FREEDOM OF INFORMATION AMENDMENT (OPEN GOVERNMENT) BILL 2003: Second Reading

Senator MURRAY (Western Australia) (3.46 p.m.) —I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted

The speech read as follows—

In 2000, I introduced the Freedom of Information (Open Government) Bill (`the Open Government Bill') as a Private Senator's bill. It was an attempt to give effect to the changes recommended to the FOI Act by the Australian Law Reform Commission and the Administrative Review Council in their joint report of 1996.

The bill I am introducing today is an updated version of that legislation. It takes into account the recommendations of the Senate Legal and Constitutional Legislation Committee that closely examined the Open Government Bill.

The Committee endorsed many of the amendments to the FOI Act contained in the bill. Most importantly, it recommended that the bill proceed subject to certain changes.

At the time of introducing my original legislation, two things were clear. The first was that our FOI laws were in serious need of reform. The second was that the Government had no intention of delivering that reform.

Three years later, neither of these things appears to have changed.

FOI laws exist, firstly, to allow access to certain personal information held by government departments and, secondly, to provide a general right of access to government information.

FOI is a democratic imperative. Unless citizens have the power to access and independently scrutinise government information there is little prospect of having a genuinely deliberative and participatory democracy. FOI opens government up to the people. It allows people to participate in policy, accountability and decision making processes. It opens the government's activities to scrutiny, discussion, comment and review.

Former Prime Minister Malcolm Fraser identified as a fundamental requirement that `people and Parliament have the knowledge required to pass judgement on the government'. He said that `too much secrecy inhibits people's capacity to judge the government's performance.' In 1983, Bob Hawke put the case bluntly: “Information about Government operations is not, after all, some kind of `favour' to be bestowed by a benevolent government or to be extorted from a reluctant bureaucracy. It is, quite simply, a public right”.

It is a public right because it is in the public interest. Consider the example of policy documents that outline the criteria applied by government agencies in making administrative decisions. Such documents are almost never forthcoming in response to FOI requests, irrespective of the merits of the particular case. How can it be in the public interest to shroud in secrecy the terms on which public administrative power is exercised? The principle of popular sovereignty demands that people have access to the very information

they require to participate effectively in decision making processes. Alan Rose, former President of the Australian Law Reform Commission, made the point succinctly:

“In a society in which citizens have little or very limited access to governmental information, the balance of power is heavily weighted in favour of the government. It is doubtful that an effective representative democracy can exist in such circumstances.”

Liberal democracies throughout the world have passed freedom of information legislation in recent decades. The United States embraced the idea in the 1960s, and this example has been followed worldwide. After a protracted debate, Australia belatedly enacted the Freedom of Information Act in 1982.

It was only a partial enactment of the recommendations put to the Government by the Senate Standing Committee on Constitutional and Legal Affairs. Over the years, the Act has been widely criticised as inadequate. Australia has embraced freedom of information much less vigorously than other democracies. In 1996, for example, the United States Attorney General announced that the Department of Justice was making FOI performance part of the job description for every relevant employee and rating them on how well they do. The New Zealand Court of Appeal has described New Zealand's FOI legislation as of “such permeating importance” that “it is entitled to be ranked as a constitutional measure.”

The 1996 Constitution of the Republic of South Africa provides for a constitutional right of access to information held by the State. British Columbia's FOI regime requires the government to disclose, among other things, “information which is clearly in the public interest.” This is a mandatory duty to disclose which arises even where no particular individual has specifically requested the information. In contrast, Australia's commitment to freedom of information has been disappointingly half-hearted.

In January 1996, the Australian Law Reform Commission and the Administrative Review Council released an extensive review of the Commonwealth FOI Act. There can be no doubt that an effective freedom of information regime is crucial to the health of our democracy, and the Government's failure to act on the moderate and sensible recommendations contained in the report is disappointing. This bill gives effect to many of those recommendations.

The review uncovered a disturbing culture of secrecy in some government agencies. The FOI Act establishes a rebuttable legal presumption in favour of the disclosure of requested documents. Unfortunately, this does not reflect the approach taken by some government agencies. The review found that some agencies decide immediately not to disclose information and quickly consult the list of exemptions to find some way to justify non-disclosure. As one submission stated:

“It is my sad conclusion... that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts.”

This attitude is reflected in the Ombudsman's subsequent observation that `few agencies have mechanisms in place which encourage or promote the

disclosure of information without recourse to the FOI Act.' FOI should be the final resort for obtaining information. Many agencies simply refuse to provide information for no sound reason, forcing recourse to the FOI Act. This obstructionist attitude is most pronounced in relation to requests for policy information. The Ombudsman's review of FOI administration in Commonwealth agencies offered the following conclusion:

“Collectively, the problems identified in this report are illustrative of a growing culture of passive resistance to the disclosure of information. These problems are unlikely to be overcome while ever there is no body or authority with oversight of administration of the FOI Act.”

The need for independent oversight of FOI administration was also highlighted by the Australian Law Reform Commission in its 1996 report. Indeed, Justice Kirby had stressed the need for a body to scrutinise FOI performance as early as 1983.

The Open Government Bill proposed just such a body. I stated in my second reading speech that the bill would:

“create an independent FOI Commissioner. The Commissioner will audit agencies' FOI performance to ensure that the Act is administered consistently with its purpose. He or she will provide FOI training to agencies. He or she will issue guidelines as to how the Act is to be administered and will be available to provide advice and assistance to agencies relating to FOI requests.”

The Commissioner was to be an important check on FOI administration. There is little point in having a statutory right of access to government information in circumstances where a culture supporting the denial of that right is allowed to flourish. The arrogant attitude of some government agencies that treat requests for information in a dismissive and contemptuous manner should not be tolerated. The Open Government Bill was to make agencies accountable for their FOI performance.

The Senate Legal and Constitutional Committee accepted the need for an oversight agency such as an FOI Commissioner, recommending that the role be conferred on the Commonwealth Ombudsman. That recommendation has been adopted in this bill.

One technique that has been employed by obstructionist public servants and their secretive executive masters, their ministers, has been to impose excessive charges for FOI services to discourage use of the Act. As well as making the setting of fees subject to the scrutiny of the FOI Commissioner, this bill would establish a more reasonable fee system. Access to personal information would be free and the discretion to waive or reduce charges would be clarified. Various unnecessary charges would be abolished altogether.

I have adopted a number of Committee recommendations in reformulating this bill. The bill proposed a number of changes to exemption clauses to promote a pro-disclosure approach. It is apparent from the Committee Report that these changes do not at this stage enjoy cross-party support. The Committee took the view that reforming the exemption regime is a matter for the longer term to be considered in light of the practical effect of other proposed changes such as the establishment of an FOI Commissioner.

I do not resile from the view that the exemption clauses need reform. Indeed I do not believe it to be the position of the Committee that reform is not needed. However, I recognise that there is disagreement as to approach and timing. In the interests of progressing reform, I undertook to remove these items from the bill and have done so.

Consistent with the view of the Committee, the bill retains the exempt status of the Defence Signals Directorate and the Defence Intelligence Organisation in recognition of their status as intelligence agencies.

The Committee supported most of the changes proposed in the Open Government Bill to Part V of the FOI Act, concerning amendment and annotation of personal records. This Part is important to assist people in identifying errors and misleading or irrelevant information in their personal records. The Committee opposed the removal of the requirement that the person seeking to amend the personal record must have lawfully accessed the document, and the bill has been amended accordingly.

Submissions to the Committee illustrated division on the proposal in the Open Government Bill to remove internal review as a pre-requisite for review by the Administrative Appeals Tribunal.

Ultimately, the Committee took the view that it is preferable that the internal review systems and processes of agencies be audited to facilitate reform to ensure that applicants have access to competent and efficient internal review. Therefore, under this bill, internal review will remain a prerequisite for external review.

The Committee was not prepared to support changes to empower the AAT to grant access to documents exempt under s 43 (documents relating to business affairs) where the public interest justifies such access. It acknowledged concerns that commercial-in-confidence claims are misused but did not support the concept of an express public interest test. While I have removed this proposal from the bill, I remain of the view that there is, quite rightly, support for this change in the community and among commentators. It is an issue that the Government or the Parliament must address.

The FOI Act prescribes time limits for the processing of FOI requests. The Open Government Bill sought to reduce the time limit for processing a standard request from 30 days to 14 days. Both the Law Reform Commission and the Ombudsman's reports suggested that existing time limits were too long. Most witnesses before the Committee welcomed the proposed changes. The Committee acknowledged the expectation that technology and improved records management will enable a shorter response time to FOI requests. It suggested a 21 day time limit, which has been adopted in this bill.

It also noted the need to provide a maximum time frame for the actual provision of the information requested once access has been granted. The bill contains a seven day limit, as considerable time will have already elapsed in which the agency examined the information to determine its suitability for release.

I have removed from this bill the proposal to provide that, when determining whether a disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may embarrass the Government. This important principle has been acknowledged in decisions of the Federal Court

and the AAT. On that basis, it was considered unnecessary by the Committee. I am of the view that there is no harm in clearly enunciating this principle in the legislation. Nonetheless, it has been removed in line with the Committee's recommendation.

I have also amended the test applying to exemptions based on legal professional privilege to bring it into line with the common law position and the Committee's view.

The great challenge for our FOI laws is to give effect to the objects of FOI in circumstances where certain sectors will use any available excuse to conceal what need not and should not be concealed. This challenge will be overcome in part by establishing effective mechanisms for scrutiny and review of FOI administration, but also by clarifying the obligations of government agencies. When these obligations are clarified, what may pass now for a superficially plausible excuse for refusing FOI requests will be seen for the spurious obstructionism it often is. Government agencies must be brought to account for their actions. The maladministration of Australia's FOI laws has a serious negative impact on the quality of Australian democracy. It improperly excludes from public scrutiny and debate information to which the people, the sovereign rulers of our democratic nation, are entitled.

There are obviously circumstances in which information in the possession of government should not be made widely available. High level information dealing with such topics as national security and defence clearly must remain confidential.

The bill will also protect private personal information in the possession of government from disclosure to members of the general public. The FOI Commissioner will be required to develop, in consultation with the Privacy Commissioner, guidelines to protect private personal information from being accessed under the Act.

It is not the objective of this bill to create a raft of new rights to access governmental information. Much of it is devoted to giving effect to rights that currently exist in theory but are frequently denied in practice. The bill makes FOI more accessible to ordinary people. The FOI Commissioner will have a role in publicising the Act in the community and ensuring that people have the information and assistance that they need to exercise their legal rights. Unjustified and unduly prohibitive fees will be eliminated.

Most importantly, the bill provides for a system of accountability in FOI administration. At present, oversight of FOI is palpably inadequate, resulting in the denial of important democratic rights. The proposed FOI Commissioner will provide, for the first time, an independent and effective check on the administration of the Act.

FOI reform is long overdue. The problems I have outlined are not new, nor are the solutions I offer. This is a moderate and sensible response to a serious problem, the existence of which has been documented in detail by such bodies as the Australian Law Reform Commission, the Administrative Review Council and the Commonwealth Ombudsman.

I have accepted the recommendations of the Senate Legal and Constitutional Committee, which did an excellent job of reviewing the Open Government Bill.

In many cases, my support for the original proposals remains but it is clear that they are unlikely to proceed as part of a first wave of reform.
What remains is a package of measures that enjoy a considerable degree of support among a range of stakeholders. They would do a great deal to advance Commonwealth FOI laws. It now becomes a question of political will as to whether they will be implemented.

I seek leave to continue my remarks later.

Leave granted; debate adjourned.