Submission No 136
Spec 1.4

Freedom of Information Review

Submission by

Beaudesert Shire Council

13 April, 2000

In accordance with the directions provided in the discussion paper this submission has been prepared based on the questions posed by the Review Team. Each of the relevant sections are referenced in the footnotes on each page.

SUMMARY

Beaudesert Shire Council has been receiving an increasing number of Freedom of Information applications over recent years and along with the increase in numbers comes the increase in work loads for part-time decision makers. Having spoken to many of the surrounding Council's there appears to be little in the way of support for these decision makers in terms of resolving difficult questions or providing answers for decision letters. The other major issue for Council's is related to the costs involved in the preparation of FOI applications and this matter has been addressed in the submission.

There are four key issues considered by Council as being important for the Review Team to consider, these being:

- Timeframes
- Costs
- Accountability
- Clarification/definitions

Each of these have been outlined in response to the relevant section of the discussion paper.

Anything which helps to clarify the intent of the FOI Act is seen as a beneficial change and while the change suggested in point six (6) does not necessarily provide this, it would help to reduce the perception that Government is still working under the "need to know" operations of old. Council considers that as stated in the ALRC/ARC Freedom of Information recommendations the object clause of the FOI ACT could be revised to "promote a pro-disclosure interpretation of the Act and to acknowledge the role of FOI in Australia constitutionally guaranteed representative democracy ... and that information collected and generated by government officials is a national resource". What also needs to be considered in this change is that the information generated needs to be so in an official capacity and still needs to be tied back to the public interest concept and then still taking into consideration the requirements of other legislation. At the present time the people who implement the Act are, in most cases, aware of this already however its inclusion would certainly make the "old secrecy regime" harder to maintain in any places that cling to it.[6]

Point eight (8) of the discussion paper highlights the concept of making Government agencies responsible for the release of information through routine releases of information based on some sort of criteria. While this appears like a logical approach, the implications for already resource stretched agencies could make this impractical. Most organisations should have in place policies and procedures for the administrative release of information which can be freely accessed without the need for FOI and this process is more cost and resource effective that the production of material which may be of interest to just a small component of the community. The type of information which may be released under these arrangements (for local government) would be the following:

- Information relating to dangerous dogs and other animal related information
- Number and nature of complaints
- Correspondence to or from an individual as requested by that individual.

Changes to other legislation in recent times has also impacted upon the provision of information under the FOI Act including the type of information which must be released under the *Integrated Planning Act* (IPA). Prior to the introduction of IPA Council would not have released the details of an individual or group of individuals who had objected to a proposed development, however, under IPA these details are freely available to the person lodging the development application and viewing the file during the period when its open for inspection[8].

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[6] Should any additional matters be stipulated in the objects clauses, e.g., a statement that Parliament's intention on providing a right of access to government-held information is to underpin Australia's constitutionally guaranteed representative democracy; an acknowledgment that information collected and created by government officials is a public resource?

[8] Should the entire approach to FOI in Queensland be 'reversed' so that the onus is on agencies to routinely make certain information public (with the public still having the right to apply for information not already so released)?

What (other) considerations are relevant?

Freedom of Information is still not as widely known of as it could be, and the FOI Act only tends to be advertised when it comes up in the media as the means by which they gained their information. ***Ninemsn*** (www.ninemsn.com.au) has information about using the FOI Acts to obtain information and while it is fine that that viewpoint is in the public domain most agencies also only tend to only have information about how to make applications. While this in itself is important and is what people need to know, there is, perhaps a need to have a body or person charged with promoting FOI positively and consistently across the State[9].

If it were broadcast that Information is being released, that there are some costs, the size and number of applications and what it does cost to fulfil the requirements of the FOI Act this might circumvent some arguments that FOI decision-makers still have with regular monotony with potential applicants about what can and can't be accessed and why there is a cost and that the Act does not allow leniency in the fee – it either applies or it doesn't.

Council's Statement of Affairs is produced as required and copies are sent to community groups and to the Council Libraries, however only a handful are ever requested by members of the public and a member of the media who did take a copy last year commented on how boring it was. Beaudesert Shire Council's statement of affairs is produced in house and there is no money allocated in the budget to "pretty" this document up. To enforce the printing/production of other documents which the public rarely desire to access when, speaking from a Local Government point of view, so many Acts require registers of different types of information to be open for pubic inspection and noted in the Annual Report would be excessive[10].

The current arrangements for the operation of the Act do not provide a mechanism for the establishment of performance agreements, and it is felt that the creation of these would simply add more bureaucracy to the entire process of assessing applications. Under the current arrangements each agency has some flexibility for processing application in accordance with the requirements of the Act and to impose a standard across all levels of State and Local Government Departments would only create additional workloads[11]and potentially impossible situations were there are not dedicated FOI staff.

While the Freedom of Information *Act* is not widely know or used at the present time, any change to the title after several years of operation may create the perception in the vocal minority that the concept of the original Act is changing to restrict access and if the title is going to change someone or some organisation would have to be charged with promoting the change/explaining the difference.[12]

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[9] Is the existence of the FOIQ adequately publicised? [For example, through public libraries, on-line, by assigning promotion of the FOIQ to somebody-see T/Ref C(I).]

[10] In addition to any suggestions made in response to the above discussion points, are there any other ways in which the FOIQ, part 2 provisions concerning the publication of statements of affairs and other documents might be improved?

[11] Is there scope for performance agreements of senior public officers to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information including FOI requests?

[12] Should the title of the FOIQ be changed to the *Access to Information Act*?

"Public Interest" in its current form in the Act can be useful and at other times it would be useful to have a stricter definition contained within the Act. Council decision-makers have recently argued with Council's legal providers over a definition of public interest as it related to a particular FOI application. The issue of "Public Interest" of an individual versus the "Public Interest" of the broader community. Each party has a right to access to information, however the public interest in each case needs to be balanced to ensure that the personal affairs of the individuals are not released.[20]

There is a requirement to expand the concept of "Public Interest" in the Act to enable decision-makers to be able to effectively balance the "Public Interest" in decision making. While Council does not have an answer to how this could be achieved it needs to be based around some form of criteria which would allow a decision-maker to be able to balance the public interest of the individuals versus the public interest of the broader community[21].

In relation to covering Contractors functions while point 3 "deem documents in a contractor's possession that relate directly to the performance of their contractual obligations to be in the possession of the government agency" may be the most workable option – it does beg the question if contractors were required to create appropriate records and periodic auditing of the contractors adherence to the records system was required as it has been suggested. Who is to bear the cost and who will do the auditing?[30].

Amending the Act to include "Information rather than documents" could potentially lead to the creation of documents to answer people's questions this hasn't been the purpose in the past. Certainly sometimes this would be quicker – providing a spreadsheet rather than all the supporting information and letting them determine it themselves – but if the program/formulae or information did not already exist or if they did not have the medium to understand the information and they wanted a copy which could not be produced easily in hardcopy what happens then? In these instances there may be a benefit in making the information available through administrative provisions rather than through the FOI process[33].

With the move to electronic records management systems there is a trend for the storing of information in various electronic formats. In the future this may pose a large problem for agencies where there is a need to provide information between each other if the definition was changed to include data. In cases where the one agency was providing data they could achieve this in a single format, however, to provide the information to the applicant they would still need to do this through the traditional

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[20] Should the 'public interest' as it relates to exemptions be defined in the FOIQ? Alternatively, should the FOIQ deem any specified factors as relevant, or irrelevant (e.g., embarrassment to government), for the purpose of determining what is required by the public interest?

[21] If the 'public interest' is to remain undefined in the FOIQ, should more guidance be provided on how to apply the public interest test by other means? For example, through guidelines issued by the IC (Q).]

[30] Should the FOIQ be extended to cover contractors performing functions 'outsourced' by government? If so, why and how should this be effected?

[33] Should the FOIQ confer a general right of access to *information* instead of a right to documents? If so, what should 'information' encompass?

paper document process[34]. (Council currently scans all inwards and outwards correspondence and this is available electronically but we provide access via FOI on hardcopy. The system is not viable to provide it electronically (easily) at this stage).

At the moment the charging regime does not recognise any amount of cost in retrieving documents. Admittedly an extra 15 days is given if the document is older than 1987 (5 years prior to the implementation of the Act) but this should be changed to any document older than five years as anything older than five years from the current date may be stored in archives or be in a superseded records management system. It would not hurt to include Data in the definition but then to provide Data in a meaningful way might mean "creating" documents or providing a program. While the data might be releasable itself what if the program is exempt under S45? No applicants should be disadvantaged by deficiencies in an agency's Records Management System – but what was done is done and it can be as or more annoying and frustrating to the agency trying to retrieve the information for FOI or other purposes[36] as it is to applicants.

The loss of technical support following the dispersal of the FOI Unit at the Department of Justice and Attorney General has left decision-makers without any assistance when difficulties are encountered in the processing of an application. Generalist legal opinion has been unable to assist in the application of the Act's provisions, and the lack of technical support has the potential to result in lower quality decisions, and ultimately, will increase the number of applications for external review.

The general "What is Freedom of Information" brochure originally produced by the Department with contact numbers for queries etc is out of date in terms of the contact details but is still very valid regarding the general FOI information. With the Department of Justice & Attorney-General no longer stocking/supplying copies, Council is required to provide **photocopies** along with Council's own internal FOI information sheets to members of the public.

At times the lack of training programmes for new decision-makers has also caused difficulties as it places the full burden on training such staff on the existing decision-maker. Such in-house training will also result in incorrect interpretations of the Act being perpetuated through all subsequent decision-makers by others when the task of processing applications already requires greater legal skills to interpret decisions and legislation.

There has also been a lack of communication regarding updates to the FOIDERS software. It was only when Council changed over computer systems, re-installed the FOIDERS software and subsequently, upon experiencing some operational difficulties, contacted the Department Justice & Attorney-General that it became

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[34] If the FOIQ is to continue to provide for access to documents, can the definition of *document* be improved? (For example, by clarifying that it includes data?)

[36] Which documents should be considered in the possession of an agency for the purposes of the FOIQ? Need the Act's definitions of 'documents of an agency' and 'official documents of a Minister' be amended in this regard? Alternatively, how might the FOIQ charging regime account for agencies' identification and retrieval of documents potentially relevant to an FOI request that are 'documents of an agency' but not in the agency's physical possession?

evident that Council's version of FOIDERS was completely outdated. That has led to figures in the Annual Report for 1997-98 and 1998-99 not being totally accurate[41(a)].

It has been calculated that a fee of $50.00 would reasonably cover the costs of processing an application (these are the costs which are common to every application received, i.e. receiving the application, recording it through the Records Management System, creating a file, receipting the payments and sending an acknowledgment letter to the applicant etc). This cost would not be sufficient to cover the assessment of information relevant to the specific request[48]. The Council believes that there should not be a charge for those seeking access to personal information.

The New South Wales system provides for the application to be charged at realistic rates based on the time spent on sourcing and providing the information. A similar system should be introduced to prevent the applications which are just "fishing" or to promote narrower searches instead of the "everything" approach.

In developing a system of this nature it would need to be carefully considered as the impact upon agencies in justifying time taken to carry out a review would have to become a reviewable matter. The impact on the organisation would be high in terms of accurately allocating time (in cases where decision makers are not employed on FOI on a full time basis) and also if the request went to external review there would be a need for the Information Commissioner's Officer to be able to accurately assess workloads and timeframes. In considering the issue of supervised access to information the applicant would be able to control this component of the review based on the amount of time spent with them and therefore would be aware of the time and costs involved. The problems associated with this would be in cases where an applicant was short on money, they would be worried about the costs and may not achieve what they wanted from the application through being rushed[50 (a) (b)].

The other aspects to consider in developing a new charging system would need to be based around the amount of work involved and the setting of a reasonable cap on charges. This cap could be considered on the basis of the applicant – ie an individual's application could be set differently to that of a legal firm.

Depending on how the initial application fee is set there may or may not be a need for charges for internal and external reviews. A fee might discourage those that do an internal review just to see if there is anything else there – not because they know there is, but just in case. A recent example was one applicant said their solicitor had

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[41(a)] Given the importance of providing FOI administrators guidance on the proper interpretation and application of the FOIQ - Should the IC (Q) [or some other body responsible for overseeing the administration of the FOIQ: see T/Ref C (I)] be responsible for preparing guidelines to assist agencies and applicants to understand, interpret and administer the Act.

[48] Should the non-personal information application fee be abolished, remain at $30 or be increased (to what level)

[50 (a) (b)] Should charges be introduced for: - Processing (for retrieval of documents, decision making and/or consultation); - Supervised access; - And if so, at what levels and in what form? (For example, per hour spent, per page disclosed or dealt with, a sliding scale, with caps on fees?)

advised them to do an internal review because it didn't cost them any extra and it may turn up something else.

If there aren't going to be charges for personal affairs applications, you could argue that you shouldn't for internal review either. It could be argued on the amount of work involved for personal affairs internal review that it would be just as time consuming as for a non-personal affairs request and therefore could be charged along the same lines[53].

There is a requirement to define "substantially and unreasonably divert agency resources" or provide clear guidelines – what is unreasonable to an agency with a FOI Unit and to one with a person who does FOI part-time in amongst the other (unrelated) aspects of their job are two entirely different things[55].

The timeframe imposed by current legislation is sufficient to allow for most applications to be processed, however, there is a need for some form of leeway to be implemented to allow for increased workloads in the event of multiple requests being received by smaller organisations where resourcing does not allow for staff to work full time on requests. This would be covered through a more flexible charging process where additional costs could be recovered through charging of overtime etc. to enable timely processing of requests or through the legislation allowing for negotiation of time frames[60].

Time limits should not be decreased. While it is acknowledged that decision-makers become more practised over time, the following criteria must also be taken in to account:

(a) Decision-makers only become really practised when they process large volumes of similar types of applications. In the case of smaller councils they often receive only a few per year. Beaudesert has received 109 since the inception of the Act, each at least slightly different from the others. Equally applications in the current and previous year have tended to arrive all at once so the existing decision maker has had no FOI commitments for a couple of months and then 5 applications at once which makes it harder when FOI is not their sole job responsibility.

(b) With staff turnover or promotion there are always going to be new decision-makers who will need the current time limits to process applications until they become better accustomed to the processes.

(c) An extra 15 days should be allowed for any application where documents are older than 5 years or negotiation of the timeframes.

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[53] If application fees are introduced for internal and/or external review:

[55] In relation to s 28(2) concerning voluminous applications, should: - The word 'only' be deleted from the last paragraph of s 28(2) to widen the factors that agencies may have regard to when deciding whether to refuse to deal with an application because it would substantially and unreasonably divert agency resources;

[60] Should the basic 45-day time limit for processing access applications in s 27(7)(b) of the FOIQ be reduces to 30 days?

While the assessment period is sufficient, the time allocated to internal reviews is seen as short as often it requires a more detailed review of the information as the reasons for the decisions made need to be thoroughly investigated and, in the shortened timeframe, this often creates difficulties. In more recent times, applicants have been advised to request an internal review simply because there may be something that was missed the first time through. A way around this may be through the introduction to the legislation of a detailed reason for the internal review which would help reduce the number of requests for the internal review without justification.

This Council does not believe that 14 days is sufficient time to effectively conduct an internal review of a decision. While much of the time taken up with the initial application is in locating the information, the reviewing officer still needs as much time to determine a decision as the original decision-maker did to reach the decision. This may explain why the internal review process often does not reach a new decision but simply allows the original decision to be affirmed. It should also be remembered that doing internal reviews in Councils is generally not the person's sole job responsibility (they are either the CEO or other Executive Staff)[67].

[67] Should the 14 day limit for dealing with internal review applications for access and amendment decisions-as set out in s 52(6) and 60(6)-be extended/ If so, what should the period be?