

Your Ref:

Quote in reply: PB:21000450

3 March 2008

Dr David Solomon AM  
Chair  
FOI Independent Review Panel  
GPO Box 5236  
BRISBANE ALD 4001

Dear Dr Solomon

### QLS SUBMISSION ON THE FREEDOM OF INFORMATION ACT 1992

I am pleased to provide the following submission on behalf of the Queensland Law Society as our response to your panel's review of the *Freedom of Information Act 1992* ("the FOI Act").

The Society wishes to formally place on record its support for Freedom of Information (FOI) as one of the cornerstones of democracy which makes a significant contribution to ensuring the transparency and accountability of modern government. The Society congratulates the Government on initiating this review and congratulates also the Independent Review Panel, with yourself as its Chair, on producing a very comprehensive discussion paper.

Even though the burden placed on the Society in administering the FOI Act might be less onerous, quantitatively speaking, than that of those government departments which receive a large number of FOI applications, the Society is still required to allocate comparatively significant resources from time to time to satisfy its requirements under the FOI Act. The administration of the FOI Act remains a challenge for the Society because it is not within the core of the Society's activities and, hence, its officers do not receive the same opportunities to develop the relevant expertise as would officers from government departments. This aspect does add to the burden on the Society in this regard.

In addition, as it is outside the mainstream of government operations, although its officers do attend government seminars on FOI, the Society is often not privy to the day-to-day exchange of ideas on FOI matters which can usefully inform those dealing with FOI applications.

Also by way of introductory statement, the Society wishes to advert to its previous submissions in 2007 to the Honourable the Attorney-General seeking that it be exempted from amenability to the FOI Act regime, which submissions, it understands, were kindly passed on to the Independent Review Panel by the Attorney-General. The Society adopts those submissions for the purposes of this review, coming as they do within the ambit of the issues raised at paragraph 6.3.2 of the Discussion Paper.

It might also be noted in this context that the Bar Association of Queensland, which performs a similar role to that of the Society but for the barristers' limb of the profession, both in respect of its statutory

obligations and as a members' representative body, is not subject to the the FOI Act because, unlike the Society, it is not a statutory body.

The opening segment of the discussion paper, entitled "Introduction and Executive Summary", contains a large number of questions, described as "questions raised for discussion", which are designed to elicit answers in such a way as to be of assistance in formulating submissions to the review. However, the vast majority of those questions relate to matters which are of comparatively minimal relevance to the Queensland Law Society and which are generally outside Society expertise.

This Society's relationship to the FOI Act involves three aspects which reflect the various functions of the Society. Firstly, there are those matters which have been of concern to it in respect of the way that the FOI Act has operated, drawn from its experience as an agency under the FOI Act, so far as is within the Society's knowledge. Then, in general terms, the Society would seek to ensure that the FOI Act remains a vehicle which the Society's members, the solicitors of Queensland, can utilise in order to legitimately protect and advance the interests of their clients. In this exercise, too, the Society recognises that it bears a responsibility to advocate on behalf of the general public so that the resultant legislation is the best model for the citizens of Queensland as a whole.

### **Reasons for applications / privacy of third parties**

Many of the exemptions from disclosure of particular documents under the FOI Act require decision-makers to consider whether the release of those documents is in the public interest. The Society would advocate that, to assist in determining this issue, applicants be required to disclose the reason for their application in cases where the documents impact the privacy rights of third parties. The Society considers that the present arrangements in relation to third parties, principally relating to the consultation processes provided for in s51 of the FOI Act, are inadequate. Affected third parties are required to prepare submissions to demonstrate that the subject material is covered by one or other of the grounds for exemption in the FOI Act. This basis, of course, is not necessarily coterminous with matters which unduly invade the privacy of that party or is not one which recognises that there may be documents containing material of a sensitive nature, not necessarily personal affairs information or even personal information, to a third party.

In many cases, in order to come to a considered conclusion as to whether the release of particular material is or is not in the public interest, it would be a pertinent consideration for a decision-maker to know the reason for the application, as the *Freedom of Information Guidelines* prepared by the Department of Justice and Attorney-General acknowledges – see paragraph 3.2.1 of those Guidelines. Unfortunately, the Guidelines do not suggest mechanisms as to how a decision-maker can lawfully and effectively obtain the requisite information from the applicant.

An analogy in this regard might be drawn with the process for applying to the Registrar-General for a birth certificate or other document or information where all applicants are required to specify the reason for which the certificate is required. In this regard, s44 of the *Births, Deaths and Marriages Registration Act 2003* ("the BDMR Act") relevantly provides:

#### **44 Obtaining information from the registrar**

(1) A person or other entity may apply to the registrar, in writing,  
for—

*Done*

- (a) a certificate or information about an event that is, or may be, in a register kept by the registrar; or
- (b) a copy of a document given to the registrar in relation to the registration or notation of an event in a register kept by the registrar (a source document), other than a source document prescribed under a regulation.

(2) Unless the application relates to historical information, the registrar may refuse the application if the applicant does not have an adequate reason for obtaining the certificate, information or source document.

(3) In deciding whether an applicant has an adequate reason for obtaining the certificate, information or source document, the registrar must have regard to—

- (a) the relationship, if any, between the applicant and the person to whom the information relates; and
- (b) **the reason that the applicant wants the information;** and
- (c) **the use to be made of the information;** and
- (d) the age of the entry; and
- (e) the contents of the entry or source document; and
- (f) **the sensitivity of the information;** and
- (g) any other relevant factors. (emphasis added)

The protection of the privacy of third parties under the BDMR Act is further reinforced by s45 (Information policies) and s46 (Protection of privacy) of that Act.

In the Society's view, it would be useful to import a similar approach, including criteria corresponding to those listed in s44(3) of the BDMR Act, into the FOI legislation. These criteria would be significantly wider than the considerations allowed for in s51 of the FOI Act with the consequence that outcomes based on them would be much fairer to third parties than otherwise would be the case. It should also be kept in mind that, in some circumstances, third parties could be categorised as "innocent" in that the subject material, now in the possession, or under the control, of a public sector entity, could have been brought into existence because of the actions of other persons.

Even if privacy or other analogous considerations, as described above, are not involved, it may well be that the real reason or motivation underpinning the application may afford an arguable basis for rejecting the application, for example, an applicant may wish to harass certain third parties and this may not be immediately evident from the original application. The Society has had experience of receiving repeated applications about a particular law firm from the one applicant where it was subsequently ascertained that the law firm was acting for the spouse of the applicant in family law proceedings. When the first application for documents about complaints concerning disciplinary matters against the firm and professional indemnity insurance claims, if any, was dealt with to the apparent satisfaction of the applicant, the Society received a further application from the same applicant asking for documents relating to the s51 consultation carried out in respect of the first application, documents relating to the firms' partners applying for the current renewal of their practising certificates and copies of their actual practising certificates. It could appear that these applications might be characterised as "fishing

expeditions" and designed to harass the firm in question. It would be highly desirable to have a provision in the legislation allowing decision-makers to reject applications on grounds like these.

These considerations are partly adverted to in section 9.3 (Voluminous and/or vexatious requests) of the discussion paper. In that section, mention is made of the description by the Electoral and Administrative Review Commission of a vexatious application as one, among other things, which is made by an applicant with an ulterior motive. This description would certainly fit the scenario in the previous paragraph.

### **Processing charges**

The second of the points for discussion at the end of section 9.1 (Fees and charges) reads: "What are the comparative merits of a flat fee scaled by volume and the current time-based charging model?"

The present formula for calculating processing charges is set out in Part 1 of the Schedule to the *Freedom of Information Regulation 2006* which provides that the "(c)harge for time spent by an agency or Minister in searching for or retrieving a document, or in making, or doing things related to making, a decision on an application for access", in effect, its definition of the expression, "processing charge", is set at \$5.60 for each 15 minutes or part of 15 minutes.

The application of this formula can be time-consuming, unwieldy, imprecise and complicated. The Society would suggest an alternative basis for calculating processing charges by relating them directly to the number of folios relevant to the particular application so that the processing charge would be calculated as x cents per folio. In other words, the Society would prefer "a flat fee scaled by volume" on the grounds that it would provide a requisite degree of certainty combined with ease of calculation.

Also, the present formula for calculating processing charges does not recognise that an agency might incur quite definable costs such as retrieval costs in responding to a request. Recently, it was necessary for the Society to retrieve three files dating from 1992 from archived storage in order to respond to a request for access. The cost of this was approximately \$60 and yet the Society was unable to recover this amount. The Society recommends that disbursements of this kind be allowed for when determining processing charges.

### **Single applications with multiple, unrelated topics**

This issue is not covered within section 8.5 (FOI applications for access) of the discussion paper.

The current legislation appears to be silent on the matter as to how many unrelated topics can be included in the one application made under s25 of the FOI Act. However, the *Freedom of Information Guidelines* (May 2007), prepared by the Department of Justice and Attorney-General (DJAG), at paragraph 3.2.5 states:

An applicant can request access to documents of an agency or Minister covering any number of unrelated subject areas. There is no requirement that an applicant limit their request to a single subject area.

*CSM*

There is no authority from the FOI Act cited in support of this proposition. The only restriction mentioned by the DJAG Guidelines is that an application covering a multitude of topics runs the risk of involving a voluminous number of documents and thereby falling foul of s29 of the FOI Act.

The Society has received applications where access to documents concerning a number of quite separate and unrelated subjects. It seems anomalous that, for one application fee, an applicant can seek documents concerning more than one topic. The Society would recommend that an access application seek documents involving only one subject, which may include related matters, and not involve documents from a number of quite disparate topics.

### **Applications requesting access to documents previously disclosed**

Sub-section (3) of s29B (Refusal to deal with application—previous application for same documents) provides:

(3) The agency or Minister may, to the extent the later application relates to documents sought under the earlier application, refuse to deal with the later application **on a ground mentioned in subsection (4) if—**

(a) the agency or Minister is satisfied the documents sought under the later application are the documents sought under the earlier application; and

(b) the later application has not disclosed any reasonable basis for again seeking access to the documents. (emphasis added)

However, none of the grounds listed in sub-section (4) of that section include the situation where the applicant has previously been given a copy of the documents which are the subject of a later application. The Society recommends that this consideration be added to those grounds.

### **Statutory guidance in applying exemptions**

The FOI Act provides insufficient guidance to decision-makers in applying criteria for exemptions. Extensive recourse must be had to a plethora of decided cases, which exercise can be quite demanding especially in an agency like the Society which doesn't necessarily have the expertise or experience to apply the decision-based precedents in an authoritative way.

### **Statement of Affairs**

The Society, like all other agencies subject to the FOI Act, is obligated by s18 to publish an "up-to-date statement of affairs of the agency". Most of the information in that statement is already contained in the Society's annual report and the imposition of being required to maintain a second database containing the statement of affairs necessitates significant additional expenditure and application of resources. It would be preferable from the Society's viewpoint if the alternative of being able to satisfy the requirements of s18 by including the requisite information in an agency's was available.

*um*

## Conclusion

The Society is grateful for the opportunity of being able to make this submission as part of your panel's review. If you require further information or clarification, please do not hesitate to contact me.

Yours faithfully



Megan Mahon  
**President**