Procedure 2.04 - Right to Information Access Application

1. Application

NQBP is a Government Owned Corporation (**GOC**) subject to the *Right to Information Act 2009* (Qld) (**RTI Act**).

This Procedure applies to the member of Legal Team designated to manage an access application under the Right to Information (**RTI**) (for the purposes of the RTI Act, the **RTI Officer**), RTI Decision Maker (**DM**) and Subject Matter Expert(s) (**SME**).

Important Note: This is a high-level guide only.

2. Compliance with State Government policy and legislation

The RTI Act grants a right of access to *documents* in a public sector agency's possession or control unless, on balance, it is contrary to the public interest to give access. NQBP, as a government owned corporation under the *Government Owned Corporations Act 1993* (Qld) is an 'agency' for these purposes.

The 'principal officer' of NQBP, the CEO, or their delegate is responsible for NQBP's compliance, operation and administration of the RTI Act. The 'principal officer' may delegate some of their decision-making responsibilities, and most RTI decisions will be made by 'delegates'.

NQBP must make available on its website:

a. A Publication Scheme requiring that all relevant standard forms, policies and routine documents are published on the website;

b. Disclosure Logs recording documents released pursuant to previous RTI requests where appropriate; and

c. Any other administrative access scheme or process outlining how an external party may seek access to information not already disclosed under the above.

NQBP is expected to take a proactive, pro-disclosure approach and consideration should be given on a regular and ongoing basis to publishing key documents and those that are likely to be of public interest as part of the Publication Scheme or through another administrative access scheme.

3. What is a 'document' for RTI purposes?

RTI is about obtaining access to 'documents' not merely information. Applications must therefore relate to documents, although it is not necessary for the applicant to identify each document specifically. For example, the applicant may ask for all documents relating to a particular topic.

A document[1] is anything which has writing, sounds, images, messages, figures, perforations, symbols or other meaningful marks that can be interpreted by a qualified person, whether brought into existence or received by NQBP. Documents include electronic files.

[1] See definition of 'document' in Schedule 1, *Acts Interpretation Act 1954* (Qld).

Drafts of documents, photographs, audio or video recordings, post-it notes, emails, social media posts, text messages, diaries/calendars, and documents held in physical archives may all be documents capable of being accessed under the RTI Act. Access does not need to be given to metadata in electronic documents unless it is specifically sought and reasonably practicable for NQBP to provide access.

Back-up systems for electronic documents do not generally need to be searched, but it may be appropriate in some situations to do so and is required certain limited cases.

A document includes:

i. a document which NQBP is entitled to access; or

ii. a document which is under the possession or control (regardless of who actually holds it), of an employee of NQBP in their official capacity.

For example, documents belonging to NQBP and but held by its solicitors may be ‘documents’.

A document is not, however, information or facts that are merely known to an employee, documents no longer in NQBP’s possession (unless it is entitled to them) or posts made by an employee on a website they set up and maintain in a personal capacity.

There is no requirement to create a document that does not exist at the time of the application.

4. Accountabilities

The RTI Officer manages the RTI process and supports the DM and the SMEs.

The DM is delegated the authority to make decisions dealing with the application pursuant to the RTI Act and the relevant delegation by the CEO.

The SME is the information ‘owner’ of the documents and is responsible for conducting document searches in association with the NQBP Records Officer and providing quality advice on the discovered documents to the RTI Officer and DM. The SME person should be the project or section manager.

Everyone at NQBP must assist with the management of the RTI request when required.

5. Procedure – Preliminary Administrative Matters

Any person or organisation, can seek access to information by lodging an ‘Access Application’ (**RTI application**). These will usually be received either by post or email to an account monitored by the Legal Team.

There is an approved form for RTI applications, but it is not necessary that this be used.

The General Counsel & Company Secretary will designate an individual to be the RTI Officer for each RTI application who will ensure an appropriate file is created and the CEO is notified.

The DM will be the signatory on all correspondence with the applicant and must be identified on certain notices by name and designation.

The RTI Officer will identify an appropriate SME or SMEs within NQBP. The SME will be responsible for working with the DM and RTI Officer to process the request and to identify documents. As soon as possible the DM, RTI Officer and SME must meet to discuss the subject, size, scope and interpretation of the RTI application to inform future management of the RTI request. All relevant documents must be provided to the DM by the SME through the RTI Officer.

The RTI Officer and/or the SME should let the DM know if they have or are aware of any concerns. The SME should be asked to provide any appropriate context or background.

6. Procedure – Preliminary Statutory Matters (*see attached RTI Flowchart also at E13/09353*)

a. <u>Other Forms of Access</u>

The RTI Officer should check whether the documents to which the applicant has sought access under their RTI Act application is available in the Publication Scheme, Disclosure Process, Disclosure Log, or is available from another source, such as the Queensland State Archives.

If the information is already available / public, even if at a cost, this should be brought to attention of the applicant.

Once the DM is at the stage of making an RTI access decision, whether the document is reasonably available from another source can be a basis for rejecting the application, even if there may be a cost.

An applicant may also request documents containing their own personal information.[2] A person may also apply to amend their personal information.

If the application is limited to documents with the applicant's own personal information,[3] then there is no application fee, no processing charges (which are for NQBP's time) and the documents will not be exempt from disclosure even if they would be otherwise. An access fee may however be charged at the permitted rate, where such charges are incurred (for example, to cover the cost of physical copies).

Most personal information NQBP holds about people who are not current or former employees of NQBP will usually be covered by the NQBP Privacy Policy, which does not usually apply to current or former employees.

The DM may therefore choose to consider whether the availability of the personal information under the NQBP Privacy Policy is a basis for rejecting a RTI application, and this alternative access option should in any event by offered to the RTI applicant, who might then decide to withdraw their RTI application.

b. Valid Request (s 24, RTI Act)

The DM must determine whether the request is compliant with s 24 of the RTI Act. An RTI application will not be non-compliant just because the approved form has not been used as long as all of the other required information listed in s 24 has been provided by the applicant.

Unless the RTI application is only for documents containing the applicant's personal information, the application fee must have been received for the application to be valid and, unlike other charges, this fee cannot be waived by NQBP.

The RTI Officer must contact the applicant on behalf of the DM where NQBP receives a non-compliant request give the applicant an opportunity to rectify the problem. Reasonable efforts must be made to contact the applicant within 15 business days.[4]

An applicant must be given a reasonable opportunity to respond and make the application valid. The RTI Officer should assist the applicant to make the application compliant including giving the applicant reasonable opportunity to reply. If the applicant does not make their application valid within a reasonable time, the DM may decline to process the RTI application. A written notice reflecting this decision, which is a reviewable decision (see below), must be issued by the DM within 10 business days from date the decision is taken.

The timeframe for deciding access applications only runs from when a valid application is received (see below).

Communications with the applicant about scope or other matters unrelated to validity will not 'stop the clock' if the initial application was valid.

[2] The applicable definition of 'personal information' can be found in *Information Privacy Act 2009* (Qld), s 12.

[3] See https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/processing-applications/fees-and-charges, which explains how to determine if a document contains personal information.

[4] The definition of 'business day' Schedule 1, *Acts Interpretation Act 1954* (Qld) applies to the RTI Act.

c. **Consider whether to Transfer the Request (s 38, RTI Act)**

In the event that another agency holds the requested information, then the RTI Officer will contact that other agency to discuss a transfer under s 38 of the RTI Act.

A transfer cannot occur without the consent of the other agency. In this situation a valid request must be processed, even if NQBP does not have the information, unless the applicant withdraws the RTI request.

d. **Documents Out of the Scope of the Act (Section 32 RTI Act)**

Section 32 of the RTI Act excludes certain entities and business functions from the scope of the Act and provides a basis for refusing to process the application. A refusal to process on the basis that the documents are outside of the scope of the RTI Act must be made within 25 business days. A decision on this basis is not subject to Internal Review but may be reviewed directed by QCAT.

The excluded entities and functions are set out in Parts 1 and 2 of Schedule 2 in the RTI Act respectively. Importantly, for NQBP, s 21 in Schedule 2 of the RTI Act excludes documents relating to the asset disposal of declared projects under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld); primarily the sale of the Abbot Point Coal Terminal by NQBP's predecessor, PCQ.

e. **Statutory Timeframes**

Once validated, an RTI access application must be processed within 25 business days under s 46 of the RTI Act. An additional 10 business days is provided if consultation with an affected third party is required under s 37 of the RTI Act, as explained further below, and in the other scenarios described in the table in s 18 of the RTI Act.

Day one of the processing period is the next business day after a valid request is received or a non-compliant request is validated. (Public Holidays are excluded.[5])

Failure to respond within the statutory timeframe entitles the applicant to presume that access has been denied, obliges the refund of fees under s 46 of the RTI Act and provides a right of external review.

The DM must calculate and, where appropriate upon the giving of a notice, recalculate, statutory timeframes and plan processing to ensure statutory deadlines for notices and the decision are met.

In the event that statutory timeframes may not be met, the RTI Officer may in some situations seek additional time on behalf of the DM from the applicant. The applicant has no obligation to agree to an extension.

7. **Procedure – Scope, Charge Estimate Notice (CEN), Search and No Documents** (see attached RTI Flowchart also at E13/09353)

Informed by consultation with the SME, the DM must estimate the scope of the request and the volume of documents potentially captured. The DM only needs to locate documents in existence on the date the application is received.

After consultation with the SME, a review of the records management system and a sample document review, the DM may determine that the request is too large to process under s 41 of the RTI Act. The DM may issue a notice to the applicant seeking to reduce the size of the request (s 42, RTI Act).

The DM must calculate the estimated applicable processing and access charges under the RTI Act and *Right to Information Regulations 2009* (Qld) and record the factors taken into account. Charges cannot be levied for locating documents that are not stored in accordance with NQBP

[5] See definition of 'business day' Schedule 1, *Acts Interpretation Act 1954* (Qld).

record keeping policy and the *Public Records Act 2023* (Qld) or for the legal expenses incurred in reviewing documents.

A CEN, where there are processing or access charges, must be issued by the DM before the end of the processing period for the application. The contents of the CEN are set out in s 36 of the RTI Act. The applicant has 20 business days to confirm the request or consult to reduce the scope of the request and hence the estimated cost.

The SME may wish to commence a full search in the meantime for the documents where the RTI request is deemed manageable, whether or not the response has been received to the CEN. However, if the applicant chooses to withdraw or amend their application during this period, there can be no processing or access charges imposed for search activity up to that point.

Sometimes requested documents cannot be located and where appropriate back-up systems must be searched under s 52(2) of the RTI Act. If, however, it is clear that the document never existed, it may be decided that a back-up search is not needed.

It is important that the SME record the steps they have taken to perform the searches, including dates, times, and results (even if no documents are found) and provide this to the DM through the RTI Officer.

8. **Procedure – Decision Making** (see attached RTI Flowchart)

The RTI Officer will load all documents as PDF.

The DM will review the documents against exemptions and the contrary to public interest test and consult where needed with the SME(s) and General Counsel & Company Secretary regarding sensitive information.

It is Parliament's intention that the RTI Act should be administered with a pro-disclosure bias and a DM may decide to give access to a document even if the RTI Act provides that access to the document may be refused (see s 44(4) of the RTI Act).

Under s 37 of the RTI Act, it may be necessary to consult with affected third parties, particularly NQBP's business partners (i.e. entities with which NQBP has a business / contractual relationship), regarding commercial and personal information. The DM will plan an appropriate consultation with the RTI Officer and SME and the procedure set out in s 37. A consultation under this section extends the processing period to 35 days.

Note also that some agreements to which NQBP is a party may provide for prescribed notification or consultation procedures about confidential information, such as that covered by the RTI Act, that must be provided by law. This may involve more onerous time frames to be complied with in addition to the obligations under s 37. The relevant SME should be consulted immediately if a s 37 consultation is being contemplated to ensure compliance with those obligations under any agreement.

Note that generally, human rights under the *Human Right Act 2019* (Qld) do not need to be taken into account by the DM *unless*, "an applicant raises or refers to a specific human right in their application, or it is apparent from the application that a specific human right should be considered, an agency will need to address it in its decision."[6]

A decision regarding the RTI application will be issued by the DM after consultation with the SME, , external legal advisor (only if necessary) and other stakeholders.

The decision is, however, solely the DM's decision to take. It is a criminal offence under the RTI Act for a person to give a direction, either orally or in writing, to a DM directing the DM to make a decision the DM believes is not the decision that should be made under the legislation (see s 175 of the RTI Act). A decision made 'acting under dictation' may also be invalid.

[6] See https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/applications-and-the-hr-act.

9. Procedure – Notice of decision, Release of Documents and Disclosure Log (see attached RTI Flowchart)

The DM's decision is to be provided to the applicant in the form of a 'prescribed written notice' (s 191, RTI Act) (**Notice of Decision**) which must contain:

(a) the decision;

(b) the reasons for the decision;[7]

(c) the day the decision was made;

(d) the name and designation of the person making the decision;

(e) if the decision is not the decision sought by the person—any rights of review under this Act in relation to the decision, the procedures to be followed for exercising the rights and the time within which an application for review must be made.

The Notice of Decision, together with an itemisation of charges (if any) and other details described in section 54 of the RTI Act is be issued to the applicant as soon as possible after the decision is made. In the event there are no charges or charges have been waived, any documents for release should be dispatched together with the Notice of Decision.

When the applicant has paid the charges for access to released information, the RTI Officer will make arrangements to provide access to any documents. Note, however, that any assessed charges due remain payable regardless of whether the application is refused or the applicant chooses not to access the documents.

10. Internal Review, External Review and QCAT Appeals

a. <u>Internal Review</u>

An Internal Review arises when a person affected by a 'reviewable decision'[8] makes an application to NQBP for review by an RTI Internal Review Officer.

Internal Review is not possible for decisions made by certain DMs. These include decisions made by the CEO themselves as principal officer and decisions under s 32 of the RTI Act.

The RTI Internal Review Officer is obliged to make a new decision as if the reviewable decision has not been made including whether reasonable steps to locate the documents have been taken.

The RTI Internal Review Officer will be delegated by the CEO and will be provided with support by the RTI Officer. The RTI Internal Review Officer must <u>not</u> be the original DM, an SME or other participant in processing the original application and must hold a more senior position within NQBP than the original DM. The RTI Officer will manage the Internal Review in accordance with Part 1 of Chapter 3B of the RTI Act which also sets out the applicable timeframes. The procedure will otherwise be generally as per the originating application.

b. <u>External Review</u>

An External Review is an appeal to the Office of the Information Commissioner (**OIC**) for an independent determination regarding a decision, whether an original or Internal Review decision. An applicant may choose to seek External Review without first seeking Internal Review.

In the event of an External Review, appropriate external legal advice may be required. The RTI Officer will be the point of contact with the OIC and coordinate participation in the review process.

[7] See also s 27B, *Acts Interpretation Act 1954* (Qld) for what this should contain.

[8] Schedule 4A describes decisions that are 'reviewable decisions'.

OIC has several powers during an External Review, including seeking further information and consulting directly with third parties who the OIC considers may be affected rather than asking NQBP to do this.

The OIC will try to resolve external reviews informally where appropriate.

c. **Queensland Civil and Administrative Tribunal (QCAT) Appeals**

Appeals to QCAT will be managed on a case-by-case basis with appropriate internal and external legal advice obtained. Generally, these will be from the decision of the OIC but can be made directly from a decision by a DM under s 32.

The CEO, CFO, General Counsel & Company Secretary, Chief Information Officer and SME will be informed of all appeals and advised of the outcome.

11. Disclosure Log

If the documents do not contain personal information (of any person) NQBP may decide to add these to its online Disclosure Log. In some situations, NQBP may seek to redact the Personal Information before publication.

12. Reporting

A request register is located on HPE. This register should be used to track the progress of requests and collate statistics for mandatory annual reporting to Department of Justice.

Any Instruments of Delegation under the RTI Act must be notified to OGOC by the Principal Officer or their delegate.

13. Further resources

Office of the Information Commissioner Queensland:

- Annotated RTI Act: https://www.oic.qld.gov.au/annotated-legislation
- RTI Decision database: https://www.oic.qld.gov.au/decisions
- Information for Government: https://www.oic.qld.gov.au/information-for/government
- Information for RTI Officers: https://www.oic.qld.gov.au/information-for/right-to-information-officers
- Fees & charges: https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/processing-applications/fees-and-charges

14. Compliance Policy, Procedure, Standard and Legislative Framework

NQBP as a government owned corporation and port authority is required to comply with its own policies, prescribed applicable legislation and State Government policies and procedures. This Procedure should be read in conjunction with:

a. Policy 2 - Compliance

b. Procedure 2.01 - Compliance

c. Policy 15 - Privacy

d. *Government Owned Corporations Act 1993* (Qld)

e. Government Owned Corporations Release of Information Arrangements 3.0

f. *Information Privacy Act 2009* (Qld) (remains the relevant definition of ‘personal information’ for the RTI Act only)

g. *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (note that this Act excludes certain NQBP information from RTI, particularly the Abbott Point Coat Terminal sale by PCQ (see item 21, Part 2, Schedule 2 of the RTI Act))

h. Australian Privacy Principles (see Schedule 1, *Privacy Act 1988* (Cth))

i. *Privacy Act 1988* (Cth)

j. *Public Interest Disclosure Act 2010* (Qld)

k. Public Interest Disclosure Standard No. 3 (reporting under the *Public Interest Disclosure Act 2010* (Qld)) (https://www.ombudsman.qld.gov.au/ArticleDocuments/212/PID%20Standard%203-2019%20Dec2018.pdf.aspx?Embed=Y)

l. *Public Records Act 2023* (Qld)

m. *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

n. *Right to Information Act 2009* (Qld)

o. *Right to Information Regulations 2009* (Qld)

15. Procedure Review Date

This Procedure should be reviewed by 8 June 2028.

16. Definitions

Unless stated otherwise, defined terms used in this Procedure have the same meanings as those terms in the RTI Act and *Right to Information Regulations 2009 (Qld)*

NQBP: means North Queensland Bulk Ports Corporation Limited ACN 136 880 218.

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