

CHAPTER 2

Freedom of Information

A popular government without popular information or the means of acquiring it, is but a prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives.

James Madison, 1822

2.1 This chapter considers the principles of freedom of information, the purpose and operation of the *Freedom of Information Act 1982*, exempt documents and conclusive certificates and their respective review mechanisms.

The importance of public access to information

2.2 The importance of access to information is articulated by Article 19, an international non-governmental organisation promoting freedom of information, which states:

Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government.¹

2.3 Privacy International, a non-governmental watchdog on privacy invasion commented in its 2006 global survey that:

Freedom of information is an essential right for every person. It allows individuals and groups to protect their rights. It is an important guard against abuses, mismanagement and corruption. It can also be beneficial to governments themselves – openness and transparency in the decision-making process can improve citizen trust in government actions.²

2.4 In its 1995 review of the *Freedom of Information Act 1982* (FOI Act), the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) stated the following on the relationship between democracy and the ability of the people to scrutinise government decision making:

Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the

1 Article 19, *The Public's Right to Know, Principles of Freedom of Information Legislation*, International Standards Series, London, June 1999, p.1.

2 Privacy International, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws*, 2006, p.6, <http://www.privacyinternational.org/foi/foisurvey2006.pdf> (Accessed 9 December 2008).

members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.³

2.5 The ALRC and ARC further noted that:

Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.⁴

2.6 The 2007 Independent Audit into the State of Free Speech in Australia stated:

The primary objective of FOI is to help hold governments to account and to facilitate public participation in government decision-making.⁵

2.7 Similarly, the Commonwealth Ombudsman argued that 'access to government information is integral to democratic, transparent and accountable government'.⁶ The Ombudsman also noted that:

FOI has a symbolism that reaches far deeper into our concern as a society to enhance democracy and to ensure transparency and accountability.⁷

2.8 For this very reason, the FOI debate in Australia is not purely a legal debate. This is highlighted by evidence of the increasing use of FOI legislation by the media, particularly in seeking documents held by state and local government authorities. According to the Independent Audit into the State of Free Speech in Australia, in August and September 2007, for example, 70 media reports alone were based on documents released in response to FOI applications by journalists or other individuals

3 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.12.

4 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.12.

5 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.93.

6 Commonwealth Ombudsman, *Scrutinising government, Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, March 2006, p.2.

7 Professor John McMillan, Commonwealth Ombudsman, 'The FOI Landscape after *McKinnon*', *Public Administration Today*, Speech, April-June 2007, p.45.

including opposition members of parliament, who made the released documents available.⁸

2.9 Each year, Australian Government agencies receive over 30,000 FOI requests. In 1996–97, 30,788 such requests were made whilst in 2004–05, there were 39,265 requests.⁹ This figure rose to 41,430 in 2005–06 and then declined in 2006–07 by six per cent to 38,787.¹⁰ There has been a steady decline since 2005–06 from 41,430 to 29,019 in 2007–08.¹¹

2.10 The majority of FOI requests in Australia are made from individuals seeking access to their own personal records. Of the 29,019 FOI requests made in 2007–08, 85 per cent (or 24,684 requests) were for documents containing personal information either about the applicant themselves or other persons.¹² Centrelink received the highest number of requests (9,849 requests) followed by the Department of Immigration and Citizenship (7,912 requests) and the Department of Veterans' Affairs (6,491 requests).¹³

2.11 However, the Independent Audit into the State of Free Speech in Australia noted:

Success in access to personal information about the applicant is not an appropriate test of success of FOI. The rationale of the legislation is to improve accountability, and facilitate public participation in government decision-making.¹⁴

2.12 Indeed, applications for documents concerning non-personal information or 'other information' such as government decisions, policy development and research, are more complex than those for personal information as the statistics reveal.

2.13 In 2007–08, 15 per cent of FOI requests (or 4,335 requests) were received for non-personal information or 'other information' including documents concerning

8 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.94.

9 Commonwealth Ombudsman, *Scrutinising government, Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, March 2006, p.9.

10 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2006-07*, October 2007, p.2.

11 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.2.

12 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.3.

13 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.3.

14 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.96.

policy development and government decision-making.¹⁵ Of these, 41 per cent (1,552 requests) were directed to the Department of Immigration and Citizenship, 24 per cent (891 requests) to the Australian Taxation Office and 14.3 per cent (537 requests) to the Trade Marks Office.¹⁶

2.14 In 2007–08, 8.5 per cent of applications for 'other information' documents were refused entirely and in relation to another 53 per cent of applications, the applicant received part of the relevant information requested. Comparatively, 3.5 per cent of applications for personal documents were refused entirely while an additional 18.5 per cent of applications were granted information in part.¹⁷

2.15 Of the top twenty agencies, the Australian Securities and Investment Commission rated the highest in terms of refusals to release both personal information and 'other information' under FOI with a refusal rate of 36.84 per cent. The Department of Health and Ageing refused 32.69 per cent of all requests whilst the Australian Federal Police refused to release information in relation to 19.71 per cent of all requests during the year. However, whilst the Department of Immigration and Citizenship and Centrelink received the highest number of all FOI requests, they also refused the highest number of all requests in absolute terms across the top twenty agencies with 385 and 437 applications refused respectively. The FOI Annual Report doesn't specify how many such requests were for personal information and how many for 'other information'.¹⁸

Objective and purpose of the *Freedom of Information Act 1982*

2.16 *The Freedom of Information Act 1982* (FOI Act) came into effect on 1 December 1982 and states:

The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:

- (a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and

15 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008. p.3.

16 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008. p.4.

17 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.5.

18 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.6.

(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities; and

(c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.¹⁹

2.17 According to the Department of the Prime Minister and Cabinet (PM&C), the purpose of the FOI Act is to extend the right of every person to access information in the possession of the Government of the Commonwealth and its authorities in two ways:

- it requires Commonwealth agencies (Departments and authorities) to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public; and
- it requires agencies to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation.²⁰

2.18 The FOI Act produced a key change in the emphasis of the law as compared to the situation prior to its enactment by:

- creating a right of access;
- not requiring a person to establish any special interest or 'need to know' before he or she is entitled to seek or be granted access; and
- setting out the circumstances in which access can be denied as a matter of discretion.

2.19 The FOI Act provides a right of access to information in the possession of government departments and agencies. It is a statutory acknowledgement of the public right to know.²¹ Of this, the Commonwealth Ombudsman commented:

The purpose of the Freedom of Information Act 1982 (FOI Act) is to extend, as far as possible, the legal right of individuals to obtain access to documents held by Australian Government agencies. In addition, the Act

19 Section 3(1) of the *Freedom of Information Act 1982*.

20 Department of the Prime Minister and Cabinet, *General Description of the Freedom of Information Act 1982*, http://www.pmc.gov.au/foi/about_act.cfm, last updated 21 May 2008, (Accessed 4 December 2008).

21 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.93.

enables individuals to seek amendment of records that contain inaccurate personal information.²²

2.20 In 1979, the Senate Standing Committee on Constitutional and Legal Affairs identified three objectives of FOI legislation:

- to increase public scrutiny and accountability of government;
- to increase the level of public participation in the processes of policy making and government; and
- to provide access to personal information.²³

2.21 Transparency International identified three key facets to FOI laws in Australia:

- rights of access to public information in documents held by government agencies;
- a right to request access and amendments to personal information; and
- an obligation for government agencies to record and publish, or make publicly available, specified information.²⁴

2.22 Mr Rick Snell noted that the Act is 'about improving the flow of high-quality and reliable information between government and its citizens'.²⁵ Similarly, Mr Jack Herman and Ms Inez Ryan stated:

Among the main objectives of the Freedom of Information Act, in addition to its focus on providing access to personal information (and thus ensuring that it is accurate), is the facilitation of public scrutiny of government actions and subsequently an increase in government accountability. Consequently, the information made available should lead to greater public input into policy-making.²⁶

Exemption provisions

2.23 There are twenty exemption provisions in the FOI Act that preclude access to documents. In addition, the Act allows Ministers to issue conclusive certificates under

22 Commonwealth Ombudsman, *Annual Report 2007–2008*, p.114.

23 Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, 1979*, pp 21–22.

24 Transparency International, *Overview of Freedom of Information in Australia*, undated, http://www.transparency.org.au/documents/FOI_Summary_Information_06_10.pdf (Accessed 5 December 2008).

25 Mr Rick Snell, 'Three quick steps to bring FOI laws into the age of enlightenment', *The Australia*, 28.9.07, p.37.

26 Mr Jack Herman and Ms Inez Ryan, 'The urgent need for reform of Freedom of Information in Australia', *Freedom of Information Review*, Number 114, December 2004, p.62.

five of the exemption provisions. The ALRC and ARC review noted that the purpose of exemption provisions is to 'balance the objective of providing access to government information against legitimate claims for protection'.²⁷

2.24 According to PM&C, exemptions are based on what is essential to maintain the system of government based on the Westminster system and on what is necessary for the protection of the legitimate interests of third persons who provide information to the Commonwealth Government. PM&C also stated that such exemptions are designed to provide a balance 'between the rights of applicants to disclosure of government held documents and the need to protect the legitimate interests of government and third parties who deal with government'.²⁸

2.25 In certain circumstances, documents relating to a number of categories, where their release could damage government or third party interests or other public interests, are exempt. These include documents relating to national security, defence or international relations, Commonwealth/State relations, Cabinet and Executive Council documents as well as documents under a range of other categories.²⁹

2.26 The relevant agency is responsible for deciding whether an exemption applies or whether disclosure would be in or contrary to the public interest. Under the FOI Act, exemptions can be claimed only where the relevant information is genuinely sensitive and harm would be caused upon its disclosure.

2.27 However, the 2007 Independent Audit into the State of Free Speech in Australia noted that there was a wide range of interpretations in relation to exemptions:

There are inadequacies in the design of the laws; too much scope for interpretation of exemption provisions in the ways that lead to refusal of access to documents about matters of public interest and concern; cost barriers to access; and slow review processes that often fail to provide cost-effective resolution of complaints.³⁰

Conclusive certificates

2.28 The 1982 FOI Act provides for the power to issue conclusive certificates under a number of sections in the Act:

27 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.91.

28 Department of the Prime Minister and Cabinet, *General Description of the Freedom of Information Act 1982*, http://www.pmc.gov.au/foi/about_act.cfm, last updated 21 May 2008, (Accessed 4 December 2008).

29 Part IV, Exempt Documents of the *Freedom of Information Act 1982* provides a list of all exempt documents under the Act.

30 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.vi.

- s 33 – national security, defence and international relations;
- s 33A – Commonwealth/State relations;
- s 34 – cabinet documents;
- s 35 – Executive Council documents; and
- s 36 – deliberative process documents.

2.29 Under the Act, where the Minister (or Secretary to the Department of the Prime Minister and Cabinet (s 34) or Secretary to the Executive Council (s 35)) is satisfied that a significant document should not be disclosed, they may sign a certificate that establishes conclusively that a document is exempt from release under one of the relevant sections listed.

2.30 The issue of a conclusive certificate effectively places a document outside the reach of formal FOI processes. A certificate as a conclusive mechanism, therefore, issued by a Minister, denies access to certain documents. Government agencies are required to deny access to a document under the protection of a certificate unless it is possible to release the document with the protected material removed.

2.31 Where such a certificate is issued, the Administrative Appeals Tribunal (AAT) cannot utilise its normal power to review the merits of the exemption claim and is limited to considering whether there exist reasonable grounds for the exemption claim under section 58. Therefore, the AAT does not have the power to grant access to a document, the subject of a certificate. If the AAT finds that there are no reasonable grounds for the issue of the certificate, it can only recommend that the relevant Minister revoke the certificate. PM&C explained the process:

Where a conclusive certificate has been issued, the AAT considers whether there are reasonable grounds for the claims that the documents to which the conclusive certificate relates are exempt rather than where the final public interest lies. The decision of the AAT takes the form of a recommendation to the Minister. The recommendation is public. Whether the Minister acts on a recommendation is a matter for the Minister's discretion but an explanation must be made to Parliament if a recommendation is rejected.³¹

2.32 Therefore, if a Minister decides not to revoke the certificate, he or she must table a notice and advise Parliament of the action.

2.33 In 1995, the Australian Law Reform Commission and Administrative Review Council stated the following of conclusive certificates in their review of the FOI Act:

A conclusive certificate issued by the Minister responsible for an agency makes the document that is the subject of the certificate exempt so long as the certificate remains in force. As the word 'conclusive' indicates, the AAT

31 Department of the Prime Minister and Cabinet, *General Description of the Freedom of Information Act 1982*, http://www.pmc.gov.au/foi/about_act.cfm, last updated 21 May 2008, (Accessed 4 December 2008).

cannot revoke such a certificate. A conclusive certificate is therefore a 'ministerial veto'. The original justification for conclusive certificates was that the ultimate responsibility for decisions on particularly sensitive matters should lie with the relevant Minister. It can be argued that highly sensitive information, release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the sort of material to which the FOI Act is designed to give access because it involves responsibility at the very highest levels of government.³²

2.34 In relation to the requirement that Ministers table a notice to not revoke a certificate, the ALRC and ARC noted:

The AAT can review the issue of a conclusive certificate and express a view on whether there are reasonable grounds for the exemption claim. It can recommend, but not order, the revocation of a certificate. If a Minister chooses not to revoke a conclusive certificate on a recommendation of the AAT, he or she must advise Parliament by tabling a notice in both Houses and then reading it in the House in which he or she sits. This obligation imposes a considerable and sufficient discipline on Ministers.³³

2.35 The use of conclusive certificates has been questioned by a number of commentators with some maintaining that they can be used by Ministers to evade external merits review.³⁴ The 2007 Independent Audit into the State of Free Speech in Australia argued that a range of factors limit the effectiveness of FOI legislation in ensuring access to information relevant to government accountability, the very reason such legislation was established in the first place and that:

The existence of powers in the Federal Act for the issue of conclusive or ministerial certificates, and limited rights of review of the decision to issue a certificate, is inconsistent with the scheme of the legislation.³⁵

2.36 The *McKinnon v Secretary, Department of Treasury* High Court case is considered by some commentators to have narrowed the scope of the AAT to review a ministerial decision to issue a conclusive certificate. The Majority judgement interpreted the FOI Act to require the existence of only one reasonable ground in support of a conclusive certificate for the certificate to be upheld, even when a range

32 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, pp 98–99.

33 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.100.

34 See for example, Ms Jane Woodward, *Trans-Tasman Freedom of Information*, Honours Thesis, ANU, 10 June 2008, p.13, <http://ricksnell.com.au/resources/WoodwardThesisFOIAusNZ2008.pdf> (Accessed 8 December 2008).

35 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.vi, <http://www.smh.com.au/pdf/foireport5.pdf>, (Accessed 23 January 2009).

of contradicting reasonable grounds may exist.³⁶ Of the McKinnon case, the Commonwealth Ombudsman, Professor John McMillan stated:

Callinan and Heydon JJ, in the majority, went so far as to add that a conclusive certificate should be upheld if it contains one reasonable ground, with evidentiary support, for a claim that disclosure would be contrary to the public interest, even though there may be reasonable grounds to support disclosure.³⁷

2.37 In his Second Reading Speech, the Special Minister of State held that the very effect of a Minister placing a conclusive certificate on a document is to limit the capacity of the AAT to review the exemption claim underlying the certificate.³⁸ This consequence has ensured that conclusive certificates are controversial. Mr Rick Snell argued accordingly that:

The existence of such certificates leaves the Act exposed to changes in political will and bureaucratic commitment to the principles and objectives of the legislation...The current restraint in the use of these certificates is not cause to allow the damaging potential of this mechanism to go unchecked.³⁹

2.38 The Senate Standing Committee on Constitutional and Legal Affairs in its 1979 report *Freedom of Information* commented on the issue of conclusive certificates for material other than defence, international relations and security documents:

There is no justification for such a system tailored to the convenience of ministers and senior officials in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy.⁴⁰

2.39 Australia's Right to Know noted that the power of conclusive certificates is:

...inconsistent with the object of the legislation and undermines the Act's main purpose of enhancing government openness and transparency.⁴¹

2.40 Similarly, the Law Council of Australia stated that conclusive certificates were 'inimical' to the broad objective of the FOI Act to improve openness and

36 Transparency International, *Overview of Freedom of Information in Australia*, undated, p.3.

37 Professor John McMillan Commonwealth Ombudsman, 'The FOI Landscape after *McKinnon*', Speech, *Public Administration Today*, April – June 2007, p. 43.

38 Senator the Hon. John Faulkner, Special Minister of State and Cabinet Secretary, Second Reading Speech, *Senate Hansard*, 26.11.08, p.1.

39 Mr Rick Snell, 'Conclusive or ministerial certificates – an almost invisible blight in FOI practice', *Freedom of Information Review*, Number 109, February 2004, p.9.

40 Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, 1979, p.180, paragraph 15.20.

41 Australia's Right to Know, *Submission 1*, p.2.

transparency in public administration. The Council continued that once a Minister had issued a conclusive certificate:

The decision is non-reviewable by the Administrative Appeals Tribunal (AAT) and the Court and simply amounts to a veto power used to frustrate requests for information made under the FOI Act.⁴²

42 Law Council of Australia, *Submission 9*, p.1.