ABSTRACT

Freedom of information legislation was an important development in Australian administrative law. Starting at the Commonwealth level in 1982, it has been enacted by all Australian States and the ACT, Queensland’s legislation coming into effect in 1992. Viewed as a major step forward for effective participation and government accountability, its democratic underpinnings were hailed as a significant advance for Queensland. The Act however is charged with the difficult task of balancing the public interest in favour of disclosure against the public interest in confidentiality of some material, and has been criticised as failing to strike the appropriate balance. The argument has been that the non-application of the Act to certain bodies such as government owned corporations and contractors, and the breadth of some exemptions, particularly the Cabinet exemption, has made it impossible to achieve the professed democratic objects of the legislation.

This paper discusses the history and philosophical underpinning of Freedom of Information legislation at the Commonwealth and Queensland level. The justification for the non-application of the Act to GOCs and GBEs is outlined, as is the issue of whether FOI should apply to private contractors who have undertaken to provide public services. The Cabinet matter exemption, and the background facts to the Queensland amendments, are also discussed. The position in other Australian jurisdictions and overseas examples are highlighted by way of contrast.
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1. INTRODUCTION

Public access to government held information is a cornerstone of democracy. Such access is critical to ensuring effective public participation in politics and the decision-making process as well as improved government decision making and accountability.

The introduction of Freedom of Information (FOI) legislation was hailed as a major innovation and significant progression from the common law position, ending an era of secret and inscrutable government. Broadly the aim of the legislation is ‘good government’ through the promotion of democratic ideals of participation and accountability. The notion of FOI is however not an absolute one. The legislation gives a legal right to access government documents, which is subject to the specific exemptions. As such there is an inherent tension in FOI legislation between its professed aims of openness and accountability and informed public participation and the traditional understanding that government secrecy is sometimes necessary.\(^1\) The role of FOI legislation then is to balance the public interest in access to information against the public interest in protecting the confidentiality of certain kinds of information.\(^2\)

Some of the most topical aspects of the legislation in Queensland have been the non-application of the Act to government owned corporations, and the cabinet document exemption. A more wide-ranging review of the legislation was referred by the Queensland Parliament in March 1999 to the Legal, Constitutional and Administrative Review Committee.\(^3\) This paper examines the history and background of the legislation generally, whilst focusing on the application of FOI to government owned corporations and contractors, as well as the controversy surrounding the cabinet exemption.


2. BACKGROUND

2.1 COMMON LAW

At common law, the position was that executive secrecy was fundamental to the Westminster system of government. Historically the Crown was absolute, with “the counsels of the Crown” regarded as absolutely secret, the underlying premise being that the Crown could do no wrong. The Crown could not be questioned on how or why it acted, and it was treason for the Crown’s advisers to reveal their advice. With the shift away from absolute to constitutional monarchy, the traditions of ministerial responsibility developed, bringing with them a limited right for parliament to demand information from the Crown’s ministers. Individuals had a very limited avenue of access if they were involved in litigation with the Crown, whereby documents could be made available through “discovery processes”.

Prior to the enactment of FOI legislation there was no general right of access to documents held by Queensland government agencies, even if they contained materials which concerned a particular individual. In fact, the government may have been under a duty not to disclose information because of numerous laws containing secrecy provisions which prevented giving access to government held documents. The argument that government could not operate efficiently in a “goldfish bowl” prevailed for many years.

The Fitzgerald Inquiry Report recognised however, that the emphasis on secrecy and confidentiality provides a ready means by which a Government can misuse its power, withhold information and deliberately obscure the processes of public administration. The Inquiry urged for administrative law reform in Queensland and prompted such legislation as the Judicial Review Act 1991(Qld) and the Freedom of Information Act 1992 (Qld).

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7 Airo-Farulla, p 2.
10 The Judicial Review Act 1991, simplifies the procedure for obtaining judicial review of administrative decisions made under an enactment or under a non-statutory scheme (s 7). It also requires that reasons for decisions be given (ss 31-40).
2.2 HISTORY OF LEGISLATION

2.2.1 Commonwealth

The topic of FOI rose to prominence in Australia in the mid-1960’s. Whilst accountability and responsibility have been traditional features of Australian government, it was only after the enactment of the US Freedom of Information Act in 1966 that Australians looked upon legislation as a means of achieving these objectives.

The US legislation provided the impetus for over a decade of discussion, investigation and public campaigning in Australia, until the Commonwealth FOI Act was finally passed in 1982. This period of discussion and investigation included a Royal Commission, two Interdepartmental Committees and a Parliamentary Committee considering the issue. Legislation was first proposed by the Labor Party on the eve of the 1972 elections, and the first FOI Bill was presented to the Commonwealth Parliament by the Fraser Liberal government in 1978. This Bill was referred to the Senate Standing Committee on Constitutional and Legal Affairs which issued a lengthy report on FOI in 1979 and made a number of recommendations for changes to the Bill. The government introduced a revised FOI Bill into the Senate on April 2 1981. It did not reflect the majority of the Senate Standing Committee’s recommendations. The revised Bill was passed and commenced operation on 1 December 1982 as the Freedom of Information Act 1982.

Since the Commonwealth introduced its FOI Act in 1982, all Australian jurisdictions except the Northern Territory have introduced FOI legislation in similar terms.

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14 ALRC Report 77, p 19.
18 There are moves for the Northern Territory to introduce FOI legislation. See Paul Toohey, ‘FOI Undercut at the Top End’, The Australian, 6 May 1999, p 5.
Although modelled on the federal provisions, a number of the State Acts have sought to improve on the federal Act.\(^\text{19}\)

### 2.2.2 Queensland

Freedom of Information legislation was introduced in Queensland in 1991 and passed in 1992, following extensive investigation of the issue by the Electoral and Administrative Review Commission (EARC).\(^\text{20}\) The Fitzgerald Inquiry put the issue on the agenda, specifically recommending that the Commission, if formed, should examine the possibility of FOI legislation, as an integral part of the overall reform necessary for Queensland’s administrative law.\(^\text{21}\)

### 2.3 **CONCEPT OF FOI - OPEN GOVERNMENT & ACCESSING INFORMATION**

The notions of public participation and accountability of the government are at the heart of any democratic society. There is an expectation that people should be fully informed about government’s actions, decisions and policies; and that they should be able to participate in and influence government policy making and to scrutinise government decision making.\(^\text{22}\) Knowledge is literally power, and as such information is the linchpin of the political process.\(^\text{23}\) This inextricable linkage between power and information becomes particularly significant when it is recognised that unequal access to information confers unequal power.\(^\text{24}\)

Freedom of information is a procedure through which citizens are able to keep themselves informed. Information about government decision-making is crucial in improving government accountability and the quality and fairness of agency decision-making. It enables citizens to participate more fully in the political process, and to ensure that personal information kept about them by agencies is accurate. Freedom of information is not the only mechanism for achieving these aims however.

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\(^{19}\) ALRC Report 77, p 23.


\(^{21}\) Fitzgerald Report, p 371.


\(^{23}\) Fitzgerald Report, p 126.

its importance lies in the fact that it provides an enforceable right of access to government-held information.\textsuperscript{25}

The justification for freedom of information can be described as threefold:

1. FOI permits better scrutiny of the government and hence enhances accountability.

2. FOI gives people a means to be better informed and to participate more effectively in government decision-making.

3. FOI protects individual rights by allowing individuals a right of access to information in files relating to that individual and consequently, a right to seek to have any inaccuracies in those files corrected.

2.3.1 Accountability

The growth of modern government and particularly, the increasing reach of governmental activity in regulation and provision of services has raised doubts about the effectiveness of traditional methods of ensuring accountability.\textsuperscript{26} Traditional accountability centred on ministerial responsibility rather than the more recent desire for direct accountability of the bureaucracy. This shift in emphasis has been said to derive from\textsuperscript{27}:

\textit{...an increasing perception that the complexity of issues is such that the Executive is not sufficiently responsible to Parliament and from a more general demand for better service stemming from the consumer movement.}

If there is to be a more “direct accountability”, it is clear that government activities cannot be adequately scrutinised without knowledge of the way in which decisions have been made.\textsuperscript{28} Traditionally government accountability has been enforced by individual citizens through the ballot box. However, as pointed out by the Queensland Law Reform Commission, if voting power is to be used effectively then citizens need information about government decisions and policies in order to cast a meaningful vote.\textsuperscript{29} As well, FOI creates a greater need for the government to be seen, and in fact to be, efficient and competent.

\textsuperscript{25} ALRC Report 77.
\textsuperscript{26} QLRC, p 7.
\textsuperscript{27} ALRC Discussion Paper 59, p 5.
\textsuperscript{28} QLRC p 7.
\textsuperscript{29} QLRC pp 7-8.
2.3.2 Greater Participation in the Political Process

Being adequately informed and having access to information are essential to popular participation in the political process. Governments should receive advice constantly, not only from the professional public service but from the broader community and individual citizens.\(^{30}\) As the Senate Standing Committee on Constitutional and Legal Affairs on the Commonwealth Freedom of Information Bill stated\(^{31}\):

> Unless information is available to people other than those professionally in the service of the government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at nought.

Further it was recognised by the Australian Prime Minister of the time that\(^ {32}\):

> If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?

The House of Representatives Standing Committee for Long Term Strategies recognised in its report that access to information is a basic right and a precondition to personal and national autonomy. They also put forth the proposition that information is essential to enable Australians to participate fully in society, access available services and entitlements, act on opportunities, and make informed decisions which shape their lives, as well as a means of promoting social justice.\(^ {33}\)

**Representative Democracy & FOI**

The High Court more recently has indirectly supported FOI objectives in the political free speech cases.\(^ {34}\) The Court has held that the representative democracy provided for by the Commonwealth Constitution requires a freedom of political communication. This freedom of political communication was found to extend to

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\(^{31}\) Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, p 22.


all matters of public affairs and political discussion.\textsuperscript{35} For example Justice McHugh held\textsuperscript{36}:

\begin{quote}
\emph{If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information\textsuperscript{37}, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation...}
\end{quote}

The Court also found that public participation in political discussion is a key element of the political process\textsuperscript{38}, and that it is not limited to election periods.\textsuperscript{39} Clearly, effective public participation hinges on access to information. The Australian Law Reform Commission made a recommendation in 1995 that the objectives of the Commonwealth FOI Act should be amended to explain the underlying rationale of the Act and its significance for the proper working of representative democracy. Specifically it said that\textsuperscript{40}:

\begin{quote}
\emph{It should include a statement to the effect that the right of access provided by the Act is a basic underpinning of Australia’s constitutionally guaranteed representative democracy which enables people to participate in the policy and decision making processes of government, opens the government’s activities to scrutiny, discussion, review and criticism and enhances the accountability of the Executive.}
\end{quote}

The significance of the political free speech cases for freedom of information was explained in \textit{Re Eccleston}.\textsuperscript{41} The Commissioner held that it is implicit that\textsuperscript{42}:

\begin{quote}
...citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy
\end{quote}

\begin{flushleft}
\textsuperscript{35} \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, at 142, per Mason CJ.
\textsuperscript{36} \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, at p 231 per McHugh J.
\textsuperscript{37} Emphasis added.
\textsuperscript{38} \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, at p 139 per Mason CJ.
\textsuperscript{39} \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, at p 232 per McHugh J.
\textsuperscript{40} ALRC Report 77, p 31.
\textsuperscript{42} \textit{Re Eccleston} (1993) 1 QAR 60, p 86.
\end{flushleft}
The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.

Eccleston’s case dealt with the concept of the public interest in disclosure of information in s 41, and tacitly acknowledged that the recognition of a right to political free speech has an impact on the meaning given to the concept of “public interest”. That is, the recognition of political free speech suggests a reconceptualisation of the appropriate relationship between the citizen and the State and gives strength to the view that FOI legislation should be interpreted in a way that promotes democratic values. As the Australian Law Reform Commission has said, the High Court’s identification of a constitutional implication of political free speech casts doubt on the appropriateness of those legislative provisions founded on the “exaggerated notion that executive secrecy is in the public interest”.

2.3.3 Ensuring Accurate Personal Information

Freedom of Information legislation provides a method for individuals to ensure that information held about them by government agencies is relevant, up-to-date, accurate and complete. This is particularly important given the large amount of information about individual citizens held by government agencies and technological developments which have increased the accessibility to personal information by agencies other than the collection agency. As the Queensland Law Reform Commission states:

This may mean that information is ultimately used for a purpose other than that for which it was collected. The citizen may be unaware of the use being made of the information and may be seriously disadvantaged if the information is inaccurate or misleading.

2.4 FOI - MAINTAINING THE RIGHT LEVEL OF SECRECY

It has always been recognised that confidentiality of some kinds of Government information is justifiable and necessary. Whilst FOI is an important tool in ensuring access to government-held information, it is also a means of protecting

44 ALRC Report 77, p 14.
45 QLRC, p 9.
46 QLRC, p 9.
information of a particular type or in particular situations, from disclosure. The disclosure of some kinds of information may have such adverse effects that the public interest in confidentiality outweighs the public interest in access to that information.\textsuperscript{48} For example, the release of defence information could prejudice Australia’s national security; sensitive negotiations could not proceed if details of those negotiations were released while discussions were pending; and importantly, the disclosure of information relating to the private affairs of individuals could constitute an unreasonable invasion of their privacy.\textsuperscript{49}

The Queensland legislation specifically states that the Act is intended to strike a balance between the competing interests in giving the community a right of access to government-held information, and the prejudicial effect on the public interest of disclosing information in some instances (s 5). Broadly, the way FOI legislation achieves this is by giving people a legal right to access documents as long as those documents do not fall within one of the exemption categories. If a document does fall within an exemption then the applicant does not have an enforceable right to get access. However the decision maker still has a discretion to grant access.

2.5 THE OPERATION OF FOI LEGISLATION GENERALLY

The stated object of most FOI legislation is to extend as far as possible the right of the community to have access to information held by the government (eg s 4 Qld, s 3 Cth, s 3 ACT). Each Act creates obligations on government departments and rights for applicants.

2.5.1 Obligations of Government Agencies

In Queensland, the obligations the FOI Act 1992 imposes on government agencies include\textsuperscript{50}:

- interpreting the Act so as to promote disclosure of documents (ss 4 and 5);
- publishing the agency’s statement of affairs, which includes a description of the agency’s structure and functions, a description of the various kinds of documents that are usually held by the agency, and details of access arrangements to those documents (s 18);

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\textsuperscript{48} QLRC, p 9.


\textsuperscript{50} See Queensland Department of Justice (Human Rights & Administrative Law Branch), \textit{Freedom of Information Policy and Procedures Manual}, Queensland, (undated looseleaf) Chapter 1.3.
• publishing and making available for inspection and purchase, certain information about the functions of the agency and copies of its policy documents (ss 18 & 19);
• publishing details of arrangements for amendment of personal affairs information (s 18);
• assisting applicants in drafting and lodging their applications (s 25 also s 28);
• providing notice of, and reasons for, decisions where access to documents is deferred, or refused either wholly or partially (s 34).

2.5.2 Rights of Applicants

The rights given to applicants under the FOI legislation include:

• access to agency documents or official documents of a Minister. This right is subject to the Act (s 21). Under s 22 an agency or Minister can refuse access under the Act where for example the document is available through other means such as a public library. Access can also be refused where the application relates to exempt matter or an exempt document (s 28). Exempt matter can be deleted from a document to provide the applicant with access to the balance of the document (s 32);
• documents which relate to the personal affairs of the applicant can be amended where the document contains inaccurate, incomplete, out of date or misleading information (ss 53 & 55);
• if an agency refuses a request to amend personal affairs documents it can be compelled by the applicant to add a notation to the agency’s records (s 59);
• where access to a document or a request to amend information is refused, an aggrieved applicant may request an internal review of a decision by a different officer of the agency who is at least as senior as the original decisionmaker. If the applicant remains dissatisfied after the internal review of the decision, the Act confers the right to have external review of the decision by the Information Commissioner (ss 52, 60, 71, 79).

2.5.3 Statistics on Usage of FOI in Queensland

In 1996/97, the applications for access to documents across all Queensland government agencies totalled 7810. This figure is slightly down from previous

51 Department of Justice (Human Rights & Administrative Law Branch), Freedom of Information Policy and Procedures Manual, Chapter 1.2.
52 Some agencies are excluded from the operation of the Act, see s 11.
53 At the time of writing the 1997/98 figures were not yet available.
years, and includes applications to local government agencies. At state government level, the applications for access have predominantly been for personal information, however the gap between the number of requests for personal and non-personal information requests seems to be closing. Conversely, at local government level the vast proportion of applications have been for non-personal information. The rates of release of documents for state government agencies dropped slightly in the 1996/97 reporting year, with some 90.1% (or 729,199 documents) released, as compared to the 1995/96 reporting year with a 94.1% release rate. Local government agencies reported a significant drop in release rates from 95% in 1996/96 to 55.3% in 1996/97. The local government results appear to have been skewed by an application to the Cardwell Shire for over one hundred thousand documents, of which only 29 documents were released. If that application is not taken into account, then the release rate for local government agencies comes to 89.4%.

As for external review of FOI decisions, some 231 new applications for review were received by the Information Commissioner in 1996/97. Of these 231 applications, 80 were in relation to a refusal to grant access, 31 in relation to deletion of exempt matter, 13 in relation to a combination of refusal to grant access and deletion of exempt matter, 33 were in regards to deemed refusals to grant access, one was in relation to deferred access, 9 were in relation to fees charged, 36 were in relation to third party objections to disclosure, 4 were in relation to a deemed refusal to amend, and 22 were in relation to misconceived applications or no jurisdiction. None were received in relation to the issue of conclusive certificates. Further none were received in relation to a refusal to publish a statement of affairs or other compliance with Part 2 of the Act. In 1997/98, the Information Commissioner received 210 applications for external review, and these followed a similar breakdown as in 1996/97. The Police and Education Departments were the two highest respondent

59 Conclusive certificates are certificates signed by the Minister establishing that specified matter would, if it existed, be exempt matter either because it falls within the cabinet/executive council exemption or the law enforcement/public safety exemption. See s 36(3), 37(3), 42(3). The grounds for issuing a conclusive certificate can be reviewed by the Information Commissioner under s 84.
agencies for external review applications in both years, with the cumulative total for both years for the Police Department being 47, and for the Education Department 37.62

3. GOCs AND GBEs

3.1 AT THE QUEENSLAND LEVEL

The terminology used in Queensland is government owned corporation (GOC), whereas at Commonwealth level it tends to be government business enterprise (GBE).63 The Queensland FOI Act does not apply to a number of GOCs specified in Schedule 2 of the Act.

Section 11A of the Act provides that:

This Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.

3.1.1 Definitions

A government owned corporation (GOC) is a government entity that is established as a body corporate either by an Act or the Corporations Law and is declared by regulation to be a GOC.64 A government entity includes a government company or part of a government company; or a State instrumentality, agency, authority or entity; or a department or division, or other part of a department; or an entity prescribed by regulation.65 A GOC has a corporate structure but unlike a private corporation, all of its shareholders are Ministers, who hold shares on behalf of the state.66 All GOCs have a board of directors which has responsibility for the GOC’s commercial policy and management and is independent of ministerial control67 however; the board is accountable to the government for the overall

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63 In some jurisdictions the term “state-owned enterprise” may be used. See for example, Mick Batskos, ‘State-Owned Enterprises - Does Administrative Law Apply’, Law Institute Journal, 68(9), September 1994, pp 839-841.
64 Government Owned Corporations Act 1993 (Qld), s 6.
65 Government Owned Corporations Act 1993 (Qld), s 5.
67 Government Owned Corporations Act 1993 (Qld), s 126.
performance of the GOCs objectives. The shareholding Ministers have reserve powers in relation to GOCs’ operations where it would be in the public interest to exercise them.

The Schedule 2 GOCs are the Queensland Investment Corporation, transport GOCs (namely Queensland rail and port authorities), and State electricity entities. (An “electricity entity” is an entity that is a participant in the electricity industry. These include generation entities; transmission entities; distribution entities; and retail entities.)

The application provisions are contained in each of the relevant GOCs statutes and are in virtually identical terms. The application provisions provide that the Freedom of Information Act 1992 does not apply to a document received or brought into existence by the relevant GOC in carrying out its commercial activities or any community service obligations prescribed under regulation. “Commercial activities” is defined broadly to mean those activities which are conducted on a commercial basis. Since conducting activities on a commercial basis is the very essence of the corporatisation process provided for under the GOC Act 1993, then it would seem that by far the vast majority of a GOC’s activities will not be subject to the FOI Act.

3.1.2 Justification for s 11A

Section 11A of the Freedom of Information Act 1992 (Qld) was inserted in 1994 by the Queensland Investment Corporation Amendment Act 1994 (Qld). Section 11 of the FOI Act lists bodies to which the FOI Act does not apply, as far as documents within their possession. Previously, s 11 contained paragraphs excluding the Queensland Industry Development Corporation in relation to its investment functions and the Queensland Investment Corporation. The stated aim of the

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70 See Electricity Act 1994 (Qld), s 22.

71 See Electricity Act 1994 (Qld), s 256; Queensland Investment Corporation Act 1991 (Qld), s 37; and Transport Infrastructure Act 1994 (Qld), s 199.

72 The relevant GOCs are the Queensland Investment Corporation, a State Electricity entity, or a transport GOC.

73 See for example Electricity Act 1994 (Qld), s 256.

74 See Government Owned Corporations Act 1993 (Qld), s 16 which defines corporatisation.

75 However, once documents are in the hands of non-exempt agencies, then they are potentially obtainable through FOI processes.

76 See Freedom of Information Act 1992 (Qld) as passed, ss 11(1)(k) and 11(1)(l).
amendment was to place GOCs on a par with their private sector competitors, who are not subject to administrative law review mechanisms such as freedom of information and judicial review.

Further, in the Minister’s second reading speech on the bill, he stated that⁷⁷:

_This amendment corrects an existing anomaly in the FOI legislation which enables an exempt document to lose its exempt status once it is placed in the hands of an non-exempt body. It is expected that this amendment will greatly facilitate the performance of the monitoring process under corporatisation which requires GOCs to provide commercially sensitive information to Treasury, which is a non-exempt body for the purposes of the FOI Act._

### 3.1.3 Criticisms of s 11A

The Information Commissioner responded to the Minister’s second reading speech in his third annual report.⁷⁸ The Information Commissioner argued that it was mistaken to think that the FOI Act contained an anomaly which enabled an exempt document to lose its exempt status in the hands of a non-exempt body. He further stated:

_What I think the Minister was meaning to convey was that a document which is not subject to the FOI Act while it is in the possession of a body which is excluded from the application of the FOI Act (either generally or in respect of documents relating to particular functions) becomes subject to the FOI Act when it comes into the possession of a Minister or an agency subject to the FOI Act. If it is truly an exempt document, however, it will be an exempt document in the hands of the Minister or agency subject to the FOI Act._

In the Information Commissioner’s view s 11A has gone further than is necessary to ensure that GOCs are on an equal footing with private sector business corporations. He has argued that in fact s 11A confers special advantages on GOCs, because of the way s 11A operates; that is, s 11A creates a class of documents to which the FOI Act does not apply, irrespective of whether they are in the possession of a GOC, or, for example, a Minister exercising a supervisory function over the GOC.⁷⁹ This is not the case with private companies. For example, although FOI legislation does not apply to BHP, documents created by BHP, which come into the hands of for example, the Department of Mines and Energy, could still be accessed under the FOI legislation, provided the document doesn’t fall within any of the exemption provisions.⁸⁰

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The width of s 11A is also illustrated by the fact that no valid FOI access application can be made in relation to documents falling within the class defined by s 11A.\textsuperscript{81} This can be contrasted with the exemption provisions in Part 3, Division 2 of the Act. For example, it is possible under the Act, to apply for access to a Cabinet document, and to receive access if the decision-maker in question exercises his or her discretion under s 28(1).\textsuperscript{82}

Another argument is that sufficient protection of commercially sensitive material could be achieved through the “trade secrets, business affairs and research” exemption in s 45.\textsuperscript{83} The Information Commissioner has recommended that s 11A be repealed, and that instead there be a standardisation of approach with the GOCs which presently have the benefit of it, instead being named in additional paragraphs in s 11.\textsuperscript{84} Being named in additional paragraphs was the original approach.

Another criticism related to the breadth of s 11A is that the concern that if GOCs were subject to administrative law then they would be subject to burdens above those faced by private entities, is unjustified. The argument is that these “burdens” are outweighed by the advantages that are offered by administrative law in ensuring that justice is done on an individual basis and that the results have a positive effect on the improvement of future decision-making.\textsuperscript{85} To take this argument even further, there has been academic commentary suggesting that the underlying philosophies of accountability and participation that support FOI in the political context are appropriate for corporations.\textsuperscript{86}

The Queensland Information Commissioner has supported the recommendations made by the ALRC/ARC in its report dealing with the Commonwealth FOI Act and government business enterprises, and has argued that the considerations raised apply equally to Queensland GOCs.\textsuperscript{87} The ALRC/ARC report is discussed in the next section.

\textsuperscript{81} Queensland Information Commissioner, 3rd Annual Report 1994-95, p 36.
\textsuperscript{82} Queensland Information Commissioner, 3rd Annual Report 1994-95, p 36.
\textsuperscript{83} Queensland Information Commissioner, 3rd Annual Report 1994-95, p 36. See also the ARC’s & ALRC’s recommendations for the Commonwealth in ALRC, Discussion Paper 59, p 114.
\textsuperscript{84} Queensland Information Commissioner, 3rd Annual Report 1994-95, p 37.
\textsuperscript{87} Queensland Information Commissioner, 3rd Annual Report 1994-95, Brisbane, 1995, p 38.
3.2 **AT THE COMMONWEALTH LEVEL**

The terminology used at the Commonwealth level is government business enterprise.

### 3.2.1 Government Business Enterprises

Government-owned companies, statutory corporations and other bodies that have undergone commercialisation reforms, and that undertake commercial activities, are generally referred to as government business enterprises (GBEs).[^88] In considering whether federal administrative law should apply to GBEs, the Administrative Review Council (ARC) and Australian Law Reform Commission (ALRC) have identified a further three characteristics that point to a body being a GBE. These are: the federal government controls the body; the body is principally engaged in commercial activities; and the body has a legal personality separate from the government.[^89] Under the Commonwealth FOI Act there is no general rule governing the application of the Act to GBEs. That is, under Schedule 2, some GBEs are entirely exempt whereas others are only exempt for specified categories of documents.[^90] The ARC/ALRC (1995) has commented that there appears to be no logical basis for these differences.[^91]

### 3.2.2 Arguments in favour of extending the FOI Act to GBEs

The ARC/ALRC summarised the submissions it received in favour of extending the FOI Act to GBEs:

- the need to protect the commercial interests of GBEs, the existence of private sector accountability mechanisms and market forces do not displace the need for public accountability of GBEs due to:
  - GBEs expenditure of considerable public money, which suggests that they should therefore be publicly accessible and accountable for the use of that money;
  - GBEs are accountable to Ministers financially and strategically and the public has a democratic interest in their workings;
  - traditional private sector corporate reporting, accounting and audit requirements do not provide public accountability and potential for a just result to be achieved in individual circumstances, unlike FOI and other

[^90]: ALRC Discussion Paper 59, p 110.
[^91]: ALRC Discussion Paper 59, p 110.
administrative law mechanisms which do have the potential to provide such results and benefits;

- the competitive environment does not facilitate a fair and just provision of goods and or services. Although private remedies exist, their cost makes them prohibitive for most people, whereas administrative law remedies are by and large cheaper and therefore more accessible, and likely to lead to better public accountability and decision-making. As pointed out by Dixon, there will be many instances where GBE decision making affects an individual without there being recourse to any effective avenue of redress apart from that provided by administrative law.\(^\text{92}\)

- GBEs should be subject to FOI to promote transparency of their operations. Such transparency is particularly important given GBEs privileged position in relation to access to capital, cost of capital, and taxation, and other regulatory privileges as compared to the private sector.

- GBEs which carry out regulatory functions should be subject to the same controls as other regulatory government bodies. As such, the FOI Act should apply to a GBE’s public functions or service delivery, especially where those functions are carried out in a “less competitive or monopoly market.”\(^\text{93}\)

### 3.2.3 Arguments against extending the FOI Act to GBEs

The ARC/ALRC have summarised the argument against extending the FOI Act to GBEs:\(^\text{94}\):

- the objectives of the FOI Act are irrelevant to GBEs because GBEs operate in a commercially competitive environment;

- there is sufficient accountability provided through private sector regulatory mechanisms. For example in a genuinely competitive market, market mechanisms ensure a high quality of administration thus removing the need for the accountability provided by the FOI Act;

- there is a need to protect the commercial interests of the GBE from additional administrative and financial burdens and to put them on a level playing field with their private sector competitors. A level playing field can best be achieved by removing regulatory intrusions into the affairs of GBEs, which do not apply to the private sector.

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\(^{92}\) Dixon, ‘Should Government Business Enterprises be Subject to Judicial Review?’, p 203.

\(^{93}\) ALRC Discussion Paper 59, pp 111-112.

\(^{94}\) ALRC Discussion Paper 59, pp 110-111.
3.2.4 The ARC’s and ALRC’s Conclusions

The conclusion reached in ALRC Discussion Paper 59 was that, given the GBEs connection with the government and the need for accountability, the FOI Act should apply to GBEs. The Discussion Paper did however, acknowledge the need to protect the commercial activities of a GBE that are undertaken in a market environment where there is real competition. The means proposed for doing this are through amendment of s 43 of the Commonwealth Act, being the exemption covering business affairs documents, so that it is clear that it applies to the competitive commercial activities of GBEs.95 The ALRC/ARC was of the view that it was unnecessary to exempt GBEs generally from the operation of the FOI Act by way of inclusion in a schedule to the Act. 96

The Queensland Information Commissioner supported the recommendations made by the ALRC/ARC and argued that the considerations raised apply equally to Queensland GOCs.97

In the 1995 Report, the ALRC/ARC confirmed the view that generally GBEs should be subject to FOI legislation.98 The report emphasised however, that generally the greater the extent to which a GBE is engaged in commercial activities in a competitive market, the less the justification for applying the FOI Act, and as such the Report recommended that GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to FOI.99 One member of the ARC dissented. In the dissenting member’s view the question went beyond a test of the operation of the marketplace, and as such all GBEs should be subject to the FOI Act, the exemptions for commercially sensitive information being sufficient to protect GBEs.100 This dissenting view has been supported by the Tasmanian Legislative Council Select Committee in its report on Freedom of Information.101

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95 ALRC Discussion Paper 59, p 114.
96 ALRC Discussion Paper 59, p 114. The Queensland equivalent, s 45, is already broad enough to cover GBEs. See also Queensland Information Commissioner, 3rd Annual Report 1994-95, Brisbane, 1995, p 38.
97 ALRC Discussion Paper 59, p 114.
99 ALRC Report 77, p 214.
100 ALRC Report 77, p 214.
101 ALRC Report 77, p 214.
4. CONTRACTING OUT OF GOVERNMENT SERVICES

A related although slightly different issue for FOI legislation is the extent to which it should apply to private bodies which have contracted with government to provide public services. As the Administrative Review Council has put it, the issue is that the delivery of government services by contractors and the consequent “ privatising” of the relationship between service providers and members of the public, has the potential to result in a loss for individuals of the benefits of administrative law.

Further since the contractor’s connection with government is usually governed only by contract, the traditional accountability mechanisms of ministerial responsibility and parliamentary oversight may no longer be as effective.

4.1 CONTRACTING OUT

Contracting out (outsourcing) typically describes the provision of services by private sector contractors but it can also include in-house provision by departments or agencies where the right to provide is won through competitive tendering and is governed by contract. The issue has become particularly pertinent in recent years as the preferred mode of government service delivery has increasingly lent towards private bodies or “contractors”. The process of contracting out of services has been described as a global trend indicative of a broader privatising ideology. The reasons behind it are a belief that it will lead to greater efficiency, in particular the superior productivity engendered among competitive providers, and a more effective delivery of services.

4.2 ACCOUNTABILITY

At the same time there is an expectation that providers of public services paid for by public funds will be publicly accountable. The tension seems to arise from the fact that an underlying assumption of our political-legal system is that there are two

107 Mulgan, Contracting Out and Accountability, p 1.
108 Mulgan, Contracting Out and Accountability, p1.
quite distinct spheres, the public and the private; the private being characterised by individual freedom and the public being characterised by social responsibility and accountability.\textsuperscript{109} By effectively privatising the delivery of services which have a strong public element to them, there is a tension created between the expectations of the private service-providing body of being free of public law encumbrances, and the expectation that the public will still have the benefit of administrative law (such as a right to reasons for decision and FOI) in their dealings with the service provider. The significance of the administrative law system has been described as it being the principal means by which Government is accountable to individuals.\textsuperscript{110}

The ARC in its most recent report on the topic stated its view that limited access to information about services that are contracted out threatens government accountability to the public.\textsuperscript{111} Particularly it said that access to information by members of the public in general and service recipients in particular also enables a broader evaluation of the performance of contractors and government agencies.\textsuperscript{112} Clearly, a service recipient requires access to information which will enable them to ascertain what the contract requires of the contractor and whether they are being dealt with properly by the contractor.\textsuperscript{113} It concluded that:

\begin{quote}
...it is important that the gains in government accountability that have been achieved by the FOI Act should not be lost or diminished where services are contracted out. Normal commercial practices may not, of themselves, lead to contractors providing information voluntarily to members of the public upon request. Appropriate regimes can and should be developed which can protect the interests of contractors while still ensuring democratic accountability through access to information.\textsuperscript{114}
\end{quote}

\section*{4.3 FOI AND CONTRACTORS}

As already stated, under FOI legislation, persons have a right of access to government information or personal information held by a government agency. So


it is possible then for a request to be made under the FOI Act for access to documents in the government agency’s possession relating to the service delivered by the contractor. However a person will not be able to obtain access under the FOI Act to documents in a contractor’s possession relating to the delivery of the service.\textsuperscript{115} The exception to this may lie in relation to personal information. The Privacy Amendment Bill 1998 proposed to extend the current obligations of Government agencies under the Privacy Act 1988 (Cth) to any person or body responsible for the provision of services under a contract with the Commonwealth or one of its agencies.\textsuperscript{116} The Federal Government has also announced that the Commonwealth Freedom of Information Act will apply to requests by individuals for access to and correction of personal information about themselves held by contractors on behalf of the government.\textsuperscript{117} Access to information in the hands of contractors will still also be available through contractual provisions under which a government agency has a right of access to documents held by the contractor. The Government has also agreed to a minor clarifying amendment to the FOI Act which will ensure that these contractual rights of access are effective.\textsuperscript{118}

4.4 \textbf{ARC DISCUSSION PAPER RECOMMENDATIONS}

The Administrative Review Council (ARC) has examined this issue recently.\textsuperscript{119} The ARC has proposed that the following principles should guide the relationship between the public, the government agency and the contractor\textsuperscript{120}:

- rights of access to information relating to government services should not be lost or diminished because of the contracting out process;


\textsuperscript{116} However this Bill (introduced 5 March 1998) appears to have lapsed because of the October 1998 federal election and at the time of writing has not been re-introduced. Notwithstanding this, the recent Senate Legal and Constitutional References Committee, \textit{Privacy and the Private Sector: Inquiry into Privacy Issues, including the Privacy Amendment Bill 1998}, Canberra, March 1999, has dealt with this very issue, suggesting the topic is still one on the government’s agenda.


• the Government, rather than individual contractors, should normally be responsible for ensuring that the rights of access to information currently provided by the FOI Act are not lost or diminished as a result of contracting out.

Based on these principles, the Council identified five options in its December 1997 Discussion Paper.121 These were:

- extend the FOI Act to contractors;
- deem specific documents in the possession of the contractor to be in the possession of the government agency;
- deem specific documents in the possession of the contractor, relating to the contractor’s performance of his/her contractual obligations, to be in the possession of the government agency;
- incorporate information access rights into individual contracts; and
- establish a separate information access regime.

The ARC preferred the third proposal.122 It stated that123:

Under this Proposal the FOI Act would be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor’s obligations under the contract would be deemed to be in the possession of the government agency. The citizen would then have a statutory right to seek access to the document by making an FOI request to the agency. A further amendment to the act would be needed to require contractors to provide these documents to the government agency when an FOI request is made.

Proposal 3 is not a general extension of the FOI Act regime to the private sector but rather it would have the effect of treating the documents dealing with the contractor’s contractual obligations as though they were government agency documents so that persons have an enforceable right to access them under the legislation, subject to the current exemption provisions.

The ARC pointed out that not all documents that relate to the contract will disclose information about the manner in which the contractor carries out its contractual obligations, that is the manner in which the service is delivered. As such, Proposal 3 would not deem these documents to be in the government agency’s possession.124

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Proposal 3 was still supported by the ARC in its 1998 Report to the Attorney-General\textsuperscript{125} as well as by the Senate Finance and Public Administration References Committee.\textsuperscript{126}

The Queensland Information Commissioner has emphasised that any amendments to the Queensland FOI Act to address this issue must be co-ordinated with corresponding adjustments to the standard contract conditions used by all agencies subject to the Queensland FOI Act which contract out, or who may in future contract out.\textsuperscript{127} The Commissioner has also urged that early attention be given to the issue so that appropriate solutions may be developed.\textsuperscript{128}

5 THE CABINET EXEMPTION

Queensland FOI legislation, like its interstate counterparts, contains an exemption which protects disclosure of Cabinet documents. In all Australian jurisdictions, the exemption is absolute in that there is no public interest test attached to the exemption.\textsuperscript{129} The “absolute” nature of the Cabinet exemption seems to have arisen because of the assumption that there is an overarching public interest in favour of confidentiality in the discussion of sensitive political matters and in maintaining the convention of collective ministerial responsibility.\textsuperscript{130} The absence of a public interest test has been criticised by some commentators.\textsuperscript{131}

5.1 COMMONWEALTH LEVEL

The exemption at the Commonwealth level is contained in s 34 of the Freedom of Information Act 1982 (Cth). The exemption is framed in the following terms\textsuperscript{132}:

(1) A document is an exempt document if it is:

(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that


\textsuperscript{130} Commission on Government (WA), \textit{Report No. 1}, p 137.

\textsuperscript{131} See discussion in last section.

\textsuperscript{132} See \textit{Appendix C} for the actual wording of s 34.
was brought into existence for the purpose of submission for consideration by the Cabinet;

(b) an official record of the Cabinet;

(c) a document that is a copy of, or a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published

(1A) The section does not apply to a document that would otherwise fall within paragraphs (a)-(c) to the extent that the relevant document contains purely factual material. However, it is going to be exempt if the disclosure would breach paragraph (d).

5.2 QUEENSLAND

The original Queensland cabinet exemption section (s 36), although slightly different, closely followed the Commonwealth provision. However the original section has been amended twice with the effect being that the provision now stands in a somewhat different form.

The current s 36 exemption is framed as follows:

(1) Matter is exempt if:

(a) it has been submitted to Cabinet; or

(b) it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or

(c) it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter either submitted to Cabinet or that is proposed or at any time has been proposed to be submitted to Cabinet by a Minister; or

(d) it is or forms part of an official record of Cabinet; or

(e) its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or

(f) it is a draft of matter mentioned in paragraphs (a)-(e); or

(g) it is a copy or extract from, matter mentioned in paragraphs (a) - (f).

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133 See Appendix B for the original version of s 36.
134 See Appendix B for the actual wording of the current s 36.
(2) The exemption does not apply to matter officially published by decision of Cabinet.

(3) A certificate signed by the Minister stating that the specified matter if it existed would be exempt, establishes that the matter is exempt under this section. This is subject to review by the Information Commissioner in s 81 of the Act.

5.2.1 Effect of Queensland amendments

The current version of s 36 differs from the original in a number of key respects. The cumulative effects of the 1993 and 1995 amendments are:

- The exemption now applies to matter ‘submitted to Cabinet’; irrespective of any intention or purpose related to the creation of that document (such as consideration by Cabinet). That is, there is no purposive element to be considered as part of this paragraph. The Queensland FOI Policy and Procedures Manual states that “Proof that the document has been submitted to Cabinet will be sufficient to make a finding that the document is exempt under s 36(1)(a).”\(^ {135}\) The provision is broad enough to cover the situation where the document is a background information attachment or where the document is not actually considered by Cabinet but rather merely ‘submitted to it’. The Information Commissioner has expressed the concern that it is not necessary that the document be relevant to any issue considered by Cabinet, nor that the placing before Cabinet of the document has to occur before the application for access is made, in order for it to come within the exemption as presently worded. That is, at any time, even after an FOI access application has been made for that specific document, a document may be made exempt by placing it before Cabinet.\(^ {136}\)

- Section 36(1)(b) is broad enough to cover any document which a Minister has at some time proposed for submission to Cabinet, irrespective of whether the proposal was subsequently abandoned.\(^ {137}\)

- The factual material exception has been removed, so that even material which is merely factual or statistical and which does not disclose any deliberations or decisions of Cabinet can fall within the exemption.


5.2.2 Background to amendments

1993 Amendments

The Information Commissioner’s decision in Re Fencray/Hudson formed the backdrop for the 1993 amendments. The document in issue in that case was a Cabinet submission, which had already been considered by Cabinet. The respondent agency had made a decision that that submission was exempt under the Cabinet exemption in s 36(1), but had in fact disclosed to the applicant some information which it considered to be merely factual matter within the terms of the then s 36(2). The Information Commissioner identified additional information in the Cabinet submission which in his preliminary opinion contained merely factual matter, and was not eligible for exemption under s 36(1) by virtue of s 36(2). The findings of the Information Commissioner, based partly on the interpretation given at the Commonwealth level and the then guidelines of the Queensland FOI Administrator’s Policy and Procedures Manual, included:

- That debate within Cabinet and the views contributed to debate by individual Ministers are quite properly entitled to secrecy.
- That the document in question had been submitted to Cabinet and was brought into existence for the purpose of submission for consideration by Cabinet and hence contained exempt material under s 36(1)(a).
- That s 36(1)(a) is confined to two kinds of matter: matter which “has been submitted to Cabinet” and matter “proposed by a Minister to be submitted” provided that in either case, it was brought into existence for the purpose of submission for consideration by Cabinet.
- That the words “brought into existence for the purpose of submission” in s 36(1)(a) mean that the purpose of the document’s creation is to be determined at the time it was created. This meant that if the document was created for a different purpose, the fact that it was later decided to submit it to Cabinet does not bring it within s 36(1)(a).
- That in relation to material which has not been submitted to Cabinet the phrase “is proposed by a Minister to be submitted to Cabinet” in s 36(1)(a) means that only matter currently proposed for submission to Cabinet qualifies for exemption. That is, whilst material may initially be exempt under this provision, it may subsequently lose that exempt status upon the Minister abandoning the proposal for its submission to Cabinet.

138 Re Hudson & Department of the Premier, Economic and Trade Development (1993) 1 QAR 123.
139 eg. Re Aldred and Department of Foreign Affairs and Trade (1990) 20 ALD 264.
140 see Queensland Information Commissioner, Third Annual Report 1994-95, p 20.
• The phrase “merely factual matter” in s 36(2) of the FOI Act means matter which provides the factual background, or informs Cabinet of relevant facts, so as to assist in its deliberations. This material can be distinguished from that expressing opinions and recommendations of individual Ministers.

• That once “merely factual matter” has been identified then it must be established whether its disclosure would involve the disclosure of any unpublished deliberation or decision of Cabinet.

• That “deliberation of Cabinet” in s 36 of the FOI Act means consideration and discussion by Cabinet with a view to making a decision. The mere receipt of information which does not call for any debate or consideration does not constitute a deliberation of Cabinet.141

The decision sparked some controversy and contributed to the impetus for amending s 36. Hon DM Wells in the second reading speech of the Freedom of Information Amendment Bill 1993 stated142:

Amendments to section 36 and 37 have become necessary in the light of the recent decision in Fencray v Department of the Premier, Economic and Trade Development where the Information Commissioner significantly narrowed the type of documents which may qualify for the Cabinet exemption. That decision further gave a broad ruling about what may amount to “factual matter” so as to constitute an exception to the Cabinet exemption.

The effect of the 1993 amendments was that matter would be exempt under s 36(1)(a) if the document had been submitted to Cabinet “for its consideration” but that it would not be exempt if the matter was merely statistical, scientific or technical and did not disclose any unpublished decision or deliberation of Cabinet (per s 36(2) as it then was).

1995 Amendments

The Freedom of Information Amendment Bill 1995 was passed during the course of the Information Commissioner’s investigations in the decision of Re Beanland and Department of Justice and Attorney General.143 That case concerned applications for access to budget estimates documents, (which were departmental briefing papers for Ministers) relating to the applicant’s shadow portfolios. The application for access was made prior to the documents being submitted to Cabinet.

141 Re Porter & Department of Community Services & Health (1988) 14 ALD 403.
143 Re Beanland and Department of Justice and Attorney General, Information Commissioner Qld, Decision No. 95026, 14 November 1995, pp 1-26.
The Freedom of Information Amendment Bill 1995 was introduced on 21 March 1995 and passed on 22 March 1995. The 1995 Amendment Act received the Royal Assent and came into force with retrospective operation on the next day, 23 March 1995. In introducing the Bill, Hon Dean Wells stated that the amendments were aimed at making it clear that all matter that is submitted to Cabinet is exempt and intended to “prevent inquiry into what takes place in the Cabinet room”.¹⁴⁴ The aim was to “safeguard absolutely the confidentiality of the Cabinet and Executive Council process”.¹⁴⁵

The 1995 amendments impacted significantly upon the facts of *Re Beanland*. The amendments removed the phrase “for its consideration” from s 36(1)(a) and inserted a definition of “submit” to make it clear that no purposive element was required in s 36(1)(a), thereby leaving open the possibility of the documents being submitted to Cabinet after the application for access was made. The amendments also removed the factual material exception in s 36(2), which in the Information Commissioner’s view would have been relevant to the matter in issue before him.¹⁴⁶

The other key factor in that case was that, despite the fact that the proceedings had been commenced whilst the exemption was in the narrower 1993 terms, the 1995 amendments were expressed to have retrospective effect - applying to all FOI access applications whether they had been made before or after the 1995 amendments came into force. This meant that the decisions for review in *Re Beanland* had to be set aside because under the new provisions, the matter was clearly exempt.¹⁴⁷ The justification for making the legislation retrospective was explained in the following way¹⁴⁸:

*The FOI Act was never intended to provide a vehicle to inquire inside the Cabinet room. The Queensland Government does not accept that this would be a legitimate purpose of freedom of information legislation. The Bill is retrospective because it gives effect to the intent that this Parliament always had, that is, to protect the confidentiality of Cabinet and Executive Council deliberations and decisions and all documents physically submitted to, or prepared in relation to, Cabinet and Executive Council.*

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¹⁴⁶ *Re Beanland*, p 19.
5.2.3 Section 28 Discretion

The Information Commissioner did note however, that it was possible for the agencies in question, despite the exemption, to use their discretion under s 28 to grant access.\textsuperscript{149} That is, whilst there is a legally enforceable right to have access under s 21 of the Act, this is subject to the rest of the Act including the exemptions, so that if a matter is exempt then there is no legally enforceable right to access. However a discretion still exists for the departments to give access to the material under s 28. The Information Commissioner, in another case, noted the Commonwealth government’s policy on this issue. In \textit{Re Norman & Mulgrave Shire Council}\textsuperscript{150} he quoted the Commonwealth FOI Memorandum 19, issued by the Commonwealth Attorney General’s Department on 17 December 1993. It provides inter alia:

\begin{quote}
...that agencies should not refuse access to non contentious material only because there are technical grounds of exemption available under the Act. Proper compliance with the spirit of the FOI Act requires that an agency first determine whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out. For example, the fact that an exemption may be claimed under section 42 (legal professional privilege) should only lead to a claim for exemption where disclosure will cause real harm...
\end{quote}

In Queensland the FOI administrator’s \textit{Freedom of Information Policy and Procedures Manual} provides an example of where the discretion would be appropriate to use. It states that even though green papers are documents that have usually been submitted to Cabinet and therefore technically exempt, they are also usually publicly available for community comment prior to a decision being made in relation to a particular matter. This being so, the Policy Manual provides that “it would be entirely appropriate to find the document prima facie exempt, but use the s 28(1) discretion and provide access to the applicant.”\textsuperscript{151}

5.3 Justification for the Cabinet Exemption

5.3.1 The Cabinet and Collective Responsibility

Cabinet has been described as the crucible of government,\textsuperscript{152} and as the centre of an interlocking system by means of which Parliament, the Executive Council,
government departments, and political parties are brought under unified control.\textsuperscript{153} Comprising all Ministers, it is pivotal in our political system as the principal decision making body of the Government.\textsuperscript{154} Not specifically provided for in our written Constitutions, it exists by convention and the government of the day decides its system of operation.\textsuperscript{155} The long established convention of collective ministerial responsibility and its concomitant cabinet secrecy, are viewed as giving substance to the institution and its formal operation.\textsuperscript{156}

The convention of collective ministerial responsibility has been said to turn on the requirement that Ministers share equal responsibility for decisions and that for this to work, conditions such as unanimity (that is, if a Minister cannot agree publicly with the decisions or actions of Cabinet then he or she must resign) and confidentiality (that is, the deliberations and decisions of Cabinet must remain secret) must be present.\textsuperscript{157} The traditional emphasis on Cabinet secrecy was based on the claim that communications and advice to Ministers and Cabinet discussions must be confidential so that they can be candid and not inhibited by fear of ill-informed or captious public or political criticism.\textsuperscript{158} Arguments about the government’s inability to operate in a ‘goldfish bowl’ and the need for the “efficient and effective”\textsuperscript{159} working of Cabinet prevailed for many years and dominated the High Court’s judgment in the \textit{Northern Land Council} case.\textsuperscript{160} The Court held that it is in the public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and be uninhibited in their decision making and policy development. The majority said\textsuperscript{161}:

\begin{quote}
...the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course. The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by
\end{quote}


\textsuperscript{155} Commission on Government (WA), \textit{Report No. 1}, Commission on Government, Perth, p 111.

\textsuperscript{156} Commission on Government (WA), \textit{Report No. 1}, p 111. See also Hielscher, p 26.

\textsuperscript{157} Legal & Constitutional Committee (Victoria), p 69.

\textsuperscript{158} Fitzgerald Report, p 126. See also, \textit{Conway v Rimmer} [1968] AC 910 at 952, per Lord Reid.


\textsuperscript{161} \textit{Northern Land Council} (1993) 176 CLR 604, p 615.
encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny...

Further, the secrecy of cabinet discussions was viewed as an essential feature of a Westminster style government, in that it was said to promote solidarity and collective responsibility under which all Ministers, irrespective of their individual opinions, are required to support Cabinet decisions in Parliament.162

It is argued that collective responsibility is critical in promoting the coherence of government. The Victorian Legal and Constitutional Committee described the convention as being cardinal for a number of constitutional and political reasons. For example, the convention secures the responsibility of Cabinet to the Parliament and through Parliament to the electorate; it assists in the maintenance of government control of legislation and public spending; it acts as a strong incentive towards the co-ordination of departmental policies and actions; and it conforms with the electorate’s expectations that the government will be united.163

The Queensland Information Commissioner has explained the rationale for the Cabinet matter exemption as facilitating the process of Cabinet deliberation and decision making by providing the optimum conditions for Cabinet to make informed choices according to its judgment of what the public interest requires.164 “Optimum” signifies striking the appropriate balance between the public interests that are served by the appropriate degree of secrecy in the Cabinet process and the public interests that are served by openness, accountability and informed public participation in the processes of government.165

5.3.2 The Scope of Cabinet Confidentiality & FOI - Some Commentary

Given that the philosophical underpinnings of FOI legislation are anchored in democracy by promoting openness, accountability and informed public participation, there is a persuasive argument that the scope of cabinet confidentiality should be restricted to what is necessary to protect the confidentiality of individual minister’s contributions to Cabinet discussions and the deliberative and decision making process itself.166

162 Fitzgerald Report, p 126.
163 Legal & Constitutional Committee (Victoria), pp 70-71.
164 Re Hudson & Department of the Premier, Economic and Trade Development (1993) 1 QAR 123, p 129.
165 Re Hudson & Department of the Premier, Economic and Trade Development (1993) 1 QAR 123, pp 129-130.
Criticisms have arisen about the breadth of the Cabinet exemption and the fact that it engenders a culture of secrecy in the rest of government.\textsuperscript{167} Such a culture it is argued, is antithetical to the democratic objectives of freedom of information legislation. The criticisms have come from many sources including the Information Commissioner, various constitutional committees, and academic commentators.

As early as 1989, the Fitzgerald report in an often cited passage recognised the dangers of excessive Cabinet and executive secrecy. The Fitzgerald report stated\textsuperscript{168}:

\begin{quote}
The ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended...

The involvement of Cabinet in an extended range of detailed decisions in the course of public administration gives principles intended to apply in different circumstances an operation that cannot have been contemplated or intended. Excessive Cabinet secrecy has led to the intrusion of personal and political considerations into the decision-making process by bureaucrats and politicians.
\end{quote}

More recently, the Information Commissioner has been openly critical of the amended s 36\textsuperscript{169} as being too broad and as no longer able to represent an appropriate balance between competing public interests in disclosure and non-disclosure of government information.\textsuperscript{170} He has described the current exemption as being excessive and drawing the net so broadly that it is contrary to the professed democratic objectives of FOI legislation.\textsuperscript{171} The Commissioner has called for a re-thinking of the appropriate boundaries, and degree, of secrecy that is genuinely essential for the proper functioning of the Cabinet/Executive Council process, having regard to the nature of Australian representative democracy, the objects of the FOI Act, and the fact that the executive government holds its power in trust for the benefit of the public.\textsuperscript{172}

\begin{enumerate}
\item[	extsuperscript{167}] eg. Legal & Constitutional Committee (Victoria), p 71.
\item[	extsuperscript{168}] Fitzgerald Report, p 126.
\item[	extsuperscript{169}] And also s 37 which deals with the Executive Council exemption. It is in virtually identical terms to s 36.
\item[	extsuperscript{170}] Queensland Information Commissioner, \textit{Third Annual Report 1994-95}, p 21.
\end{enumerate}
**What should the scope be?**

The Western Australian Commission on Government has noted that, in accordance with the convention of collective ministerial responsibility, there should be a purposive element in determining what documents should be protected by the exemption;\(^{173}\) that is, only those documents which were brought into existence for the purpose of submission to Cabinet should qualify for exemption. The Commission further noted that a purposive element is useful in affording protection against the attachment of a document not designed for Cabinet consideration to a Cabinet submission, in order to gain the benefit of this exemption. The Commission also stated that it is widely accepted that factual, scientific or statistical material should not be afforded protection.\(^{174}\)

The Western Australian Commission received submissions on the issue of cabinet secrecy. Some of these submissions sought to draw a distinction between state and federal Cabinet. Namely, it was pointed out that state cabinets do not generally deal with sensitive issues like defence and national security, the perception being that a large part of cabinet deliberations involve more mundane matters, the revelation of which would not have a detrimental effect on the operation or effective functioning of government but would in fact enhance it.\(^{175}\) The Commission noted that in keeping with the convention of collective ministerial responsibility, it is appropriate to make a distinction between deliberations and final decisions with only the former being protected. It recommended that the public should generally be entitled to prompt access to Cabinet decisions and that the Cabinet decisions register model was the most suitable means of achieving this object.\(^{176}\) The Commission recognised that confidentiality should be afforded to Cabinet deliberations to preserve collective ministerial responsibility, but emphasised that the convention was a questionable accountability mechanism because it holds the potential to justify concealment of misconduct.\(^{177}\)

Academic criticism has highlighted the paradoxical position left open by the lack of a public interest test in the cabinet exemption.\(^{178}\) That is, defining a class of documents that will not be disclosed irrespective of the contents of those documents, neglects any public interest to be served through enforcement of the right of access and fails to take into account whether any damage will occur from

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\(^{173}\) Commission on Government (WA), *Report No. 1*, p 137.

\(^{174}\) Commission on Government (WA), *Report No. 1*, p 137.

\(^{175}\) Commission on Government (WA), *Report No. 1*, pp 113-114.

\(^{176}\) Commission on Government (WA), *Report No. 1*, p 142.

\(^{177}\) Commission on Government (WA), *Report No. 1*, p 158.

disclosure, and as such is somewhat at odds with the democratic aims of FOI legislation.\textsuperscript{179} As Cossins in reflecting upon the Commonwealth position states\textsuperscript{180}:

\begin{quote}
The Commonwealth has in essence retained its power over regulating the disclosure of such high-level official information and hence the power which accrues from secrecy. The absence of a public interest test under exemptions which protect such high-level documents prevents judicial scrutiny, not only of violations of an applicant’s right to be informed of the affairs and decision-making processes of government, but also of whether government agencies have tried to circumvent that public interest by refusing to disclose documents. Hence the absence of the test prevents an assessment of any violation to the democratic process sought to be protected or maintained.
\end{quote}

Recent Reform Attempts

This issue of circumventing the public interest was touched on in the recent Queensland Freedom of Information Amendment Bill 1998. Introduced by the Hon Peter Beattie as a Private Member’s bill on 4 March 1998, it was not debated and lapsed after the last parliament ended\textsuperscript{181}. The specific objectives of the Bill were outlined in the explanatory notes as ensuring\textsuperscript{182}:

\begin{itemize}
\item ...that the Cabinet exemption from FOI access applies only for proper Cabinet purposes and not for the improper purpose of merely evading FOI access;
\item ...that ministerial expenses documents do not attract the Cabinet exemption from FOI access.
\end{itemize}

The spirit of the Bill in attempting to counter the potential for abuse in s 36 was welcomed by the Information Commissioner in his 6\textsuperscript{th} Annual Report. However the Commissioner expressed concern over the practicality of a provision which in effect required a decision maker to judge whether matter was submitted to Cabinet for a legitimate purpose\textsuperscript{183}.

5.4 Cabinet Exemptions in Other Jurisdictions

Every Australian jurisdiction which has FOI legislation, contains a Cabinet exemption. The Commonwealth and other state’s provisions are included in the


\textsuperscript{180} Cossins, p 258.


\textsuperscript{183} Queensland Information Commissioner, 6\textsuperscript{th} Annual Report 1997/98, Brisbane, 1998, p 18.
appendix to this paper. Although there are subtle differences in each, a few general observations can be made. All jurisdictions, except Queensland, have some purposive element in terms of specifying the reason for which the documents submitted to Cabinet were created. All jurisdictions, bar Queensland, have a “factual/statistical material” exception. Most jurisdictions (not the ACT, Cth or Qld) have a sunset clause; that is, a clause which specifies that the exemption will only apply to documents for a certain time, usually 10 to 20 years.184 Most jurisdictions, including Queensland (but not SA, WA, or NSW) have a “conclusive certificate” provision. Generally, where such a certificate is issued it limits the reviewing body’s power to determining whether there are reasonable grounds for the claim that the documents are exempt (as opposed to a full merits review).185 The conclusive certificates are a way of maintaining control over sensitive documents by ensuring that the final decision on disclosure is made at the highest levels of government.186

5.5 OVERSEAS JURISDICTIONS

In Britain, the Blair government’s proposals for Freedom of Information were published on the 11 December 1997 in the White Paper Your Right to Know.187 The proposed FOI scheme has been described as a “pro-disclosure regime that incorporates the best features of FOI legislation from jurisdictions such as Canada, USA, New Zealand and Australia”.188 As yet the legislation has not been brought forward.189

One of the radical differences between Australian FOI legislation and the proposed UK scheme is in relation to the exemptions. The proposed UK scheme does not have any traditional categorical exemptions such as the Cabinet document

184 NB: in NSW the sunset clause does not apply to documents which came into existence before the commencement of the Act - see Schedule 1.
185 See for example, Freedom of Information Act 1992 (Qld), s 84.
186 Commission on Government (WA), Report No. 1, p 137.
189 However, there is mention of a draft Bill being published in May. See BBC News, ‘UK Politics Information Bill Set for May’, available: <http://news.bbc.co.uk/hi/english/uk%5Fpolitics/newsid%5F295000/295856.stm>, 12 March 1999.
exemption, but rather limits on disclosure are framed in terms of contents and whether “substantial harm” would result from the disclosure.\[190\]

Similarly in New Zealand, there are no categorical exemptions such as the cabinet exemption. Rather, the Official Information Act 1982 (NZ) relies on a “contents” approach. The Act contains a “principle of availability” which means that unless the Act specifies otherwise, information shall be made available unless there is “good reason for withholding it” (s 5). In determining whether there is a good reason for withholding information, the Act sets out a number of criteria, such as the likely prejudicing of the defence of New Zealand (s 6(a)); or if disclosure is not outweighed by public interest considerations, the need to protect the privacy of natural persons (s 9(2)).

This represents quite a conceptual shift from the Australian position. The New Zealand alternative focuses on the question of “what are the consequences of revealing this particular Cabinet information” as opposed to the Australian position which is a blanket approach of “this is a Cabinet document and therefore it must be exempt”.\[191\]

6. CONCLUSION

Freedom of information legislation was an important development in Australian administrative law. Viewed as a major step forward for effective participation and government accountability, its democratic underpinnings were hailed as a significant reform for Queensland. The Act however faces a difficult task of balancing the public interest in favour of disclosure against the public interest in confidentiality of some material, and has been criticised as failing to strike the appropriate balance. Much of this criticism that the FOI Act has failed to achieve its professed democratic objects, is tied to the broadness of the non-application and exemption provisions and their interpretation.\[192\]

This paper has outlined some of the difficulties raised by government owned corporations, contractors, and the cabinet exemption. In relation to GOCs and contractors, the ARC/ALRC reports have highlighted the desirability of some form of FOI applying to these bodies. In relation to Cabinet matter, the question has become not so much whether some degree of secrecy and protection from disclosure is justified for the proper functioning of Cabinet, but where the

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\[192\] See for example, Bill De Maria, ‘Revealing State Secrets’, Courier Mail, 12 April 1999, p 13.
boundaries of that protection from disclosure should lie. Interstate and overseas examples would indicate that Queensland’s Cabinet exemption, as currently framed, is in extremely broad terms.
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APPENDIX A - REFERRAL TO LCARC BY PARLIAMENT
ON THE MOTION OF THE MINISTER


FREEDOM OF INFORMATION
Referral to Legal, Constitutional and Administrative Review Committee

Hon. M. J. FOLEY (Yeronga—ALP) (Attorney-General and Minister for Justice and Minister for The Arts) (9.34 a.m.):

I move—

“That having regard to:

(a) the basic purposes of, and benefits intended to be conferred by the provisions of the Freedom of Information Act 1992, (the FOI Act) as identified in:

(i) the Electoral and Administrative Review Committee Report on Freedom of Information;

(ii) the Report of the Parliamentary Committee for Electoral and Administrative Review on Freedom of Information for Queensland; and

(iii) sections 4, 5 and 6 of part 1 division 2 of the FOI Act;

(b) the principles and provisions of the various Commonwealth, State and Territory Freedom of Information Acts;

(c) the philosophical and political foundations of the concept of freedom of information as identified in the report of the Senate Standing Committee on Constitutional and Legal Affairs on Freedom of Information (1979); and

(d) current and emerging technology for information management and maintenance, the following matters be referred to the Legal, Constitutional and Administrative Review Committee for inquiry and report:

(e) whether the basic purposes and principles of the freedom of information legislation in Queensland as set out above have been satisfied, and whether they now require modification.

(f) whether the FOI Act should be amended, and in particular:

(i) whether the objects clauses should be amended;

(ii) whether, and to what extent, the exemption provisions in Part 3 Division 2 should be amended;

(iii) whether the ambit of the application of the Act, both generally and by operation of Section 11 and Section 11A, should be narrowed or extended;

(iv) whether the FOI Act allows appropriate access to information in electronic and non-paper formats;
(v) whether the mechanisms set out in the Act for internal and external review are effective, and in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time-consuming;

(vi) the appropriateness of, and the need for, the existing regime of fees and charges in respect of both access to documents and internal and external review;

(vii) whether amendments should be made to minimise the resource implications for agencies subject to the FOI Act in order to protect the public interest in proper and efficient government administration, and in particular: whether Section 28 provides an appropriate balance between the interests of applicants and agencies; whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purpose; whether time limits are appropriate.

(viii) whether amendments should be made to either Section 42(1) or Section 44(1) of the Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the use(s) likely to be made of the information;

(ix) whether amendments should be made to the Act to allow disclosure of material on conditions in the public interest (for example, to a legal representative who is prohibited from disclosing it to the applicant);

(c) any related matter.

Motion agreed to.
APPENDIX B - QUEENSLAND CABINET EXEMPTIONS

Freedom of Information Act 1992 (Qld) [Current]

Division 2—Exempt matter

Cabinet matter

36. (1) Matter is exempt matter if—

(a) it has been submitted to Cabinet; or

(b) it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or

(c) it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter—

(i) submitted to Cabinet; or

(ii) that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister; or

(d) it is, or forms part of, an official record of Cabinet; or

(e) its disclosure would involve the disclosure of any consideration of Cabinet or could otherwise prejudice the confidentiality of Cabinet considerations or operations; or

(f) it is a draft of matter mentioned in paragraphs (a) to (e); or

(g) it is a copy of or extract from, or part of a copy of or extract from, matter mentioned in paragraphs (a) to (f).

(2) Subsection (1) does not apply to matter officially published by decision of Cabinet.

(3) A certificate signed by the Minister stating that specified matter would, if it existed, be exempt matter mentioned in subsection (1), but not matter mentioned in subsection (2), establishes, subject to part 5, that, if the matter exists, it is exempt matter under this section.

(4) In this section—

“Cabinet” includes a Cabinet committee or subcommittee.

“chief executive” means a chief executive of a unit of the public sector.

“consideration” includes—

(a) discussion, deliberation, noting (with or without discussion) or decision; and

(b) consideration for any purpose, including, for example, for information or to make a decision.

“draft” includes a preliminary or working draft.

“official record”, of Cabinet, includes an official record of matters submitted to Cabinet.

“submit” matter to Cabinet includes bring the matter to Cabinet, irrespective of the purpose of submitting the matter to Cabinet, the nature of the matter or the way in which Cabinet deals with the matter.

1 Part 5 deals with the external review of decisions.
Freedom of Information Act 1992 (Qld) [After the 1993 Amendments but before the 1995 Amendments]

Section 36

36. (1) Matter is exempt matter if—

(a) it has been submitted to Cabinet for its consideration; or

(b) it was prepared for submission to Cabinet for its consideration and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet for its consideration; or

(c) it was prepared for briefing a Minister about an issue proposed, or that has at any time been proposed, to be considered by Cabinet; or

(d) it forms part of an official record of Cabinet; or

(e) it is a draft of matter mentioned in paragraph (a), (b), (c) or (d); or

(f) it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a), (b), (c) or (d); or

(g) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet;

(2) Matter is not exempt under subsection (1) if it is merely statistical, scientific or technical matter unless—

(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and

(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.

(3) For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to part 5, that it is exempt matter.

(4) In this section—

“Cabinet” includes a Cabinet committee.

“matter” includes matter that was prepared before the commencement of the Freedom of Information Amendment Act 1993.
Freedom of Information Act 1992 (Qld) [Original]

36. (1) Matter is exempt matter if—

(a) it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or

(b) it forms part of an official record of Cabinet; or

(c) it is a draft of matter mentioned in paragraph (a) or (b); or

(d) it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a) or (b); or

(e) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.

(2) Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless—

(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and

(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.

(3) For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to part 5, that it is exempt matter.

(4) In this section—

“Cabinet” includes a Cabinet committee.
APPENDIX C - COMMONWEALTH CABINET EXEMPTIONS

Freedom Of Information Act 1982 (Cwth)

Section 34

Cabinet documents

(1) A document is an exempt document if it is:

(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;

(b) an official record of the Cabinet;

(c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(1A) This section does not apply to a document (in this subsection referred to as a "relevant document") that is referred to in paragraph (1)(a), or that is referred to in paragraph (1)(b) or (c) and is a copy of, or of part of, or contains an extract from, a document that is referred to in paragraph (1)(a), to the extent that the relevant document contains purely factual material unless:

(a) the disclosure under this Act of that document would involve the disclosure of any deliberation or decision of the Cabinet; and

(b) the fact of that deliberation or decision has not been officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document:

(a) is one of a kind referred to in a paragraph of subsection (1); and

(b) is not a document containing purely factual material that is excluded from the application of this section under subsection (1A);

establishes conclusively, subject to the operation of Part VI, that it:

(c) is an exempt document of that kind; and

(d) is not a document containing such material.

(3) Where a document is a document referred to in paragraph (1) (c) or (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under subsection (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document as described in a request would, if it existed:

(a) be one of a kind referred to in a paragraph of subsection (1); and
(b) not be a document containing purely factual material that is excluded from the application of this section under subsection (1A);

establishes conclusively, subject to the operation of Part VI, that, if such a document exists, it:

c) is an exempt document of that kind; and

d) is not a document containing such material.

(5) Where a certificate in accordance with subsection (4) has been signed in respect of a document as described in a request, the decision on the request may be a decision that access to a document as described in the request is refused on the ground that, if such a document existed, it would be an exempt document referred to in the paragraph of subsection (1) that is specified in the certificate.

(6) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.
APPENDIX D - AUSTRALIAN CAPITAL TERRITORY CABINET EXEMPTIONS

Freedom Of Information Ordinance 1989 (ACT) - Sect 35

Executive documents

35. (1) A document is an exempt document if it is-

(a) a document that has been submitted to the Executive for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Executive;

(b) an official record of the Executive;

(c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Executive, other than a document by which a decision of the Executive was officially published.

(2) This section does not apply to a document (in this subsection called a "relevant document")-

(a) that is referred to in paragraph (1) (a); or

(b) that is referred to in paragraph (1) (b) or (c) and is a copy of, or of part of, or contains an extract from, a document that is referred to in paragraph (1) (a); to the extent that the relevant document contains purely factual material unless-

(c) the disclosure under this Act of that document would involve the disclosure of any deliberation or decision of the Executive; and

(d) the fact of that deliberation or decision has not been officially published.

(3) For the purposes of this Act, a certificate signed by the Chief Executive who has control of the administrative unit to which responsibility for the co-ordination of government administration is allocated under section 14 of the Public Sector Management Act 1994 certifying that a document is of a kind referred to in a paragraph of subsection (1) establishes conclusively, subject to Part VII, that it is an exempt document of that kind.

(4) Where a document is a document referred to in paragraph (1) (c) or (d) only because of matter contained in a particular part of the document, a certificate under subsection (3) in respect of the document shall identify that part of the document as containing that matter.

(5) For the purposes of this Act, a certificate signed by the Chief Executive who has control of the administrative unit to which responsibility for the co-ordination of government administration is allocated under section 14 of the Public Sector Management Act 1994 certifying that a document as described in a request would, if it existed, be of a kind referred to in a paragraph of subsection (1) establishes conclusively, subject to Part VII, that, if such a document exists, it is an exempt document of that kind.

(6) Where a certificate under subsection (5) has been signed in respect of a document as described in a request, the decision on the request may be a decision that access to a document as described in the request is refused on the ground that, if such a document existed, it would be an exempt document referred to in the paragraph of subsection (1) that is specified in the certificate.

(7) A reference in this section to the Executive includes a reference to a Committee of the Executive.
APPENDIX E - NEW SOUTH WALES CABINET EXEMPTIONS

Freedom Of Information Act 1989 (NSW) - Schedule 1

(Section 6 (1))

Part 1 Restricted documents

1 Cabinet documents

(1) A document is an exempt document:

(a) if it is a document that has been prepared for submission to Cabinet (whether or not it has been so submitted), or

(b) if it is a preliminary draft of a document referred to in paragraph (a), or

(c) if it is a document that is a copy of or of part of, or contains an extract from, a document referred to in paragraph (a) or (b), or

(d) if it is an official record of Cabinet, or

(e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

(2) A document is not an exempt document by virtue of this clause:

(a) if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet, or

(b) if 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Subclause (2) (b) does not apply to a document that came into existence before the commencement of this clause.

(4) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.
APPENDIX F - SOUTH AUSTRALIA CABINET EXEMPTIONS

Freedom Of Information Act 1991 (SA) - Schedule 1

Exempt Documents

Part 1

RESTRICTED DOCUMENTS Cabinet documents 1.

(1) A document is an exempt document-
   (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or
   (b) if it is a preliminary draft of a document referred to in paragraph (a); or
   (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
   (d) if it is an official record of Cabinet; or
   (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
   (f) if it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

(2) A document is not an exempt document by virtue of this clause-
   (a) if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet; or 20 years have passed since the end of the calendar year in which the document came into existence.

(3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.
APPENDIX G - TASMANIA CABINET EXEMPTIONS

Freedom of Information Act 1991 (Tas)
PART 3 - EXEMPT INFORMATION

Cabinet information

24. (1) Information is exempt information if it is contained in -

(a) the official record of a deliberation or decision of the Cabinet; or

(b) a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration provided that the Minister has contributed to the origin, subject or contents of that record; or

(c) a record that is a copy of, or a copy of part of, a record referred to in paragraph (a) or (b); or

(d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.

(2) Subsection (1) ceases to apply in respect of information incorporated in a record after the commencement of this Act 10 years after its incorporation.

(3) For the purpose of this Act, a certificate signed by the Secretary of the responsible Department in relation to the Constitution Act 1934 certifying that a record is one of a kind referred to in subsection (1) establishes that fact conclusively.

(4) Subsection (1) does not include information solely because it is contained in a record that -

(a) was submitted to the Cabinet for consideration; or

(b) is proposed by a Minister to be submitted to the Cabinet for consideration - if the record was not brought into existence for submission to the Cabinet for consideration.

(5) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the Cabinet which has not been officially published.

(6) The Ombudsman has no power under section 48 to require that information contained in a record referred to in subsection (3) should be provided and shall be limited to determining whether a document has been correctly classified as an exempt document within the meaning of subsection (1).

(7) Where the Ombudsman, on a review under section 48, decides that the public interest requires that the information shall be provided, the Ombudsman shall prepare a report on the application for the information and the refusal to supply it, and the Ombudsman's review of the decision, and present it to both Houses of Parliament.

(8) In this section "the Cabinet" includes a committee of the Cabinet.
APPENDIX H - VICTORIA CABINET EXEMPTIONS

Freedom of Information Act 1982 (Vic)
Act No 9859/1982

Part IV—Exempt Documents

28. Cabinet Documents

(1) A document is an exempt document if it is—

(a) the official record of any deliberation or decision of the Cabinet;

(b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet or a document which has been considered by the Cabinet and which is related to issues that are or have been before the Cabinet;

(ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;

(c) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.

(3) Sub-section (1) does not apply to a document referred to in a paragraph of that sub-section to the extent that the document contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.

(4) For the purposes of this Act, a certificate signed by the Secretary to the Department of Premier and Cabinet certifying that a document as described in a request would, if it existed, be one of a kind referred to in a specified paragraph of sub-section (1), establishes that, if such a document exists, it is an exempt document.

(5) The Ombudsman may not conduct an investigation in respect of a certificate under sub-section (4) or a question whether a document is of a kind referred to in sub-section (1) or a decision to sign such a certificate.

(6) Nothing in Part V applies to a document to which a certificate under sub-section (4) applies.

(7) In this section—

(a) “Cabinet” includes a committee or subcommittee of Cabinet;

(b) a reference to a document includes a reference to a document whether created before or after the commencement of section 12 of the Freedom of Information (Amendment) Act 1993.
APPENDIX I - WESTERN AUSTRALIA CABINET EXEMPTIONS

Freedom of Information Act 1992 (WA) SCHEDULE 1

EXEMPT MATTER

1. Cabinet and Executive Council

Exemptions

(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it --

(a) is an agenda, minute or other record of the deliberations or decisions of an Executive body;

(b) contains policy options or recommendations prepared for possible submission to an Executive body;

(c) is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy where the decision is of a kind generally made by an Executive body or the policy is of a kind generally endorsed by an Executive body;

(d) was prepared to brief a Minister in relation to matters --

(i) prepared for possible submission to an Executive body; or

(ii) the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body;

(e) is a draft of a proposed enactment; or

(f) is an extract from or a copy of, or of part of, matter referred to in any of paragraphs (a) to (e).

Limits on exemptions

(2) Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless --

(a) its disclosure would reveal any deliberation or decision of an Executive body; and

(b) the fact of that deliberation or decision has not been officially published.

(3) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1) (f), the original matter, came into existence before the commencement of section 10 and at least 15 years have elapsed since it or the original matter (as the case may be) came into existence.

(4) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1) (f), the original matter, came into existence after the commencement of section 10 and at least 10 years have elapsed since it or the original matter (as the case may be) came into existence.

(5) Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.
Definition

(6) In this clause "Executive body" means --
    (a) Cabinet;
    (b) a committee of Cabinet;
    (c) a subcommittee of a committee of Cabinet; or
    (d) Executive Council.