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Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600

## **Inquiry into the Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012**

We are responding to the invitation to make a submission to the Committee's inquiry into the above Bill.

The Government's explanation for this Bill is that it supplements earlier legislation that made the Parliamentary Budget Office (PBO) an exempt agency under the *Freedom of Information Act 1982* (FOI Act). The exemption of the PBO will not be fully effective unless there is a similar exemption under the FOI Act for documents held by other government agencies that reveal the contents of confidential communications between agencies and the PBO.

We do not express an opinion on whether it is appropriate as a matter of policy to exempt PBO documents from the operation of the FOI Act. Our comments relate only to the scope of the exemption that is appropriate to embody that policy in the Act.

We accept that the exemption from the FOI Act of documents in the possession of the PBO and PBO-related documents held by other agencies, rest on the same policy rationale. The Bill does not appear to go further than necessary to effect that policy intent in the FOI Act. The Bill will enact provisions similar to those already in the FOI Act that extend the exemption applying to security intelligence agencies (such as the Australian Security Intelligence Organisation) to 'intelligence agency documents' held by other agencies but which originated with ASIO or were received by ASIO (FOI Act s 7(2A)-(2C)).

The Parliament agreed to the exemption of the PBO in 2011. We accept that the current Bill corrects an unintended consequence of the narrow scope of the earlier exemption. If the exemption for PBO documents as extended by the Bill is to be reconsidered, the more appropriate time to do so may be in the context of the general review of the FOI Act that will commence in November this year as required by s 93A of the Act.

There is, however, one aspect of the PBO exemption that we would like to raise at this time. Under current arrangements there will be no legal right of public access to PBO documents until they reach the open access period in the Archives Act 1983. In effect, that will be 20 years after a PBO document was created (the open access period currently set at 28 years is being reduced progressively to 20 years). This archival open access principle also applies to other Commonwealth agency documents that are exempt under the FOI Act, but there is an important difference.

Many other FOI exemptions contain a qualifying phrase or principle that can result in a document that is initially exempt losing that status before the archival open access period is reached. There are eight public interest conditional exemptions in the FOI Act that apply only if 'access to the document at that time would, on balance, be contrary to the public interest' (s 11A(5)). The qualifying phrase in some of the nine other exemptions in the Act include that disclosure 'would, or could reasonably be expected to, cause damage' to a particular interest (s 33), 'prejudice the conduct of an investigation' (s 37(1)), or have 'a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed' (s 47(1)(b)).

We raise for consideration whether a time limitation should be placed on the operation of the PBO exemption. The policy rationale for the exemption is that Senators and Members of the House of Representatives should 'have access to independent and non-partisan budget analysis and policy costings over the entire course of the three-year electoral cycle' (Attorney-General's Second Reading Speech). The Explanatory Memorandum to the Bill states that the exemption of PBO documents from the FOI Act 'will ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined' (para [6]).

That policy rationale is principally tied to the three-year electoral cycle of the House of Representatives. Following the election of a new Government, there is not the same rationale for exempting from public access documents that were more directly related to matters arising during the life of a former government. Certainly, it is difficult to see why PBO documents should retain their exempt status for twenty years. A more reasonable limitation may be that the PBO exemption continues only for a short period after a general election (perhaps one year).

This approach is adopted for some exemption provisions in the Queensland *Right to Information Act 2009*. A ten year limitation is placed on information that is brought into existence for the consideration of Cabinet, in the course of the State's budgetary processes, or to brief an incoming Minister about a department (Schedule 3, Items 2, 4). An eight year limitation applies to information relating to a payment to a person under an investment incentive scheme (Schedule 3, Item 11).

We do not make a firm proposal in this submission as we recognise that this time limitation issue was not discussed at the time that the PBO was made an exempt agency in 2011. Broader discussion may be appropriate before a specific time limitation is imposed. This discussion could be undertaken in the forthcoming review of the FOI Act. The Committee, in reporting on this Bill, may choose to express an opinion on the issue raised in this submission for the guidance of the FOI Act review.

We would be happy to meet with the Committee to discuss this issue further.

Yours sincerely

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Australian Information Commissioner

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Freedom of Information Commissioner

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