FREEDOM OF INFORMATION BILL 1981

Date Introduced: 2 April 1981
House: Senate
Presented by: Senator the Hon. P.D. Durack, Attorney-General

Short Digest of Bill

Purpose

To give members of the public rights of access to official documents of the Government and its agencies except where an overriding interest may require that confidentiality be maintained.

Background

The concept of freedom of information became prominent as an issue in Australian government following the ALP's commitment to "open government" during the 1972 election campaign. In 1973 the Whitlam Government authorised the then Attorney-General, Senator Murphy, to prepare legislation along the lines of the U.S. Freedom of Information Act subject to whatever modifications might be necessary to adapt the American system to the Australian constitutional and administrative structure. Following that decision, an Interdepartmental Committee was established to report on what modifications should be made to the United States system.

The Report of the 1973 IDC, which was tabled in December 1974, was criticised for the time involved in its production and the paucity of what was produced. No legislation resulted from it. The present Prime Minister committed his government to freedom of information legislation during the 1975 election campaign and another IDC was established in 1976. Its brief was "to study and report to the Attorney-General on policy proposals for freedom of information legislation, taking into account the Report of the Interdepartmental Committee on Proposed Freedom of Information Legislation that was tabled in Parliament in 1974, the implications of amendments to the United States Freedom of Information Act that were made in 1974 and not dealt with in the Report and any other matters that might be relevant". The 1976 IDC Report, which was tabled on 9 December 1976, was considerably more comprehensive than the 1973 Report in its approach to the
question of what form freedom of information legislation should take.

The question of freedom of information was also examined by the Royal Commission on Australian Government Administration. The majority declined to recommend specific legislation. In an extensive minority report, however, Commissioner Munro included a draft Bill modelled on the U.S. Act with an extensive explanatory memorandum. This Bill was considered by the 1976 IDC while preparing its Report.

A Bill, largely based on the recommendations of the 1976 IDC was introduced in the Senate on 9 June 1978 and on 28 September 1978 was referred to the Senate Standing Committee on Constitutional and Legal Affairs together with certain aspects of the related Archives Bill 1978 (subject to this that Bill was referred to the Senate Standing Committee on Education and the Arts).

The Constitutional and Legal Affairs Committee held extensive hearings (there were 168 submissions and 129 witnesses). Its Report was presented to the Senate on 6 November 1979 and recommended significant alterations to the Freedom of Information Bill particularly to those provisions allowing documents to be exempted and those dealing with appeals where access is denied. On 11 September 1980 the Attorney-General tabled a document setting out the Government's response to the Report. This Bill contains changes based on that response and other changes. In the following short discussion of the provisions of the Bill the Senate Committee's attitude on important issues will be indicated. A very detailed comparison with the previous Bill is contained in the Explanatory Memorandum to be circulated by the Attorney-General and there will also be a black-type memorandum showing differences between the two Bills.

Main Provisions

Clause 3, which is new, sets out the object of the Bill and Parliament's intention that the Bill is to be interpreted to further this object and discretions exercised so far as possible so as to facilitate and promote the disclosure of information. The Committee had recommended an additional clause exhorting agencies when processing requests to do so with a view to making the maximum amount of information promptly and inexpensively available (para. 9.5, recommendation 15).

Clause 4 defines several important terms used in the Bill:
"agency" means a Public Service Department (but not the Parliamentary Departments) and prescribed authorities, i.e., other statutory bodies and other agencies performing government functions; but the Act does not apply to agencies of an external territory, to the A.C.T. House of Assembly or N.T. Legislative Assembly; to courts and tribunals (clause 5); to the bodies set out in Part I of the Schedule (e.g. Auditor-General, ASIO, National Labour Consultative Council); or to the bodies set out in Part II of the Schedule in respect of particular documents (e.g. Australian Postal Commission in relation to documents in respect of its competitive commercial activities, the ABC in relation to its program material); and regulations may be made exempting other bodies. The Committee had recommended, (para. 12.14 R 33) that exempt agencies should all be listed initially in a Schedule and that amending regulations would require an affirmative resolution of both Houses. It also recommended (para. 12.21, R 34) that exemption of entire commercial agencies or classes of documents should only be made after the agencies had demonstrated the need.

"document" covers written and printed matter and also maps, photographs, sound recordings, films, microfilms and computers.

Publication of agency, functions

The Minister responsible for an agency must ensure that, within a year of the commencement of Part II, a statement is published setting out particulars of the organization and functions of the agency, a statement of the categories of documents possessed by the agency, details of the agency's procedures under Part III (access to documents) and the officers and places to which inquiries should be directed. The third category is new and is based on para. 7.14, R 4 of the Committee which also recommended publication of all avenues for direct and indirect participation in decision-making and informational literature available by subscription or free mailing lists. Statements up-dating this information must be published at maximum intervals of 12 months (sub-clause 7(1)).

The Committee recommended the broadening of the clause to cover "letters of advice of precedential status", statements of policy and law enforcement documents. They also recommended quarterly up-dating of indexes (paras. 7.32 and 34, R 6 and 7).
Clause 9 provides that where documents are not made available under clause 8, persons are not to be prejudiced if they are not aware of relevant rules, guidelines, practices.

Publication of interpretation manuals etc.

Clause 8 compels the publication by agencies of manuals and other documentary material which contain interpretations, rules etc. for the guidance of officers in making decisions under legislation or schemes administered by the agency and which have an effect - either beneficial or detrimental - on members of the public.

Right of Access

Clause 10 gives every person a legally enforceable right of access to agency documents and to official documents of Ministers, other than exempt documents. The onus is on an agency to justify the withholding of a document, not on the person seeking access to justify his request; nor is the person seeking access required to show any interest or entitlement to access. The clause generally applies only to documents which come into existence or into the possession of an agency or a Minister after the commencement of Part III (sub-clause 11(2)) unless the document is necessary for the proper understanding of a document to which the applicant has lawfully had access.

The Committee recommended that:

- individuals should have a right to prior documents affecting themselves (para. 14.12, R 40);
- the Bill should be amended to give a right of access to documents up to 5 years old for one year from the date of proclamation;
- further retrospective access should be phased in by subsequent amendments.

Clause 18 sets a time limit of 60 days for replies to requests made under the Act although a lesser period may be prescribed. The Committee recommended a reduction of the 60 day time limit to 45 days after 2 years and 30 days after 4 years (para. 8.43, R 14).

Under clause 20 access can be deferred until some particular event has occurred if the applicant is informed of the reason and period of deferment. If access is deferred until the document is tabled in Parliament the deferment ceases to have effect after 5 sitting days unless the document has been tabled.
Exempt Documents and Review of Decisions

Part IV of the Bill specifies various categories of documents which are exempt from disclosure. However the fact that a document comes within a category of exemptions does not mean that access is automatically barred. Generally the fact that a document is exempt means that there is a discretion whether to give access to it. The categories of exemption are:

- Documents affecting national security, defence, international relations and relations with the States (clause 28)
- Cabinet documents (clause 29)
- Executive Council documents (clause 30)
- Internal working documents (clause 31)
- Documents affecting enforcement of the law and protection of public safety (clause 32)
- Documents to which secrecy provisions of enactments apply (clause 33)
- Documents affecting financial or property interests of the Commonwealth (clause 34)
- Documents concerning certain operations of agencies (clause 35)
- Documents affecting personal privacy (clause 36)
- Documents affecting legal proceedings or subject to legal professional privilege (clause 37)
- Documents relating to business affairs etc. (clause 38)
- Documents affecting the national economy (clause 39)
- Documents containing material obtained in confidence (clause 40)
- Documents whose disclosure would be in contempt of Parliament or contempt of court (clause 41)
- Documents in respect of which the Attorney-General has certified that disclosure should be withheld on a ground of public interest, being a ground that
would form the basis for a claim of privilege for the document in judicial proceedings (clause 42)

. Certain documents arising out of companies and securities legislation (clause 43)

A new interpretation provision specifically provides that exemptions are not to be read down because of the operation of another exemption.

Part V of the Bill provides for review by the Administrative Appeals Tribunal of decisions refusing or deferring access to a document (clauses 45 and 46). There are several limitations on this right of appeal. First the Tribunal's power is limited in that once it establishes that a document is an exempt document it cannot decide that access should be granted; that is, it has no power to review a discretion to deny access to an exempt document.

Second, there is no appeal where a Minister certifies that disclosure of a document would be contrary to the public interest because it would prejudice security, defence, international relations or relations with the States or Northern Territory or would divulge information communicated in confidence by another government (clause 28 and sub-clause 48(5)); nor where a certificate has been given by the Secretary to the Department of Prime Minister and Cabinet that a document is a Cabinet document or the Secretary to the Executive Council that a document is an Executive Council document.

Furthermore the Tribunal has no power to review a decision by an agency or Minister not to disclose an internal working document because it would be contrary to the public interest. It may, however, review a decision by the Attorney-General to give a certificate alleging that a document is privileged but the Tribunal must be constituted by the President or a Deputy President alone (clause 42 and sub-clause 48(7)).

There is also a procedure for internal review in certain circumstances - clause 44. Such a review, where applicable, must be sought before going to the Tribunal (sub-clause 45(2)). It is also possible to make a complaint to the Ombudsman (clause 47).

The Committee made extensive recommendations about the scope of exemptions and also about appeals (Chapters 16 to 26, R 42 to 69). Some of their major recommendations were:

. deletion of the paragraph relating to information
supplied in confidence by another government (para. 16.32, R 48);

appeals in relation to exemptions for security, defence, international relations and Commonwealth/State/Northern Territory relations, Cabinet documents, Executive Council documents (para. 16.38, R 49);

appeals in relation to internal working documents (para. 19.30, R 55);

that any secrecy provisions in other legislation which are to override the Bill should be listed in a Schedule (para. 21.13, R 58). In the 1978 Bill these provisions had to be prescribed by regulation to be effective in overriding the Bill. Clause 33 in the new Bill merely exempts any document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting disclosure whether absolutely or subject to exemptions or qualifications (Appendix 6 of the Committee's Report lists Commonwealth legislation restricting access to information as prepared by the Attorney-General's Department on 5 June 1979 - report pages 485-489).

that where an agency relies on exemptions relating to security, defence or international relations, Cabinet or Executive Council documents or law enforcement it should be entitled to respond in a form of words which denies access without confirming or denying the existence of the document (para. 9.34, R 19(a)) and, in the case of law enforcement documents, whether or not the existence of a document is a matter of concern in any particular case (para. 20.17, R 57). Sub-clause 24(1) provides that an agency does not have to admit the existence of a document if to refer to it in a document would make the latter document exempt on grounds of security, defence, international relations or Commonwealth/State/ Northern Territory relations or some categories of exemptions relating to law enforcement. Sub-clause 24(2) allows the answer to a request for such a document to be that the existence of such a document is neither confirmed nor denied but that if it existed it would be an exempt document.

The Explanatory Memorandum discusses in detail the exemption and appeal provisions and the Committee's
recommendations about them.

Report to Parliament

Sub-clause 58(1) requires an annual report on the operation of the legislation to be made by the Minister responsible for its administration and laid before both Houses.

For further information see:


Copies are available from the Publications Officer, Mrs. Gill Peters extension 6468.

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