

Submission on FOI Reform

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Support for proposal

I would like to commence by expressing my strong support for the reforms in the exposure draft of the *Freedom of Information Amendment (Reform) Bill 2009*. They are long overdue and provide a good balance between the right of the public to information about government and the need for government efficiency and stability. The comments in this submission refer to provisions of that draft Bill, unless the contrary is indicated.

Extension to special access for academic works of national importance

The extension of the open access period so that it applies 20 years after the creation of a document, rather than 30 years, will be of great benefit to those publishing works of history, politics and the like. It is an important development that should be applauded and followed by the States.

It should be recognised, however, that academic access to documents for the purpose of writing such works is usually achieved through the *Archives Act*, rather than through freedom of information. This is because the amount of material sought is usually significant and the costs under FOI would be prohibitive.

Section 56 of the *Archives Act 1983* permits the Minister to authorize access to records that are not in the open access period in such circumstances as are permitted by the regulations. Regulation 9 of the *Archives Regulations* permits the grant of special access to Commonwealth Records under s 56 to a person carrying out research for the purpose of preparing a work for publication if the Minister has approved of the work on the ground that it is likely to make a substantial contribution to the recording and assessment of events in the political, social, economic, cultural, scientific or other development of Australia, particularly as that development relates to the administration or affairs of the Government of the Commonwealth.

This all has to be done pursuant to 'arrangements approved by the Prime Minister'. A document entitled 'Special Access Arrangements Under Sub-Section 56(2) of the Archives Act 1983' was published by the National Archives in November 1988.

There are some problems with these laws and procedures which should be addressed in tandem with the FOI reforms.

Merits review: On p 7 of the 'FOI Reform-Companion Guide' it is stated that the removal of the power to issue conclusive certificates means that 'all decisions to refuse access to documents on grounds of exemptions would be subject to full independent external merits review'. This does not appear to be the case, however, in relation to

refusals to give access to documents under s 56(2) of the *Archives Act*. As far as I am aware, there is no right to a merits review of such decisions. They should be brought under the same system as review of decisions with respect to FOI decisions.

Timing or decision-making: Another issue is timing. Section 56(5) of the *Archives Act* 1983 states that the Minister shall, at intervals of no more than 3 months, cause to be made available to the National Archives Advisory Council a statement setting out particulars of each request for special access to documents and the decision of the Minister in relation to each request. This has been read by the Commonwealth as not requiring a decision to be made within 3 months of the request, but rather requiring that decisions, if made, be reported at three monthly intervals. There does not appear to be any time limits with respect to making decisions with regard to applications.

In my case, I made an application for special access to records held by the Commonwealth Attorney-General's Department and the Department of Prime Minister and Cabinet in 2003. It took 2-3 years for the Attorney-General's Department to deal with it and 5 years for the Department of the Prime Minister and Cabinet to deal with it. An outcome was only achieved after political pressure was applied to the relevant departments. This simply goes to show that without time limits nothing will be done. While I accept that the potentially broad nature of requests made under s 56 of the *Archives Act* would demand longer time periods to identify and assess documents than under FOI, some timing discipline should also apply to applications under s 56 of the *Archives Act*.

Security clearances: A third issue is the onerous conditions on access. For example, if any of the documents requested are 'classified', such as Cabinet documents, then the person to whom they are given must have a current security clearance to the appropriate level before the documents can be made available. When I first requested documents concerning the negotiation of the *Australia Acts* 1986, I was told that I would have to get (and pay for) an ASIO security clearance. However, if the point of giving me access to the documents was for the purpose of publishing a work of national importance, then unless every reader was required to have a security clearance, there would be little point in requiring the author to have one too. Surely the point of the special access regime is to de-classify documents so that the author might write about their content in the work of national importance? (I note that the requirement that I get an ASIO clearance was later waived – although this might have been because I was not given access to classified documents anyway).

Consultation: Similarly the consultation regime under the Special Arrangements is excessive. Clause 3.13 provides that any request for special access to non-intelligence records shared with or originated by a State which is on a departmental file 'must be referred to the Secretary of the Department or to the Head of Agency to whom the record is addressed'. To start with, this condition does not make sense. It is not clear whether it is only Commonwealth public servants that are consulted, or whether it is the head of the State department or agency that is consulted if it was the recipient of the letter (but not if it sent the letter). In practice, the Commonwealth Government appears to regard this

clause as requiring consultation with States (and foreign governments) on every single document where information has been shared with or originated from the States. The consequence is that the amount of consultation involved is enormous, resulting in the rejection of applications because the consultation obligations are too onerous. They are only so onerous because the special access arrangements deliberately make them so. The system is set up to fail, presumably deliberately so.

Other governments do not indulge in such extensive consultation. Hence I was able to obtain, without any delay or difficulty, all the correspondence between the United Kingdom Government and the Commonwealth Government concerning the negotiation of the *Australia Acts* by getting it from the United Kingdom Government under its FOI legislation. I was able to obtain all the correspondence between the Commonwealth Government and the State Governments on the same subject by getting it from the State Governments under their special access regimes. I could not, however, get exactly the same material from the Commonwealth Government because of excessive consultation obligations. This is clear evidence of the Commonwealth's failure, both on an administrative and a policy basis, to meet standards of transparency and openness common in other comparable governments.

I note that in contrast, under proposed s 26A set out in the Bill, consultation with a State will only be required if it appears to the agency or Minister that the State may reasonably wish to contend that the document is conditionally exempt and its release is not in the public interest. Proposed section 47B provides that a document can only be conditionally exempt if its disclosure could reasonably be expected to cause damage to relations between the Commonwealth and a State or it would divulge information communicated in confidence. If a similar test applied in relation to special access arrangements under the *Archives Act*, the amount of consultation would be reduced making the system potentially workable. In addition, if consultation could take place with respect to classes of documents, rather than every single individual document (as is currently the case) this would also improve the efficiency of the process.

Phase-in period for open access: As the open access period is to be extended to 20 years from the date of a document's creation, but for logistical reasons is to be phased in over a period of ten years, it would be appropriate to provide (in the *Archives Regulations* or elsewhere) that where special access has been sought to documents for the purposes of publishing a work of national importance, then access should be granted immediately to all documents that are 20 years or older (without the delays involved in the phasing-in of the 20 year rule). As there are so few of these applications and these documents would have to be assessed anyway as part of the application process, this would not involve any additional burden, but rather, would make the assessment process easier and would provide an immediate improvement for scholarly access to government documents.

Public interest test and Information Commissioner: Finally, a public interest test should be applied with respect to decisions made under the special access regime with respect to documents less than 20 years old and the Office of the Information

Commissioner should also have jurisdiction with respect to access decisions made under the *Archives Act*.

FOI Act – fees and charges

The ‘FOI Reform-Companion Guide’ states that the first five hours of the decision making time will be free of charge for journalists and not-for-profit community groups. This should also be extended to include academics (who are usually less well resourced than journalists), especially if the special access regime is not improved and they have to resort to the use of FOI instead.

Another way of reducing costs for FOI applicants would be to permit files to be viewed (eg at the National Archives) and permit those to whom access has been given to take digital photographs of the documents. This preserves original documents, saves paper and saves the time and expense of photocopying documents. It is now the most common way in which documents are copied in archives today.

Legal professional privilege

The proposed reforms do not appear to affect s 42 of the FOI Act which exempts documents of such a nature that they would be exempt from production in legal proceedings. While this remains appropriate for recent legal opinions and particularly those concerning litigation which is on foot, it makes it difficult to obtain access to historic legal opinions. For example, in 2006 I was denied access under the special access regime to documents that contained legal opinions concerning the development of the *Australia Acts* 1986. All of these documents are at least 20 years old and one more than 27 years old. Access was denied on the ground that they contained legal and constitutional advice and that the Commonwealth has a practice of preserving its position in such matters. However, no court or other body would hold the Commonwealth today to an opinion given more than 20 years ago. The value of these opinions lies in the fact that they give the context in which some of our foundational constitutional documents (in this case the *Australia Acts*) came into being. Other jurisdictions, such as the States and the United Kingdom government waived any privilege in their legal advices on the same subject and gave me access to them.

I am conscious of the fact that the extension of the open access period to 20 years from the creation of the document might resolve this particular problem for me. However, s 33(2) of the *Archives Act* still permits the withholding of documents from access, even if they are in the open period, because they would be regarded as privileged by a court. In this case, at least, the decision to withhold documents is subject to a public interest test. Such a test should also apply to legal opinions that remain in the closed access period – rather than a blanket exemption. The point is that the necessity to maintain the confidentiality of legal advice dissipates over time and that this should be a consideration made in assessing access to the document both within and outside the open access period.

Exempt documents within the open access period

If the extension of the open access period is to be effective, then the exemptions from access during the open access period should also be re-examined. These exemptions, set out in s 33 of the *Archives Act*, and the public interest test that relates to them, should also be reassessed in the spirit behind these FOI reforms.

Public interest test

I support the formulation of the proposed public interest test, which places the emphasis on disclosure unless it is otherwise established to be contrary to the public interest. This places the burden on the holders of the documents to establish that it is not in the public interest to release them, which is much fairer than placing the burden of establishing that release is in the public interest on the applicant who has not seen the documents. I also support the use of the words 'on balance' to establish that it is a balancing test, in which positive and negative factors need to be considered.

I further support the use of factors favouring access and irrelevant factors in proposed s 11B. However, I would suggest adding a further factor to those favouring access, being:

- (e) promote understanding of Australia's history, system of government and political affairs.

This is because some of the material sought from government documents under FOI might concern matters which do not inform current debates on matters of public importance, but will create a broader and deeper understanding of our history, the way our system of government works and political affairs more broadly (such as the policies of past governments and their actions in implementing them). There is significant value in explaining our history and the way our system of government operates to the Australian people and this should be reflected in the factors in favour of granting access to documents.

Requirement to publish information

It is not clear to me what is meant by proposed paras 8(2)(g) and (h) of the exposure draft bill. What is meant by documents to which the agency 'routinely' gives access or 'routinely' provides to Parliament? How would it relate, for example, to proposed s 6C(3)(a)? How does one know that it is a document to which an agency would 'routinely' provide access, if one does not yet have it?

Publication of released material

My concern with proposed s 11C(2) is that if a person pays a large amount of money in fees to receive access to a large number of documents, the documents are then immediately made available to that person's competitors (eg other journalists or other academics) free of charge. This seems to be a little unfair. Perhaps some form of reasonable delay could be included before the information is made freely available to the

public – such as one month – so that the person who has paid for access to the documents gets the first right to use them.

My other concern, from the opposite perspective, is how the public can find out about this information and get access to it. If it is simply placed on an agency's web-site, researchers will find it very difficult to know that the information has been made public. It might be better to record released documents in a central and searchable location, such as the National Archives database, so that others have a chance of finding them.

Deletion of 'irrelevant' material

I have concerns about proposed s 22(1) which allows material to be deleted from a document because it would 'reasonably be regarded as irrelevant to the request for access'. This provision is very likely to be used in the future as a way of excluding material that is embarrassing to the government or which reveals maladministration, contrary to the spirit of the 'irrelevant' grounds for exemption under the public interest test. It appears to me to be the Trojan Horse in the draft exposure Bill. The consequence will be that FOI requests will have to be drafted broadly to ensure that material is not edited out on the grounds of irrelevance, leading to greater costs in agency time and greater financial costs to the applicant. This provision needs to be reconsidered.

Consultation before refusal on grounds of practical reasons

I support the obligation to consult with the applicant where a 'practical refusal reason' exists (proposed ss 24-24AB). However, it would be preferable to remove the grounds for most 'practical refusal reasons' by reducing the excessive consultation requirements. This is the more 'practical' way to confront the problem.

Further comments

I am happy to provide further comments or give advice on any additional proposals, if you wish. Please contact me at a.twomey@usyd.edu.au.

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