

**Freedom of Information Amendment
(Reform) Bill 2009, Australia**

A PRELIMINARY CRITIQUE

AND

RECOMMENDATIONS FOR IMPROVEMENT

Submitted by

Ms. Maja Daruwala

Ms. Vrinda Choraria and Mr. Venkatesh Nayak



Commonwealth Human Rights Initiative (CHRI)

**B-117, First Floor, Sarvodaya Enclave,
New Delhi – 110 017**

Tel: 011-2685 0523 / 2686 4678

Fax: 011-2686 4688

Email: info@humanrightsinitiative.org

majadhun@vsnl.com

vrinda@humanrightsinitiative.org

venkatesh@humanrightsinitiative.org

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Introduction

With the enactment of the *Freedom of Information Act 1982*, (FOIA) Australia became one of the then few Commonwealth countries to officially recognise people's right to seek and obtain information from government institutions. The Government of Australia introduced the Freedom of Information Amendment (Reform) Bill 2009 (the Bill) in Parliament on 26 November 2009. It has since been referred to the Senate Finance and Public Administration Legislation Committee on November 31, 2009. This Committee is due to report its findings and recommendations on March 16, 2010. Meanwhile the Committee has thrown open the Bill for consultation. CHRI welcomes this gesture and submits this preliminary analysis and recommendations for improving the contents of the Bill based on its research and ground level experience of the implementation of information access laws in Commonwealth countries.

CHRI has been advocating for the adoption of access to information laws in Commonwealth countries for more than ten (10) years. CHRI was on the civil society drafting committee that drew up a draft Bill which eventually was enacted as *The Right to Information Act* by the Indian Parliament in 2005. CHRI has been closely involved with the process of its implementation in various jurisdictions in India and has also trained several thousand officers in their duties under this law. CHRI's recommendations have been incorporated in similar access legislation in the Cayman Islands in the Caribbean. CHRI has advised government and civil society in Uganda to design and plan the process of implementing its *Access to Information Act* passed in 2005. CHRI has also shared its technical expertise on access to information (ATI) matters with governments and civil society advocates in Bangladesh, Ghana, Fiji, Kenya, Malawi, Malta, Nigeria, Pakistan, Sierra Leone, Sri Lanka and Tanzania.

Recommendations for Strengthening the Access to Information Regime:

CHRI would like to draw attention to the following seven (7) key issues in the Bill which if remedied can improve the effectiveness of the access legislation in engendering transparency and accountability of high standard that is in line with international best practice:

1. **Replace the restrictive term ‘documents’ with the broader term ‘information’:** CHRI has observed the usage of the term ‘documents’ all through the Bill which is reflective of the usage in the FOIA, to refer to the materials that requestors can potentially seek and obtain under the access legislation. This is a restrictive term and does not cover all possible meanings of the term ‘information’. Current international best practice is to provide ‘access to information’ rather than to mere copies of documents and records or allow inspection of such documents. This difference is crucial because a public authority covered by the access law may hold the requested information in multiple documents in a disaggregate manner. Information may require to be culled out of such documents in order to satisfy the queries of a requestor. It may be easier and less expensive to cull out this information and provide it in a collated form to the requestor instead of making copies of all the documents. The requestor may not be interested in all the information contained in a document. The access legislation (Bill and FOIA) must allow for such collation of disaggregate information. **Therefore it is better that the term ‘document’ wherever used in the Bill and in the FOIA to mean information requested by any person, be replaced with the term ‘information’.**

Recommendation:

The term ‘document’ wherever used in the Bill and the FOIA to mean information requested by a person may be replaced with the term ‘information’. The term ‘information’ may be defined as follows:

“Information means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, and data material held in any electronic form.”

2. **No to exempting entire classes of documents:** In the list of exemptions, **cabinet documents as well as trade secrets and commercially valuable information are completely exempt from disclosure.** No public interest test has been prescribed for information falling under these categories. Such class exemptions are anathema to the third generation of access to information laws. The right to information has gained acceptance in the international community as a human right. Consequently, a human right must be enjoyed to the fullest and may be circumscribed only where it is necessary to protect a public interest. The principle of ‘maximum disclosure’ arises out of this understanding of the right to information as a human right. Maximum disclosure is a cardinal principle of access legislation that has gained recognition in many countries that have passed such laws. Exempting entire categories of documents or information from the purview of the access legislation is a negation of the principle of maximum disclosure. Circumstantial exemptions are the preferred norm. All exemptions must include a harm test and be subject to a public interest override to be decided by an independent appellate authority. **It is important to amend the Bill to**

include a harm test for the exemptions related to Cabinet documents, trade secrets and commercially valuable information.

Recommendation:

It is recommended that all exemptions in the Bill be made subject to strict harm tests and public interest override.

- 3. Reduce the period of secrecy for cabinet-related information:** The Bill's intention to bring down the **open access period for cabinet notebooks and other records** in a phased manner is a valuable one. However the duration of secrecy accorded to these documents is unreasonably long. **It is recommended that the duration of secrecy be brought down to not more than a decade.**

Recommendation:

The open access period for cabinet notebooks and other records should be brought down to ten (10) years.

- 4. No provision for urgent information requests:** The Bill has **no mention** of the possibility of an agency or minister receiving any **urgent information requests** and consequently no procedure or guidelines have been set out on how to deal with such situations. Internationally it is becoming common place for access laws to provide for procedures to deal with requests for information involving life and liberty of any person on an urgent basis. India's Right to Information Act, 2005 allows for a maximum of 48 hours for dealing with such requests where information is crucial to secure the life or liberty of a person as timing is of the essence in such cases. The Right to Information Act of Bangladesh passed in 2009 is even more progressive because it requires such information to be provided within 24 hours. **The Bill should also contain such provisions to deal with urgent information requests where there is a justifiable reason for doing so.**

Recommendation:

A provision may be included in the Bill, to specify a time limit for dealing with information requests pertaining to life or liberty of a person where an urgency may be materially evident. In all such circumstances the information may be provided within 24 hours.

- 5. Duty to confirm or deny the existence of a document is necessary:** Access to information laws are like any other class of laws whose primary objective is to lay down norms and standards with a certain degree of

certainty so that the outcomes of the legal process are predictable to a large extent. It is this certainty which makes State agencies professional and dependable. The FOI Act does not place a duty on public authorities to confirm or deny the existence of a record or document if it relates to one or more exemptions. The proposed Bill does not change this position. The ‘uncertainty principle’ discovered by the renowned physicist Mr. Werner Heisenberg is best left to the field of quantum physics. Such uncertainties must not be permitted to come in the way of the operation of access to information laws. A record either exists or can be created from a set of disaggregate records or it simply does not exist. Therefore the head of a government body must be compelled by law to confirm or deny the existence of a record that is the subject of a request. If public interest is better served by withholding access to the record one or more of the exemptions provided in the Act may be invoked. **Consideration may be given to amending this section to place a duty on the head of the government body to confirm or deny the existence of a record.**

Recommendation:

Section 25 may be redrafted to place a duty on government agencies to either confirm or deny the existence of a record/document/information if that is the subject of an information request received from any person. This would promote the objective of FOIA better and bring openness in the manner in which government bodies operate.

6. **Dealing with ‘vexatiousness’:** Section 89 in the Bill sets out a detailed procedure for declaring a person ‘a vexatious applicant’. This provision is deeply problematic and is likely to be used to target journalists who may submit multiple information requests to any public authority. The proposed procedure seeks to enable the proposed Information Commission to label a person as a ‘vexatious applicant’ for all time to come. Once so labelled a person’s information request will be entertained by a public authority only if the Information Commission clears the request. This procedure will make the Information Commission an interested party and therefore unfit to adjudicate an access dispute that may arise out of an information request submitted by a person labelled ‘vexatious applicant’ that it has cleared. Such procedure would be violative of natural justice principles (*nemo iudex in sua causa*).

Vexatiousness must be identified in and limited to information requests and not extended to people. The Municipal Freedom of Information and Protection of Privacy Act (MFOIPP Act) of Ontario, Canada is a good example on how vexatious requests may be handled by a public authority. The relevant section reads as follows:

“A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous

or vexatious, shall state in the notice... (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious; (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and (c) that the person who made the request may appeal to the Commissioner under subsection 39 (1) for a review of the decision.” (Sec 20.1 of the MFOIPP Act)¹

Consideration may be given to amending the Bill to declare an information request or ‘application’ ‘vexatious’ in deserving cases instead of declaring the applicant ‘vexatious’ and creating a permanent legal disability for such person..

7. **No to implied exclusion of entire organisations within the government apparatus:** The Bill contains a list of documents that are outside the coverage of FOIA whether they are with the agency they originated from (the Australian Secret Intelligence Service; the Australian Security Intelligence Organisation, the Inspector-General of Intelligence and Security, the Office of National Assessments, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation, and the Defence Signals Directorate) or any other agency/office or Ministry that may have received them. This provision exists in the FOIA and remains unaltered by the Bill. With a comprehensive list of exemptions already in place that can very well prevent disclosure of information that could harm the public interest, there is no need to have a separate list of agencies whose documents are declared out of bounds for information seekers. Such class exemptions are a hindrance to transparency and violate the cardinal principle of maximum disclosure. **It is recommended that all these excluded agencies be brought within the scope of the Act through an enabling provision in the Bill.**

Recommendation:

Consideration may be given to end the exclusion of intelligence and defence-related agencies from the purview of FOIA.

¹ See: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m56_e.htm#BK26 as on 28th January, 2010.