

Review by Shadow Attorney-General of the *Australian Freedom of Information Act 1982*

Submitted by the
Commonwealth Human Rights Initiative[#], March 2004

"A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

James Madison

1. The Commonwealth Human Rights Initiative (CHRI) was founded in 1987 as an independent, non-partisan, international non-government organisation, mandated to ensure the *practical* realisation of human rights in the countries of the Commonwealth. Originally based in London, CHRI's headquarters are now in New Delhi, India. In addition to CHRI's general human rights protection and promotion mandate, CHRI has two specific programmes – Access to Information and Access to Justice. Our Access to Information Programme works on promoting the effective implementation of the right to information (RTI) throughout the Commonwealth. We work to support RTI advocacy campaigns, as well as providing technical input to both governments and civil society on RTI law-making and implementation. Notably, CHRI also recently published a comprehensive report on RTI, *Open Sesame: Looking for the Right to Information in the Commonwealth*, on which this submission draws heavily.
2. After some initial general comments, this submission focuses primarily on the specific topics raised in the call for submissions by the Shadow Attorney General. Notably, international experience has shown that while FOI is supported by parties in opposition, it is often resented by parties in power. CHRI encourages the Australian Labor Party to remain committed to vigorously pursuing reforms to the Act which increase openness and accountability, both while in Opposition and in Government.

General comments

3. As early as 1946, the international community, constituted as the United Nations General Assembly recognised that: *"Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated"*.¹ Enshrined in the Universal Declaration of Human Rights, the right's status as a legally binding treaty obligation was affirmed in Article 19 of the International Covenant on Civil and Political Rights which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". This has placed the right to access information firmly within the body of universal human rights law.
4. In the last 50 years, the right to information has taken concrete form in the political, as well as the human rights, discourse as recognition has grown that an effectively functioning RTI regime is an essential prerequisite to meaningful participatory democracy. Without sufficient information, citizens are unable to meaningfully participate in the democratic process – not only at the

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¹ UN General Assembly (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

functional stage of casting an informed vote, but more broadly, by engaging in governmental decision-making processes and overseeing the exercise of government powers.

5. While strong freedom of information (FOI) legislation is a promising start in entrenching open governance and the citizen's right to participate, experience has shown that the enactment of an FOI law is often the high watermark of open government. Constant vigilance is required to ensure that the law is properly operationalised and not undermined by a subsequent lack of political or bureaucratic will.
6. CHRI welcomes the current review of the Australian *Freedom of Information Act 1982* (FOI Act) by the Federal Opposition. After more than 20 years of freedom of information in Australia, the recent spate of legislation aimed at addressing terrorism has drawn attention to how easily hard won rights – including the right to information - can be restricted in the so-called national interest. It is vital at this time, that Australia remain committed to the principles of open government enshrined in its FOI laws and ensure that they remain an effective means by which Australian can simply, cheaply and effectively scrutinise the operations of their government and thereby ensure greater participation and increased accountability.
7. The FOI Act should explicitly maintain a commitment to “maximum disclosure” subject only to legitimate exemptions in the public interest. Notably, the implications of the principle of maximum disclosure for the FOI Act is that: (i) there should be no *prima facie* exemptions for whole classes of information; (ii) *ALL* exemptions should be subject to a public interest override (see paragraphs 8-12); and (iii) disclosure should not be able to be vetoed via the use of a Ministerial certificate (see paragraphs 13-17).

The breadth of the public interest test

8. Some – though not all – of the Act's exemption provisions contain a specific public interest test, formulated in varying terms. Currently, the FOI Act contains no overarching public interest override. This does not accord with best practice international standards which require that the principle of maximum disclosure is best protected by ensuring that narrowly drawn exemptions all remain subject to an overriding test of whether disclosure would be in the public interest.
9. It is disappointing that the Australian Law Reform Commission in its 1995 review of the FOI Act did not support the introduction of a general public interest override. At a practical level, such an override simplifies use of the Act by bureaucrats by ensuring that one test is applicable to all exemptions. More importantly, it encourages bureaucrats to recognise that the public interest should be determinative of the final outcome of any FOI application. Without such an override, bureaucrats may easily fall into the habit of exempting certain pieces of information without considering the significance of disclosure in the *specific* circumstances.
10. The international formulation of the public interest override has been succinctly articulated by Article 19, another international NGO working on RTI. The test requires that consideration be given in *each case* to whether, despite the application of a permissible exemption, information should still be disclosed because the public interest in the *specific* case requires it. The test is in 3 parts:
 - (i) Is the information covered by a legitimate exemption?
 - (ii) Will disclosure cause substantial harm?
 - (iii) Is the likely harm greater than the public interest in disclosure?CHRI recognises that the introduction of an overarching public interest test is likely to be opposed by bureaucrats and third parties (particular the corporate sector), who will be concerned that the test will result in the increased release of formerly exempt documents. While this may be the case, the fact remains that the FOI Act is designed as a tool to aid open government and should be developed and

promoted as such. Maximum disclosure is the legitimate objective of the Act. In any case, it should not be forgotten that it is not proposed that the current exemptions clauses in the FOI Act be removed altogether, but merely that they be tempered by an allowance for disclosure in instances where it is shown that the public interest demands the release of information. This must surely be recognised as a fair balance in a country which prides itself on the transparency and accountability of its public institutions.

12. CHRI further recommends that the Administrative Appeals Tribunal (AAT), the body given responsibility for hearing appeals under the Act, be given the power to apply the public interest override. Currently, s.58(2) applies so that, while the AAT can determine whether an exemption applies, it has no discretionary power to require disclosure regardless of the availability of an exemption. Considering that the AAT is an independent appeals body staffed with impartial judicial officers there is little justification for the current refusal to allow the AAT to exercise a discretion to compel release when it is in the public interest. An independent body which is external to government and immune to political pressure surely is best placed to apply a test which may have direct implications for both politicians and public officials. This argument has increasing force when one considers the increasing trend towards politicisation of the public service. It is hard to justify allowing government officials to use their discretion in applying the Act, while limiting the powers of the independent watchdog responsible for overseeing their decisions.

The use of conclusive certificates

13. The problems associated with the availability of conclusive ministerial certificates to block disclosure were recently demonstrated by the Australian Treasurer's decision to attempt to block the release of Treasury documents requested by *The Australian* newspaper. The very arguments put forward by the Treasurer in defence of his use of the certificate demonstrate the flimsiness of the basis on which such certificates can be issued and their liability to misuse.
14. *The Australian* reported on 5 December 2003, that in defence of the suppression order, the Treasurer said the material might be reported unfairly. This is no basis for non-disclosure under the Act; it is not a recognised exemption and therefore cannot be relied upon as a legitimate reason to withhold information. The Treasurer further stated that release of the documents would interfere with the ability of public servants to speak freely with ministers and their advisers. "If they were to be released for public scrutiny, officers may in the future feel reluctant to make a written record, to the detriment of processes and the public record." This ground, at least, is a recognised exemption under s.36 of the FOI Act, but it is weak provision and not one, in CHRI's view, which should be relied upon by a Minister committed to public service accountability.
15. (In fact, CHRI recommends that s.36 of the FOI Act should be removed – not only should a conclusive certificate not be available, but the entire section provides unnecessary protection because the public interest is already protected by the subject-specific exemptions in the remainder of the Act. The classes of records referred to in s.36(1) contain exactly the type of information that the public *should* be able to access if they are to be able to meaningfully scrutinise government decision-making. It is vital that the public knows what advice and information the Government bases its decisions on and how the Government reaches its conclusions. It is not enough in this context to argue that disclosure of this kind of information would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, where the discussions relate to sensitive information, it must be remembered that such information will be protected under other exemptions clauses.)
16. The use of conclusive ministerial certificates should be removed from the Act. Ministerial certificates have no place in an access to information regime which is genuinely committed to openness and transparency *at all levels of government*. A properly drafted exemptions regime

should be sufficient to protect the public interest. The Minister, as the Head of the Department for which he/she is responsible, has the power to apply these exemptions. Providing individual Ministers with an *additional* power to veto the application of the Act serves no additional public interest function, while unnecessarily providing Ministers with a broad power to undermine the Act. While politicians may argue that they are best placed to determine the public interest, CHRI's would observe that international experience has shown that too often the interpretation of the public interest is that which serves a *government's* interests instead. There is an obvious conflict of interest, such that an impartial body, such as the AAT, should instead be entrusted with the final decision regarding disclosure. In this context, it is cynical that the Attorney-General was reported in *The Australian* as recently as 15 March 2004 as saying that the use of conclusive certificates would *not* be reformed because in any case it would be politically difficult for any minister to reject a tribunal recommendation that documents subject to a ministerial certificate be released. The Attorney-General's willingness to rely on "political pressure" as a mechanism for ensuring accountability and transparency in the bureaucracy is problematic. At a minimum, CHRI advocates the precedential application of clear laws by an independent body as a more sound alternative.

17. Notably, the current provisions for issuing conclusive certificates do not impose any time limit on the duration of such certificates, such that they operate unless revoked. In the event that the recommendation in paragraph 16 is not implemented, at a minimum CHRI endorses the recommendation of the 1995 ALRC FOI Act Review that regulations should be made under s 36A prescribing two years as the maximum duration of conclusive certificates.

The growing use of the commercial-in-confidence exemption

18. CHRI notes that the Administrative Review Council (ARC) submitted a report to the Attorney-General in 1998 - *The Contracting Out of Government Services* – which specifically considered the application of the FOI Act to private bodies in the context of the increasing contracting out of services by Government. CHRI agrees with the ARC that, at a minimum, where service delivery is contracted out, it is correct that the *FOI Act* should require that all documents that are in the possession of the contractor and relate to the performance of the contractor's obligations under the contract shall be deemed to be in the possession of the government agency, so that people may seek access to them under the Act.
19. Notably however, CHRI is of the opinion that amendments to the FOI Act to take account of increasing outsourcing and privatisation of government services should go further than the ARC's recommendations. International experience has demonstrated that, with more and more private companies providing public services with public money, previously clear distinctions between public and private information may need to be reconsidered for the public good. Thus, a number of countries have accepted that some measure of private confidentiality must be legitimately forgone in order to ensure that corruption, for example, in the tendering and implementation of government contracts, cannot be kept hidden through the use of so-called "commercial-in-confidence" provisions. Prioritising transparency and accountability may *sometimes* require that commercial and/or contractual information, including financial details, must be disclosed.
20. At the very least therefore, the FOI Act should be amended to make the so-called 'commercial-in-confidence exemptions' *expressly* subject to a public interest override. The current provisions fail to meet the minimum standards evidenced in other jurisdictions. For example, s.26(6) of the *Canadian Freedom of Information Act 1982* expressly allows the head of a government institution to disclose a record that contains commercial information (other than a trade secret) "if the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party". Section 9(1) of the *New Zealand Official Information Act 1982* states that a good reason for withholding confidential commercial information will be taken to

exist “unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

21. Taking account of current best practice international standards, CHRI would go further and suggest that serious consideration be given to following the example set by the South African *Promotion of Access to Information Act 2000* and extending the application of the right to information to private bodies where the information requested is “required for the exercise or protection of any rights”². The South African Act recognises that the application of an access to information law should be “resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested information.”³ While this is a novel approach in a capitalist, neo-liberal economy such as Australia’s, it has much to recommend it to a Government which prioritises the protection of human rights over corporate rights. People should not be forced to worry about who is affecting their rights – be it a public or private body – they should simply be able to *protect* their rights by accessing whatever information they need.
22. CHRI recognises that changes to the current Australian FOI regime along the lines suggested in paragraphs 18-21 above will result in an outcry from the business community. However, the fact remains that, with private bodies currently exerting a major influence on people’s lives, there is a strong argument that they should not be exempt from the application of a law designed to increase transparency and accountability simply because of their private status. Companies are legal constructs. They are not natural people endowed with natural rights – a fact that should be considered seriously when claims are made to protect such “rights”. The people of Australia have a responsibility and a right to ensure that their money is being appropriately expended and the human rights respected and properly protected. The FOI Act should accept and facilitate this by lifting the corporate veil of secrecy where the public interest requires it.

FOI and anti-terrorism legislation

23. CHRI is concerned that there has been a recent spate of legislation presented to the Australian Parliament which seeks to restrict access to information by the Australian public on the basis that such restrictions are necessary anti-terror measures. While CHRI recognises the importance of protecting the Australian public from terrorist measures, we note that legislation in support of the so-called “war on terror” should be vigilant in ensuring that it is not used to legitimise restrictions on individual’s inalienable human rights. Thus, in addition to rights to a speedy trial, to be free from arbitrary detention and to legal representation for example, the right to information must also be protected from unreasonable interference. It should be recognised that s.33 of the current FOI Act already operates to protect against the disclosure of information which would, or could reasonably be expected to, cause damage to the security or defence of the Commonwealth.

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² Part 3. See Currie, I. & Klaaren, J. (2002) *The Promotion of Access to Information Act Commentary*, SiberInk, Cape Town, for a more detailed discussion.

³ Lewis, D. (2003) “The Need and Value of Access to Information from Non-State Agencies”, CHRI unpublished, p.9.