

FREEDOM OF INFORMATION (AMENDMENT) ACT 1992
No. 38

NEW SOUTH WALES



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FREEDOM OF INFORMATION (AMENDMENT) ACT 1992
No. 38

NEW SOUTH WALES



Act No. 38, 1992

An Act to amend the Freedom of Information Act 1989 in relation to the review of agency determinations and to the exemption of documents and agencies from the operation of the Act; and for other purposes. [Assented to 19 May 1992]

Freedom of Information (Amendment) Act 1992 No. 38

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Freedom of Information (Amendment) Act 1992.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Freedom of Information Act 1989 No. 5

3. The Freedom of Information Act 1989 is amended as set out in Schedule 1.

Explanatory notes

4. Matter appearing under the heading “Explanatory note” in Schedule 1 does not form part of this Act*.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

Amendments—time limit on dealing with applications

(1) (a) Sections 18 (3), 21 (6), 24 (2), 37 (2), 41 (3), 43 (2) and 50 (2):
Omit “45 days” wherever occurring, insert instead “21 days”.

(b) Section 20 (6) (b):
Omit “14 days”, insert instead “10 days”.

(c) Section 59B:
Before section 60, insert:

Extension of 21 day period for dealing with applications

59B. (1) This section applies to a period of 21 days referred to in section 18 (3), 21 (6), 24 (2), 37 (2), 41 (3), 43 (2) or 50 (2).

* The matter marked “+” in the explanatory notes was inserted after the introduction of the Bill in the Legislative Assembly to explain amendments to the Bill that were moved in Committee.

SCHEDULE 1—AMENDMENTS—*continued*

(2) If the person dealing with an application under this Act determines in writing that the special circumstances of the case make it necessary to extend any such period of 21 days:

- (a) the period is taken to be extended by a further period of 14 days; and
- (b) the person must, as soon as practicable, inform the applicant that the period has been so extended.

(3) The only special circumstances that may be relied on to extend any such period of 21 days are as follows:

- (a) the necessity to consult any other person or body under Division 2 of Part 3;
- (b) the necessity to locate and retrieve the relevant document from archived documents;
- (c) any other special circumstances prescribed by the regulations.

Transitional provision—item (1)

The amendments apply only to applications made after the commencement of the amendments.

Explanatory note—item (1)

The amendments reduce from 45 days to 21 days the time in which an application for access to an agency's or Minister's documents, or for amendment of an agency's or Minister's records, must be dealt with by the agency or Minister. Item (1) (b) makes a consequential amendment concerning applications transferred from one agency to another.

† The amendments also allow the reduced period to be extended by a further 14 days in certain special circumstances.

Amendments—review of refusal to deal with certain applications

(2) **Section 22 (Agencies may refuse to continue to deal with applications if advance deposit not paid):**

- (a) Omit section 22 (1) and (2).
- (b) Omit section 22 (5)–(8), insert instead:

(5) An agency that refuses to continue to deal with an application under this section must forthwith cause written notice of that fact to be given to the applicant.

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SCHEDULE 1—AMENDMENT—*continued*

(6) A refusal to continue to deal with an application under this section is taken to be a determination that is subject to internal review under Part 3 and external review under Part 5, and the provisions of those Parts apply accordingly.

(3) Section 24 (**Determination of applications**):

From section 24 (3), omit “refused to deal with, or to continue to deal with,”, insert instead “refused to continue to deal with”.

(4) Section 25 (**Refusal of access**):

(a) After section 25 (1) (a), insert:

(a1) if the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency’s resources away from their use by the agency in the exercise of its functions; or

(b) After section 25 (4), insert:

(5) Subsection (1) (a1) does not permit an agency to refuse access to a document without first endeavouring to assist the applicant to amend the application so that the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert the agency’s resources away from their use by the agency in the exercise of its functions.

Transitional provision—items (2)–(4)

The amendments extend to applications pending on the commencement of the amendments but do not apply to applications that have been dealt with before the commencement of the amendments.

Explanatory note—items (2)–(4)

Section 22 empowers an agency to refuse to deal with an application on the ground that to do so involves a substantial and unreasonable diversion of the agency’s resources away from their use in the exercise of its functions. Currently, such a refusal is not reviewable under the Act.

The amendments classify the refusal to deal with the application as an ordinary refusal of access. This will allow a person aggrieved by a refusal to apply to the agency concerned for review of the determination under section 34, to apply for the review of the refusal by the Ombudsman under section 52 and to appeal to the Court against the refusal under section 53.

SCHEDULE 1—AMENDMENTS—*continued*

‡ The amendments also enable a review or appeal to be made in the case of a refusal of an agency to deal with an application because of the applicant's failure to pay an advance deposit.

Amendments—refusal of access to old documents**(5) Section 25 (Refusal of access):**

- (a) From section 25 (1) (d), omit “agency; or”, insert instead “agency.”.
- (b) Omit section 25 (1) (e) and (2).

Transitional provision—item (5)

The amendments extend to applications pending on the commencement of the amendments but do not apply to applications that have been dealt with before the commencement of the amendments.

Explanatory note—item (5)

The amendments remove the right of an agency to refuse access to a document on the ground that the document came into existence more than 5 years before the commencement of the Act.

Amendment—report by Ombudsman**(6) Section 52 (Review by the Ombudsman):**

After section 52 (5), insert:

(6) In a report under section 26 of the Ombudsman Act 1974 of an investigation of a determination made by an agency under this Act, the Ombudsman may recommend:

- (a) that the public release of the document concerned would, on balance, be in the public interest even though access has been duly refused because it is an exempt document; or
- (b) that any general procedure of the agency in relation to dealing with applications made under this Act be changed to conform more closely to the objects and requirements of this Act.

(7) Any part of a report under section 26 of the Ombudsman Act 1974 of an investigation of a determination made by an agency under this Act (except any part of such a report on a question of law or containing a recommendation

SCHEDULE 1—AMENDMENTS—*continued*

referred to in subsection (6)) is admissible in evidence in any proceedings before the Supreme Court or District Court under this Act if that part of the report is relevant to the proceedings.

Transitional provision—item (6)

The amendment applies to reports made after the commencement of the amendment, whether the investigation or application for access was made before or after that commencement.

Explanatory note—item (6)

The amendment empowers the Ombudsman, when reporting on an investigation of the conduct of any person or body in relation to a determination made by the agency, to recommend that a document should be released in the public interest (despite the fact that it is an exempt document) or to make recommendations for changes to the agency's general FOI procedures.

† The amendment also provides for certain reports of the Ombudsman relating to a review under the Act to be admissible in evidence in proceedings on an appeal to the Supreme Court or District Court concerning the matter.

Amendments—review and confirmation of Ministerial certificates for restricted documents

(7) Section 57:

Omit the section, insert instead:

Consideration of restricted documents

57. (1) The District Court may, on the application of the appellant, consider the grounds on which it is claimed that a document is a restricted document, but only if the document is not subject to a Ministerial certificate.

(2) In any proceedings under this section, the District Court is, on the application of the Minister administering this Act, or the agency or Minister concerned, to receive evidence and hear argument in the absence of:

- (a) the public;
- (b) the appellant; and
- (c) if in the opinion of the District Court it is necessary to do so to prevent the disclosure of any exempt matter—the appellant's representative.

SCHEDULE 1—AMENDMENTS—*continued*

(3) If the District Court is not satisfied, by evidence on affidavit or otherwise, that there are reasonable grounds for the claim, it may require the document to be produced in evidence before it.

(4) If, after considering any document produced before it, the District Court is still not satisfied that there are reasonable grounds for the claim, the District Court is to reject the claim when determining the appeal.

(5) The District Court is not to reject the claim unless it has given the Minister administering this Act a reasonable opportunity to appear and be heard in relation to the matter.

(6) For the purposes of any proceedings under this section, the Minister administering this Act is a party to the proceedings.

(8) Part 5, Division 3:

After section 58, insert:

Division 3—Review by the Supreme Court

Review by the Supreme Court

58A. (1) The Supreme Court may, on the application of the appellant in proceedings before the District Court under Division 2, consider the grounds on which it is claimed that a document that is the subject of a Ministerial certificate is a restricted document.

(2) In any proceedings under this section, the Supreme Court is, on the application of the Minister administering this Act, or the agency or Minister concerned, to receive evidence and hear argument in the absence

(a) the public;

(b) the appellant; and

(c) if in the opinion of the Supreme Court it is necessary to do so to prevent the disclosure of any exempt matter—the appellant's representative.

(3) For the purposes of any proceedings under this section, the Minister administering this Act is a party to the proceedings.

SCHEDULE 1—AMENDMENTS—*continued***Consideration of documents the subject of a Ministerial certificate**

58B. (1) If, in proceedings under section 58A, the Supreme Court is not satisfied, by evidence on affidavit or otherwise, that there are reasonable grounds for the claim that the document is a restricted document, it may require the document to be produced in evidence before it.

(2) If, after considering any document produced before it, the Supreme Court is still not satisfied that there are reasonable grounds for the claim, the Supreme Court is to make an order to that effect and remit the matter to the District Court.

(3) The Supreme Court is not to make such an order unless it has given the Minister administering this Act a reasonable opportunity to appear and be heard in relation to the matter.

(4) A Ministerial certificate which is the subject of an order under this section:

- (a) subject to paragraph (b)—ceases to have effect when the order takes effect; or
- (b) in the case of a certificate that states that the document is a restricted document by virtue of clause 1 (Cabinet documents) or clause 2 (Executive Council documents) of Part 1 of Schedule 1—ceases to have effect at the end of the period of 28 days after the order is made, unless the certificate is confirmed in accordance with section 58C.

(5) If the Minister administering this Act withdraws the Ministerial certificate before the end of the period of 28 days after the order is made, the Minister must, as soon as practicable, cause notice to be served on the appellant, and on the agency or Minister concerned, that the certificate is no longer in force.

Confirmation of a Ministerial certificate for Cabinet and Executive Council documents

58C. (1) A Ministerial certificate that is the subject of an order under section 58B may be confirmed by the Minister administering this Act, but only if it is a certificate to which this section applies.

SCHEDULE 1—AMENDMENTS—*continued*

(2) This section applies to a Ministerial certificate that states that the specified document is a restricted document by virtue of clause 1 (Cabinet documents) or clause 2 (Executive Council documents) of Part 1 of Schedule 1.

(3) The Minister administering this Act must cause notice of the confirmation to be given to the agency or Minister concerned.

(4) The notice must be given before the end of 28 days after an order is made by the Supreme Court in relation to the Ministerial certificate.

(5) The notice must specify:

- (a) the reasons for the Minister's decision to confirm the certificate; and
- (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.

(6) The Minister must cause a copy of the notice to be given to the appellant and a further copy to be tabled in each House of Parliament within 5 sitting days after the giving of the notice.

(7) Nothing in this section requires any matter to be included in a notice if it is of such a nature that its inclusion in the notice would cause the notice to be an exempt document.

Transitional provision—items (7) and (8)

The amendments apply only to applications made after the commencement of the amendments.

Explanatory note—items (7) and (8)

Documents referred to in Part 1 of Schedule 1 are restricted documents. The categories of restricted documents at present include Cabinet documents, Executive Council documents, documents affecting law enforcement and public safety and documents exempt under the Freedom of Information legislation of the Commonwealth or other States.

Section 59 provides that when a Minister signs a certificate that states that a specified document is a restricted document because of a specific provision of Part 1 of Schedule 1, the Ministerial certificate is taken to be conclusive evidence of that fact.

SCHEDULE 1—AMENDMENTS—*continued*

Currently, the District Court has power to consider the grounds on which a document is claimed to be a restricted document even if that document is the subject of a Ministerial certificate.

The amendments provide for the Supreme Court to consider documents the subject of a Ministerial certificate and remove the District Court's power to do so. The Supreme Court may order that there are no reasonable grounds for the claim. Under the amendments the power of the Minister to confirm a certificate is to be limited to restricted documents that are Cabinet documents or Executive Council documents.

Amendments—particulars in Ministerial certificates for restricted documents**(9) Section 59 (Ministerial certificates):**

- (a) From section 59 (1), omit “section 57”, insert instead “Division 3 of Part 5”.
- (b) After section 59 (1), insert:
 - (1A) A certificate under this section must specify:
 - (a) the reasons for the Minister's decision that the document is a restricted document; and
 - (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.
 - (1B) A copy of a certificate under this section is to be given to an applicant seeking access to the document concerned. Such a copy is, for the purposes of section 28 (2) (e), sufficient notice to the applicant of the reasons for the refusal of access and the relevant findings underlying those reasons.
- (c) After section 59 (3), insert:
 - (4) Nothing in this section requires any matter to be included in a certificate if it is of such a nature that its inclusion in the certificate would cause the certificate to be an exempt document.

Transitional provision—item (9)

The amendments apply only to certificates issued after the commencement of the amendments.

SCHEDULE 1—AMENDMENTS—*continued***Explanatory note—item (9)**

At present Ministerial certificates are only required to specify the provision of the Act under which it is claimed the document is a restricted document. The amendments require Ministerial certificates to include details of the grounds on which the specified document is certified to be a restricted document. The requirement is expressed in the same terms as the requirement for an agency to give reasons for denying access to a document (s. 28 (2) (e)) and the requirement for the Minister to give reasons when confirming a certificate (existing s 57 (9) and proposed s 58C (5)).

Amendment—definition of “public interest”

(10) Section 59A:

After section 59, insert:

Public interest

59A. For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:

- (a) cause embarrassment to the Government or a loss of confidence in the Government; or
- (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

Transitional provision—item (10)

The amendment applies to determinations whether made before or after the commencement of the amendment.

Explanatory note—item (10)

Section 25 currently provides that an agency may refuse access to a document if it is an exempt document. Many categories of exempt documents are exempt only if on balance the disclosure would be contrary to the public interest. The amendment defines “public interest” to remove the possibility of embarrassment to the Government or confusion to the applicant caused by the disclosure being taken into account.

Amendment—review of certain determinations relating to charges

(11) Section 67 (**Fees and charges**):

After section 67 (3), insert:

(3A) The guidelines in force under this section are to be taken into account:

SCHEDULE 1—AMENDMENTS—*continued*

- (a) by the District Court when reviewing a determination described in section 53 (3) (a) (iv) or (v); and
- (b) by the Ombudsman when reviewing the conduct of a person or body in relation to such a determination.

(3B) A charge under this Act for dealing with an application or for giving access to a document is not to include any amount for additional time spent in searching for a document that was lost or misplaced.

Transitional provision—item (11)

The amendment applies only to an appeal from a determination made after the commencement of the amendment.

Explanatory note—item (11)

Section 53 creates a right of appeal in relation to a determination by an agency to impose a charge for providing access to documents which the applicant considers to be unreasonable or to impose a charge for dealing with the application which the applicant considers to have been unreasonably incurred.

The amendment requires the District Court, in reviewing such a determination, to have regard to any guidelines relating to fees and charges published by the Minister in accordance with section 67. The Ombudsman will also be required to have regard to those guidelines when reviewing the conduct of a person or body in relation to such a determination.

† The amendment also provides that a charge may not be made by an agency under the Act for additional time spent in searching for a document that was lost or misplaced.

Amendment—Ministerial certificates for restricted documents under other FOI legislation**(12) Schedule 1 (Exempt documents):**

Omit clause 3 of Schedule 1 and insert it (re-numbered as clause 21) after clause 20 of that Schedule.

Transitional provision—item (12)

The amendment applies only to applications made after the commencement of the amendment.

Explanatory note—item (12)

Under the current Act exempt documents under the Freedom of Information legislation of the Commonwealth or Victoria are categorised as restricted documents. The amendment provides that such documents are not restricted documents but are still

SCHEDULE 1—AMENDMENTS—*continued*

exempt documents. An agency will continue to be able to deny access to the documents on the grounds that they are exempt, but a Ministerial certificate cannot be issued in relation to them.

Amendments—revision of references to Police Force**(13) Schedule 1 (Exempt documents):**

- (a) From clause 4 (3) (a), omit “State Intelligence Group of the Police Force”, insert instead “State Intelligence Group of the Police Service”.
- (b) From clause 4 (3) (b), omit “former Special Branch of the Police Force”, insert instead “Special Branch of the Police Service”.

Explanatory Note—item (13)

The amendments revise references to the Police Service.

Amendments—bodies and offices exempt from Act**(14) Schedule 2 (Exempt bodies and offices):**

- (a) From the matter relating to the Auditor-General, omit “all functions”, insert instead “investigative, audit and report functions”.
- (b) From the matter relating to the Director of Public Prosecutions, omit “all functions”, insert instead “prosecuting functions”.
- (c) From the matter relating to the Independent Commission Against Corruption, omit “all functions”, insert instead “corruption prevention, complaint handling, investigative and report functions”.
- (d) Omit the matter relating to the State Bank, insert instead:
The State Bank of New South Wales Limited and any of its subsidiaries—all functions.
- (e) Omit the matter relating to GIO Australia Holdings Limited.
- (f) Omit the matter relating to State owned corporations.

Transitional provision—item (14)

The amendments apply only to applications made after the commencement of the amendments.

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SCHEDULE 1—AMENDMENTS—*continued*

Explanatory note—item (14)

The amendment varies the schedule of bodies and offices which are exempt from the operation of the Act in relation to the functions specified. The exemption for the Auditor-General, DPP and ICAC is being restricted to their operational functions (as is the case with the exemption for the Ombudsman). The general exemption for State owned corporations is being removed except for the State Bank on the basis that any such exemption should be limited to such a corporation that operates in a competitive market. The exemption for the GIO is being removed since it will not be necessary following its privatisation.

*[Minister's second reading speech made in—
Legislative Assembly on 5 March 1992
Legislative Council on 6 May 1992]*