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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FREEDOM OF INFORMATION AMENDMENT (PARLIAMENTARY BUDGET OFFICE) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable Nicola Roxon, MP)
FREEDOM OF INFORMATION AMENDMENT (PARLIAMENTARY BUDGET OFFICE) BILL 2012

Outline

2. The PBO is established under the Parliamentary Service Act 1999 as a fourth parliamentary department. The PBO is an important new institution that will further strengthen Australia’s fiscal and budget frameworks by providing non-partisan and independent information to the Parliament on the budget, fiscal policy and financial implications of proposals.

3. The functions of the PBO are to:
   • prepare election policy costings upon request of authorised party representatives and Independent members of parliament;
   • prepare policy costings outside of the caretaker period upon request of individual senators and members of parliament;
   • prepare responses to budget-related non-policy costing requests of individual senators and members of parliament;
   • initiate its own work program in anticipation of client requests, including research and analysis of the budget and fiscal policy settings; and
   • provide formal contributions on request to relevant parliamentary committee inquiries.

4. The establishment of the PBO allows all parliamentary parties and Independent members to have their policies costed by the PBO. Senator and members will be able to request confidential information relating to the budget. Senators and members will also be able to request confidential policy costings from the PBO outside of the caretaker period of a general election. During general elections policy costings will be made available to the public.

5. While the PBO is an exempt agency under the FOI Act, documents related to PBO requests may be held by departments and other agencies. This information may not be protected from release under the FOI Act.

6. The Bill amends the FOI Act to provide an exemption for information held by departments and agencies that relates to a confidential request to the PBO. This will ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined.

7. The Bill amends section 25 of the FOI Act to provide that an agency is not required to give information as to the existence or non-existence of a document where it is exempt under the new exemption for documents that relate to a confidential request to the PBO.

8. The Bill also makes a consequential amendment to the Privacy Act.

Financial Impact Statement

9. The amendments in the Bill do not have any significant financial implications.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

10. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill


12. The establishment of the PBO allows all parliamentary parties and Independent members to have their policies costed by the PBO. Senators and members will be able to request confidential information relating to the budget. Senators and members will also be able to request confidential policy costings from the PBO outside of the caretaker period of a general election. During general elections policy costings will be made available to the public.

13. While the PBO is an exempt agency under the FOI Act, documents related to PBO requests may be held by departments and other agencies. This information may not be protected from release under the FOI Act.

14. The Bill amends the FOI Act to provide an exemption for information held by departments and agencies that relates to a confidential request to the PBO. This will ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined.

15. The Bill amends section 25 of the FOI Act to provide that an agency is not required to give information as to the existence or non-existence of a document where it is exempt under the new exemption for documents that relate to a confidential request to the PBO.

16. The Bill also makes a consequential amendment to the Privacy Act.

Human rights implications

17. The Bill engages the following right:

- The right to freedom of expression - article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Freedom of Expression

18. Article 19(2) of the ICCPR provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
19. The Bill limits the right of individuals to receive information. However, paragraph 3 of Article 19 provides that the rights protected by paragraph 2 may be limited as follows:

20. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   a. For respect of the rights or reputations of others;
   b. For the protection of national security or of public order (ordre public), or of public health or morals.

21. The Bill protects public order by enhancing public administration. Specifically, the objective of the Bill is to protect the integrity of the PBO. The role of the PBO is to inform the Parliament by providing independent and non-partisan analysis of the budget cycle, fiscal policy and the financial implications of proposals. This analysis is an important element of policy development and public administration. Senator and members may be reluctant to request such analysis from the PBO in the absence of certainty that information provided in response to confidential requests will not be released under the FOI Act. The Bill provides this assurance.

22. The Bill is necessary because its objectives cannot be achieved by relying on existing exemptions in the FOI Act. Although existing exemptions may apply to some potential FOI requests relating to PBO related documents held by agencies, it cannot be said with certainty that they would apply to all such requests. Moreover, agencies do not currently have the option of confirming or denying the existence of a confidential PBO request.

23. The Bill’s limitation of the right of individuals to receive information is reasonable and proportionate to its objective of protecting the integrity of the PBO. This is because the Bill will protect the integrity of the PBO while having a minimal impact on the amount of government information withheld from the public. It is important to note that the work of the PBO is undertaken for the benefit of the Parliament and does not inform government decision making. The Bill will not disproportionately affect any particular group.

Conclusion

24. The Bill is compatible with human rights because its limitation of the rights protected by Article 19 of the ICCPR is reasonable, necessary and proportionate.
**List of abbreviations used**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AIC</td>
<td>Australian Information Commissioner</td>
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<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<tr>
<td>FOI Act</td>
<td><em>Freedom of Information Act 1982</em></td>
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<tr>
<td>PBO</td>
<td>Parliamentary Budget Office</td>
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<tr>
<td>PB Officer</td>
<td>Parliamentary Budget Officer</td>
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<tr>
<td>PS Act</td>
<td><em>Parliamentary Service Act 1999</em></td>
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Notes on Clauses

Clause 1: Short title

25. This clause is a formal clause which provides the citation of the Bill.

Clause 2: Commencement

26. This clause provides that the provisions in the Bill will commence on the day the Act receives the Royal Assent.

Clause 3: Schedule(s)

27. This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
Schedule 1 – Amendments

Freedom of Information Act 1982

Items 1 and 2: Subsections 25(1) and (2)

28. These items amend section 25 of the Freedom of Information Act 1982 (FOI Act) so that the right to neither confirm nor deny the existence of certain exempt documents applies to the new exemption in proposed section 45A for Parliamentary Budget Office (PBO) documents.

Item 3: After section 45

29. This item inserts new section 45A which provides a new exemption for PBO documents. This exemption will not be subject to the public interest test in subsection 11A(5) of the FOI Act.

Section 45A: Parliamentary Budget Office documents

30. While the PBO is an exempt agency under the FOI Act, documents related to PBO requests may be held by departments and other agencies. This information may not be protected from release under the FOI Act. Proposed section 45A will protect information held by departments and agencies that relates to a confidential request to the PBO. This will ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined.

31. Proposed subsection 45A will apply the exemption to documents that:

• originate from the PB Officer or PBO and the document was prepared in response to, or otherwise relates to, a confidential request (proposed paragraph 45A(1)(a));
• are brought into existence for the dominant purpose of providing information to the PB Officer or PBO in relation to a confidential request (proposed paragraph 45A(1)(b));
• are provided to the PB Officer or PBO in response to a request for more information in relation to a confidential request (proposed paragraph 45A(1)(c));
• are drafts of documents referred to in proposed paragraphs 45A(1)(a), (b) or (c) (proposed paragraph 45A(1)(d)).

32. Confidential requests are defined in proposed subsection 45A(8) to be requests made by a Senator or Member of the House of Representatives under paragraph 64E(1)(a) or (c) of the Parliamentary Service Act 1999 (PS Act) that include a direction to treat the request or any other information relating to the request as confidential. This will ensure that confidential requests to prepare a costing of a policy or a proposed policy under section 64H of the PS Act and confidential requests for information relating to the budget under section 64M of the PS Act are covered by the proposed exemption.

33. Proposed subsection 45A(2) exempts a document to the extent that it is a copy or part of, or contains an extract from, a document that is exempt under proposed subsection 45A(1). This is similar to the provision in proposed paragraph 45A(1)(d) that provides an exemption for draft documents.
34. Proposed subsection 45A(3) exempts a document to the extent it contains information which would reveal that a confidential request has been made except if the confidential request has been disclosed by the Senator or the Member of the House of Representatives who made the request.

35. Proposed subsection 45A(4) makes it clear that a document is not exempt only because it is attached to a document that that would be covered by the exemption. For example, if certain information is prepared for the purpose for public release and providing that information to the PBO is incidental to that main purpose of public release, the information will not be covered by the PBO exemption. Attaching that information to other information covered by the exemption will not make the information exempt under the PBO exemption.

36. Proposed subsection 45A(5) provides that a document is not an exempt document if the information has been made available by the PBO in accordance with the PS Act.

37. Similarly proposed subsection 45A(6) provides that a document is not an exempt document if the information has been made available by the Senator of the Member of the House of Representatives who made the confidential request to which the document relates.

38. Proposed subsection 45A(7) provides that information in PBO documents which is ‘purely factual material’ is not exempt unless its disclosure would reveal the existence of a confidential request and the existence of the confidential request has not been disclosed by the Senator or Member of the House of Representatives.

**Item 4: Subsection 55T(1) note**

39. The item amends the note to refer to new section 45A.

**Item 5: Section 55U (heading)**

40. This item amends the heading to section 55U of the FOI Act to reflect the fact that section 55U is amended by item 6 to apply to documents claimed to be exempt under new section 45A.

**Items 6 and 7: Subsections 55U(1) and (3)**

41. Items 6 and 7 amend section 55U to apply the provision to the new PBO exemption.

42. Section 55U gives the Australian Information Commissioner (AIC) a discretionary power to require a document claimed to be exempt under certain exemptions to be produced, but only where the AIC is first not satisfied on affidavit or other evidence that the document is exempt. As this is intended to protect against the unnecessary disclosure of sensitive information it is appropriate that this provision applies to the new PBO exemption.

**Item 8: Subsection 58B(1)**

43. Item 8 amends subsection 58B(1) to apply the provision to the new PBO exemption.
44. The effect of this amendment is to provide that where an application is made to the Administrative Appeals Tribunal (AAT) for a review of a decision refusing to grant access to a document that is claimed to be exempt under the new PBO exemption, the AAT must be constituted by 3 presidential members or by a presidential member alone. A presidential member of the AAT means the President of the AAT, a member of the AAT who is a judge or a Deputy President.

Items 9 and 10: Subsection 58E(1) and (2)

45. Section 58E replicates section 55U of the FOI Act for matters in the AAT.

46. Section 55U gives the AAT a discretionary power to require a document claimed to be exempt under certain exemptions to be produce, but only where the AAT is first not satisfied on affidavit or other evidence that the document is exempt. As this is intended to protect against the unnecessary disclosure of sensitive information it is appropriate that this provision applies to the new PBO exemption.

47. Items 9 and 10 amend section 58E to apply the provision to the new PBO exemption.

Item 11: Application of the amendments

48. Subclause 1 of item 11 provides that the amendments to the FOI Act made by Schedule 1 apply to requests for access made under section 15 of the FOI Act that are received after the commencement of this item, that is the day the Act receives the Royal Assent.

49. Subclause 2 of item 11 provides that the amendments to the FOI Act made by Schedule 1 will also apply to requests for access (made under section 15 of the FOI Act) that are received in the period between the day after the Bill is introduced and the day the Act receives the Royal Assent.

Privacy Act 1988

Item 12: Subsection 34(1)

50. Item 12 is a consequential amendment arising from the proposed amendments at items 1 and 2 to section 25 of the FOI Act.