



6 April 2000

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George St
Brisbane Qld 4000

Ref: Freedom of Information Act Review

Dear Director

Introduction

I am writing to you about the Freedom of Information Act (1992). I was an officer of Education Queensland where, for a time, I worked as the internal review officer for decisions under the FOI Act. I am now employed in a senior position in a New Zealand University.

I have three concerns about the operations of this Act. They are:

- The absence of any provision in the Act to refuse access to applicants making frivolous and vexatious applications for other peoples' personal information (especially for material under section 44),
- An anomaly concerning the meaning of "documents of an agency" (defined in section 7) and,
- An effective appeal mechanism concerning decisions of the Information Commissioner (related to section 97).

Background

Section 44 matters.

The preamble to the Act seeks to ensure that the public has access to documents held by an agency and to enable members of the community to ensure completeness and correctness of their personal affairs documents. This is laudable. However, the operation of section 44 has become a nightmare for public servants when other people access their internal files for vexatious purposes.

I write from experience. When I was handling an internal review decision on a matter under the Act, a solicitor threatened to "FOI" my file if I did not give him what he demanded at once. In due course he received access to the information on another person's file and then proceeded to "FOI" both my own and my wife's files. This has resulted in the generation of about 2000 documents and involved legal expenses personally and by my Union, the SPSFQ. This particular applicant had, in 1996, by my last count amassed over 10,000 documents just from the Education Department. I have no doubt he has many other documents from other Departments. All this is at public cost. His applications are made in such a way that each application is not onerous on the Department under section 28(2)(b)(1). Timid FOI managers rarely refuse access on this ground despite the huge waste of public resources made available in support of applicants whose behaviour is bizarre. There is ample case law on this matter, but the Information Commissioner will not apply it in Queensland. Furthermore, it is not possible to discover the full extent of the applications made by such applicants because the schedules made available by Departments to the Information Commissioner describing these activities are not subject to the FOI Act itself.

In personal discussions with other FOI officers in other Departments, it is revealed that each Department has one or more applicants who behave in a similar manner. The whole cost of this to the public is unknown.

Defences against vexatious applicants

There are no defences against vexatious applicants under this Act in the way that the Information Commissioner under Section 44 interprets it. The public interest clause is used to release information, regardless of the actual public interest involved, if any. Despite numerous appeals and references to decisions in other similar jurisdictions in Australia and overseas, the Information Commissioner consistently releases almost every document in a public servant's personal file except the narrowly construed exemptions of address (easily obtained from a phone a book) and certain health matters. The net effect is that a public servant's personal file is public information. Once the information is in the public domain, vexatious applicants then use the Act to obtain information from other

institutions, such as Universities, to query the validity of person's qualifications etc. This leads to more applications and defences. In my case it involved the applicant making applications in other States and universities both inside and outside Queensland on matters pertaining to employment many years ago.

This particular applicant then made similar applications against my wife's file even though neither of us lived in Australia and were no longer employed by a government agency. She has since lived in fear that he would access information on her parents, since her father, who is in ill health and long retired, was a prominent public servant. His personnel matters could have been easily brought up to public gaze at considerable stress to himself.

I am concerned that applicants are not required to give reasons for accessing other people's information. For example, if a member of the public became suspicious that a public servant did not have a claimed qualification and sought to verify it, the reason could be easily given. Not having to justify access results in vexatious applicants "trawling" personal files for matter that might give rise complaint. Such "trawling" is not allowed in allowed in criminal matters, why should it be allowed under the FOI Act?

I am certain that the FOI Act was never intended to have these consequences. It is my view that it should be amended to cure this "evil". Amendments might include those to prevent frivolous and vexatious applicants having access to information and a requirement for the giving justifiable reasons for accessing information in another person's file.

Documents of the Agency

One particular case stands out in my mind concerning the application of section 7. At a school meeting some parents tape recorded a conversation between themselves and the other departmental officers. The tapes were housed at the school subsequently. The operation of section 7 meant that the Information Commissioner regarded these tapes as "documents of the agency" and in due course released them.

It seems that there is a legal confusion here between an institution having mere "possession" of documents as opposed to having "legal title" to execute or deal with documents. Clearly, the two concepts are not the same. An examination of the Hire Purchase Act (Qld) and Copyright Act (Commonwealth) will demonstrate this. A person with goods on hire purchase may have possession of them, but no legal title to sell them. A person who owns the copyright over documents cannot have that right overridden by the another. Yet, the Information Commissioner's decisions, using the definition in

section 7, seem to have the power to claim "title" by virtue of "possession". Perhaps this element of legal interpretation needs clarification to maintain the separation between the concepts of "title" and "possession".

Appeals from Information Commissioner's Decisions

There are two concerns arising from this area. They are:

- The excessive legalisms contained in the Information Commissioner's decisions, and
- The actions of the Information Commissioner in respect of government Departments.

In my experience as an FOI Officer and as an appellant on "reverse FOIs", public servants whose files are sought by others spend an inordinate amount of both public and private time and personal cost interpreting the meanings of the Information Commissioner's decisions. Those without legal training, such as my wife, who despite having more than one degree from a University, finds it impossible to understand the decisions and to follow the long and complicated train of schedules and documents that may be exempt, partially exempt or not exempt, especially if the documents are not filed in the same manner as those of the Information Commissioner. Hiring a legal adviser to interpret the decisions is very costly, particularly so when the history of the Commissioner's decisions is to release documents anyway. Ordinary people could not afford the cost and there would be little point in terms of the outcomes, since nothing seems to influence the Commissioner.

Because few individuals can afford the cost of appeals from the Information Commissioner to the Supreme Court, by way of the Judicial Review Act, there are very few decisions in the Queensland jurisdiction that govern the Information Commissioner legally. Most of the Information Commissioner's decisions rely on his previous decisions and rarely on case law, and hardly at all on case law from other jurisdictions. In effect, an application for a review of the Commissioner's decisions is "Caesar appealing to Caesar". This state of affairs does not serve the cause of justice, since it seems that once the Information Commissioner has made a decision, he uses his previous decisions to support it. The only real avenue is a Judicial Review of the decision and the Information Commissioner does not advise unsuccessful appellants about this avenue. Even so, few could afford it.

It is also my experience that legally trained people do not normally staff offices in Government Departments. As a result, FOI officers do not have the legal knowledge to put a case for release or exemption of information in ways that the legally trained officers in the Commissioner's office can follow. Consequently, Departmental officers are somewhat intimidated by the legalism emanating from the Commissioner and are more

likely to comply with the Commissioner's view instead of making decisions more appropriate to the circumstances of each case. This was certainly so in the Department of Education, where only no legally trained people made FOI decisions despite the existence of lawyers in the same Administrative Law section.

Summary

In my experience as a former internal FOI review officer and as an appellant to the Information Commissioner, I believe that there are some outstanding faults with the Act and its operations. They are:

- The absence of a mechanism to protect personal information from access by vexatious and frivolous applicants,
- An effective appeal mechanism for the Information Commissioner's decisions,
- Excessively legalistic decisions made by the Commissioner relying on the Commissioner's own decisions and,
- Issues concerning the meaning of "documents of an agency" where the concepts of "title" and "possession" are confused.

I trust that this submission is of some help to the Review Committee. I am willing to appear before the Committee and supply any relevant documents.

Thank you for the opportunity to make this submission

Yours sincerely

A handwritten signature in cursive script, appearing to read "A Higgins".

Dr Andrew Higgins (PhD)