Freedom of Information Act reform

The South Australian Government has reviewed the state's current FOI laws and is proposing to update them in line with legislative developments interstate and changes in technology.

The draft Freedom of Information (Miscellaneous) Amendment Bill 2019 will amend the current FOI Act, while maintaining the balance between enhanced transparency and accountability and the logistics of administering the legislation.

What are the changes?

The draft Bill seeks to strengthen the objectives of the Act – namely, enhanced transparency and open government.

Updates to the Act aim to better reflect electronic communications and information management and storage – including establishing limits around what an agency is expected to do in producing a document from data stored electronically.

It will also create an offence for improperly directing or influencing a decision or determination made under the Act.

Legislating current requirements

The draft Bill will give legislative backing to a number of FOI requirements currently operating through government policies, namely:

- Proactive disclosure requirements – these are currently outlined in the Premier's Circular PC035 'Proactive disclosure of regularly requested information' and include things like credit card statements, travel expenditure and gift registers that must be published regularly on agency websites.
- Disclosure logs – this is currently outlined in the Premier's Circular PC 045 'Disclosure logs for non-personal information released through FOI' and requires an agency to make available a list of previous FOI requests and determinations that may be of interest to other members of the public.

Stronger Ombudsman powers

These reforms will increase the Ombudsman's powers as external reviewer. Under the proposed changes, the Ombudsman will have stronger powers to obtain documents. It will also allow the Ombudsman to send deemed refusals or inadequate determinations back to the agency for consideration after an external review.

There is also a new provision requiring an agency to explain to the Ombudsman in an external review what searches were undertaken to locate documents, and to then be directed to conduct further searches.

The Ombudsman can also declare an applicant vexatious and refuse to continue dealing with the application (or a further application) by the person – but they must first give the person an opportunity to make written or oral submissions.

The refusal to conduct an internal review because the request was lodged out of time is also proposed to be a reviewable decision.

Changes are also proposed to the external review process to streamline reviews by SACAT:

- External review applications must first be made to the Ombudsman, and only then to SACAT with permission.
- External review by SACAT will only be on issues relating to the application of exemptions.
- Agencies will no longer be limited to reviews on errors of law.
- The Ombudsman will be entitled to make written submissions to SACAT on review.

Setting clearer limits around 'unreasonable requests'

The draft Bill sets clearer limits around 'unreasonable requests' for access to documents:

- When deciding whether an application would unreasonably divert an agency's resources, the agency can consider two or more related applications as one application.
- Applications for all of an agency's documents received or produced during a specified period - without including any other information about the nature of the documents sought - will be deemed invalid on the basis that the application does not sufficiently identify the documents.
- An agency may refuse to deal with an application if the document requested has been the subject of a subpoena (or other court order) and is available to the applicant as a result of being produced in compliance with that request.
- An agency may refuse to continue dealing with an application if they have already finalised a previous application for the documents concerned (or for documents that contain the same information) made by the applicant and there are no reasonable grounds for believing the agency would make a different decision
- An agency may refuse to deal with an application if they determine more than 40 hours of work will be entailed (and this would substantially and unreasonably divert the agency's resources) or refuse to continue to deal with an application after spending a total of 40 hours dealing with the application.

Increasing time limits

The current time limit of 30 days has meant a high number of applications have been refused, because it is not feasible to resolve them within this timeframe. These reforms will increase the time agencies have to deal with an application from **30 days to 45 days**.

The time limit to conduct an internal review would be increased from 14 calendar days to 20 calendar days. As well, agencies would be able to extend the time limit by up to 14 days (or longer by agreement with the applicant) when:

- consultation with third parties is required
- the application is a second or subsequent related internal review application by the same person
- the internal review determines documents cannot be found or do not exist and the reviewer believes additional searches are required.

The time limit to make an internal review application would only start running from the time a notice of deemed refusal has been provided.

Refusing access to documents and exemptions

The draft Bill further clarifies the circumstances where an agency can refuse access to documents.

An agency can refuse access if:

- a document is published on the internet or otherwise publicly available
- documents cannot be found or do not exist – but this is subject to review.

The draft Bill proposes to exempt:

- Information and correspondence prepared by agencies for the purposes of an audit by the Auditor-General.
- Documents containing information about the location of threatened or endangered flora or fauna, or other rare items of cultural or scientific importance as this could endanger their safety.

The Bill also proposes to exempt the Office of Parliamentary Counsel in relation to documents it holds that are subject to legal professional privilege.

Applications

The draft Bill clarifies that an application is taken to apply to documents that are in existence as at the day of the application. It will also legislate that agencies must promptly acknowledge their receipt of an FOI application (including for an internal review) and inform the applicant of their relevant review rights and timelines.

When an applicant needs to amend their application, the Bill also clarifies that the 'clock stops' (ie time that does not count towards the legislated timeframe to assess applications) during this time. Agencies can refuse to deal with applications after a reasonable period of time has elapsed without the application being satisfactorily amended. It also addresses the need for applicants to provide proof of identity and authorisation to act as an agent for another person when requesting personal information.

Determinations

Currently, FOI determinations must include the name or the person making the determination. Due to concerns with personal safety, the Bill proposes changing this to only require the position title or designation and listing the contact details for the agency in case of follow-up questions.

The draft Bill will also legislate that FOI determinations must identify the documents held by the agency that are within the scope of the application. It is also clarified that a copy of a document can be provided that deletes information that is irrelevant to the information requested to facilitate access to the requested information.

Fees and charges

Agencies may charge a fee for retrieval and redacting of documents (including de-identifying CCTV and similar footage) as well as for finding, sorting, compiling and copying documents. If agencies exceed the statutory time limit, they will not be allowed to charge processing fees and any charges already paid by the applicant must be refunded. The Bill also clarifies that a decision to require payment of a deposit to process an application is reviewable, and that this information be provided to the applicant.

Consultation provisions

For documents including personal information, consultation provisions will be amended to provide:

- The requirements to give notice and defer giving access does not apply where the agency has taken reasonable steps to obtain the views of the person concerned but has been unable to locate the person
- If the person being consulted is under a minimum age, the consultation may be sent to a parent or guardian instead
- In relation to giving access to the applicant's registered medical practitioner, the agency must have a 'reasonable expectation' that disclosing this information will have an adverse effect, rather than simply 'be of this opinion'.

As the FOI Act also applies to local government, the draft Bill proposes that local government authorities take reasonable steps to consult with State Government where documents might affect them. The requirement to consult in regard to documents affecting 'intergovernmental' relationship is extended to include the relationship between the State Government and the governments of other countries.

Documents of defunct agencies

The draft Bill amends current provisions dealing with documents of defunct agencies to:

- Extend to the situation where an agency has not become defunct, but some of its functions have moved to another agency – in this situation, the responsibility for determining the application lies with the agency that has possession of the relevant documents
- Address an existing gap in relation to documents of now-defunct agencies that were exempt agencies – in this situation, an agency that holds the documents of the defunct agency (eg a former royal commission) is considered an exempt agency in relation to those documents.

Greater flexibility in staff

The proposed changes will provide greater flexibility around who can deal with certain FOI applications.

For FOI applications relating to amending records, the Bill removes current seniority requirements. It also provides for FOI officers in larger departments to undertake the role on behalf of smaller agencies and attached offices.

Clarifying definitions

The draft Bill will update inconsistent definitions and outdated terminology throughout the FOI Act, as well as:

- Clarify the definition of a document (for the purposes of the FOI Act) applies only to documents made or received by an agency in the conduct of their functions or business. This is based on the definition of 'official record' in the *State Records Act 1997*.
- Replace the term 'personal affairs' with 'personal information' to bring the FOI Act in line with the SA Information Privacy Principles.
- Remove certain subcategories of document exemptions as they are already covered in other Schedules.