

Introduction

1. This joint submission has been prepared by three of the four parliamentary departments, namely the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services. In particular, it responds to item 1(e) in the terms of reference relating to:

The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act...

2. The three departments have been affected by a change in the guidelines in May this year by the Australian Information Commissioner stating that the FOI Act applied to the parliamentary departments when previously the guidelines stated that the FOI Act did not apply to the departments of the Parliament. The change in the guidelines was not consequent upon a legislative enactment by the Parliament nor upon a decision of a court. It has raised a number of issues which require urgent clarification by a deliberative decision of the Parliament rather than through a variation in executive interpretation of longstanding legislative provisions.
3. The three parliamentary departments support amendments to the FOI Act which would clarify that the Act applies to requests for access to departmental documents which relate to matters of an administrative nature.
4. However, the FOI Act as it is currently framed was designed to provide access to *government* information. The *Parliamentary Service Act 1999* requires that parliamentary service staff provide professional advice and support for the Parliament independently of executive government. The recent, retrospective inclusion of the parliamentary departments under the Act due to an administrative interpretation does not sufficiently recognize the institution of the Parliament and the need for parliamentary officials to provide frank and complete advice on a range of matters, not all of which are covered by parliamentary privilege. This also requires urgent clarification.
5. The fourth parliamentary department, the Parliamentary Budget Office, is not affected by the Information Commissioner’s ruling earlier this year as it is subject to explicit exemptions which were recently clarified by the passage of the Freedom of Information (Parliamentary Budget Office) Act in November.

Background

6. When the FOI Act was first passed by the Parliament in 1982, it did not, and was never intended to, apply to the parliamentary departments. From the beginning, FOI was designed to create access to *government* documents and the parliamentary departments are not part of executive government.
7. The issue of whether the parliamentary departments should be subject to FOI had been given a substantial amount of consideration at the time. The Senate Constitutional and Legal Affairs Committee considered the original FOI Bill in a 1979 report and it was open to the idea of some aspects of the work of parliamentary departments being subject to FOI from an accountability perspective. But the committee found it difficult to determine where the line should be drawn in relation to parliamentarians performing their duties (eg in matters such as requests to the Parliamentary Library).
8. The committee recommended that the parliamentary departments should be encouraged to act as if the legislation did apply to them. For the next three decades there was general agreement amongst the departments that while the FOI Act did not apply to the parliamentary departments, in general, material should be supplied on request unless there were good grounds for refusing requests and reasons were provided for any such a refusal.
9. In 1994 the then Clerk of the Senate, Mr Harry Evans, wrote to the secretary of the Australian Law Reform Commission to comment on Issues Paper number 12 on the subject of whether the parliamentary departments should be exempt from FOI. Mr Evans stated:

It would be possible to amend the Freedom of Information Act to distinguish such information in the possession of the parliamentary departments from other information not subject to parliamentary privilege, and to make the latter category of information subject to the Act.

10. In the following year (1995) the ALRC published Report number 77, *Open Government, A Review of the Federal Freedom of Information Act 1982* which referred to the 1979 Senate committee report referred above and noted the submission from the then Clerk of the Senate in which he supported coverage. The ALRC report also noted that:

The Department of the Senate has, in any case, always acted as though it were subject to the FOI Act, releasing documents unless they would have fallen within an exemption (paragraph 11.8)

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11. The report concluded in recommendation 73 that the parliamentary departments should be made subject to the FOI Act but no change eventuated. The ALRC commenced another inquiry into FOI in 2007, but this inquiry was deferred in July 2008 “pending Government Reforms”.
12. In late 2011, advice was received by the parliamentary departments that the FOI Act may in fact have applied to the parliamentary departments since the passage of the Parliamentary Service Act in 1999. The reasoning was that due to a faulty transitional provision in the legislation which created the Parliamentary Service, the parliamentary departments had technically been ‘prescribed agencies’ since 1999 and thus subject to the scope of the Act since that time.
13. On 9 May 2012, the Australian Information Commissioner, Professor John McMillan, wrote to the heads of the (then three) parliamentary departments to advise that further to earlier discussions and correspondence, he had on that date amended guidelines issued under section 93A of the FOI Act. Until that time the guidelines had stated that “The Act does not apply to the departments of the Parliament”. In Professor McMillan’s words:

I have today amended the Guidelines to reflect the correct legal position.
14. This led to some publicity and the parliamentary departments received a number of FOI requests, principally related to payments to Members and Senators. The parliamentary departments made prompt efforts to comply not just with the requests received (where appropriate), but also with the other requirements of the FOI Act, including the reporting of statistics and the establishment of an FOI register on the parliamentary website.
15. Of strong concern to the parliamentary departments is the acknowledgement by the Freedom of Information Commissioner, Dr James Popple, in correspondence to the parliamentary heads dated 13 February 2012, that:

Some of the points that you raise support the view that the application of the FOI Act to the parliamentary departments since 1999 was unintentional or at least inadvertent.

The departments have complied with the new guidelines and because requests for information have been met whenever they could to date a court has not been required to decide whether in fact the departments are subject to the Act. The strong view of the heads of the departments presenting this submission is that the law should reflect the intention of the Parliament which is subject to interpretation by the courts. It should not be the role of officers of a government agency to declare what the law is.

Issues

16. As stated above, the parliamentary departments have complied with FOI requests on matters of an administrative nature both before it was considered that the FOI Act applied and since the guidelines were changed in 2012. In evidence to the Supplementary Budget Estimates hearing of the Finance and Public Administration Legislation Committee on 15 October 2012, the Clerk of the Senate, Dr Laing made the following response in answer to a question from Senator Rhiannon:

Senator RHIANNON: *Considering public money allows the Department of the Senate to function, should it be beyond the reach of FOI laws?*

Dr Laing: *I might take that one. There is certainly an argument that the administrative functions of the parliamentary departments—the Department of the Senate—should be within the remit of the FOI regime. We do run on taxpayers' money; we are open and transparent about our operations. The difficulty comes, I think, with things that are not the administrative functions of the Department of the Senate, and that is the whole area of proceedings of parliament and the operation of the Senate and its committees, and there is a very strong argument under the separation of powers that those areas should be beyond what is effectively interference by the executive. This is not a radical idea; it is already present in the Freedom of Information Act by the way that the act applies to the courts and to the Office of the Official Secretary to the Governor-General. In recognition of the fact that they are separate institutions of government, the FOI Act applies only to administrative documents of court registries, not to the proceedings of courts, and it applies only to the administrative documents of the Official Secretary to the Governor-General, recognising that there are other areas that are beyond that coverage.*

Senator FAULKNER: *In relation to transparency for administrative documents and such matters, does the Department of the Senate have a policy in relation to full transparency?*

Dr Laing: *I believe we do, yes. We have always cooperated with the spirit of the FOI Act. Those students of old annual reports will see from time to time where we did get requests, purportedly under the FOI Act, that we did outline how we responded to them. Yes, I have no argument with the idea that the FOI Act should apply to administrative documents of the department.*

17. As publicly resourced agencies, the parliamentary departments support the principle that the *administrative* documents of any taxpayer-funded agency should be open to scrutiny subject to any claim of appropriate immunity (which the FOI Act exemptions generally reflect). (See Recommendation (i) below.)

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18. However, there are serious concerns about documents which are not of an administrative nature, mainly relating to parliamentarians and the role of the departments in supporting Members and Senators as they perform their constitutional roles. These documents are categorised below.
19. The first category of documents which should not be, and in our view, are not, covered by the FOI Act are those materials which are covered by parliamentary privilege. Each House of Parliament and parliamentary committee has exclusive authority over the publication of their respective proceedings and individual parliamentarians are protected by parliamentary privilege in the performance of their functions as members. The term "proceedings in Parliament" is defined in subsection 16(2) of the *Parliamentary Privileges Act 1987* as:

...all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes-

- (a) the giving of evidence before a House or a committee, and evidence so given;*
- (b) the presentation or submission of a document to a House or a committee;*
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and*
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.*

20. Certain documents such as a submission to a parliamentary committee or speech notes used by a Member or Senator during a debate in the chamber are clearly not subject to FOI. However, section 46 in the FOI Act is still confusing as it provides that a document is exempt from FOI if disclosure would:

(c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory or of Norfolk Island.

21. It is unclear what the term "infringe the privileges of the Parliament" means as privilege belongs to an individual House, not to the Parliament as a whole and there is no such thing as "privilege of the Parliament of the Commonwealth". This could lead to an unfortunate scenario where an applicant who had been refused documents covered by privilege (such as a parliamentarian’s speech notes) sought a review by the Information

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Commissioner under Part VII of the FOI Act. Were the Information Commissioner to attempt to proceed with such a review, the process of the Commissioner seeking access to the documents would necessarily involve a questioning of the proceedings of parliament by a tribunal, which is unlawful under the Parliamentary Privileges Act. This issue requires clarification. (See Recommendation (ii) below.)

22. This leads to the second category of documents which should not be subject to FOI and concerning which the position is unclear under the FOI Act as it currently stands.
23. In particular, staff of the parliamentary departments regularly advise Members and Senators and other persons on a range of matters, some of which would not necessarily be within the scope of subsection 16(2) above but which do require protection from disclosure. For example, advice from either of the Clerks of the House to an individual parliamentarian about procedural developments in another jurisdiction and the implications for the relevant House, or advice to the Presiding Officers from parliamentary officers on matters of security at Parliament House, do not relate to proceedings in parliament but should not be subject to FOI.
24. In fact, questions about Parliament House security raise a particular issue which illustrates how there are a combination of factors at work here. While questions about Parliament House security may already be exempt under section 37 of the FOI Act (enforcement of law and protection of public safety) and sections 47E and F (agency operations and privacy), the Presiding Officers have overall responsibility for the parliamentary precincts. Any advice to the Presiding Officers from parliamentary officials on or about the parliamentary precincts should not be subject to FOI.
25. Another complication is that section 38B(2) of the Parliamentary Service Act 1999 states that:

*The Parliamentary Librarian must perform the function mentioned in paragraph (1)(a):
(a) in a timely, impartial and confidential manner...*

This clause provides an expectation of confidentiality among parliamentarians which is enshrined in legislation but at odds with the FOI Act. (See Recommendation (ii) below.)

26. As officers serving the institution of Parliament, parliamentary service staff should be able to provide frank and complete advice on questions related to the proceedings of parliament and any other matter which supports

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parliamentarians, and the Houses and committees in the performance of their constitutional roles. Parliamentary officers serve all members of Parliament equally, and are not dedicated to the government of the day. This advice should not be subject to FOI because that disclosure would mean that the information could become part of the political process and lead to a break-down in the current system of parliamentary officers providing complete advice to all parliamentarians equitably and discreetly. (See Recommendation (iii) below.)

27. The third category of information relates to material held by Senators and Members and which is not in the control of the parliamentary departments. While it is relatively straightforward for one of the chamber departments to decline access under an FOI request for paper documents in a Senator’s or Member’s office as they are not in the control of the department, it is not as straightforward in relation to digital information such as emails held on the Parliamentary Computing Network (PCN). In fact, the parliamentary departments have received a number of FOI requests for data in this form and the requests received to date have been declined on the basis that while one of the parliamentary departments may run and maintain the computer network, the information must be regarded as belonging to the parliamentarian and not to one or more of the parliamentary departments. However, this has not been tested and needs clarification. (See Recommendation (iv) below.)

Conclusion

28. The accidental exposure of the parliamentary departments to the FOI Act despite the Parliament’s original intention is unfortunate and needs urgent clarification. This submission has outlined key issues with the applicability of the FOI Act to the parliamentary departments that require urgent legislative clarification.
29. The current situation in relation to the parliamentary departments is inconsistent considering that sections 5, 6 and 6A of the FOI Act provide that the Act does not apply in respect of the other arms of government (namely the courts, tribunals and the Official Secretary to the Governor-General) unless the documents relate to matters of an administrative nature. Furthermore, sections 5 and 6 clarify the status of office-holders of courts and tribunals by declaring them not to be prescribed authorities for the purposes of the Act, yet the situation in relation to the Presiding Officers is not clear.

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30. Therefore, the current situation of an inadvertent application of the FOI Act to the parliamentary departments needs to be addressed by a deliberative decision of the Parliament.

Recommendations

- i. That the Departments of the Senate, the House of Representatives and Parliamentary Services be subject to the FOI Act in relation to documents of an administrative nature only.
- ii. That the FOI regime not apply to any matter subject to parliamentary privilege and that section 46 of the current FOI Act be amended to remove doubt. The impact of section 38B of the *Parliamentary Service Act 1999* on the FOI Act should also be reviewed.
- iii. That the FOI Act not apply to advice provided by *Parliamentary Service Act 1999* staff, irrespective of whether or not parliamentary privilege applies.
- iv. That the FOI Act be clarified to remove any doubt that the provisions do not apply to any documents held by parliamentarians (and their staff) even if the information resides on facilities provided by the parliamentary departments.