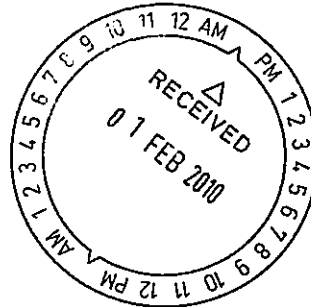




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**Australian Press Council submission to the Senate Standing Committee
on Finance and Public Administration on its Inquiry into the *Freedom of
Information Amendment (Reform) Bill 2009* and *Information
Commissioner Bill 2009***

Given its interest in encouraging the use of freedom of information by journalists to ensure that matters of public concern are brought to the public's attention through the press, the Australian Press Council welcomes the proposals to reform federal Freedom of Information legislation to make it more workable and also welcomes the opportunity to make suggestions as to how the FoI scheme can make government more open and accountable to its citizens.

The Council is gratified to see that there are in the *Freedom of Information Amendment (Reform) Bill* a number of positive aspects that foster greater accessibility to information.

- The proposed Objects clause states clearly that the intention of the Act is to increase access to government information and to promote Australia's representative democracy by contributing to increasing public participation, discussion, scrutiny and review of the Government's activity. The Objects make it clear that information held by government is a national resource and establishes the requirement that agencies publish information.
The Council has long been of the view that the expression of such an aim in an Objects clause is the best way of making sure that those administering the legislation have a presumption to release, rather than suppress, information.
- The introduction of the Information Publication Scheme, which will require that agencies make most operational and non-contentious information available on their website free of charge (or indicate on the website how information is available), is a good advance. Associated requirements that agencies have a plan to implement this scheme and have an obligation to see that information is accurate and up-to-date will ensure the success of the Scheme.
- The introduction of a new "public interest" test and the repeal of a number of categories of exemption are also welcome changes. The categories of documents that were previously subject of exemptions will now come under a new category of "conditional exemption" to which a presumption of disclosure will apply and which will be assessed for release using the "public interest" test. That the Bill contains a non-exhaustive list of factors that apply to the test and that the Information Commissioner will be preparing guidelines to assist agencies in decision-making are also positive advances. The guidelines will assist the necessary change in culture within the Public Service towards a presumption to release information and promote consistency in approach.
- Other changes in the legislation that advance the cause of freedom of information include:
 - that private sector providers of services to the Commonwealth will come within the scope of the legislation;
 - that applicants are no longer required to apply for internal review of their application prior to applying for external review and can seek review after thirty days deemed refusal;
 - that the application of the legal professional privilege exemption has been narrowed so as to no longer apply to documents that have lost that privilege;
 - that the public interest test makes it an irrelevant consideration that any person may misinterpret or not understand the document;
 - that the operation of the legislation will be reviewed in two years;

- that, once an agency has decided that a document that was subject of an application can be disclosed, the agency is required to make that document publicly available within ten days;
- that the Bill includes a table/flowchart showing how the legislation will apply to exemptions and conditional exemptions to make this clear to an applicant; and
- that the Information Commissioner will have enforcement power by being able to refer a matter to the Federal Court for issue of an order.

Specific concerns

The Press Council has some specific concerns with aspects of the legislation that it believes should be given further consideration before the Bills are passed by Parliament.

Whether the Bills contain effective measures to ensure that the right of access to documents is as comprehensive as it can be.

Cabinet exemption

It is pleasing to see that the Bill introduces “conditional exemption” and repeals a number of categories of exemptions that are currently in the legislation. However it remains disappointing that the Cabinet exemption continues to apply. While the exemption has been narrowed by introduction of a “dominant purpose” test, there does not appear to be any sound reason why Cabinet materials cannot also be subject to the “public interest” test that applies to “conditional exemption” in the same way as applies to a number of other categories of documents that were previously subject of an exemption. In any event, governments of all persuasions have, in the past, frequently made public those Cabinet documents that are politically helpful to them and withheld those documents that are inconvenient - all of which suggests that there is nothing necessarily sacrosanct about documents considered by Cabinet.

The Objects clause emphasises the need to promote democracy through increasing participation, scrutiny and review of government activity and yet the Cabinet exemption allows governments to withhold those documents that have the greatest potential to contribute to transparency and to scrutiny of critical decision-making processes. It is also undesirable that governments can selectively recruit documents into the Cabinet process merely to render them inaccessible, notwithstanding that those documents may, for example, be the report of an independent consultant or a review funded by taxpayers.

Restricted Access Periods

While it is pleasing to see that the legislation includes amendments to the *Archives Act* to reduce periods of restricted access for records and Cabinet notebooks from 30 to 20 years and from 50 to 30 years respectively, the Council considers that these periods are still too long, unless disclosure of particular information would impact adversely on the public interest.

Vexatious Requests

In relation to "vexatious requests", it should be pointed out that there can be legitimate reasons for repeated requests. For example, a researcher or an investigative journalist may have found out some information on the basis of an initial request and then become aware that there is likely to be further information of relevance to that line of inquiry. It is pleasing to see that the proposed legislation seeks to limit the circumstances in which the Information Commissioner can make a vexatious applicant declaration to where there is a manifestly unreasonable abuse of process and that the provisions include steps to accord any potential vexatious applicant procedural fairness. The Council would not like to see these provisions used to restrict what appear to be repeat

requests, or relentless pursuit of information, which may be made in the interests of thoroughness, or undertaking investigations in the public interest.

Charging

Procedural and cost obstacles are major factors that impact on the willingness and ability of citizens to avail themselves of the provisions of freedom of information legislation to seek information.

It is a step forward that the Bill includes an amendment that allows the regulations to provide for differential charging for different classes of applicants. This opens up the possibility of a lesser charge for journalists (and the Press Council notes that the draft *Fees and Charges Regulation* amendments provide a welcome free search period for journalists and some others). However it is disappointing that the categories of applicant to which differential charges apply will not be stated in the legislation, rather than in regulations.

The proposed legislation introduces a number of features that are consistent with the Objects, including an Information Publication Scheme, which will see all operational and non-contentious information available via the websites of agencies free of charge and a new public interest test that is to be applied with a pro-disclosure presumption in determining if certain types of information that was previously exempt from FoI are to be released.

Under the proposals, most information will now be available without any requirement for an application and free of charge. Where information that is not available routinely is assessed for release following a request, it will also be publicly available to all, without charge, within ten days of a decision to release it. In this context, an applicant's request should be viewed as a mechanism by which those documents for which a decision needs to be made prior to public release are prioritised in accordance with demand.

Accordingly, it is timely to reconsider the justification for charging what can be high fees to applicants for information that requires assessment under the proposed changes in the legislation.

Should the FoI regime continue to charge for searching, examination and decision-making, then the approach recommended by the June 2008 review of Queensland's FoI legislation should be considered. It recommended no charge for personal information and that, for other information, the fee be determined by the number of pages supplied to an applicant, rather than on an estimate of time taken to supply the information. This would ensure consistency in charging by all agencies, and provide an incentive to improve the efficiency of information retrieval. Reasonable copying charges can also be applied.

It is increasingly common for jurisdictions to include in their legislation provisions that limit, discount or waiver fees. In Appendix 1, there is a summary of how the states have dealt with this question.

The Council believes that the Committee should seriously consider the example set by Tasmania in its recent *Right to Information Act* in relation to charges. The Tasmanian Act (section 16) provides only for an application fee. There is no provision for fees for searching or for decision-making. Further the application fee can be waived for applicants who are impecunious, or who are members of Parliament applying in connection with their duties or who are applicants who are able to show that they intend to use the information for a purpose that is of general public interest or benefit. If there is no search fee nor a decision-making fee, then agencies have an incentive to make production and assessment of information efficient, whereas fees applied on the basis of time simply encourage administrative inefficiency.

Whether the improvements to the request process are efficient and could be further improved.

A 2002 study prepared for the Press Council identified other barriers to the use of the FOI regime by journalists, including extended timeframes and requirements for a high degree of specificity for requests.

With the routine release of the majority of documents and the use of electronic data management systems to store and retrieve information, there should be scope for shortening timeframes for release of those documents that are stored electronically. This should be reflected in the legislation. In the management of information release, consideration should be given to freeing up staff to provide greater assistance to applicants in refining the scope of a search.

These changes will facilitate greater use of the FoI regime by journalists and others.

Whether the measures will assist in the creation of a pro-disclosure culture and what further measures may be appropriate.

Offence of withholding information for improper purposes

Overall, the proposed legislation is thorough in its detail and provides what appears to be a clear and workable scheme for improving access to government information. It is disappointing, however, that the Bill does not include a clause that makes it an offence to withhold information for improper purposes, such as to conceal maladministration or corruption. Such matters go to the heart of effective FoI. The legislation should introduce such an offence.

Implementation

In order to create a culture that is supportive to a proactive approach to information release, the following is required:

- The government should demonstrate leadership in implementing a pro-disclosure culture. To this end, the Prime Minister should ensure review of all Cabinet documents following meetings in order to determine which documents are suitable for routine release.
- All relevant staff in all government agencies should be thoroughly trained on how to determine which information can be released routinely so that, as information is entered into electronic data management systems, it is coded to identify which information is available for open public access and which information will require assessment prior to release. This responsibility should be institutionalised within agencies by making supervisors and managers responsible for ensuring that staff are appropriately trained and are appropriately coding documents.
- Key personnel who are charged with making decisions about release of information that is not routinely released need to be trained on how to apply the public interest balancing test in relation to any information that may be requested.
- How well the coding and application of the public interest balancing test are being done should be assessed routinely by spot audits of documents and also by ensuring that staff performance reviews consider how well these things are being done.
- The Bill envisages that information will be placed on the websites of government agencies. It does not stipulate how long the information will be required to remain on the website. A more effective alternative may be to investigate options that would provide direct online public access and searching of the records database of each agency so that citizens are readily able to peruse documents that are identified for public access. This would require staff to be trained to code appropriately documents as they are placed into electronic data management systems.

Assessment of the functions, powers and resources of the Information Commissioner.

The Press Council is pleased to see that the *Information Commissioner Bill* provides for the creation of the Office of the Information Commissioner comprising two new statutory appointments, the Information Commissioner and the Freedom of Information Commissioner, in addition to the existing Privacy Commissioner. It is particularly pleasing to see that the proposed amendments:

- clarify the Information Commissioner's role and its relationship to the Ombudsman and the AAT;
- establish detailed and clear processes that provide a high level of procedural discretion; and
- propose a full range of powers (including investigation, review and enforcement powers) to make the role effective.

The Press Council has long advocated the need for an independent Information Commissioner. While it is pleasing to see that the Bill proposes that the Information Commissioner be directly appointed by the Governor-General and has the status of an agency head, the independence of the role would be further enhanced if the position were to report directly to Parliament, rather than through the relevant Minister.

The Bill provides discretionary power to the Information Commissioner to exclude classes of information from the Information Publication Scheme requirement if it appears unreasonable to publish the information. The grounds for any such exclusion need to be fully spelled out and any exclusions should only be introduced by amendments to the legislation to ensure that they are subject to full Parliamentary and public scrutiny prior to being introduced.

Appendix 1

Proposed state charging regimes

State regimes for dealing with charges under recently revised freedom of information legislation.

Queensland

Includes duty to minimise costs

Makes provision for waivers:

- where it is uneconomical to impose a fee because the cost of charging would be greater than not charging;
- where the Minister has delayed the information;
- where the applicant can show financial hardship, determined by whether the person is a concession card holder;
- where that applicant is a not for profit organisation, determined by whether the organisation is in receipt of government funding.

NSW

Counts an application fee towards the costs.

Provides 50% discount for hardship.

Provides 50% discount if the information is of benefit to the public generally.

Victoria

Does not charge for time looking for a file or document that was lost.

Does not charge for time taken to examine a document to determine if it is an exempt document or for deleting exempt material from documents.

Does not charge for producing documents for inspection.

Waives charges if the request is a routine request.

Does not charge (other than for copying or transcribing) if the information is intended to be used for general public interest or is related to personal affairs.

Includes the power to charge a different amount.

Appendix 2

The Australian Press Council

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

The Australian Press Council
Members
January 2010

Chair

Professor Julian Disney

Industry Members (5)

Phil McLean (Fairfax Media) – Mark Baker (The Age) is his alternate

Campbell Reid (News Limited)

Pam Walkley (ACP Magazines) – Linda Smith (Pacific Magazines) is her alternate

Phillip Dickson (AAP) alternating with Bob Cronin (WA Newspapers)

John Dunnet (Country Press Australia) alternating with Bob Osburn (Community Newspapers Australia) and Peter Owen (APN News and Media)

Panel of Public Members (up to 10 members - Vice Chair and 5 others attend each meeting)

Professor H P Lee (Vic) Vice-Chair

Cheryl Attenborough (Tas)

John Fleetwood (SA)

Professor Ron Grunstein (NSW)

Brenton Holmes (ACT)

Katherine Sampson (Vic)

Lisa Scaffidi (WA)

Melissa Seymour-Dearness (Qld)

Panel of Independent Journalist Members (up to 4 members of whom 1 attends each meeting)

Prue Innes

Adrian McGregor

Journalist Member representing the Media Entertainment and Arts Alliance

Alan Kennedy

Panel of Editor Members (2 members of whom 1 attends each meeting)

Warren Beeby

Gary Evans

Executive Secretary (non voting)

Jack R Herman

For details and biographies see:

<http://www.presscouncil.org.au/pcs/site/about/members.html>

