

Prior documents

14.1 The present Bill does not provide generally for access to previously existing documents. If enacted in its present form therefore, the Bill would permit access only to documents brought into existence or coming into the possession of agencies or ministers in the future. There is provision for prior documents to be available if they are necessary to the understanding of other documents which have been lawfully obtained. Essentially, however, the Bill rules out access to prior documents. The relevant provision, clause 10 (2) is as follows:

A person is not entitled to obtain access under this Part to a document that became a document of an agency or an official document of a Minister before the date of commencement of this Part, except where access to the document by him is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister to which he has lawfully had access.

14.2 This provision was strongly criticised in evidence before us and has indeed been the subject of criticism for some years, notably during the deliberations of the 1974 and 1976 Interdepartmental Committees. The justifications offered for the present provision are not strong, and the only one put forward with any degree of conviction relates to the supposed cost of allowing access to prior documents in the Bill. We believe that this objection can be met through arrangements to phase in access to prior documents over a period of time. We are convinced that access to prior documents must be permitted if the legislation is to be of real value. The limited access permitted under the Bill as it stands is an uneasy compromise which in our view is subject to uneven application and will lead to confusion and cost. Access to prior personal records is especially important and arrangements to provide for this should take effect as soon as possible. This chapter reviews the evidence which has led us to these conclusions.

14.3 Many submissions to the Committee argued that section 10 (2) was too restrictive. *The Sydney Morning Herald*, for example, argued

If it is proper—and it demonstrably is—that people should be able to obtain Federal documents in which they have an interest, then all such documents should be dealt with on the same basis. It is impossible not to read the clause without concluding that it has been inserted merely to make life easier for the bureaucracy.¹

The Victorian Committee for Freedom of Information similarly argued that

Access to past material is needed to understand if departments have been operating efficiently, incompetently or even illegally. Without access to past material the process of gaining community support for programmes is lost as there cannot be full understanding of present policies. Thus the demand for openness should not be understood as applying simply to allowing public scrutiny of present policies and practices. To understand and contribute to present and future policy requires full understanding of past methods and programmes.²

CAGEO also said that the sub-clause was 'both unnecessary and undesirable, and therefore should be deleted'.³ *The Advertiser* thought that 'ruling out all documents produced before . . . the Act comes in force, is objectionable'.⁴

¹ Submission no. 111, p. 2.

² Submission no. 44, incorporated in *Transcript of Evidence*, p. 397.

³ Submission no. 8, incorporated in *Transcript of Evidence*, p. 995.

⁴ Submission no. 128, incorporated in *Transcript of Evidence*, p. 1894.

Witnesses pointed out that other countries with freedom of information legislation have permitted access to prior documents. The Australian Journalists' Association said that

the public must have access to all the documents necessary to the understanding of the subject under inquiry. Accordingly, the Bill should make access to prior documents mandatory, with the onus on the Department to prove they should not be disclosed. The Association notes that the United States Act does not prevent access to documents existing before the Act became law. Much of the effectiveness of the United States Act has been related to the availability of prior documents. The Association regards this as a serious fault and one that must be corrected if the Bill is to have any credibility.⁵

The New South Wales Privacy Committee noted that

Freedom of Information legislation in most overseas countries gives a right of access to documents created before the Act, subject to the usual restraints such as those dealt with in clauses 30 and 34. While we do not recommend that access indiscriminately be made available to documents created prior to the Act, we consider that provided appropriate safeguards are introduced access need not be denied.⁶

14.4 Public service departments generally took an opposing view. The Department of Immigration and Ethnic Affairs, for example, argued that a 'very restrictive attitude should be taken'⁷ to prior documents. However the justifications for such an attitude were not convincing. It was said that prior documents had not been prepared with release in mind and so should be protected. We do not accept this argument. On the contrary, it is just such information to which access very often needs to be permitted. As one witness (Mr D. Bubner) pointed out

Many documents including reports, studies, enquiries and policy proposals deal with issues which have been shelved, deferred, abandoned or even forgotten. For example carefully prepared soundly based reports may be put into the 'too hard basket' or shelved for political, policy or administrative reasons. It's not unheard of for a proposal on the establishment of a new body to serve a particular function to be shuffled sideways as a casualty of departmental territoriality or inter-departmental rivalry. It would be most disappointing if documents of this sort are as a result of the F.O.I. and related legislation virtually relegated to the archives.⁸

The Freedom of Information Legislation Campaign Committee (FOIL) similarly argued that the need to grant access to pre-existing documents was important in order

to facilitate historical research, to reveal the perpetuation of obsolete or deficient values and ideas, to discover methods of decision-making or investigation that might be publicly disapproved, or—in the case of an individual upon whom a file is maintained—to uncover inaccurate information that continues to stain an agency's assessment of him or her.⁹

The Law Institute of Victoria put a similar view

In practice Government policy is not made overnight and many decisions are continuing and being implemented over a number of years. To prevent members of the public from examining documents that came into existence years before the introduction of the Act is to severely affect the assessment of aspects of present Government policy. Decisions, opinions and other influential matters contained in documents disclosed by the legislation

⁵ Submission no. 81, incorporated in *Transcript of Evidence*, p. 309.

⁶ Submission no. 87, incorporated in *Transcript of Evidence*, p. 492.

⁷ Submission no. 158, incorporated in *Transcript of Evidence*, p. 2333.

⁸ Submission no. 105, p. 3.

⁹ Submission no. 9, incorporated in *Transcript of Evidence*, p. 166.

could be meaningless and unintelligible to the public or any person or corporation seeking to resolve a problem or to use those documents for the purpose for which the applicant applies.¹⁰

14.5 But the major argument against altering the sub-section fundamentally was, to quote the Attorney-General in his Second Reading Speech on the Bill, that it would substantially increase the administrative burden and cost of implementing the legislation at a time when the Government is seeking to contain the resources devoted to the Public Service.¹¹ The Chairman of the Public Service Board similarly said that access to prior documents 'would certainly significantly add to the problems of departments in circumstances in which, even meeting the current demands, the nature of the demand is not known.'¹² The 1976 Report of the Interdepartmental Committee was also concerned

about the additional administrative burdens that departments would face on top of the administrative load imposed by freedom of information generally if all prior documents were subject to disclosure. These difficulties would result both from the increased volume of requests and because of the difficulties in locating prior documents.¹³

14.6 For a number of reasons we believe that these fears are not well founded. In the survey undertaken at our request by the Public Service Board ('PSB Survey') (see Appendix 4), departments were asked to what extent they anticipated an increased demand for information under the Freedom of Information legislation if disclosure were to be required of past documents. As is apparent from our discussion in Chapter 6, departments were able to make only rough guesses though many anticipated the worst. The amount of prior material held by departments is, however, relatively limited judging by the figures in the survey.¹⁴ For example, the Department of Foreign Affairs indicated that the bulk of files was less than ten years old.¹⁵ Similarly the Department of Defence indicated that some 85% of files were less than ten years old.¹⁶

14.7 More positively, the Bill (in clause 10 (2)) does require access to past documents where that is necessary to the understanding of a document to which a person lawfully has access. As the Explanatory Memorandum points out, in paragraph 26, 'relevant access to the other document is not limited to access under the Bill, nor does it matter whether that other document was in existence before the commencement of the Freedom of Information Act or not.'¹⁷ There is disagreement about the likely effect of this provision. We suggest strongly that it would be better to plan for orderly access to prior documents rather than await the uneven application of limited rights of prior access. That could certainly lead to a chaotic situation in which resource demands become considerable because they have not been anticipated.

14.8 It is certain that some departments are concerned that this provision could produce an uncontrollable situation. The Department of Foreign Affairs, for example, has argued that 'especially in the case of the "research" type of inquiry

¹⁰ Submission no. 112, p. 3.

¹¹ Australia, Senate, *Hansard*, 9 June 1978, p. 2696.

¹² *Transcript of Evidence*, p. 871.

¹³ Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977, para. 17.5.

¹⁴ Public Service Board summary of responses to survey on resource implications for government agencies of the Freedom of Information Bill (hereafter 'PSB Survey'), Appendix 4, p. 451.

¹⁵ *ibid*, Appendix 4, p. 451.

¹⁶ *ibid*, Appendix 4, p. 451.

¹⁷ Explanatory Memorandum to the *Freedom of Information Bill* 1978, p. 6.

there could be a chain effect with the inquirer seeking access to any document or file referred to in each document to which he has been given access'.¹⁸ The Department of the Capital Territory has similarly said that its view

is that sub-clause 10 (2) in fact opens up a very wide range of "pre-existing" documents to scrutiny, because any existing document which is reasonably necessary to enable a proper understanding of a document to which a person has had lawful access, must be made available. This provision would appear to authorise requests for access in respect of any published decision or report, irrespective of when that decision or report was made.¹⁹

On the other hand the Australian Journalists' Association sees this limited right of access as a 'narrow qualification'²⁰ only. Clearly, then, there is room for quite conflicting views to be held. We welcome the attitude demonstrated by the Department of the Capital Territory and hope that other departments share that attitude. We trust that the fears of the Australian Journalists' Association on this provision will be unfounded.

14.9 There is, however, a degree of uncertainty with respect to personal records. This uncertainty should be clarified. A number of witnesses made this point. The South Australian Council of Social Service, for example, was concerned that section 10 (2)

would mean that files about an individual, created before the Bill being proclaimed, would not be available to that individual for verification of accuracy, yet could still be an active and used file . . . Freedom of Information legislation . . . should apply to documents created before the passing of the Bill.²¹

The State School Teachers' Union of Western Australia said that if the legislation is to work in the interests of both the Government, the employer and the employee, then particularly in the area of personal files the employee should have the right to inspect his file from the date of commencement which may be in some cases up to some 40 years ago.²²

14.10 Some departments have conceded the validity of these points. The Department of Social Security, most importantly, said that

clause 10 (2) provides no means whereby access could be refused to personal information compiled prior to the commencement of Part III of the legislation. Quite clearly information obtained after the date of commencement would, in the short term, have little or no value to a person who has been a continuing client of the Department. It is clear therefore that persons seeking access to their personal records will have to be given access to all relevant accessible documents held by the Department.²³

The Commonwealth Employment Service said

Clause 10 (2) requires that historic documents be produced if they are necessary to enable a proper understanding of a document to which access is granted under the Bill. This may generate additional work in tracing and transferring to the point at which access is to be given, historical documents. It will also generate a need to consider current record handling procedures to ensure that where necessary cross-referencing is carried out. This work should not produce heavy demands and no time has been included for it in the estimates [of staffing needs.]²⁴

¹⁸ Submission no. 150 incorporated in *Transcript of Evidence*, p. 2380.

¹⁹ Submission no. 149, incorporated in *Transcript of Evidence*, p. 2222.

²⁰ Submission no. 81, incorporated in *Transcript of Evidence*, p. 309.

²¹ Submission no. 94, incorporated in *Transcript of Evidence*, p.1745.

²² Submission no. 63, p. 1.

²³ Submission no. 117, incorporated in *Transcript of Evidence*, p. 2132.

²⁴ Submission no. 164, para. 4.14, p. 24.

14.11 It is preferable that access to personal records to allow their correction should be permitted under the Bill immediately and without reservation. This would be consistent with the recommendations of Mr Justice Hope that access to the Security Appeals Tribunal should be permitted to employees to enable correction of their own personal records.²⁵ The questions of access to personal records and associated matters affecting rights of privacy are dealt with in greater detail in Chapter 24.

14.12 Recommendation: The Bill should be amended to specifically provide individuals with a right of access to prior documents affecting themselves.

14.13 Allowing such a right of access by individuals to prior records which affect them, will assist departments to further extend a right of access to prior documents generally. Such a development would, in our view, be highly desirable. Earlier in this chapter (see paragraph 14.8) we alluded to the concern expressed by some departments at the effect which heavy demands for access to prior documents would have on their operations. The question of increased demand arising from the disclosure of prior documents was one of those put to departments in the PSB Survey.²⁶ Departmental responses varied considerably, although most could not be specific about the effect of making prior documents available. On the side of optimism, two departments (Transport, and Industry and Commerce) took the view that access to prior documents would not affect their operations in a significantly different way from their expectations if the Bill were enacted in its present form.

14.14 Other agencies (Administrative Services, Attorney-General's, Foreign Affairs, National Development, Industrial Relations Bureau, Australian Bureau of Statistics, Australian Electoral Office) spoke of the effect of granting access to prior documents in such terms as 'substantial increase', 'significant increase' and 'significantly greater impact'. Several agencies were more specific: thus Primary Industry, Prime Minister and Cabinet, Treasury and the Australian Government Retirement Benefits Office predicted that the number of requests could be expected to double. The most pessimistic outlook was that of the Public Service Board which stated that 'if demand was concentrated on material less than five years old, the area (i.e. number of files) within which information would have to be researched would be increased by a factor of five or six'.

14.15 We note again the vagueness of agency estimates and the significant variations between those estimates. We recognise that this disparity is, to some extent, related to the differences in agency functions. Nevertheless we are firmly of the view that, although there are bound to be greater administrative difficulties, at least in the short term, if access to prior documents is granted, these difficulties are by no means insurmountable. Indeed, as experience of the Act's operation grows and improved record-keeping and retrieval systems are developed, these early administrative problems will diminish. It is our firm view that effective freedom of information legislation demands access to prior documents. Clause 12 already permits the granting of access to documents apart from the provisions of the Act and therefore provides the opportunity for ministers or agencies to grant access to prior documents. Nevertheless, this provision is not adequate to ensure access to prior documents as a matter of right—which, in our view, it should be. Our conviction of the need for access to prior documents is strengthened by our

²⁵ Australia, Royal Commission on Intelligence and Security, *Report*, AGPS, Canberra, 1977, para. 168.

²⁶ Question 3 of PSB Survey, cited footnote 14, (see Appendix 4).

knowledge of the situation in the United States, where the greatest effectiveness of the Freedom of Information Act has been in the access it has provided to documents pre-dating its enactment.

14.16 In recognition of the initial burdens created by granting access to prior documents, we favour a staged introduction of such access. Several witnesses suggested phasing-in arrangements. The Queensland Council for Civil Liberties, for example, suggested that

some interim measures should be framed which will gradually make the Act apply retrospectively. Some of the most important revelations about government activities in the United States have come from access to documents created before the Act was passed. The public interest in such information should not be sacrificed so that public servants may avoid "administrative problems".²⁷

The Women's Electoral Lobby (Victoria) also suggested that the Bill should be amended to allow five years retrospective access.²⁸ Such phasing-in will allow agencies a period to assess the administrative problems involved and develop appropriate systems of retrieval and access to deal with them.

14.17 From information supplied by agencies in response to the PSB Survey, it appears that for most agencies the greatest proportion of their document holdings is five years old or less,²⁹ although there were some significant variations from this pattern.³⁰ We therefore accept that some delay should occur after the proclamation of the Act to enable agencies to prepare for the granting of access to prior documents. In our view it is appropriate that access to documents up to five years old at the time of proclamation should commence one year after proclamation. It would then be possible, after a further specified period of time had elapsed and agencies had made the necessary administrative adjustments, to phase in access to, say, documents aged six to ten years at the time of proclamation. By a gradual process, it would be possible eventually to overcome the gap between documents to which access could be granted under the Freedom of Information Bill as presently drafted (i.e. those coming into existence from the time of proclamation) and those in the open access period under the Archives Bill (i.e. over thirty years old).

14.18 In our view it is quite undesirable that this gap should exist. When enacted the Freedom of Information and Archives Bills should provide a continuum. There are no convincing reasons why a controlled phasing-in of the sort discussed in the preceding paragraph should not occur to progressively bridge the thirty-year gap which would exist if the Bills were enacted in their present form. The legislation should specifically provide for access to be granted within a year of proclamation to documents up to five years old at the time of proclamation. Such provision will amount to recognition of the importance of access to prior documents for effective freedom of information. Further retrospective access could be brought in as experience showed it to be possible. Decisions about this would depend upon the monitoring of the legislation which is discussed in Chapters 31 and 32. As the

²⁷ Submission no. 19, incorporated in *Transcript of Evidence*, p. 1343.

²⁸ Submission no. 7, incorporated in *Transcript of Evidence*, p. 368.

²⁹ PSB Survey, cited footnote 14, (see Appendix 4); question 3 (c) e.g. Aboriginal Affairs 56.3%, Administrative Services 65%, Defence 60%, Australian Development Assistance Bureau 60%, Housing and Construction 40%, Transport 45%, Auditor-General 50%, Australian Bureau of Statistics 75%.

³⁰ Finance 0-5 years 4.7%, over 30 years 73.8%; Primary Industry 0-5 years 20%, 5-10 years 40%; Public Service Board 0-5 years 17%, 10-30 years 60%.

Attorney-General has said, departments and authorities will 'become progressively familiar with the operation of legislation of a kind of which there has been no previous experience in Australia'.³¹

14.19 Recommendation:

- (a) The Bill should be amended to provide for a right of access to documents up to five years old at the time of proclamation, such right of access to be effective after one year from the date of proclamation.**
- (b) Further retrospective access should be phased in by subsequent amendment to the Act as it becomes administratively possible until access is available to documents within the thirty-year period between proclamation of the Freedom of Information Bill and the open access period provided in the Archives Bill.**

³¹ Senator the Hon. P. Durack, Q.C., 'The Freedom of Information Bill', an address to the Australian Pharmaceutical Manufacturers Association, Press Release, Canberra, 21 August 1978, p. 10.