



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES
INFORMATION COMMISSIONER BILL 2009

FREEDOM OF INFORMATION
AMENDMENT (REFORM) BILL 2009

Second Reading

SPEECH

Tuesday, 11 May 2010

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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Questioner
Speaker Keenan, Michael, MP

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Mr KEENAN (Stirling) (4.58 pm)—I rise to speak on the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009. Freedom of information, the statutory right of access to government documents, is justified on the grounds that it encourages transparency and political accountability and discourages corruption and other forms of wrongdoing. At the federal level, it was the Fraser government that first introduced freedom of information into Australia in 1982 through the Freedom of Information Act of the same year. This formed part of a broader package of administrative law reforms promulgated during the 1970s and 1980s, and this made Australia the first country with a Westminster system of government to legislate for freedom of information. In subsequent years, following the Commonwealth's taking the lead, similar legislation was passed in all Australian states and territories.

As noted in the *Bills Digest* for the FOI Amendment (Reform) Bill 2009, these FOI acts have certain major features in common. First, government is obliged to publish information about its activities in general and about whether it holds certain kinds of documents. Second, every person has a legal right to obtain access to information in documentary form, subject to the operation of specific exemptions and exclusions, which is in the possession of ministers or government agencies. Exemptions can apply to specified agencies—for example, our domestic or international intelligence agencies or the police forces of the state jurisdictions—or to categories of documents, such as documents that deal with international relations or international security. A third feature of FOI acts is the personal privacy dimension, which enables a person who has gained access to a document held by government that relates to his or her personal affairs to request that the document be amended in some respect, to appeal against a refusal to amend the document and—even if the appeal is unsuccessful—to request that an annotation be attached to accompany the record when it is shown to any other person. The last feature common to all the FOI regimes is a right of review in relation to most decisions made under the acts—that is, internal review within the agency and further review by a body external to the decision maker.

The Rudd government's position on freedom of information, like so much of what we see from this government, mirrors its failings in other policy areas. Prior to the 2007 federal election the Rudd government was very heavy on rhetoric, but after it was elected FOI was added to its list of comprehensive policy failures and broken promises. When in opposition, Rudd Labor stated:

A Rudd Labor Government will restore trust and integrity in the use of Commonwealth Government information, promoting a pro-disclosure culture and protecting the public interest through genuine reform.

The Labor Party when in opposition described its approach to making information more accessible to the general public with the colourful phrase Operation Sunlight. However, although the government is very good at sloganeering, it is very bad at follow-through. The Labor Party's election policy document was entitled *Government information: restoring trust and integrity in government information*. This document foreshadowed significant changes to freedom of information legislation. It stated that a Labor government would abolish conclusive certificates and implement the recommendations of the *Open government: a review of the federal Freedom of Information Act 1982* report. It is interesting to note that the government promised a pro-disclosure policy and cultural change when it came to freedom of information requests, but its own figures, quietly released three days before Christmas last year, show that its rhetoric on FOI has failed to match that reality. Doesn't the fact that the government released the report on its failure to adhere to its Operation Sunlight promises three days before Christmas say everything about how this government operates?

The 2008-09 *Freedom of information annual report* shows that the Labor government have refused more FOI requests than did the previous coalition government. The government's own figures show there is less freedom of information under the Rudd government than there was under the Howard government. The Rudd government's heroic pro-disclosure rhetoric from opposition stands in stark contrast to the cold, hard statistical reality that they have implemented since they have been in government. The annual report is dated 31 October 2009, but the Rudd government waited until 22 December, a time when the political cycle is at a pretty low ebb, to quietly release it because it contained a litany of their failures in this area. The timing of the report's release alone demonstrates

the reality of the Rudd government's attitude to disclosure. My colleague, the shadow Attorney-General, Senator George Brandis, was quoted in the *Australian* on 30 December 2009:

A reduction in the number of successful FOI applications of 10 per cent, and an increase in the number of outright refusals of almost 1 1/2 times, is certainly evidence of a change of culture within the government towards the release of information. Unfortunately, it demonstrates that the trend is in the opposite direction from that promised by Faulkner.

Far from bringing about the dawn of a new age of access to government information, the Rudd government has done the very opposite. As Senator Brandis also noted:

The exemptions in the FOI Act were invoked to block disclosure in 6.1 per cent of cases. By comparison, in the last full year of the Howard government, only 4.4 per cent of FOI applications were refused outright. The number of applications granted in part only was 22.9 per cent. The comparable figure in the last year of the Howard government was 15 per cent. In all, only 71 per cent of applications were granted in full; the comparable figure in the last year of the Howard government was 80.6 per cent.

As noted by the coalition senators in the Senate Standing Committee on Finance and Public Administration's report, the cost of facilitating FOI requests has also increased substantially under the Rudd Labor government. From the last full financial year of the Howard government until the first full financial year of the Rudd government, the cost of FOI increased from just under \$25 million to over \$30 million—an increase of over 21 per cent. Given the increasing cost of facilitating FOI requests and the decline in the number of FOI access requests, in the two years between 2006-07 and 2008-09 there has been an extraordinary increase in the average cost per FOI request. In 2006-07 the average cost per FOI request was \$642, whereas in 2008-09 the cost per request was \$1,101—an increase of 71 per cent over two years. These facts contradict Labor's purported commitment to 'promoting a pro-disclosure culture and protecting the public interest'. The government's commitment to a pro-disclosure culture was put to the test last year. The behaviour of public servants in the Department of Climate Change and Energy Efficiency in their response to an FOI request from Dr Richard Denniss from the Australia Institute was reported in the *Australian* on 30 January 2010. The article read:

Even though the department rang Denniss to confirm that he wanted advice to the minister, and the department's lawyers said this was covered by the request, it was excluded on the instruction of departmental head ... and his deputy ...

Not easily deterred, Denniss fired in another request asking for documents prepared to help inform Wong—

that is, Senator Wong—

and her advisers of the details, merits, limitations and criticisms of the ETS. The response: he may be able to get what he wants if he hands over \$256,586.98—

over a quarter of a million dollars—

although, catch-22, if he proceeds with his request, the department may decide it involves an unreasonable diversion of resources.

It is not clear what else the department of climate change actually have to do, but clearly they were not keen under this minister to facilitate Operation Sunlight, so proudly announced by Labor in opposition and so woefully adhered to in government. This example about a prominent public policy issue further illustrates that the Labor government is not honouring its election commitment to create a pro-disclosure culture and that Labor's rhetoric on FOI does not match the reality of continued denial of access to information.

I move to some of the specifics. The Freedom of Information Amendment (Reform) Bill 2009 contains key amendments: (1) introducing an information publication scheme which would require agencies to proactively disclose more information to the public (2) changing the time periods for access under the Archives Act, from 30 years to 20 years for all documents and from 50 years to 30 years for cabinet notebooks (3) abolishing FOI application fees, abolishing all charges for a person seeking access to their own information, making the first hour of decision-making time charge free for all FOI requests and allowing a five-hour charge free period for journalists and not-for-profit organisations (4) a single public interest test for disclosure (5) extending the FOI Act to cover documents held by service providers to the government and (6) introducing an objects clause to emphasise that the aim of the act is to give the Australian community access to information held by the government.

The bill that we are debating concurrently, the Information Commissioner Bill 2009, establishes the Office of the Information Commissioner, which was part of the reform of the FOI regime announced in March

2009. The functions of this office will be threefold: the FOI functions, which are about giving the Australian community access to information held by the government in accordance with the FOI Act; the privacy functions, which are about protecting the privacy of individuals in accordance with the Privacy Act and other acts; and the Information Commissioner functions, which are strategic functions concerning advice to government on information management.

As noted in the bill's explanatory memorandum, the Information Commissioner, which is a new position, will be head of the office. The Information Commissioner will be able to perform all of the functions of that office. To ensure a workable governance arrangement, the Information Commissioner will be head of the office both strategically and administratively. Provision is made in the bill to ensure that no duplication arises in carrying out functions between the three commissioners and to ensure that no disagreement arises in the discharge of those functions.

The FOI Commissioner, which is also a new position, will mainly perform the FOI functions. For flexibility, the FOI Commissioner will also be able to perform the privacy functions. The Privacy Commissioner is an existing position established under the Privacy Act; however, the Privacy Commissioner will be appointed under this bill. The Privacy Commissioner will mainly perform the privacy functions. For flexibility, the Privacy Commissioner will also be able to perform the FOI functions. It is proposed in the bill that the existing Office of the Privacy Commissioner be amalgamated into the Office of the Information Commissioner.

The FOI functions of the Information Commissioner include: promoting an understanding of the FOI Act; assisting agencies to publish information in accordance with the publication scheme; providing guidelines, advice and training to agencies; and conducting investigations and reviews of decisions. In effect, it will perform an ombudsman's role in relation to information matters.

I understand that discussions are underway between the opposition and the government regarding the onus of proof provision. Whilst the coalition supports these bills in principle, further amendments will be made in the Senate. I trust that the government and the opposition, with a bit of goodwill on both sides, will be able to find common ground on these two bills. As mentioned in the *Bills Digest* regarding the FOI Amendment (Reform) Bill 2009, there is an argument that in a number of areas the reforms do not go far enough. A common theme in submissions to the Senate inquiry was that, while the bill repeals a small number of exemptions, it retains an almost entirely untouched list of excluded agencies and documents held by certain agencies listed in schedule 2 of the FOI Act.

The two bills are not the end of the story. In relation to two key aspects of the FOI Act—namely, access to and amendment of one's own personal information and the imposition of processing charges for FOI requests—the government has promised further reform. However, by the government's own reckoning, access to government information is much less free today than it was prior to the change of government. The coalition have consistently stated support for any reforms to the freedom of information regime that would result in improved public access to information. So, whilst we commend this bill and support it in principle, it is on the basis that in the past two years freedom of information has gone substantially backwards under Kevin Rudd and his Labor government.