



## 2004 Amendments to the FOI Act 1991

### Background

In early 2002, in line with the Government's Honesty and Accountability Platform to strengthen Freedom of Information (FOI) legislation in South Australia, a review of the FOI regime in South Australia was undertaken. The review concluded that both legislative and administrative changes were required.

In August 2002, the *Freedom of Information (Miscellaneous) Amendment Bill 2002* was introduced into Parliament. A deadlock conference between both houses of Parliament was held on 6 May 2004 that successfully concluded the passage of the Bill through Parliament.

The *Freedom of Information (Miscellaneous) Amendment Act 2004* was proclaimed on 2 December 2005 to come into force on 1 January 2005.

### Key Changes to the FOI Amendment Act

#### The Objects

The Objects of the *Freedom of Information Act 1991* (FOI Act) have been amended to ensure consistency with the Government's commitment to:

- the promotion of openness and accountability of Ministers of the Crown and other government agencies; and
- the facilitation of effective participation by members of the public in the making and administration of laws and policies.

The Objects now place more of an emphasis on the disclosure of information over non-disclosure.

The new section 3(2)(b) provides for a legally enforceable right to access government information *subject only to such restrictions as are consistent with the public interest (including the maintenance of the effective conduct of public affairs through free and frank expression of opinions) and the preservation of privacy*. These new words may be helpful when deciding if a document is restricted under Schedule 1 particularly regarding working documents. They will support a claim of exemption for a document that contains high-level sensitive communication (such as that between a Minister and Chief Executive) where it is considered the disclosure of such a document may damage the conduct of public affairs.

The new section 3A, called the *Principles of administration*, focuses on the interpretation of the FOI Act to further the Objects and to ensure the public and members of Parliament are assisted in exercising their rights under the Act and that the Act is applied promptly and efficiently.

## External Review

The external review procedures have been amended to enhance the role and powers of the Ombudsman and Police Complaints Authority. Previously they only had the power to direct an agency to make a decision.

The review authorities now have the power to:

- extend the time for aggrieved parties to make an application for external review beyond 30 days. This ability to extend the time is consistent with an agency's powers to extend the time in the case of an internal review, and the District Court's power to extend the time in which an appeal may be made;
- direct an agency to attend at a specified time and place to sort or compile documents or to undertake consultations they find should have been undertaken by an agency (all this at the agency's cost); and
- confirm, vary or reverse a determination.

Further to these changes, section 21 of the *Ombudsman Act 1972* will no longer apply to external FOI reviews. This means that the Ombudsman will now be able to access Cabinet documents appropriate to the review in hand.

The Ombudsman and the Police Complaints Authority will now be able to report, to the appropriate person, any inappropriate conduct where they believe a breach of duty or misconduct has occurred.

## Ministerial and Agency Certificates

The ability to issue a Ministerial or Agency Certificate for a restricted document has been removed from the FOI Act. These certificates resulted in the exempt status of these documents being unquestionable during an external review by the Ombudsman or Police Complaints Authority. Removal of this provision ensures the potential for abuse of these certificates is no longer present.

This amendment, in effect, increases power for the review authority to consider the grounds for a document exemption, particularly in regard to the public interest test. The legislation does, however, require that the agency's assessment be upheld unless there are cogent reasons not to do so.

## Fees and Charges

Amendment of section 53 of the FOI Act clarifies that fees and charges can only be calculated for the processing of FOI applications in relation to finding, sorting, compiling and copying documents and undertaking consultation required by the Act.

Agencies will not be able to charge for obtaining legal advice or internal consultation. Agencies, however, can still charge for third party consultation and should still be able to charge for numbering documents and producing a document schedule where appropriate.

The prescribed threshold for Members of Parliament has been increased to \$1000 per FOI application before any charges are incurred. The *FOI (Fees and Charges) Regulations 2003* have been amended and this amendment came into force on 14 November 2004.

## **Cabinet and Executive Council Documents (Clause 1 and 2, Schedule 1)**

The amendments also include changes to the scope of the exemption of Cabinet and Executive Council documents. Generally Cabinet and Executive Council documents are exempt except where a Minister has certified that Cabinet or Executive Council has approved its release under FOI.

The amendments also clarify that a document is not an exempt document because it has merely been attached to a Cabinet or Executive Council submission. It must have been specifically prepared for Cabinet to be exempt.

While it is recognised that confidentiality is essential for the proper and efficient conduct of government business, the amendments also recognise that not all Cabinet documents contain sensitive information and therefore disclosure of some of these documents would not result in adverse consequences for the Government.

Cabinet Office has updated Premier and Cabinet Circular No 19 *Preparing Cabinet Submissions* to take account of the changes to the FOI Act.

Cabinet submissions that have been approved for access to be given under FOI will be stamped as such and signed by a Minister.

## **Documents affecting personal affairs (Clause 6, Schedule 1)**

This amendment removes the 30-year sunset clause in relation to documents affecting personal affairs. These documents can no longer be released where it would be unreasonable to do so – regardless of their age.

If it is considered an unreasonable disclosure of personal affairs at the time the application is made, it will not be released. Sensitivity of the information will be based on the facts at hand at the time of the application.

The definition of personal affairs has also been clarified – personal affairs do not include the personal affairs of a body corporate.

## **Documents affecting Business Affairs & Documents containing confidential material (Clause 7 and 13, Schedule 1)**

The amendments to clauses 7 and 13 allow for greater access to contract documents entered into by the Crown or an agency. The *Business Affairs* exemption can no longer apply to contracts. That is, agencies will no longer be able to claim a contract document exempt merely because it is a contract.

The *Confidential Information* exemption can no longer be claimed in relation to any contract unless the contract contains a confidentiality clause that has been approved by the Responsible Minister (or his or her delegate) before the contract is executed. In the case of Non-State Government agency (i.e. a Local Government Agency or a University) approval must be sought from the agency.

It is important that confidential clauses are approved before the contract is executed, as confidential information may not be protected from disclosure under FOI if approvals are sought after the contract has been entered into.

For State Government agencies, the amendments provide for the Minister to delegate the power to approve confidentiality clauses to a specified person or the holder of a specified office, such as the Office of the Chief Executive. The delegation must be in writing and may be subject to conditions, or restrictions, as the Minister sees fit. The power to approve confidentiality clauses cannot be sub-delegated.

The amendments only affect the actual contract documents entered into after 1 January 2005. Pre-contractual documents, or documents generated in the course of the administration of the contract will not be affected. Hence the *Business Affairs* exemption and the *Confidential Information* exemption will continue to apply to these documents.

Legal advice should be sought in regard to exercising an extension to a contract. In some cases, particularly where the terms of the contract are renegotiated, the contract may be considered a new contract and may require approvals to be sought for confidential clauses from the Responsible Minister or the Agency.

The Crown Solicitors Office has issued a Legal Bulletin (Bulletin No 33) on the amendments to the FOI Act, which includes specific advice for State Government Agencies in regard to contract documents. The Bulletin also includes standard clauses that should be used in government contract documents where confidentiality clauses will be included. Agencies should also check any Standard Term Contracts and amend where appropriate.

During the preparation and negotiation of contracts every effort must be made to avoid incurring an obligation of confidentiality on the part of Government. Seeking approval of confidentiality clauses in contracts should only be used as last resort.

### **Reporting Requirements re Contracts**

A contract that is to include a confidentiality clause must be reported to the Minister responsible for the FOI Act by all agencies as soon as practicable after it is approved. The number of contracts containing confidential clauses is also to be reported in the FOI Annual Report. Pursuant to section 54AA the Minister will advise, by notice in the Gazette, how reporting of confidentiality clauses in contracts will be administered.

An exemption under Premier and Cabinet Circular 27 (the Government's Contract Disclosure Policy) will not affect an agency's obligation to disclose a contract under FOI. Premier and Cabinet Circular 27 provides Chief Executives of Government Agencies the power to exempt parts of a contract from public disclosure on the Government's Tenders and Contracts website.

### **Transitional Provisions**

The transition from one piece of legislation to another can be difficult to manage, particularly legislation such as the FOI Act where applications need to be processed and managed on an ongoing basis.

The following points should be noted in regard to the transition of the new legislation:

- The amendments apply to determinations made on or after the 1 January 2005 whether the application was lodged before or after this date.

- The new provisions for external reviews will only apply to determinations made after the commencement of the FOI Amendment Act including where an application was lodged before commencement.

From 1 January 2005, documents affecting personal affairs (including those where the 30 year period had already expired) will be considered exempt.