

**AUSTRALIAN
PRESS
COUNCIL**

SUBMISSION

Suite 10.02, 117 York Street, Sydney NSW 2000
Phone: (02) 9261 1930 Fax: (02) 9267 6826

Internet: <http://www.presscouncil.org.au/>
Email: info@presscouncil.org.au

**Australian Press Council submission to the ACT Legislative Assembly
Standing Committee on Justice and Community Safety Inquiry into the
*Freedom of Information Act 1989***

Executive Summary

The purpose of the *Freedom of Information Act* should be to promote democratic, open, transparent and accountable government.

The Act should also give effect to the rights that ACT citizens have under the *Human Rights Act 2004* to seek, receive and impart information as part of the right to freedom of expression (s16) and as part of the right to participate in public affairs (s17).

Consistent with these purposes, the *FOI Act* should be amended as follows:

- Replacing the objects clause to make it clear that the objects of the Act are:
 - to improve democratic government in the ACT;
 - to increase the openness, transparency and accountability of the executive government to the people;
 - to increase opportunities for citizens to participate in their own governance;
 - to promote freedom of expression;
 - to promote routine release of information; and
 - to be a mechanism of last resort to obtain information that may be restricted where there is thought to be a public interest that overrides the public interest in participation in public affairs and freedom of expression;
- Removing the current reference to exclusions and exemptions from the objects clause;
- Including provisions that establish a presumption in favour of release of information, unless there is an overriding public interest against its disclosure;
- Clarifying that, as the legislation provides a means of last resort to access information, it provides processes and procedures to seek access to information that is not routinely released and which requires that a decision is made as to whether the information is to be released;
- Including a public interest test, such as is used in NSW legislation, so that where there is a public interest reason favouring the non-release of information this public interest reason must be balanced against the public interests in its release;
- Ensuring that no information is excluded from disclosure simply because of its class, requiring that *Part 4 Exempt Documents* be rewritten;
- Requiring that, where the public interest test is applied and access declined, the decision-maker sets a timeframe for when the information is likely to be reviewed for release;
- Including a statutory limit to the length of time that any information that has not been disclosed can be withheld from the public and providing that no information is withheld from release longer than 10 years from when it was created;
- Removing from legislation the capacity for an agency or a Minister to decline access to information on the grounds that compliance would “substantially and unreasonably” divert resources from the offices other operations (eg s16(2));

- Reviewing and addressing procedural obstacles:
 - Routine disclosure of most information should free up staff time to provide assistance to applicants on how to refine their requests;
 - Removing search and decision-making fees so that requests are subject only to an application fee and reasonable copying/transcription costs;
- Clarifying that the legislation applies to all government-owned corporations and to the private sector firms that have significant government contracts for projects and services, to enable citizens to monitor performance and scrutinise the use of public funds.

In order to create a culture that is supportive to a proactive approach to information release the following is required:

- The Chief Minister should review all Cabinet documents following meetings and determine which documents are suitable for routine release;
- Training of all relevant staff on how to determine which information can be released routinely;
- Training key personnel charged with making decisions about release of information that is not routinely released on how to apply the public interest balancing test;
- Appointing an Information Commissioner to develop policy, guidelines and training across the public sector, to accept complaints, and to monitor implementation; and
- Investigating options for providing direct on-line public access to the records system of each agency so that citizens are readily able to peruse documents that are identified for public access.

Submission

The Australian Press Council congratulates the ACT Assembly for undertaking a review of its Freedom of Information legislation. The Inquiry is timely in that the ACT Assembly will have the benefit of various reviews, reports and revisions of legislation that have been undertaken recently by the Commonwealth and several States and will have the opportunity to see how other jurisdictions have analysed and responded to the issues, particularly to changes that clearly identify the role of access to information in enhancing openness and accountability in government, in promoting public participation and in promoting freedom of expression.

The Press Council has considered many reports and has reviewed legislation recently proposed and/or introduced in other jurisdictions. It has identified what are the important factors that need to be addressed to enhance the effectiveness of FOI legislation from the point of view of achieving the objectives of increasing public access to information to enhance openness, transparency and accountability in decision-making and facilitating freedom of speech and participation in public affairs.

Comments below have been organised under key terms of reference of your Inquiry.

Purposes and principles of freedom of information.

How the purpose and principles of FOI legislation are categorised is critical to how the legislation is framed and implemented.

The terms of reference require that the Committee have regard to the view that access to information is an essential right of every person and notes that, under the Territory's *Human Rights Act* 2004, freedom to seek, receive and impart information and ideas is part of the right to freedom of expression. The terms of reference also require that the Committee have regard to the view that access to government information is fundamental to openness, transparency and accountability in government.

However the terms of reference do not point out that s17 of the *Human Rights Act* 2004 is also relevant. That section focuses on the right of every citizen to take part in the conduct of public affairs.

Information is an essential underpinning of democracy and access to information affects the ability of individuals to participate in and effectively scrutinise decision making that affects them.

If the purpose of FOI is to promote open and accountable government within the democratic system then this gives rise to some important principles that should be embodied in FOI legislation being that there is a public interest in ready access to information about government and that there should be a presumption in favour of disclosure of information. It also gives rise to the expectation that all information should be released as a matter of course, unless there is a strong countervailing public interest against disclosure.

The Right to Information, the Queensland FOI Review (the Solomon report), contains useful discussion about this public interest purpose of FOI in promoting open and accountable government.

Whether the FOI Act 1989 satisfies those purposes and principles.

Objects

An objects clause should provide the reasons for the Act. The terms of reference state that open and transparent government is the goal of FOI legislation, and the Press Council encourages the ACT government to redraft the objects clause to be consistent with this purpose.

The objects clause in the current Act makes no reference to the role of FOI in promoting open and accountable government or in enhancing the capacity of citizens to participate in public affairs or in promoting freedom of speech. Nor does it support the routine release of all information or create a presumption in favour of disclosure.

The current clause s2(1)(a) limits information to people who are affected by it and s2(1)(b) creates a general right of access, but this is restricted by exclusions and exemptions.

In the Tasmanian *Right to Information Bill* 2009 that was released for public comment in September 2009, s3(1) contains a clear objects clause. The objects of the Act are to improve democratic government in the state, to increase accountability of the executive to the people and to increase the ability of the people to participate in their own governance. It states that the government holds information for and on behalf of the people of the state.

The objects clause in the *NSW Government Information (Public Access) Act* also provides a good example of an objects clause that promotes the purpose of FOI in maintaining and enhancing a system of responsible and representative democratic government that is open and accountable. Flowing from this, it includes in its objects clause that it will mandate proactive release of information, give the public an enforceable right to access government information and provide that access to information is only to be restricted when there is an overriding public interest against disclosure.

If the objects make it clear that there is to be routine proactive release of most documents, then the recourse to an *FOI Act* would be last resort and thus the Act would focus on processes by which information that is not routinely accessed can be assessed for potential release.

The objects clause in the ACT *FOI Act* needs to be rewritten to focus on the role of information in the process of government. It should also remove reference to exemptions and exclusions.

Appropriateness of exemptions (classes of documents and Part 4)

If the purpose of FOI is to enhance democracy and participation of citizens in the democratic process, then exemptions should be minimised and only apply where there is some countervailing public interest that is likely to be harmed by the release of information.

Part 4 of the Act sets out classes of exemption. The Act should be amended clearly to identify the public interests that are likely to be harmed under each class of document so that there is no automatic presumption against release simply based on classification or description of a document.

For each request, a decision should be made on whether to release a document based on an assessment process in which the public interest in a document's release is balanced against any countervailing public interest against disclosure.

For example, the current Act adopts an approach common across Australia and exempts Executive Documents, being documents that have been submitted to the Executive for consideration, or are proposed to be submitted by a Minister, or are an official record of the Executive, or would involve the disclosure of any deliberation or decision of the Executive.

In an accountable and participatory democracy, such documents are likely to be of great interest to voters, and to the media, and as such should be documents that are appropriate for routine release. However there are public interests that may justify non-disclosure. One such interest is the doctrine of collective Ministerial responsibility that requires that all ministers subscribe to policies, irrespective of their personal views.

The New Zealand *Official Information Act* takes a different position to all jurisdictions in Australia. It focuses on what the consequences would be of revealing particular Cabinet information. The New Zealand approach is preferred because it considers each document and the consequences of its release rather than restricts release of a document simply because it belongs to a class of documents.

In relation to the exemption that applies to business affairs, in order to ensure accountability for the allocation and use of public funds, the Act needs to be clear that citizens have a right to information from any government business enterprise or government-owned corporation. The right to access information should also extend to private sector organisations in respect to the project costs, administration and performance for any government project being undertaken under contract so as to ensure accountability for the expenditure of public funds. This is particularly relevant given that much of the activity of government is now conducted outside the budget sector by private contractors.

Effectiveness and efficiency of processes, including time provisions, fees and costs, voluminous and/or vexatious requests

In 2002 a report was prepared for the Australian Press Council on the use of FOI by journalists. It identified that little use was made of FOI by journalists and that journalists found it more expedient to rely on alternative processes, ie “leaks”. The report demonstrated that procedural obstacles deterred use of FOI regimes. These obstacles included the degree of specificity that was required in order for a request to be accepted, the costs and the time delays.

The report largely focussed on the experience of journalists with the Commonwealth FOI regime. The report quoted examples:

- a journalist made a broad request and was quoted \$68,000 to process the request;
- a journalist was able to specify the name of the file and the file number, and was quoted \$7,000 for “decision making time”;
- journalists indicated that timeframes for application and review were not compatible with the operating environment of the media where there was generally limited lead time to complete a story, particularly when times (and costs) were likely to blow out for review or appeal.

While the Press Council does not have specific examples in relation to the use of the ACT legislation, clearly timeframes and costs are significant issues.

Should the ACT government make provision for any search or decision-making fees, then the approach recommended by the Solomon Review of Queensland legislation should be considered. It recommends no charge for personal information and that for other information the fee be determined by the number of pages supplied to an applicant rather than on an estimate of time taken to supply the information. This would ensure consistency in charging by all agencies, and provide an incentive to improve the efficiency of information retrieval. Reasonable copying charges can also be applied.

However it is increasingly common for jurisdictions to include in their legislation provisions that limit, discount or waive fees:

Queensland

Includes duty to minimise costs

Makes provision for waivers:

- where it is uneconomical to impose a fee because the cost of charging would be greater than not charging;
- where the Minister has delayed the information;
- where the applicant can show financial hardship, determined by whether the person is a concession card holder;
- where that applicant is a not for profit organisation, determined by whether the organisation is in receipt of government funding.

NSW

Counts the application fee towards the costs.
 Provides 50% discount for hardship.
 Provides 50% discount if the information is of benefit to the public generally.

Victoria

Does not charge for time looking for a file or document that was lost.
 Does not charge for time taken to examine a document to determine if it is an exempt document or for deleting exempt material from documents.
 Does not charge for producing documents for inspection.
 Waives charge if the request is a routine request.
 Does not charge (other than for copying or transcribing) if the information is intended to be used for general public interest or is related to personal affairs.
 Has the power to charge a different amount.

Commonwealth

Under the Regulations, it is up to the Minister or agency to decide.

This highlights the complexity of charging fees, other than application fees and copying/transcription costs.

If the purpose of FOI legislation is to promote open, transparent and accountable government and to encourage citizens to take part in public affairs, then the ACT government should follow the lead set by Tasmania in its recently passed *Right to Information Act* in relation to costs. The Tasmanian Act (s16) provides only for an application fee. There is no provision for fees for searching or for decision-making. Further the application fee can be waived for applicants who are impecunious, or who are members of parliament applying in connection with their duties or who are applicants who are able to show that they intend to use the information for a purpose that is of general public interest or benefit.

Current costs for information retrieval should be considerably lower to agencies than would be the case when the first wave of FOI legislation was introduced into Australian jurisdictions in the 1980s due to the use of electronic data management systems (EDMS) that make searching and retrieval of information much faster and less complicated. Indeed the use of EDMS provides opportunities for agencies to provide direct on line access to the public. This will become increasingly easy if staff is trained to enter a code that would indicate whether a document can be disclosed routinely or requires assessment at the same time that the document is entered into the EDMS. If there is only an application fee then agencies have an incentive to make production and assessment of information efficient, whereas fees applied on the basis of time simply encourage administrative inefficiency.

Timeframes must be shortened as far as is practicable. There is little justification for the current timeframes, or for delays for information that is stored in EDMS.

In relation to repeat or vexatious requests, it should be pointed out that there can be legitimate reasons for repeat requests. For example a researcher or an investigative journalist may have found out some information on the basis of an initial request and then become aware that there is likely to be further information of relevance to a line of inquiry. Measures should not restrict what appears to be repeat requests that may be made in the interests of thoroughness.

Ways in which the FOI Act 1989 can be improved and modernised.

Following reviews and changes to legislation in other jurisdictions there are clearly positive changes that can be made to the FOI Act to modernise it. These include:

- Replacing the objects clause to make it clear that the objects of the Act are:
 - to improve democratic government in the ACT;
 - to increase the openness, transparency and accountability of the executive government to the people;
 - to increase opportunities for citizens to participate in their own governance;
 - to promote freedom of expression;
 - to promote routine release of information;
 - to be a mechanism of last resort to obtain information that may be restricted where there is thought to be a public interest that overrides the public interest in participation in public affairs and freedom of expression;
- Removing the current reference to exclusions and exemptions from the objects clause;
- Including provisions that establish a presumption in favour of release of information, unless there is an overriding public interest against its disclosure;
- Clarifying that, as the legislation provides a means of last resort to access information, it provides processes and procedures to seek access to information that is not routinely released and which requires that a decision is made as to whether the information is to be released;
- Including a public interest test, such as is used in NSW legislation, so that where there is a public interest reason favouring the non-release of information this public interest reason must be balanced against the public interests in its release;
- Drafting the legislation so that no information is excluded from disclosure simply because of its class. This would require that *Part 4 Exempt Documents* be rewritten to specify that consideration be given to both the public interests in releasing documents in each class of information and the harms that may be prevented by restricting release. Each particular piece of information is then able to be assessed by a process of balancing public interests;
- Requiring that, where the public interest test is applied and access declined, the decision-maker sets a timeframe for when the information is likely to be reviewed for release;
- Including a statutory limit to the length of time that any information that has not been disclosed can be withheld from the public and providing that no information is withheld from release longer than 10 years from when it was created;
- Removing from legislation the capacity for an agency or a Minister to decline access to information on the grounds that compliance would “substantially and unreasonably” divert resources from the offices other operations (eg s16(2): this “out” provides an incentive to not improve the efficiency of records management systems and processes. Agencies should have incentive to improve systems so that information is readily able to be retrieved for the agency’s own purposes as well as for public access);
- Reviewing and addressing procedural obstacles:
 - Routine disclosure of most information should free up staff time to provide assistance to applicants on how to refine their requests;
 - Removing search and decision-making fees so that requests are subject only to an application fee and reasonable copying/transcription costs.
- Clarifying that the legislation applies to all government-owned corporations and to the private sector firms that have significant government contracts for projects and services, to enable citizens to monitor performance and scrutinise the use of public funds.

In order to create a culture that is supportive to a proactive approach to information release the following is required:

- The Chief Minister should review all Cabinet documents following meetings and determine which documents are suitable for routine release;
- Training of all relevant staff on how to determine which information can be released routinely so that as information is entered into electronic data management systems it is coded to identify which information is available for open public access and which information will require assessment prior to release;
- Training key personnel charged with making decisions about release of information that is not routinely released on how to apply the public interest balancing test in relation to any information that may be requested;
- Appointing an Information Commissioner to develop policy, guidelines and training across the public sector, to accept complaints, and to monitor implementation. This position will need to remain independent of any agency and should answer directly to the Assembly. It could be a time-limited appointment for, say, 5 years.;
- Investigating options for providing direct on-line public access to the records system of each agency so that citizens are readily able to peruse documents that are identified for public access.

Interaction between FOI and other mechanisms for accessing information held by Government

While changes have been made to FOI legislation in a number of other jurisdictions, to favour more proactive disclosure, what is significant is that most legislation remains comparatively lengthy and complex and has to varying degrees, retained many features of earlier legislation. No jurisdiction has favoured a radical change.

An example of radical change to access to information provisions is amendments that were made to the *Local Government Act (NSW) 1993*. This Act was amended several years ago to create an alternative legislative regime to FOI (which continues to apply to local councils but is now rarely used) for accessing information held by local councils. These changes are included in s12.

The regime in s12 provides access to listed documents as of right and then provides access to any other council document free of charge, unless in the case of a particular document access would be, on balance, not in the public interest. It also provides a right for a person to take away a copy of any document, subject to reasonable copying charges.

For the purpose of determining access it is irrelevant that the inspection of the documents may cause embarrassment to the council, cause loss of confidence in council or cause a person to misinterpret the information contained in it.

S12 provides that should the General Manager or other staff decide it is not in the public interest to give access to information, they are required to provide the council with written reasons for restriction, the reasons must be publicly available and the restriction must be reviewed no later than three months after the date of the decision.

The only information that is not required to be provided is plans and specifications for a residential building except for plans that show the height and external configuration and any commercial information that is likely to prejudice the commercial position of the person who supplied it or reveal a trade secret.

Many local councils now readily supply information and few applicants use the more complex and costly procedures that apply under FOI.

Most Councils now have search facilities on their websites that allow direct public access to certain files held by Councils particularly files related to assessment of development applications, planning, mapping. This enables people to access files from their own home or office, for example to track progress of assessment of development applications. The public are able to view submissions, correspondence, officer's reports etc as they are placed on files. Use of such search facilities has considerably decreased phone calls to councils and provided cost and staff savings.

Balancing public interest in access to information with requirement for confidentiality of deliberative processes for Ministers.

See comments in relation to operation of exemptions (in relation to part 4, above). Open government should support open deliberative processes.

The Press Council supports the recommendation made in the Solomon Review of Queensland FOI that the Premier (Chief Minister) should decide in consultation with the Cabinet secretariat which documents can be released proactively following a Cabinet meeting and that they should release a summary of the Cabinet agenda and decisions.

Benefits of independent Information Commissioner and whether a commission should report directly to the Assembly.

The success of legislation depends on how it is implemented. Where the legislation is intended to drive a change in the culture of government, there is a need to have someone who is independent of any agency who can coordinate the preparation of policy and guidelines to assist government agencies to adjust to change and also monitor implementation and receive complaints.

The current Act allows complaints to the Ombudsman and also appeals to ACAT. Both these bodies deal with a wide variety of other complaints and have formal processes that would delay decisions. Providing in the legislation that complaints can be made to an Information Commissioner may provide a speedier and more informal complaints handling mechanism. It also allows for complaints to be dealt with by someone who is extremely familiar with the legislation and operation of FOI and who could mediate with the agency concerned. Handling of complaints would also provide the Commissioner with the opportunity to monitor implementation of the legislation in order to be able to report to the Assembly.

Conclusion

An approach to release of information that favours automatic release of most information and for a low cost and timely assessment process for release of all other information should result in greater reliance on formal government information and a reduction the current recourse to the use of "leaks". It will assist in creating more accountable, transparent and open government.

The Australian Press Council

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

The Australian Press Council
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December 2009

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Professor Julian Disney

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Phil McLean (Fairfax Media) – Mark Baker (The Age) is his alternate

Campbell Reid (News Limited)

Pam Walkley (ACP Magazines)

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John Dunnet (Country Press Australia) alternating with Bob Osburn (Community Newspapers Australia) and Peter Owen (APN News and Media)

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Panel of Independent Journalist Members (2 members of whom 1 attends each meeting)

Prue Innes

Adrian McGregor

Journalist Member representing the Media Entertainment and Arts Alliance

Alan Kennedy

Panel of Editor Members (2 members of whom 1 attends each meeting)

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For details and biographies see:

<http://www.presscouncil.org.au/pcsite/about/members.html>