

2011

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

FREEDOM OF INFORMATION AMENDMENT BILL 2011

EXPLANATORY STATEMENT

Presented by
Mr Simon Corbell MLA
Attorney-General

Freedom of Information Amendment Bill 2011

Overview of Bill

This Bill amends the *Freedom of Information Act 1989* (the FOI Act).

The amendments give partial effect to the Government Response to the Standing Committee on Justice and Community Safety's Inquiry into the *Freedom of Information Act 1989*. A further Bill is proposed to implement remaining elements such as a further amendment to the objects clause and the inclusion of the Office of the Auditor-General as an exempt entity.

This Bill enhances the principles of public sector transparency and open government which underpin the FOI Act. It amends the objects of the Act to reflect these principles and a desire to facilitate public access to information held by Territory Government agencies.

The exemptions provisions of the FOI Act are amended to better align with the Commonwealth *Freedom of Information Act 1982* (the Commonwealth FOI Act).

The Bill rearranges the exemptions from access to government-held information so that it is clear which documents are generally exempt and which are conditionally exempt subject to a public interest test.

A single public interest test is applied to conditionally exempt documents. The test provides that conditionally exempt documents should be released unless it would be contrary to the public interest for them to be disclosed.

The Bill also removes several ineffective or redundant provisions, including the protection from an action for copyright infringement and several exemptions that are unnecessary because they are covered by other existing exemptions.

Human Rights implications

The FOI Act positively engages the human right to seek, receive and impart information provided for in section 16 (2) of the *Human Rights Act 2004*. The amendments recognise this right by enhancing the ability of those seeking to access Territory Government held information to obtain documents under the FOI Act.

The amendments also ensure that the right to privacy under section 12 and the right to take part in public life under section 17 are respected in the administration of the FOI Act.

The details of the amendments are set out below.

Clause Notes

Clause 1 Name of Act – states the title of the Act as the *Freedom of Information Amendment Act 2011*.

Clause 2 Commencement – provides that the Act commences on a day fixed by the Minister by written notice.

Clause 3 Legislation amended – specifies that the Act amends the *Freedom of Information Act 1989*.

Clause 4 Object, Section 2(1), new paragraph (c) – inserts a new object into the FOI Act. New paragraph (c) provides that information held by the Territory is to be managed for public purposes, and is a Territory resource.

Clause 5 New sections 10A to 10C – inserts new sections 10A, 10B and 10C into the Act.

Section 10A is pivotal to the Government's implementation of its recently announced Open Government policy. This section provides that an agency or minister must give a person access to documents in accordance with the FOI Act if the person makes an FOI request. The obligation does not require the provision of access to documents that are exempt, or to documents that are conditionally exempt where it would be contrary to the public interest to release them to the person who has requested access.

Subsection 10A(5) sets out the circumstances in which an agency or minister is not required to give access to a document at a particular time. It states that an agency or minister is not required to release a document that is both a conditionally exempt document and an exempt document within the meaning of paragraphs (b) and (c) of the dictionary definition of "exempt document" (that is, a document in respect of which an agency is exempt from the operation of the FOI Act pursuant to section 6 of the Act, or an official document of a minister that contains some matter that does not relate to the affairs of an agency).

Section 10B sets out the factors used to determine whether it would be contrary to the public interest for documents to be released. Subsection 10B(2) sets out the factors favouring access to a document. Subsections 10B(2)(b) and 10B(2)(c) set out that where disclosure of a document would inform debate on a matter of public importance or promote effective oversight of public expenditure, then the circumstances will favour providing access to the document. Subsection 10B(3) sets out factors that cannot be taken into account when determining whether the release of a document would be contrary to the public interest. These factors favour the disclosure of conditionally exempt documents.

Section 10C describes the circumstances in which documents released under the FOI Act must be published on a website. Subsection 10C(2) provides that the agency or minister must publish information on a website by making the information available for downloading from a website, a link to a website or through providing information or other details on the website of how the information may be obtained.

Subsection 10C(3) provides that the publication must occur within 15 working days after the day the person is given access to the document.

Subsection 10C(1) sets out the circumstances in which the requirement to publish a document on a website does not apply, which relate to privacy of personal and professional material and the impracticality of publishing information if such material is excluded.

Clause 6 Exempt documents, Part 4 – substitutes new part 4, split into 3 divisions, being preliminary (4.1) as well as exempt (4.2) and conditionally exempt (4.2). Part 4 provides for the exemption of documents from access under the FOI Act.

Division 4.1 – Preliminary

This division prescribes the operation of the part, setting out that a document will be exempt if it is described as exempt in division 4.2, or as conditionally exempt as described in division 4.3 and it would be contrary to the public interest under subsection 10A(4) to provide access to the document. New section 31A states when a document is exempt for the purposes of part 4. New section 32 restates existing section 32 of the FOI Act which provides that exemptions do not limit each other.

Division 4.2 – Exemptions - General

Division 4.2 consolidates all the exemptions in the FOI Act that are fully rather than conditionally exempt and are not subject to the public interest test.

The exemptions now grouped into division 4.2 are:

- Section 33 executive documents;
- Section 34 documents affecting enforcement of the law and protection of public safety;
- Section 35 documents affecting national security, defence or international relations;
- Section 36 documents to which secrecy provision of enactments apply;
- Section 37 documents subject to legal profession privilege;
- Section 38 documents containing material obtained in confidence;
- Section 39 documents disclosure of which would be contempt of Legislative Assembly or court;
- Section 40 documents disclosing trade secrets or commercially valuable information; and
- Section 41 electoral rolls and related documents.

The following provisions of the existing Act have not been included in division 4.2:

- Existing section 33 – Documents exempt under Commonwealth FOI Act; and
- Existing section 47 – Certain documents arising out of companies and securities legislation.

Existing section 33 exempts documents that, were they in the possession of a Commonwealth agency, would be exempt under the Commonwealth FOI Act. This provision has been removed on the basis that documents to which this exemption

would apply are already covered by the exemption for documents affecting relations with the Commonwealth and States.

Existing section 47 exempts documents that are a copy, are part of, or contain an extract from documents arising out of the Ministerial Council for Corporations or documents that have been furnished to the Australian Securities and Investments Commission by the Commonwealth, a State or Territory. This provision has been removed on the basis that the documents to which this exemption would apply are already covered by the exemption for documents affecting relations with the Commonwealth and States.

In line with the Government's commitment to maintain, to the extent possible, alignment with the Commonwealth FOI Act, the existing exemption for documents relating to business affairs, etc. (existing section 43) has been split into two exemptions.

New section 40 will provide a comparable exemption to section 47 of the Commonwealth FOI Act by exempting documents the disclosure of which would disclose trade secrets or commercially valuable information. That part of the existing exemption that relates to documents disclosing a person's business or professional affairs will become a conditional exemption, again, consistent with the Commonwealth Act.

Subsection 37(2) is included to codify the common law on waiver of legal professional privilege, and is consistent with the comparable Commonwealth FOI Act exemption.

The grouping of these exemptions into one division is intended to maintain alignment with the amendments of 1 November 2010 to the Commonwealth FOI Act, which were designed to increase the clarity of the exemptions provisions.

Division 4.3 – Public interest conditional exemptions

Division 4.3 consolidates all the exemptions in the FOI Act that are subject to the public interest test, with the addition of exemptions for documents affecting personal privacy and documents disclosing business or professional affairs.

Access to conditionally exempt documents must be provided unless it would be contrary to the public interest for this to occur. Even if a document satisfies the criteria in one of the conditional exemptions, disclosure of the document must still be provided unless it contrary to the public interest to disclose it. Whether the disclosure of a document would be contrary to the public interest should be determined by reference to the public interest factors set out on in new section 10B of the FOI Act.

The exemptions grouped into division 4.3 are:

- Section 42 relations with Commonwealth and States;
- Section 43 deliberative processes;
- Section 44 financial or property interest of the Territory;
- Section 45 certain operations of agencies;
- Section 46 personal privacy;

Section 47 business; and
Section 47A the economy.

Section 43, which provides for the exemption of documents that reflect deliberative processes, amends the title of, and relocates, the existing exemption in section 36 for internal working documents, to improve consistency between the FOI Act and the Commonwealth FOI Act. The operation of this exemption is not intended to be altered by this amendment.

Section 46 provides for the exemption of documents on the basis of personal privacy. The exemption in existing section 41 of the FOI Act, for documents affecting personal privacy, was not previously subject to a public interest test. The Bill amends the title of, and relocates, the existing exemption in section 41 to improve consistency between the FOI Act and the Commonwealth FOI Act. Section 46 has also been amended to reflect comparable Commonwealth exemptions for personal privacy. The amendments clarify the circumstances in which documents provided in response to requests for access can be provided to ‘qualified people’ such as medical practitioners, counsellors or social workers.

Section 47 provides for the exemption of documents on the basis that disclosure of the document would disclose a person’s business or professional affairs. This exemption incorporates that part of the ‘business affairs etc’ exemption in existing section 43 that was not moved into the general exemptions in division 4.2. This exemption has been made conditional to maintain consistency with the Commonwealth FOI Act.

Section 47A provides for the exemption of documents on the basis that disclosure of the document would, or could reasonably be expected to, have a substantial adverse effect on the Territory’s economy.

Existing section 44 of the FOI Act has been amended to reflect the comparable exemption in the Commonwealth FOI Act. The existing exemption provides that documents are conditionally exempt if disclosure would have a substantial adverse effect on the ability of the Government of the Territory to manage the economy, or it could it could reasonably be expected to result in an undue disturbance of the ordinary course of business in the community, or an undue benefit or detriment to any one by giving premature knowledge of proposed or possible action or inaction by the Territory Government or Legislative Assembly. This exemption has been amended to reflect the comparable exemption in section 47J of the Commonwealth FOI Act. The major change in this exemption is the adoption of subsection 47J (1) of the Commonwealth FOI Act which changes the exemption to provide that the conditional exemption now applies to documents where disclosure would have, or could reasonably expect to have, a substantial adverse effect on the Territory’s economy (rather than the capacity of the Government to manage the economy).

Subsection 47A (2) has been included to clarify the term “substantial adverse effect on the economy of the Territory”. The term includes a substantial effect on a particular sector of the Territory’s economy, or the economy of a particular region of the Territory. This subsection reflects subsection 47J (2) of the Commonwealth FOI Act.

Documents relating to foreign investment have also been added to the kinds of documents that may be conditionally exempt under this provision, following the list provided in subsection 47J (3) of the Commonwealth FOI Act. No other documents listed in the Commonwealth list were appropriate for adoption in the FOI Act.

Clause 7 Protection against certain actions, section 77 (1) – omits a reference to infringement of copyright. Subsection 77(1) currently provides protection for those providing access to documents in accordance with the FOI Act from actions for infringement of copyright. The protection is removed because it is inconsistent with the Commonwealth *Copyright Act 1968*, and this amendment is consequential on that removal.

Clause 8 Section 77 (2) and (3) – substitutes new subsections 77(2) and (3).

New subsection 77(2) extends the existing protection from civil actions in subsection 77(1), which relates to the giving of access to documents, to the publication of documents in accordance with section 10C of the Act. No action for defamation or breach of confidence lies against the Territory, an agency, a Minister or an officer because of the publication of a document in the honest belief that the publication was required under section 10C of the Act.

New paragraph 77(2)(b) further extends this protection to the publication of, or giving of access to, a document in the honest belief that the publication or access is required or permitted otherwise than under this Act (whether or not under an express legislative power).

New subsection 77(3) provides that the giving of access to a document will not be taken to authorise or approve the publication of the document or its contents by the person to whom access is given.

Clause 9 New parts 9 and 10 – inserts new parts to deal with the status of previously issued conclusive certificates and the transitional arrangements for the operation of the FOI Act.

Part 9 – Transitional – Freedom of Information Amendment Act 2011

New section 100 – Application of amendments – provides that amendments to the FOI Act made by this Bill apply in relation to a request for access made under section 14 that is received on or after the day the amendments commence.

New section 101 – Transitional regulations – allows for the Executive to make regulations to prescribe transitional matters or to modify the transitional part in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in the transitional part.

Although this power allows a regulation to modify the effect of, rather than amend, an Act, it is transitional in nature, having no lasting effect, and subject to the oversight of the Legislative Assembly by way of possible disallowance. Its limited scope and timeframe, and the oversight, moderate the otherwise unacceptable nature of a regulation modifying an Act.

New section 102 provides for part 9 to expire one year after it commences, to allow for transition to the new scheme.

Part 10 – Revocation of certain conclusive certificates

New section 103 – Revocation of certain conclusive certificates – revokes conclusive certificates signed by the Minister under one of the following provisions in force before the commencement of the *Freedom of Information Amendment Act 2009* (the amending Act), if the certificate was in force immediately before the commencement of the amending Act:

Section 34(2) Documents affecting relations with Commonwealth and States;

Section 35(4) Executive documents;

Section 36(3) Internal working documents.

Under new section 104, this part expires on the day it commences.

Clause 10 Dictionary, new definition of *conditionally exempt* – inserts a definition of the term ‘conditionally exempt’. A document will be conditionally exempt if part 4, division 4.2 applies to the document.

Clause 11 Dictionary, new definition of *exempt* – inserts a definition of the term ‘exempt’ for part 4 (Exempt documents). The definition refers to section 31A of the Act, which states that, for part 4, a document is exempt if—

(a) it is an exempt document under division 4.2; or

(b) it is conditionally exempt under division 4.3 and access to it would, on balance, be contrary to the public interest under section 10A (4).

Clause 12 Dictionary, definition of *exempt document*, paragraph (a) – substitutes the paragraph (a) of the definition of the term ‘exempt document’. An exempt document is a document that is exempt for the purposes of part 4.

Schedule 1 – Consequential amendments

Schedule 1 amends a number of Acts to reflect changes to section numbers and titles in the FOI Act. Those Acts are:

- *Children and Young People Act 2008*
- *Crimes (Restorative Justice) Act 2004*
- *Freedom of Information Act 1989*
- *Gene Technology Act 2003*
- *Territory Records Act 2002*