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using the law to protect the natural and built environment

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30 September 2009

Dale Webster
Project Manager
FOI Act Review
GPO Box 825
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By email: Dale.Webster@justice.tas.gov.au

Dear Dale,

Draft Right to Information Bill 2009

The Environmental Defenders Office (**EDO**) is a non-profit, community based legal service specialising in environmental and planning law. We welcome the opportunity to comment on the draft *Right to Information Bill 2009*.

The EDO maintains the position expressed in detailed comments made in response to the Issues Paper and the Directions Paper for the FOI Act review. We will limit this submission to matters of detail in the proposed legislation and to highlight areas we believe warrant further reform.

In general, the EDO is supportive of the proposed legislation and its emphasis on public access to information. In particular, we commend:

- The 'hierarchy' of disclosures, with assessed disclosure recognised as a last resort;
- Introduction of a consistent public interest test (including the identification of matters that are *not* relevant to an assessment of public interest);
- The clear extension of the legislation to GBEs and organisations funded by a public authority to perform public functions; and
- Removal of charges for the provision of information.

Despite this support, we have identified a number of concerns in relation to the proposed legislation. We believe that, by addressing the concerns discussed below, the Act would better facilitate the achievement of the objectives of openness, accountability and responsibility.

Specific Comments

Applications for assessed disclosure – s.13

Section 13(1) of the Bill provides that a person who **requires** information in possession of a public authority or Minister make a written application for assessed disclosure.

We are concerned that the use of the term 'requires' will allow some applications to be refused unless the applicant is able to demonstrate how they intend to use the information being sought. There is no justification for such a limitation on access to information.

We recommend that section 13(1) be amended to simply provide that a person who **seeks** information in the possession of a public authority or Minister must make a written application.

Information to be given on application – s.15

The only information that should not be released under the Act is exempt information the disclosure of which is assessed to be contrary to the public interest.

The exemptions in Part 3 recognise the balance between the public interest in open government and the public interest in security and 'full and frank' internal discussions. The public interest test should be used only as a qualification on these exemptions – that is, to narrow the exemptions - not as a justification for withholding additional information that does not fall within those recognised categories.

Presently, s.15 provides more broadly that a public authority or Minister may refuse to release information that is considered to be against the public interest – this is not qualified by requiring that the information also fall within an exemption category. This provision would allow an authorised officer to determine on a case-by-case basis that information that is not within a recognised exemption category should not be released. We believe that it is inappropriate to extend the scope of refusals in this way.

As discussed below, we believe that *all* exemptions in Part 3 should be subject to a public interest test. Currently, s.33(1) provides "In this Part, information is not exempt information if it is not contrary to the public interest to disclose the information" (our emphasis). While we strongly support the application of the public interest qualification to all of Part 3, we understand that the intention of the legislation is to apply the public interest test only to information in Division 2.

We believe that s.15 should provide that information is to be provided unless the information is exempt information. This would include:

- All information in the categories described in Part 3, Division 1;
- Information in the categories described in Part 3, Division 2 if disclosure of the information has been assessed as being contrary to the public interest.

Charges for information – s.17

The efficacy of a right to information would be compromised if the right could only be exercised at significant cost. Therefore, we support the removal of charges for the provision of information, to be replaced by an application fee only.

Currently, s.17(1)(g) of the *Freedom of Information Act 1991* allows charges to be waived or reduced if the applicant is impecunious or intends to use the information for the public benefit. The second of these options has been excluded from the *Right to Information Bill*.

While the proposed application fee of 25 fee units is reasonable, there is no guarantee that the fee will remain low. Further, some public interest community organisations may make numerous applications for information, in which case the annual total of application fees may be considerable. Therefore, we believe that the legislation should include the option for the application fee to be waived in relation to information sought for public interest purposes.

We recommend that s.17(2) of the *Right to Information Bill 2009* be amended to include:

(c) the applicant intends to use the information for a purpose that is of general public interest or benefit.

The decision to waive the fee would remain at the discretion of the authorised officer, however guidelines should be produced giving examples of situations in which an applicant's use of information is in the public interest.

We also recommend that the waiver applying to Members of Parliament under s.17(2)(b) extend to elected Councillors.

Deferment of provision of information – s.18

We strongly oppose allowing deferral of disclosure on the grounds that the information will become publicly available within a period of up to 12 months.

This provision could allow information that may be relevant to a matter of current public debate to be 'buried' for a significant period of time, until its release is less damaging for the responsible public authority or Minister.

Similarly, information may be sought to assist an individual to prepare her case in seeking an injunction to prevent a development, forestry operation or release of water for irrigation on the basis of anticipated damage to the environment. If the information can be withheld on the basis that it will be released at a later date, the injunction action may be defeated for lack of evidence. Relevant information that may have assisted the applicant to successfully obtain an injunction to prevent damage may not be made publicly available until after the damage has occurred.

It is our position that where information is not exempt information, there is no justification for delaying its release. We recommend that s.18 be deleted from the Bill.

Exempt information – Part 3, Division 1

As discussed in our previous submissions, we believe that *all* exemptions in Part 3 should be subject to the public interest test. We do not believe that the public interest in maintaining Cabinet confidentiality and 'full and frank' internal discussions will always overwhelm the public interest in disclosure.

Subjecting the release of cabinet information, executive council decisions and similar documents to a clearly articulated public interest test may still result in most applications being defeated on public interest grounds. However, we believe that the opportunity should be available to argue that release of the information is in the public interest. In situations where the public interest test supports release, the authorised officer or the Ombudsman should be empowered to order that the information be disclosed.

We do not support the 10 year exemption for the release of Cabinet information (s.27) and internal briefing information (s.28) and recommend that these categories of information be subject to a public interest test (as for information relating to closed meetings of Council (s.43)). If the strict exemption is maintained, we recommend that the timeframe be reduced to 3 years.

Draft decisions of the Ombudsman – s.49

Section 49(1)(a) requires the Ombudsman to seek input from the relevant public authority or Minister before finalising his or her decision. In contrast, s.49(1)(b) provides that the Ombudsman *may* seek input from other interested parties prior to finalising his or her decision.

Section 49(2) restricts the power of the Ombudsman to revisit his or her decision after it is finalised. Therefore, it is important that all parties be given equal opportunity to consult with the Ombudsman prior to finalisation of the decision in relation to disclosure.

Section 49(1) should be amended to require the Ombudsman to release a draft decision to, and invite comments from, all parties. The Ombudsman must have regard to all comments received when finalising his or her decision.

Public Interest Test – Schedule 1

The factors listed in Schedule 1 are very broadly stated. In order to provide some consistency in balancing those factors to determine whether disclosure is contrary to the public interest, and to protect against abuse of the criteria to prevent disclosures, we would support the Ombudsman issuing a manual relating to the operation of the Act.

The manual should include clear guidelines on how the 'public interest test' is to be implemented and practical examples of situations where disclosure is and is not contrary to the public interest. The emphasis of this guidance should be a starting presumption that information is a public asset and should be disclosed.


Any guideline or manual must be publicly available (ideally, by publication on the Ombudsman's website). The manual should also be periodically reviewed in response to feedback from authorised officers and applicants regarding the implementation of the public interest test.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc

Per:

A handwritten signature in black ink, appearing to read 'Jess Feehely', written over a light blue horizontal line.

Jess Feehely
Principal Lawyer