

Ombudsman forces Tasmanian Government to release Cabinet Documents

*by Rick Snell, Tasmanian Times
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The Ombudsman decision has delivered a major boost to achieving the objectives of the Freedom of Information Act namely to improve accountability, democracy and 'the ability of the people of Tasmania to participate in their governance .' (Section 3)

The Acting Secretary of the Tasmanian Department of Premier and Cabinet, Rebekah Burton wrote on 22 August 2006:

"As you are aware, on the basis of legal advice received, by the Department, a decision was made to refuse access to these decisions. Since that time there has been further discussions with the office of the Ombudsman, and I write to advise that, despite our legal advice, I now intend to release documents to you.

"It will take a short time to finalise the documents for release. There may be some personal information that is exempt from release, and out of courtesy I think it is appropriate for me to inform Mr R J Groom, the Premier for the period covered by these requests, that the agendas are to be released."

This immediate decision by Ms Burton only applies to the requested Cabinet Agendas but the logic applies to all Cabinet information created between the 1 January 1988 to August 1996. The Cabinet and Internal working documents exemption in the Tasmanian Freedom of Information Act ceases to apply 10 years after the information has become incorporated into a record.

The decision by the Tasmanian Ombudsman in this test case may be an Australian first.

NSW, Victoria, Western Australia have similar provisions in their legislation, whilst South Australia permits access after 20 years but there appears to be no recorded cases where Cabinet information has been requested and released in these states. Only Victoria and Western Australia have 10 year maximum limits on internal working documents like Tasmania (the rest have unlimited life spans).

The Tasmanian Parliament when it passed the FOI Act in 1991 decided that democracy and accountability in Tasmania would be significantly improved by allowing citizens access to the majority of Cabinet documents after 10 years.

The intent was to allow citizens to more fully understand why governments made key decisions and to check that decisions were made based on extensive, competent and sound advice. Cabinet decisions made for purely political reasons contrary to departmental and other advice would eventually be exposed. The idea was to allow Tasmanians and their governments to learn from their recent history.

In the Second Reading Speech to the Tasmanian Legislative Council (Upper House) on 16 July 1991 Mr Batt (ALP) stated:

This bill also improves on legislation elsewhere in that exemptions have been removed relating specifically to cabinet confidentiality. This has been done with strong backing from the Communications Law Centre.

An important aspect of freedom of information is that exemptions should relate to the content of documents, not their source. If, for the public good, information contained in a cabinet document should not be disclosed the exemption clauses elsewhere in this legislation will protect it.

The public interest is not altered by the fact that the information happens to be contained in a cabinet document. Nor can it be coherently argued that the public interest is best serviced by an extension of executive power.

An unintentional benefit of freedom of information as experienced in other legislatures has been the focus it has placed on the growing authority of executive government over parliamentary democracy. In that sense, a very useful spin-off of freedom of information is its function as an important delineator and as a brake on executive government secrecy.

Fifteen years after this speech the Tasmanian Ombudsman has ensured that the intent of the Tasmanian Parliament has been realised. This decision moves Tasmania into line with best practice in other jurisdictions like New Zealand where Cabinet documents are regularly released.

The Ombudsman has not yet issued a formal ruling and at the moment this is a voluntary, but reluctant, release of documents by DPAC.

The Tasmanian Government can still claim other exemptions to protect privacy, law enforcement and other types of sensitive material but must release all other information.

All Tasmanian Cabinets since 1991 should have been aware and advised that after a period of 10 years the majority of their decision-making processes and actual decisions would be revealed to public scrutiny.

The Department of Premier and Cabinet resisted release for almost 9 months. DPAC received legal advice that suggested they could ignore both the intent of Parliament in 1991 and the clear provisions of the Freedom of Information Act. After a long delay the Tasmanian Ombudsman appears to have rejected the government's legal advice.

Hopefully the Department of Premier and Cabinet will take an active and positive approach to allowing all Tasmanian citizens their legal right to examine the majority of Cabinet decisions after the 10 year protection limit expires.

Ideally the Tasmanian Archives should release on the web, at the start of each year, copies of all 10 year old Tasmanian Cabinet documents with some information exempted. This

would be like the National Archives releasing Commonwealth Cabinet documents under the '30 year rule.'

This release program would avoid the necessity of countless FOI applications to access 10 year old Cabinet documents on a random basis. It would allow the thoughtful and careful examination of relatively recent government decisionmaking by political scientists, historians and journalists among others. The public service would be able to provide background information to put the Cabinet decisions into context.

This may be a new era in the way democracy might be practiced in Tasmania. The way parliamentarians, journalists, researchers and citizens use this new and unprecedented access to Cabinet information will impact upon the quality of the Tasmanian democratic process.

The Tasmanian Parliament in 1991 granted a substantial and important democratic legacy to all Tasmanians when it passed the Freedom of Information Act. That legacy has now had another instalment delivered.

Rick Snell is a senior lecturer in law at the University of Tasmania. A former (if you can be) West Coaster he now lives in Fern Tree. He has been active on access to information issues at a local national and international level for the past 15 years.