

FOI SEMINAR: SPEAKING NOTES

NEW FOI CHANGES: NOVEMBER 2010

General purpose/objectives behind them – to increase government and bureaucratic openness, transparency and accountability by fostering a more pro-disclosure culture in FOI processing thereby facilitating greater disclosure of government held documents and information – in turn allowing greater opportunities for scrutiny of government actions and decisions and increasing public participation in the democratic process. See Senator Faulkner's letter explaining the rationale behind the changes.

Main changes:

- 1) Abolition of 'conclusive certificates'
- 2) Insertion of new objects clause
- 3) Creation of Information Commissioner and FOI Commissioner
- 4) Abolition of application fees and reduction of processing charges
- 5) Creation of 'conditional exemptions'
- 6) Changes to the 'public interest test'
- 7) New publication regime

Conclusive Certificates

Conclusive certificates were a means whereby a Minister or Departmental head could, in certain circumstances, simply certify that a document was exempt. Such a certificate was then immune from any sort of effective external review on the merits. They have now been abolished – meaning that every decision made to exempt a document is potentially liable to be the subject of a full external review on the merits.

New Objects Clause

The new objects clause is very pro-disclosure in its terms - making it clear, for instance, that the primary purpose of the Act is to facilitate the disclosure of as much government held information as possible and making it clear that such information is a national resource and is to be managed for public purposes.

New Commissioners

A new FOI Commissioner and a new Information Commissioner have been appointed whose basic roles are to monitor, oversee and scrutinise FOI practices and procedures throughout the Commonwealth to ensure they are in compliance with the new legislation. Never before have FOI practices and procedures been the subject of such external scrutiny. The Commissioners will investigate complaints, institute their own audits as they see fit and have the power to review (free of charge) all primary decisions on their merits – should unsuccessful applicants wish them to do

so. They also have the power to issue guidelines on how the provisions of the Act should be interpreted.

Fees and Charges

Application fees for primary requests and internal reviews have been abolished. In relation to processing charges, the first five hours of 'decision making time' will be free.

Conditional Exemptions

The new concept of a 'conditional exemption' has been introduced. In essence, it means that a new public interest test has been inserted into the process in relation to these exemptions. In other words, even though a document is exempt under the provisions of the particular exemption, it will have to be released unless the decision maker is legitimately satisfied that its release would be contrary to the public interest.

The new 'conditional exemptions' are as follows:

- documents the release of which would damage Commonwealth/State relations;
- internal deliberative documents;
- documents the release of which would have a substantial and adverse effect on the operations of an agency;
- documents the release of which would constitute an unreasonable disclosure of personal information; and
- documents the release of which would damage an organisation's business or financial affairs.
- documents the release of which would damage the national economy;
- documents the release of which would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency;
- documents containing information relating to certain kinds of research not yet completed, the release of which would unreasonably expose the agency to disadvantage.

Public Interest Changes

The term 'public interest' will remain undefined in the new Act. However, the new legislation sets out factors which *must* be taken into account by a decision maker when deciding whether release of a document would be contrary to the public interest and factors which must *not* be taken into account.

The factors which must be taken into account are as follows:

- whether release of the document would promote the objects of the Act;
- whether release of the document would inform debate on a matter of public importance;

- whether release of the document would promote effective oversight of public expenditure; and
- whether release of the document would allow a person to access his or her own personal information.

Factors which must not be taken into account are as follows:

- that disclosure could result in embarrassment to, or a loss of confidence in the Commonwealth Government;
- that access to the document could result in the applicant misinterpreting or misunderstanding it;
- the seniority of the author of the document; and
- that access to the document would result in confusion or unnecessary debate.

New Publication Regime

As from 1 May 2011 a new publication regime will come into force which will require all agencies to 'publish' certain documents on their websites.

Firstly, all documents released by an agency pursuant to an FOI request must be 'published' on its website within 10 days of release. The term 'publishing', however, will include a statement on the website that the documents have been released, a brief description of them and details on how they can be obtained.

Secondly, agencies will be required to proactively 'publish' on their websites documents containing the following information:

- details of the structure of the Department;
- details of the functions of the Department;
- details of appointments of officers of the agency that are made under Acts (other than APS employees);
- information contained in the Department's Annual Report;
- details of arrangements for members of the public to comment on specific policy proposals for which the Department is responsible, including how (and to whom) those comments may be made;
- information contained in documents to which the Department routinely gives access in response to FOI requests;
- information held by the Department that is routinely provided to Parliament in response to requests and orders from Parliament;

- contact details of an officer who can be contacted about access to the above information and documents;
 - the Department's operational information (defined as information held by the Department to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public, for example Departmental rules, guidelines, practices and precedents relating to those decisions and recommendations); and
 - a plan produced by the Department outlining what information (of the type set out above) it proposes to publish under the new requirements and how it proposes to publish it.
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Departmental FOI Procedures

Primary Decisions

The following officers are authorised by the Secretary to make primary decisions on FOI requests made to the Department:

- Director, FOI and Privacy Section
- Assistant Director, FOI and Privacy Section
- Senior Project Officer, FOI and Privacy Section

Each request received by the Department is processed by the FOI and Privacy Section. The Section's specific functions are as follows:

- acknowledging each request
- ensuring that the requirements of the Act have been met by the applicant
- settling/clarifying with the applicant the precise scope of the request
- transferring requests to other agencies where appropriate
- determining and imposing any applicable processing charges
- obtaining the relevant files and documents from the appropriate line area
- deciding which documents fall within the ambit of the request
- consulting with the relevant line area to seek its views on any harm or damage which is likely to result from disclosure of the documents in question
- consulting with any relevant third parties and other agencies

- deciding whether the documents are exempt under the Act – and, if so, which exemptions are applicable
- seeking AGS advice where appropriate
- preparing, where access is denied, a statement setting out the findings on material questions of fact, the material on which those findings are based and the reasons for the decision
- advising the applicant of the decision and his/her appeal rights
- forwarding documents to the applicant
- preparing documents for the Information Commissioner and/or the AAT if appeals are lodged
- representing the Department at AAT hearings, and instructing AGS in any Federal Court appeals.

Line areas within the Department assist the FOI and Privacy Section in the following ways:

- retrieving the documents requested and forwarding them to the FOI Section
- providing background information relating to the documents as and when required, and
- providing views on any harm or damage likely to result from release of the documents.

Internal Review of Decisions

The FOI Act provides that any officer other than the officer who made the primary decision can carry out an internal review of the primary decision.