

# AUSTRALIA'S RIGHT TO KNOW

Response to the draft Information Commissioner Bill 2009 and the  
draft Freedom of Information Amendment (Reform) Bill 2009

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# TABLE OF CONTENTS

<b>1</b>	<b>EXECUTIVE SUMMARY</b>	<b>2</b>
<b>2</b>	<b>INTRODUCTION</b>	<b>3</b>
<b>3</b>	<b>FOI REFORMS – A POSITIVE STEP TOWARD THE FREE FLOW OF INFORMATION</b>	<b>4</b>
	3.1 Objects of the Act	4
	3.2 Proactive Publishing of Information	4
	3.3 Information Commissioner	4
	3.4 Exemptions	5
	3.5 Amendments to the Archive’s Act	5
	3.6 Right of Access to Personal Information	5
	3.7 Costs	5
	3.8 Review of the FOI Act	5
<b>4</b>	<b>FURTHER AMENDMENTS REQUIRED</b>	<b>6</b>
	4.1 Exemptions and public interest test	6
	4.2 Parliament	7
	4.3 Security agencies	7
	4.4 Review of the FOI Act	8
	4.5 Amendments to the Archives Act	8
	4.6 Internal Review Processes	8
	4.7 Time frames	8
	4.8 Costs	8

## 1 Executive Summary

- Australia's Right to Know (ARTK) Coalition welcomes the Government's reforms of the Commonwealth Freedom of Information Act 1982 (FOI Act) and the Archives Act 1983 (Archives Act).
- ARTK supports the Government's significant reforms and is confident the amendments will serve to improve the Australian public's access to Government information and documents.
- ARTK is of the view there are a number of areas of the FOI regime which require further amendment:
  - Claims by public servants that disclosure will discourage full and frank advice should be listed as an irrelevant factor in FOI decision making
  - The new single public interest test should be applied to all exemptions in the Bill.
  - The Cabinet exemption should be extended to apply to factual/statistical extracts of documents contained in Cabinet documents and whole factual/statistical documents attached to Cabinet documents.
  - The administrative functions of security agencies, the Parliament and the Governor-General should be subject to the FOI Act.
- ARTK supports the announced review of the FOI Act to be conducted in two years, but is of the view it should be a wholesale review addressing the entire FOI regime.
- ARTK endorses the announced changes to the charging regime for FOI applications.
- ARTK welcomes the Information Commissioner's pending review of costs and timeframes as vital in ensuring the FOI regime is cost effective and the FOI's Act's objectives are met.

## 2 Introduction

Australia's Right to Know (ARTK) is a coalition of twelve major media organisations formed in 2007 to address the troubling state of freedom of speech in Australia.

ARTK welcomes the opportunity to provide this submission on the draft Information Commissioner Bill 2009 and the draft Freedom of Information Amendment (Reform) Bill 2009 (the FOI Bills).

ARTK commissioned independent research into whether Australians are being denied information that should be public. An audit was carried out by Irene Moss AO, a former NSW Ombudsman and former chair of the Independent Commission Against Corruption (ICAC). The final report presented on 5 November 2007 found Freedom of Information laws meant to facilitate the flow of information did not serve the public well on matters of government accountability with costs, delays, complexity all contributing to systemic failure.

This submission addresses the following topics:

**Section 3** briefly outlines areas of the reform ARTK particularly endorses.

**Section 4** discusses the areas of the FOI Act which require further reform and amendment

### **3 FOI Reforms – a positive step toward the free flow of information**

ARTK welcomes the release of the FOI Bills which together with The Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 will introduce significant reforms to the Commonwealth's FOI regime.

ARTK supports the Government's significant reforms and is confident the amendments will serve to improve the Australian public's access to Government information and documents.

Following is a brief outline of the areas of reform ARTK particularly endorses.

#### **3.1 Objects of the Act**

ARTK strongly supports the amendments to the objects of the FOI Act.

The FOI Bills amend the objects of the Act to express the intention that FOI will promote Australia's representative democracy by contributing towards:

- increasing public participation in government processes, with a view to promoting better-informed decision making; and
- increasing scrutiny, discussion, comment and review of the Government's activities.

ARTK welcomes this focus on an increased recognition that information held by the Government is a national resource and is to be managed for public purposes.

This right of access is also recognised by the welcome proposed removal of conclusive certificates in the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 and the amendment of the Archives Act to lower the barrier for access to most government records from 30 years to 20 years, and for Cabinet notebooks from 50 years to 30 years.

#### **3.2 Proactive Publishing of Information**

The FOI Bills acknowledge that Australian Government agencies will now have an obligation to pro-actively publish information. The FOI Act will specify various classes of information that must be published with agencies obliged to have regard to the objects of the FOI Act.

ARTK supports the amendments which will result in the Commonwealth Government actively providing more information to the public.

#### **3.3 Information Commissioner**

ARTK welcomes the establishment of the Office of the Information Commissioner headed by the Information Commissioner and supported by the FOI Commissioner and Privacy Commissioner.

To assist the Commissioners, ARTK recommends the government establish an advisory committee of non-government representatives, including key stake holders, to provide advice.

ARTK supports the requirement on the Information Commissioner to issue guidelines for agencies, and supports the Information Commissioner's role in training as both a resource for the public and agencies. The Information Commissioner's ability to investigate agency compliance with the FOI Act will be crucial to the increased access to Government information.

ARTK also supports the decision to retain the role of the Ombudsman.

### **3.4 Exemptions**

ARTK welcomes the proposed simplified exemption scheme for FOI requests and in particular, the reduction in the number of exemption categories, the introduction of a single public interest test for conditional exemptions and the re-formulation of the cabinet documents exemption to include a dominant purpose test.

### **3.5 Amendments to the Archive's Act**

ARTK supports the proposed amendment of the Archives Act to lower the barrier for access to most government records from 30 years to 20 years, and for Cabinet notebooks from 50 years to 30 years. ARTK is of the view, a further reduction in this 20/30 time frame should be considered by the Information Commissioner in their first review of the new Act.

### **3.6 Right of Access to Personal Information**

ARTK supports the government's recognition that the vast majority of FOI requests are submitted by applicants in relation to their own information. ARTK supports the amendments to the Privacy Act to provide an enforceable right of access to personal information rather than access through the FOI Act.

### **3.7 Costs**

ARTK welcomes the government's decision to abolish all application fees, to reduce costs for applicants and to require the Information Commissioner to review the costing regime within 12 months of appointment.

### **3.8 Review of the FOI Act**

ARTK welcomes the proposal to review the operation of the FOI Act. ARTK submits that a broader review is necessary and sets out in section 4.4 below the further issues which should be included in any review.

## 4 Further amendments required

### 4.1 Exemptions and public interest test

ARTK welcomes the reforms to the exemption scheme for FOI requests.

ARTK also welcomes the obligation on the Information Commissioner to issue guidance on the public interest test. The requirement for agencies to identify the public interest factors taken into account in their reasons is also supported. However, to further enhance the process, ARTK recommends that the relevant agency also disclose how they balanced competing public interest factors.

#### *Irrelevant factors*

ARTK has consistently argued the public interest factors first identified in *re Howard* (*re Howard and the Treasurer of Australia (1985) 7 ALD 645*) lack any evidentiary basis and have been blight on effective FOI. ARTK supports the decision to make at least some of those factors irrelevant in determining the public interest test.

However, we are of the view the FOI Bill should be amended to also include claims by public servants that disclosure will discourage full and frank advice as an irrelevant public interest factor.

The flaws in arguing against disclosure in those circumstances were identified in the AAT's judgment in *McKinnon v Dept PM & Cabinet V2005/1033*. In that case, Deputy President Forgie rejected claims that public servants have a reasonable expectation the documents they prepared would remain confidential.

#### *Application of public interest test*

The FOI Bill does not apply the new public interest test to several exemptions in the Act, including cabinet documents and documents relating to national security, defence and international relations.

ARTK is of the view the single public interest test should be applied to all exemption categories, furthering the objects of the FOI Bill and acting to protect against abuse of the exemption categories. There is no evidence that applying a public interest test to all exempted documents will have a detrimental impact on the Government's decision making processes.

In these categories of exempt documents, without extraordinary circumstances, Australian decision makers including courts are very unlikely to ever conclude that after taking into account the fact that releasing such a document could cause the harm of compromising collective ministerial accountability or could endanger national security, nevertheless it was in the public interest that documents be released.

But ARTK believes that the FOI law needs to provide for the extraordinary. As the Australian Wheat Board case has shown, government failings of indisputable national significant consequence can occur and should not be protected by the sanctity of Cabinet. In such situations, decision makers should be required to consider where the public interest lies and consider whether or not to decide to release the documents.

### *Cabinet exemption*

ARTK supports the amendments in the FOI Bill to clarify the scope of the Cabinet exemption on the basis the exemption now only captures documents prepared for the dominant purpose of submission to the Cabinet.

ARTK submits that this new test for Cabinet documents should also extend to extracts of factual/statistical documents contained in Cabinet documents and whole factual/statistical documents attached to Cabinet submissions so that it is clear that factual/statistical material contained in or attached to Cabinet submissions should be released unless that material itself was collected or collated for the dominant purpose of the submission to Cabinet.

## **4.2 Parliament and the Governor-General**

Currently, the administrative details of the Parliament and of the Governor-General are not subject to the FOI regime.

ARTK acknowledges there may be certain documents relating to the Parliament and Governor-General which should not be disclosed and that some documents in relation to Parliamentarians expenses are available from the Department of Finance. However, the public is entitled to know how the Parliament and the office of the Governor-General are administered. Tax payers are entitled to know how public funds are being spent.

The value of transparency has been highlighted by the recent revelations of details of Parliamentary expenses in the United Kingdom. These revelations have only come to light as a result of changes to the UK FOI law which have made the Parliament subject to FOI.

ARTK submits that the administration of the Parliament and the office of the Governor-General should be subject to the FOI Act.

## **4.3 Security agencies**

Similarly, ARTK is disappointed that the Government's new FOI regime does not amend the exemption in relation to security agencies.

Section 7 exempts certain persons and bodies such as ASIO and ASIS in their entirety without limiting the types of documents covered by the exemption. All documents from the agencies listed in Schedule 2 Part 1 are exempt regardless of whether or not the document relates to security issues or to administrative issues.

We appreciate that documents that relate to national security, defence and international relations should be exempt from FOI as set out in the exemption in section 33. But we do not agree security agencies in their entirety should be exempt.

The administrative functions of these public funded agencies should be transparent to the public. For example, documents dealing with issues such as allocation of resources and levels of pay which do not relate to the issues in section 33 should be subject to FOI.

We are of the view that section 7(1) and (1A) should either be removed in its entirety or amended to provide that certain agencies should only be exempt in certain

circumstances – for example intelligence organisations should only be exempt in relation to their security functions (not administrative). There is precedent for this in section 7(2) where agencies are exempted only in relation to certain activities and documents and in section 5 that states that the Act only applies to the courts in relation to their administrative functions.

#### **4.4 Review of the FOI Act**

ARTK supports the Commonwealth Government's continued commitment to improving public access to information and in particular, the commitment to review specific aspects of the Act (structures and processes, exemptions and agencies exempt for commercial activities) two years from the commencement of the new legislation.

However, given the current review of the Act is the first since 1982, we consider it is vital the government continue to focus on reform by having a wholesale review of the entire regime in two years.

#### **4.5 Amendments to the Archives Act**

ARTK welcomes the amendments to the Archives Act to lower the barrier for access to most government records from 30 years to 20 years, and for Cabinet notebooks from 50 years to 30 years. ARTK is of the view, a further reduction in this 20/30 year time frame should be considered by the Information Commissioner in their first review of the Act in two years.

#### **4.6 Internal Review Processes**

Review of a FOI decision within a department or agency is a pre-requisite to external review of the decision and this system will remain under the new regime. Given that internal review of a decision often unnecessarily delays the release of information, ARTK is of the view applicants should have the option to choose to bypass internal review and elect to apply for review in the first instance by the newly created Information Commissioner.

ARTK supports the FOI Bill's retention of the AAT in the review process as a cost effective option for a review of the Information Commissioner's decision. However decisions by the Information Commissioner to refer questions of law to the Federal Court should be at the Information Commissioner's expense and not the applicants.

#### **4.7 Time frames**

ARTK submits that the time permitted to process FOI applications should be reduced from 30 to 14 days in line with best practice in overseas jurisdictions and to reflect advancements in technology since the Act was introduced in 1982.

This is particularly important given that delay in accessing documents remains one of the greatest obstacles to an effective FOI regime.

#### **4.8 Costs**

ARTK welcomes the government's decision to abolish all application fees and to reduce costs for applicants.

The FOI Bill proposes that the first hour of decision making will be free for all applications made by journalists and the first five hours for not-for-profit community groups. This is welcome, but we remain concerned that particularly complex applications may be discouraged by high costs arising from search and retrieval and decision making. In an attempt to alleviate this problem, we consider the Information Commissioner should have the power to waive all fees and charges on complex applications where it considers it is in the public interest.

ARTK supports the government's announcement of a comprehensive review of fees and charges to be undertaken by the Information Commissioner within 12 months.