
Draft Freedom of Information Reforms

**Privacy and FOI Policy Branch,
Department of the Prime Minister and Cabinet**

14 May 2009

General Comments

1. The Law Council of Australia is pleased to provide the following comments on the exposure drafts of the *Freedom of Information Amendment (Reform) Bill 2009* (the FOI Reform Bill) and the *Information Commissioner Bill 2009* (the IC Bill).
2. Generally, the Law Council supports the intent of the draft Bills and considers the proposed reforms will be ultimately beneficial. The regular review of Freedom of Information legislation is very important in meeting the objectives of increased transparency and accountability in Government action. The proposed FOI Reform Bill provides some very welcome changes which, if implemented will increase disclosure of Government information.
3. In particular, the information publication scheme outlined in the amended Part II of the *Freedom of Information Act 1982* (Cth) (the FOI Act) will be extremely valuable in providing access to many documents via the internet, cutting down time spent waiting on FOI requests and perhaps reducing the number of requests, given the greater availability of government information online.
4. It is important that this pro-active publication of Government information on the internet is structured in a way which will best promote the underlying objectives of the FOI Bill. A culture should be developed in which information is presented in an organised and consistent manner across Government agencies. It may be useful for someone to be nominated to coordinate a system by which agencies can present the most accurate and up to date information in a format which is easily accessible and user-friendly. In this regard it is noted that it is the Government's intention that the Information Commissioner will be addressing the public promotion of material.
5. The Law Council considers the proposed creation of the statutory Offices of the Information Commissioner and Freedom of Information Commissioner to be important and worthwhile initiatives.
6. The Law Council does not propose to raise the minutiae of concerns related to legislative drafting and organisation, other than to note that there are inconsistencies in the use of terminology under the FOI Reform Bill and the Bill will also render the *Freedom of Information Act 1982* (the FOI Act) significantly more complex. For example, certain provisions may now require up to 7 or 8 steps in order to determine which parts of the Act must be read together. The Department should request that the Office of Legislative Drafting consider and address these anomalies before the draft legislation is introduced.

Public interest test for business affairs documents

7. It is clear that the re-formulation of the public interest test, and the extension of the test to exemptions for personal privacy, business affairs and research, is intended to reflect pro-disclosure values. However, it is questionable whether there should be a public interest override for business affairs documents given the subject matter. Under the new s 43 of the FOI Act, business affairs documents are deemed as 'conditionally exempt', which means that disclosure must be given unless access to the document would be contrary to the public interest. This will very likely to lead to an increase in the release of documents, and has the potential to force exposure of trade secrets and commercially sensitive information.
8. Under the proposed new s 11A(3), it is relevant to the consideration of whether the public interest favours release of information if release will:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

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- (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure; or
 - (d) allow a person to access his or her own personal information.
9. The Law Council considers that there will rarely be a public interest in releasing documents which record 'trade secrets', yet the public interest test will have to be applied in each and every case. It is unclear why a public interest test weighted heavily towards disclosure should be applied in these circumstances.
 10. In *Harris v ABC* (1983) 78 FLR 236 [at 250] Beaumont J held that the object of s 43 is 'to protect, within reasonable limits, the interests of third parties dealing with an agency or undertaking and supplying information to it in the course of that dealing'. By shifting the balance of the business affairs exemption so far in favour of disclosure, the interests of these third parties may be jeopardised.
 11. Of course, a company has a statutory right to be consulted if documents containing commercial information are the subject of an FOI request. However, under the new test, an affected company will now need to respond by addressing public interest issues in addition to the issue of the effect of release on their business. This formulation places the onus primarily on the company to show why a document should not be disclosed, and will likely result in added time and expense on their part.

Alternative formulations of the test for disclosure of business affairs documents

Exemption unless disclosure would be in the public interest

12. Under s45 of the *Freedom of Information Act 1992* (Qld), business affairs documents are exempt for disclosure '*unless disclosure of the document would, on balance, be in the public interest*'. This formulation requires some positive justification to disclose the document, rather than the test enumerated in the FOI Bill, which requires positive justification for retention of the document. A test of this nature would seem more appropriate for business affairs, particularly in light of the s43 objectives to protect the interests of third parties.
13. The same public interest test in which documents remain exempt 'unless disclosure is in the public interest' is found in the following provisions:
 - *Freedom of Information Act 1989* (NSW), Schedule 1: relating to Cabinet and Executive Council documents; and
 - *Freedom of Information Act 1992* (Qld), ss38, 39, 40, 41, 42, 42AA, 44, 46, 47, 49: relating to matters affecting relations with other governments, ombudsman investigations, matters concerning certain operations of agencies, matters relating to deliberative processes, matters relating to law enforcement or public safety, matters created for ensuring security or good order of corrective services facility, matters affecting personal affairs, matters communicated in confidence, matters affecting the economy of State, matters to which secrecy provisions of enactments apply, matters affecting financial or property interests.

Whether there are public interest considerations which outweigh the competitive disadvantage

14. Under s 34 of the *Freedom of Information Act* (Vic), documents relating to trade secrets are protected in the following way:

Section 34(2) In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

...

(d) whether there are *any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage* to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls— [emphasis added]

15. Again, this formulation of the test requires a balancing of the competing considerations which requires some positive justification for the release of the documents. This would seem more appropriate given the subject matter in the proposed s 43 of the FOI Act.

Documents provided in confidence

16. The Law Council notes that under the proposed reforms, documents exempt from disclosure on the basis that their release could form the basis for an action against the Commonwealth for breach of confidence will not be subject to conditional exemption under s 45. Accordingly, there will be no public interest test applied before any decision about such documents is made.
17. The Law Council considers this to be anomalous. While the Commonwealth must be able to uphold its promises not disclose protected confidences, it appears reasonable to at least allow consideration of public interest arguments in favour of disclosure.
18. The Law Council recommends that s 45 be subject to a similar formulation of the public interest test as proposed above in relation to documents relating to business affairs.

Review of FOI decisions

19. The reforms resulting in ss54F - 54Z and 55 – 55P of the FOI Act create a two-level merits review system for FOI matters, by allowing the Information Commissioner to undertake merits review of decisions by agencies and Ministers to refuse access to documents. This is intended to introduce a level of efficient independent review of primary FOI decisions. However, by maintaining the requirement of internal review, the amendments will create an additional layer of review and may slow down what can already be a time consuming process. This seems to be at odds with the aims of providing a low cost and fast review service. It is worth noting that Senator John Faulkner, in his address to the FOI Practitioner's Forum on 3 April 2009, stated that 'in the last financial year, the Ombudsman reported that 34 per cent of FOI complaints received concerned delay'.
20. A possible improvement may be to amend the proposed s 15AB(5) and s 54D(4) so that the further time allowed by the Information Commissioner to an agency or Minister to make a decision has a statutory maximum (e.g. 30 days). Further, perhaps the Act could provide that, in deciding what further time to allow, the Information Commissioner is to have regard to whether time has already been extended by the agency/Minister.

Qualifications of the FOI/Privacy Commissioners

21. It should be noted that the proposed s 15 outlined in the *Information Commissioner Bill 2009* allows the Privacy Commissioner to perform the freedom of information functions as well as the privacy functions. Under the proposed s 17(3) it is a requirement for the Freedom of Information Commissioner to have a tertiary law degree. However, it appears to be an anomaly that the same requirement is not necessary for the Privacy Commissioner when performing the freedom of information functions (s 15(2)).

Public Interest Override/Residual Discretion

22. A notable omission from the Bills is that the Administrative Appeals Tribunal will not be given the same power as the original decision-maker to release a document found to be exempt in any event (which arises under section 18(2) of the FOI Act).
23. Section 58(2) of the FOI Act provides that "*Where, in proceedings under this Act, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted*".
24. This may be contrasted with the situation in Victoria (see, for example, *Osland v Secretary, Department of Justice* (2008) 234 CLR 275) and in New South Wales (see, for example, *University of New South Wales v McGuirk* [2006] NSWSC 1362 and *Cianfrano v Director General, Premier's Department* [2007] NSWADT 216).
25. Whilst the ALRC considered in its Report No 77 "Open Government: A Review of the Federal Freedom of Information Act 1982" (1995) that such a provision is not necessary, the Law Council considers that such a power is necessary for the reasons stated by the NSW Administrative Decision Tribunal in *Mangoplah Pastoral Co Pty Ltd v Great Southern Energy* [1999] NSWADT 93. In that matter, the Administrative Decisions Tribunal stated (at [17]) it is of "*fundamental significance for the working of the legislation, and the [NSW] FOI Act will fail to meet its objective to promote open government if the discretion is ignored or not given proper scope by decision-makers*."
26. In principle, the Law Council considers there is no reason why an independent merits review tribunal of considerable experience such as the AAT should not possess all the powers and functions of the original decision-maker in reviewing FOI matters.
27. It is a fundamental principle of proper and effective merits review generally that the reviewing authority be empowered to stand in the shoes of the decision maker (*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286). It is also the underlying premise in the Administrative Review Council's report No 39 titled "*Better Decisions: Review of Commonwealth Merits Review Tribunals*" (1995).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.