public importance
 - Promote effective oversight of public expenditure
 - Allow a person access to his/her own personal information
 - No indication of what factors do not favour disclosure

The FOI Act

- Conditionally exempt documents
 - Section 11B(4) - Factors irrelevant to the public interest test are whether disclosure would:
 - Result in embarrassment to the Commonwealth Government or cause loss of confidence in Commonwealth Government
 - Result in any person misinterpreting or misunderstanding the document
 - The author of the document was or is of high seniority in the agency to which the FOI request was made
 - Access to the document would result in confusion or unnecessary debate

The FOI Act

- Conditionally exempt documents
 - Categories that are conditionally exempt:
 - Commonwealth-State relations (s 47B)
 - Deliberative processes (s 47C)
 - Financial/Property interests of the Commonwealth (s 47D)
 - Operations of agencies (s 47E)
 - Personal privacy (s 47F)
 - Business affairs (s 47G)
 - Research (s 47H)
 - National Economy (s 47J)

The FOI Act

- Internal review
 - Not available for a decision of the Minister/Secretary
 - An application must be in writing
 - Review conducted at one level higher than decision made
- Information Commissioner Review
 - Internal review decisions
 - Access refusal decisions (including decisions to allow access to only some of the documents the subject of an FOI request)
 - Access grant decisions, where access has been granted despite third party consultation

The FOI Act

- AAT review
 - . AAT may review decisions of the IC, or instances where the IC requests the AAT review an FOI decision
 - . No AAT review of internal review decisions

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