

**Senate Finance & Public Administration Committee:
Answers to written Questions on Notice Additional Budget Estimates 2013
Parliamentary Departments Portfolio**

Department/Agency: Department of the Senate

Topic: Freedom of Information (FOI)

Senator: Senator Rhiannon

Question reference number: 3

Type of Question: Oral

Question

Senator Rhiannon asked if correspondence from the Departmental heads to Dr James Popple be tabled. Dr Popple's response (in part) to this correspondence is referred to in the parliamentary departments' submission to the review of the operation of the FOI Act being undertaken by Dr Allan Hawke AC.

Answer

A copy of the latter dated 23 January 2012 is attached.



PARLIAMENT OF AUSTRALIA

23 January 2012

Dr James Popple
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cc Ms Louise Glanville
First Assistant Secretary
Access to Justice Division
Attorney-General's Department
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BARTON ACT 2600

Dear Dr Popple

APPLICATION OF THE *FREEDOM OF INFORMATION ACT 1982* TO THE PARLIAMENTARY DEPARTMENTS

We were interested to meet with you on 21 December 2011 and to receive follow-up emails explaining the basis of your view that the parliamentary departments are covered by the provisions of the *Freedom of Information Act 1982* (FOI Act).

We understand your view to be based on the conclusion that the parliamentary departments come within the definition of *prescribed authority* in subsection 4(1) of the FOI Act because they are unincorporated bodies, established for a public purpose by, or in accordance with, the provisions of an enactment, and are not specified in the exclusions to that definition which include the legislative assemblies of the self-governing territories. Subject to certain exemptions, the FOI Act applies to documents of an *agency* which is currently defined in section 4 to mean "a Department, a prescribed authority or a Norfolk Island authority". In turn, *Department* is defined to mean "a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth". Since the parliamentary departments are not covered by the definition of Department, they must therefore come within the definition of *prescribed authority*.

As indicated in recent correspondence between the Presiding Officers and the former Minister for Privacy and Freedom of Information, this is not a view shared by the parliamentary administration. While the proposition is arguable at a superficial level, an examination of the legislative history of the FOI Act and related legislation indicates otherwise. Moreover, the contrary interpretation is consistent with the policy and objects of the FOI Act, Commonwealth drafting practices, the doctrine of the separation of powers, and principles of statutory interpretation.

Legislative history and drafting practices

The first FOI Bill was introduced in 1978 with the object of creating a right of access to documents in the possession of Commonwealth agencies, subject to certain exemptions designed to reflect the Westminster-style system of government, as it was described in the explanatory memorandum to the bill. The application of the bill was explained as follows:

- (v) The Bill applies to all Commonwealth Ministerial Departments and authorities. It does not apply to the Parliament or the Courts. Agencies may be excluded from the Bill by regulation, either entirely or as to certain functions. A regulation so made is subject to disallowance by either House of the Parliament. (EM, p. (ii))

In detailed notes on clauses, the explanatory memorandum explained the definition of *Department* as follows:

'Department' is defined as a Department of the Australian Public Service other than the Parliamentary Departments. This definition is in accordance with the recommendation in paragraph 35 of the 1974 Report which was adopted in the 1976 Report (paragraph 5.3 and 5.4 of the 1976 Report). The definition is similar to that contained in sub-section 3(1) of the Ombudsman Act 1976, which also excludes the Parliamentary Departments. **The present Bill is concerned with access to information about the activities of the Executive Government and the exclusion of the Parliamentary Departments is therefore appropriate. (emphasis added)**

The 1978 bill was superseded by the 1981 version of the bill, subsequently enacted, which took into account many of the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs which tabled a substantial report on the bills in November 1979 (PP 272/1979). The committee considered whether the bill should apply to the parliamentary departments but, in the absence of any submission recommending that the parliamentary departments be subject in whole or part to the bill, determined not to recommend any amendments in this regard. It concluded, "We do, however, believe that the parliamentary departments should be encouraged to act as if the legislation were applicable to them in the same way as the executive departments have been instructed to treat requests before the introduction of the legislation as if it were in force" (Report, p. 159). The chamber departments have observed this principle (as evidenced, for example, in all successive annual reports of the Department of the Senate).

As originally enacted, the FOI Act defined an *agency* as "a Department or a prescribed authority". *Department* was defined as follows:

"Department" means a Department of the Australian Public Service other than the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff and the Joint House Department.

Some months after the FOI Act was passed as Act No. 3 of 1982, the *Public Service Acts Amendment Act* 1982 was enacted (Act No.111 of 1982). This legislation made some significant changes to the then Australian Public Service, including changes to give effect to recommendations of the Senate Select Committee on Parliament's Appropriations and Staffing which reported in 1981 (PP 151/1981). The committee's final recommendation was that section 9 of the *Public Service Act* 1922 be amended to invest in the Presiding Officers,

separately or jointly as the case may be, the power of appointment, promotion, creation, abolition and reclassification of offices, and the determination of rates of pay and conditions of service. The second reading speech of the minister who introduced the bill in the Senate when it was received from the House of Representatives (Senator Peter Baume) referred to:

... that part of the Public Service Act covering the staffing of the parliamentary departments. These amendments reflect the Government's decision on the recommendations of the Senate Select Committee on Parliament's Appropriations and Staffing. Briefly, the changes will enhance the autonomy of the parliamentary departments by empowering the Presiding Officers to create or abolish offices and to promote officers. The present provisions of the Public Service Act require these matters to be submitted to the Governor-General in Council for approval. (*Senate Debates*, 18 May 1982, page 2052)

By these changes, the parliamentary departments were given greater autonomy under the Presiding Officers, although the staff of the departments remained employees of the Australian Public Service and the departments themselves continued to be listed in Schedule 2 of the *Public Service Act 1922* which listed all Commonwealth departments, beginning with the parliamentary departments. The new definition of *Department* in that Act allowed greater flexibility in including bodies in relation to which persons exercised the powers of Permanent Head (as Secretaries were then known), including statutory officers like the Auditor-General, given the powers of Permanent Head by other legislation (EM, p. 2).

It was in response to these changes that the FOI Act was amended in 1983, although the principal amendments derived from a review of the early operation of the legislation. Relevantly, the definition of *Department* was amended by omitting the existing definition and substituting the following:

"Department" means a department of the Australian Public Service that corresponds to a Department of State of the Commonwealth.

The explanatory memorandum to the bill explained the change in the following terms:

Paragraph 3(a), which will omit from sub-section 4(1) the existing definition of "Department" and substitute a new definition of that word, is consequential upon changes to the definition of "Department" in the Public Service Act 1922 effected by the Public Service Acts Amendment Act 1982. **The change in definition will not affect the scope of the Principal Act. (emphasis added)**

The inclusion of the term "Department of State of the Commonwealth" in the definition of *Department* in the 1983 amendments to FOI legislation, and the conferral of powers on the Presiding Officers by the *Public Service Acts Amendment Act 1982* that were previously exercised by the Governor-General in Council reflect the status of parliamentary departments as not being departments of state and therefore continuing not to be caught by the definition of *Department* in the FOI Act.

The distinction between a parliamentary department and a department of state was well recognised in contemporary legislation. The *Archives Act 1983*, as made, for example, defined *Department* as follows:

- (a) a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth; or
- (b) a Parliamentary Department.

Parliamentary Department was further defined by listing the then five departments. The *Ombudsman Act 1976*, as made, used the same definition as the 1982 FOI Act.

The structure of these definitions reflect drafting practices which recognise departments, so-called – whether parliamentary departments or departments of state – as particular kinds of public entities, distinguishable from the increasing number and variety of other entities called by such other names as authorities, offices, commissions, organisations, services or directorates, to mention but a few.

The explicit declaration in the explanatory memorandum to the 1983 FOI Amendment Bill that the change to the definition of *Department* would not affect the scope of the Principal Act confirms the continued exclusion of the parliamentary departments from the operation of that Act. The status of the parliamentary departments under the Act was dealt with by the definition of *Department*. Exclusion from the definition of *Department* did not open up the parliamentary departments to being considered as *prescribed authorities*. Having been excluded from the definition of *Department*, the parliamentary departments were therefore not *agencies* at all. This view was endorsed by the joint review of the FOI Act by the Australian Law Reform Commission and the Administrative Review Council in 1994-95 which stated that the parliamentary departments were currently excluded from the operation of the Act (ALRC Report 77: Open Government: A Review of the Federal *Freedom of Information Act 1982*, paragraph 11.8) and, specifically, that they were not prescribed authorities as defined in section 4 (footnote 23). (The ALRC/ARC report recommended that the parliamentary departments should be covered by the FOI Act.)

In the mid-1990s, the government of the day resolved to replace the 1922 Public Service Act under which the parliamentary departments had previously been established. It was therefore necessary to decide whether parliamentary departments and departments of state would be re-established under the same replacement legislation. In recognition of the separation of powers and the independence of the parliamentary service, separate but parallel legislation was proposed in 1997 and eventually enacted in 1999. The enactment of separate parliamentary service legislation in 1999 involved no changes in policy regarding the application of legislation from which the old parliamentary departments had previously been excluded. The exclusions continued.

The significance of the term “department” (and the irrelevance of the term “prescribed authority” to the parliamentary departments) is illustrated by amendments to the *Ombudsman Act 1976* which gave effect to a policy decision to extend the jurisdiction of the Ombudsman to the parliamentary departments.

In February 1992, the Senate Standing Committee on Finance and Public Administration presented a report on its Review of the Office of the Commonwealth Ombudsman (PP 519/1992). The government response was tabled on 5 December 1992, agreeing to several recommendations and, in particular, agreeing to extend the Ombudsman’s jurisdiction to the parliamentary departments and to Federal Court registries. Amendments to this effect were enacted in the *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994* (Act No. 33 of 1994).

The amendments changed the definition of *Department* and added a definition of *Parliamentary Department*. These are the definitions that are still in the Ombudsman Act, updated, in the case of the definition of *Department*, by item 711 of Schedule 1 of the *Public Employment (Consequential and Transitional) Amendment Act 1999* to define it by reference to the *Public Service Act 1999* and, in the case of the definition of *Parliamentary Department*, by Item 130 of Schedule 6 of the *Statute Law Revision Act 2011* (sic.) to define it by reference to the *Parliamentary Service Act 1999*.

The explanatory memorandum to the *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994* contained a number of explicit statements about the extension of the Act to the parliamentary departments. The amendments described included amendments to:

- clarify the jurisdiction of the Ombudsman in relation to incorporated companies over which the Commonwealth is able to exercise control and extend the Ombudsman's jurisdiction to Parliamentary Departments and federal court registries;

The new definition of *Parliamentary Department* listed the then five departments by name. The new definition of *Department* was explained as follows:

A new definition of "Department" is inserted by clause 18(c) to include the Parliamentary Departments. Complaints about the actions of those departments will therefore be subject to investigation by the Ombudsman.

Significantly, nowhere in the relatively extensive commentary on changes to the definition of *prescribed authority* was there any mention of the newly admitted parliamentary departments. They were admitted to the jurisdiction of the Ombudsman Act not because they were to be regarded as *prescribed authorities* but because they were to be included as *Departments*, as their names indicated.

Statutory interpretation – long titles and objects clauses

The lack of support for the incidental inclusion of the parliamentary departments under the definition of *prescribed authority* in the FOI Act is further reinforced by the stated policy of the FOI Act which is concerned with the right of citizens to have access to information held by government departments and agencies, reflected in the long title (An Act to give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies) which indicates the scope of the Act. Moreover, the objects of the Act, as stated in section 3, refer to public participation in government processes, promotion of better decision-making, increased scrutiny, discussion, comment and review of government activities and by these to promote Australia's representative democracy. There is no reference to the role or operations of parliamentary departments which do none of the following: make decisions about individuals, including in relation to benefits, rights or obligations; administer public policy programs; administer grants; conduct regulatory activities or perform any of the many other functions carried out by government agencies.

Referring to court decisions under the FOI Act in relation to its objects clause, Pearce and Geddes observe that, although not determinative, where an interpretation has been adopted that does not fit readily with such a clause, courts have required an explanation (*Statutory Interpretation in Australia*, 6th edition, p. 155).

Guidelines under section 93A of the FOI Act

Section 93A of the FOI Act provides for the Information Commissioner to issue guidelines for the purposes of the Act. Subsection 93A(2) provides:

For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information Commissioner under this section including, but not limited to, guidelines issued for the purposes of the following provisions:

- (a) paragraph 9A(b) (information publication scheme);
- (b) subsection 11B(5) (public interest factors);
- (c) subsection 15(5A) (decisions on requests).

Subsection 93A(3) provides that guidelines are not legislative instruments.

Currently the guidelines state that the Act does not apply to the parliamentary departments, which in our view is an accurate statement of the law. We are advised, however, that the Information Commissioner proposes to "correct" this statement when the guidelines are next re-issued.

As they are not legislative instruments, guidelines made under section 93A of the FOI Act cannot change the existing law. In the absence of either statutory or judicial authority for the proposition that parliamentary departments are to be viewed as *prescribed authorities* and therefore subject to the FOI Act, we believe that the status quo should continue to be observed by the Information Commissioner.

We reiterate the Presiding Officers' confirmation of our willingness to participate in the scheduled review of the FOI Act and, in the meantime, will continue to formalise access arrangements to reflect the constitutional separation of the Parliament from the Executive. Such arrangements will not, of course, apply to the Parliamentary Budget Office which is of an entirely different character to the other parliamentary departments and was therefore afforded the different and explicit status of being an exempt agency, an action which has no bearing on the status of the existing parliamentary departments as excluded from the operation of the Act.

We trust this explanation clarifies our views.

Yours sincerely



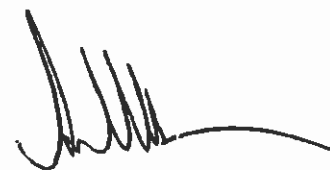
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