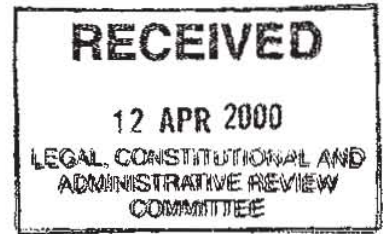


To: Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House, George Street
BRISBANE QLD 4000



Submission NO 141
Spec 1.4

SUBMISSION
TO THE INQUIRY INTO
THE FREEDOM OF INFORMATION ACT 1992 (QLD)

From:

Friday 7 April 2000

This submission is made in my capacity as a private individual and not as a Public Officer. It addresses a matter which may be considered to fall under the heading:

B. Whether the FOI Act should be amended, and in particular: (etc.)

as set out on page 61 of the Committee's Discussion Paper No.1. Argument and material in this submission will be seen to be similar to the material which the Committee will probably receive from the Department of Transport on the same subject. This will be because I made a substantial contribution to the development of that section of Transport's submission. However, the present submission, I reiterate for emphasis, is made in my private capacity. Part Three, Division Two of the Act would appear to be where some amendment might be made to accommodate the concerns I raise here.

The issue

The issue is FOI access to documents created within a Department's or Agency's Employee Assistance Program (EAP). I present some argument for the exemption from disclosure to FOI applicants of the confidential counselling records (other than records of the applicant's own sessions with the counsellor) which are created by the counsellor to record counselling carried out with persons other than the applicant.

The EAP in a modern public sector agency is a well-utilised resource and staff place constant demand upon the counselling service it offers. (This is certainly the case in the EAP of Queensland Transport, where I work as Staff Counsellor. My EAP colleagues in other agencies find the same is true there.) An agency's EAP helps it to do a number of things including maintain productivity, resolve staff issues, afford a means of mediation in certain cases, provide consultancy to all levels of management, discharge its legal and moral obligation when workers undergo traumatic events, and gather the data to diagnose organisational dysfunction at a macro level.

For these reasons the service is very valuable to the agency. One of the foundation stones of its success is its wide acceptance as trustworthy and confidential. The EAP's reputation rests squarely upon the guarantee (in my own case, published at the program's inception, and often reiterated since) that EAP records will be maintained "under separate security, accessible only to the Staff Counsellor." (Quote from the EAP policy in my own department.) Such policy protections, along with other features, are consciously built into a good EAP and enable the agency to preserve the status of its EAP as "a safe place to talk things out."

Now, the FOI Act seeks to encompass much government activity. The records made by the Staff Counsellor of counselling sessions with staff fall within its ambit and of course are not, at this time, specifically referred to in the Act, in section 5 of the Regulation or anywhere else. Thus it is legally permitted for an applicant under the FOI Act to seek the records of the Counsellor's sessions with persons other than the FOI applicant. In such cases the FOI applicant would stand as a "third party", as it were, to the relationship between the Counsellor

and counsellee. (EAP practice generally is to freely provide such records to the counselled staff member him- or herself, or in special circumstances to provide them to the staff member's doctor, so an FOI request would not be needed when the client him- or herself is seeking the counselling record.)

(An application by such a third party as described above was in fact made in 1998 to access my records of counselling with other persons. More detail is given in the section called An Illustration below.)

It is unlikely that exposure to a third party of the details of the relationship between Counsellor and client was intended by the framers of the legislation; and it is at least arguable that the Act, in this particular nuance and when it produces this consequence, could be rightly described as bad law. It jeopardises good management practice, and is therefore in need of amendment. The amendment could take the form of specifying EAP records in section 5 of the Regulation. Or perhaps other legal drafting techniques might better serve the same end.

The threat of unprofitable exposure posed by the present state of the law falls into a similar category to that which the FOI Bill was seen to pose in relation to performance agreements, including those at CEO level, at the time of its drafting. I understand that there was at that time sound agreement among the architects of the legislation and management people that the assessments of officers' performance arising out of those performance agreements should not be subject to FOI request. The relationship between supervisor and subordinate was considered sacrosanct. The relationship between Counsellor and client should be considered at least equally so. Moreover, even if it were possible to mount an argument for exposure of the assessment element of performance agreements, it is clear that none can be mounted for exposure of staff counselling records.

When the FOI Bill was drafted the nature of modern Employee Assistance had not its present hold upon the popular mind and was little understood. EA programs had only recently evolved from the nascent understanding of the impact upon individuals of work-related stress. Their value as enhancements of organisational health were then, naturally, not appreciated. It is my view that amendment of the kind I am proposing might be welcomed as bringing the legislation into line with present thinking. It may also be welcomed by other agencies of government who value their employee assistance programs and understand their foundations in confidentiality.

The Staff Counsellor's records are created to assist the counsellor to recall the professional interaction with the client. They enable consistent treatment and understanding of the treated staff member and make it possible for the counsellor to reflect in solitude upon the work in progress. They are not created for publication to third parties; and are, of course, only necessary because a counsellor cannot remember the counselling interactions she or he has with hundreds of persons sufficiently well unaided by notes. They play no role in, and are totally irrelevant to, departmental decision-making. I think it would be hard to argue that exempting them from exposure to a person not party to the counselling session would in any

way thwart the legislature's intention of ensuring openness and accountability in government decision-making. This is especially so since the EAP carefully stays clear of decision making. It explicitly eschews any encroachment upon the role of management in relation to the disposition of staff, a neutrality which is, in the case of my own department's practice, also spelled out in published EAP policy.

As edited By the Committee

AS EDITED BY THE COMMITTEE

Yours faithfully

A handwritten signature in cursive script that reads "Michael O'Neill".

Michael O'Neill
Friday 7 April 2000