

Community & Public Sector Union

Stephen Jones • National Secretary

15 May, 2009

Privacy and FOI Policy Branch
Department of Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600
Email: foiconsultation@pmc.gov.au

Dear Sir/Madam

Freedom of Information Reform

Submissions on the Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009

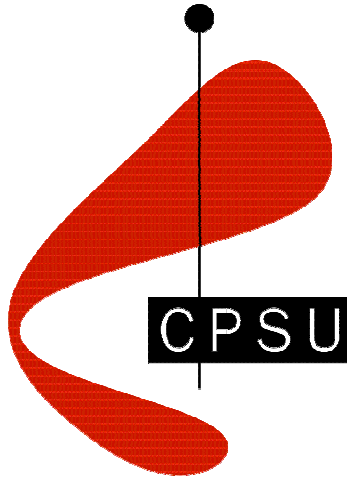
Please find attached a submission from the Community and Public Sector Union (PSU Group) to the Freedom of Information Act Reform.

The contact person for this submission is Ms Melissa Donnelly, Senior Legal Officer, CPSU ph 02 8204 6971.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stephen Jones', written in a cursive style.

Stephen Jones
CPSU National Secretary



CPSU (PSU Group) Submission to:

**Freedom of Information
Reform**

**Submissions on the *Information
Commissioner Bill 2009* and
*Freedom of Information Amendment
(Reform) Bill 2009***

May 2009

CPSU Submission to:

Freedom of Information Reform

Submissions on the *Information Commissioner Bill 2009* and *Freedom of Information Amendment (Reform) Bill 2009*

The CPSU welcomes the reform of the *Freedom of Information Act 1982*, and the subsequent consultation process that has followed the release of the *Information Commissioner Bill 2009* and the *Freedom of Information Amendment (Reform) Bill 2009*.

Introduction

1. The PSU Group of the Community and Public Sector Union (“CPSU”) represents workers in the Australian Public Service (“APS”), the ACT Public Service, the Northern Territory Public Service, Telstra, the telecommunications sector, call centres, employment services and broadcasting.
2. The *Freedom of Information Act 1982* (“FOI legislation”) was introduced with high hopes of creating a more open, transparent and accountable government. In many ways, however, the legislation has failed to live up to those ideals. The ability of the FOI legislation to empower citizens and open up debate on governance and policy has been hampered by extensive exemptions provisions, the absence of central oversight and confusion and uncertainty within agencies.
3. While the problems of the current legislation have been much publicised and the subject of various reviews¹, to date there has been a general reluctance by Government to institute amendments to the legislation. A thorough reconsideration of the terms of the FOI legislation is long overdue.
4. FOI legislation is important to the CPSU and its members. As the principal union representing members in the Australian Public Service, it is our members who are called on to administer this legislation on a daily basis.
5. Given the nature of the work done by CPSU members, the CPSU and its members have a fundamental interest in improving openness and transparent governance in Australia. This is a key objective of the CPSU’s ‘*Agenda for Change*’, which was developed after extensive consultations

¹ See Australian Law Reform Commission Report No 77 and Administrative Council Review Report No 40, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Canberra 1996 (“ALRC Report”) and Senate Legal and Constitutional Committee, *Consideration of legislation referred to the Committee: Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001

with members. The ways in which this goal should be achieved, as identified by the CPSU and its members, includes:

“fostering easier and more open access to information within and between public sector departments/agencies and the general public, including Freedom of Information requests”².

6. It is vital that the community has confidence in the decision making process and administration of Government policies that affect their lives. Access to Government information is a critical part of that.
7. The CPSU therefore welcomes the opportunity to comment on the draft Bills.

Objects

8. The CPSU supports the redrafting of the objectives provision. The current objectives are somewhat obscure and do not clearly state the purpose of the legislation. The redrafted provision clearly communicates the purpose of the FOI legislation.
9. The statement contained in clause 3(2) that the legislation is intended to promote representative democracy by increasing public participation in Government processes and increasing scrutiny and discussion of Government’s activities is particularly important in reframing the role of FOI legislation in our democracy. We hope that a redrafted objects clause will assist in reshaping how FOI is viewed by Government and Agencies alike.
10. We note that the draft Bill also removes references to exemptions within the objects provision. We support these amendments. The focus of FOI legislation must be the general right of access, not the necessary exemptions. To include a reference to exemptions in the objects misconstrues the purpose of the legislation, which can in turn, impact on their administration.
11. The draft Bill establishes a clear principle of general access to documents. Specifically, clause 11A(3) provides that:

*“Mandatory access – general rule
The agency or Minister must give the person access to the document in accordance with this Act, subject to this section”.*
12. Broad statements of this nature are important in establishing the general thrust of the legislation; that is, the general proposition is that documents must be disclosed but for a legitimate exemption. Unfortunately, the experience of FOI applicants does not always accord with this principle.

² CPSU ‘Delivering on our Agenda for Change’, October 2008.

Pro-active publication

13. We support the reforms regarding the proactive publication of Government information. These reforms will be important in transforming the emphasis from one where disclosure is the exception to the rule, to one where it is the rule. It may be the case that the proposed requirement that any information disclosed is to be made publicly available within 10 days is difficult to meet. Whilst the objective is laudable, the viability of such a deadline needs to be explored. If this is the Government's intention, it must ensure that agencies are adequately funded to comply.

Extended coverage

14. The CPSU notes that the Government proposes to extend FOI coverage, through contractual provisions, to contracted service providers and subcontractors who provide services for and on behalf of the Government. The CPSU clearly supports this proposal but has significant concerns about its application. The concerns primarily relate to whether there is a need for essential government services to be contracted out in the first place.

15. The CPSU believes that the contracting out of Government services erodes accountability and is often inefficient. The proposal to extend FOI coverage through contractual provisions is intended to impose some degree of accountability and openness in how those services are delivered. The fact that it is necessary to try to extend matters governed by statute to private providers through contractual provisions raises the question of why these services are being delivered by the private sector, as opposed to the public sector. If it is appropriate and necessary that the services are delivered in a way that we would expect of the Commonwealth Government, then it surely follows that the services should be being delivered by the Government itself.

16. The extension of FOI requirements, or for that matter any other public sector legislative requirements, through contract will never be as effective as the terms applying by the force of statute. Agencies and individual officers are bound by law to follow the FOI legislation. A wilful failure to meet obligations under the Act would potentially have repercussions for an agency by virtue of the Information Commissioner's Parliamentary reporting function and for individuals by virtue of the Code of Conduct under the *Public Service Act 1999*.

Enforcement

17. The enforcement of contractual provisions as contemplated by these reforms will be difficult, and in reality near impossible. Firstly, it is unclear how an agency would even know if a private provider had withheld certain information. Secondly, even if an agency came to know or reasonably

believe that documents were being withheld, the agency would have to spend its limited resources on pursuing legal processes to try to enforce the contract. In our view, the proposed extension of coverage to contractors and subcontractors will not achieve the level of accountability that is required of Government agencies.

Exemptions

18. The CPSU agrees with the general criticisms made of the exemptions regime by ALRC Report. The existing exemptions within the legislation are far broader than what is required to protect documents which legitimately should not be disclosed. In addition, the exemptions have been interpreted in such a broad way that the objectives of open and transparent government have been fundamentally undermined.
19. We note that the draft Bill repeals some of the current exemptions. We fully support the proposed repeal of s40 (1)(e) which covers the Commonwealth's conduct of industrial relations.
20. We also welcome the introduction of the conditionally exempt category. Under this provision, documents that are conditionally exempt are to be disclosed unless their disclosure would be contrary to public interest. Again the emphasis in this provision is important; it must be shown that public interest does not support the disclosure in order to prevent it, rather than showing that public interest supports the disclosure.
21. This category will encompass a range of documents which are currently exempt, including documents relating to:
 - relations between Commonwealth and States;
 - deliberative processes (working documents);
 - financial or property interests of Commonwealth;
 - certain operations of agencies;
 - personal privacy;
 - business affairs;
 - research; and
 - the National economy.
22. The relations between the Commonwealth and State governments require special consideration to ensure there is a uniform approach taken to FOI. The same document may be precluded by one jurisdiction but accessible in another. Given the dramatic increase in matters that are subject to COAG consideration and the far reaching implications of COAG decisions, there should be a strong presumption to disclose such information.
23. The 'deliberative processes' documents are particularly important in FOI. It is important that these documents are reviewed and, where consistent with the legislation, released in totality so the applicant can understand the

document's context. Such an approach to these documents is also necessary at the review stage.

24. In our view, it is sensible that the Bill establish a single formulation of the public interest test. A single public interest test is easier to apply and will allow for greater consistency in decision-making across the service.
25. Whilst 'public interest' is a ubiquitous term in public service structures and decision-making processes, what the public interest is in any given circumstance may not be readily apparent. Quite simply, whilst we may all agree that consideration of the public interest is significant and should be the determining factor; it may not be as easy to agree on whether the public interest supports disclosure or exemption in a given case. Given the potential complexities in the implementation of the public interest test, we recommend the Commissioner review how it is operating six months after commencement of the reforms.
26. The statement in clause 11B(3) of factors that should be considered in assessing the public interest is helpful. These factors are however, perhaps inescapably, vague and subject to individual interpretation. For example, what one agency thinks may inform debate on a matter of public importance another agency may not. Furthermore, an agency may believe that a particular document does not go to a matter of public importance, therefore form the view that the document need not be disclosed.
27. The list of irrelevant factors contained in clause 11B(4) does go some way to dealing with these problems. The matters listed in that clause have often been reasons relied on by Government to refuse FOI requests; it is therefore encouraging that criteria such as embarrassment to the Government, potential for misinterpretation and potential for confusion are expressly excluded from any consideration of the public interest.
28. Given the broad nature of relevant factors that agencies are to consider in ascertaining the public interest it is important that further guidance is provided by the central agency. The reality of the proposed scheme is that officers will be called on to determine the complicated issue of the public interest in a myriad of different circumstances. For the system to work effectively, the Government must ensure that agencies and the officers making these decisions have the requisite levels of competence and confidence to complete this task. Appropriate training and guidance must be provided and there must be a simple way to access further advice when difficult questions arise.
29. The scheme will be improved if greater information is made available to the public. Such information should include advice about their FOI rights, but also explain the existence and purpose of exemptions provisions. This will increase public faith in the FOI system.

Creation of an Information Commissioner and an FOI Commissioner

30. We welcome the creation of the statutory positions of Information Commissioner and FOI Commissioner.
31. A common and persistent criticism of the operation of the current FOI legislation is that there is no person or agency with responsibility for overseeing its operation. This can be compared with the central bureaucratic oversight that exists in the context of privacy complaints and general maladministration complaints.
32. A key recommendation arising out of the ALRC Report into the FOI legislation was the creation of an FOI Commissioner. The fact that to date there has been no independent monitor to oversee the Act has undermined its effectiveness and allowed for its deterioration over time. The Commission found that “many of the shortcomings in the current operation and effectiveness of the Act can be attributed to this lack of a constant, independent monitor of and advocate for FOI”³.
33. The administration of the FOI legislation is currently beset by a number of problems, including:
- FOI legislation is quite complicated and difficult for agencies and individual officers to administer;
 - confusion within agencies about the nature of their obligations under the Act;
 - no easily accessible review process; and
 - no central source of advice or information for agencies and applicants.
34. The creation of the statutory offices of Information Commissioner and FOI Commissioner will go some way in dealing with these issues. The CPSU believes that the issuing of guidance material and the provision of training by the Information Commissioner are important first steps in improving the way in which FOI legislation is administered in the public service.
35. FOI matters are often complicated. Often they also raise questions about how the FOI legislation interacts with other statutory provisions binding the agency or officer, such as privacy and secrecy. It is therefore essential that officers are provided with proper training and information and able to access advice as needed.
36. The right to seek an external review of FOI decisions made by agencies significantly improves applicants’ rights under the Act and will no doubt enhance public confidence in FOI more generally.
37. The processes by which Information Commissioner reviews would be conducted under the terms of the draft Bill are appropriate; in particular it

³ Australian Law Reform Commission Report No 77 and Administrative Council Review Report No 40, Open Government: A Review of the Federal Freedom of Information Act p61-62

is appropriate that procedural rights are afforded to the parties. We also note that the onus in the review process is on the agency to demonstrate that their decision was justified; given the objects of the Act and right of general access it is proper that the onus lay with the agency.

38. The purpose of clause 55D (1)(b), is unclear. This clause provides that the agency may show the decision was justified, or the agency may otherwise show that the Commissioner should give a decision adverse to the review applicant. Such a provision will need to be interpreted narrowly; otherwise it may operate as a loop-hole by which review applications are not properly considered.
39. The Information Commissioner should have to publicly report his/her reasons for making a decision. This is important to ensure that, if a party seeks judicial review of the Commissioner's decision, then the Court will have the benefit of understanding the Commissioner's reasons for the decision.
40. We note that the decision of the Information Commissioner in respect of a review application has the same effect as a decision of the agency or Minister who made the initial decision. That is, in making a review decision the Commissioner can make a final decision in the place of the agency. This position is consistent with review systems operating in Western Australia and Queensland. The CPSU welcomes such provisions. We note that in other areas of public sector review, such as reviews conducted by the Merit Protection Commissioner, the Commissioner's decisions only constitute a recommendation and are therefore not binding on the agency. Whilst the *Public Service Act* allows the Merit Protection Commissioner to provide a report to Parliament if dissatisfied with an agency's response, in our experience this is seen as an extreme step and there is a general reluctance to pursue it that far.
41. The provisions allowing the Information Commissioner to review exempt documents to satisfy themselves that the agency's decision is justified are appropriate.

Cabinet records

42. The CPSU supports the proposed amendments to the *Archives Act 1983* to bring forward the "open access period" for Cabinet records from 30 years to 20 years and Cabinet notebooks from 50 years to 30 years. This is a commendable proposal and again is indicative of a more open approach to Government.
43. Whilst these proposals have provided for a 10 year phase-in of this change, the CPSU emphasises that such a change will create a significant workload and should be adequately resourced across the Commonwealth with additional funds, and not absorbed within existing funding arrangements. If the Government does not properly resource and fund

such activities, then the Government's intention to improve access to public records will not be achieved.

44. We note that the material released will be subject to withholding information which continues to be sensitive. While this is consistent with the current exemptions under the *Archives Act 1983*, there needs to be clear information about what constitutes 'sensitive' information for this exemption to be publicly accepted.

Australian Public Service and FOI legislation

45. Agency culture and attitude is often cited as a significant cause of the problems with the administration of FOI legislation. The CPSU and its members believe in the importance of FOI legislation and are committed to fostering open and accountable Government in this country. In our view, the claim that the public service and public servants are antithetical to the philosophy of FOI legislation, is not sustainable.
46. Our members advise the CPSU that attitudes or approaches to FOI within agencies vary greatly. While individual officers may be committed to FOI principles, within certain agencies there is a perception that the agency or senior management wants public servants to find an exemption to FOI requests. This perception is created by confusion within agencies about the priority that FOI should be given and the absence of clear, ongoing commitments by senior management communicated to employees about FOI legislation.
47. The politicisation of elements of the public service over the last decade has also contributed to a general wariness of FOI matters. When public servants are working in a highly politicised environment, there is an added sensitivity to releasing documents which may be seen to be prejudicial to the Government. The reinvigoration of FOI legislation must be part of a more comprehensive set of measures which ensure that the public service is able to operate apolitically and in the public interest.
48. FOI is, however, only effective if the documents sought actually exist. The adequate creation of appropriate documentation to record decision making processes is therefore fundamental. Since the late 1990s, the Australian Law Reform has on two occasions considered this issue and recommended reform⁴. At present there is no Commonwealth legislation imposing such a general obligation. In contrast, over the last decade, various States and Territories have enacted public records legislation which includes obligations in respect of record-keeping.

⁴ Australian Law Reform Commission *Open Government Report* 1996 and Australian Law Reform Commission *Federal Record Report* 1998

49. The CPSU supports a general legislative obligation in the following terms:

“agency heads must ensure the making and keeping of full and accurate records of their office and agency activities”.

The CPSU is disappointed that the Commonwealth Government has not taken this opportunity to introduce such a legislative obligation.

Interaction with Secrecy Laws

50. Another source of concern for CPSU members is the interaction between secrecy provisions and FOI legislation. In recent CPSU forums, many members reported the difficulty in assessing these competing priorities of secrecy and FOI legislation. Both sets of laws are difficult, requiring complicated assessments of pieces of information. While the FOI legislation provides some protection for public servants who publish or give access to documents in good faith, it does not deal with the issue in its entirety.

51. Public servants have to make decisions on FOI requests on a regular basis. Vital to the success of the FOI system is that these officers are able to make fair decisions while meeting their legislative obligations. Officers need to be able to understand the purpose and context of any document that falls within the scope of an FOI request and then to assess that document and their competing obligations under different pieces of legislation.

52. The draft Bills, while moving a long way in terms of FOI legislation, do not settle the vexed question of how secrecy provisions and FOI legislation should interact. Employees who breach of secrecy provisions can face very serious criminal and civil consequences. To truly create an environment in which access is the norm, secrecy provisions must be rationalised and there must be clear guidance to employees about these issues.

53. We note that the secrecy provisions are currently subject to a separate review by the Australian Law Reform Commission and it therefore may be more appropriate for this issue to be revisited when the ALRC has published that report.

54. Similar complexities arise about the interaction between privacy laws and FOI legislation. Given the inclusion of the Privacy Commissioner within the draft Bills, and in particular their identification as an information officer for the purposes of the Information Commissioner Bill, it is necessary that clear guidance be provided to public servants about the interaction between their obligations under privacy and FOI legislation.

Conclusion

55. The draft Bills represent an important step forward in reinvigorating the ideals of FOI and open government at a federal level. The legislation sets the parameters by which FOI matters will be assessed and the framework that will oversee its administration. Legislation, however, is not the whole answer. To reshape how FOI is viewed and works in the Commonwealth Government, the Government must fully resource appropriate training, information and advice to agencies and public servants and ensure that essential public services are conducted by the Government rather than outsourced.