



Australian Government

Department of the Prime Minister and Cabinet

November 2009

Summary of main changes between the exposure draft and introduced FOI reform Bills

The draft Information Commissioner Bill (IC Bill) and draft Freedom of Information Amendment (Reform) Bill (FOI Amendment (Reform) Bill) were released for public comment on 24 March 2009. The Government made a number changes to the draft Bills after careful consideration of public submissions and further consultation with agencies.

Variation from the exposure draft version	Explanation
1. IC Bill and FOI Amendment (Reform) Bill – commencement Commencement of the structural reform measures in the Information Commissioner Bill (IC Bill) is to be on a date fixed by Proclamation (instead of 1 January 2010) with most measures in the FOI Amendment (Reform) Bill to commence immediately after commencement of the IC Bill. Provision is made so that if any of the measures in the IC Bill do not commence within 6 months of Royal Assent, they will commence at the end of the 6 month period.	As commencement on 1 January 2010 cannot be achieved, commencement on proclamation allows for flexibility of the start date following passage of the Bills.

Variation from the exposure draft version		Explanation
2	<p>IC Bill –subclauses 11(4) and 12(4)</p> <p>The performance of certain functions by the Privacy Commissioner and the FOI Commissioner which involve substantial policy decisions (such as issuing guidelines and recommending legislative changes) are subject to the Information Commissioner’s approval.</p>	<p>A number of submissions raised that disagreement may arise between the three statutory office holders. It is intended that the Information Commissioner be head of the new Office of the Information Commissioner both strategically and administratively. All of the functions of the Office are conferred on the Information Commissioner who is also the head of the Office for the purposes of the <i>Public Service Act 1999</i> and the <i>Financial Management and Accountability Act 1997</i>. The manner in which the IC Bill confers functions on the Privacy and FOI Commissioners is intended to work like a standing delegation (but does not require specific delegation by the Information Commissioner as the principal office holder). Provisions in the Bill are directed at ensuring that no duplication arises in relation to decisions made by the three Commissioners. This change to the IC Bill strengthens the intention that the Information Commissioner is the head of the Office for all purposes. The requirement for approval is intended to ensure consistency in policy advice and, in case of disagreement, that the Information Commissioner’s view prevails.</p>
3	<p>IC Bill – clause 27</p> <p>The Cabinet Secretary (as minister responsible for the Bill) will be able to appoint members to the Information Advisory Committee who are external to the government and who are appropriately qualified (in addition to representatives from agencies).</p>	<p>The Information Commissioner is to have a function of advising the Cabinet Secretary on broad government information management policy matters (beyond privacy and FOI). The Information Commissioner is to be assisted in that function by an Information Advisory Committee. A number of submissions suggested that it would be beneficial to broaden membership of the Committee (from agency representatives) to include members from outside government, possibly representatives from academia, business and the community.</p>
4	<p>IC Bill – subclause 24(2)</p> <p>The functions that can be performed by consultants engaged by the Information Commissioner have been limited, so that consultants may only assist with those functions (or exercise those powers) that can be delegated by the Information Commissioner to a member of the staff of the Office of the Information Commissioner.</p>	<p>Consultants engaged by the Information Commissioner should not be able to perform functions or exercise powers that cannot be carried out by staff of the Office of the Information Commissioner.</p>
5	<p>IC Bill – clause 25</p> <p>Two additional functions have been added to the list of functions that cannot be delegated by the Information Commissioner to staff, namely, the preparation of the Office’s Annual Report and the function of making a declaration that an applicant is vexatious for the purposes of the FOI Act.</p>	<p>Given the Information Commissioner is the head of the Office of the Information Commissioner, he or she should not be permitted to delegate the preparation of the Annual Report of the Office to a staff member (although staff can assist with preparatory work). The effect of restricting the Information Commissioner’s power to delegate the vexatious applicant declaration function is that only the Information Commissioner, FOI Commissioner or the Privacy Commissioner could make such a declaration (although again, staff can assist with preparatory work).</p>

Variation from the exposure draft version		Explanation
6	<p>FOI Amendment (Reform) Bill – Schedule 2 – proposed paragraph 8(2)(g)</p> <p>The requirement to publish information (under the information publication scheme) to which access has routinely been given in response to FOI requests is qualified, so that the requirement does not apply to any of the following:</p> <ul style="list-style-type: none"> • access requests containing personal information about any individual, if it would be unreasonable to publish the information; • access requests containing business affairs information of any person, if it would be unreasonable to publish the information; • any other information of a kind determined by the Information Commissioner (by legislative instrument) if it would be unreasonable to publish the information. 	<p>Around 85-90 percent of FOI requests made annually relate to requests for access to personal information. In many cases the applicant will be given access to their own personal or business information but that information would not be released to third parties. An applicant may also receive access to another person’s personal or business information because that person consents to disclosure to the applicant. These are examples where it will normally be unreasonable to publish the information even though the information is in a class that is regularly disclosed. A discretionary power is given to the Information Commissioner to exclude other classes of information from this aspect of the publication scheme requirements if it would be unreasonable to publish the information.</p>
7	<p>FOI Amendment (Reform) Bill – Schedule 2 – proposed subsection 8D(4) and Schedule 3 – proposed subsection 11C(4)</p> <p>The circumstances in which a charge may be imposed for accessing information under the information publication scheme or accessing information that is published following disclosure under an FOI access request are clarified. Charges may be imposed if the agency incurs a specific reproduction or incidental cost in providing access.</p>	<p>These charges are intended to be separate from charges imposed for processing an access request set out in Regulations. The provisions make clear that an agency cannot charge a person for simply accessing information from the website. A charge may be imposed, for example, where the information is contained in a recording that cannot be readily converted to electronic format for downloading from a website. Another example would be if a person seeks a published hard-copy version of a report which is otherwise available on-line.</p>
8	<p>FOI Amendment (Reform) Bill - Schedule 3 – Part 1</p> <p>The Archives Act is to be amended to make the following consequential amendments.</p> <ul style="list-style-type: none"> • A provision which requires the transfer of records to the National Archives within a certain period is varied from 25 years to 15 years (paragraph 27(3)(b)). • A provision which requires the National Archives to ensure that a record transferred to its care, and that is subsequently made available to an institution remains in the custody of that institution, is to be amended so that the obligation applies to a record that is more than 15 years old instead of 25 years old (subsection 30(2)). • A provision which provides that it is an offence to alter a record that has been in existence for a certain period (subject to certain exceptions) is to be amended to apply to a record that is 15 years old instead of 25 years old (subparagraph 26(1)(a)). 	<p>The FOI Amendment (Reform) Bill proposes to bring forward the open access period for most records from 30 years to 20 years and for Cabinet notebooks from 50 years to 30 years. As a consequence of that measure, other provisions in the Archives Act which are tied to the open access period require amendment to reflect the changed period.</p>

Variation from the exposure draft version		Explanation
9	<p>FOI Amendment (Reform) Bill – Schedule 3 – proposed subsection 11B(4)</p> <p>For the purposes of applying the public interest test, it is an irrelevant factor that <i>any</i> person (including the applicant) may misinterpret or misunderstand the document.</p>	<p>The exposure draft Bill proposed that it should be an irrelevant factor (that is, a factor that cannot be taken into account) for the purposes of applying the public interest test that access to the document could result in <i>the applicant</i> misinterpreting or misunderstanding the document. The variation implements a suggestion made in a submission.</p>
10	<p>FOI Amendment (Reform) Bill – Schedule 3 – proposed subsection 42(2)</p> <p>The exemption provision for documents subject to legal professional privilege is to be amended so that the exemption cannot be claimed in circumstances where the privilege has been waived.</p>	<p>The variation implements a suggestion made in submissions and implements recommendation 67 in the <i>Open Government</i> report.</p>
11	<p>FOI Amendment (Reform) Bill – Schedule 3 – proposed section 11C</p> <p>The requirement to publish information given in response to an access request is qualified so that the requirement does not apply to:</p> <ul style="list-style-type: none"> • access requests containing personal information about any individual, if it would be unreasonable to publish the information; • access requests containing business affairs information of any person, if it would be unreasonable to publish the information; • any other information of a kind determined by the Information Commissioner (by legislative instrument) if it would be unreasonable to publish the information; or • information that is not reasonably practicable to publish having regard to the nature and extent of any modifications required in order to delete information which should not be published (including personal or business information). 	<p>The limitations on publication align with the limitations that apply under the information publication scheme for proposed paragraph 8(2)(g). The fourth ground recognises that in some cases it will not be practicable to publish information after personal or business information has been deleted (whether because of resource implications or because the end result may not hold sufficient public interest).</p> <p>This provision will commence at the same time as the Part II publication scheme (six months after the commencement of the IC Bill).</p>
12	<p>FOI Amendment (Reform) Bill – Schedule 3 – proposed section 47</p> <p>The public interest test is not applied to trade secrets or to any other information of commercial value that could be expected to be destroyed or diminished if disclosed.</p>	<p>The variation implements a suggestion made in submissions. The public interest test will apply to the other limbs of the business exemption under new section 47G.</p>

Variation from the exposure draft version		Explanation
13	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed paragraphs 54L(2)(a) and 54M(2)(a)</p> <p>An applicant will have the choice of applying for internal review by an agency in respect of a decision to refuse access to a document or applying directly for review by the Information Commissioner. The effect of this change is that internal review will not be a pre-requisite to external review by the Information Commissioner.</p>	<p>A number of submissions recommended that internal review should be optional. In recent years internal review has resulted in around half of agency decisions being varied (either in full or partially). In 2007-08, agencies made 385 decisions on internal review. Of these, 171 (or 44 percent) affirmed the original decision; 30 (or 8 percent) were granted in full and 184 (or 48 percent) resulted in some concession to applicants. 133 applications for internal review were withdrawn in this period. Only a fairly small percentage of internal review decisions actually lead to full disclosure. Making internal review optional should encourage decision makers to ensure they make the best decision at first instance.</p>
14	<p>FOI Amendment (Reform) Bill – Schedule 4 – removal of proposed paragraph 54M(2)(c)</p> <p>A provision in the exposure draft Bill made a decision of an agency not to extend the time period for an affected third party to lodge an internal review application amenable to review by the Information Commissioner. That provision is removed so that the existing rule applies and decisions of this kind are not reviewable.</p>	<p>Under the existing FOI Act, an agency or Minister has discretion to extend the time for an affected third party to make an application for internal review (existing subsection 54(1F)), but this decision is not amenable to review by the AAT. An agency cannot give access to a document until the time for exercising the first available review right by a third party opposing a grant decision has run out. Rendering a decision of this kind amenable to external review will prolong resolution of an access request.</p>
15	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed section 93B</p> <p>The FOI Act is to be amended to provide that the Government will undertake a review of the operation of the FOI Act two years after commencement of the reform measures. Provision for a review of the Information Commissioner Act along similar lines is also made in the Information Commissioner Bill – see clause 33.</p>	<p>The provision gives statutory force to the Government’s announcement on 24 March 2009.</p>
16	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed section 31</p> <p>Section 31 of the FOI Act (certain periods to be disregarded for the purposes of processing requests) was re-drafted as a consequence of the proposal to give the Information Commissioner a function of undertaking review of FOI decisions. The exposure draft Bill introduced the concept of an ‘extension’ of time. It is proposed to revert to terminology which is more consistent with the existing provision along the lines that the processing period is to be disregarded while a charge remains unpaid.</p>	<p>Minor change in terminology.</p>

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17	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed paragraph 54N(1)(b)</p> <p>The content requirements for making an application for Information Commissioner review are changed so that an applicant is required to include a copy of the decision made by an agency or a Minister (instead of giving particulars of the decision).</p>	Minor change to improve the application process for review by the Information Commissioner.
18	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed paragraph 54S(2)(a)</p> <p>The time period for making an application for Information Commissioner review by third parties affected by a decision to grant access to a document is changed to accommodate the situation where a third party seeks internal review before application to the Information Commissioner.</p>	Minor change to address an omission.
19	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed paragraph 55(5)(c)</p> <p>It is part of the procedure of an Information Commissioner review that part of a hearing may be held in the absence of a review party (or their representative) if it is necessary to do so to prevent disclosure of any evidence or matter relating to the proceeding. That provision is clarified so that it relates to the disclosure of evidence or matter of a confidential nature.</p>	Minor change to improve clarity.
20	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed section 55G</p> <p>For the purposes of a review application, a provision is inserted which requires the Information Commissioner to deal with a decision that has been varied by a Minister or agency after a review application has been made as though it is the decision for review. The provision only applies to decisions that benefit the applicant.</p>	Where the Information Commissioner engages with parties after a review application has been made to the Commissioner, an agency or Minister may decide to vary the decision in a manner that favours the applicant. It is preferable in this case that the ‘varied’ decision becomes the reviewable decision. The provision is facilitative in nature.
21	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed sections 60, 60AA and 60AB</p> <p>The provision in the exposure draft Bill that determines who is a party to a review application in the AAT is changed so that an affected third party is not automatically made a party to a review application in circumstances where the applicant is seeking review of a decision to refuse access to the information concerning the third party.</p>	In this case, the agency or Minister who made the decision to refuse access will be a party, but the affected third party may not wish to be a party. Provision is made so that the affected third party is notified of the review proceedings. The affected third party can then apply under the <i>Administrative Appeals Tribunal Act 1975</i> to be a party. This is the position that applies under the existing Act.

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22	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed section 61</p> <p>New section 61 (onus in AAT proceedings) clarifies that the person who makes the application to the AAT has the onus of establishing that a decision given in respect of the request or application is not justified or that the AAT should give a decision adverse to a party to the proceeding. The onus will remain on affected third parties (who are parties to the AAT proceedings) to prove that a decision refusing access is justified or that a decision adverse to the person who requested access should be given.</p>	Minor change to ensure the effective operation of the review process in the AAT.
23	<p>FOI Amendment (Reform) Bill – Schedule 4 – proposed subsection 77(6)</p> <p>Provision in the FOI Bill that permits the Information Commissioner to enter premises (with consent) in connection with the investigation function is changed to extend the range of persons who are authorised to exercise this power. Authorised persons will include all the information officers and a member of staff performing duties at the SES equivalent (in addition to officers at the level of Executive Level 2 or equivalent).</p>	Minor change to ensure effective operation of this power.
24	<p>FOI Amendment (Reform) Bill – Schedule 5</p> <p>The exposure draft Bill did not contain Schedule 5 which will implement the amendments consequential to the establishment of the Office of the Information Commissioner.</p>	
25	<p>FOI Amendment (Reform) Bill – Schedule 6 – proposed subsections 7(2C) and 7(2D)</p> <p>The proposal to exclude a limited class of Department of Defence documents (relating to its collection, reporting or analysis of operational intelligence and to special access programs under which a foreign government provides restricted access to technologies) is to apply to Ministers and agencies when holding those documents and to a document of a Minister and agency that contains a summary of, or extract or information from, a Department of Defence document of this kind.</p>	The amendment will ensure consistent treatment of these documents for the purposes of the FOI Act.

Variation from the exposure draft version		Explanation
26	<p>FOI Amendment (Reform) Bill – Schedule 6 – proposed paragraph 13(1)(e) Subsection 13(1) of the FOI Act is amended to prescribe the National Film and Sound Archive as an institution for the purposes of that provision.</p>	<p>Under subsection 13(1) of the FOI Act, a document is not subject to the Act if a person (including a Minister or former Minister) <i>other than an agency</i> placed it in the collection of the Australian War Memorial, National Library of Australia, National Museum of Australia or the National Archives of Australia. It is a purpose of that provision that the FOI Act does not inhibit voluntary deposits to these institutions. The National Film and Sound Archives, which was established as an independent statutory authority on 1 July 2008, receives deposits similarly to the other collecting agencies in subsection 13(1).</p>
27	<p>FOI Amendment (Reform) Bill – Schedule 6 – proposed paragraph 15(2)(aa) In order to make a valid request for access to documents it will be a requirement that the applicant state that the request is an application for the purposes of the FOI Act.</p>	<p>This amendment is intended to remove any possible ambiguity as to whether a request is made under the FOI Act. As a result of the proposed removal of the requirement for applicants to pay an application fee, a clear statement that the request is made for the purposes of the FOI Act will distinguish the request from a general information related inquiry.</p>
28	<p>FOI Amendment (Reform) Bill – Schedule 6 – proposed section 15AA A new measure is added that permits agencies to extend the period for making a decision on an access request with the agreement of the applicant. The extended period cannot be greater than 30 days.</p>	<p>This provision allows agencies to self-manage requests with the agreement of an applicant. It is also a requirement that the agency or minister gives notice of the agreed extension to the Information Commissioner as soon as practicable after the agreement is made.</p>
29	<p>FOI Amendment (Reform) Bill – Schedule 6 – proposed subsection 24(2) Provision in the FOI Bill that enables an agency or Minister to refuse an FOI access request if it is onerous in nature (after consultation) is proposed to be changed so that the provision may also be invoked for the purposes of two or more applications seeking access to documents where the subject matter is substantially the same (in addition to when the requests relate to the same document).</p>	<p>This provision is intended to address circumstances where an applicant makes several separate applications over short periods for related documents (for example, request A may be for documents on file for January in a specific matter and requests B and C may be for documents on file for February and March in the same matter). It allows the full impact of the burden of multiple requests to be assessed together.</p>
30	<p>FOI Amendment (Reform) Bill – Schedule 6 – existing paragraph 94(2)(a) The regulation making power in section 94 of the FOI Act is amended to allow the decision to impose differential charges for journalists and not for profit organisations to be effected.</p>	<p>Under the existing regulation making power, charges cannot be imposed based on whether the applicant is in a specific ‘class’.</p>

Variation from the exposure draft version		Explanation
31	<p>FOI Amendment (Reform) Bill – Schedule 6 Part 3</p> <p>The exposure draft Bill did not contain Part 3 of Schedule 6. The amendment proposed to the <i>Australian Crime Commission Act 2002</i> corrects an error. The amendments proposed to the <i>Environment Protection and Biodiversity Conservation Act 1999</i> inserts cross-references to actual exemption provisions in the Bill. The amendments to the <i>Inspector-General of Intelligence and Security Act 1986</i> are consequential amendments to the secrecy provision in that Act.</p>	
32	<p>FOI Amendment (Reform) Bill – Schedule 7</p> <p>The exposure draft Bill did not contain Schedule 7 which provides for transitional measures consequential to the proposal to merge the Office of the Privacy Commissioner into the Office of the Information Commissioner and to appoint the Privacy Commissioner under the IC Bill instead of the <i>Privacy Act 1988</i>.</p>	