

Submission

FREEDOM OF INFORMATION REVIEW

To: Office of the Information Commissioner

May 2010

Submission

A Law Society of Western Australia submission in response to a request from the OFFICE OF THE INFORMATION COMMISSIONER for comment on the FREEDOM OF INFORMATION REVIEW as REQUESTED on 19 MARCH 2010

- 1. The Law Society of Western Australia Inc ("Society's") welcomes the opportunity to provide submission to the OFFICE OF THE INFORMATION COMMISSIONER on the FREEDOM OF INFORMATION REVIEW.**
- 2. The Society is the professional association for Western Australian barristers and solicitors. This submission therefore is based on the experience of members of the legal profession from working within the jurisdiction of the legislation.**
- 3. The submission is not intended to represent the interests of clients or groups of clients. The Society expects individual firms to present submissions on behalf of specific clients if those clients wish to comment on this review.**
- 4. The Society is happy for the OFFICE OF THE INFORMATION COMMISSIONER to make the contents public as the Society has previously made public comment on the subject.**

REVIEW OF THE ADMINISTRATION OF FREEDOM OF INFORMATION IN WESTERN AUSTRALIA

Background comment: Merits Review by the State Administrative Tribunal

The Society commented to the Attorney General on Recommendation 42 made by the Legislative Council Standing Committee on Legislation, following its inquiry into the Jurisdiction and Operation of the State Administrative Tribunal conducted last year.

“Recommendation 42: The Committee recommends that the Freedom of Information Act 1992 be amended to empower the State Administrative Tribunal to conduct a merits review of the decisions of the Information Commissioner, with no further right of appeal.

Government response: Requires further consideration. The agency with carriage of the Act has expressed concerns over the recommendation and does not support its implementation. This response differs from that originally provided by the former Information Commissioner to the Committee. The current Information Commissioner is of the alternative view that merits review should remain at the Office of the Information Commissioner and the right of appeal should exist to the Supreme Court.

The Society sees considerable merit in those parties dissatisfied with decisions of the Information Commissioner having a right of review to the SAT, as the Standing Committee recommends.

The addition of a merits review from the Information Commissioner's decisions to the SAT would not replace or derogate from the existing external review process. The Information Commissioner would continue to conduct a merits review of decisions and, as such, the primary merits review would remain at his office.

The implementation of the Standing Committee's recommendation would afford access applicants and respondents to those applications who are dissatisfied with the Information Commissioner's decision with an additional avenue of merits review. At present, they are restricted to an appeal to the Supreme Court on a question of law only.

Contrary to the Standing Committee's recommendation, the Society also supports a right of appeal (by leave on a question of law) from FOI reviews determined by the SAT to the Supreme Court, as already provided for in s.105 of the *State Administrative Tribunal Act 2004*.

It follows that the Society does not support the Standing Committee's recommendation that there be no further right of appeal from the SAT.

This would be consistent with the stated objects and intent of the legislation, namely to enable the public to participate more effectively in governing the State, and make the persons and bodies that are responsible for the State and local government more accountable to the public (s. 3 *Freedom of Information Act 1992*).

See also the remarks made by the Chief Justice in *Salaries & Allowances Tribunal v West Australian Newspapers Ltd [2008] WASC 39* at para [54]:

...The objects of the Act are specified by s 3. They are to enable the public to participate more effectively in the government of the State and to make the persons and bodies who are responsible for State and local government more accountable to the public....”

(Law Society Paper; Western Australian Government’s Response to the Legislative Council Standing Committee on Legislation Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal November 2009)

Public sector agencies

General comment

The Society notes the Terms of Reference for this review, and the particular matters raised by the Information Commissioner.

The Society is not in a position to comment on specific matters concerning the manner in which public sector agencies are administering the FOI process.

That said, the Society believes it is important for the FOI process to be administered, across the board, in a manner which achieves the stated objects of the Act, namely to enable the public to participate more effectively in the government of the State, and to make the persons and bodies who are responsible for State and local government more accountable to the public (s. 3 *Freedom of information Act 1992*).

It agrees with the Information Commissioner’s comments on the importance of the review he is undertaking.

Available statistics on the administration of the FOI process

At face value, available statistics on the operation FOI Act appear encouraging, insofar as the administration of the FOI process by public sector agencies is concerned (*Annual Reports of the Information Commissioner or Acting Information Commissioner; 2000 to date*).

The Society notes the following statistics, in particular:

- The number of access applications made to agencies under the FOI Act has steadily increased, from 3,323 at the end of the first reporting period, to 12,336 in 2008/9 (an increase of approximately 271% over the past 14 years).¹
- In contrast, the number of applications for external review by access applicants dissatisfied with agency decisions appears to have remained relatively constant (between about 120 and 240 applications for external review appear to have been made during each reporting period since 1999, the highest numbers being in early 2000).
- Whereas the number of FOI applications has substantially increased, the percentage of access applicants seeking external review has markedly decreased over the years.
- The Acting Information Commissioner noted in his 2007/8 Annual Report that only 1.2% of all applications dealt with by agencies under the FOI Act in the reporting period (totalling 11,015) resulted in complaints being lodged with his Office (123 applications).²
- In the most recent 2008/9 reporting period, this percentage appears to be 1.46%; of the 12,336 applications dealt with by agencies under the FOI Act, 180 applications were made for external review.³
- During the 2008/9 reporting period, of the 10,519 decisions on access applications made by State Government agencies (who received over 95% of all access applications made), approximately 91.9% of decisions made on those applications were to the effect that access in some form was given; this was consistent with statistics from the previous year.⁴
- It was noted by the former Acting Information Commissioner that an unusual feature of the 2004/5, 2005/6 and 2006/7 reporting periods was that almost one quarter of the total number of valid complaints to the Information Commissioner were lodged by a small number of complainants, and in most of those cases, the second or third complaints received related to successive access applications made to the same agency by the same complainant; a similar pattern was evident in the 2007/8 reporting period.⁵

These statistics suggest that the administration of the FOI process by agencies has improved quite markedly over the years.

The Society agrees with the former Acting Information Commissioner's view that although the conclusions that can be drawn from statistics such as these are limited, they are a

¹ Office of the Information Commissioner Annual Report 2008-2009 par 3.4

² Information Commissioner Annual Report to The Parliament 2007/08 para 2.3

³ Office of the Information Commissioner Annual Report 2008-2009 paras 1.1 and 3.4

⁴ Office of the Information Commissioner Annual Report 2008-2009 paras 3.4.1 and 3.4.2

⁵ Information Commissioner Annual Report to The Parliament 2007/08 para 2.3

positive indicator that, overall, agencies are giving effect to the FOI Act in the manner in which it is intended to operate.⁶

The statistics for external reviews are viewed in the context of access applicants being advised of their right to seek an external review to the Information Commissioner if dissatisfied with an agency decision, and there are no costs associated with making this application.

On the other hand, as the Acting Information Commissioner noted, only limited conclusions can be drawn from these statistics, which need to be treated with caution as a variety of factors could have impacted at least some of the results.

In the case of the information sought by access applicants, for example, as the Chief Justice commented in *Salaries & Allowances Tribunal v West Australian Newspapers Ltd [2008] WASC 39* at para [7]:

7 The relevance, value and utility of most information is dependent upon the timeliness with which it is provided.

Whether access applicants did not complain to the Information Commissioner about an agency decision because the 'relevance, value and utility' of the information they were seeking had diminished, as a result of the time taken for an agency to deal with their application and then conduct an internal review (as per the statutory time periods), is only one of the unknown factors which could have affected the statistics.

Positive comments on the FOI process in Western Australia also made by the former Acting Information Commissioner in May 2009 appear similarly encouraging. These are contained in his submission on the Exposure Drafts of the Commonwealth Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009⁷:

"A key measure of effectiveness of FOI is the rate of FOI applications to agencies. In Western Australia, the rate of application has grown every year since 1993. Last year, over 11,000 FOI applications were made. Overall, nearly 90% of applicants get some or all of what they are seeking. At the same time agencies are increasingly making information available outside the formal FOI process"

Agency charges

The Society shares the Information Commissioner's concerns about the increasing trend in the amount of charges being collected by agencies for dealing with access applications seeking non personal information in the most recent reporting period.⁸

⁶ Information Commissioner Annual Report to The Parliament 2007/08 para 3.5

⁷ Submission to The Department of the Prime Minister and Cabinet; Exposure Drafts of the Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009 May 2009 pg 4

⁸ Office of the Information Commissioner Annual Report 2008-2009 paras 3.1 and 3.4.6

Again, at face value, the available statistics indicate that whereas the current trend is upwards, the actual amount of the charges imposed by agencies, and the actual increases, have not warranted complaint by access applicants.

As the Information Commissioner commented in his most recent Annual Report, total complaints made to his Office in relation to the imposition of charges remains very low which suggests they are not presenting a significant barrier to persons exercising their rights under the Act.

The Society notes the following statistics, in particular:

- The number of non-personal applications to agencies has risen by a total of 77% since 2005, and despite this the amount of charges collected within the commensurate period increased by 176%.⁹
- The average amount of charges imposed by agencies increased substantially in 2007/8 in comparison to the previous year – by almost double from \$7 per non-personal application to over \$15 in 2007/8, the rise being seen as consistent with the trend towards more complex FOI applications¹⁰ and reversing the downward trend over the preceding 2 years.
- The average amount of charges imposed by agencies increased again in 2008/9, by almost \$4.58 per non-personal application.¹¹
- Whereas complaints may be made to the Information Commissioner about an agency's decision to impose a charge or require payment of a deposit, no access applicant applied for an external review on this basis during the 2007/8 or 2008/9 reporting periods, despite agency charges increasing. There were only 3 complaints on this basis over the past 4 years and as the Information Commissioner comments, this suggests that charges are not presenting a significant barrier to persons exercising their rights under the Act.¹²

Although the statistics point to an upward trend over the past few years, it would appear the actual amount of charges imposed, and degree of the increases (around \$4.50 per non personal application in 2008/9 compared to 2007/8) has not warranted complaint by access applicants.

Agency timeliness

The Society again refers to comments by the Chief Justice in *Salaries & Allowances Tribunal v West Australian Newspapers Ltd [2008] WASC 39* at para [7] concerning the issue of timeliness.

⁹ Office of the Information Commissioner Annual Report 2008-2009 para 3.1

¹⁰ Information Commissioner Annual Report to The Parliament 2007/8 para 3.5

¹¹ Office of the Information Commissioner Annual Report 2008-2009 para 3.4.6

¹² Office of the Information Commissioner Annual Report 2008-2009 para 3.1

The importance of access applications being dealt with as quickly as possible is clear and any increase in the time taken to do so is undesirable.

The average time taken by agencies to deal with access applications during the most recent reporting period did increase (to 27 days) which as noted by the Information Commissioner is 3 days longer than the previous year, but still well within the maximum period of 45 days.¹³

This reverses the trend from the previous reporting period, where the average time taken by agencies to deal with access applications (24 days) decreased by approximately five days.¹⁴

Office of the Information Commissioner

Under resourcing and delay in the Information Commissioner's determination of external reviews and agency training

External review role of the Information Commissioner

Of concern to the Society are potential delays in the Information Commissioner's determination of external review applications. This was raised in the Information Commissioner's evidence before the Standing Committee on Estimates and Financial Operations in September last year:

"Now certainly those goals are met more strongly if turnaround times for matters before me are quicker....Timelines are suffering and they are going to suffer much, much more before they get better on current resources....

....

However ,... and even if this month we drop right back to our normal levels of about 120 applications a year rather than 180 or 190, it would still take, on our current resources, probably four or five years to clear the backlog and get back to a level at which matters can be expedited and resolved within a couple of months. I am not suggesting that matters currently before me will take four or five years; I am saying that matters currently before me will take longer than the ideal time frame. They might take six months to resolve, whereas they should take two months. It will take me a number of years on current resources to get back to a level at which matters before me are dealt with that quickly." ¹⁵

If the Office of the Information Commissioner remains under resourced to that extent, the Society considers the Government should do something about it. Ongoing delays of the sort referred to by the Information Commissioner should not be allowed to continue.

¹³ Office of the Information Commissioner Annual Report 2008-2009 para 3.4.5

¹⁴ Information Commissioner Annual Report to the Parliament 2007/8 para 3.5

¹⁵ Standing Committee on Estimates and Financial Operations; Transcript of Evidence 7 September 2009 pgs 2,3

Advice and Awareness role of the Information Commissioner

The Society recognises the importance of the Information Commissioner's statutory responsibilities in relation to ensuring agencies are aware of their responsibilities under the Act, and providing assistance to agencies on matters relevant to the Act¹⁶, and their relevance to the administration of the FOI processes by public sector agencies.

The Society supports the activities undertaken by the Information Commissioner to train and assist agencies in exercising their obligations under the Act, which he outlines in his most recent Annual Report eg conducting a range of training courses and briefings, FOI Coordinator Workshops and Decision Maker's forums, in addition to dealing with written and oral enquiries.¹⁷

The Society is again concerned about the under resourcing of the Office of the Information Commissioner, also raised in the Information Commissioner's evidence to the Standing Committee on Estimates and Financial Operations¹⁸, and the resulting impact on his Office's activities :

"Now certainly those goals are met more strongly ...and if the training and awareness that my office can provide is of the highest quality and is accessible.... On training - and training was actually identified in Parliament recently...about delays as a problem. In other words, agencies out there and ministers' offices could benefit from more FOI training. Obviously part of that is the change of government..... But the problem is quite large. At the moment, if an agency comes to me and asked to be put on a training course, I pretty much have to say the next one that we can slot you into is in the 2010 with our current resources. Now again, if we could say yes we have got one next week, come along, that would help achieve the objects of the Act. The reason I am being a bit hesitant about a direct answer to the question is that it is simply the case that yes with more resources we could do more, time lines would shorten, training would reduce – that is, time lines or waiting times for training would reduce significantly...

.....

... but they all need to be trained in the processes under the Act and in the relevant case law under the Act. They are the sort of courses that I am saying at the moment you cannot get on to one until 2010."¹⁹

If the Office of the Information Commissioner remains under resourced, the Society considers the Government should do something about it. Delays of the type referred to by the Information Commissioner are unacceptable.

¹⁶ s.63 FOI Act

¹⁷ Office of the Information Commissioner Annual Report 2008-2009 para 2.3

¹⁸ Standing Committee on Estimates and Financial Operations; Transcript of Evidence 7 September 2009

¹⁹ Standing Committee on Estimates and Financial Operations; Transcript of Evidence 7 September 2009 pgs 2,3,7

The WA Information Commissioner model - "Splitting" his 2 roles

It is useful to refer to Queensland's recent comprehensive and independent review of FOI in this context.

The outcome of the Queensland FOI review resulted in The Right to Information Report and replacing of the Freedom of Information Act with The Right to Information Act.

The Review Panel's recommendations for 'revamping' the Information Commissioner's Office appear to have been adopted in Queensland (although to date a Right to Information Commissioner, a deputy to the Information Commissioner, has not been appointed).

The Panel's view was to:

"revamp the Information Commissioners' office... replaced with the Information Commissioner who is an active and shared resource across government, and the champion of FOI and responsible for helping agencies implement it....External review should continue to be conducted by the Office, under an FOI Commissioner.....The Panel proposes to give the Information Commissioner a significant role in information policy generally, across government. The Information Commissioner would take a leading role in encouraging the proactive release of information by agencies.."20

At this time, the Society supports the views of the former Acting Information Commissioner on splitting the decision making role of the Western Australian Information Commissioner from his advice and awareness role. He believed the current WA model provides the more effective way of promoting better awareness of FOI among both government agencies and the public, than the approaches taken by models that split the decision making role from the advice and awareness role.²¹

The Review Panel in Queensland also argued:

"for a whole of government strategic information policy and governance arrangements addressing the lifestyle of government information and interconnecting strategically with other relevant public policies. FOI's place in the government information experience should be recast as the Act of last resort moving the existing 'pull' model to a 'push' model where government routinely and proactively releases government information without the need to make an FOI request..."22

The FOI Act expressly acknowledges that:

"Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents...otherwise than under this Act if that can properly be done or is permitted or required by law to be done."²³

²⁰ Introduction and Executive Summary; Right to Information Review pg 5

²¹ Submission to The Department of the Prime Minister and Cabinet; Exposure Drafts of the Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009 pg 3

²² Introduction and Executive Summary; Right to Information Review pg 4

²³ FOI Act s.3(3)

The Society agrees with the Information Commissioner's views that "an administrative process for making information available to the public, either proactively or on request, is preferable to making such information available only under the Freedom of Information process"²⁴.

Necessarily balanced against the public right to access information under the FOI Act, as the FOI Act expressly acknowledges is the range of exemptions it contains, among other things the need for government to preserve the integrity and confidentiality of certain information in order to govern effectively and the public's right to privacy.

Agencies and Section 96 Information Statements

The Society notes the Information Commissioner's concerns about the Information Statements which agencies are required to publish under the FOI Act.²⁵

Agencies are required to publish an up to date Information Statement every 12 months, and provide a copy to the Information Commissioner as soon as practicable after publication²⁶. This statement is to contain, among other things, information about the agency's operations and decision-making functions and a description of the kinds of documents that are usually held by the agency, including which kind of documents can be inspected under a written law other than the FOI Act.

Bearing in mind the importance of these statements to the public seeking access to information from an agency, of concern are comments made by the former Acting Information Commissioner in his 2007/8 Annual Report, following the Information Statement Survey he conducted.²⁷ These included comments about the actual contents of the statements provided.

In light of the recent Queensland FOI review, the Society also agrees with the former Acting Information Commissioner's view that it is arguable the Statutory Information statement requirement in its current form is now reaching its "use by" date.²⁸ The Queensland FOI review recommended a new model which would provide an online single entry point of searchable 'metadata' comprising published information from all agencies.

The actual model which has been implemented in Queensland could provide future guidance in WA. This model appears to involve agencies making information available to the public proactively where possible, through agency publication schemes, responding to

²⁴ Office of the Information Commissioner Annual Report 2008-2009 Para 1.1

²⁵ Office of the Information Commissioner Annual Report 2008-2009 Para 1.1

²⁶ FOI Act s 96

²⁷ Information Commissioner Annual Report to The Parliament 2007/8 para 2.4.7

²⁸ Information Commissioner Annual Report to The Parliament 2007/8 para 3.3

requests through an administrative access scheme and as a last resort, responding through legislative access processes.²⁹

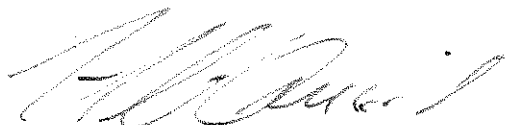
The Society supports the Information Commissioner's aim to improve the usefulness of these Information Statements for the public, referred to in evidence before the Standing Committee on Estimates and Financial Operations:³⁰

"...The other thing of course is that agencies themselves have obligations to do things such as publish information statements...I have some concern about how well that aspect is operating. Agencies are complying with the letter of that, but a lot of information statements that are out there at the moment I think are not useful. They might be accurate; they might be correct but they are not that useful. Some of them are just tomes. ..."

Review by the Office of the Information Commissioner; Department of Health August 2008

The Society endorses the recommendations made by the Acting Information Commissioner following his comprehensive review of the Department of Health's FOI processes.³¹

The Society believes the outcome of his review is relevant to the Information Commissioner as it looks at the deficiencies in the Department's FOI processes and makes recommendations as to how these should be addressed.



Hylton Quail
President

May 2010

²⁹ Office of the Information Commissioner; Queensland

³⁰ Standing Committee on Estimates and Financial Operations; Transcript of Evidence 7 September 2009 pg 25

³¹ Report: FOI processes of the Health Department; Review of the Acting Information Commissioner 26 August 2008 para 6.