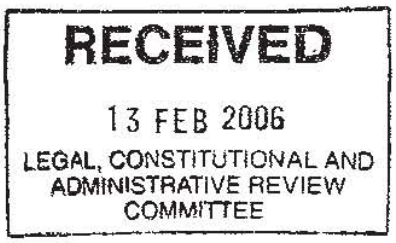
Jaana Hokkanen

From: Ian Timmins [
Sent: Sunday, 12 February 2006 11:11 PM
To: LCARC
Subject: Submission for Accessibility of Administrative Justice review.



Ian Timmins

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12th February 2006

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

Dear Madam,

I would like to make this submission directed mainly at Key issues 3 and 5 of " The Accessibility of Administrative Justice " review.

It is based mainly on my experiences over an extended period with three government agencies.

In this submission, Ombudsman refers to the Office of the Ombudsman rather than the Ombudsman personally. HRC refers to the Health Rights Commission, rather than the Commissioner, and Minister refers to the Queensland Minister for Health or their office. More than one Minister held the position during the period involved, and from both Labor and Coalition.

Unless stated otherwise, the incidents relate to investigations following the death of my father. Briefly, my father entered a nursing home following a stroke. He suffered another stroke whilst on an outing with us fifteen days later, and was taken to hospital where I was advised immediately by the admitting doctor (a diagnosis which was importantly confirmed by blood tests and x-rays within an hour of his arrival at hospital) that he was **SEVERLY** dehydrated, and had pneumonia. He died four days later.

I felt that the nursing home should have been aware of his condition, particularly the dehydration, so I commenced seeking an investigation of the home. Following some false starts, on the advice of the Commonwealth Ombudsman I eventually lodged a complaint with the HRC. They took **EIGHTEEN MONTHS** to conduct their " investigation ", and concluded in part that my " .. *complaint about dehydration and aspiration pneumonia CANNOT BE SUBSTANTIATED* ."

However in my father's hospital files, the admitting doctors refer to his dehydration three times. They also state that part of his treatment included rehydration. In the biochemistry reports, time stamped at 3pm (less than one hour after his arrival at hospital), his NA was critical, his Urea was critical, his CO2 was high, his CRE was high, and his ALB was low. Since anybody with just a basic knowledge of the English language could determine from the hospital files that the HRC conclusion was preposterous, I lodged a complaint about the HRC with the Ombudsman, who then took **FOUR AND A HALF YEARS** to conduct their " investigation ", eventually finding my complaints sustained and concluded that the HRC's handling of my complaint was " **UNSATISFACTORY** "

and " **INADEQUATE** ", but failed to instigate any action against anybody involved, or direct the investigation be reopened.

It was during this four-and-a-half year period when the Ombudsman was conducting their " investigation " that I lodged several FOI applications, and experienced my greatest problems. Sadly it was only through information that I personally gleaned from the FOI applications that then provided the Ombudsman with ammunition to use in their process. They made no attempt that I could determine to question the answers given to them by the HRC. However, the HRC was misleading them with their answers, something which I was able to expose, though both the Ombudsman and Queensland Health made it as difficult as possible for me to gather the evidence.

Prior to his death, I had my father's Enduring Power of Attorney, and was Executor and Trustee of his estate after he died, so I **always** had his authority to represent him. It would seem that the FOI legislation may not accept that a third party can legally represent another, and thus facilitates restriction on release of personal information to that third party.

Some sections of the Act have changed slightly since then, but by and large the problems remain.

PROBLEM 1 - the HRC

Section 11 (1)(p) states that the Act does not apply to the Health Rights Commissioner, leading me to the belief that I could not lodge FOI applications with the HRC.

This section creates some confusion, as during the course of a much later investigation I was advised by HRC staff that I could obtain information from them under FOI, and in fact it was supplied.

PROBLEM 2 - the Ombudsman

Section 39 (1) states

" *matter is exempt matter if its disclosure could reasonably be expected to prejudice the conduct of*

(a) an investigation by the Ombudsman;..
unless its disclosure would, on balance, be in the public interest."

My experience with FOI applications to the Ombudsman was that **EVERY SINGLE ONE** of several applications which involved documents **WAS REJECTED**, quoting this section of the Act to justify their decision. They even used a barrister to reject my first application, possibly to try to give more weight to their decision. He went on to say in part " .. *release of the report could reasonably be expected to inhibit the future flow of information in relation to this and other investigations.* " In other words, agencies are protected by the Ombudsman so that future cooperation is not jeopardised.

However, in **every single case** their initial rejection was overturned when I appealed, but it allowed them to delay releasing the information, and additional costs of both time and money for me. So in my case the perception is that the Ombudsman abuses this right to try to prevent the public making applications under FOI.

Regardless, some documents I requested on 17/6/97 were not provided until 27/2/03, nearly **SIX YEARS** after my FOI application was lodged.

They also ignored other legislated time requirements which will be discussed later.

PROBLEM 3 - time limits ignored

Agencies regularly **IGNORE** the legislated time requirements, knowing that since there are **NO PENALTIES** for them in doing so, and given the enormous waste of time and money the public would face in taking the matter to court, they have absolutely no fear of ignoring the Act.

Section 27 (1) states that an applicant must be advised " .. *not later than 14 days after the application is received* ".

Section 52 (6) states with regard to an Internal Review " *If an agency or a delegate of the Minister does not decide an application AND notify the applicant of the decision within 28 (formerly 14) days after receiving it, the agency or the delegate is taken to have made a decision at the end of the period affirming the original decision.*"

Section 73 (1)(d) states that an application to the Information Commissioner for a review of a rejected internal review can only be made within 28 (formerly 60) days " ... *from the day on which **WRITTEN** notice of the decision is given to the applicant ...* "

In one case, the Ombudsman did not acknowledge receipt of the application within the period specified in section 27, and in other cases simply failed to acknowledge their receipt at all.

In a recent application to the Minister about another matter, they would have received the application on 4th October 2005. They sent an acknowledgment letter dated 10th October. However he did not respond until 22nd November (well outside the 28 days required under section 52), thus technically making it a deemed rejection. He forwarded my application to an officer for attention, and that officer then advised me the date of receipt of my application as 24th November, and stated " *it is recognized under the FOI Act that the Agency ... has a **MINIMUM** of 45 days to process your application* ". That advice is in fact **INCORRECT** and misleading as has since been confirmed by the Information Commissioner. And as of the date of this submission, they **STILL HAVE NOT** supplied any of the requested information.

In one case, the Ombudsman rejected an FOI application, but on review, they agreed to release the documents but claimed a fee would be charged on the grounds that " ... *as a matter of law the documents do not relate to your " personal affairs " but to your late father's*". Surprising since they had already released documents two years earlier which were more specific to my father, and saw no problem then about them not being my " personal affairs ". An appeal against that decision was lodged with the Information Commissioner on 28/09/98, and on 29/10/98 the Information Commissioner upheld my appeal. However the Ombudsman **SIMPLY IGNORED** that decision and did **NOTHING**. At that time the Ombudsman **WAS ALSO** the Information Commissioner, and the two organizations shared the same offices! The **TWO** pages involved were not sent until 16/12/98, almost two months late, and only after I had written a letter of complaint to the Information Commissioner on 29/11/98 (showing the Ombudsman **STILL DID NOT HURRY** even after I had complained about their failure to act). Given that my father's name **DID NOT** appear once in the requested documents, whereas my name did appear, it is not surprising that they lost the appeal! So they had managed to delay releasing **TWO** pages for over **FIVE** months by continually stalling, and failing to review my application within the legislated time frame. They also wasted a lot of everybody's time in the process. They also denied my allegation to then Opposition leader Peter Beattie that they had breached FOI regulations, and advised me to detail the breaches to them (which I had), or raise the matter with the CJC (who took no action).

The way the system works at present is that an agency can **COMPLETELY IGNORE** an FOI application with impunity. They can refuse to send a letter confirming receipt of the application, and hence not advise the applicant of their appeal rights, with no penalty. They can then ignore the

application, making it a deemed refusal. And if the application had been sent to the Minister's office, there is no internal review process available (see section 52 (3)). So by simply ignoring the application, they don't have to do anything, forcing the applicant to appeal to the Information Commissioner (if they are in fact aware of that right). And even that may not be possible (see problem 4 below) as there is no **WRITTEN** rejection.

So there is a history of agencies completely ignoring their legislated requirements with absolute impunity, and the public have no real redress. If a member of the public breaks a law, there are financial and/or custodial penalties. However if an agency breaks a law - **NOTHING** happens to them. So until bureaucrats face a **REAL** penalty, they will continue to flout laws.

For example, at that time section 72 of the Health Rights Commission Act required the HRC to **ASSESS** if they would investigate a complaint within a maximum of 56 days. That section has been replaced by section 76 which now gives them a maximum of 90 days. Either way, the HRC took **ELEVEN MONTHS** just to **ASSESS** my complaint to them to determine if they would accept it for investigation, and later admitted to the Ombudsman that they were in breach of their own legislation. However, in a finding dated 1st November 1996, the Ombudsman made the point that " .. *a remedy is not provided in the Act for a complainant or provider if the Commission fails to notify the parties or assess the health services compalint within the specified time limits. The Act does not provide any recourse against the Commission if it fails to comply with the statutory time limits imposed by the Act.* "

And this failure to proscribe a penalty for failure to comply is found in **MANY** areas of legislation, making it so easy for agencies to refuse to comply.

PROBLEM 4 - appeal rights neutralized

Referring to section 73 (1)(d) mentioned above, it specifically states that an appeal can only be made to the Information Commissioner within 28 (formerly 60) days " *from the day on which **WRITTEN** notice of the decision is given to the applicant ...* "

This point was emphasised when, in rejecting my FOI applications, the Ombudsman states " *should you seek a review of this decision you may apply for review of it in writing within 28 days from the date of receipt of this letter. Further appeal then lies to the Information Commissioner, notice of which must be delivered within 60 days upon the date upon which any internal review decision is communicated to you in **WRITING**.* "

Now if the agency fails to communicate the decision of their internal review, hence making it a deemed rejection, there is **NO REJECTION IN WRITING**. So under the Act there is no way to make an application for external review by the Information Commissioner.

In my case there were several applications for which the Ombudsman simply opted for the deemed rejection option (section 60 (6)), and did not provide a written rejection of the internal review.

PROBLEM 5 - fees

Following an attempt by the Minister to charge me a fee for the release of some documents, I received the following advice from the Information Commissioner on 25th May 2000. They said " *provided the documents responsive to the terms of your FOI access application dated 25 April 2000 include **AT LEAST ONE DOCUMENT** that contains no information that can be properly charactised as information about your personal affairs, then QH was correct in requiring payment of a $30 application fee. Please note that it is not sufficient that the documents you seek were created in response to, or as a result of, a complaint initially made by you. Each requested document must*

contain some information about your personal affairs, otherwise an application fee must be paid. "

They referred to prior decisions of the Information Commissioner, one of which states that " *an FOI access application need seek only one document which does not concern the personal affairs of the applicant to attract the application fee* " (Steinback and Ipswich City Council).

Since the applicant may be completely unaware of exactly what documents exist, it would often be impossible for them to nominate only those documents which are personal. However they are given no advice about which documents are personal, but simply charged for **ALL** of them.

The demand for a fee was based on section 6 of the Freedom of Information Regulations 1992 which states

" *(1) an applicant who applies for access to a document that does not concern the applicant's personal affairs must pay an application fee of $34.40 at the time the application is made.*

(2) An application fee is not payable for access to a document that concerns the applicant's personal affairs."

I argued that the Information Commissioner's decision is flawed because exactly the opposite view could be formed based on the legislation using his logic. That is, if at least one document **DOES** contain information regarding the personal affairs of the applicant, then **NO FEE** may be charged.

Where does the legislation state that section 6 (1) of the regulations has precedence over section 6 (2)?

In any event, the department changed its mind before the Information Commissioner ruled on my argument.

But if the same rulings apply, then I believe the legislation is ambiguous. Certainly the applicant should be given the opportunity to reject non-personal documents when there is a mixture of personal and non-persoanl documents.

The current FOI legislation allows agencies to ignore FOI applications with impunity, or to impose conditions designed to deter applicants. When Queensland Health failed to meet time requirements for one application, they offered to (and did) provide the information immediately if I changed the FOI application to an Administrative Access application.

Ian Timmins