



**Office of the Information Commissioner
Queensland**

Level 4
300 Adelaide Street
Brisbane, Q 4000

PO Box 10143
Adelaide Street
Brisbane, Q 4000

Phone (07) 3005 7155
Fax (07) 3005 7150
www.oic.qld.gov.au

ABN: 70 810 284 665

10 March 2008

Dr D Solomon AM
Chair
Freedom of Information Independent Review Panel
GPO Box 5236
BRISBANE QLD 4001

Dear Mr Solomon

FOI Review Discussion Paper

I refer to your letter requesting submissions in response to the Discussion Paper: Enhancing Open and Accountable Government – Review of the *Freedom of Information Act 1992* for the Office of the Information Commissioner. Please find attached the submission for the Office of the Information Commissioner.

I note that due to the nature of the role of this Office, particularly the independence of the Information Commissioner from the executive government, it would not be appropriate for this Office to comment on how exemptions should or should not apply under the *Freedom of Information Act 1992* (FOI Act) and therefore influence rights of access. Therefore this submission focuses on issues of particular relevance to this Office.

If the Review Panel has any queries regarding the submission or may be of further assistance please contact me on telephone 30057155 or by email at administration@oic.qld.gov.au.

Yours sincerely



Rachael Rangihaeata
Acting Information Commissioner

OIC response to FOI Review Discussion Paper

The nature of the role of the Information Commissioner in an external review, where the Commissioner objectively and impartially applies the legislation of the day, is such that it would not be appropriate for this Office to express views about or influence where rights of access lie. In addition, a number of issues raised in the FOI Review Discussion Paper (Discussion Paper) are either not relevant to this Office or the Office does not have any direct experience to rely on to make comment.

Accordingly, this submission will focus on two issues in the Discussion Paper: internal and external review of freedom of information (FOI) decisions; and dealing with applicants, and applications, that may be considered 'voluminous or vexatious'.

Internal review of FOI decisions

The Discussion Paper raises the issue of whether the internal review process should be retained or the first right of review be an external review by this Office.

I acknowledge the points made in the Discussion Paper that a significant proportion of internal review decisions are the subject of an external review application, and that applicants may feel that the agency is likely to make the same decision on internal review. However, there are a number of considerations that are relevant to this issue.

It is important to note that even where an applicant continues to seek external review after receiving an internal review decision made by the agency, the issues have often been substantially reduced, and further documents either located or released, through the internal review process. In such cases the applicant is granted access more quickly to a greater number of documents. Agencies, unlike the Information Commissioner,¹ also have discretion to release documents that are technically exempt from disclosure under the FOI Act. An internal review decision provides an opportunity for the agency to make a decision to release otherwise exempt matter.

Internal review decision makers are often an agency officer within, or with greater access to, a legal area of the agency, and consequently decisions involving particularly technical legal issues may be either made more appropriately in accordance with the legislation and relevant caselaw, or the reasons for decision explained in more detail.

The effect is that the applicant has a greater opportunity to understand why an agency has decided not to grant access to a particular document, and if they proceed to external review, the reasons for the decision are more evident, expediting the review process.

I also note however that as a number of internal review decisions considered by this Office on external review do not set out any reasons for decision or what searches were undertaken, a lesser proportion of internal review decisions may proceed to external review if applicants were provided with an explanation of why the decision was made.

In such cases it is often the case that once the relevant exemption provisions, and their application in the specific case, are explained the applicant accepts the internal review decision. However, as a result the applicant has been required to go through another

¹ See section 88(3) of the FOI Act.

review process, and further public sector resources have been utilised, where an internal review decision, setting out clear reasons for decision, could have avoided the need to go further.

In terms of the impact on agency resources, an external review where there is no internal review decision² or inadequate reasons were given in the internal review decision, necessarily requires the agency to provide submissions early in the process to set out such reasons, and answer a number of queries from this Office.

In such cases:

- it is often necessary for the agency to essentially undertake the work and provide this office with what they would prepare for making an internal review decision
- the extensive involvement of the agency in an external review is critical as the agency knows their business, the way the Department operates, when documents are created and where they are stored, and certain sensitivities that are relevant to claims for exemption.

Proceeding to external review too early is not efficient in such cases as the time taken by the agency to undertake initial work to search for and review documents, consider claims for exemption and other issues under the FOI Act significantly delays the external review process for the applicant.

Whereas, an internal review decision is made within 28 days and further documents can be released to the applicant at that time, or the applicant may be satisfied with the decision with the exception of a particular issue that they pursue through to external review, thereby focusing the scope of the review.

External review of FOI decisions

Conduct of external reviews

The Discussion Paper asks what type of body should perform the external review function and notes the current review 'Reform of civil and administrative justice' being undertaken by the Department of Justice and Attorney-General (DJAG). Both the Discussion Paper and the DJAG review discuss options including the current model of the Information Commissioner and alternatives such as an Administrative Appeals Tribunal model where the function would be amalgamated with tribunals and other similar bodies conducting administrative reviews of decisions.

Key issues for consideration of such options, as they relate to the external review function relate to the specific role and process of the Information Commissioner in conducting an external review, in particular the:

- independence of the OIC from other bodies that may be a party in an external review

² For example, where an internal review decision has not been made within the statutory timeframe and proceeds straight to external review.

- flexibility and informality of processes, including negotiation and conciliation, that are very effective in resolving reviews
- ability to deal with sensitive information and obtain confidential submissions from parties about information that is claimed to be exempt from disclosure.

Independence

The Information Commissioner is a statutory office holder appointed by the Governor in Council. The Commissioner reports directly to the Queensland Parliament through the Legal, Constitutional and Administrative Review Committee (LCARC). The Information Commissioner is independent of executive government.

Section 101E of the FOI Act provides that the Commissioner is not subject to direction by any person about: the way in which the Commissioner's powers in relation to investigations and reviews are to be exercised; or the priority to be given to investigations and reviews.

The OIC is required to independently determine issues regarding government agencies, statutory bodies, universities and local government. Some reviews involve issues about whether the FOI Act applies to documents held by bodies such as tribunals and courts, including those set out in Attachment 1 of the DJAG Discussion Paper that are within the scope of that review. For example, recent external review applications have involved documents of, or regarding, the Magistrates Court, Anti-Discrimination Tribunal, the Health Practitioners Tribunal and the Adult Guardian.

Section 11 of the FOI Act provides that the FOI Act does not apply to specific matters regarding courts and tribunals – it does not provide a complete exclusion of such bodies from the operation of the FOI Act. This means that under the current FOI legislative framework the OIC is required to determine issues relating to the application of that provision to bodies that may be amalgamated with the OIC under option 1 of the DJAG Discussion Paper.

Process

Background

The majority of applicants for external review are individuals (75%), with a small proportion of applications made by prisoners (9%), companies (7%) and lobby and community groups (2%).³ Most applications relate to access to documents (94%), with a small number relating to amendment of records (3%), and fees and charges (3%).⁴

There has been an increasing trend of applications relating to whether searches undertaken by the agency have been sufficient. In many cases an application will involve both sufficiency of searches and refusal of access to documents. Where sufficiency of search issues are involved, there can be a significant increase in the work required by the OIC and parties in the review to ascertain whether further documents exist and should be located by the agency. Such reviews generally take a longer period of time to resolve, with numerous communications between the Office and parties in the

³ 2006-07 Annual Report of the Office of the Information Commissioner at page 24.

⁴ 2006-07 Annual Report of the Office of the Information Commissioner at page 25.

review, particularly where new documents that are located during further searches undertaken by the agency and provided to an applicant raise further issues regarding additional documents that should exist.

External review of applications is currently conducted on the basis of the documentation before the decision-maker, including correspondence from the parties and file notes of telephone conversations between staff of the OIC and parties to a review. While formal hearings are provided for in Part 5 (External review) of the FOI Act, external reviews do not currently involve formal hearings.

Informal resolution

As noted in the Discussion Paper, an important feature of the external review process is that the OIC attempts to informally resolve matters wherever practicable and appropriate. A large proportion (approximately 75%) of external review applications are resolved through informal resolution methods, including providing a preliminary view, either orally or in writing, of the strengths and weaknesses of a participant's case. The relative informality of the process, as compared to some other models in the Discussion Paper, is advantageous for individual participants who often are not familiar with government operations, processes and legislative processes. In this respect the Office has noted an increasing trend in external review applications by individuals that involve personal or sensitive documents held by government about people, such as information regarding adoption, relationships and health matters.

It is considered that the key issue for the effectiveness and efficiency of the OIC that would be associated with any alternative model, including amalgamation of the OIC with other tribunals and similar bodies is whether the external review body could continue to use existing informal resolution processes that have proven to be highly effective in resolving external reviews.

As noted above, a key disadvantage of amalgamation would be the loss of the ability to tailor processes to specifically address the needs of the issue dealt with by a single tribunal and the stakeholders who use the tribunal. The increased formality and adversarial nature of a general review body, is likely to reduce the effectiveness of the body in resolving issues in the majority of external reviews, particularly where an explanation to a party over the telephone or by correspondence of how the law applies may be all that is required to gain understanding and acceptance of the outcome. Further, the majority of applicants are not legally represented and many are not familiar with government processes and legal concepts.

Decision

As set out above, informal resolution is usually attempted at the outset of each external review and many, if not all, issues in an external review are often resolved informally. When it becomes apparent that informal resolution of all the issues in an external review will not be possible, any outstanding issues are resolved by a written decision which finalises the external review.

Confidentiality and security of sensitive material

The OIC obtains and stores copies of documents agencies or third parties claim are exempt from disclosure under the FOI Act for the purpose of conducting an external review. The OIC is responsible for ensuring safe and secure storage and use of such information for the duration of the review and period of time such information is retained prior to expiration of an appeal period following a decision being made.

In July 2006 the OIC relocated to independent, separate and secure premises that provide strict confidentiality and security for Office staff and documents. The security and confidentiality of the information and documents held by the OIC was recognised in the 2006 Strategic Management Review of the OIC as a significant strategic issue for the Information Commissioner.⁵ The Strategic Reviewer considered that:

- co-location with the Queensland Ombudsman, an agency subject to the FOI Act, including shared facilities such as storage, did not provide the necessary independence and perception of independence of the OIC from that agency
- the OIC requires a high level of security of its IT environment
- the Office should be located in self-contained secure office accommodation not shared with any other agency.⁶

If the OIC was amalgamated or co-located with other bodies, appropriate security measures would need to be put in place to ensure confidentiality and security of sensitive material could be maintained in accordance with requirements of the FOI Act.

Additional functions of an external review body

The Discussion Paper sets out a range of models and asks whether additional functions should be held concurrently by the body that conducts the external review role. The role of the Information Commissioner is currently set out in detail in section 101C of the FOI Act and primarily relates to conducting external reviews of decisions made by agencies under specific provisions of the FOI Act relating to access and amendment of documents.

In Queensland the FOI & Privacy Unit of DJAG, as lead agency responsible for the FOI Act in Queensland, provides information, training and a telephone helpline to resource agency decision-makers and assist the community to understand and participate in the FOI process.⁷ The FOI & Privacy Unit also prepare the FOI Annual Report.

The Office of the Information Commissioner has also published a suite of 'FOI Concepts' on the website to assist participants in external reviews understand key concepts that are discussed during an external review. Such concepts refer to relevant legislation and

⁵ Report of the Strategic Management Review of the Office of the Information Commissioner, April 2006 at page 23.

⁶ Strategic Management Review Report at 24.

⁷ It is noted that, in the past, the Office expanded its role to include training and information awareness as such services were not otherwise being undertaken. Since 2005, the DJAG FOI & Privacy Unit have undertaken such functions in Queensland.

decisions of courts, tribunals and the Information Commissioner. The FOI Concepts may also provide assistance to agencies and applicants during the FOI process.

The independence of the Information Commissioner from all parties in an external review is critical. This means it is important that the Office is not in a position of providing advice to agencies, applicants or other potential parties in a future external review. If the Office were to provide advice on a situation to either an agency or applicant and later on external review form an alternative view once all information and evidence was before the decision-maker, the person would likely protest that the Office gave contrary advice. The other party in the review may feel that the Information Commissioner cannot come to the external review with an open mind because they have already expressed a view and 'helped' the 'opposing' party. Such inquiries are therefore appropriately dealt with by the FOI helpline operated by DJAG or respective legal advisors.

Similarly, if the external review body also performed a role promoting a policy position in relation to the extent of access to documents, it may not appear to be consistent with the role of the Information Commissioner to objectively apply the provisions of the FOI Act. It is important to note that parties other than agencies sometimes hold strong objections to release of documents concerning them, and it is possible they may perceive the Office to have conflicting roles in such a situation and that this may influence their outcome on external review.

The experience of this Office is that a number of people, for various reasons, have a very low trust of public sector organisations when they come to external review. The threshold for concern of such perceived influence is therefore quite low. Any other relationship or cause for familiarity the Office has with an agency or another party to an external review would likely be treated with heightened suspicion and concern by another external review party in such circumstances.

As set out above, the Office has considerable success in informally resolving a significant number of external review applications. If the role of the Information Commissioner were expanded to include other functions it is possible it will affect the perception of the independence of the Office as set out above, and undermine the confidence participants in an external review process have in the process and views of the Office. It is likely that if this occurs, the success of informal resolution will be reduced, resulting in longer, more formalised external reviews that require more resources and affect the timeliness of finalising all external reviews conducted by the Office. It is likely there could also be reduced acceptance or faith in the written decisions of the Office, reducing the satisfaction of parties in the process as to whether they had received a fair hearing and the appropriate outcome had been reached.

Voluminous and /or vexatious requests

The Discussion Paper raises issues regarding FOI applications that may be considered voluminous and or vexatious requests.

As noted previously, this is a very difficult and complex issue and requires careful management to ensure the rights of all people to seek to access information are met in

accordance with the FOI Act, whilst also minimising the adverse effect on individuals dealing with the applications and excessive use of resources.

The nature of applications in which these issues arise are such that they are particularly resource intensive and can detract from the ability to expeditiously progress all applications. Such applications are also difficult to progress as it is often the case that they involve numerous extensive submissions from the person, that are difficult to understand and specifically relate to the issues and documents in the external review.

The complexity of the issue requires that decision makers have a range of responses and tools to manage the situation while ensuring a person can exercise their rights of access under the FOI Act. I acknowledge the difficulties that an agency can experience in such situations, including very abusive behaviour towards staff, and the resource implications. This Office also experiences the effects of this situation. In relation to a particular applicant this Office tends to see a subset of the extent of applications received by an agency, however will also have a number of other reviews with a cross-section of agencies.

The 2005 amendments to the FOI Act introduced a number of additional tools to assist FOI decision makers to deal with such applications. For example, section 29B deals with specific circumstances where a later application requests documents previously sought by the applicant under the FOI Act and take into account whether there is a reasonable basis for again applying for the documents. Such tools can be useful as they require an assessment of the merits of the application rather than a broad approach.

To an extent section 77 of the FOI Act may apply on external review however this section is limited to certain circumstances. A small number of decisions have been made to not deal with, or further deal with, all or part of an application for external review under section 77 of the FOI Act. In most cases such decisions have related to a particular part of the application and the remainder of the application has been dealt with by the Office.

Section 96A of the FOI Act provides that the Information Commissioner may declare in writing that a person is a vexatious applicant. No decisions have been made by the Information Commissioner under section 96A of the FOI Act. I note that section 96A is a severe restriction on a person's right to otherwise access documents under the FOI Act, and accordingly could only be expected to apply in very limited circumstances. As noted above, there are a number of legislative and management tools that would be appropriately used before rights of access were limited or denied through a declaration under section 96A of the FOI Act.

It is considered that there are difficulties associated with the practical effect of section 96A of the FOI Act. The independence of the Information Commissioner, in ensuring that external reviews and decisions taken on external review are able to be impartial and not subject to direction or otherwise influenced by any of the parties, is critical and is very important in achieving informal resolution. However, if a decision was made under section 96A of the FOI Act that a person was or was not a vexatious applicant, at least one party (applicant, agency or third party) to an ongoing or future external review may believe that the Office holds some bias towards certain parties and is not able to be independent, objective and impartial.

In this respect I note that recent legislative provisions proposed in Victoria,⁸ which are similar to section 96A, require that a decision as to whether to declare a person to be a vexatious applicant be made only by the President of the Victorian Civil and Administrative Tribunal, a Supreme Court judge. Further, an agency can only apply to the Tribunal for a declaration if they first satisfy the Attorney-General that it is the appropriate course of action.

It is important to note that it is the experience of this Office that, while the type of applicant behaviour initially experienced may be inappropriate in some cases, there can be real issues in how an application has been dealt with that clearly warrant external review. It can also become apparent that the applicant's level of frustration at how they have been dealt with has significantly contributed to the deterioration in the interaction between the agency and the applicant. In some cases once deficiencies in the FOI process and decision-making have been acknowledged and addressed, the applicant's behaviour can improve and the review progressed and ultimately resolved. It is also important to note that some applicants experience difficulty in participating in government processes such as FOI, including because they are unfamiliar with government processes and legislation, or they have an illness or disability affecting their ability to understand or process information being presented to them.

It is critical that every individual FOI application be considered on its merits, without pre-judgment based on who the applicant is. Even where an applicant may have made a number of internal or external review applications previously that have upheld the previous decision, this does not preclude a later application from raising real grounds for review.

In terms of FOI applications involving a large volume of documents, the Discussion Paper asks whether a definitive test be applied. The matters set out, such as the number of pages, the number of days and the cost of processing are all considerations where they are relevant to the nature of the documents and it may be useful for all FOI decision makers to have such matters set out clearly in the legislation. I note that due to the different types of 'documents' raised in FOI applications now and into the future, any legislative changes should not preclude the flexibility to assess a range of considerations that might be more appropriate as a basis to assess the diversion of an agency's resources.

⁸ Freedom of Information Amendment Bill 2007, Part 4 (Vexatious Applicants).