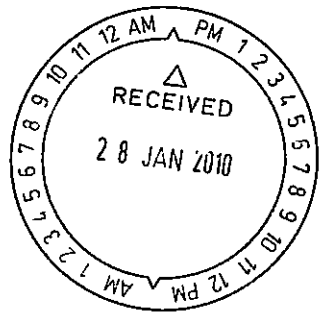

Law Council
OF AUSTRALIA

28 January 2010

Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: fpa.sen@aph.gov.au

Dear Sir/Madam

FREEDOM OF INFORMATION AMENDMENT (REFORM) BILL 2009 AND INFORMATION COMMISSIONER BILL 2009

The Law Council of Australia welcomes the opportunity to respond by way of the enclosed submission to the Senate Finance and Public Administration Committee inquiry into the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009.

Yours sincerely

Bill Grant
Secretary-General

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Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009

To Senate Finance and Public Administration Committee

28 January 2010

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About the Law Council of Australia

The Law Council of Australia (**Law Council**) is the peak organisation representing the Australian legal profession on issues of national and international concern. The Law Council advises governments, courts and other federal agencies on how the law and the justice system can be improved on behalf of the profession and for the benefit of the community.

The Law Council's Constituent Members comprise the state and territory law societies, bar associations and, as of 2007, the Large Law Firm Group, all of which are more fully identified at **Attachment A** to this submission.

Acknowledgment

The Law Council acknowledges the assistance of the Administrative Law Committee of its Federal Litigation Section and the Law Institute of Victoria in the preparation of this submission.

Introduction

On 30 November 2009, the Senate referred the Freedom of Information Amendment (Reform) Bill 2009 (**FOI Bill**) and the Information Commissioner Bill 2009 (**IC Bill**) to the Senate Finance and Public Administration Committee for inquiry and report (**Inquiry**). The Law Council welcomes the opportunity to respond by way of this submission to the Inquiry.

The stated purpose of the FOI Bill is to amend the *Freedom of Information Act 1982* (Cth) (**FOI Act**), "to promote a pro-disclosure culture across government and build a stronger foundation for more openness in government."[1] The IC Bill will establish three independent statutory office holders, namely the Information Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner, and the Office of the Information Commissioner.[2]

The purpose of the Senate Finance and Public Administration Committee (**Committee**) Inquiry is to consider:

- Whether the FOI Bill and the IC Bill contain measures effective to ensure that the right of access to documents is as comprehensive as it can be;
- Whether the improvements to the request process are efficient and could be further improved;
- Whether the measures will assist in the creation of a pro-disclosure culture with respect to government and what further measures may be appropriate; and

[1] Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009, 1, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4163%22.

[2] Explanatory Memorandum, Information Commissioner Bill 2009, 1, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4164%22.

- Assessment of the functions, powers and resources of the Information Commissioner.[3]

The Law Council has previously made a submission to the Department of the Prime Minister and Cabinet supporting the intent of the draft Bills.[4] The Law Council considers that the proposed reforms will be ultimately beneficial and expects the reforms to promote the objectives of increased transparency and accountability in Government action.

This submission will address:

1. Issues previously raised by the Law Council in its Draft Freedom of Information Reforms submission to the Department of Prime Minister and Cabinet; and

2. Other general issues regarding the Bills.

Previous Law Council Draft Freedom of Information Reforms submission

On 14 May 2009, the Law Council made a submission to the Department of Prime Minister and Cabinet in relation to the Exposure Draft of the FOI Bill. The Law Council would be pleased to provide a copy of that submission to the Committee, if so requested.

That submission addressed the following issues:

1. Public interest test for business affairs documents;
2. Alternative formulations of the test for disclosure of business affairs documents;
3. Documents provided in confidence;
4. Review of FOI decisions;
5. Qualifications of the FOI/Privacy Commissioners; and
6. Public Interest Override/Residual Discretion

The Law Council is concerned that the recommendations contained in that submission have not been adopted. Each of the issues identified above will be addressed below.

Public interest test for business affairs documents

The Law Council commented in its previous submission in response to the Exposure Draft of the FOI Bill that it was questionable whether a public interest test should be applied to business affairs documents, as there will rarely be any public interest in releasing documents which record 'trade secrets' or divulge commercially valuable information.

Clause 47G of Sch 3 Part II of the Exposure Draft of the FOI Bill published on 24 March 2009 provided that a document is conditionally exempt if it disclosed trade secrets, commercially valuable information or information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking. Clause 9 of Sch 3 Part II of the FOI Bill amends

[3] See Parliament of Australia Senate Finance and Public Administration Committee, Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009, at http://www.aph.gov.au/Senate/committee/fapa_ctte/foi_ic/index.htm.

[4] Law Council of Australia, Draft Freedom of Information Reforms, 14 May 2009, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=49936762-1E4F-17FA-D22A-7E35F1D97BA4&siteName=lca.

s 4(1) of the FOI Act by inserting that a document is conditionally exempt if Division 3 of Part IV (public interest conditional exemptions) applies to the document. The note to this provision states that "[a]ccess must generally be given to a conditionally exempt document unless it would be contrary to the public interest..."

The Law Council previously expressed concern about the requirement that there be a presumption in favour of releasing documents which potentially divulge trade secrets and/or commercially valuable information, unless the owners of that information advance a public interest case against disclosure. The Law Council commented that shifting the balance of the business affairs exemption so far in favour of disclosure would jeopardise the interests of third parties, who provide information to government agencies about their business affairs, and may result in additional time and expense being incurred by affected companies unnecessarily.

The amendments contained within clause 32 of Sch 3 Part II of the FOI Bill repeal s 47 of the FOI Act to provide that documents disclosing trade secrets or commercially valuable information are exempt documents.

The Law Council has some reservations about this provision. Under the new s 11A(4) of the FOI Act, the agency or Minister will not be required to give a person access to any document or information that discloses trade secrets or commercially valuable information.[5] Accordingly, trade secrets and "commercially valuable information" would be subject to an absolute exemption and the public interest test would not be applied. However, under proposed s 47G,[6] business affairs documents (besides documents that reveal trade secrets and commercially valuable information) would be subject to the public interest test.

The Law Council believes that a complete exemption of documents containing trade secrets or valuable commercial information may go too far. There may be rare cases in which there is a strong public interest in releasing documents containing trade secrets, notwithstanding the cost of such disclosure to the organisation or undertaking concerned. It may be more appropriate to regard such documents as conditionally exempt documents, disclosure of which would be subject to a more stringent public interest test. The Law Council considers an appropriate formulation for the test would be to create a presumption against disclosure, subject to the public interest balancing test. That is, the FOI Bill should require that documents which reveal trade secrets and/or valuable commercial information should not be released unless it can be shown that, on balance, it is in the public interest to disclose the relevant documents or information. A conditional exemption for these documents is arguably more consistent with the objects of the FOI Act, as amended by the FOI Bill, which are to "give the Australian community access to information held by the Government of the Commonwealth, by:

(a) requiring agencies to publish the information; and

(b) and providing for a right of access to documents."[7]

The presumption in favour of release should be displaced only in respect of documents revealing trade secrets and commercially valuable information, and be retained for all other business affairs documents, as is presently the case under proposed s 47G (see cl 33 of Sch 3 Part II).

[5] Freedom of Information Amendment (Reform) Bill 2009, Sch 3 Part II, cl 14.
[6] Freedom of Information Amendment (Reform) Bill 2009, Sch 3 Part II, cl 33.
[7] Freedom of Information Amendment (Reform) Bill 2009, Sch 1, cl 3.

Alternative formulations of the test for disclosure of business affairs documents

The Law Council has previously provided alternative formulations of the public interest test for disclosure of documents containing trade secrets or valuable commercial information, as detailed below.

Exemption unless disclosure would be in the public interest

Under s 45 of the *Freedom of Information Act 1992* (Qld), business affairs documents are exempt from disclosure 'unless disclosure of the document would, on balance, be in the public interest'. This formulation requires some positive justification to disclose (rather than retain) the document. A test of this nature would seem more appropriate for documents containing trade secrets and commercially valuable information.

The same public interest test according to 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;[8] and
- *Freedom of Information Act 1992* (Qld), ss 38, 39, 40, 41, 42, 42AA, 44, 46, 47, 49.[9]

Whether there are public interest considerations which outweigh the competitive disadvantage

Section 34(2)(d) of the *Freedom of Information Act* (Vic) protects trade secrets by providing that, in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, the Minister may consider "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."

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 47 of the FOI Act.[10]

Application of the public interest test

The Law Council acknowledges that the FOI Act provides some guidance in relation to matters relevant to the application of the public interest test. However, in practice, the public interest test, such as that included in the conditionally exempt provisions, may be difficult to apply and may result in inconsistent application by the various agencies. The Law Council does not recommend inserting prescriptive public interest test guidelines into the FOI legislation. However, non-legislative guidelines should be published by the Department of the Prime Minister and Cabinet or the FOI Commissioner to ensure consistent application of the test by the various agencies. The Law Council welcomes the

[8] These provisions relating to Cabinet and Executive Council documents.
[9] These provisions relate 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.
[10] Freedom of Information Amendment (Reform) Bill 2009, Sch 3 Part II, cl 32.

provision in the proposed s 93A of the FOI Bill[11] that the Information Commissioner may issue guidelines and that regard must be had to guidelines issued for the purposes of public interest factors provisions.

Documents provided in confidence

The Law Council recommended in its submission on the Exposure Draft of the FOI Bill that s 45 of the FOI Act be subject to a similar formulation of the public interest test as that proposed in relation to business affairs documents. This formulation would require some positive justification to disclose the document, rather than the test enumerated in the Exposure Draft of the FOI Bill, which required positive justification for retention of the document.

The Law Council noted 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 would not be subject to a conditional exemption under s 45 of the FOI Act. Therefore, the public interest test would not have applied to such documents.

Clause 30 of Sch 3 Part II of the FOI Bill amends s 45 of the FOI Act to provide the following:

(1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.
(2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
    (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
    (b) an agency or the Commonwealth.

The amendments to s 45 of the FOI Act above do not make any provision for the application of the public interest test. The Law Council maintains its previous submission that a positive justification for disclosure of a document held in confidence should be introduced, regardless of whether such disclosure may result in an action against the Commonwealth for breach of confidence.

Review of FOI decisions

The Law Council commented in its previous submission that the new ss 54F - 54Z and 55 – 55P[12] created a two-level merits review system for FOI matters. Under the Exposure Draft of the FOI Bill, the Information Commissioner was authorised to undertake merits review of decisions by agencies and Ministers to refuse access to documents. The Law Council's concern with these provisions was that, although intending to introduce a level of efficient independent review of primary FOI decisions, maintaining the requirement of internal review created an additional layer of review. Consequently, the Law Council noted

[11] Freedom of Information Amendment (Reform) Bill 2009, Sch 3 Part II, cl 33.
[12] Freedom of Information Amendment (Reform) Bill 2009, Sch 4 Part I, cl 34.

that the two-level merits review system arguably may have further slowed down the review process.

The Law Council welcomes the amendments to cls 54L(2) and 54M(2) of Sch 4 Part I, providing for Information Commissioner review of both access refusal and access grant decisions without the need to first seek internal review. Thus, the amendments give an applicant a choice of applying for internal review by the relevant agency or applying directly for independent review by the Information Commissioner.

However, the Law Council maintains that the two-level merits review system for FOI matters is likely to result in delays in the review process. As previously suggested, a possible improvement may be to amend the new ss 51DA(5)[13] and 54D(4)[14] so that the further time allowed by the Information Commissioner to an agency or Minister to make a decision has a statutory maximum, such as for instance, of 30 days. Further, the FOI 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 or the relevant Minister.

Qualifications of the FOI/Privacy Commissioners

The Law Council noted that the proposed s 15 of the Exposure Draft of the IC Bill allowed the Privacy Commissioner to perform the freedom of information functions as well as the privacy functions. However, under the proposed s 17(3) of the Exposure Draft of that legislation, the FOI Commissioner is required to have a tertiary law degree. The Law Council regarded it an anomaly that the same requirement was not necessary for the Privacy Commissioner when performing the freedom of information functions under proposed s 15(2), or, for that matter, Privacy Commissioner's role in respect of privacy matters.

This anomaly has not been addressed and no explanation for the distinction in academic qualifications between the Privacy and the FOI Commissioners is offered in the documents produced by the Department of Prime Minister and Cabinet.[15]

However, the Law Council notes the Explanatory Memorandum for the IC Bill states that the "[p]erformance of the FOI review function could be expected to be enhanced from the possession of legal knowledge because of the need to routinely apply precedents and to interpret legislative provisions in the FOI Act in order to make review decisions. The Information Commissioner and Privacy Commissioner are not required to have a qualification of this kind, even though they may perform the FOI review function. This is because, in practice, most reviews will be performed by the FOI Commissioner. To impose an equivalent condition for the Information Commissioner and Privacy Commissioner may unduly limit potential candidates for these statutory positions, who will have other functions that do not necessitate a legal background."

The Law Council accepts that candidates for the Information Commissioner and Privacy Commissioner ought not to be unduly limited by academic qualifications. However, it appears highly probable that both office holders will be required to apply precedents and interpret legislative provisions in respect of privacy and FOI matters. The Law Council suggests that the Senate Committee seek clarification as to how, and to what extent,

[13] Freedom of Information Amendment (Reform) Bill 2009, Sch 4 Part I, cl 29. This provision was previously contained in s 15AB(5) of the Exposure Draft, Freedom of Information Amendment (Reform) Bill 2009.
[14] Freedom of Information Amendment (Reform) Bill 2009, Sch 4 Part I, cl 34.
[15] See Department of the Prime Minister and Cabinet, Summary of main changes between the exposure draft and introduced FOI reform Bills, November 2009, available at http://www.dpmc.gov.au/consultation/foi_reform/docs/main_changes_draft_&FOI_bill.pdf.pdf.

those functions will differ to those ordinarily exercised by the FOI Commissioner; and why there should not be a similar requirement to have the necessary qualifications to perform those roles.

Public Interest Override/Residual Discretion

The Law Council noted in its earlier submission that the Bills failed to vest the Administrative Appeals Tribunal (**AAT**) with the same power as the original decision-maker to release a document found to be exempt in any event. Currently, s 58(1) of the FOI Act provides that the AAT "has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the [AAT] under this section has the same effect as a decision of the agency or Minister." Under s 58(2) of the FOI Act "[w]here 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."

The Australian Law Reform Commission considered in its Report No 77, *Open Government: A Review of the Federal Freedom of Information Act 1982* [italics inserted] that a provision giving the AAT the same power as the original decision-maker in respect of exempt decisions was not necessary. However, with respect, 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, it was held that 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."[16]

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. 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.[17] It is also the underlying premise in the Administrative Review Council's Report No 39 entitled *Better Decisions: Review of Commonwealth Merits Review Tribunals*. The Law Council therefore recommends that a provision giving the AAT the same power as the original decision-maker in respect of exempt decisions be inserted in the legislation.

General Observations

The Law Council notes and welcomes other significant changes under the FOI Bill and the IC Bill, including:

- limitation of the functions that can be performed by consultants engaged by the Information Commissioner, so that consultants may only assist with those functions or with the exercise of the powers that can be delegated by the Information Commissioner (see cl 25 of the IC Bill);

[16] *Mangoplah Pastoral Co Pty Ltd v Great Southern Energy* [1999] NSWADT 93, [17].
[17] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

- the requirement to publish information to which access has routinely been given in response to FOI requests, except for documents containing personal and business affairs information or any other information that the Information Commissioner determines would be unreasonable to publish (see proposed s 8(2)(g) contained in Sch 2, cl 3 of the FOI Bill);
- clarification of the circumstances in which a charge may be imposed for access to information under the information publication scheme or following disclosure under an FOI access request (see proposed s 8D(4) contained in Sch 2, cl 3 and proposed s 11C(4) contained in Sch 3 Part II, cl 15 of the FOI Bill);
- limitation of the matters the decision maker may consider in applying the public interest test, including whether a person (including the applicant) may misinterpret or misunderstand the document (see proposed s 11B(4)(b) contained in Sch 3 Part II, cl 14 of the FOI Bill);
- amendment of the legal professional privilege exemption to clarify that the exemption cannot be claimed in circumstances where the privilege has been waived (see proposed s 42(2) contained in Sch 3 Part II, cl 28 of the FOI Bill);
- qualification of the requirement to publish information given in response to an access request so that the requirement does not apply to access requests containing personal or business affairs information, 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 (see proposed s 11C contained in Sch 3 Part II, cl 15 of the FOI Bill); and
- requirement that the Government undertake a review of the operation of the FOI Act and the proposed Information Commissioner Act two years after commencement of the amending Act (see proposed s 93B contained in Sch 4 Part I, cl 57 of the FOI Bill and cl 33 of the IC Bill, respectively).

However, the Law Council wishes to raise some general concerns with the FOI Bill and the IC Bill.

FOI Bill

Publication of personal information

The proposed s 8(2)(g)(i) contained in cl 1 of Sch 2 appears to provide for the publication of personal information according to a different test or standard than that provided for in the Privacy Act. Under the FOI Bill, an agency must publish personal information unless it would be unreasonable to publish that information. Under s 13A(a) of the Privacy Act, an act or practice is an interference with privacy if the act or practice engaged in by an agency breaches an Information Privacy Principle (**IPP**) in relation to personal information that relates to the individual. IPP 11 limits the disclosure of personal information unless:

(a) individual concerned is reasonably likely to have been aware, or made aware, that personal information is usually passed to that person, body or agency;
(b) individual concerned has consented to the disclosure;
(c) disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
(d) disclosure is required or authorised by or under law; or
(e) disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

The Law Council believes that the test or standard relevant to personal information in the FOI Bill should be consistent with that in the Privacy Act in order to prevent any inconsistency between the two schemes.

Review rights

The proposed ss 26A(4), 27(7) and 27A(6) contained in cl 21 of Sch 3 Part II of the FOI Bill provide that, in some instances, the agency or Minister must not give the applicant access to the documents unless all the opportunities for review or appeal by an affected third party have run out. The Law Council considers that the FOI Bill should be amended to allow an affected third party to advise the agency that they do not wish to, or will not, exercise those review rights in that particular case, and for the documents to be released accordingly. This will avoid unnecessary delays for applicants and agencies in cases where the affected third party has no intention of exercising its review rights. The Law Council believes that the inclusion of such a provision is necessary in order to promote consistency with the objects of the FOI Act, which under the proposed s 3(4)[18] include facilitation and promotion of *prompt* public access to information. However, any amendment such as that proposed above would need to make clear that, by giving this indication, the affected third party was waiting its right to seek review of the access decision as provided for under the FOI Act.

IC Bill

Functions and powers of the information officers

Division 3 of the IC Bill describes the functions and powers of the Information, FOI and Privacy Commissioners. The Law Council considers that the relationship between these office holders is not clear. Each Commissioner should have a discrete role, functions and responsibilities. A regime where the Information Commissioner can duplicate the functions of the FOI and Privacy Commissioners and where the FOI and Privacy Commissioners can duplicate each other's functions, despite each office holder being required to possess specialised qualifications and skills, is not appropriate.

[18] Freedom of Information Amendment (Reform) Bill 2009, Sch 1, cl 1.

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.