

Review of the *Freedom of Information Act 1982* (FOI Act)
and the *Australian Information Commissioner Act 2010*

Attorney-General's Department

**Submission by the Administrative Law Committee of the Federal Litigation Section
of the Law Council of Australia**

10 December 2012

This submission has been prepared by the Administrative Law Committee (the Committee) of the Federal Litigation Section of the Law Council of Australia.

The Committee welcomes the opportunity to comment on this review of the *Freedom of Information Act 1982* ('FOI Act' or 'the Act') and the *Australian Information Commissioner Act 2010*.

The FOI Act serves an important and central role in Australia's system of government and its administrative law. By providing a general right of access to documents of agencies, with external merits review and ultimately enforceable in the Federal Court, the Act acknowledges that the information in such documents is a national resource to be managed for public purposes. As such, it promotes representative democracy.

These objects are to be lauded, and the successful operation of the Act needs to be supported by adequate resourcing of agencies and the Office of the Australian Information Commissioner to perform their FOI functions and responsibilities in a way that means the objects of the Act are achieved.

The following submission uses the numbering of the Terms of Reference (1(a) to (g)) issued by the Attorney-General on 29 October 2012.

1 (a), (b), and (c): the impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system; the effectiveness of the Office of the Australian Information Commissioner; the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters.

1. It is the Committee's understanding that the new two-tier system of merits review of FOI decisions, involving the possibility of review by the Information Commissioner, has led to significant delays in processing reviews by the Commissioner.
2. If the new system is to be maintained, it needs to be properly resourced so that applications for the review of decisions are processed within the 60 day time limit imposed by s54S of the Act.

1.(d): the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account (i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and (ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;

3. The 2010 amendments to the FOI Act reformulated the exemptions, including by the introduction of a general public interest test in s11B.
4. This term of reference requests that consideration be given to whether legitimate protection is given to Cabinet documents.
5. As one of the exemptions in Division 2 of Part IV, the Cabinet documents exemption in s34 does not involve the public interest test: FOI Act ss11A(4),

31B(a). The position is the same as prior to the 2010 amendments. Section 34 appears to still operate effectively.

6. This term of reference also asks whether legitimate protection is given to the broader class of sensitive government documents. The following are included in Division 2 as exempt without a public interest test: s33 (documents affecting national security, defence or international relations); s34 (Cabinet documents); s37 (documents affecting enforcement of law and protection of public safety); s38 (documents to which secrecy provisions of enactments apply); s42 (documents subject to legal professional privilege), s45 (documents containing material obtained in confidence), s46 (documents disclosure of which would be contempt of Parliament or contempt of court), s47 (documents disclosing trade secrets or commercially valuable information) and s47A (electoral rolls and related documents). The Committee is of the view that these exemptions were appropriately included in Division 2 and should remain free of the public interest test.
7. The conditional exemptions currently included in Division 3 are subject to the public interest test: FOI Act ss11A(5), 11B, 31A. The Committee is of the view that these exemptions are appropriately conditional in that they are only available subject to the public interest test, and there is no case for moving any of them to Division 2.
8. The review is also asked to report under this term of reference as to whether, given the reformulation of the exemptions, government may obtain frank and fearless advice from agencies and third parties who deal with government.
9. In the Committee's view the reformulation has no negative impact on the ability of government to obtain frank and fearless advice. Legal advice is exempt under s42. The Committee notes that the Office of Australian Information Commissioner *Guidelines*, issued in October 2011 under s93A of the FOI Act, state at [5.118] that it is not always clear whether the privilege applies to advice given by agency lawyers. It would be desirable if the *Guidelines* could be expanded to provide guidance as to the application of the privilege to a lawyer employed within an agency giving independent legal advice to the agency's decision-makers.
10. The Committee also questions the inclusion in the *Guidelines* of [5.130], which refers to a 1986 circular advising that agencies must not claim the exemption unless 'real harm' would result from disclosure. While the Committee is not in a position to know whether the circular is still current and of general application, the Committee questions whether it is consistent with recent High Court authority on the importance of the privilege as a substantive rule of law and a fundamental common law right.
11. As to other kinds of advice provided internally, in the Committee's view adequate protection is provided by s47A (deliberative processes), s47D (financial or property interests of Commonwealth or Norfolk Island), s47E (certain operations of agencies), s47H (research) and s47J (economy). Advice from third parties is protected principally by ss45 and 47 (referred to above) and s47G (business).
12. In the Committee's view, the amendment of the FOI Act in 2010 has not diminished the protection which these exemptions provide. In the case of the conditional exemptions, the public interest test in s11B(4) provides that certain factors must not be taken into account by a decision-maker when determining whether access

to a document would, on balance, be contrary to the public interest. It is noted that frankness and candour is not listed in s11B(4) as such a factor.

1.(e): the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act.

Agencies, Departments and prescribed authorities

13. Section 11 of the FOI Act provides for a legally enforceable right to obtain access to a document of an agency, other than an exempt document.
14. 'Agency' is defined in s4 of the Act to mean 'a Department, a prescribed authority or a Norfolk Island authority'.
15. A 'Department' means a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth.
16. A 'prescribed authority' is defined in s4 to mean 'a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with, the provisions of an enactment, or an Order-in-Council' with a range of bodies then specifically excluded.
17. Section 4(2) provides that certain unincorporated bodies, namely boards, councils, committees or sub-committees of prescribed authorities, shall not be taken to be separate prescribed authorities for the purposes of the Act, but shall be deemed to be comprised within the relevant prescribed authority with which they are connected.
18. The Committee does not suggest that there should be any change to those definitions. The public purpose criterion is an apt one, and it accords with one of the objects in s3 of the Act, being: 'that the information held by the Government is to be managed for public purposes, and is a national resource.'

Exemption of certain persons and bodies

19. Sections 5, 6 and 7 of the FOI Act, exempt various agencies, tribunals, courts and other bodies listed in Schedules 1 and 2 to the Act, either partially or entirely from the operation of the Act. It is convenient to use the structure and content of the two Schedules themselves (including their Parts and Divisions) to comment on these exemptions.
20. Section 6A exempts documents of the Official Secretary to the Governor-General, unless they are of an administrative nature. This exemption appears to be directed at protecting documents relating to the exercise of prerogative power and as such should be maintained, as it still permits access to administrative documents and to that extent is compatible with the accountability objects of the FOI Act.
21. Section 6C, which requires agencies to take contractual measures to, in effect, extend the operation of the FOI Act to Government contractors (except in relation to documents they hold relating to entering into those contracts) is appropriate and desirable to ensure that publicly-funded contracts and contractors providing services related to the functions or exercise of powers of agencies, are also open to public scrutiny.

Schedule 1

22. While s5 exempts courts from the operation of the Act, except in relation to administrative matters, s6 extends that exemption to certain tribunals listed in Schedule 1¹, again except in respect of administrative matters. The Committee does not see any need to recommend any change to the exemption for courts, which is protective of the independence of the judiciary and the administration of justice, and it is appropriate to extend that exemption to the named tribunals in Schedule 1 to the extent that it applies only to their court-like, or quasi judicial, operations.

Schedule 2, Part I, Division 1

23. The following agencies are entirely exempt from the operation of the FOI Act:
Aboriginal Land Councils and Land Trusts
Auditor-General
Australian Government Solicitor
Australian Secret Intelligence Service
Australian Security Intelligence Organisation
Inspector-General of Intelligence and Security
National Workplace Relations Consultative Council
Office of National Assessments
Parliamentary Budget Office
Parliamentary Budget Officer
24. Insofar as these blanket exemptions apply to the Auditor-General, the Australian Government Solicitor, and the listed intelligence agencies (all of which are bolded and italicised above), and in particular because of the alternative accountability mechanisms provided for by the Inspector-General of Intelligence and Security and the Parliamentary Committee on ASIO, the Committee considers that they are uncontroversial and should be maintained.
25. The Committee has recently commented on the exclusion of the Parliamentary Budget Office and Officer and agrees with those exclusions.
26. It is not clear why Aboriginal Land Councils and Land Trusts and the National Workplace Relations Consultative Council should enjoy a similar blanket exemption. The second reading speech by Senator Durack on the introduction of the FOI Bill in 1981 refers to Schedule 1 as including 'agencies which are engaged in commercial enterprises' and 'a number of agencies which are there for *special reasons*' and then refers to these two bodies.
27. If the only reason for the inclusion of these two bodies in the total exemption provided by this Schedule is because of their involvement in commercial enterprises (which seems unlikely) then it is unclear why they warrant a blanket exemption beyond that applicable to other agencies which are similarly, or more so, involved in commercial enterprises or, as discussed below in relation to government business enterprises (GBEs), why they warrant exemption beyond

¹ The Australian Industrial Relations Commission (now Fair Work Australia), the Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars.

the specific exemption for trade secrets or commercially valuable information provided for by s47.

28. If there are 'special reasons' then these should be articulated and documented.
29. The Committee recommends that these two bodies should be asked to demonstrate to the Attorney-General why they should remain subject to the blanket exemption. If they cannot so demonstrate, then they should be removed from this part of Schedule 1 and be subject to the operation of the FOI Act, subject only to the specified exemptions.

Schedule 2, Part I, Division 2

30. Division 2 excludes three Defence agencies from the operation of the FOI Act: Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation, and Defence Signals Directorate. These agencies are deemed by s7(1A) not to be part of the Department of Defence, and not to be agencies in their own right for the purposes of the Act.
31. For the reasons given above in relation to other intelligence agencies, the Committee does not recommend any change to this exemption.

Schedule 2, Part II, Division 1

32. Division 1 of Part II lists particular agencies in relation to nominated types of documents, the most common of which are 'documents in respect of [their] commercial activities'.
33. The agencies which attract this exemption in Division 1 of Part II are: Albury-Wodonga Development Corporation, the Attorney-General's Department, the Australian Government Solicitor, the Australian Postal Corporation, Comcare, CSIRO, the Royal Australian Mint, the Human Services Department, Indigenous Business Australia and NBN Co.
34. It is not clear why these agencies, and not others that also perform commercial activities at least to some extent, are granted the special exemption and others are not. For example what is it about the commercial activities of Comcare, or the Chief Executive of Medicare, that warrants special exemption, as compared with similar activities of other agencies not listed in this Division? The Committee suspects that it may be that these presently listed agencies gained an exemption at some point and it has not been reconsidered. It is time for such a reconsideration to occur.
35. 'Commercial activities' for the purposes of this Division, are defined in s7(3) of the FOI Act to mean activities carried on by an agency on a commercial basis in competition with persons other than governments, or such activities that the agency might reasonably be expected to carry on in the foreseeable future. For NBN Co. (under s7(3A)) there is no requirement for competition, just that the activities be carried on by NBN Co. on a commercial basis.
36. In 1995, in a report of a joint review by the Australian Law Reform Commission and the Administrative Review Council entitled '*Open Government: a Review of the Federal Freedom of Information Act 1982*' at paragraph 11.14, it was recommended that, if s43 were to be amended to apply to documents that related

to an agency's competitive commercial activities, then agencies listed in this part of Schedule 2 for this particular exemption, should be removed from the Schedule.

37. Section 43 has since been repealed and it has been substituted by s47 which provides an exemption if disclosure of a document would disclose trade secrets or any other information having a commercial value which could reasonably be expected to be destroyed or diminished if disclosed.
38. It therefore appears that the basis on which the ALRC and ARC recommended removal of agencies subject to this exemption from the Schedule did not eventuate. In other words, the current exemption in s47 is not as broad as the amendment foreshadowed to s43 in the 1995 report: it will protect trade secrets and commercially valuable information that might be destroyed or diminished if released, but it does not go so far as to give an overall exemption for an agency for documents 'in respect of its commercial activities'.
39. A further difference between the specific exemption in s47, and the broader exemption arising from being listed in Schedule 2 is that by being in Part II of Schedule 2, the relevant agency is exempt overall from the operation of the FOI Act in relation to those documents. This means that it does not have to process a request, consider exemptions, and be subject to review in relation to those documents: it can simply respond to a request by stating that it is not subject to the Act.
40. The 1995 report also dealt in some detail with the application of the FOI Act to GBEs. Without repeating the full detail of that consideration of the accountability of GBEs and issues of competitive neutrality, and of market forces versus administrative law as the most appropriate accountability mechanism for agencies, the overall thrust of the report was that:
 - (a) GBEs that operate **predominantly** in commercial activities in a competitive market should not be subject to the FOI Act; and
 - (b) other GBEs should be subject to the Act, but should not be placed in a Schedule and thereby given a general exemption for particular categories of documents.
41. In broad terms the Committee agrees with those propositions, but with the caveat that they were based on the supposition that s43 of the Act would be amended to specifically exempt documents related to competitive commercial activities. That did not happen, and Schedule 2 remained the mechanism for dealing with this type of exemption. (The Committee notes that in the *Government Information (Public Access) Act 2009 (NSW)* s14 table clause 4(a), a public interest consideration against disclosure is that the disclosure could be expected to undermine competitive neutrality in connection with an agency's functions, or place the agency at a competitive disadvantage in a market, and that this is coupled with a much reduced list in Schedule 2 clause 3 of agencies that enjoy a special exemption in respect of competitive and market sensitive information.)
42. As a result, the current recommendations from the Committee are that: GBEs with a **predominantly** commercial focus in a competitive market maintain a complete exemption; that s47 be amended to include an exemption for competitive commercial activities; and that otherwise the partial exemptions for documents in relation to commercial activities in Schedule 2 be removed and other GBEs and

agencies with some commercial operations be subject generally to the Act, but able to rely on the expanded exemption.

43. Other types of documents partially exempted for the agencies in this Division are, for example:
- exempt content-service documents of ACMA under the *Broadcasting Services Act 1992*;
 - exempt internet-content documents under Schedule 5 to that Act;
 - those related to overseas development projects carried out by the Australian Trade Commission.
44. The content and internet service exemptions related to the Schedules of the *Broadcasting Services Act 1992* appear to be designed to protect the investigation powers of ACMA under those schedules in relation to prohibited content of online services. To that extent the Committee sees no need to recommend any change to those exemptions.
45. The ABC and SBS also have exemptions under this Division of Part II, in relation to their program material and datacasting content. Presumably this exemption relates to the competitive commercial market in which these broadcasters operate and as such is uncontroversial. Similarly the Reserve Bank's exemptions for banking operations, individual open market operations, and foreign exchange dealings should be maintained.

Schedule 2, Part II, Division 2

46. Documents of the Australian Statistician containing information collected under the Census and Statistics Act 1905, are exempt under this Division, and should remain so.

Schedule 2, Part III

47. Section 7(2AA) refers to the legislation listed in this Part III of Schedule 2 (*Wine Australia Corporation Act 1980, Dairy Produce Act 1986, and Primary Industries and Energy Research and Development Act 1989*) and exempts bodies established under these Acts from the operation of the Act in respect only of their commercial activities. The Committee does not see any need to change these exemptions, for the reasons given above.

Schedule 3 – Secrecy provisions

48. Section 38 provides that documents are exempt if they contain information disclosure of which is prohibited by secrecy provisions in the legislation listed in this Schedule. The Committee sees no reason to vary this provision or the Schedule.

Schedule 4 – Research Institutions

49. The two bodies referred to here (CSIRO and the ANU) are given a conditional exemption by s47H in relation to documents containing research information, the disclosure of which, before the research is completed, would expose the agency to disadvantage. The conditional exemption means that access should still be given

to the document unless to do so would be contrary to the public interest. This conditional exemption should remain for these two research institutions.

1.(f): the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime.

50. The Committee provided submissions on the Information Commissioner's recent review of the current charging regime and a copy of those submissions is enclosed.

1. (g): the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

51. While this term of reference appears more directed towards obtaining comment from agencies themselves, the Committee repeats the point made above about the need for adequate resourcing of FOI functions within agencies to enable them to meet the objectives of the Act.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 59,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.