

FREEDOM OF INFORMATION BILL 1988 (No. 2)

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The objects of this Bill are—

- (a) to require information concerning documents held by the Government to be made available to the public; and
- (b) to enable the public to obtain access to documents held by the Government; and
- (c) to enable the public to ensure that personal records held by the Government are not incomplete, incorrect, out of date or misleading; and
- (d) to make consequential amendments to certain other Acts.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act is to commence on a day or days to be appointed by proclamation.

Clause 3 provides that the proposed Act is to bind the Crown.

Clause 4 provides that the proposed Act is not to limit the operation of any other Act or law that requires information concerning documents held by the Government to be made available to the public, that enables the public to obtain access to documents held by the Government or that enables the public to ensure that personal records held by the Government are not incomplete, incorrect, out of date or misleading.

Clause 5 specifies the objects of the proposed Act.

Clause 6 defines certain expressions (in particular “agency”, “exempt document”, “Ministerial certificate”, “policy document”, “principal officer”, “responsible Minister” and “restricted document”) for the purposes of the proposed Act.

Clause 7 defines the expression “public authority” for the purposes of the proposed Act.

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Clause 8 defines the expression "public office" for the purposes of the proposed Act.

Clause 9 and Schedule 2 exempt certain bodies and offices from the operation of the proposed Act in relation to certain specified functions.

Clause 10 ensures that a court or tribunal, and its staff, are excluded from the operation of the proposed Act in relation to the judicial functions of the court or tribunal.

Clause 11 provides that a document that is held by the Archives Authority, the Australian Museum, the Museum of Applied Arts and Sciences, the State Library or any other agency prescribed by regulations under the proposed Act, but that has been created by some other agency, shall be taken to be held by the other agency. The clause further provides that any documents that are held by such an agency and that relate to the affairs of a Royal Commission or a Special Commission of Inquiry shall be taken to be held by the Minister administering the Act under which the relevant Commission is established.

Clause 12 provides for the situation in which an agency becomes defunct by providing that applications made to it, and determinations made by it, are to be taken to have been made by the agency on which have devolved the original agency's functions.

PART 2—PUBLICATION OF CERTAIN INFORMATION

Clause 13 applies the provisions of the proposed Part 2 to and in respect of all agencies other than local authorities.

Clause 14 requires the responsible Minister for an agency to cause a statement of the affairs of the agency to be published each year. Such a statement is to include—

- (a) a description of the structure and functions of the agency; and
- (b) a description of the way in which the agency's functions affect members of the public; and
- (c) a description of the arrangements that exist to enable the public to participate in the formulation of policy by the agency and the exercise of the agency's functions; and
- (d) a description of the various kinds of documents that are usually held by the agency; and
- (e) a description of the arrangements that exist to enable the public to obtain access to documents held by the agency and to seek amendment of the agency's records concerning personal affairs; and
- (f) a description of the procedures of the agency in relation to the giving of access to such documents and to the amendment of such records.

The clause also requires an agency to cause a summary of its affairs to be published in the Gazette.

Clause 15 requires an agency to cause copies of its latest statement of affairs, its latest summary of affairs and each of its policy documents to be made available for inspection and purchase by the public. The clause also ensures that a person is not to be subject to any prejudice on account of an agency's policy document if the document is not available for inspection and purchase, if the person is not otherwise aware of the policies contained in it and if the person could have otherwise lawfully avoided the prejudice.

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PART 3—ACCESS TO DOCUMENTS**Division 1—General**

Clause 16 entitles a person to be given access to an agency's documents in accordance with the proposed Act. However this right is to extend, in relation to a local authority's documents, only to such of the local authority's documents as concern the person's personal affairs.

Clause 17 provides for the manner in which applications for access to an agency's document should be made. An application will be subject to an application fee.

Clause 18 specifies that an application shall be dealt with by the principal officer of the agency or by some other officer of the agency authorised by the principal officer in that regard and shall be dealt with as soon as practicable (and, in any case, within 45 days) after it is received.

Clause 19 prohibits an agency from refusing to accept an application that does not contain sufficient information to enable a document to be identified without first taking such steps as are reasonably necessary to assist the applicant to provide such information. The clause also requires an agency to take such steps as are reasonably necessary to assist an applicant to direct a misdirected application to the appropriate agency.

Clause 20 enables an agency to transfer an application to another agency if the document to which the application relates is held by the other agency or is more closely related to the functions of the other agency.

Clause 21 enables an agency to require an advance deposit for the costs of processing an application.

Clause 22 enables an agency to refuse to deal with an application that appears to involve an amount of work that would substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions. An agency may also refuse to continue dealing with an application if the applicant fails to pay an advance deposit requested under proposed section 21.

Clause 23 requires an agency to deal with an application relating to information of a kind that is not contained in any written document held by the agency, but of a kind for which the agency could produce a written document, as if the application were for a document so produced and the agency held such a document in its possession.

Clause 24 requires an agency to determine an application for access to a document (by giving access to the document, immediately or subject to deferral, or by refusing access to the document) and, if access is to be given, to determine any charge payable in respect of the giving of access. The clause further provides that failure to determine an application within 45 days after it was received is to be taken to constitute a refusal to give access. The clause also requires an agency to determine the charge, if any, that is payable for the agency's costs in processing the application.

Clause 25 specifies the various grounds on which an agency can refuse access to a document (the principal ground being that the document is an exempt document) but requires the agency, in the case of an exempt document, to give access to a copy of the document from which the exempt matter has been deleted. The clause further requires an agency to refuse access to a restricted document that is the subject of a Ministerial certificate.

Clause 26 specifies the various grounds on which an agency can defer access to a document. Generally, these grounds are that the document is required to be published, or is designated for presentation or submission to a particular person or body, but is yet to be published, presented or submitted.

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Clause 27 specifies the various forms in which access to a document may be given. The clause requires access to be given in the form requested by the applicant unless that would have a substantial adverse effect on the performance of the agency's functions, be detrimental to the preservation of the document or involve an infringement of copyright.

Clause 28 requires an agency to cause notice to be given to an applicant of its determination of his or her application or, if the application relates to a document that is not held by the agency, of the fact that the agency does not hold such a document.

Clause 29 specifies that proposed Division 1 has effect subject to the provisions of proposed Division 2.

Division 2—Consultation

Clause 30 applies to documents that contain matter concerning the affairs of the Government of the Commonwealth or of another State. The clause prohibits an agency from giving access to such a document unless the views of the Government concerned have been obtained and, if access to the document is proposed to be given, requires the agency to defer giving access to the document until the Government concerned has had an opportunity to obtain a review of the decision to grant access.

Clause 31 applies to documents that contain information concerning the personal affairs of any person. The clause prohibits an agency from giving access to such a document unless the views of the person concerned have been obtained and, if access to the document is proposed to be given, requires the agency to defer giving access to the document until the person concerned has had an opportunity to obtain a review of the decision to grant access.

Clause 32 applies to documents that contain information relating to the trade secrets of, or to matters of a business, professional, commercial or financial nature concerning, any person. The clause prohibits an agency from giving access to such a document unless the views of the person concerned have been obtained and, if access to the document is proposed to be given, requires the agency to defer giving access to the document until the person concerned has had an opportunity to obtain a review of the decision to grant access.

Clause 33 applies to documents that contain information concerning research that is being, or is intended to be, carried out by or on behalf of any person. The clause prohibits an agency from giving access to such a document unless the views of the person concerned have been obtained and, if access to the document is proposed to be given, requires the agency to defer giving access to the document until the person concerned has had an opportunity to obtain a review of the decision to grant access.

Division 3—Internal review

Clause 34 entitles a person to a review of a determination made by an agency under proposed Part 3. An application for a review is to be dealt with as if it were an original application for access, except that it is not to be dealt with by the person by whom the original application was determined or by a person who is subordinate to that person. The clause further provides that failure to determine an application for review within 14 days after it was received is to be taken to constitute a refusal to give access to the document to which it relates.

Division 4—Ministers' documents

Clause 35 entitles a person to be given access to a Minister's documents in accordance with the proposed Act.

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Clause 36 provides for the manner in which applications for access to a Minister's document should be made. An application will be subject to an application fee.

Clause 37 specifies that an application shall be dealt with by the Minister concerned or by some other person authorised by the Minister in that regard and shall be dealt with as soon as practicable (and, in any case, within 45 days) after it is received.

Clause 38 applies the provisions of proposed Divisions 1 and 2 of proposed Part 3 to applications and to Ministers to whom applications are made.

PART 4—AMENDMENT OF RECORDS**Division 1—General**

Clause 39 enables a person to whom access to an agency's document has been given to apply to the agency for amendment of any of its records concerning his or her personal affairs that are incomplete, incorrect, out of date or misleading.

Clause 40 provides for the manner in which applications for amendment of an agency's records should be made.

Clause 41 specifies that an application shall be dealt with by the principal officer of the agency or by some other officer of the agency authorised by the principal officer in that regard and shall be dealt with as soon as practicable (and, in any case, within 45 days) after it is received.

Clause 42 prohibits an agency from refusing to accept an application that does not contain sufficient information to enable a document to which the applicant has been given access to be identified without first taking such steps as are reasonably necessary to assist the applicant to provide such information.

Clause 43 requires an agency to determine an application for amendment of its records. The clause further provides that failure to determine an application within 45 days after it was received is to be taken to constitute a refusal to amend its records.

Clause 44 allows an agency to refuse to amend its records in accordance with an application if it is not satisfied that its records are not incomplete, incorrect, out of date or misleading or that the application contains matter that is incorrect or misleading or if the procedures for amending its records are prescribed by some other law.

Clause 45 requires an agency to cause notice to be given to an applicant of its determination of his or her application or, if the application relates to records that are not held by the agency, of the fact that the agency does not hold such records.

Clause 46 enables a person whose application for amendment of an agency's records has been refused to require the agency to add a notation to its records to the effect that the person claims those records to be incomplete, incorrect, out of date or misleading. The clause further requires the agency to ensure that, if it discloses information to which such a notation relates to any other person, it gives to that person a statement setting out the details of the claim and the notation.

Division 2—Internal review

Clause 47 entitles a person to a review of a determination made by an agency under proposed Part 4. An application for a review is to be dealt with as if it were an original application for amendment of an agency's records, except that it is not to be dealt with by the person by whom the original application was determined or by a person subordinate to that person. The clause further provides that failure to determine an application for review within 14 days after it was received is to be taken to constitute a refusal to amend the records to which it relates.

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Division 3—Ministers' records

Clause 48 enables a person to whom access to a Minister's document has been given to apply to the Minister for amendment of any of the Minister's records concerning his or her personal affairs that are incomplete, incorrect, out of date or misleading.

Clause 49 provides for the manner in which applications for amendment of a Minister's records should be made.

Clause 50 specifies that an application shall be dealt with by the Minister concerned or by some other person authorised by the Minister in that regard and shall be dealt with as soon as practicable (and, in any case, within 45 days) after it is received.

Clause 51 applies the provisions of proposed Division 1 of Part 4 to applications and to Ministers to whom applications are made.

PART 5—EXTERNAL REVIEW**Division 1—Review by the Ombudsman**

Clause 52 empowers the Ombudsman to investigate the conduct of any person or body in relation to a determination made by an agency under the proposed Act. The clause restricts the right of the Ombudsman to investigate a complaint concerning a determination under the proposed Act where the determination is subject to a right of internal review or an appeal to the District Court. The clause further prevents the Ombudsman from requiring the production of any document the subject of a Ministerial certificate, from investigating the conduct of any person or body in relation to the issue of any such certificate or from disclosing any exempt matter.

Division 2—Review by the District Court

Clause 53 confers a right of appeal to the District Court in respect of determinations under the proposed Act.

Clause 54 requires an appeal to be made within 60 days after the determination to which it relates was made or, if a complaint has been made to the Ombudsman within that period, within 60 days after the completion of the Ombudsman's investigation of the complaint.

Clause 55 provides that an appeal is to be heard by way of a new hearing and regulates the procedure of the District Court in relation to the hearing of an appeal. In particular, the District Court is not to be able to require access to an exempt document to be given.

Clause 56 gives the District Court certain powers in relation to appeals concerning determinations that have not been made but are to be taken to have been made. The District Court may allow further time to the agency or Minister concerned to determine an application, but in doing so it can make orders concerning the charges that the agency or Minister will be allowed to impose in relation to the giving of access to a document and orders concerning the payment of the costs of the appeal proceedings.

Clause 57 specifies the procedures to be followed by the District Court in investigating matters concerning restricted documents the subject of Ministerial certificates. In particular, it provides that such a certificate ceases to have effect in relation to a particular document that the District Court considers is not a restricted document unless the Minister confirms the certificate within 28 days of the decision.

Clause 58 encourages the District Court to report instances of improper conduct in connection with the administration of the proposed Act.

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PART 6—MISCELLANEOUS

Clause 59 provides that a certificate that is signed by the Minister administering the proposed Act and that states that a specified document is a restricted document is, except for the purposes of proposed section 57, conclusive evidence of that fact. Such a certificate has a life of 2 years unless it is sooner withdrawn. However, a further certificate may be issued in respect of the same document.

Clause 60 provides that notices under the proposed Act may be served on a person personally or by means of a letter posted to the person's last known address. The clause further provides that, if it is served by means of a letter, notice is to be taken to have been given at the end of the fifth day after the letter was posted to the person.

Clause 61 places the burden of establishing that a determination under the proposed Act is justified on the agency or Minister by whom the determination was made.

Clause 62 provides that a determination made under the proposed Act on behalf of an agency shall be taken to have been made by the agency.

Clause 63 enables proceedings under the proposed Act to be taken or defended on behalf of an agency by the principal officer of the agency as nominal plaintiff or nominal defendant, but ensures that the principal officer is not thereby personally liable for the costs of any such proceedings.

Clause 64 protects certain persons from any action for defamation or breach of confidence, and any related action, where access to a document has been given under the proposed Act.

Clause 65 protects certain persons from criminal proceedings arising from the giving of access to a document where access has been given under the proposed Act.

Clause 66 ensures that certain persons are not to be personally liable in respect of any act or omission done or omitted in the execution of the proposed Act.

Clause 67 provides for the regulation of the fees and charges, by means of guidelines established by the Minister administering the proposed Act, to be imposed in respect of applications for access to documents and the processing of applications, and the giving of access to documents, under the proposed Act.

Clause 68 provides that the Minister administering the proposed Act is to prepare an annual report on the administration of the proposed Act and to cause the report to be tabled in Parliament.

Clause 69 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 70 amends the Annual Reports (Departments) Act 1985 as a consequence of the enactment of the proposed Act.

Clause 71 amends the Annual Reports (Statutory Bodies) Act 1984 as a consequence of the enactment of the proposed Act.

Schedule 1 contains a description of the various classes of exempt documents. These are as follows:

Part 1—Restricted documents

Cabinet documents (clause 1).

Executive Council documents (clause 2).

Exempt documents under interstate Freedom of Information legislation (clause 3).

Documents affecting law enforcement and public safety (clause 4).

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Part 2—Documents requiring consultation

- Documents affecting inter-governmental relations (clause 5).
- Documents affecting personal affairs (clause 6).
- Documents affecting business affairs (clause 7).
- Documents affecting the conduct of research (clause 8).

Part 3—Other documents

- Internal working documents (clause 9).
- Documents subject to legal professional privilege (clause 10).
- Documents relating to judicial functions (clause 11).
- Documents the subject of secrecy provisions (clause 12).
- Documents containing confidential material (clause 13).
- Documents affecting the economy of the State (clause 14).
- Documents affecting financial or property interests (clause 15).
- Documents concerning operations of agencies (clause 16).
- Documents subject to contempt etc. (clause 17).
- Documents arising out of companies and securities legislation (clause 18).
- Private documents in public library collections (clause 19).
- Miscellaneous documents (clause 20).

Schedule 2 lists the various bodies and offices that are to be exempt, either wholly or partially, from the operation of the proposed Act. These are as follows:

- The office of Auditor-General.
 - The office of Director of Public Prosecutions.
 - The Government Insurance Office.
 - The Independent Commission Against Corruption.
 - The office of Public Trustee.
 - The State Bank.
 - The State Authorities Superannuation Board.
 - The Treasury Corporation.
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