

Information Commissioner

QUEENSLAND

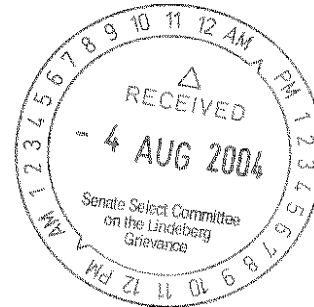
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GJS:MT

Your ref:
Our ref:

2 August 2004

Mr Alistair Sands
Secretary
Senate Select Committee on the Lindeberg Grievance
Parliament House
CANBERRA ACT 2600



Dear Sir,

1. I refer to your letter dated 29 June 2004, forwarding a copy of Mr Lindeberg's written submission to the Senate Select Committee.
2. In that submission, Mr Lindeberg has made adverse comments about the Office of the Information Commissioner Queensland (the OIC), and about me personally.
3. I have performed the duties of Deputy Information Commissioner since 10 November 1992. In that capacity, I am responsible for the day-to-day management and supervision of the performance of the Information Commissioner's review functions under Part 5 of the *Freedom of Information Act 1992 Qld* (the FOI Act), subject to the direction of the Information Commissioner.
4. Mr Lindeberg has taken the opportunity, under the cloak of Parliamentary privilege, to attack the professional competence and/or integrity of several people, beyond those whose conduct he is entitled to address within the Senate Committee's terms of reference. I submit that the Senate Committee should not indulge Mr Lindeberg in this regard.
5. Having regard to the Senate Committee's terms of reference, there is simply no justification for any adverse comment to have been made at all about the OIC, myself, or any member of staff of the OIC. None of us gave evidence to, or were otherwise involved in, any of the Senate Committee proceedings identified in paragraph (a) of the terms of reference, and hence could not have been involved in giving false or misleading evidence in those Senate Committee proceedings.
6. With respect to paragraph (b) of the terms of reference, none of us has been involved in taking any action detrimental to the protection of children from abuse, or detrimental to the protection of whistleblowers. None of us has been involved in the destruction by government of information which should be available in the public interest. The only respect in which it could conceivably be suggested that any of us has been involved in the concealment by

government of information which should be available in the public interest, is where we have been obliged by the terms of the FOI Act, to make findings that information was exempt from disclosure under the FOI Act pursuant to exemption provisions which contain no public interest balancing test (see paragraph 22 below). Such findings were required by the proper application of the law as enacted by the Queensland Parliament.

The functions of the OIC

7. The Information Commissioner (Qld) is a specialist tribunal, established under Part 5 of the FOI Act. A person who is dissatisfied with a decision made by an agency or Minister under the FOI Act, that falls within the categories of decisions prescribed in s.71 of the FOI Act, is entitled to seek independent review by the Information Commissioner of the merits of the relevant decision.
8. The Information Commissioner performs the same function in the context of the Queensland FOI Act as the Commonwealth Administrative Appeals Tribunal (AAT) performs in the context of the *Freedom of Information Act 1982* Cth. Like the Commonwealth AAT (and indeed most Australian courts and tribunals), the Information Commissioner aims to resolve as many cases as possible by mediation/negotiation/conciliation with the parties to a review (roughly 80% of cases are resolved in that way), rather than by formal adjudication. Even when a case cannot be entirely resolved by mediation/negotiation/conciliation, the process usually results in a significant narrowing of the issues which must be determined by formal adjudication.
9. If it appears likely that a case will need to proceed to formal adjudication, the parties are given the opportunity to lodge written submissions and evidence in support of their respective cases. The submissions and evidence are exchanged with an opportunity given for final replies. (Often the exchange of evidence and submissions opens up further opportunities for negotiated concessions from the parties.) An oral hearing could be convened if considered necessary to resolve conflicts of evidence as to material facts. The Information Commissioner (or his delegate) gives a written decision making findings as to the correct application of relevant provisions of the FOI Act to the issues still outstanding between the parties: see. s.89 of the FOI Act.
10. That decision substitutes for the decision of the agency or Minister that was under review, and is effectively binding on the parties (subject to the availability of judicial review by the Supreme Court for legal error). The more significant decisions of the Information Commissioner in terms of precedent value are published on the Information Commissioner's website (www.infocomm.qld.gov.au), and in the Queensland Administrative Reports (QARs).

Mr Lindeberg's comments about the OIC

11. I will briefly respond to the issue raised by Mr Lindeberg in his submission at p.66, last full paragraph, through to the first full paragraph on p.67, and continued at p.72, third last paragraph, through to p.73, fifth paragraph.

12. In the first paragraph on p.73 of his submission, Mr Lindeberg has quoted only one segment of the relevant parts of my letter to him dated 21 November 1994. The relevant parts stated:

The Department of Administrative Services (the Department) has now agreed to grant you access to the following material:

- *letter from the Crown Solicitor to the Acting Secretary to Cabinet dated 16 February 1990;*
- *letter from the Acting Secretary to Cabinet to the State Archivist dated 23 February 1990;*
- *internal memorandum dated 23 February 1990; and*
- *internal memorandum dated 30 May 1990.*

I have authorised the Department to release to you the matter identified above. Would you kindly contact Ms S E C Byrne of the Department, on telephone 224 4884, to make the relevant arrangements.

Disclosure of the above material will mean that all matter claimed to be exempt in the decision under review has (eventually) been disclosed to you. Accordingly, no issues remain to be determined under Part 5 of the FOI Act, and I will now close my file in this matter.

13. It is true that Mr Lindeberg had supplied what he asserted to be *prima facie* evidence of a conspiracy to pervert the course of justice, which in his view disentitled the Crown Solicitor's advice from attracting legal professional privilege. However, ongoing negotiations by my staff with the Department of Administrative Services had resulted in that Department agreeing to give access, under the FOI Act, to all outstanding documents. The Information Commissioner had therefore not been required to consider and rule on the Department's claims for exemption under s.43(1) of the FOI Act (the legal professional privilege exemption) in the face of Mr Lindeberg's contention that there was sufficient *prima facie* evidence of an illegal or improper purpose to disqualify the documents from attracting legal professional privilege.
14. My letter to Mr Lindeberg made it clear that the Department had agreed to give him access to the specified documents. Mr Lindeberg was given no decision by the Information Commissioner under s.89 of the FOI Act making findings on the competing claims as to whether or not the documents were subject to legal professional privilege.
15. Yet Mr Lindeberg persists in saying that he was entitled to assert that the Information Commissioner had considered and upheld his claims that the 'illegal or improper purpose' exception disqualified the document from attracting legal professional privilege.

16. On 22 November 1994, Mr Lindeberg made a fresh application to the Information Commissioner for review of a decision by the Department of Justice and Attorney-General refusing him access to documents under s.43(1) of the FOI Act. In the second last paragraph of that application, Mr Lindeberg said:

As you have already accepted that I have provided sufficient "prima facie evidence" of the offence of obstructing justice by releasing exempt material in my Administrative Services Department application...

17. In a letter to Mr Lindeberg dated 29 November 1994 acknowledging receipt of the application for review, the Information Commissioner said:

The opening words of the penultimate paragraph of your letter dated 22 November 1994 are not correct. The Information Commissioner has not accepted that you have provided sufficient "prima facie evidence" of the offence of obstructing justice. The Information Commissioner has not said or written anything to that effect, or indeed formed any opinion to that effect. I caution you against making any representation to that effect in your dealings with others. Your previous application for review was resolved by negotiation, with the respondent agreeing to exercise the discretion which an agency possesses under the FOI Act to release a document notwithstanding that it might technically be an exempt document. No formal findings were made by the Information Commissioner.

18. Some two months later on 20 January 1995, Mr Michael Barnes of the Criminal Justice Commission (the CJC) wrote to me saying that the Queensland Police Service had referred to the CJC a complaint alleging that the destruction of the "Heiner Inquiry documents" involved a conspiracy to pervert the course of justice. In a letter to the Queensland Police Service dated 22 November 1994, Mr Lindeberg had said:

This recently released evidence together with the independent decision of the Deputy Information Commissioner to release it on the basis of the allegation that a conspiracy to pervert the course of justice had been committed, fully supports the contents in my [prior complaints to the Queensland Police Service]...

19. To enable him to assess Mr Lindeberg's complaint, Mr Barnes asked for details of any decision I had made to disclose the Crown Solicitor's advice on the basis alleged by Mr Lindeberg.
20. At that stage, I was not authorised by the Information Commissioner to make decisions under s.89 of the FOI Act. If the Information Commissioner had given a decision under s.89 of the FOI Act in the terms stated by Mr Lindeberg, Mr Barnes would have been entitled to obtain a copy. I considered it proper to correct Mr Lindeberg's misrepresentation as to the manner in which his earlier application for review by the Information Commissioner had been resolved. I wrote to Mr Barnes explaining that the earlier application for review had been resolved through concessions made by the respondent agency, and quoting the same passages quoted at paragraphs 16 and 17 above.

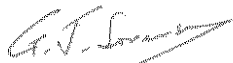
21. That correspondence, and a preceding courtesy call from Mr Barnes to inform me of the letter he was forwarding, was my only contact with any officer of the CJC in relation to any application for review under Part 5 of the FOI Act lodged by Mr Lindeberg, prior to his lodgment in December 1998 of an application seeking review of a decision made by the CJC itself.
22. Mr Lindeberg's comments in the first two full paragraphs on p.74 of his submission refer to the Information Commissioner's reasons for decision in *Re Lindeberg and Department of Families, Youth & Community Care* (1997) 4 QAR 14 at paragraphs 12-14 and 25. The correct way for Mr Lindeberg to test his contention that the Information Commissioner had incorrectly interpreted s.36(1) and s.37(1) of the FOI Act was to commence judicial review proceedings in the Supreme Court of Queensland. It is pointless to ventilate the issue before the Senate Select Committee.
23. In the second last paragraph on p.74 of his submission, Mr Lindeberg makes the totally unsupported assertions that former Information Commissioner Albietz and myself have helped "colour and clothe" the allegedly false and misleading evidence provided by the Queensland Government and CJC to the Senate in some form of respectability or acceptability, and that our "hands are far from clean".
24. There is not a shred of evidence anywhere in his submission to support that gratuitous slur, nor the similar gratuitous slur in the last paragraph on p.14 of Mr Lindeberg's submission.
25. Similarly, on p.3 of his written submission to the Senate Committee, Mr Alastair MacAdam has included the Information Commissioner in a list of Queensland government bodies which he alleges have failed to do their duty in a fair and impartial manner. Mr MacAdam provides no particulars, and no supporting evidence, to back his gratuitous slur.
26. The function of the OIC is to resolve disputes between citizens and government agencies over access to documents, or amendment of information, under the FOI Act (preferably by informal mediation/negotiation/conciliation, and failing that, by formal adjudication). Of the three applications for review by the Information Commissioner lodged by Mr Lindeberg prior to December 1998, one was resolved by a decision (cited at paragraph 22 above) which dealt with a few outstanding documents, after the vast majority of the documents in issue were disclosed by the respondent agency during the course of the review, as explained at paragraphs 7-9 of the Information Commissioner's decision. The other two were entirely resolved by negotiated concessions, i.e., Mr Lindeberg agreed not to pursue access to certain information, and the relevant government agencies ultimately agreed to give Mr Lindeberg access to the rest of the information in issue. In accordance with s.76(2) of the FOI Act, copies of documents in issue obtained by staff of the Information Commissioner for reference during the review process were returned to the respondent agency at the completion of each review. None of the cases even proceeded to the point where the respondent agency lodged written submissions and/or evidence to establish its claims for exemption under s.43(1) of the FOI Act, in the face of Mr Lindeberg's contentions as to illegal/improper purpose. The Information Commissioner was not required to consider and rule on Mr Lindeberg's contentions that certain documents could not attract legal professional privilege on account of the 'illegal, improper purpose' exception.

27. The Information Commissioner was certainly not required to consider whether or not the interpretation by the Crown Solicitor of s.129 and s.119 of the *Criminal Code* was correct or not. Legal advice is not disqualified from attracting legal professional privilege merely because it might be incorrect. Depending on the nature of any case put forward to establish the 'illegal or improper purpose' exception to legal professional privilege, it could in theory become relevant to examine the correctness of the legal advice as an aspect of the 'illegal/improper' purpose issue. However, as I have already explained, the Information Commissioner was not required to consider and determine any such issue, because the relevant agencies agreed to disclose all documents remaining in issue that had previously been claimed to be subject to legal professional privilege.
28. The January 1997 advice by the Director of Public Prosecutions was not seen by any member of staff of the OIC until a copy was obtained during the course of a review initiated by Mr Lindeberg in August 2003. That review was recently resolved by a decision of Assistant Information Commissioner Moss which upheld agency claims that the DPP's advice was exempt from disclosure to Mr Lindeberg under s.36(1) of the FOI Act (the Cabinet exemption), as a document that had been submitted to Cabinet and forms part of an official record of Cabinet.

Conclusion

29. In closing, I urge the Senate Committee to curb Mr Lindeberg if he seeks to extend, beyond the Senate Committee's terms of reference, his attacks on people he believes have done the wrong thing by him.
30. In case the Senate Committee wishes to examine them, I have forwarded copies of the decisions referred to at paragraphs 22 and 28 above.
31. I do not wish to be a witness at the Senate Committee's hearings.

Yours faithfully



G J SORENSEN

DEPUTY INFORMATION COMMISSIONER

Encl.