

minutes of departmental meetings and reports by departmental officers to consider his Job Train applications.

It appears that Sharples was looking for particular documents which he knew, or believed, to exist.

At the initial decision stage, DEETYA granted access to some documents but refused access to three unspecified documents claiming the legal professional privilege exemption under s.42.

At internal review, DEETYA affirmed this decision but also relied on s.118 of the *Evidence Act 1995* to establish legal professional privilege.

AAT hearing

On conclusion of the hearing, the AAT invited the parties to put written

submissions to it. Sharples provided no written submission, although DEETYA did. The AAT decided the case on the materials before it.

Sharples examined DEETYA's files. When he indicated at the hearing that the particular documents he was seeking were not on the files, the AAT adjourned the proceedings to enable DEETYA to conduct further searches for the documents. At the resumed hearing, evidence was provided by DEETYA to the effect that the documents had been lost or destroyed.

The AAT held that s.24A, rather than s.24(1), applied.

The question of legal professional privilege, though claimed by DEETYA and apparently not agreed

to by Sharples, was not in issue before the AAT.

Comment

The specific details of the documents Sharples thought existed are not made clear in the reasons for the decision.

The AAT seemed to think Sharples' assumption that they did exist was reasonable but did not make any comment on the circumstances of their disappearance or destruction.

[N.D.]

Recent developments

RECENT DEVELOPMENTS IN QUEENSLAND, WESTERN AUSTRALIA AND THE COMMONWEALTH

Introduction

The Western Australian Information Commissioner, the Queensland Information Commissioner and the Commonwealth Ombudsman have all recently released their annual reports for 1998–99, which provide an overview of their operations and highlight the importance of the role of external review in FoI legislative and administrative schemes. Each report identifies problems in alleviating the backlog of cases and renewed attempts to improve the timeliness with which complaints are dealt with. There is also a common emphasis on the role of mediation and conciliation as an alternative to formal dispute resolution, the aim being to reduce the time and expense faced by participants in the review process.

Though the Report of the Commonwealth Ombudsman has a less specific focus on the operation of FoI legislation at the Commonwealth level, its detailed analysis of the administrative structures of some key Commonwealth agencies nevertheless provides a useful contextual basis to assess the role of FoI in general corporate management. The Ombudsman's Report also raises the issue of contracting out, which is of increasing relevance to the scope of application of FoI.

The Queensland Report highlights the need to avoid an unduly legalistic approach to the application of FoI legislation, while the Western Australian Report reiterates that although recommendations for legislative reform have been made in previous reports, there have been no such changes made, the only amendments being to extend the range of exempt documents. The Western Australian Report is particularly progressive in that the Commissioner suggests a 'rethink' of design principles for FoI legislation in order to better enhance contemporary public administration, and contains acknowledgment that reforms must address the interaction between FoI and privacy legislation. However, neither of these suggestions is further articulated within the Report.

Statistics

Differences in format between the respective reports makes a comparison of data cumbersome. However, some common statistical information can be identified (*see Table 1 on the next page*),

Western Australian Information Commissioner's Report

The Western Australian Report offers a refreshing and easy to read appraisal of each relevant agency with respect to the way in which FoI requests and complaints are handled, and includes a brief summary of the main agency functions. The 'report card' approach facilitates an assessment of each agency according to various criteria such as:

- timeliness and costs involved in processing a request;
- the way in which agencies manage data and perform record searches;
- the manner in which decisions are made and the adequacy of reasons given for those decisions; and
- an overall assessment of the 'responsiveness and openness' of the agency's administrative framework.

The 'reports' for 1998–99 were generally positive — for example, the Report highlighted the way in which computerised tracking systems could be used to facilitate data checks and revealed that the preparation of 'Information Statements' by agencies can clarify their operation and the type of information held.

However, there have been problems in practical application of the legislation. For instance, it was noted that the Ministry of the Premier and Cabinet had installed no means by which to formally evaluate the effectiveness of their FoI procedures nor did their 'information statement' identify in detail the categories of documents held. The Commissioner noted that the Ministry was re-evaluating its classification system. Further, the Commissioner noted that the reasons given for decisions by the Ministry for Planning were often insufficient and that the rate of refusal to allow access to documents has increased with

Table 1
Statistics extracted from the Western Australian Information Commissioner, Queensland Information Commissioner and Commonwealth Ombudsman Reports 1998-99

1998-99	WA	QLD	CTH
Number of applications under FoI in jurisdiction	4835	N/A	N/A
Number of requests for personal information	3531	N/A	N/A
Most common type of applicant under FoI	N/A	Public servants	N/A
Number of requests for non-personal information	1304	N/A	N/A
Average time taken to deal with requests	21 days	N/A	N/A
Number of applications for external review of agency determinations	189	207	253
Number of applications resolved without the need for a formal decision	100	231	N/A
(Selected) outcomes of external review:			
Decision not to review	19	3	N/A
Decision affirmed	20	26	
Decision varied	2	21	
Decision set aside	4	11	
Number of external review decisions appealed via judicial review	2	2	N/A
Agencies attracting the most applications for external review	Police Force	Police Force	Centrelink

respect to that agency. Similarly, it was noted that there appeared to be some misunderstanding among agencies — particularly the WA Police Service — as to the role of the Information Commissioner in the FoI process.

The Western Australian report also contains a comprehensive outline of the role of the Information Commissioner, including a mission statement to enhance 'public understanding and confidence in the decision-making process of government agencies through access to relevant information'. The Commissioner outlined the ways in which the Office has contributed to 'advice and awareness' of FoI legislation among the community. A program has been designed to improve public knowledge and use of the legislation via training courses for agency staff; the development of workshops/seminars; the provision of assistance and advice to agencies in complying with the Act; the distribution of posters and brochures; the maintenance of statistical data and other information; providing briefings to community groups; and by handling general enquiries and correspondence.

The report lists a set of performance indicators to assess the operation of the Office, with the indicators being audited and confirmed as correct by the Auditor-General. A survey of participants in the external review process in Western Australia showed that 88% of parties were satisfied with the external review process, while 98% of agencies surveyed were satisfied with the advice and guidance provided by the Commissioner's Office. The Report reveals a steady increase in the number of applications for external review which were resolved by conciliation, with the percentage rising from 60% in 1996 to 80% in 1999. This is an important trend which can relieve some of the antagonistic nature of disputes and was more cost efficient.

Commonwealth Ombudsman's Report

The total number of complaints, including those involving FoI, received by the Commonwealth Ombudsman rose

by 8% to 23,201, most relating to the decisions/actions taken by government agencies. The Office directed attention to relieving a backlog of investigations that had accrued, and there was added emphasis on timeliness in handling disputes — fewer than 35% of cases take longer than a week to finalise. This improvement arose despite the fact that the average staffing level for the Office was reduced by 4.2% over the course of 1998-99.

The Ombudsman conducted an inquiry into the administration of the *FoI Act*, in response to complaints that there were administrative problems within departments and agencies in dealing with FoI requests. The *Needs to Know* report was released on 3 June 1999 and revealed widespread problems in the recording of FoI decisions, as well as misuse of exemption provisions to avoid disclosure. It was noted that approximately one in four requests was not being acted upon within the statutory time limit. The principles underlying the legislation had been forgotten or were not fully understood, necessitating a range of recommendations

within the report to facilitate better compliance with the legislation.

The major problem with the Report, in contrast to the Western Australia Information Commissioner, and surprising in light of the *Needs to Know* report, was trying to gain a fuller and more detailed understanding about the Ombudsman's handling of FoI issues. Possibly the Ombudsman considered the *Needs to Know* report a sufficient coverage of the work and activity of his office in this area.

The Report also outlined the steps taken to improve the public's access to the Ombudsman's office via upgrades of telephone and computer technology, while also placing emphasis on the role of mediation in complaint handling — the Ombudsman being an 'honest broker' in bringing the dispute to a resolution.

The Report addressed the issue of contracting out and re-affirmed the view that the public ought not lose their right to complain about poor service where this has occurred and that the government should retain ultimate responsibility for contractors. The government is currently considering clarification of the role of the Ombudsman with respect to private sector accountability. Further, the possibility was raised that the Ombudsman be given responsibility for the administration of a proposed scheme to regulate whistleblowing.

Finally, an outline of the role of the Ombudsman and the types of documents held by the Office is a useful guide to the services available. For example, the Ombudsman's Office has available an FoI manual, guidelines as to the exercise of discretion by the Ombudsman, a good practice guide for effective complaint handling as well as various files on complaints, legal opinion and administration.

Queensland Information Commissioner's Report

The Report outlines the fact that during the reporting period the Office significantly increased its output, though an increase in applications for external review has meant that a backlog of cases remains. The Report confirms the opinion of earlier Reports that the Information Commissioner model remains the most cost effective and efficient mechanism of external review, with reference being made to the standards of timeliness set by the Office of the Western Australian Information Commissioner.

The Queensland Office of Information Commissioner, like its Western Australian counterpart, accords great emphasis on mediation and conciliation in the resolution of disputes, the aim being to keep costs to a minimum for the applicant. The Report made some general observations as to the FoI process in Queensland, which were timely in light of the announcement that the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly had undertaken a reference to review the operation of the *FoI Act*. The Committee is currently preparing a discussion paper.

The Report contains a profile of applicants who utilise the external review capacities of the Information Commissioner. The main applicants for review were public servants (or former public servants) seeking information about workplace disputes; followed by business people or business organisations seeking information for purposes related to their business; followed by individuals seeking information as to how a proposed government decision or policy will affect them or has affected them. It was noted that the use of the external review mechanism by politicians and journalists is quite low in Queensland compared to Commonwealth and Victorian jurisdictions in particular.

The Report criticised the passing of legislation that had the effect of making substantive amendments to the *FoI Act*. The *Coal Mining Safety and Health Act 1999* had the effect that s.42 of the *FoI Act* was amended to introduce a new exemption which is broadly framed and general in application. The Ombudsman expressed concern that such an amendment had been classified as a 'consequential' amendment within the new piece of legislation and should have been introduced instead as an

amendment to the *FoI Act* so that interested people would have had a better opportunity to consider it.

Finally, the Report provides a survey of the issues dealt with in the formal decisions published by the Information Commissioner during 1998–99, as well as summaries of decisions issued by means of letters to participants. The Queensland Police Force was the agency most often involved in the disputes, with other agencies involved including the Criminal Justice Commission, the Department of Family Services and Aboriginal and Islander Affairs, the Queensland Corrective Services Commission and the Department of Families, Youth and Community Care. The summaries are useful sources of information about the way in which applications are dealt with, and the issues commonly at stake.

Conclusion

External review is a crucial part of the FoI process. This article has attempted to provide a brief overview of the most recent reports issued by the Commonwealth Ombudsman, the Queensland Information Commissioner and the Western Australian Information Commissioner. The reports suggest that the external review process is meeting key performance indicators with renewed emphasis on improving the efficiency of the process, though there remain long identified problems such as a backlog in cases, under-resourced offices and a lack of public awareness as to the availability of external review. The reports provide some up-to-date reading on the operation of FoI, with some positive improvements in administration and complaint handling procedures being offset by continued accounts of resistance from agencies to FoI, and, in some instances, the role of external review bodies themselves.

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Reference

1. See Walker, Paula, 'The Western Australian FoI Experience 1996–1998 — Any lessons for reform?' in (1999) 79 *FoI Review* 7.

FoI Review Index: Numbers 79–84 1999

Articles

Auzimour Just, Fleur. Freedom of information and the contracting out of government services: preserving rights in a changing environment	79:2
Coulthart, Ross. Why the FoI Act is a joke or 'don't shoot the media, we're doing our best'	81:43
Lye, Jane. FoI and public interest litigation	83:74
Mullaly, Jenny. FoI in Victoria: a right of access under siege	79:13
Paterson, Moira. Victoria's new FoI Bill: some long overdue reforms but still room for improvement	84:90
Seaman, Bob. FoI, the Crimes Act and Yes, Minister	79:5
Snell, Rick. Book Review. Freedom of Information Law in Ireland	80:21
Snell, Rick. Book Review: Open Government: Freedom of Information and Privacy	80:18

Snell, Rick. Researching FoI on the web	79:22
Tyson, Nicole. Freedom of information in South Australia 1991–1999	82:58
Walker, Paula. The Western Australian FoI experience 1996–1998 — any lessons for reform?	79:7
Wheeler, Chris. Public sector compliance with FoI in New South Wales	81:38

Recent Developments

Australia, South Africa, United Kingdom	80:23
FoI Conference: an outsider's perspective	83:88
Freedom of Information (Amendment) Act 1999 (Vic.)	81:56
Queensland, Western Australia and the Commonwealth	84:109