



15 May 2009

foiconsultation@pmc.gov.au

Assistant Secretary
Privacy and Freedom of Information Policy Branch
Department of Prime Minister and Cabinet
P O Box 6500
Canberra ACT 2600

Comments on the Freedom of Information Amendment (Reform) Bill 2009

Submitted by the New Zealand Food Safety Authority

Introduction

The New Zealand Food Safety Authority (NZFSA) appreciates the opportunity to comment on the above Bill.

NZFSA is the lead New Zealand agency in the Australia and New Zealand joint food standards setting system and in that capacity, creates and disseminates documents to Australian Commonwealth agencies including Food Standards Australia New Zealand, the Department of Health and Ageing (including the Food Regulation Secretariat), and the Department of Fisheries and Forestry. NZFSA is also the recipient of documents created by the above Australian agencies (and State agencies responsible for food regulation matters), as well as the Australia and New Zealand Food Regulation Ministerial Council.

While the Bill relates predominantly to information about, generated within, and held by Australian agencies; information and documents created by NZFSA also fall within scope of Freedom of Information Act (FOI) requests received by Australian agencies. Further, as a party to the joint food standards setting system, NZFSA (as agent of the New Zealand Government), has a keen interest in matters going both to the availability, and in some instances the confidentiality, of documents generated within that system.

In light of the above, the comments set out below focus on those clauses of the exposure draft that have potential implications for NZFSA as a contributor to the body of information to which FOI requests may relate, and as the recipient of requests for such information under New Zealand's official information legislation, the Official Information Act (OIA).

Exempt Documents

It is noted that the exposure draft retains s.33 of the FOI (Exempt Documents), which covers (inter alia) documents affecting international relations, namely where disclosure of the same would, or could reasonably be expected to cause damage to the international relations of the Commonwealth, or divulge any information or matter communicated in confidence by or on behalf of a foreign government, or an authority of a foreign government to the Government of the Commonwealth or an authority of the Commonwealth.

Not infrequently, Australian entities consult NZFSA on FOI requests they have received relating to joint food standards matters and which cover documents produced by NZFSA, by the New Zealand Minister represented on the Australia and New Zealand Food Regulation Ministerial Council, or by the Council itself. S.33 provides the only FOI grounds NZFSA can rely on in the event we consider a document on which we are being consulted, should be withheld. S.33 of the FOI finds its parallel in section 6 of the OIA which sets out conclusive reasons for withholding official information, including prejudice to the international relations of the Government of New Zealand. Under the OIA, reliance on conclusive reasons does not require consideration of countervailing public interest considerations, but an agency must be able to identify with sufficient particularity that disclosure of the information would have a prejudicial effect.

Invariably, NZFSA has no issues with the release of documents. Further, documents created within the context of the joint food standards system are rarely, ab-initio, 'confidential'. They may however be communicated in confidence, or their release at a particular time may have the potential to affect relations between New Zealand and Australia as partners to the Food Treaty.

In NZFSA's view it is therefore important that an international relations ground, as set out in S.33, is retained in the FOI.

Consultation

The exposure draft includes a new provision (refer 27 on page 123) (to be inserted at the end of the existing s.15 of the FOI) for an extension of the processing period to consult with a foreign entity. The provision allows a 30 day extension to the 30 day period in which an applicant needs to be notified of a decision on a request. As a 'foreign entity' that may be consulted, NZFSA considers the 30 day extension period to be appropriate.

In respect to this provision however, it is noted that there is no reference in the exposure draft to the process or procedure for such consultation. The new s.26A sets out a 'procedure on request in respect of documents likely to affect Commonwealth-State relations' (where arrangements have been entered into between the Commonwealth and the State with regard to consultation under the section), but there is no equivalent procedure/requirement for consultation in relation to requests for documents likely to affect Commonwealth-Foreign Entity relations. As it stands, NZFSA has no issues with the consultation that occurs between Australian entities (predominantly Food Standards Australia New Zealand or the Food Regulation Secretariat (Department of Health and Ageing)) and NZFSA on FOI requests. Further, there is no formal 'arrangement' in respect to such consultation (such as is required to invoke the Australia specific s.26A); it occurs as part of the positive relationship between the Food Treaty¹ partners.

¹ Namely; the Agreement between the Government of Australia and the Government of New Zealand concerning a joint food standards system.

However, given the new s.15 provision, which specifically references consultation with a foreign entity as a ground for extending a decision on a request, a new provision that formalises the requirement for such consultation may be appropriate.

The FOI (and OIA) consultation that currently occurs between NZFSA and Australian entities is founded on good relationships and good faith. This informal arrangement works effectively in practice, but amendment to the FOI may provide an opportunity to make express that FOI requests relating to documents likely to affect Commonwealth-Foreign Entity relations should be subject to consultation with the potentially affected foreign entity. As noted above, documents produced by NZFSA, or by the Minister for Food Safety can fall within scope of FOI requests, and it continues to be very important that consultation occurs. NZFSA notes that there is no such express requirement in the OIA.

Publication of information in accessed documents

Section 11C of the exposure draft requires the agency or the Minister to publish information released under the FOI, within 10 working days of the initial requester having been given access to the information. While this is not a provision that would apply to NZFSA, we note that it is not clear if initially released documents must be published or if the information set out in those documents must be made more generally available. This could have significant consequences in terms of the amount of resource agencies need to commit to meeting the publication requirements.

It is noted that subsection 4(1) of the exposure draft defines “document of an agency” as a document “that is in possession of an agency, whether created in the agency or received in the agency”. It would appear that section 11C therefore contemplates an FOI recipient agency publishing to members of the public, a range of documents produced internally or by other Australian and/or foreign entities. NZFSA would have no issue with documents it had not opposed release of being published on the websites of Australian entities, but suggest that the publication requirement is defined to optimise its intent. On the basis of NZFSA’s OIA experience, such documents or information could include email correspondence, and other communications between and across various levels of officialdom – a proportion of which may be routine, repetitive, inconsequential (in respect to the issue to which they relate) and therefore of limited public interest. The privacy of officials may also be a relevant factor in further consideration of the publication requirement.

The release of documents created by foreign entities, where the foreign entity has opposed release, or the release of documents created in the context of joint arrangements where one party to the arrangement does not support release, is an issue that predates the development of the Bill. The publication requirement does however have the potential to heighten sensitivities in situations where release by an Australian entity is opposed by a foreign entity. While currently, disclosure of such a contested document would have been limited to the party making the request, the requirement for the same document to be published on the website of the releasing Australian entity may be of particular concern to a foreign entity that had opposed release.

New Zealand does not have the right of Australian jurisdictions to seek internal review of FOI decisions made by Australian entities. This means that in cases where New Zealand is consulted on an FOI request, and opposes release of a document or part thereof, there is no further opportunity (other than judicial review) for New Zealand to make its case.

The internal review process available to Australian entities may serve to 'iron out' situations of different views on the release of documents, and if that is the case, there may be diminished sensitivity between Australian jurisdictions at the point at which a contested document is published.

While disagreement on the withholding or release of documents is unusual in the context of the joint food standards relationship, where such a situation does arise, it is possible that the publication requirement could have an aggravating effect – particularly for New Zealand, where there has been no internal review right to exercise.

NZFSA would appreciate the opportunity to further explore this matter, if appropriate.



Carole Inkster
Director (Policy)
New Zealand Food Safety Authority

Contact details: carole.inkster@nzfsa.govt.nz
DDI: 0064 4 894 2505