Parliamentary Service Amendment (Freedom of Information) Bill 2013

Mary Anne Neilsen
Law and Bills Digest Section

Contents

Purpose of the Bill ................................................................................................................... 2
Background ............................................................................................................................. 2
Outline of the FOI Act ............................................................................................................. 2
Exempt agencies ..................................................................................................................... 3
Meaning of ‘agency’ and ‘prescribed authority’ ...................................................................... 3
Exempt documents .................................................................................................................. 3
Parliamentary departments and the FOI Act ......................................................................... 4
Policy position of non-government parties/independents ....................................................... 8
Position of major interest groups .......................................................................................... 9
Financial implications ............................................................................................................. 10
Statement of Compatibility with Human Rights ................................................................... 10
Key provisions ....................................................................................................................... 10
Parliamentary Service Amendment (Freedom of Information) Bill 2013

Date introduced: 29 May 2013

House: House of Representatives

Portfolio: Leader of the House

Commencement: On the day of Royal Assent, although note that the Bill will operate retrospectively from 5 December 1999, being the date of commencement of the Parliamentary Service Act 1999.¹

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Parliamentary Service Amendment (Freedom of Information) Bill 2013 (‘the Bill’) is to amend the Parliamentary Service Act 1999 (‘the Act’) in order to restore the exclusion of parliamentary departments and office holders under the Act from the application of the Freedom of Information Act 1982 (the FOI Act).³ The Bill will apply to the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services (referred to in this Bills Digest as ‘the three parliamentary departments’). The fourth parliamentary department, the Parliamentary Budget Office (the PBO) is not affected by the Bill, as it has already been designated an exempt agency under the FOI Act.

Background

Outline of the FOI Act

A basic outline of the FOI Act provides a useful background to the Bill.

The federal FOI Act, like its state counterparts, is based on the principle that every person has a legal right to obtain access to information in documentary form, which is in the possession of ministers or government agencies, subject to the operation of specific exemptions and exclusions.

Specifically section 11 of the FOI Act states:

(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:

¹ Item 2 of Schedule 1 of the Bill.
(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

Exemptions can apply to:

- specific agencies, or
- categories of documents.

Exempt agencies

Some agencies are currently exempt from the FOI Act entirely (for example, the PBO and the Australian Security Intelligence Organisation) while other agencies are exempt in relation to some material (for example, NBN Co is exempt in respect of documents relating to commercial activities).

Meaning of ‘agency’ and ‘prescribed authority’

In the context of this Bill, the definition of agency is particularly relevant. ‘Agency’ is defined at section 4 of the FOI Act as, relevantly, ‘a Department [or] a prescribed authority’. ‘Department’ is defined as a ‘Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth’. Relevantly a ‘prescribed authority’ also is defined in section 4. The definition includes amongst other things:

... a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, [other than certain exclusions listed in subparagraphs (i) to (viii)].

Exempt documents

The various categories of exempt documents are divided into two classes of documents and set out in Divisions 2 and 3 of Part IV of the FOI Act. The two classes are:

- ‘exempt documents’ (dealt with in Division 2 of Part IV). These include, for example, documents affecting national security, defence or international relations, cabinet documents, and documents the disclosure of which would be contempt of Parliament or contempt of court. In the case of these Division 2 documents, exemption from disclosure is not subject to a public interest test and

---

4. ‘Agency’ is defined at section 4 of the FOI Act. See discussion below.
5. Subsection 7(1) of the FOI Act. A list of exempt agencies can be found at Part I of Schedule 2 of the FOI Act. The Parliamentary Budget Officer is also deemed to be an exempt agency under this provision.
6. Subsection 7(2) of the FOI Act. A list of agencies exempt in relation to particular documents can be found at Part II of Schedule 2 of the FOI Act.
7. Section 31B of the FOI Act.
Parliamentary Service Amendment (Freedom of Information) Bill 2013

- ‘conditionally exempt documents’ (dealt with in Division 3 of Part IV) where access to the document must be given unless disclosure would, on balance, be contrary to the public interest test. These include, for example, documents affecting personal privacy, documents related to Commonwealth-state relations and documents that could have a substantial adverse effect on Australia’s economy if released.

Parliamentary departments and the FOI Act

Until 2012, the common understanding was that the FOI Act did not apply to the three parliamentary departments. This dated back to the enactment of the original FOI Act in the early 1980s when parliamentary departments were deliberately placed outside the coverage of the FOI Act, an exclusion which was confirmed by later amendments affecting the Public Service. While never categorised as excluded agencies within the FOI Act, the exclusion was based on an interpretation that the Parliamentary departments were not ‘prescribed authorities’ or ‘departments’ within the meaning of the FOI Act and were therefore not agencies to which the FOI Act applied.

This position was not always regarded favourably. For instance at the time of the 2010 reforms to the FOI Act, the Australian Law Reform Commission (ALRC) and others questioned why parliamentary departments were not being brought within the scope of the FOI Act. As the ALRC noted in its submission to the Senate Committee inquiry into the 2010 Bill, its much earlier Open Government report had recommended that parliamentary departments should be brought within the scope of the FOI Act on the basis that documents that warrant protection would be adequately protected by the exemption provisions (for example by the exemption based on parliamentary privilege).

---

8. Subsection 11A(5) of the FOI Act. The factors to be taken into account when working out whether access to a conditionally exempt document would, on balance be contrary to the public interest are outlined at section 11B of the FOI Act.


In defence of their exclusion from the FOI regime, the three departments have argued that there has always been general agreement amongst them that while the Act did not apply to parliamentary departments, in general, material should be supplied on request unless there were good grounds for refusing requests and reasons were provided for any such a refusal.\textsuperscript{13}

A critical event occurred in 1999. In that year, the three parliamentary departments were established as a separate service under the Parliamentary Service Act. The Speaker of the House at the time explained the rationale underpinning the legislation:

\begin{quote}
Establishing a separate Parliamentary Service with its own legislation will publicly restate the principles that the legislative arm of government is separate from the executive arm and that its staff are responsible to the Australian parliament rather than to the government of the day.\textsuperscript{14}
\end{quote}

The view that parliamentary departments were not subject to the FOI Act changed quite dramatically in 2012 and was affected by opinions expressed by the Australian Information Commissioner, Professor John McMillan (Information Commissioner) and the Freedom of Information (FOI) Commissioner, Dr James Popple. In late 2011, advice from the Commissioners was received by the three parliamentary departments that the FOI Act may in fact have applied to the parliamentary departments since the passage of the \textit{Parliamentary Service Act in 1999}. The reasoning was that since the passage of the Parliamentary Service Act, the parliamentary departments had technically been ‘prescribed agencies’ since 1999 and thus subject to the scope of the Act since that time.\textsuperscript{15}

On 9 May 2012, the Information Commissioner, in line with this advice, amended the FOI Guidelines\textsuperscript{16} to provide:

\begin{quote}
Three of the Commonwealth Parliamentary departments (the Department of the House of Representatives, the Department of the Senate and the Department of Parliamentary Services) are subject to the FOI Act because they were established by, or in accordance with, s 54 of the \textit{Parliamentary Service Act 1999} and they have not been exempted.\textsuperscript{17} The fourth Commonwealth Parliamentary department, the Parliamentary
\end{quote}

\textsuperscript{13} Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services, \textit{Review of the operation of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010}, op. cit., p. 2.


\textsuperscript{15} Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services, \textit{Review of the operation of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010}, op. cit.

\textsuperscript{16} Section 93A of the FOI Act allows the Information Commissioner to issue written guidelines for the purposes of the FOI Act (the FOI Guidelines). Under subsection 93A(2) of the FOI Act, agencies must have regard to the FOI Guidelines when performing functions or exercising powers under the FOI Act.

\textsuperscript{17} Section 54 of the Parliamentary Service Act establishes the Department of the Senate and the Department of the House of Representatives and provides for other Parliamentary Departments to be established by resolution of both Houses of Parliament.

\textit{Warning:} All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Previously, the FOI Guidelines had stated that ‘the [FOI] Act does not apply to Departments of the Parliament’.  

Following the change to the FOI Guidelines, these three parliamentary departments are now regarded as being agencies to which the FOI Act applies.

There was a mixed response to this development. Media reports at the time suggested that the Attorney-General was considering options to ‘correct this anomaly’. The Australian Greens, on the other hand welcomed the change, arguing that ‘greater disclosure of the workings of parliament and the work of MPs is critical to a healthy democracy’. The Greens were also critical of suggestions that the Attorney-General might legislate to reverse this development.

The heads of the three parliamentary departments and the Parliamentary Librarian have argued strongly against their changed status under the FOI Act with their views being well articulated in the various submissions to the current inquiry into the FOI Act being conducted by Allan Hawke (the Hawke review). Their submissions focus on the term of reference dealing with ‘the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act …’

The joint submission of the heads of the three parliamentary departments argues:

… [t]he FOI Act as it is currently framed was designed to provide access to government information. The Parliamentary Service Act 1999 requires that parliamentary service staff provide professional advice and support for the Parliament independently of executive government. The recent, retrospective inclusion of the parliamentary departments under the Act due to an administrative interpretation does not sufficiently recognize the institution of the Parliament and the need for parliamentary officials to provide frank and
complete advice on a range of matters, not all of which are covered by parliamentary privilege. This also requires urgent clarification.\textsuperscript{24}

The submission is also critical of the FOI Commissioner’s approach and interpretation stating:

Of strong concern to the parliamentary departments is the acknowledgement by the Freedom of Information Commissioner, Dr James Popple, in correspondence to the parliamentary heads dated 13 February 2012, that:

\textit{Some of the points that you raise support the view that the application of the FOI Act to the parliamentary departments since 1999 was unintentional or at least inadvertent.}

The departments have complied with the new guidelines and because requests for information have been met whenever they could to date a court has not been required to decide whether in fact the departments are subject to the Act. The strong view of the heads of the departments presenting this submission is that the law should reflect the intention of the Parliament which is subject to interpretation by the courts. It should not be the role of officers of a government agency to declare what the law is.\textsuperscript{25}

Significantly, the submission does not recommend a blanket exemption for parliamentary departments noting that ‘as publicly resourced agencies, the parliamentary departments support the principle that the \textit{administrative} documents of any taxpayer-funded agency should be open to scrutiny subject to any claim of appropriate immunity (which the FOI Act exemptions generally reflect)’.\textsuperscript{26}

However, there are serious concerns within the three departments about documents which are not of an administrative nature, mainly relating to parliamentarians and the role of the departments in supporting Members and Senators as they perform their constitutional roles.\textsuperscript{27}

The submission concludes by recommending:

\begin{itemize}
\item That the Departments of the Senate, the House of Representatives and Parliamentary Services be subject to the FOI Act in relation to documents of an administrative nature only.
\item That the FOI regime not apply to any matter subject to parliamentary privilege and that section 46 of the current FOI Act be amended to remove doubt. The impact of section 38B of the \textit{Parliamentary Service Act 1999} on the FOI Act should also be reviewed.\textsuperscript{28}
\item That the FOI Act not apply to advice provided by \textit{Parliamentary Service Act 1999} staff, irrespective of whether or not parliamentary privilege applies.
\item That the FOI Act be clarified to remove any doubt that the provisions do not apply to any documents held by parliamentarians (and their staff) even if the information resides on facilities provided by the parliamentary departments.\textsuperscript{29}
\end{itemize}

\textsuperscript{24} Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services, \textit{op. cit.}, \textit{Review of the operation of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010}, p. 1.

\textsuperscript{25} Ibid., p. 3.

\textsuperscript{26} Ibid., p. 4.

\textsuperscript{27} Ibid.

\textsuperscript{28} Section 38B relates to the functions of the Parliamentary Librarian. See explanation below.
The Parliamentary Librarian, Dr Dianne Heriot, whose statutory position is established by section 38A of the Parliamentary Service Act submitted separately to the Hawke Review. Dr Heriot, like the heads of the three parliamentary departments, is extremely concerned about the recent developments. Her arguments focus around the conflict between the requirements of her statutory and those of the FOI regime. Quoting the Joint Chairs of the Joint Standing Committee on the Parliamentary Library submission to the Hawke review she states:

... subjecting client requests and advice to the FOI regime is contrary to the will of the Parliament as set out in the Parliamentary Service Act, and would have the effect of jeopardising the Parliamentary Librarian’s ability to carry out her statutory obligations to provide a confidential service ‘having regard to the independence of the Parliament from the Executive’.  

Dr Heriot offers several options on the model that the exemption may follow, noting that in the interests of transparency and accountability a partial exemption is to be preferred. This, she argues, would protect the Parliamentary Library’s confidential relationship with its parliamentary clients, while at the same time ensuring that the Library is open and transparent about its administrative operations.

The Bill was introduced into the House of Representatives on 29 May 2013 with second reading debate and passage through the House following immediately. The Leader of the House, Mr Anthony Albanese, in his second reading speech indicated the major impetus for the Bill and the reason for the haste in its introduction and debate, was in direct response to the concerns of the Joint Committee on the Parliamentary Library about:

... the Library’s ability to continue to provide individual members and senators with research and advice on a confidential basis in an environment where FOI access decisions are ultimately made by agents of the executive government and by the courts. The potential for such decisions to undermine the rights of Parliament and its members is considerable.

Mr Albanese stressed that the Bill is an interim measure to protect the Parliament until such time as the Parliament can fully consider the appropriate position, informed by the report of the Hawke review.

Policy position of non-government parties/independents

In the debate in the House of Representatives, the Coalition supported the Bill, with Mrs Bronwyn Bishop concurring with the views of the Leader of the House. Mrs Bishop also focused much of her
attention on the Parliamentary Librarian and her role. Mrs Bishop argued that it is vital that the Parliament put the question of an FOI exemption beyond doubt and legislate to protect the Librarian and uphold her duties under the Parliamentary Service Act.  

The Australian Greens, in their submission to the Hawke Review, recommended that no amendments be made to the FOI Act to exclude the parliamentary departments from the operation of the FOI Act. In relation to the actual Bill, it is reported that Greens Leader Senator Christine Milne said it was ‘disappointing that the old parties are not committed to greater accountability’ and she called for the report of Hawke review to be released before the Senate debate.

**Position of major interest groups**

In contrast to the bipartisan support in the Parliament, Fairfax media reports in the days following the Bill’s introduction criticised the Bill, with the *Sydney Morning Herald* headline reading: ‘MPs unite to keep pollies perks secret’. The article questions why three departments with a total budget of $170 million that oversee Parliament should gain a blanket exemption from freedom of information laws and also questions why the Bill was pushed through so rapidly given the report of the Hawke review is soon to be released.

Although the article’s title focussed on the Bill’s perceived potential to exempt entitlements paid to politicians from the FOI regime, the provision of many such entitlements is overseen by the Department of Finance and Deregulation (DoFD), which is also responsible for administering the accountability mechanisms. DoFD publishes reports on expenditure on entitlements by Parliamentarians, former Parliamentarians and surviving spouses or de facto partners of former Parliamentarian. The latest report covers the period from January to June 2012.

---


35. Ibid.


37. Ibid.


*Warning:* All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact.40

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.41

Key provisions

As explained above, the FOI Act applies to documents of ‘agencies’ which include ‘prescribed authorities’ as defined in section 4 of that Act. Item 1 of Schedule 1 of the Bill inserts proposed section 68A into the Parliamentary Service Act. It provides that parliamentary departments and persons holding or performing the duties of an office established under the Parliamentary Service Act are not prescribed authorities for the purposes of the FOI Act. The effect of this amendment is to exclude the parliamentary departments and their office holders from the application of the FOI Act.

Item 2 of Schedule 1 of the Bill is a transitional provision and its effect is to give the amendment in item 1 retrospective application. The retrospective application dates back to 5 December 1999, being the date when the Parliamentary Service Act commenced.

The Explanatory Memorandum justifies this retrospective application on the grounds that:

[...] it restores what was widely thought to be the position (that is, that the parliamentary departments are not subject to the FOI Act) and it preserves the rights of the Parliament to make an informed decision at a future date about the basis (if any) on which the FOI Act might apply.52

As noted above, the amendment in Schedule 1 will not affect the PBO which has a separate and specific exemption set out the FOI Act.

The different drafting approaches adopted for these two exemptions are of interest. The exemption in this Bill that affects the three parliamentary departments is drafted via amendment to the Parliamentary Service Act. In contrast, the PBO exemption is a specific agency exemption in the FOI Act. This is arguably a much clearer and more direct approach. The Explanatory Memorandum does not comment on this difference in drafting, but it may reflect the fact that the amendment in the Bill

41. The Statement of Compatibility with Human Rights can be found at pages 3–5 of the Explanatory Memorandum to the Bill.
42. Explanatory Memorandum, Parliamentary Service Amendment (Freedom of Information) Bill 2013, op. cit., p. 5.
is seen as a temporary interim measure until the Parliament has an opportunity to address the issue in more depth. Perhaps it also represents more accurately the stated purpose of the Bill which is to ‘restore the exclusion’ from the FOI Act for parliamentary departments and office holders under the Parliamentary Service Act.