

Department of Prime Minister and Cabinet
Privacy and FOI Policy Branch

Submission on the Exposure Drafts

Freedom of Information Amendment Reform
Bill 2009

Information Commissioner Bill 2009

Submission by
Peter Timmins
Timmins Consulting Australia Pty Ltd

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(02) 8356 9622
www.foi-privacy.blogspot.com

Freedom of Information Reform (Amendment) Bill and related legislation

The proposed reforms are a welcome and important advance in moving in the direction of open transparent and accountable government. The new scheme - proactive publication, FOI applications as a last resort, the Information Commissioner model, planned use of privacy legislation as the vehicle for access to a person's personal information - will provide a better basis for pursuing this goal.

The link between the new objects, the public interest factors in favour of disclosure, and the publication scheme significantly tip the Act in favour of disclosure.

The proposed changes seek to implement the commitments given prior to the 2007 Federal election. They stop short of an attempt to identify contemporary thinking about best practice ideas. The proposed legislative changes, mostly drafted in plain English are grafted onto the existing framework of a technically complex legalistic 'old style' act, now almost 30 years old. The result overall is an act that falls short of an information access act for the 21st century.

The centrality of documents

For example the new act will continue to revolve around access to "documents". The current definition of the word in the Act runs to half a page of text. While it includes information stored electronically, this is not the central focus.

Digital forms and electronic systems dominate thinking about information in the 21st century. The Freedom of Information (FOI) Act 1982 was developed in an era when information was mostly recorded on paper and held on paper files. While discrete paper documents continue to be an important part of public administration, electronic systems are now the primary repositories of government information. Documents however will remain at the centre of the FOI Act.

For example the long title reads "An Act to Give to Members of the Public Rights of Access to Official Documents of the Government of the Commonwealth and of its Agencies" The objects refer to (b) providing for a right of access to documents. Part III is headed "Access to Documents" and that term is used in Section 11 and other provisions particularly Section 15 which confers the right to

"access a document of an agency or official document of a minister". The headings of sections in the Act including all the exemptions other than those conditionally exempt, refer to documents.

Section 17 is headed "Requests involving the use of computers". Computers are the primary storage systems for information in all government agencies, and agencies routinely undertake a search of such systems in response to an application. However the Act does not mandate such a practice. Section 17 is only enlivened where the information requested is "not available in a discrete document in written form".

By way of contrast the draft NSW Open Government Information (OGI) Bill released for consultation in recent weeks is "An Act to facilitate open access to government information". The objects in Clause 3 include the words "proactive release of information" and "enforceable right of access to information". A provision in the NSW FOI Act -Section 23(g) - similar to Section 17 of the Commonwealth Act is to be repealed. Instead in response to an application, Clause 50 of the OGI Bill requires an agency to undertake "reasonable searches as may be necessary" to locate requested information using any resources reasonably available "including resources that facilitate the retrieval of information stored electronically."

The word document is rarely used in the OGI Bill. The term "record" is used to describe the medium for making information available. In addition in recognition of the fact that requested information may not always be held in a discrete document, Clause 72 provides there is nothing to prevent an agency creating a new record containing the information requested.

The Commonwealth should give consideration to incorporating changes along these lines in the amendment legislation.

ALRC recommendations

The Government has explained the proposals as the implementation of an election commitment. The commitment included some specifics-to abolish conclusive certificates, establish an Information/Freedom of Information Commissioner, not let fees and charges stand in the way of achieving objectives of open transparent and accountable government- but otherwise was to implement "key findings" of the Australian Law Reform Commission (ALRC) Open Government Report (77/1995).

Many recommendations in that report relating to legislative changes

are covered in the Exposure draft bills. Some recommendations have been overtaken by time; others concerning the inter-relationship between privacy and FOI understandably have not been acted on because privacy laws are now under separate active reconsideration by the Government. The recommendation to repeal Section 38 – which gives primacy to certain secrecy provisions in other acts - has not been acted upon presumably because it is also under current consideration in the ALRC review of secrecy provisions in Commonwealth acts.

However a number of recommendations ALRC 77 have not been acted on, nor any explanation offered as to why they were not accepted. A partial list includes:

28. The definition of document should be amended to clarify that it includes data.

31. In three years the time limit for processing FOI requests should be reduced to 14 days.

42. The FOI Act should be amended so that a 'neither confirm nor deny' response under s 25 is not available in respect of documents information about the existence or non-existence of which would be exempt under s 33A (Commonwealth/State relations).

44. Section 33(1)(b) of the FOI Act should be subdivided and the exemption for information communicated in confidence by an international organisation made subject to a public interest test.

52. Section 36 of the FOI Act should be amended to exclude purely statistical information.

55. Section 37 of the FOI Act should be amended to provide that specified documents (those described in FOI Act (NSW) Sch 1 cl 4(2)) are not exempt if their disclosure would, on balance, be in the public interest.

58. Section 44 of the FOI Act should be repealed. (Partly acted upon).

61. Section 41 of the FOI Act should be amended to provide that in weighing the public interest in disclosure an agency may have regard to any special relationship between the applicant and the third party.

73. The parliamentary departments should be made subject to the FOI Act.

74. The intelligence agencies should remain in Schedule 2 Part I. All other agencies currently listed (other than GBEs) should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the Act. If they do not do this within 12 months, they should be removed from Schedule 2 Part I.

75. If s 43 of the FOI Act is amended as recommended by the Review, the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II.

76. Schedule 2 Part III should be repealed provided s 43 of the FOI Act is amended, as recommended by the Review, to apply to documents that relate to agencies' competitive commercial activities.

83. Internal review should not be a prerequisite to AAT review of an FOI decision.

88. Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using. The scale should be developed by the FOI Commissioner in consultation with the Chief Government Information Officer and reviewed annually.

Many of these recommendations would improve the legislation. Recommendation 73 warrants special mention.

Extension to parliamentary departments

The lack of transparency and accountability of the parliamentary departments is a significant weakness in current arrangements for public access to government information. Publicity about disclosures of questionable public expenditure by parliamentarians in the UK in recent weeks – originally prompted by use of the UK FOI Act which applies to the houses of parliament - is in marked contrast to the lack of publicly available information in Australia.

The Department of House of Representatives will spend \$61 million

in 2009-2010, including \$27-\$30 million in salaries and allowances to be paid to members. The Department of The Senate \$47 million including about \$15 million in member entitlements and the Department of Parliamentary Services \$210 million, with around \$73 million carried over. There is no publicly available information about the payments to individual members and senators or how the money is acquitted (if at all) or spent.

The Auditor General's Report 5/2001-2002 'Parliamentarians Entitlements 1999-2000' noted there was no public reporting on some allowances and payments made to MPs and senators who, in addition to publicly funded electorate offices (and staff), have a privately-plated Commonwealth vehicle, and receive electorate, printing, postal, and telephone allowances. While travel allowance payments are reported, detail is limited and travel at government expense by spouse or dependents is not published. Many of the payments appear to be made on the basis of self certification, without the need for proof of expenditure. The Report says "a key area in which some overseas models reviewed, particularly those of Canada and the United States, differed from the approach currently taken in respect of the Australian Federal Parliament is that they provide for significantly greater levels of public disclosure of the guidelines and/or rules that govern entitlements' expenditure by the members of the respective legislatures; and of the costs incurred by the individual members."

Information about MPs travel and use of cars is published by the Department of Finance and Deregulation twice a year but not on the web. Departmental officials in March this year told a Senate Estimates Committee that some unnamed members refuse to comply with a requirement to certify that payments made on their behalf by Finance are correct or properly incurred.

There is a strong case in the name of open and transparent government for public access to information about the operations of Parliament, either through extension of the Act to cover the parliamentary departments or through action by the Parliament to establish appropriate rules and processes.

Comments on draft provisions

Definition of document

As suggested above this should be reframed so that information rather than "document" is central to the publication and access provisions. The OGI Bill uses this term throughout to cover information in a record, defined (Schedule 6) as "any document or

other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means.”

The Exposure Draft in the definition of document (and in proposed Section 6C) also refers to a document held by an agency by virtue of “contractual measures” taken to ensure that it receives the document from a contracted service provider. The right of access disappears in the event that the agency has failed in its duty under proposed Section 6C to provide for this in any contract. The legislation should stipulate that information held by a contractor performing a function on behalf of an agency is information taken to be held by the agency for the purposes of the Act.

Definition of personal information

The definition should exclude information about ministers or public servants that relates to the conduct of official functions, along the lines of the WA FOI Act (Schedule 1 Clause 3):

- (3) Matter is not exempt matter under sub clause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to
- (a) the person;
 - (b) the person’s position or functions as an officer; or
 - (c) things done by the person in the course of performing functions as an officer.

A similar exclusion in the WA Act applies to information about a person acting under a contract with an agency.

The OGI Bill (Schedule 5 Clause 4) excludes from the definition of personal information (c) information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.

Exemption of certain persons and bodies

The only changes proposed to Section 7 and Schedule 2 relate to the addition of some documents held by the Department of Defence, and intelligence agency documents held by a minister. The latter will be achieved through legislation to abolish conclusive certificates, and other measures, currently before Parliament.

Blanket exemptions for some public bodies and for all documents held by some agencies that relate to specified functions represent a

significant departure from the principles that underpin the legislation. Other exemptions are available to protect sensitive information held by agencies specified or that relate to particular functions. The effect of blanket exclusions is to remove from potential public scrutiny, and the accountability framework, information concerning the conduct of public functions and the use of public money without any balancing of the interests involved.

Any exclusions that are included in the legislation must be tightly drawn. For example the current exclusion of documents held by the Australian Broadcasting Corporation (and SBS) – “with respect to documents in relation to its program materials” – has been interpreted in a way that goes far beyond what appears to have been the original intention to protect its commercial and competitive interests.

Information Publication Scheme

The proposed scheme is welcome but the Exposure Draft is short on detail, and lacks strong compliance requirements.

The only additions to existing publishing requirements concern publication of information routinely released in response to requests under the Act and information routinely provided to parliament in response to requests and orders. While importantly agencies must have regard to the objects and guidelines issued by the Information Commissioner, proposed Section 93A provides only that the Commissioner “may” issue guidelines. This should be a duty not a discretion.

The Information Commissioner appears to have no powers to require an agency or agencies to comply with any direction in respect of a publication scheme, to mandate the adoption of a model scheme of schemes or require the publication of particular types of information. There appears to be no provision to complain to the Commissioner about an agency’s failure to comply with the requirements of the proposed scheme.

Access to Documents

Public interest exemption factors

The public interest factors listed as favouring disclosure are important positive statements. On irrelevant considerations, the list includes most of the broad theoretical claims referred to by Justice Davies in *Re Howard* in 1985, with the notable exception of “frankness and candour.” This should not be left where it currently

stands with some precedents supporting and others generally rejecting this consideration. As Deputy President Forgie in McKinnon and Department of Families, Housing, Community Services and Indigenous Affairs [2008] AATA 161 commented public servants have a duty to provide honest, comprehensive advice in the course of government decision making. The “frankness and candour argument” should not be left open as a consideration favouring non disclosure particularly in the context of deliberative process documents. Transparency and accountability requirements are not inconsistent with public service values.

Proposed Section 11B(4)(b) also needs amendment. The NSW FOI Act (Section 59A) has included a similar provision citing the irrelevance of the “applicant misinterpreting or misunderstanding” information as a result of amendments to the Act passed in 1991. The Queensland draft RTI Bill copies these words, as does the Exposure Draft. Fertile minds always see opportunity in a gap, as illustrated by this extract from discussion of the public interest concept in the NSW Premier’s Department FOI Manual (2007-10.4.19):

“Ill-informed speculation and public confusion – although the possibility that the applicant him or herself may misunderstand information contained in a document cannot be taken into account it may be a relevant consideration that release of the document would mislead the public generally, or otherwise cause general public confusion.”

The NSW OGI Bill proposes replacing “applicant” with “any person”. The Commonwealth should follow the lead.

Dealing with requests to access

The time limit for processing applications – 30 days, plus an additional 30 days where consultation is required – remains unchanged. The result is that users of the Act have not received, nor can expect any efficiency dividend from the millions of dollars spent over the years on improving government information management systems through the use of technology. The Act should provide for a reduction in time to 21 days, with an additional 14 days for consultation in line with provisions of the NSW Act in force since 1991.

The Act and proposed amendments make no provision for expedited processing of applications where information sought might be necessary for reasons particular to an applicant, or for applications by the media or others where matters of broad and immediate

public significance are involved.

Requests involving use of computers

According to the Department's annual report on the operation of the FOI Act 2007-2008, the cost per application of dealing with FOI requests across government increased from \$730 to \$940. It is unclear what gave rise to the increase, or whether agencies are using available technologies to reduce costs.

The Act should impose a duty on an agency or minister to undertake a reasonable search for relevant information using the most efficient means available, including electronic systems for identification, retrieval and any necessary redaction. There should also be scope for a complaint to the Information Commission where it appears the most efficient means of search have not been utilised, given the unnecessary costs often imposed on an applicant.

Forms of access

While technically the current definition in Section 20 might cover a computer disk or tape, the Act should specify that where requested, or where the agency and the applicant agree, information may be provided in that form.

Decisions to be made by authorised persons – Section 23

Section 23 includes authority for the responsible minister on behalf of an agency to make a decision in response to a request made to the agency. The extent to which ministers have exercised this authority since the commencement of the Act is unknown. Later freedom of information legislation in Australia (other than the Victorian Act) distinguishes an application for agency documents from an application for minister's documents and confers authority on an agency officer to make decisions concerning the former. There has been a widely held perception of political interference in decision making in the case of applications for documents containing politically sensitive information. The Commonwealth Ombudsman (Annual 2005-2006 Chapter 7) commented that complaints to his office concerning applications to access non-personal documents typically raise concern about the involvement of ministers and their staff in dealing with a particular application.

A minister should retain authority for the making of decisions on requests for information held by the minister but not in respect of applications for information held by an agency. A decision to refuse access involves the exercise of a statutory discretion. This requires

an objective decision in good faith based on all relevant but no irrelevant considerations. A determination should be free of political or other influences not specified in the legislation. Removal of ministerial powers in respect of a decision on an application for agency documents would be one step in this direction.

The NSW OGI Bill (Clause 9 (2)) includes a specific provision that a minister cannot direct or control an officer in dealing with an application for agency information. The Bill also includes offence provisions (Clauses 111-115) for acting unlawfully, directing unlawful action, improperly influencing a decision on access, misleading conduct or deception, and the concealment or destruction of government information. Provisions along these lines in the Commonwealth act would strengthen the position of the determining officer in making the correct decision.

Exemptions

Absolute exemptions

Given the objects of the Act, and the Government's commitment to open and accountable government, the categories of documents given an absolute exemption represent a significant diminution in the right to access government information. To achieve the Government's objectives all information held by a government agency or minister should be available for access subject to a public interest test. This should involve consideration of disclosure of requested information on the basis of the content, timing and circumstances particularly whether any harm would result from disclosure. Blanket exemptions erode this principle.

Some information held by government clearly needs protection from disclosure in the public interest. While deliberations in the Cabinet room fall in this category not all inputs into the process or decisions made should be hidden from public scrutiny for 30 (or as proposed 20) years. As has often been mentioned in the FOI debate, in New Zealand information about submissions to Cabinet is routinely available. In the United Kingdom FOI Act there is no specific exemption for Cabinet documents, simply protection for documents concerning policy development, subject to a public interest test. In any event as the annual release of 30 year old Cabinet documents by Archives Australia continues to illustrate, many Cabinet submissions and decisions involve non sensitive matters. No harm would result from early disclosure.

Although it is proposed to progressively reduce the closed access period for Cabinet and other documents to 20 years, NSW and some

other jurisdictions have, since the early 90s, operated with Freedom of Information legislation that provides for the Cabinet document exemption not to apply to documents 10 years after they were created. A Cabinet document may still be exempt at that time but only on the basis of other exemption provisions. Dire consequences have not followed. The complete rewrite of the NSW Act in the form of the OGI Bill proposes no changes to these arrangements.

With regard to another absolute exemption the Haneef case demonstrated that while information that relates to law enforcement matters might often need to be strictly held, there are in some instances strong competing considerations favouring disclosure in the public interest. The current and proposed exemptions for this category of information do not permit such testing.

Similarly aspects of the Haneef case also illustrated the breadth of the exemption for information under Section 33(1)(b) - information "communicated in confidence by or on behalf of a foreign government". Deputy President McPherson in Haneef and Australian Federal Police [2009] AATA51 at 40 observed that it is not a requirement that the information itself be confidential, only that it be *communicated in confidence*. The fact that the information or matter was no longer confidential was irrelevant. A public interest test would require consideration of these factors and others that might justify disclosure in the circumstances.

The ALRC recommended that the exemption regarding receipt of information from another government or an international organisation be separated with the latter to be subject to a public interest test.

The legal professional privilege exemption is often used by government agencies to protect information from disclosure where no harm would result, or regardless of any competing public interests favouring disclosure. The rationale for privilege is based on the proper administration of justice. This is the justification for confidentiality of communications arising from the lawyer-client relationship and for information prepared for the dominant purpose of use in legal proceedings. Legal advice in the context of policy development within government usually has no connection with the administration of justice. The NSW consultation draft, while stopping short of a public interest test for a privilege claim, proposes a requirement that an agency consider waiver of privilege in all cases where the exemption is claimed.

The application of a public interest test for material obtained in confidence would also ensure appropriate weight was given to interests other than those of the provider of information and the government agency concerned.

Public interest conditional exemptions

The Exposure Draft proposes the inclusion of a new public interest test in the personal information and business affairs exemptions. These provisions currently include a reference to unreasonable disclosure or unreasonable adverse effects of disclosure. The public interest test adds an important dimension to the exemption but retention of the reasonability aspect may be somewhat redundant. A more straight forward approach might be to require decision maker to take into account all relevant considerations including whether disclosure would, on balance be contrary to the public interest.

It is unclear whether it is intended that in disclosure of personal information about a person to another person, the decision maker can have regard to any special factors concerning the relationship or the reasons given by the applicant for seeking access. Proposed Section 47 lists as relevant in determining unreasonable disclosure, "any other matters that the agency or Minister considers relevant". However Section 11(2) continues to provide that a decision maker is not to be influenced by reasons given by the applicant in making the application. The policy that underpins the legislation in this respect is unclear.

While reasons should be irrelevant to the right to make an application and to processing the application, particular factors including special relationships should be taken into account in making a decision concerning access to the personal information of another person. A Senate Committee made a recommendation along these lines in a report in 1978. So did ALRC 'Open Government Report' (Recommendation 61). The issue has been examined in detail recently in the Victorian Court of Appeal in *Victoria Police v Marke* [2008] VSCA218.

The ALRC also recommended the repeal of the exemption for research documents (not acted upon - proposed Section 47H) and the complete exemption for documents relating to the economy (partly acted upon - proposed Section 47J).

Review of decisions

While internal review has often led to the variation of a determination, the applicant should have the option of seeking internal review or going direct to external review. Experience of some applicants with some agencies suggests little value from requiring resort to internal review in the first instance. The ALRC made such a recommendation. The NSW OGI Bill provides an applicant with this option.

Information Commissioner

Proposed Section 55K states the Commissioner has no power to give access to an exempt document. However proposed Section 55J states that the Commissioner may exercise the powers of the person who made the reviewable decision. The reviewable decision maker has discretion to release an otherwise exempt document. The Commissioner should have the same discretion, particularly where in all the circumstances disclosure of the document is in the public interest.

Tribunal

There should be some limitations on an agency right to take a decision of the Information Commissioner to the Tribunal for further review. One possibility might be a requirement for the Commissioner or minister to certify that the considerations involved justify further use of public resources before resolution.

The opportunity should be taken to amend Section 66 of the Act and the current tight limits on the circumstances regarding a recommendation for payment of an applicant's costs in proceedings in the Tribunal. Last year the Department's annual report on the operation of the Act stated that total of \$672 had been paid to a successful applicant. The Tribunal in exercising its discretion must have regard to whether the applicant has been successful and a range of other factors including financial hardship, benefit to the general public, any commercial benefit to the applicant and the reasonableness of the decision under review. Substantial success in the Tribunal should result in a cost order in favour of the applicant.

There should also be provision that protects an applicant from a cost order where a government agency takes a matter on a question of law to the Federal Court and succeeds. In such cases the FOI applicant is not necessarily a willing or interested party in such proceedings.

Fees and charges

Charges for access have been a major problem in use of the Act. The publication scheme may represent significant improvement in access to information.

The fees and charges regulation has not been released for public comment at this stage. The Minister has indicated the removal of application fees, no charges for applications for personal information, one hour of free processing for all applicants and up to five hours for applications by the media. The Minister has also indicated a more fundamental review of charges policy to be undertaken by the Information Commissioner. The ALRC recommendation that imposes limits on charges for processing applications that do not result in disclosure should be one factor taken into account in any new charges regime. So too in light of the new objects of the Act should be the seeking of access to information about the conduct of government functions and holding government to account.

Peter Timmins
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