Your Ref: CYS:RJB:28177
Our Ref: 210798

19 March 2009

Richard Bradfield
deVere Lawyers
PO Box 24
SANCTUARY COVE QLD 4212

By fax: (07) 5577 8864

Dear Mr Bradfield

External review of decision under the *Freedom of Information Act 1992*

I refer to the email correspondence dated 9 March 2009 from de Vere Lawyers (**de Vere**) seeking external review in respect of the Whitsunday Regional Council's (**Council**) decision regarding your freedom of information application dated 20 April 2008.

The purpose of this letter is to inform you of my decision, under section 77(1)(a) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**), not to deal with this external review application on the basis that it is 'lacking substance'.

The relevant background to this matter is as follows:

a) On 26 May 2008 de Vere lodged a freedom of information application (**FOI Application**) with Whitsunday Regional Council (**Council**) seeking access to a range of documents concerning the development of the Yacht Club and Qualia Resort on Hamilton Island.

b) For the next two months de Vere and Council negotiated the potential scope of the FOI Application reaching an agreed position on 31 July 2008.

c) On 7 August 2008 Council wrote to de Vere seeking an extension of time to 6 September 2008 in which to process the application. You agreed to an extension of time to 2 September 2008.

d) In a decision dated 2 September 2008 (**Original Decision**), Ms Carol Clifton, Freedom of Information decision maker for Council decided to release documents responding to the FOI Application once the $281 charge had been paid.

e) By correspondence dated 20 October 2008 de Vere sought internal review of the Original Decision (**Internal Review Application**) contending that Council had not provided a 'significant number' of relevant documents responding to the FOI Application.

f) Council accepted[1] the Internal Review Application on 22 October 2008 and indicated the due date for the internal review decision was 19 November 2008.

[1] Under section 52(2)(c) of the FOI Act an application for internal review must be lodged with the relevant agency of the Minister within 28 days after the day on which written notice of the

g) Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision. Accordingly, as you were not notified of Council's decision within the statutory time-frame, Council's principal officer was taken to have affirmed the Original Decision.

h) By correspondence dated 5 February 2008 Council notified de Vere of its decision to release copies of 1054 folios[2] once the amount of $1352.55 had been paid. The documents were provided to de Vere on or about 25 February 2009.

i) On 5 March 2009 de Vere sought an extension of time in which to potentially lodge an external review application.

j) On 6 March 2009 a staff member of the Office explained that the Information Commissioner would assess whether to extend the time to apply for external review only once the application had been received.

k) On 9 March 2009 de Vere lodged an application for external review (**External Review Application**). This application was lodged within the statutory time-frame of 28 days specified in section 73(1)(d) of the FOI Act.

Relevant law

Section 77(1)(a) of the FOI Act

Section 77(1)(a) of the FOI Act states:

> ***77 Commissioner may decide not to review***
>
> *(1) The commissioner may decide not to deal with, or not to further deal with, all or part of an application for review if—*
>
> *(a) the commissioner is satisfied the application, or the part of the application, is frivolous, vexatious, misconceived or lacking substance;*

'Lacking substance'

The expression 'lacking substance' in section 77(1)(a) of the FOI Act is not defined in the Act. However, the expression frivolous, vexatious, misconceived or lacking in substance appears in various pieces of Australian legislation and the meaning of the individual terms in this sequence has been considered in a number of cases in various jurisdictions.[3]

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decision was given to the applicant. The same sub-section provides for the agency or the Minister to allow further time for lodgement.

[2] Some folios consist of A3-size pages which for copy purposes are counted as 2 A4-size pages.

[3] See for example *Langley v Niland* (1981) 2 NSWLR 104; *Zouk v Owners Corporation of Strata Plan and Anor* [2005] NSWSC 845; *Cocks Macnish v Biundo* [2004] WASCA 194; *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 (*SECV*); *Assal v Department of Health Housing and Community Services* (1992) EOC 92-409 (***Assal***).

In *Cocks Macnish*, Jenkins J observed that tests for whether a matter is 'lacking in substance' have been differently formulated by the Federal Court and the Victorian Court of Appeal. Whilst expressing a preference, in the context of the matter before him, for the test formulated by Ormiston JA in *SECV*, his Honour indicated nonetheless, that the distinction between the two tests is subtle and that different outcomes could be anticipated in only exceptional cases.[4] Though, I note that in *Assal v Department of Health Housing and Community Services*,[5] Sir Ronald Wilson cautioned that '*it is unwise to postulate any rules intended to guide the exercise of the power in question. That exercise must be governed by the words of the statute itself in the context of the particular circumstances of the case*.'

In *Ebber and Another v Human Rights and Equal Opportunity Commission and Others*,[6] Drummond J, of the Federal Court found (in respect of a provision similar to section 77(1)(a) of the FOI Act though in the context of anti-discrimination legislation) that:

> *A complainant must … have at the outset of the inquiry into his complaint sufficient material … to show that he has* ***more than a remote possibility of a well-founded claim****, if he is to defeat an application for the summary dismissal of the case that can be made at the start of the inquiry.* [my emphasis]

Also in the context of anti-discrimination legislation, Ormiston JA found in *SECV*, a decision of the Victorian Court of Appeal, that a complaint is lacking in substance if the complainant has '*no arguable case*'.[7] In that decision, His Honour cited *Dey v Victorian Railways Commissioners*[8] where Dixon J stated:

> *Prima facie every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals, and the inherent jurisdiction of the Court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious in point of law will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed.*

In line with Dixon J's observations, Ormiston JA went on to state that:

> *In the absence of a proper hearing at which the complainant has an opportunity to call all relevant evidence there can be no satisfactory way of determining that a complaint should be dismissed at a preliminary stage, unless it can be demonstrated, either from the materials by which the complainant has instituted the claim or by reference to facts which would undoubtedly deny the complainant relief, that the complaint is so hopeless that it should be summarily brought to an end … [w]hatever test may be acceptable at other stages of the administrative process or during the conduct of an ordinary tribunal hearing, a complaint cannot be dismissed under s. 44c or its successor unless it is clear beyond doubt that the complaint is lacking in substance, that is, that the complainant has* ***no arguable case*** *which should be allowed to be resolved at a full hearing.* [my emphasis]

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[4] At paragraph 30, citing *Legal Services Commissioner v Ball* [2001] NSWADT 86 at paragraph 27.
[5] (1992) EOC 92-409, 78.
[6] (1995) 129 ALR 455.
[7] At 110.
[8] At 91-92

In my view, the tests formulated in the above cases can provide useful guidance in determining whether a matter lacks substance for the purposes of section 77(1)(a) of the FOI Act as both anti-discrimination legislation and the FOI Act are remedial in nature. Though there must be regard to '*the words of the statute in the context of the particular circumstances of the case*'.

Application of the law

In reaching a decision in this matter I have taken into account the relevant law as set out above, de Vere's letter dated 5 March 2009 and the External Review Application (including its attachments).

I note that de Vere initially sought an extension of time on 5 March 2009 on the basis that:

- de Vere were instructing Counsel in the matter
- Counsel was unable to form a view as to whether it was necessary for de Vere to seek external review because of the large number of documents involved, that the documents were received on 25 February 2009 and Counsel's competing trial dates for March 2009.

This position is re-iterated in the External Review Application where de Vere state:

> *…counsel has been unable to review the documents to ascertain whether or not an external review application is required, and will not be able to do so comprehensively until mid to late April 2009.*

On the basis of the above, I conclude that:

- de Vere indicate that they are instructing counsel in this matter and counsel has not been able to determine whether an external review is required
- de Vere are therefore unable at the present time to identify any basis on which the Information Commissioner could investigate and review Council's decision
- in this matter there is no basis whatsoever on which an external review can be progressed at this time
- at the present time de Vere has no arguable case and cannot establish that it has more than a remote possibility of a well-founded claim, in this external review.

Accordingly, under section 77(1)(a) of the FOI Act, I have decided not to deal with the External Review Application on the basis that I am satisfied it is 'lacking substance'. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Future lodgement

My decision in this matter does not preclude de Vere from applying for external review in relation to the FOI Application at a future date. However, any future application will be lodged outside of the 28 day timeframe in section 73(1)(d) of the FOI Act.

Section 73(1)(d) of the FOI provides for the Information Commissioner to allow a longer period within which to lodge an application for external review. In *Young and Workers' Compensation Board of Queensland*[9], the Information Commissioner

[9] (1994) 1 QAR 543.

indicated that the following principles are relevant in determining whether to exercise the discretion to extend time for lodging an application for external review:

(a) *the extent of the delay in applying for review and whether the applicant has an acceptable explanation for the delay*

(b) *the balance of fairness, having regard to any prejudice the applicant would suffer by a refusal to grant an extension of time, compared with any substantial prejudice the respondent or third parties would suffer if the extension of time was granted*

(c) *the merits of the substantive application for review: i.e., whether it raises genuine issues and discloses a reasonably arguable case, with reasonable prospects of success, in respect of one or more of the documents in issue; or whether it would be futile to permit the application to proceed because it is apparent that the applicant lacks any grounds of substance for challenging the decision under review and has no reasonable prospects of success.*

Accordingly, if de Vere subsequently decides to lodge an application for external review, de Vere would need to provide a submission addressing the above issues with the application.

If you have any questions or require further information you can contact the Office by writing to the above address, emailing administration@oic.qld.gov.au, faxing 07 3005 7150 or telephoning 07 3005 7155.

Yours sincerely

Acting Assistant Commissioner Jefferies