VEXATIOUS APPLICATIONS UNDER FOI

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> Gone is the notion that people elect a government and then allow them to govern. Complexity in government business and the wish of people to participate more in the decision-making processes which affect the quality of their life in a democracy means that citizens need access to information and that governments have an obligation to facilitate transparency and consultation and to give adequate reasons for their actions.-Sir John Robertson[1]

Sir John Robertson identified that the basis of freedom of information legislation in Australia involves the provision of government-held information to encourage accountability and active citizenship. However, Robertson's statement fails to address the influential nature of citizens' applications for information. The exercise of power associated with freedom of information legislation requires that the people's need for government transparency is balanced against the ongoing preservation of governmental efficiency. Arguably, where an imbalance exists, the fundamental ideals of the legislation are compromised. This research paper discusses the impact of vexatious applications on the achievement of the governmental efficiency-accountability balance. The *Freedom of Information Act* 1982 (Cth), s24, and the South Australian legislative equivalent, s18, contain statutory provisions for addressing voluminous applications, a type of vexatious request. However, agencies are provided with no legislative guidelines with regard to other types of vexatious applications, such as repeat or serial requests, unlike Victoria, which is currently the only State to embody such a provision. Though there has been much Parliamentary and academic debate regarding the inclusion of a legislative provision to deter vexatious applicants generally, there has been consistent approval for encouraging a general culture of disclosure among government departments to ensure an appropriate balance between the interests of agencies and applicants alike.

Brief investigation of the legislative history of freedom of information in Australia reveals a concept which resides awkwardly between our inherited Westminster style of governance and the pertinence of maintaining democracy, but one mediated by positive attitudes and acceptance. Though Australia was greatly influenced by the 1960s 'open government' movement in the United States of America, there was uncertainty as to whether such legislation would be compatible with the inherent secrecy associated with our English-based regime.[2] In its consideration of the Freedom of Information Bill 1978 (Cth), the Senate Standing Committee on Constitutional and Legal Affairs rejected the perceived notion of legislative incompatibility with styles of government, stating that 'it is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving'.[3] The resulting *Freedom of Information Act* 1982 (Cth) was used as a model for the legislative provisions of the States It embodied three primary intentions: (1) individuals should have the right to know and access what information the government holds about them; (2) when government is more open to public scrutiny, it is accountable, which should, in turn, foster competency and efficiency; and (3) public access to information should lead to increased public participation in policy making and government processes.[4] It is this underlying right to access government-held information, without having to prove standing, which is argued to be a fundamental safeguard of democracy in

* *A paper presented at the University of Adelaide Law School and AIAL Administrative Law Students Forum 2003.*

Australia.[5] This proposition is supported by the freedom of speech cases, which discussed the fundamental significance of information and citizen access to that information to ensure active participation in Australia's representative democracy.[6] However, this paper will focus more closely on the second legislative intent, and whether the Commonwealth and South Australian legislation adequately address the need for balance between applicant and agency interests in the provision of information.

Commonwealth and South Australian freedom of information legislation includes provisions enabling government agencies and Ministers the opportunity to refuse the processing of requests in certain circumstances.[7] In essence, both provisions allow agencies to refuse to deal with an application if satisfied that processing would 'substantially and unreasonably divert' resources from the agencies[8] or interfere with the performance of the Minister's functions.[9] The obvious policy implication of this section is to allow agencies the discretion to determine whether they can meet the processing demands embodied in applications, particularly where a time limit is involved. However, by allowing agencies to exercise discretion to ensure that their continued efficiency is not compromised by public applications for information, does this help or hinder achieving the efficiency-accountability balance? Is this discretion justifiable in light of vexatious applications or does it undermine the spirit of freedom of information legislation?

Vexatious applications for information require government agencies to conduct resource intensive searches, resulting in a large administrative burden. Whilst the Commonwealth *Freedom of Information Act* s24 and the South Australian *Freedom of Information Act* s18 endeavour to remedy such burdens, it must be considered whether these sections extend far enough to ensure a balance between the interests of both agencies and applicants. Vexatious requests are those which can be described as having been made to 'cause waste or inconvenience'[10] and can be commonly characterised by the lodgment of multiple applications by one person on the same topic (repeated), or, by requesting many documents in one application (voluminous).[11] Understandably, the processing of such requests is time-consuming and encroaches on the efficiency of agencies. Vexatious applications have been reported to severely hinder the administration of freedom of information across the nation and agencies have called for amendments to be made to address the problems that such applications present.[12]

Arguably, the Commonwealth *Freedom of Information Act* s24 and the South Australian *Freedom of Information Act* s18 address the problem of voluminous applications by allowing agencies to refuse access where processing would hinder their operations. Commentary surrounding the inclusion of a similar provision in the Victorian *Freedom of Information Act* 1982[13] provides relevant insight into the acknowledged need for reform without undermining the legislative intention of the Act. In 1989, the Legal and Constitutional Committee of the Victorian Parliament recommended that it was necessary to alter the Victorian *Freedom of Information Act* 1982 to achieve a balance between the citizens' right of access to information and the diversion of governmental resources in processing large requests for information. The Committee reported that 'the public interest in efficient government requires that voluminous requests be discouraged' and, as such, agencies should have legislative support to enable the refusal of large applications.[14] The Committee asserted that, when used correctly, such a provision would not compromise the spirit of the Act. The Attorney-General of Victoria, in the second reading of the *Freedom of Information (Amendment) Act* 1993, echoed similar concerns, arguing that 'although the number of voluminous requests was relatively small it nevertheless caused severe disruption to agencies', citing one example in which an applicant lodged a request involving more than 2000 documents.[15]

In response to the 1989 Legal and Constitutional Committee recommendation, academic commentary suggested that the proposal 'failed to appreciate that an applicant may lodge a number of individual requests which, when viewed separately, appear to be reasonable.

However, when lodged together, often simultaneously, they form a package which is certainly voluminous'.[16] This argument pre-empted the discussion by the Victorian Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*[17] where the Department refused to process Kelly's application on the grounds that it was not 321 small requests, as Kelly contended, but one voluminous request which was aggregated on the basis of the commonality of the requests. It was later argued that Kelly might have actively sought to avoid enlivening s25A by lodging 321 small requests, which is certainly contrary to the intentions of the Act[18] and exploitative of the concept of freedom of information generally.

The Victorian *Freedom of Information Act* 1982 extends beyond the Commonwealth and South Australian provisions, with the inclusion of s24A to limit requests made by repeat or serial applicants. The addition of this provision was in response to the Australian Law Reform Commission and the Administrative Review Council's joint review of the Commonwealth *Freedom of Information Act* in 1995.[19] The ALRC/ARC Review, in their determination of whether the administrative objects of the Act had been achieved, received submissions from agencies expressing the need for reform regarding vexatious applications.[20] The ALRC/ARC Review recognised that s24 of the Commonwealth *Freedom of Information Act* placed agencies in a powerful position over citizens and, as such, emphasized the importance of officer consultation with applicants to narrow their requests, to ensure their applications would be processed. The ALRC/ARC Review recognised that agencies have no means of refusing repeated applications. In response the Review proposed Recommendation 35:

> The FOI Act should be amended to provide that an agency may refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being made again.

It is clear from the array of submissions made to the ALRC/ARC Review that vexatious applications compromise government efficiency, unsettling the intended balance between agencies and applicants. Though the Commonwealth has not acted upon the ALRC/ARC's recommendation, Victoria has successfully integrated s24A into their freedom of information legislation, though, as yet, it has not been subject to litigation.

The inclusion of provisions allowing refusal of vexatious requests cannot be complete without consideration of the possible disadvantages. Of course, such provisions are open to abuse, swinging the pendulum toward encouraging greater government agency discretion and away from their role as caretakers of the public interest, arguably hindering the achievement of an appropriate efficiency-accountability balance. The ALRC/ARC Review received submissions expressing concern about the potential for decision-makers to abuse such a provision, most notably from the Commonwealth Ombudsman.[21] The Review said that such a provision would enable agencies to refuse processing requests simply because they pose a nuisance to the usual performance of operations in already stretched government agencies.[22] The Review acknowledged the word 'vexatious' could not be clearly defined and predicted awkward implementation of the concept.[23] Academics Helen Sheridan and Rick Snell, contend that vexatious requests are extremely rare and an inevitable consequence of any information access scheme.[24] Thus, opponents argue that the inclusion of a provision allowing agencies to refuse all vexatious applications would be an excessive response when, as is discussed below, the balance between agency and applicant interests would be better achieved by encouraging a general governmental attitude of disclosure.

It has been argued that if agencies are legislatively empowered to refuse vexatious applications, such discretion should be mediated by consultation with the State Information Commissioners or Ombudsmen, in conjunction with guidelines, to ensure that the potential for abuse is minimised and an appropriate balance between agency and applicant interests is realised. Queensland's 1990 Electoral and Administrative Review Committee

acknowledged that although State government agencies were unhappy with their inability to refuse vexatious applications, the insertion of such a provision would be contrary to the spirit of freedom of information legislation as it would go to the applicant's motive for making their request, 'a matter which Australian FOI legislation deliberately avoids'.[25] The Information Commissioner of Western Australia, however, saw benefit in the government being able to refuse unreasonable applications but recommended that the agency must have the permission of the Information Commissioner before refusing such a request.[26] The South Australian Ombudsman recommended that, although reasonably rare, applications that are frivolous, vexatious, misconceived or lacking in substance should be able to be refused, and should be provided for in South Australian legislation.[27] He made reference to a case where he was 'requested by the same applicant to review two determinations which ostensibly dealt with the same documents...(and he) saw no practical purpose in wasting already limited resources...(and) had concerns about the bona fides of the applicant'.[28] Both the Information Commissioners of Queensland and Western Australia believed that it would not be contrary to the aim of freedom of information legislation if a provision were included to refuse vexatious applications. However, the discretion of decision-makers needed to be reduced by the imposition of guidelines to ensure that the statute is appropriately applied by agencies.[29] Likewise, the South Australian Ombudsman stressed the importance of allowing the Ombudsman the 'legislative discretion' to refuse vexatious applications.[30]

Certainly, the administrative success of freedom of information legislation, especially provisions allowing agencies to refuse the processing of applications,[31] must be tempered by strong, positive attitudes regarding the provision of information. Bayne expressed concern that s25A has the potential to limit the effectiveness of the Victorian Act if misused and thus, it was important for officers to approach applications openly.[32] Likewise, the Victorian Ombudsman encourages freedom of information officers to maintain a positive and open attitude, to actively consult with applicants to ensure their requests are processed and achieve resolution.[33] Given the similarity of s25A of the Victorian *Freedom of Information Act* 1982 with the Commonwealth and South Australian legislative equivalents, calls for administrative openness should be heard and seriously considered. The ALRC/ARC Review emphasized the importance of establishing a proactive rather than reactive attitude to freedom of information. This approach finds support in the South Australian Ombudsman's 1997/1998 Annual Report which suggested that State legislation should 'contain a presumption in favour of the release of information'.[34] More recently, administrative attitudes were regarded as highly influential in the United Kingdom, where it was argued that 'openness does not begin and end with an FOI Act...statutory provisions need to be championed within government itself if openness is to become part of the official culture rather than an irksome imposition'.[35] It has further been submitted that developing a culture of disclosure within government has the potential to reduce the burdensome effect of vexatious applications.[36] Thus rather than attempting to control the number of vexatious requests that are submitted, it would be beneficial to develop other areas of freedom of information, over which the government has more control, to achieve a greater balance between governmental efficiency and accountability, and ensure that the interests of agencies and applicants are met.

It could be argued that the South Australian *Freedom of Information Act* 1991 s18(2a), which came into effect on 1 July 2002,[37] is the most flexible provision as it enables agencies to validly refuse *both* vexatious and voluminous applications, whilst maintaining an acceptable efficiency-accountability balance. Section 18(2a) reads:

> An agency may refuse to deal with an application if, in the opinion of the agency, the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information.

As discussed above, s18(1) enables the agency to refuse the application if it would compromise agency operations, but s18(2a) allows refusal where the agency believes the application abuses the spirit of the legislation. Whilst the provision does not expressly extend as far as the Victorian *Freedom of Information Act* 1982 s24A, it enables wider agency discretion than does the Commonwealth legislation. Certainly, this presents a more balanced approach to maintaining governmental efficiency and accountability in light of vexatious applications for information.

The South Australian Ombudsman's recommendations are complemented by the opinions expressed by Paul Williams, Principal Auditor for the South Australian branch of the Department of Administrative and Information Services. Mr Williams, who has had much first hand experience with compiling freedom of information reviews, believes that governmental accountability is enhanced by freedom of information legislation, as it sets clear boundaries for agencies and allows various levels of appeal for unsatisfied applicants. Mr Williams explained, much like the ALRC/ARC Review and the Victorian and South Australian Ombudsmen, that voluminous applications are rare. However, he conceded that while such requests can have a detrimental effect on the administration of the freedom of information regime due to time constraints, limited resources and few sufficiently trained officers, most agencies have freedom of information officers whose full time job entails the co-ordination of freedom of information reviews. Mr Williams agreed that while there would be some benefit in including a provision like s24A of the Victorian Act to deter repeated requests, he believed that it would have a limited impact on governmental efficiency due to the rarity of such applications.

One of Mr Williams' most distinct arguments in relation to vexatious requests stressed the importance of weighing the interests of the individual against those of the wider community. He felt that the *Freedom of Information Act* 1991 (SA) may be compromised in spirit where agencies have the discretion to refuse applications in certain circumstances. However, reality suggests that limited government resources can only extend so far before costs of processing large or repeat applications will be passed on to the greater community. As Mr Williams argues, the question which then arises is 'whether one person's right to information is greater than the community's right to services'. Thus, whilst the spirit of the Act is somewhat compromised, the inclusion of sections regarding vexatious applications would not be without merit.

Current Commonwealth and South Australian freedom of information legislation achieve a tenuous balance between the interests of agencies and applicants. It seems unavoidable that vexatious applications will arise in any freedom of information regime. Therefore, rather than attempting to control the number of applicants, it appears more beneficial to incite change in areas where the government has control. Suggested means of control include investing Ombudsmen and Information Commissioners with legislative discretion with regard to the processing of such applications, greater encouragement of consultation between officers and applicants to reduce or focus requests, and the development of a general culture of disclosure among agencies. Democracy demands that government remain accountable for its decisions and that citizens are encouraged to scrutinize those decisions. Though vexatious applications arguably compromise freedom of information legislation, it is consistently suggested that its administrative success is best achieved, and the interests of agencies and applicants are met, when both a positive attitude and a conciliatory approach are adopted.

Endnotes

1 6th International Ombudsman Conference, October 1996, Buenos Aires, Argentina as cited by the South Australian Ombudsman, *25th Annual Report* 1996/1997 at 99.

2 Legal, Constitutional and Administrative Review Committee: Freedom of Information in Queensland, Discussion Paper No. 1 (2000), 2.
3 Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 ('Senate Committee'), Freedom of Information, AGPS, Canberra, 1979 n 2 at para 4.63, as cited above in n 2 at 5.
4 Senate Committee, n 2 at paras 3.3-3.5, as cited above in n 2 at 2.
5 As cited above in n 2 at 4.
6 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
7 *Freedom of Information Act* 1982 (Cth) s24; *Freedom of Information Act* 1991 (SA) s18.
8 *Freedom of Information Act* 1982 (Cth) s24(1)(a); *Freedom of Information Act* 1991 (SA) s18(1).
9 Freedom of Information Act 1982 (Cth) s24(1)(b).
10 Electoral and Administrative Review Committee (EARC), GoPrint, Brisbane, 1990, n 7 at (x), as cited above in n 2 at 44.
11 Department of Justice and Attorney-General (Queensland), *Freedom of Information Annual Report* 1997/1998, n 35 at 10, as cited above in n 2 at 44.
12 Ibid per submissions made by the Queensland Police Service, Department of Tourism, Sport and Racing, Office of Health Professional Registration Board and the Queensland Corrective Services Commission, as cited above in n 2 at 44.
13 s25A.
14 The 38th Report of the Legislative and Constitutional Committee upon Freedom of Information in Victoria, November 1989, para 5.19.
15 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 1993, 1738.
16 Editors, 'Victorian Government Responds to Legal and Constitutional Committee Report' (1990) 29 *Freedom of Information Review* 62, 63.
17 [2001] 4 VR 595.
18 Editors, 'Victorian FOI Decisions: *Kelly and Department of Treasury and Finance*' (2002) 98 *Freedom of Information Review* 23, 24.
19 Australian Law Reform Commission and the Administrative Review Council, 'Open Government: A Review of the Federal *Freedom of Information Act* 1982' (1995). <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html>
20 Ibid, para 7.18, per submissions made by the Department of Finance, Department of Employment, Education and Training, Department of Defence, Department of Administrative Services and the Department of Immigration and Ethnic Affairs.
21 Ibid, submission 53.
22 Ibid, para 7.18.
23 Id.
24 Ibid, submission 58.
25 EARC, n 7 at para 18.71, as cited above in n 2 at 44-45.
26 Information Commissioner of Western Australia, *4th Annual Report* 1996/1997, n 261 at 12, as cited above in n 2 at 45.
27 South Australian Ombudsman, *26th Annual Report* 1997/1998, n 57 at 72.
28 South Australian Ombudsman, *23rd Annual Report* 1994/1995, Recommendation 8 at 65.
29 As cited above in n 2 at 45.
30 As cited above in n 28.
31 *Freedom of Information Act* 1982 (Cth) s24; *Freedom of Information Act* 1991 (SA) s18; *Freedom of Information Act* 1982 (Vic) s24A and s25A.
32 Peter Bayne, 'Freedom of Information' (1993) 1 *AJAL* 51, 51.
33 Victorian Ombudsman, *29th Annual Report* 2001/2002, at 159.
34 South Australian Ombudsman, *26th Annual Report* 1997/1998, at 64.
35 UK Government, 'Your Right to Know: The Government's Proposal for a Freedom of Information Act' ('White Paper'), December 1997 at para 7.1, as cited above in n 2 at 11.
36 As cited above in n 2 at 43.
37 Freedom of Information (Miscellaneous) Amendment Act 2001, No 61 of 2001 [Assented to 6 December 2001].