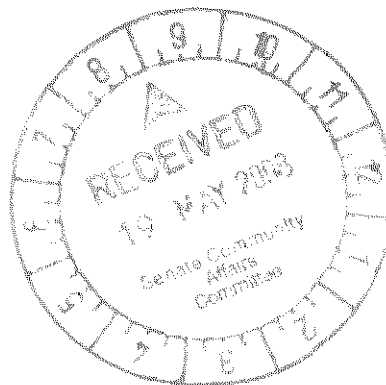


Law Council
OF AUSTRALIA

Committee Secretary
Senate Standing Committee on Community Affairs
The Senate
Parliament House
CANBERRA ACT 2600



Dear Mr Humphreys,

On 29 April 2008, the Law Council of Australia appeared at the Senate Standing Committee of Community Affairs' public hearings into the Review of the *Families, Housing, Community Services and Indigenous Affairs and other Legislation Amendment (Emergency Response Consolidation) Bill 2008*.

During questioning of the Law Council's representatives, Senator Siewert requested that the Law Council provide copies of documents referred to in paragraph 30 of its submission, which were produced by the Department of Housing, Families, Community Services and Indigenous Affairs under the *Freedom of Information Act 1982 (Cth)*.

The requested documents are **enclosed**, with schedules of all documents released or to which access was refused by the Department. Please note that this request was handled by the Department in two parts and accordingly there are two schedules relating to 2 separate decisions. As the release of most documents falling within the request was refused at first instance, the schedules relate to the subsequent decisions made following internal review of the primary decisions.

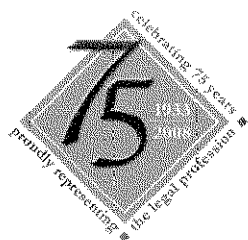
Please note that no report was produced by the department, reporting on its consultations undertaken during the 2007 review of the NT Aboriginal lands permit system. However, a Ministerial Minute was prepared summarising consultations. It is suggested that this document will be most useful to Senators on the Committee and it has been placed on top of the documents provided under this letter, for ease of reference.

Please do not hesitate to contact me on (02) 6246 3733 if there are any queries regarding the documents or the Law Council's submissions to this inquiry.

Yours sincerely

Nick Parmeter
Policy Lawyer

9 May 2008



GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au



Australian Government

**Department of Families, Community Services
and Indigenous Affairs**

Box 7788 Canberra Mail Centre ACT 2610
Telephone 1300 653 227
TTY 1800 260 402
Facsimile 02 6121 4512
E-mail david.fintan@facsia.gov.au
www.facsia.gov.au

Mr Nick Parmeter
Law Council of Australia
GPO Box 1989
CANBERRA ACT 2601
By fax 02 6248 0639

Dear Mr Parmeter

FREEDOM OF INFORMATION (FOI) REQUEST – INTERNAL REVIEW

I refer to your letter dated 21 September 2007 requesting internal review of a decision dated 18 September 2007 to not release certain documents under the *Freedom of Information Act 1982 (FOI Act)*.

Request for internal review

I understand your request for internal review is confined to the part of the decision that involved exempting 42 documents in full from release pursuant to section 41 of the FOI Act.

In requesting internal review you have stated (see letter of 21 September 2007):

The Law Council is not interested in the identification of individuals who made submissions to the inquiry, or third parties who may be identified using information contained in those submissions. The purpose of the Law Council's request is to ascertain all substantive matters that were submitted to the inquiry, such as whether a particular submission supported the measures proposed in the FaCSIA discussion paper and, if so, which option(s) it favoured.

The Law Council notes the examples of 'personal information' listed in paragraph 12.2.8 of the 'Freedom of Information Guidelines' [footnote omitted] and the factors for consideration of the test for unreasonableness listed at paragraph 12.4.4. The Law Council is highly sceptical that 42 out of 95 submissions to a public inquiry consist entirely of information which is personal in nature, or that it is not possible to excise personal information from information which is commonplace and factual and responds to the terms of reference of the inquiry.

Decision

Attached is a Schedule that sets out the decision I have made in relation to your request for internal review.

In summary, after considering your request for internal review, the relevant documentation and consultations undertaken with affected third parties, I have decided to:

- release in full those documents identified in the final column of the Schedule as 'Release' (including eight documents that were previously withheld pursuant to the first decision);
- release in part those documents identified in the final two columns of the Schedule as 'Partial release' and exempt under section 41 of the FOI Act (including 31 documents that were previously withheld pursuant to the first decision). I have removed exempt parts of these documents under section 22 of the FOI Act; and
- release in part the document identified in the final two columns of the Schedule as 'Partial release' and exempt under section 45 of the FOI Act. I have removed the exempt part of this document under section 22 of the FOI Act.

In addition, there are two documents (numbered 91 and 92 in the Schedule) that were mistakenly listed in the Schedule for the first decision of 18 September 2007, but which clearly are not submissions received by the Commonwealth in relation to the permits system review, and therefore do not fall within category of documents that you agreed should be considered first as part of a staged decision-making process.

Since these documents are internal departmental documents, and hence may be exempt on grounds other than section 41 of the FOI Act (for example, under section 36 of the FOI Act), I propose that it would be appropriate for the release of these documents to be considered as part of the internal review of the second category of documents in the staged decision-making process.

Legislation

The following parts of the FOI Act are relevant to this internal review decision:

22 Deletion of exempt matter or irrelevant material

- (1) Where:
 - (a) an agency or Minister decides:
 - (i) not to grant a request for access to a document on the ground that it is an exempt document; or
 - (ii) that to grant a request for access to a document would disclose information that would reasonably be regarded as irrelevant to that request; and
 - (b) it is possible for the agency or Minister to make a copy of the document with such deletions that the copy:
 - (i) would not be an exempt document; and
 - (ii) would not disclose such information; and

- (c) it is reasonably practicable for the agency or Minister, having regard to the nature and extent of the work involved in deciding on and making those deletions and the resources available for that work, to make such a copy;

the agency or Minister shall, unless it is apparent from the request or as a result of consultation by the agency or Minister with the applicant, that the applicant would not wish to have access to such a copy, make, and grant access to, such a copy.

- (2) Where access is granted to a copy of a document in accordance with subsection (1):
 - (a) the applicant must be informed:
 - (i) that it is such a copy; and
 - (ii) of the ground for the deletions; and
 - (iii) if any matter deleted is exempt matter because of a provision of this Act—that the matter deleted is exempt matter because of that provision; and
 - (b) section 26 does not apply to the decision that the applicant is not entitled to access to the whole of the document unless the applicant requests the agency or Minister to furnish to him or her a notice in writing in accordance with that section.

...

27A Procedure on request in respect of documents containing personal information

(1AA) This section applies if:

- (a) a request is received by an agency or Minister in respect of a document containing personal information about a person (including a person who has died); and
- (b) it appears to:
 - (i) the officer or Minister dealing with the request; or
 - (ii) a person (the reviewer) reviewing under section 54 a decision refusing the request;

that the person referred to in paragraph (a) or, if that person has died, the legal personal representative of that person, might reasonably wish to contend that the document, so far as it contains that information, is an exempt document under section 41.

- (1) A decision to grant access under this Act to the document or an edited copy of the document, so far as it contains that information, must not be made unless, where it is reasonably practicable to do so having regard to all the circumstances (including the application of subsections 15(5) and (6)):
 - (a) the agency or Minister has given to the person or the legal personal representative of the person, as the case may be, a reasonable opportunity of making submissions in support of a contention that the document or edited copy, so far as it contains that information, is an exempt document under section 41; and

- (b) the person making the decision has had regard to any submissions so made.
- (1A) In determining, for the purposes of subsection (1AA), whether a person might reasonably wish to contend that a document, so far as it contains personal information, is an exempt document under section 41, the officer, Minister or reviewer, as the case requires, must have regard to the following matters:
- (a) the extent to which the personal information is well known;
 - (b) whether the person to whom the personal information relates is known to be associated with the matters dealt with in the document;
 - (c) the availability of the personal information from publicly accessible sources;
 - (d) such other matters as the officer, Minister or reviewer, as the case requires, considers relevant.
- (2) Where, after any submissions have been made in accordance with subsection (1), a decision is made that the document or edited copy, so far as it contains the information referred to in paragraph (1)(a), is not an exempt document under section 41:
- (a) the agency or Minister shall cause notice in writing of the decision to be given to the person who made the submissions, as well as to the person who made the request; and
 - (b) access shall not be given to the document or edited copy, so far as it contains the information referred to in paragraph (1)(a), unless:
 - (i) the time for an application to the Tribunal in accordance with section 59A by the person who made the submissions has expired and such an application (other than an application that has subsequently been withdrawn) has not been made; or
 - (ia) such an application has been made but the Tribunal has dismissed the application under section 42A of the Administrative Appeals Tribunal Act 1975; or
 - (ii) such an application has been made and the Tribunal has confirmed the decision.
- (3) Nothing in paragraph (2)(b) prevents access being given to a document of a kind referred to in that paragraph if a further request has been made for access to the document and there is no failure to comply with this section in dealing with the further request.

41 Documents affecting personal privacy

- (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) Subject to subsection (3), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

...

Reasons for Decision

Section 22

The FOI Act provides for a number of exemptions. Under section 22 of the FOI Act, a decision-maker is permitted to delete material from documents containing matter that would otherwise render the document exempt in full. Accordingly, the information that is considered irrelevant, or exempt under section 41 of the FOI Act, has been deleted from the documents the subject of this internal review decision under section 22 of the FOI Act.

Section 41

Section 41 of the FOI Act provides that a document is exempt if its disclosure would result in the unreasonable disclosure of personal information about any individual person (including a deceased person).

For this exemption to apply, it is necessary to establish:

- first, that the documents contain personal information; and
- secondly, that disclosure would be unreasonable.

In relation to the first limb of the test, I find that the documents identified in the Schedule as being exempt in part under section 41 of the FOI Act contain personal information, being information that will allow individuals to be identified.

I note that this includes information that does not directly identify individuals by name, but which otherwise would enable one or more individuals to which the information relates to be identified.

In relation to the second limb of the test, I have had regard to the following factors in considering whether disclosure of these documents (or, at least the parts of the documents that contain personal information) would be unreasonable:

- the stated object of section 3 of the FOI Act to facilitate and promote the disclosure of information;
- whether there would be an unreasonable invasion of the privacy of the individuals concerned;
- the serious consequences for the individuals that may arise from disclosure of the personal information;
- the currency of the information;
- the relevance of the information to the affairs of government;
- representations (if any) made by the individuals to whom the personal information in the documents relates; and
- the statement in your letter of 21 September 2007 that you are 'not interested in the identification of individuals who made submissions to the

inquiry, or third parties who may be identified using information contained in those submissions', but rather 'substantive matters that were submitted to the inquiry'.

I am satisfied that it would be unreasonable to disclose the documents, to the extent that they contain personal information, because it would constitute an undesirable and unnecessary invasion of the individuals' privacy and that serious consequences for the individuals may arise in relation to such disclosure, particularly given the sensitive nature of the information contained in the documents.

I am also satisfied that these factors are sufficient to outweigh the stated object of section 3 of the FOI Act to facilitate and promote the disclosure of information.

Based on the above, I am satisfied that disclosure of the parts of the documents containing personal information would be unreasonable in the circumstances within the meaning of subsection 41(1), and therefore should be removed pursuant to section 22 of the FOI Act.

I note in relation to the eight documents that I have decided to release in full, but which were previously withheld pursuant to the first decision on the grounds of exemption under section 41 of the FOI Act, that I have decided to release these documents in full because:

- the author(s) of the document has(have) expressly consented to the release of the document in full; or
- I am satisfied that the document does not contain person information; or
- I am satisfied that it would not be unreasonable to disclose the personal information because of the circumstances in which it was provided to the Commonwealth.

Section 45

In relation to the document identified in the Schedule as being partially exempt under section 45 of the FOI Act, I affirm the part of the decision of 18 September 2007 relating to that document, for the same reasons as set out in that decision.

RIGHTS OF REVIEW

Administrative Appeals Tribunal

If you disagree with my decision on internal review, you have the right to apply to the Administrative Appeals Tribunal (**AAT**) for a review of this decision within 60 days of the date when notice of this decision is given to you. The AAT is a completely independent review body with the power to make a fresh decision.

The address of the AAT is:

The Deputy Registrar
Administrative Appeals Tribunal
PO Box 9955
ADELAIDE SA 5001
Telephone: (08) 8201 0600

The AAT has a help desk from which you can obtain assistance. Your application should be accompanied by the relevant application fee which may be refunded in some instances and may be waived where payment would result in financial hardship to you. Further information is available from the AAT.

Complaints to the Commonwealth Ombudsman

Section 57 of the FOI Act provides that a person may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the Act.

A complaint to the Ombudsman may be made orally, or in writing, and should be directed to the following address:

Commonwealth Ombudsman
Level 5, 50 Grenfell Street
ADELAIDE SA 5000
Telephone: 1300 362 072
Facsimile: 08 8226 8618
Email: ombudsman@ombudsman.gov.au

There is no particular form required to make a request to the Ombudsman. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to your request should be investigated.

An applicant cannot seek concurrent review by the AAT and the Ombudsman of the same decision. The time limit on applications for review by the AAT is suspended while the Ombudsman is investigating the same matter.

If you have any enquiries regarding this decision, please do not hesitate to contact me on the number below.

Yours sincerely



Mr David Fintan
Deputy Branch Manager (Indigenous)
Legal Services Branch

26 October 2007

Telephone: (02) 6121 4512