

# **Transparency International**

## **Overview of Freedom of Information in Australia**

### **1. What is Freedom of Information**

Freedom of Information ('FOI') laws in Australia grant members of the public a general right to access information which is held by Government Ministers, Departments and Agencies in documentary form. The framework of FOI rights in Australia is established by Federal and State legislation. In 1982, the Federal Parliament passed the *Freedom of Information Act 1982*. Each of the States have also enacted similar legislation.

There are three key facets to FOI laws in Australia. These are:

- (a) rights of access to public information in documents held by government agencies. The scope of documents extends beyond materials in paper form, and includes photographs, maps, films, emails, tape and video tape recordings;
- (b) a right to request access and amendments to personal information. If you believe that your personal information, as it appears in administrative documents which are being used by a government agency, is incomplete, incorrect, out of date or misleading, then you may request that the document be corrected; and
- (c) an obligation for government agencies to record and publish, or make publicly available, specified information. The purpose of publishing this information is to bring the affairs and procedures of government agencies into the public arena.

It is the third of these three features which is particularly relevant to the promotion of transparency in government.

### **2. Why is FOI relevant to Transparency International?**

FOI laws are an important instrument in creating transparency and thus helping to make governments accountable. A key objective of FOI laws is to create an opportunity for individuals, businesses and media to monitor and review government decision making processes. The obligation on government agencies to publish, and the rights for individuals to access, information of general public interest is a crucial tool in the struggle to prevent corruption.

### **3. Restrictions on FOI**

The rights granted by FOI legislation are not absolute. Rather, the scope of FOI is limited by certain exceptions and exemptions. Members of the public may not be entitled to documents which:

- (a) are subject to legal professional privilege;
- (b) are subject to public interest immunity;
- (c) contain private information about other people; or
- (d) contain information provided to a Government agency in confidence.

#### 4. Criticisms of Australia's FOI framework

In June 2006, the Victorian Ombudsman published a report following a comprehensive review of the *Freedom of Information Act 1982* (VIC) ("**Ombudsman Report**"). The Ombudsman Report was critical of various aspects of the FOI system in Victoria and presented recommendations of a legislative, procedural and administrative nature. The key criticisms relate to unnecessary delays in processing FOI applications and poor quality of assistance offered to applicants. Many of the criticisms identified by the Victorian Ombudsman apply equally to the Federal FOI scheme and that of the other States and Territories. A copy of the Ombudsman Report is available from the [Ombudsman Victoria website](#).

We set out below a discussion of the criticisms of Australia's FOI system raised in the Ombudsman Report and by other commentators.

**US model grafted onto a Westminster system:** Australia's Freedom of Information provisions are loosely based on the United State's Freedom of Information Act. The US model has been forced to interact with an Australian system of infrastructure which encompasses a UK approach to access to information, based on the idea that individual and collective responsibility before Parliament is the most appropriate way to create accountability. A wide ranging Act, which enhances accountability, provides citizen participation, and creates a general right of access to information in documentary form which is in the possession of Government agencies, is applied to a reluctant public sector with an established practice of secrecy. This may be a contributing factor to delays in dealing with applications for information, as well as the frequent recourse to ministerial certificates (see below) and inadequate recording of documents.

**Legislative immunities are too broad:** Australian FOI laws operate on a restrictive policy of granting wide exemptions to certain government departments, rather than encouraging availability of information unless there is a specific case for withholding it. It may be that vague drafting of certain sections in FOI legislation provides an opportunity for government agencies to take advantage of the lack of precision. In effect, it can be argued that the exemptions confer a discretion on agencies and ministers to claim immunity status for virtually any document – an outcome which is contrary to the pro-disclosure objective of FOI legislation. Dr. Moira Paterson suggests that existing clauses could be supplemented with a 'principle of availability' which would allow the information to be made available unless there is a good reason for withholding it.<sup>1</sup>

**Risk of misuse of conclusive certificates:** A certificate is a conclusive mechanism which is issued by a Minister to deny access to certain documents. Government agencies are required to deny access to a document under the protection of a certificate unless it is possible to release the document with the protected material removed. Critics argue that the scope for review of a certificate is too narrow. The Administrative Appeals Tribunal ("**AAT**") does not have the power to grant access to a document the subject of a certificate. Rather, the AAT's power of review is restricted to determining whether reasonable grounds exist for the issuance of the certificate. The High Court of Australia is deciding an appeal relating to an AAT decision which found that there were reasonable grounds for the issuance of conclusive certificates.

**McKinnon v Secretary, Department of Treasury:** The McKinnon case has been pivotal in attracting the attention of the media and public to the nature of conclusive certificates. In December 2002, Mr McKinnon, the Freedom of Information Editor of the Australian newspaper, made FOI applications to the:

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<sup>1</sup> Paterson, Dr. M. (2005) *Freedom of Information and Privacy in Australia*, Butterworths, Australia at 42.

- (a) Australian Taxation Office – for documents relating to taxation brackets; and
- (b) Federal Treasury – for documents relating to the national first home buyers scheme.

Prior to the hearing of the applications, the Treasurer issued conclusive certificates, under the *Freedom of Information Act 1982* (Cth), denying access to the documents on the grounds that their disclosure would be contrary to the public interest. Mr McKinnon applied to the AAT for the decision to be reviewed. As discussed above, the AAT's power of review is restricted to determining whether there exist reasonable grounds for the relevant Minister, in this case the Treasurer, to issue the certificates. The AAT held that such grounds did exist but failed to consider the public interest arguments in favour of disclosure in arriving at its decision. Mr McKinnon appealed to the Full Federal Court on the ground that, among other things, the AAT misconstrued its power of review and failed to take account of relevant considerations. The appeal was rejected.

In early 2006, in a final bid, Mr McKinnon appealed to the High Court of Australia. The question before the High Court was whether the Full Federal Court made an error of law in dismissing Mr McKinnon's appeal against the decision of the Tribunal. It is important to note that the High Court (like the Full Court and the Tribunal) did not have the power to decide whether the Minister's decision to issue the certificates was correct. The power of review accorded by the Act is clearly limited to determining whether there exist reasonable grounds for the claim that disclosure of the document would be contrary to the public interest.

*Majority Judgement* – Justices Callinan and Heydon recognised that there is tension between the objects of the Act – to make available, and create a general right of access to, information in the possession of the Australian government – and the limited power of review conferred upon the Tribunal. A restricted power to review Ministers decisions results in an increased capacity for Ministers to deny freedom of information claims. Nevertheless, his Honours noted that this tension is dealt with by the express and unmistakably clear language of the Act. They found that if one reasonable ground for a claim of contrariety to the public interest exists, even though there may be opposing reasonable grounds, a conclusive certificate will be beyond review. Callinan and Heydon JJ dismissed the appeal, as did Hayne J for similar reasons.

*Dissenting Judgement* – Chief Justice Gleeson and Justice Kirby delivered a joint judgement in dissent. His Honours were not satisfied that an application for review of a certificate should fail simply because there is one reasonable ground in support of the certificate. The question of whether there are reasonable grounds in support of a certificate can only be decided after considering all relevant propositions. His Honours considered that the Full Court had made an error of law in finding that the existence of one reasonable ground was sufficient to satisfy a review of the certificate.

*Impact of the McKinnon Case* – The decision of the High Court in the McKinnon case has had the effect of further constricting the limited right for the AAT to review a Ministerial decision to issue a conclusive certificate. The Majority judgment interprets the FOI Act to require the existence of only *one reasonable ground* in support of a conclusive certificate for the certificate to be upheld, even though there may be a plethora of contradicting reasonable grounds. For this reason, FOI advocates and media commentators, have condemned the decision and called for the FOI Act to be amended.

You can obtain a copy of the High Court of Australia's full judgement from the following address: [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2006/45.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2006/45.html)

**Need to harmonise FOI laws with privacy legislation:** Australian FOI legislation creates an exemption for documents the disclosure of which would involve unreasonable disclosure of "personal affairs". Critics argue that "personal affairs" should be amended to refer to "personal information" in order to bring FOI laws into harmony with the *Information Privacy Act 2000* and the *Health Records Act 2001*. These two acts protect the privacy of "personal information". The Ombudsman Report recommended that this amendment take place in order to harmonise the reach and effect of the legislation.

**Risk of misuse of "irrelevance"** The *Freedom of Information Act 1982* (Cth) allows for portions of a document to be deleted if the information in question can reasonably be regarded as irrelevant to an application for access. The test as to whether an edited copy can be practicably created rests with the decision maker, as well as the exercise of judgement as to what is relevant and irrelevant. Although an applicant provided with an edited copy has to be made aware of this situation and the reasons for it, there is no requirement to provide a statement of reasons unless an applicant specifically asks for one. This has been criticised as being contrary to the aim of the Act – to make public information easily accessible unless there is a valid exemption. It could be argued that irrelevance should only be applied with the consent of the applicant, thus limiting the power of the decision maker to withdraw information from the remit of the application. FOI laws in New South Wales and Victoria do not create a ground for editing a document on the basis of irrelevance.

## **5. Making a Freedom of Information application**

If you are interested in making an application for FOI, the first step is to identify the information you are seeking and the government agency which is likely to hold the information. The Commonwealth and each of the States have FOI officers who can assist applicants with their FOI claims. Once you have identified these details, the next step is to prepare your application.

An FOI application form can be obtained from the government department (Federal or State – see the website addresses below) which holds the information you are seeking. Or alternatively, you may make an application by writing a letter which sets out the details of your request.

An FOI application will generally require payment of an application fee, and may incur other charges for agency decision-making and consultation time, locating documents and photocopying. These fees may be waived or remitted where an application relates to personal income maintenance documents or in circumstances where the applicant can demonstrate financial hardship or public interest.

If your FOI application is rejected, you will be provided with reasons for the decision. You may also have the right to apply for an internal review of the decision. If the decision to reject the application is upheld, then you may have the opportunity to appeal to the Administrative Appeals Tribunal or in some circumstances, the Federal Court of Australia. The disadvantage in pursuing these options is the cost that you may incur. These costs may include: legal representation, court costs, witness costs and maybe even the costs of the government agency, if your appeal is not successful.

An alternative to bringing action in the Courts, is lodging a request with the Ombudsman to review the decision. The Ombudsman has the power to review decisions of government agencies. The Ombudsman does not have the power to overturn a government agency's decision. However, the Ombudsman will prepare a report which may recommend that a decision be overturned.

## 6. Useful links

If you would like further information regarding FOI, the following sources may be helpful:

Freedom of Information, Attorney-General's Department, Australia

<http://www.ag.gov.au/foi>

The Freedom of Information Act 1982

<http://scaleplus.law.gov.au/html/comact/4/2174/top.htm>

NSW Premier's Department

<http://www.premiers.nsw.gov.au/NSWCommunity/FreedomOfInformation/>

Freedom of Information Online, Department of Justice, Victoria

<http://www.foi.vic.gov.au/>

Office of the Information Commissioner, Western Australia

<http://www.foi.wa.gov.au/>

Queensland Government Freedom of Information Website

<http://www.foi.qld.gov.au/>

Office of the Information Commissioner, Queensland

<http://www.infocomm.qld.gov.au/>

Office of the Information Commissioner, Northern Territory

<http://www.nt.gov.au/justice/infocomm/foi/index.shtml>

Department for Administrative and Information Services, South Australia

<http://www.archives.sa.gov.au/foi>

Department of Justice and Community Safety, ACT

[http://www.jcs.act.gov.au/eLibrary/foi\\_info.html](http://www.jcs.act.gov.au/eLibrary/foi_info.html)

Paterson, M. (2005) *Freedom of Information and Privacy in Australia*, Butterworths, Australia

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