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using the law to protect the natural and built environment

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Dale Webster
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By email: Dale.Webster@justice.tas.gov.au

Dear Mr Webster

Review of the *Freedom of Information Act 1991*

The Environmental Defenders Office (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law.

Open and accountable government is critically important to public interest environmental issues. Public access to information is a vital component of encouraging public participation in resource management decision-making. As such, we are grateful for the opportunity to comment on the review of the *Freedom of Information Act 1991*.

This submission makes general comments in relation to current FOI laws and practices in Tasmania. We anticipate that resolutions generated at the upcoming EDO Conference "*Information: A Privilege or a Right?*" will further contribute to this review process. Information regarding this conference is attached for your interest.

SUMMARY OF COMMENTS

- FOI legislation must adopt as a starting position that information is to be released, unless its release would be against the public interest.
- A pro-disclosure culture should be adopted throughout government agencies. FOI officers must be given appropriate training, resources and ongoing guidance to enable them to effectively implement such a culture.
- All exemptions should be subject to a public interest test. Guidelines should be published to assist officers to apply the test.
- The 10-year rule for Cabinet documents should be abolished.

- The Ombudsman should be able to order the release of Executive Council and Cabinet documents on public interest grounds.
- More guidance should be available to ensure consistent and appropriate application of the commercial-in-confidence exemption.
- FOI obligations should extend to all GBEs, funded bodies and contractors / subcontractors performing government functions.
- Internal reviews should be optional, with the Ombudsman able to accept an application for review if the applicant explains why internal review was not appropriate.
- Failure to comply with statutory timeframes should result in a deemed decision to release information.
- Government agencies should establish an Information Register specifying all the documents within their control. This will help applicants to specify what they are requesting.
- Maintain the maximum costs cap, no application fee and capacity to waive fees for matters of public interest.
- More resources must be devoted to training and providing support for FOI officers. FOI Officers should be senior positions.
- All agencies should be encouraged to release information without recourse to the FOI legislation. If necessary, protection of officers under s.53 should be extended to releases of information other than through FOI.

OBJECTIVES OF FOI LEGISLATION

The essential tenets of FOI legislation include openness, accountability and responsibility. These principles are necessary to enable the public to access relevant information to assist them to understand decisions, participate in policy making and scrutiny of outcomes and ultimately improving decisions.

We therefore support the existing objects of the FOI Act and the intention to give the public a right to information limited only by "necessary exceptions and exemptions". However, in practice, exemptions are regularly relied on to deny access to information where there is no justifiable policy reason to deny access. The most important advances in improving access to information and the implementation of the FOI legislation will rely on creating and nurturing a pro-disclosure culture within government agencies.

In his comparative analysis of FOI legislation in Australia and NZ[1], Rick Snell noted that the explicit guiding principle of availability, informed by the purpose of accountability and participation, in the NZ legislation has been a key difference in the way the legislation is implemented in the two countries.

We would therefore support a clearer statement in the objects clause, or in a preamble to the Act, that the overriding principle of the legislation is access

[1] Snell, R., "Freedom of Information Practices", Agenda, Vol. 13, No. 4, 2006, p. 297. cited in Enhancing Open and Accountable Government: Discussion Paper. Review of the *Freedom of Information Act 1992,* Independent Review Panel 29 January 2008 p41.

to information. The presumption should be clearly stated that information will be released; the onus must be on the relevant agency to demonstrate how an exemption applies to the request.

As outlined below, we also support an overriding public interest test. That is, where an exemption may apply, the determining factor is whether that exemption should prevail over the public interest in disclosure.

It should also be made clear that decision-makers must have regard to and act to further the objectives of the FOI Act when making determinations. This is the approach adopted in relation to resource management and planning legislation (see, for example, s.5 of the *Land Use Planning and Approvals Act 1993*).

PUBLIC INTEREST TEST

As discussed above, the EDO believes that there is a very strong public interest in the release of information held by government agencies and related bodies. In a participatory democracy, politicians and their agencies should be open and responsive to public involvement. In our opinion, public interest considerations must be given a greater role in determining whether information is released under the Act.

All exemptions in Part 3 of the Act should be subject to the qualification that disclosure would be contrary to the public interest. That is, agencies must show that an exemption applies and then balance the harm that may be caused by release of the exempt information against the public interest in disclosure. Unless the harm caused would outweigh the public benefit, the information should be released.

A public interest test is particularly important in relation to Cabinet documents. There is no reason to presume that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and ministerial responsibility. The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public. Information should be released that is clearly in the public interest, even if it causes some harm to the public body releasing it.

To support the consistent implementation of a public interest test, we would encourage guidelines to be produced outlining the various issues to be considered when weighing the public interest. A senior FOI officer within the Department of Justice could also be nominated as a contact point to answer questions from other officers applying the test.

EXEMPTIONS

The EDO acknowledges the importance of exemption provisions in balancing the objective of providing access to government information against legitimate claims for protection. However, it is critical that such exemptions are strictly regulated and enforced. Again, we believe that all exemptions should only be available where it is shown that disclosure would be contrary to the public interest.

We would support the removal of certificates under s.23(2) of the FOI Act. Further, the public interest test should be applied consistently to all documents requested, therefore the Ombudsman should be able to order release of Executive Council information if s/he believes release is in the public interest.

We do not support the strict 10 year exemption for the release of Cabinet documents (s.24). In our view, such a blanket exemption discourages government and public sector openness and is open to abuse. We recommend a general exemption for Cabinet documents, subject to a public interest test. If, for reasons of certainty, a time limit is imposed on the exemption, it should be a period of only 3 years.

We acknowledge the possibility that the release of Ministerial briefing papers and internal working documents could result in less frank discussion and loss of documented corporate memory. However, the experience in NZ has been that where there is a culture of open government, officers recognise the value of public participation and produce accurate and comprehensive advice to engender trust and confidence in government (see comments of Marie Shroff, NZ Privacy Commissioner, in the Qld Discussion Paper pp51-2). A strong, consistently implemented public interest test will provide adequate protection against the release of sensitive material.

The exemption in s.31 must only be available if it can be shown disclosure would cause demonstrable harm to the competition process in the long-run. It is our experience that the 'commercial-in-confidence' exemption is poorly understood and open to abuse. Information which is important to the community in understanding resource management decisions has been denied under this exemption, such as details of chemicals applied under a research permit and supporting documentation for development applications (such as architectural drawings, fauna reports etc). We recommend that guidelines be produced to assist government agencies to exercise the exemption appropriately.

We strongly support retention of the exemption in s.35A regarding information with the potential to jeopardise threatened species or protected places.

APPLICATION TO GBEs AND FUNDED BODIES

Government Business Enterprises (***GBEs***) are publicly funded, constituted to provide public services, and are overseen by shareholders who are elected representatives of the people. These bodies should be accountable to the public for their decisions.

Considerable information of public interest and of enormous research value is also held by GBEs and private sector bodies contracted by government. Often, these are the only bodies capable of investing in research, development and data collection.

We therefore support the continued application of FOI legislation to GBEs and would support amendments to extend its operation to *all* bodies supported by government funds.

Arguably, GBEs and government agencies will be encouraged to privatise services to avoid the operation of the FOI legislation. We believe that the FOI Act should extend to any body that is exercising government functions – which should include any functions that are funded from government revenue and operating through government processes to provide services for public purposes. Private sector organisations performing government functions should be subject to the same level of scrutiny as the government would attract if it had delivered the services itself. Unless the private sector bodies can show that they could operate as competitively in the market-place without government funding or functions, they should be subject to the same FOI obligations as government agencies.

We would also support disclosure of major government contracts, consistent with the practice in New South Wales and the ACT.[2] Disclosure of this information enhances transparency and accountability in engaging the private sector to perform government functions. Contracts between government and private sector bodies should explicitly establish that agency FOI obligations will also apply to the private sector body and any contractors / sub-contractors engaged to perform work under the contract.

REVIEWS

We submit that the Ombudsman is the appropriate body to carry out reviews. That office has performed the function well, though additional resources would improve efficiency. We support the Bartlett government 10-point plan including providing adequate funding to allow the Ombudsman's office to perform its functions diligently.

Currently, internal reviews are mandatory and matters cannot be referred to the Ombudsman until an internal review has been carried out. While internal review is appropriate in many cases, it can provide an unwarranted additional hurdle where information is required quickly and where there is antipathy between the applicant and the agency holding the information requested. We recommend that internal review be optional and that the Ombudsman be able to consider applications for review where the applicant explains why an internal review is not appropriate.

TIMEFRAMES

In our experience, government agencies frequently fail to comply with the statutory timeframes for responding to FOI requests. In many cases, this is an unavoidable consequence of lack of resources. In other cases, there is no excuse offered for the delay.

We recommend that where an agency fails to determine an application within the statutory time period, the application should be deemed to be approved and the information released.

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[2] Enhancing Open and Accountable Government: Discussion Paper Review of the *Freedom of Information Act 1992,* Independent Review Panel 29 January 2008 p 36

Adequate resources and staff training should be available to ensure agencies have capacity to deal with FOI requests in a timely manner.

PUBLIC INFORMATION

We would support efforts to make government information more freely available on agency websites. We acknowledge the work of many agencies to do this already.

Availability of accurate and comprehensive government information would considerably reduce the need for many FOI requests. It would also promote a pro-disclosure culture and improve faith in government. We would also support the UK Information Asset Register approach of publishing lists of documents online to assist the public to make targeted requests for information.

RESOURCES

Guidelines

We note that the Tasmanian FOI guidelines are outdated and not publicly available. In contrast, the Commonwealth FOI guidelines are published on their website and provide clear guidance to the public regarding the assessment of FOI applications. We strongly recommend that the Tasmanian guidelines be updated and made readily available on the Department of Justice website.

The guidelines should include definitions and practical examples of common terms such as 'internal working docs', 'commercial dealings' and 'ministerial advice'. Such guidelines would considerably improve the consistency of FOI decisions made by different agencies. We also recommend that a senior officer in the Department of Justice be available to assist smaller agencies with questions in relation to the guidelines.

Fees

An open and accountable FOI system should not be based on fee recovery, or use fees as a deterrent. We acknowledge that some costs are involved in processing requests however it is important that FOI charges not be incompatible with the objects of disclosure and transparency.

We strongly support the following aspects of the FOI regime:

- No application fees;
- Maximum fee cap;
- Waiver of fees where request is made in the public interest.

We also support the practice of some government agencies to provide the first two FOI requests for each applicant without charge.

Where a large number of documents are made available to the applicant, a list should be provided to allow the applicant to nominate which documents they require copies of. This will limit costs to both the agency and the applicant.

Assistance

We strongly support resources being made available to agencies to enable them to work with applicants to streamline their requests.

GENERAL COMMENTS

In a pro-disclosure culture, agencies should promote disclosure without resort to the FOI legislation. This is encouraged by s.12 of the FOI Act. However, it continues to be our experience that many agencies refuse to provide information without a formal FOI request.

We would support efforts to change this attitude and hope that the Bartlett government's commitment to open and connected government will improve transparency within agencies. We would also support extending the protection offered by s.53 of the FOI Act to officers who provide requested information outside the FOI legislation.

One of the most common reasons for refusal in Tasmania is that documents are otherwise available.[3] Rather than refusing to supply documents available through other statutory means, the FOI officer should supply the documents under those other statutory means (or through administrative processes). Again, this often happens in practice, but should happen in all cases.

As a final comment, access to information is highly significant in a democracy. In recognition of its importance, we believe that FOI officers should be senior positions with a fiduciary duty of care allowing them to release agency information they believe it is reasonable to release. Adequate training and resources must be provided to allow FOI officer to fulfil their role and to encourage a pro-disclosure culture within their agency.

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
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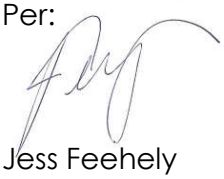

Jess Feehely
Principal Lawyer

[3] Freedom of Information Annual Report on the Administration of *Freedom of Information Act 1991* 1 July 2006 – 30 June 2007. Office of the Secretary, Department of Justice p 14.