



Publication: Encore  
Date: May 2009  
Page No: 13  
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Publisher: Reed International Books Australia Pty Ltd

## FOI: Major Reforms

The Government has announced changes to Commonwealth Freedom Of Information (FOI) legislation and procedures. Ian Robertson and Linda Luu, from national law firm Holding Redlich, outline the key changes.

The upcoming changes aim to “promote a new system and culture of pro-disclosure for Government information”. Such changes are necessary considering that, according to the worldwide press free index (compiled by the independent organisation Reporters Without Borders), Australia ranks 28<sup>th</sup> in the world for press freedom, behind nations such as Latvia (12<sup>th</sup>), New Zealand (15<sup>th</sup>), Costa Rica (21<sup>st</sup>) and Mauritius (25<sup>th</sup>). Australian laws currently contain approximately 500 separate prohibitions and restrictions on the information which the public is allowed to access.

On 24 March 2009, Senator John Faulkner, Cabinet Secretary and Special Minister of State, released exposure drafts of two Bills, the *Information Commissioner Bill 2009* and the *Freedom of Information Amendment (Reform) Bill 2009* for public comment. The Bills propose a significant overhaul of the *Freedom of Information Act 1982 (FOI Act)* which has not been amended since it commenced operation 27 years ago.

The principal object of the Bills is to “promote a pro-disclosure culture across the Government and build a stronger foundation for more openness in government”. Senator Faulkner also informed the audience at the “Australia’s Right to Know” seminar held on 24 March 2009 that the reforms aimed to “increase public interaction with Government activities” and “recognise that information is held by Government authorities for public purposes.”

The Bills seek to achieve these aims by widening the scope of the public’s right to obtain information from Federal Government departments, agencies, authorities and their contractors.

## **Office of the Information Commissioner**

The Bills establish two new statutory positions, the Information Commissioner and FOI Commissioner, which together with the Privacy Commissioner will establish a new Office of the Information Commissioner. The Office will be the point of contact for members of the public and government agencies on matters relating to information disclosure, policy and management.

## **Exemptions and the public interest test**

The FOI Act currently contains 18 categories of documents which are exempt from release to the public. The Bills propose to fully repeal exemptions for the following three categories of documents: Executive Council documents, documents arising out of companies and securities legislation, and documents relating to the conduct of an agency of industrial relations.

The Bills also propose to reformulate the exemption for Cabinet documents so that it only covers documents prepared for the 'dominant purpose' of submission to Cabinet.

The Bills will introduce a single, clear public interest test, weighted in favour of disclosure of documents, in place of the existing multiple formulations of the test. A government agency or Minister will be required to:

*"give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest."*

The Bills provide for a non-exhaustive list of factors favouring disclosure and require that certain factors which are currently able to be relied upon to refuse access to documents can no longer be taken into account. The factors which can no longer be taken into account include: that access could result in embarrassment or loss of confidence in the government; could result in the applicant misinterpreting or misunderstanding the document; could result in confusion or unnecessary debate; or that the author of the document is of high seniority.

## **Publication of information on Government agency websites**

Under the Bills, Government agencies will have new obligations to publish information on agency websites. Information that is required to be published includes details of statutory appointments, information to which an agency routinely gives access in response to requests, information that is routinely provided to Parliament, and operational information about an agency's functions or powers in making decisions that affect the public.

## **Fees, charges and the 30 Year Rule**

Other reforms to the FOI Act proposed by the Bills include amendment to the *Archives Act 1983* to bring forward the open access period for most government records from 30 years to 20 years, and of cabinet notebooks from 50 years to 30 years. A number of fees and charges are to be abolished, including all FOI application fees and all charges for a person seeking access to their own information.

### **Simplified review and appeal processes**

The Bills propose to simplify review and appeal processes by introducing a merits based review process after internal review by the agency concerned but prior to an application to the Administrative Appeals Tribunal (AAT). The Information Commissioner will have the power to undertake merits based reviews of decisions by Government agencies and Ministers which refuse access to documents. These reviews are designed to be time and cost effective, with most matters being resolved without a hearing. After review by the Information Commissioner, the applicant may still apply to the AAT.

Copies of the Bills and other information on the proposed reforms are available from the Department of the Prime Minister and Cabinet website: [www.pmc.gov.au](http://www.pmc.gov.au).