

28 January 2010

Committee Secretary
Senate Finance and Public Administration Committee
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Parliament House
Canberra ACT 2600
Email: fpa.sen@aph.gov.au

Dear Sir/Madam

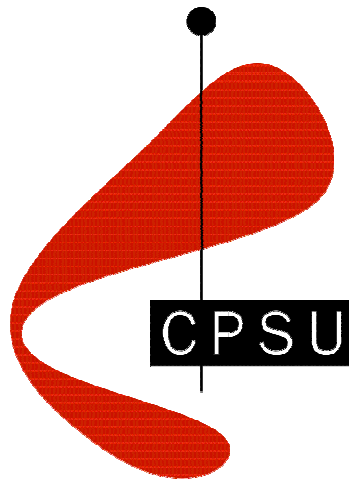
**Freedom of Information Amendment (Reform) Bill 2009 and Information
Commissioner Bill 2009**

Please find attached a submission from the Community and Public Sector Union (PSU Group) to the Inquiry into the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009.

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

Yours sincerely

Stephen Jones
CPSU National Secretary



CPSU (PSU Group) Submission to:

**Inquiry into Freedom of
Information Amendment
(Reform) Bill 2009 and
Information Commissioner Bill
2009**

January 2010

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. 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.
3. Given the nature of the work done by CPSU members, the CPSU and its members have a fundamental interest in improving open and transparent governance in Australia. This is a key objective of the CPSU’s *Agenda for Change*, which was developed after extensive consultation with members. The ways in which this goal should be achieved, as identified by the CPSU and its members, include:

‘fostering easier and more open access to information within and between public sector departments/agencies and the general public, including Freedom of Information requests¹’.

4. The *Freedom of Information Act 1982* (“FOI Act”) was introduced with the fundamental aim of creating a more open, transparent and accountable government. In many ways, however, the legislation has failed to meet these expectations. While the limitations of the current legislation have been much publicised and the subject of various reviews², to date there has been a general reluctance by Government to introduce legislative amendments.
5. A thorough reconsideration of the terms of the FOI Act is long overdue. It is vital that the community has confidence in the decision making processes and the administration of Government policies that affect their lives. Access to Government information is critical to maintaining public confidence and to ensuring that the activities of government are open and transparent.
6. For these reasons, the CPSU welcomes reform of the *Freedom of Information Act 1982*, including the opportunity to provide comments on the Freedom of Information Amendment (Reform) Bill 2009 (“FOI Bill”) and the Information Commissioner Bill 2009 (“IC Bill”). The CPSU has also provided comments on Exposure Drafts of the Bill released for public consultation by the Department of Prime Minister and Cabinet.

¹ CPSU ‘Delivering on our Agenda for Change’, October 2008.

² 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

Purpose of FOI legislation

7. The FOI Act was introduced to open the doors of Government to citizens and enshrine the citizen's right to access Government documents. An articulation of this important purpose should form part of the FOI legislation. Unfortunately, the objectives of the current FOI Act are somewhat obscure and fail to clearly articulate this purpose. Clause 3 of the FOI Bill, which rewrites the objects of the legislation, is a substantial improvement.
8. Clause 3(2) states the intention of the legislation to promote representative democracy by increasing public participation and scrutiny of Government decisions and processes. Such a statement is important in reframing the role of FOI legislation in our democracy and will assist in reframing how FOI is viewed by Government and agencies alike.
9. It is also appropriate that the FOI Bill removes references to exemptions within the objects provision. The focus of FOI legislation must be the general right of access, not any necessary exemptions. To include a reference to exemptions in the objects misconstrues the purpose of the legislation, which can in turn, impact on its administration.
10. The Bill establishes a clear right of general access to documents at clause 11A (3). 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.'
11. Broad statements of this nature are important in establishing the general intention of the legislation; that is, the proposition is that documents must be disclosed but for a legitimate exemption. Unfortunately, the experience of FOI applicants has not always accorded with this principle.

Pro-active publication

12. The proactive publication of Government information, as set out in Schedule 2 of the FOI Bill, is a welcome initiative. 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. Firstly, the Bill requires agencies to proactively publish certain information and detail the types of information that would usually be released when requested under FOI. Secondly, the Bill contains a requirement that agencies publish information released (with exceptions for documents that contain personal, commercial information and so on) under an FOI request within 10 days of giving access to the applicant.
13. These provisions are welcomed and should be supported. It must be noted however that they do impose quite rigorous obligations on agencies.

Agencies, particularly smaller agencies, may have some difficulty meeting these requirements particularly given the current approach to APS funding and the budgetary pressures caused by the efficiency dividend. The Government must ensure that all agencies have the necessary resources to properly comply with these provisions.

Extending FOI to contractors

14. The Bill proposes the inclusion of clause 6C in Schedule 6 which deals with requirements for Commonwealth contracts. The Explanatory Memorandum explains that this clause:

‘is intended to extend the scope of the FOI Act so that requests for access may be made for documents held by contracted service providers (and subcontractors) for or on behalf of an agency to persons in the community’.³

15. Contracting out should not be a means by which agencies contract out of their responsibilities at large. As the National Archives advises:

‘Outsourcing does not lessen an agency’s responsibilities – the work of an Australian Government agency must always be performed accountably and efficiently’.⁴

Consideration should be given to a legislative amendment to make this general principle clear in the legislation.

16. The proposal to extend FOI obligations to contractors is consistent with principles of open government, however it will be incredibly difficult to enforce. The need for such a provision also begs the question of why essential government services to the community should be provided by private entities. Contracting out of Government services erodes accountability, exposes the private details of citizens unnecessarily and is often inefficient. If it is appropriate and necessary that the services are delivered in a way that would be expected of the Commonwealth Government, then it surely follows that the services should be being delivered by the Government itself.

17. 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.

³ *Freedom of Information Amendment (Reform) Bill 2009 Explanatory Memorandum* p52

⁴ National Archives of Australia website <http://www.naa.gov.au/records-management/IM-framework/outsourcing/index.aspx> (viewed 27 January 2010)

18. The enforcement of contractual provisions as contemplated by these reforms will be difficult, and in reality is 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 enforce the contract.
19. The inherent difficulties in enforcing these provisions are apparent in the proposed section 24A. This provision would allow an agency to refuse a request for access to a document if the agency has taken reasonable steps to receive the document in accordance with contractual measures and those measures were unsuccessful. There is no further guidance on what would constitute 'reasonable steps' by an agency. This provision severely weakens the attempts to extend FOI coverage to private providers of public services, and demonstrates the inherent difficulties in the enforcement of such provisions.
20. Quite simply, the proposed extension of coverage to contractors and subcontractors will not achieve the level of accountability that is required of Government agencies and even in the case of known breaches by a contractor or subcontractor there is no guarantee that the FOI applicant will get access to the document.
21. Six months after the commencement of these reforms, the Information Commissioner should be tasked with reviewing the application and enforcement of FOI provisions in respect of private sector contractors. As part of that review the Information Commissioner should publicly report to the Government and make any recommendations to improve this aspect of the FOI scheme.

Exemptions regime

22. The CPSU agrees with the general criticisms made of the exemptions regime by ALRC Report. The exemptions within the current FOI Act are far broader than what is required to protect documents which legitimately should not be disclosed. In addition, the exemptions provisions have been interpreted in such a broad way that the objectives of open and transparent government have been fundamentally undermined. The FOI Bill makes welcome reforms to the exemptions provisions of the current Act.

Conditionally exempt category

23. The introduction of the conditionally exempt category is welcomed. Documents that fall within this category are to be disclosed unless disclosure would be contrary to public interest. 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.

24. The category of relations between the Commonwealth and State Governments requires careful attention to ensure, to the extent possible, Governments are taking a uniform approach 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.

25. 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.

Public interest test

26. 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.

27. 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 it may be easily agreed 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.

28. 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.

29. The list of irrelevant factors contained in clause 11B (4) does go some way to addressing 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.

30. 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. It is essential that the Information Commissioner issue specific guidelines on this issue, as foreshadowed by clause 11B (5), and appropriate training is provided to staff, prior to the commencement of the new scheme. The Information Commissioner should also be responsible for monitoring the application of the public interest test and providing expert advice to agencies as necessary.

Cabinet records

31. The proposed amendments to the *Archives Act 1983* in reducing the “open access period” for Cabinet records from 30 years to 20 years and Cabinet notebooks from 50 years to 30 years are commendable and again indicative of a more open approach to Government.
32. Whilst there is a 10 year phase-in for these changes to take place, these proposals will create a significant workload and should be adequately resourced across the Commonwealth with additional funds, rather than 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.

Creation of an Information Commissioner and an FOI Commissioner

33. The creation of the statutory positions of Information Commissioner and FOI Commissioner is welcomed.

Central oversight

34. A common and persistent criticism of the operation of the current FOI legislation is that there is no office-holder or agency responsible for overseeing its operation. This can be compared with the central bureaucratic oversight that exists in the context of privacy complaints (Privacy Commissioner) and general maladministration complaints (Ombudsman).
35. 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'⁵.

36. 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/or applicants.
37. The creation of the statutory offices of Information Commissioner and FOI Commissioner will go some way to addressing these issues.

Reviews

38. The right to seek an external review of FOI decisions made by agencies significantly improves applicants' rights under the Act. Such a step will no doubt enhance public confidence in FOI more generally.
39. The processes by which reviews by the Information Commissioner would be conducted under the terms of the Bill are appropriate; in particular it is appropriate that procedural rights are afforded to the parties. The Bill provides 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 lies with the agency.
40. The purpose of clause 55D (1)(b) is unclear. This clause provides that the agency may show that a 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.
41. The Information Commissioner should be required to publicly report his/her reasons for making a decision. This is important in promoting open and transparent governance.
42. 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

⁵ 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

position is consistent with review systems currently 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 a matter that far. It is therefore important that the FOI review system provides a quick and effective way of rectifying decisions identified as incorrect.

43. The provisions allowing the Information Commissioner to review exempt documents to satisfy themselves that the agency's decision was justified are appropriate.

Educative role

44. The FOI and Information Commissioners must play an educative role in respect of FOI legislation.
45. FOI matters are often complicated. Frequently, they raise questions about how the FOI legislation interacts with other statutory provisions binding the agency or officer, such as privacy and secrecy legislation. It is therefore essential that officers are provided with proper training and information, and be able to access advice as needed. The issuing of guidance material and the provision of training by the Information Commissioner are important first steps in this process.
46. 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. The Information Commissioner and FOI Commissioner must be adequately funded and resourced to undertake all these roles. Further discussion of funding is found below.

Australian Public Service and FOI legislation

47. 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. Any claim that the public service and public servants are antithetical to the philosophy of FOI legislation is not sustainable.
48. Our members report that attitudes to FOI requests 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 prefer that public servants ordinarily 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 a clear commitment to FOI principles by senior management..

49. The politicisation of elements of the public service over the last decade has also contributed to a general wariness towards FOI matters. When public servants are working in a highly politicised environment, there is an added sensitivity to releasing documents which may be seen as 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.
50. FOI is 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 reform⁶. 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.

51. 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’.

It is disappointing that the Commonwealth Government has not taken this opportunity to introduce such a legislative obligation.

Funding

52. These Bills go a long way in addressing the problems that have beset the FOI system at a federal level. However, effective legislation alone is only half the answer. For the FOI system to be truly effective, it needs to be well-administered and this requires funding – funding for an increased number of FOI officers, funding for initial and ongoing training and funding for community education campaigns. This was acknowledged by Mr Anthony Byrne, the Parliamentary Secretary to the Prime Minister, in the Second Reading when he stated:

“there is the potential for a substantial resource impost in the maintenance of an effective FOI system”⁷.

While the amendments to FOI are laudable, to give them effect, the Government must properly resource agencies for these responsibilities.

⁶ Australian Law Reform Commission *Open Government Report* 1996 and Australian Law Reform Commission *Federal Record Report* 1998

⁷ Second Reading Speech, House of Representatives Hansard, Thursday 26 November 2009 p12972

53. Currently government information management generally is managed by a number of agencies. The Information Advisory Committee, contemplated by clause 27 of the IC Bill, will presumably have some role in co-ordinating and managing these responsibilities. To be effective, the Committee must be adequately resourced and funded.

Interaction with Secrecy Laws

54. 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.

55. 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.

56. The 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.

57. Secrecy legislation is currently subject to a separate review by the Australian Law Reform Commission and it therefore may be more appropriate for this particular issue to be revisited, and any legislative amendments introduced, when the ALRC has published that report.

58. Similar complexities arise about the interaction between privacy laws and FOI legislation. Clear guidance must be issued by the Privacy Commissioner and the Information Commissioner/FOI Commissioner to address this.

Conclusion

59. The 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 operates 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.