



Environmental Defenders Office

24 January 2020

Via email: LLPSubmissions@sa.gov.au

Re: draft Freedom of Information (Miscellaneous) Amendment Bill 2019

The EDO is a community legal centre specialising in public interest environmental and planning law. We provide legal advice and representation services to individuals, groups and organizations that bring public interest environmental matters to our attention. In addition we engage in legal education and law reform activities.

The EDO welcomes the opportunity to comment on the draft Freedom of Information (Miscellaneous) Amendment Bill 2019 (the Bill) as one of our key priority areas is access to justice for community members and groups. Government accountability and transparency play an integral role in facilitating access to justice through the provision of information to the community. The United Nations has long acknowledged freedom of information as a fundamental human right.

The EDO is often approached by clients who have inquiries about accessing information from government agencies. Our FOI clients are usually individuals, local community groups or peak environment bodies who seek access to information on government policy development and decision making, rather than personal information about themselves.

The EDO generally supports the Bill given that we recognise the importance of transparency in government decisions and policies. The proposed legislation appears to strengthen this principle through increased ability to access documents and decisions of government. Moreover, it incorporates in to the legislation policies which are otherwise followed.

However whilst we believe the Bill will help to improve the community's ability to access information we are concerned that without ongoing and renewed momentum agencies may tend towards a 'business as usual' approach to (refusing) access to information, rather than a genuine commitment to open government. This concern extends to the level of openness and transparency of public policy making in the environmental law context. Our concern about a 'business as usual' approach to FOI requests includes the difficulties of making FOI applications in time-dependent situations (such as rapid public policy development) and the broader problem of proactive transparency and public participation in developing environmental law and public policy.

Principles and Objects

We support the proposed objects as they make clearer that access to information assists the community in protecting democratic rights, participating in policy making and understanding government decisions.

Time Limits

EDO clients often experience delays to processing applications and the use of practical refusals. Access to anything with any complexity and information has a temporal value to it and even when documents are released they are often rendered irrelevant by delays. Therefore access in a reasonable time frame is important if the information obtained is to be used in a meaningful way. Our clients often report that agencies push time frames out, typically by claiming they need to consult third parties or that a request is complex or large. Whilst extended time frames are supported every effort should be made to comply.

Exemptions

The EDO supports the proposed provision which provides for the specific exemption of documents containing information about the location of threatened or endangered flora or fauna, or other rare items of cultural or scientific importance, as this could endanger their safety. However the EDO considers that the way in which the exemptions in general are applied needs change and in particular we recommend the inclusion of a public interest test which includes the introduction of guiding principles for assessing the public interest – both the ‘Factors favouring access’ and ‘Irrelevant factors’.

Fees and Charges

The EDO’s overall position is that fees and charges should not be imposed for accessing government information. The cost of obtaining information can prove a means of preventing access. The importance of access to information is recognised by the revised objects with the emphasis on the provision of access to information “at the lowest reasonable cost”.

Those acting on behalf of the public should not be unfairly burdened or deterred, especially where proactive disclosure and participatory policy making is limited. However many of our clients have found FOI charges too expensive and have in some cases been prompted to drop their request or to limit it’s terms considerably.

It appears to the EDO that at least some agencies have continued to use the fees and charges provisions as a means to dissuade applications for access to information. In some situations clients decide not to pursue a matter because they perceive that this will be a costly venture. In addition to the abolition of all application fees for requests we also recommend provision for not-for-profit community groups to receive the first five hours of decision-making time free of charge where there is sufficient public benefit in an application.

Our reasoning to remove fees relates partly to the obstacle that such fees can be to exercising the fundamental right to information; and partly to the fact that the current processing fee does not take into account the existence of more efficient records management systems. The EDO acknowledges that this is balanced by situations where agencies have been happy to respond to formal applications by providing information without charge.

The EDO recognises that agencies are sometimes concerned about the diversion of resources and cost to the agency of dealing with access applications. However, the issue of right to information is too significant for these economic matters to outweigh this fundamental right. This issue therefore needs to be dealt with by way of investment in staff and better

records management systems. Additionally, in our experience many clients prefer to receive information by digital means which further limits the processing and production costs associated with this activity.

Should you have any questions on the above, please do not hesitate to contact Melissa Ballantyne on (08) 8359 2222 (Tuesdays and Thursdays) or melissa.ballantyne@edo.org.au

Yours faithfully

A handwritten signature in cursive script, appearing to read 'mBallantyne', enclosed in a light grey rectangular box.

Melissa Ballantyne

Managing Lawyer, Adelaide
Environmental Defenders Office