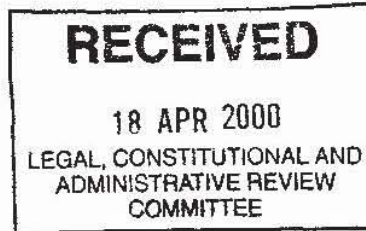


ATTORNEY GENERAL  
FOR WESTERN AUSTRALIA

MIN No 61284  
CSO 677/00



Submission NO 157



12 APR 2000

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

Dear Mr Fenlon

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

I refer to your letter of 7 February 2000 and thank you for the opportunity to comment on the discussion paper prepared by your Committee ("the discussion paper") as part of the review of Queensland's *Freedom of Information Act 1992*. My comments are intended to advise you of the Western Australian experience, where that experience is relevant to the issues raised in the discussion paper.

As you are aware, a review of the Western Australian *Freedom of Information Act 1992* was conducted in 1997 ("the WA Review") and the Government proposes to introduce a number of amendments to give effect to matters raised in the review.

- At page 11, the discussion paper considers the release of information outside of the *Freedom of Information 1992 (Qld)* ("the FOIQ"). Western Australian agencies have been cautious about releasing information outside of the *Freedom of Information Act 1992 (WA)* ("the FOIWA") because of the concern that information released in this way is not covered by the indemnity provisions found in sections 104 to 107 of the FOIWA. Release of information without the protection of these sections would expose both the State and the person releasing the information to the risk of legal action. Generally, agencies have formed the view that this risk is unjustified. The WA Review suggested amendment of the FOIWA to overcome this difficulty.

---

12 TH FLOOR DUMAS HOUSE, 2 HAVELOCK ST, WEST PERTH  
WESTERN AUSTRALIA 6005

TEL: +618 9321 2222 FAX: +618 9322 5149  
<http://www.wa.gov.au/cabinet/foss/index.html>

- At page 19, the discussion paper considers the need for statutory guidelines on how to apply the public interest test which arises under the FOIQ. As you are aware, the FOIWA also contains a number of public interest tests. The Western Australian Information Commissioner has prepared guidelines which set out factors to be considered in relation to the public interest for and against disclosure of a document. The concept of the public interest has also been discussed in a number of the Information Commissioner's decisions. The WA Review concluded that there was no need to provide the Information Commissioner with a specific power to formulate such guidelines. In Western Australia there is sufficient information available to agencies to allow them to evaluate the public interest considerations which might apply to their decisions, without the need for statutory guidelines.
- At page 21, the discussion paper considers the issue of exempting from the FOIQ certain documents brought into existence by Government owned corporations. In Western Australia, Cabinet has put into place a procedure to ensure that any exemptions from the FOIWA proceed by way of an amendment to the FOIWA, in consultation with the Minister responsible to the FOIWA, (at the moment me, as Attorney General). Such proposals for amendment are referred to the Information Commissioner for comment and, where appropriate, opened up for public comment.
- At page 22 the discussion paper canvasses the issues relating to the application of FOI legislation to Government owned corporations. The FOIWA applies to all public bodies created under a statute for a public purpose and thus continues to apply to Western Australia Government owned corporations. There are two exceptions, the State Government Insurance Corporation and Perth International Centre for Application of Solar Energy which are listed as exempt agencies under the FOIWA. Government owned corporations are entitled to rely on any exemptions and in particular the provisions of clause 10 of Schedule 1 to the FOIWA, which exempt disclosure of material which would reveal trade secrets, information of commercial value to an agency or information concerning the commercial affairs of an agency. A public interest test applies to some aspects of the exemption.
- At page 24, the discussion paper considers the accessibility of documents which are held by private contractors undertaking duties on behalf of the State. Under the FOIWA "documents of an agency" include documents in the possession or under the control of the agency or to which the agency is entitled to have access. Documents held by a private contractor and to which an agency is entitled to obtain access are therefore accessible under the FOIWA. The Western Australian government has recently introduced changes to the FOIWA to provide that where prison, court security or custodial services are provided by a private contractor or subcontractor, that contractor or sub-contractor is deemed to be an agency for the purposes of the FOIWA. Access applications can be made directly to the contractor themselves. These amendments came into operation on 18 December 1999.
- At page 27, the discussion paper canvasses the adequacy of the definition of "document" in the FOIQ. The definition of "record" in the FOIWA includes "any article on which information has been stored or recorded, either mechanically, magnetically or electronically". The breadth of the Western Australian definition generally allows for access to pre-existing information in a wide variety of forms, and is regarded as preferable to providing access to information per se.

- At page 34, the discussion paper raises the question of whether there should be a statutory provision requiring the Information Commission to publish all decisions in either full or summary form. In Western Australia, the publication of the Information Commissioner's decisions has been very useful to agencies, improving the consistency of FOI decision making across Government and providing a source of guidance to agencies on the application of exemptions in the FOIWA and of the public interest test. The publication of these decisions also contributes to public awareness of the operation of the FOIWA. The Western Australian Information Commissioner has recently established a web site from which her decisions are available in an inexpensive and readily accessible form.
- At page 43 of the discussion paper, there is consideration of the difficulties faced by agencies in dealing with voluminous applications. In Western Australia there is no restriction on the factors to which an agency may have regard in deciding whether an application would divert a substantial and unreasonable portion of the agency's resources away from its other operations. Accordingly, agencies and the Information Commissioner have had regard to issues such as the size of an agency, the number of personnel available and the number of staff competent to deal with FOI applications within that agency. This allows a more flexible and realistic approach to the question of voluminous requests.
- At page 44 of the discussion paper, the issue of vexatious applicants is considered. This is also a matter of concern in Western Australia and the WA Review recommended that the FOIWA be amended to allow the Information Commissioner to authorise an agency to refuse to deal with a frivolous and vexatious access applicant.
- At page 52, the discussion paper considers whether the personal details of a public servant ought to be released. As the Western Australian provision is currently worded, certain personal information about a public servant is accessible although there is an obligation on the agency to consult with that public servant prior to releasing information, so that the officer has the opportunity to comment on whether the information is in fact non-exempt and if dissatisfied with the agency's decision to release, to seek review of that decision.

If after considering this response you have any further concerns, please feel free to address those concerns to me.

Yours sincerely



Hon. Peter Foss QC MLC  
ATTORNEY GENERAL  
MINISTER FOR JUSTICE