Queensland Law Society Inc

Telephone (07) 3842 5888
Facsimile (07) 3842 5999

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15 March 2000

Mr Gary Fenlon MLA
Chair
Legal, Constitutional & Administrative Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
BRISBANE QLD 4000

Dear Sir,

REVIEW OF THE *FREEDOM OF INFORMATION ACT 1992* (QLD)

I **enclose** for consideration of your Committee, the Queensland Law Society's submission on the Review of the *Freedom of Information Act 1992.*

Congratulations on an excellent discussion paper on this most important issue. The paper has now been reviewed by the Administrative Law Committee of the Council.

It is apparent that FOI has developed in ways which may sometimes be viewed as controversial, particularly where those developments have produced conflict between privacy principles and the need for accountability of public authorities and we welcome this opportunity to have some input into the direction of FOI in this State.

It is clear that FOI may apply to many entities which receive no public funding and the staff of which are not public servants. The Society is such an example. It is fair to say that the Society has received numerous FOI applications which would, if it were not for the present form of the FOI legislation, raise questions regarding the bona fides of the applicants and in some cases, questions of whether the approach could not be considered as consistent with certain proscribed forms of harassment. These issues may be worthy of review by your Committee.

I commend the Society's submissions to you.

Yours faithfully

Peter Carne
President

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SUBMISSION BY THE QUEENSLAND LAW SOCIETY TO THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE OF THE LEGISLATIVE ASSEMBLY OF QUEENSLAND

Review of the *Freedom of Information Act 1992* (Qld)

The following submission is made by the Queensland Law Society to the Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee regarding the review of the *Freedom of Information Act 1992* (QLD).

Terms of Reference

A new approach to FOI in Queensland

B(i) Reversing the FOI concept

As a private members body the Queensland Law Society makes available for its members various publications free of charge which are included in their membership fee. These include *Proctor*, member updates, a Queensland Law Society web page (which has information for both members of the public and members of the Law Society), brochures which are regularly updated outlining various changes to various aspects of the law which affect the Queensland Law Society's members in daily practice, and an annual report which contains detailed information including most of the information that is contained in the Law Society's Statement of Affairs published under Section 18 of the FOI Act.

Most, if not all of the information required in a Statement of Affairs is available to members of the Law Society and to members of the public by either the Law Society's annual report and/or the Law Society's web page. The Society does not think it would be appropriate to place a further financial burden on its private members with a requirement to publish and administer further documents and information, including an indexed register of non-personal information released in response to FOI requests, particularly as the Society receives no government funding and is funded entirely by member fees (a proportion of which would need to be allocated to the administration and maintenance and updating of such a service).

Recommendations

- That Statements of Affairs, where practicable, be included or incorporated into an agency's annual report, as the majority of the information contained in a Statement of Affairs is in an agency's annual report in any event. It would be a simple matter to include the small amount of information not included in an annual report but required to be included in a Statement of Affairs in an agency's annual report.

B(ii) Whether, and to what extent, the exemption provisions in the FOI Act, Part 3, Division 2 should be amended;

Section 43 of the FOI Act exempts from disclosure any document that would attract legal professional privilege in a legal proceeding. The phrase "legal professional privilege" is not

defined in the Act and therefore common law principles apply. In *Re Hewitt and the Queensland Law Society* the Information Commissioner stated at paragraph 127 that in general, he considers that public interest considerations which support the existence of legal professional privilege would be better served if a discreet proportion of confidential professional legal advice was able to be severed from a document that was not brought into existence solely for the purpose which attracts legal professional privilege, with the severed portion retaining the protection of privilege. This is the approach taken by Dawson J in *Waterford v. Commonwealth of Australia* 1987 163 CLR 54.

The Information Commissioner went further at paragraph 128 to provide that the approach taken by Dawson J and Deane J (being the minority judges in *Waterford's* case) more easily sits with the scheme of the Queensland FOI Act. In the recent High Court of Australia decision of *Esso Australia Resources Limited v The Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA67 21 December 1999, the High Court revisited the original decision in the case of *Grant and Downs* (1976) 137 CLR 674 – the leading case in Australia on the subject of legal professional privilege – with a majority of that Court deciding the correct approach to take in deciding whether or not documents should be subject to legal professional privilege was the dominant purpose test and not the sole purpose test. We note that the Office of the Information Commissioner (Qld) has unofficially begun to adopt the dominant purpose test in relation to legal professional privilege, as opposed to the sole purpose test that the Information Commissioner felt obliged to follow in the case of *Waterford & Commonwealth of Australia* 1987 163 CLR 54.

Recommendations

- That amendments be made to the FOI Act to define "legal professional privilege" according to the "dominant purpose test" in light of this recent High Court decision.

B(iii) Whether the ambit of the application of the FOI Act, both generally and by operation of Section 11 and Section 11A, should be narrowed or extended;

Sections 4, 5 and 6 of the *Freedom of Information Act 1992* (FOI Act) in essence provide that the object of the Act is to provide members of the community with access to information held by Queensland government to thereby promote open discussion of public affairs and enhance government's accountability.

Functions of the Queensland Law Society

The Queensland Law Society is a legal professional association for some 4,700 solicitors in Queensland. It is incorporated under the *Queensland Law Society Act 1952* and is administered by an elected Council of legal practitioners. The Society serves two main functions. It is, in effect, the solicitors' union and it provides a full range of services one would expect of any union. On the other hand, it exercises important public functions under the *Queensland Law Society Act*. These include handling of complaints/discipline of the profession; control of trust accounts; receivership of trust property; management of the Legal Practitioners Fidelity Guarantee Fund; audit investigations; management of General Accounts Contribution Account; and registration of the profession.

Private Functions

The Queensland Law Society's private functions are entirely funded from private membership fees paid by solicitors in Queensland. The Law Society receives no government funding or subsidies. Its private functions are fundamentally similar to any other private special interest group, eg. union or sporting club. It is not the appropriate function of the FOI legislation that the Society's private functions in respect of continuing legal education for its members, editorial policies and finances of its publications or any other particulars of its member services should be subject to FOI.

In 1996 the then Government accepted submissions made by the Society for the amendment of the Freedom of Information Regulations to exempt the private functions of the Society from the operation of the FOI Act. Parliamentary Counsel subsequently drafted an amendment to the regulations in terms suggested by the Society and accepted by the Government. Unfortunately the amending regulation did not proceed to Governor in Council prior to the Government assuming the caretaker role in the lead up to the state election in May 1998.

Public Functions

Furthermore, in relation to Section 11 of the FOI Act the Society made a submission to the then Government that the effect of the operation of Section 11 of the Act should be altered by Regulation made pursuant to Section 11(1)(q) prescribing that the Queensland Law Society and those persons and instrumentalities (save and accept of the Grants Committee) appointed under the Queensland Law Society Act should not be subject to the FOI Act. In relation to the public functions of the Society, the Society submitted that the special powers granted and given to the Society by the Queensland Law Society Act provided for a specific criminal offence if any person in the Society published any information or document arising from the exercise of the powers of the Society (Section 50 of the Queensland Law Society Act). That secrecy provision properly identified the injustice created by any situation where a person could be compelled to reveal confidential information for a specific purpose which may have been, in turn, published to the public at large. Section 50 is now overridden by the FOI Act. The Society's view remains that it is fundamental for the matters previously protected by the secrecy provisions of Section 50 of the Queensland Law Society Act not be subject to the possibility of disclosure.

Indeed, it has been recognised in Part 7 of the Health Rights Commission Act, which deals with investigations, creates information of a most confidential and sensitive nature relating to the private affairs (medical or legal as the case may be) of members of the Queensland public at large. To protect this information Section 138 of the Health Rights Commission Act mirrors Section 50 of the Queensland Law Society. Further, and in support of this contention, the recent amendment to the Coalmining Safety and Health Act 1999, which serves to amend the FOI Act by inserting a new Section 42(1)(A) recognises the need to protect the information gained from persons who are compelled to answer questions in the course of an investigation (in this case in relation to Coalmining Health and Safety). In the explanatory notes in relation to Section 42(1A) is the following:

Information and documents gained as a result of answers obtained under compulsion likewise cannot be used in any proceedings against the person and are not discoverable under FOI legislation.

The Society would reiterate its concern over the inequitable position of being able to utilise coercive powers to force admissions from its members against their own interests if the use of those admissions cannot be limited to the purpose of the Queensland Law Society Act, which provided the coercive power. In addition, the Society believes it would be improper for the Society to bring material into its possession in the course of an audit, receivership or complaint examination which revealed information sensitive to solicitors clients and which the Society may unable to completely protect from FOI examination.

Recommendations

That the Queensland Law Society's private functions be excluded from the operation of the FOI Act. The desired result could be achieved by either an amendment to section 11 of the FOI Act or a regulation made pursuant to Section 11 of that Act prescribing that the private functions performed by the Society not be subject to the provisions of the FOI Act. The Society's private functions are those contained in Rule 2 of the Queensland Law Society Rules (excluding subparagraphs 5 and 22) and the Indemnity Rules.

That the Queensland Law Society Act 1952, Section 50, be included in Schedule 1 of the FOI Act – secrecy provisions giving exemption, thus allowing the Society to continue to utilise its very considerable powers in the performance of its public functions including the powers to require production of, or enter and seize, records and files which evidence the confidential, and on many occasions, very sensitive or legal professionally privileged, affairs of members of the general community. Alternatively, that Section 42(1A) of the FOI Act be amended, and therefore broadened, to include Section 50 of the Queensland Law Society Act 1952.

With regard to FOI and the private sector, the Society can see no argument for extending the ambit of the FOI Act to cover the private sector generally. Private organisations are under no obligation to account to the general public and nor should they be subject to a financial burden in complying with the FOI Act where to comply with the Act would by necessity be funded solely by the private organisations.

B(vi) The appropriateness of, and the need for the existing regime of fees and charges in respect of both access to documents and internal and external review;

In our previous submission the Queensland Law Society pointed out that we had been faced with extraordinary costs and resource implications relating to FOI compliance. Nearly half of the FOI applications made to the Law Society are made purely on a "fishing expedition". Many of these applications seek to access such a broad range of information that there are by necessity broken into up to 10 headings with 5 or 6 classes of document under each heading. The result of this is that an applicant, for a $30.00 fee for non-personal information, can, in effect, make 10 separate applications in the one application. In these circumstances, the compliance issues on the Queensland Law Society are onerous to say the least, with compliance costs solely being borne from the subscription levies of individual members of the Society.

In addition to the size and complexity of an FOI application that can be made for a $30.00 application fee, there is no mechanism that encourages an applicant to view the documents which have been located, identified, collated, examined for any exemptions, prepared for inspection, (with an exemption schedule prepared) along with an inspection time and time allocated by a staff member to supervise an applicant should they choose to attend the Society and view the documents which have been made available. On numerous occasions the Society has gone to great lengths to ensure that an applicant can have access to documentation sought under FOI, only to have that applicant totally ignore invitations to inspect those documents, and choosing to go straight to the Office of the Information Commissioner to have reviewed their right of access to those few documents which may have been exempt.

The imposition of charges on search times and the time it takes to prepare necessary documentation for inspection, may be enough to encourage applicants to narrow the line of a request rather than embark on a fishing expedition to see what turns up.

Recommendations

- That the FOI Act should impose charges for access according to a scale of costs based on the number of documents to which access is allowed in respect of non-personal information.

- Alternatively, agencies should be allowed to charge search and retrieval time at an hourly rate. This would then acknowledge the amount of time spent processing an FOI request in order for a decision to be made.

- Agencies should also be able to charge for time spent supervising the inspection of documents in relation to the photocopying charge that is currently permitted under the regulations.

- The Society recommends that in addition to the $30.00 application fee payable for non-personal information, a further fee, ie $30.00 should be payable when the applicant seeks an internal review of a decision under this heading. If on internal review the original decision is altered or varied in any way, then the internal review fee should be refunded by the agency to the applicant.

- The current photocopying charge pursuant to the FOI regulations should remain.

- A further fee should be payable by an applicant on lodging an application for external review. This would deter vexatious and frivolous external review applications.

B(vii) Whether the FOI Act should be amended to minimise the resource implications for agencies subject to the Act in order to protect the public interest in proper and efficient government administration, and in particular, whether Section 28 provides an appropriate balance between the interests of applicants and agencies;

The re-drafting of Section 28, where access may be refused in certain cases where applications are voluminous [S28(2)], is an issue of great importance to the Queensland Law

Society. The Law Society is funded solely by its members, and receives no government funding to fulfil the obligations imposed on it by the FOI Act. As mentioned above, many applications received by the Law Society are broad based "fishing expeditions" which do nothing more than tie up the resources of the Society in locating and collating documents for inspection which lie idle while the original applicant submits further FOI applications of equal breadth. In the Society's case, one applicant has submitted 16 FOI applications in the past two years, seeking to access documents of a far reaching nature, with these applications becoming progressively more complicated.

Although the basic premise of the FOI Act is that an applicant can make a request for information without having a motive behind that application questioned, the Society feels that there must be some mechanism by which an applicant making continual applications can be termed "vexatious". This would serve the purpose of freeing up the Society's FOI officer to concentrate their time and energies on legitimate FOI requests and would also discourage serial/repeat/vexatious applicants from continuing their ongoing trawling exercises.

Recommendations

- Amendments should be made to Section 28(2) concerning voluminous applications, deleting the word "only" from the last paragraph of Section 28(2) to widen the factors that agencies may have regard to when deciding whether to refuse to deal with an application on the basis that it would substantially and unreasonably divert agency resources. This would enable agencies to have regard to additional factors rather than "only" the number and volume of documents and the difficulties in finding or collating them in individual applications.

- Agencies should not be obligated under the Act to consult with the Information Commissioner prior to invoking Section 28(2), as Section 28(4) is quite clear that an agency must consult with the applicant with a view to narrowing their request so that it may be more easily processed and thus fall outside the ambit of Section 28(2).

- Amendments need to be made to the FOI Act to give agencies the power to refuse to process vexatious applications, so as to reduce the unnecessary burden on agency resources. This is particularly important to an organisation like the Law Society, where funding of the Society's activities come solely from its members, and not from government. The amendments should be along the lines of the FOI Bill 1999 (UK) which provides for both repeat and vexatious requests. In other words, an agency is not obliged to comply with vexatious requests; and need not comply with repeated or substantially similar requests from the same person other than at reasonable intervals. This would serve the dual purpose of preventing serial applicants making vexatious and resource intensive applications under FOI, and preventing serial vexatious applicants convincing others to make requests for access on their behalf.

B(viii) Whether amendments should be made to either Section 42(1) or Section 44(1) of the FOI Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the uses likely to be made with the information;

The general application of the FOI Act has the potential to disclose an individual's personal information and thereby invade the person's privacy. Further, the Law Society has received several FOI applications specifically targeting individual employees files, electronic and hard copy diaries, and financial records. The exemption provisions contained in the FOI Act do not go far enough to adequately avoid this unreasonable invasion of a person's privacy. This is particularly the case with the Law Society, where the employees of the Society are not public servants and are not funded by the public purse in any way. Many of the employees of the Law Society do not in fact deal with the public functions of the Law Society in any way and deal only with the private functions of the Law Society, and in that sense should not be held up to the scrutiny that is available to an applicant under FOI.

Section 42(1) of the FOI Act, which concerns law enforcement and public safety and includes in sub section (c) an exemption of matter if its disclosure could reasonably be expected to *endanger a person's life or physical safety*, is one that is open to interpretation. It in no way defines a person's physical safety, or take into account that what some individuals may perceive a direct personal threat others do not.

Similarly, Section 44(1) which, in order to protect personal privacy, operates to exempt disclosure of *personal affairs* information unless its disclosure would, on balance, be in the public interest, does not go far enough in providing protection for a third party's privacy. In 1991, amendments were made to the *Freedom of Information Act 1992* (Cth) by amending the term *personal affairs* and substituting *personal information* so as to cover information about a person's work capacity and performance. This would seem to be the correct approach.

Recommendations

- Section 44 of the FOI Act should be amended to provide that "personal information" is exempt from disclosure under FOI. In addition to this, guidelines in relation to the categories of personal affairs information that should be exempt under Section 44 – along the lines of the definition of "personal affairs" in *Re Stewart v The Department of Transport* (1993) 1 QAR 227- could be included in the FOI regulations.

- Some thought should be given to what is meant by a person's "physical safety" in Section 42(1) (c), as in today's world, with issues of occupational health and safety, and the various physical and mental conditions which can be attributed to originating in the workplace, should the term remain in reference to a purely physical apprehension of danger, and an apprehension by who?