

SUBMISSION BY

MEDIA, ENTERTAINMENT & ARTS ALLIANCE

TO

**DEPARTMENT OF PRIME MINISTER AND CABINET
PRIVACY AND FOI POLICY BRANCH**

ON

**DRAFT FREEDOM OF INFORMATION AMENDMENT REFORM
BILL 2009**

INFORMATION COMMISSIONER BILL 2009



The Media, Entertainment & Arts Alliance

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Executive Summary

- The Alliance welcomes the Government's proposed reforms of the Commonwealth Freedom of Information ACT 1982 (Fol Act) and the Archives Act 1983 and considers the proposals to represent significant moves in the right direction.
- The Alliance endorses the principle that access to government information should be available to the public unless such access would be contrary to the public interest. However the Alliance believes that this principle should apply to all government information rather than being restricted to specific classes of information.
- The Alliance also believes that the proposed revision of Cabinet exemptions set out in the Bill is too restrictive. In the majority of cases the Alliance believes that the notion that public scrutiny would inhibit open and frank debate to be without merit. The disclosure of Cabinet deliberations and advice to Cabinet should be subject to a public interest test as in the UK.
- Further, consideration should be given to proactively releasing Cabinet documents that pass the public interest test as soon as possible.
- The new legislation should contain some form of sanction for improperly withholding information. In the past there has been too much of a bias towards criminalising the release of information. The Alliance believes a presumption towards disclosure should carry a similar weight.
- The Alliance supports the removal of fees from the Fol process and also the provision of a five-hour period of free decision-making time for journalists.
- The Alliance also supports the establishment of an office of the Information Commissioner to oversee the release of Government information.

Submission

Re Howard and the Treasurer of Australia (1985) 7 ALD 645

The Alliance believes the public interest factors identified in *Re Howard* have been prejudicial to effective FoI administration over the years. The arguments, particularly, that public interest in disclosure would be outweighed and exemption justified because of:

1. the seniority of the person who created, annotated or considered the information;
2. the possibility that the threat of later disclosure might inhibit the “frankness and candour” of public servants’ deliberations; and
3. the possibility that the public may not readily understand any tentative or optional quality of the information.

are generally viewed as lacking any evidentiary basis. They should be discounted as irrelevant.

The arguments for viewing 2) as irrelevant are all the more powerful after the judgment of the Administrative Appeals Tribunal, whereby Deputy President Forgie rejected claims that public servants have a reasonable expectation that the documents they prepared would remain confidential.¹

Public Interest Test

The new FoI Bill sets up several categories of information which are exempt from the public interest test, including cabinet documents, documents relating to national security, defence and international relations.

The Alliance believes these blanket exemptions to be unwarranted and is of the view that the public interest test should apply to all exemption categories. If the release of any Government document poses no significant threat to the public interest, it should simply be released. The Alliance does not believe that this will have any dampening effect on full and frank decision making.

Cabinet Exemption

The Alliance particularly believes that the exemption of cabinet documents and notebooks from the FoI process is an important impediment to open and accountable government. Cabinet documents should be withheld only when their disclosure is judged to present a serious risk to the public interest. They should not be treated any different than any other Government document.

Further, the office of the Information Commissioner should set up a process whereby Cabinet documents are proactively published on a regular and timely basis.

¹ McKinnon v Dept PM & Cabinet V2005/1033

Parliament and the Governor-General

The Alliance believes the blanket exemption of administrative details of the Parliament and the Governor-General from FoI is excessive. As we have recently seen with the publication of details of MPs expenses in the UK, tax-payers have an abiding interest in how public funds are spent. The public airing of these details, which is likely to have a profound influence on the next UK general election, could only have come about after changes to Britain's FoI regime which made the Parliament subject to FoI. The Alliance urges that the administration of Parliament and the Governor-General should be subject to the FoI Act.

Security agencies

The Alliance accepts that documents and data relating to national security should be exempt from disclosure under the FoI Act. However, as taxpayer-funded bodies, the administrative functions of these agencies should be, where possible, open to scrutiny – again subject to a public interest test.

Archives Act

The Alliance supports the amendments to the Archives Act to lower the access to most government records from 30 to 20 years and to Cabinet notebooks to 30 years, however the Alliance believes that Cabinet notebooks should be in line with all other Government records at 20 years. We urge that a review of the Act should consider reducing this time limit even further.

Time Frames

The time allowed to process FoI requests should be reduced from 30 days to 14 days as recommended by the ALRC in its 2001 submission on the FoI (Open Government) Bill 2000².

Costs

The Alliance supports the decision to abolish application fees and reduce costs for applicants. Further we welcome the proposal that the first five hours of decision-making will be free for journalists.

The Alliance has been asked to define what could be considered a "journalist" for the purposes of the Act. We would urge the Department to adopt as broad a definition as possible but, for the purpose of FoI applications, the Alliance would prima facie define a journalist as someone who undertakes "journalism." This involves the researching, gathering, writing and dissemination of information, ideas and opinion

² ALRC supplementary submission on the FOI (Open Government) Bill 2000, Submission to Senate Legal and Constitutional Legislation Committee, 9 March 2001
<http://www.alrc.gov.au/submissions/ALRCsubs/2001/0309.htm>

to and for the public. In any definition developed for use under this Act, it should at the very least capture:

a) journalists working for a media organisation or under written or verbal contract to a media organisation whose purpose is to publish information for public use and,

b) freelance journalists, “bloggers” and citizen journalists whose purpose in FoI applications is to publish information in the public sphere.

The Alliance would further urge that any definition or “journalist” or “journalism” include adherence to the Media Alliance Code of Ethics which requires fair and honest dealing on the part of the journalist³.

³ The Media Alliance Code of Ethics: <http://www.alliance.org.au/code-of-ethics.html>