No 14

Legal, Constitutional and Administrative Review Committee

THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE

RESPONSE FORM

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This submission could be provided in electronic form if that would help those assembling the Committee's material.

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Submission to the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament on the Accessibility of Administrative Justice.

1. INTRODUCTION

1.1 This submission concentrates on only two elements of the administration of the Freedom of Information Act–identification within an agency of an applicant's name and some consequences of the charging regime introduced in November 2001.

2. OBSERVATION ON THE STATISTICS

2.1 It would have been helpful if the discussion paper had given details of the outcome of external reviews undertaken by the Office of the Information Commissioner.

2.2 Figure 1 in the paper indicates that in 2003-4 a total of 12,288 applications were received by agencies. Of these, only 368 (or 3%) went to internal review, and of that number 287 (2.3%) went to external review. I could not find any analysis of what happened with those 287 cases. Giving the outcomes of those cases would provide useful information to the public and make the whole of Figure 1 much more relevant.

3. COMMENT ON KEY ISSUE 5

3.1 *Identification of Applicants* The issue I would like to draw to the Committee's attention is the change in policy by the Office of the Information Commissioner to allow identification of an FOI applicant.

3.2 I was involved in the administration of FOI for the decade following the introduction of the Act. We were advised by the staff administering the Act, at that time in the Ombudsman's Office, that the fact an individual had lodged an FOI application was information concerning the personal affairs of that person. Consequently, the identity of an applicant was withheld when staff within the agency being consulted over the application asked who was requesting the documents in question.

3.3 There are two obvious reasons why this makes sense. Firstly, knowledge of who is seeking the information is likely to colour the attitude of any person being consulted over whether they have objections to the release of material. The issue is whether the applicant has a right in law to access the document, not whether a person who might be affected by the document's release has concerns over it being made available to a particular individual.

3.4 The second reason concerns the potential for victimisation of an applicant within the agency. The code of conduct an agency has introduced under the Public Sector Ethics Act will not necessarily afford protection if senior managers learn the identity of an FOI applicant. That person will be regarded with suspicion: why do they want this information? Is it any concern of theirs? It is not hard to imagine the likely treatment of an identified FOI applicant seeking information from the Bundaberg Hospital!

3.5 I have been advised that the change in policy was made because the current Information Commissioner ruled that as the Act was silent on revealing the identity of an applicant, agencies were now free to reveal the information. I contend that the original decision that the identity was "personal affairs" is in the same league as every other policy decision made on what constitutes personal affairs. The original Act never spelt out what was to be covered by section 44(1) and all interpretations and rulings have been based on cases coming before the Commissioner since 1992, for example, name, address, telephone number etc. Hence a policy of not revealing the identity of an applicant should be no different.

4 COMMENT ON KEY ISSUE 1

4.1 While I support the principle of allowing an agency to recoup some of the cost of administering FOI, there are still some teething problems with the charging régime.

4.2 *Charging for Personal Affairs Applications* At present no charge is made for applicants seeking information on personal affairs. Such applications may be just as costly as any other type. The Committee may wish to consider whether it should recommend extending a form of charging for the processing of applications dealing with personal affairs.

4.3 The Act allows for the Commissioner to declare a person a vexatious applicant. Falling short of this, some agencies have to deal with constant personal affairs applications that, while not necessarily vexatious, are time consuming and expensive. Perhaps an initial application may continue to be cost free, and after that costs are levied unless the agency chooses to waive them or the applicant successfully appeals to the Commissioner.

4.4 *Potential Abuse of the Charging Regime* The charging regime in place is open to potential abuse by an agency to discourage any applicant. This danger, I am sure, was seen from the outset by the framers of the revised legislation, hence the protections built into the Act.

4.5 As a specific example, I can refer to an application made to a North Queensland agency. I sought access to documents already in existence produced over the period 2001 to mid-2005, maybe 35 pages per year in total. The pre-existence of the documents was stated in the application. The agency's initial processing cost estimate was $9811. The FOI coordinator then invited me to revise the scope of the request in order to reduce the cost. After I had re-emphasised that the documents I wanted already existed, the new cost estimate was an acceptable $175.

4.6 There are protections in the legislation over charging but applicants not familiar with the operation of the FOI Act will stand little chance against an agency determined to not grant access, and creating an unreasonably high processing estimate at the outset will almost certainly deter most applicants.

4.7 *Charging for Decisions* The second issue with charging that warrants examination is the scope within the Act for which a processing levy may be made. In the case referred to above, in para. 4.5, a processing charge was levied in part to cover the cost of drafting the decision letter and statement of reasons (2 hours). This gave rise to a strange situation where a member of the public has a right to seek access to documents relating to the operation of the agency. Access to all of the documents is declined, but the applicant is nevertheless asked to pay for the privilege of being given written reasons why no access will be granted. It is difficult to believe the Legislature envisaged this situation. There is, of course, no incentive to pay in such circumstances unless the applicant wants to push on with an internal review. It is also interesting to speculate on the public relations consequences of an agency seeking to collect their debt through the courts.

4.8 Clarification might be given in the Act, though preferably by policy, on those elements of the discovery and processing operation that should attract a charge. A case could be presented that the decision letter and the statement of reasons are an obligation of the agency once it has accepted the application fee; originally the application fee would have covered this part of the process.

4.9 *Imposing the Processing Deposit when Refusal of Access is Likely* Related to 4.4 above is an obligation on an agency to make a serious effort to decide whether the documents sought under an application will be declared exempt before the processing charges are estimated and the deposit collected. I wonder what the agency would do if I had agreed to pay the original estimate of $9811 and at the end of the exercise it still decided to refuse access totally. (A visit to court using the Judicial Review Act might result.) An agency, in my view, has a duty of care to assess the likelihood of total or substantial denial of access before it collects the processing deposit. There will, of course, be situations where you cannot know what the discovery process may produce though usually an experienced FOI officer will have a good idea of how much material may have to be withheld.

4.10 *Conflict Between Privacy and FOI* It appears that a new complication in the FOI process is concern over privacy issues. There seems to be a growing point of tension between supposed rights of privacy of people paid from the public purse on the one hand and the rights of the public to have access to information about the agency in which those people are employed. This may be complicating the consultation process within agencies and adding to the processing time and costs–for both agencies and applicants. I suggest this is an aspect of FOI that the Committee may wish to explore further.

R. E. Gilliver

16 March 2006