

The Freedom Of Informationg Act

Mingge Lu

Bond University, Australia

ABSTRACT

Freedom or access to information is a cornerstone of any democratic and responsible government. The logic behind allowing citizens to have access to information is to ensure transparency, accountability and upholding the principles of representative democracy. While the Freedom of Information Act 1982 (Cth) ("1982 Act"), and subsequent amendments made thereto, are a great leap forward to achieve these objectives, it is submitted that there is a lot of room for improvement. That is to say it can be considered as a means to an end but not an end in itself. These submissions, rather recommendations, are provided under the discussion of each Terms of Reference (TORs) provided by the Australian Senate with reference to the subject above.

KEYWORDS

definition; amend; Access to Information; the appeal process

1 LEGAL IMPACT OF STATUTORY OBJECTIVES IN THE 1982 ACT

The objectives of the 1982 Act are enlisted under Section 3 thereof. At the cursory look they seem to be pragmatic and impose positive obligations on the public functionaries to make information easily and promptly accessible. However, these objectives need to be examined in light of the exemptions provided under Division 2 of Part IV (Exempt Documents) and Division 3 of Part IV (Conditionally Exempt Documents) of the 1982 Act which set out exceptions to the general right to information. While there are solid grounds to provide the said exceptions, it is submitted that they still provide the government with quite a bit of leeway to pick and choose which information to share or not.

For instance, Section 33 of the 1982 Act exempts disclosing information on matters of "national security" but it fails to elaborate on the question as to what will amount to a matter of national security? It cannot be in government's sole discretion to judge and address this question. This issue is especially pertinent in the context of immigration cases. It is correct that one can always approach courts to interpret the question whether denial of access is indeed a matter of national security, however, this tedious and costly remedy defeats the 1982 Act's own objectives. And the same has been acknowledged by the High Court which has held that it is the court and not the government who decides whether there will be immunity from disclosure.¹

SUBMISSION 1: There should be a clear and detailed definition and guidelines with regards to what will count as a matter of national security. Furthermore, other exempted and conditionally exempted documents also need to be elaborated upon to make the 1982 Act more transparent and in line with the objectives thereof.

¹ Sankey v Whitlam (1978) 142 CLR 1

2 ADEQUACY OF STATUTORY OBLIGATIONS UNDER THE 1982 ACT

The discussion on this TOR requires a reference to Section 11 of the 1982 Act which states that every person has a legally enforceable right to access documents of agency (defined under Section 4 of 1982 Act as government department, body or corporation) and official documents of Minister, except for the exempt documents. While exemptions have already been addressed above, it is noteworthy to mention here that the said statutory obligations are only to the extent of access or information sought and, thus, not really obligations per se. Meaning thereby that these obligations are reactive and not proactive in nature. Consequently, the obligations are only applicable in response to a request for information.

While this may be in line with international practice, it is submitted that Australia can lead by example here by making the obligations under the 1982 Act proactive in nature. In this regard, it is submitted that the Office of Australian Information Commissioner (OAIC) can play a great role. As opposed to waiting for an application for access to a document, such documents, if financially and technically viable, can be uploaded on the relevant entity's for general public to access. This will be a true access to information. It is, however, acknowledged that this may not be a practical approach in relation to all documents. And when compared with New Zealand, Australia is already more forthcoming and allows easy access to information.² Nonetheless, it will be a start and a step towards the right direction.

SUBMISSION 2: The 1982 Act needs to be amended, and OAIC needs, to take a proactive approach. In context of new laws, there should be a statement by the public entity in the preamble of its primary or secondary legislation to the effect that the information in relation to the said legislation, body or department, as the case may be, will be accessible through its website to general public. Similarly, the website of the OAIC should contain a log of website addresses of all the 'agencies', to the extent it is practical and possible to do so, which will directly take the visitor to the page of the said agency containing all the relevant documents.

3 ADEQUACY OF THE NAME OF THE 1982 ACT

Freedom of Information may be a misleading term to a lay person. The word "freedom" bears the connotation such as right. One may say that this name empowers the general public with the right to have information. This could be compared with freedom to profess religion, freedom of speech, freedom or right to access to justice, which are globally recognized as fundamental rights.³ However, as we have observed above, that is not entirely the case in light of the exceptions provided under the 1982 Act. Therefore, it is submitted that the name of the 1982 Act is misleading and, hence, not adequate.

SUBMISSION 3: It is submitted that the name of the 1982 Act should be changed to "Access to Information" Act instead. This will be more apt and easier for a lay person to understand. Moreover, the recommended name will be in line with the language of the 1982 Act as Section 11 provides a right to access, as opposed to right to a freedom of information, to agency and Minister's documents. Thus, it is submitted that the name of the 1982 Act be reconsidered in light of this submission.

2 Snell, R. (2000). The Kiwi Paradox—A Comparison of Freedom of Information in Australia and New Zealand. *Federal Law Review*, 28(3), 575-616. <<http://www.ricksnell.com.au/Articles/snell%20kiwi.pdf>> accessed on 28 June 2023

3 United Nation. *Universal Declaration of Human Rights*. <<https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Everyone%20has%20the%20right%20to%20freedom%20of%20thought%2C%20conscience%20and,%2C%20practice%2C%20worship%20and%20observance.>> accessed on 28 June 2023

4 DELAYS, IF ANY, IN THE REVIEW OF FOI APPEALS

This is an important TOR because just in the case of justice, which needs to be swift, the FOI appeals process needs to be quick as well. While the review and appeals mechanism provided under the 1982 Act needs to be appreciated for its comprehensiveness, the process itself needs to be quick and accessible as well. It is submitted that while there is a limitation of 28 days for filing of an appeal to the Federal Court of Australia there is no time limit on how long should it be before a decision is passed the Federal Court. This could be an issue where the information sought is of urgent nature. This can be seen by case law examples as well.⁴

SUBMISSION 4: It is submitted that the appeal process be made subject to a maximum duration within which the Federal Court should give its decision. This will address the delays issue with regards to review of appeals. It is recommended that the 1982 Act be amended to provide a time frame of maximum 180 days for the decision of an appeal before the Federal Court.

5 STATUTORY TIME FRAME FOR COMPLETION OF FOI REVIEWS

It is very important to provide a definite time period for review process. Currently, while there is a time frame provided vis-à-vis acknowledgment of receipt of request as 14 days and response to the said request within 30 days, under Section 15(5) of the 1982 Act, there is no time frame for the review of such decision. To the contrary, the Government of Australia's recommendations to the Attorney General has recommended, in its Recommendation 7, to even amend Section 54T which empowers a person to apply to OAIC for extension of time to file review.⁵ It is respectfully submitted that this is against the objectives and true spirit of the 1982 Act.

SUBMISSION 5: In light of the above, it is submitted that there should be a definite time frame for the review process provided under the 1982 Act. This will not only make the entire review process efficient but will at the same time give credibility to the same and provide the parties with confidence in the system. It is recommended that the 1982 Act be amended and a time frame of maximum 60 days be provided under the same for an efficient review process.

4 *Ali v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 453

5 Hawke, A. (2013). Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010. <<https://apo.org.au/sites/default/files/resource-files/2013-08/apo-nid35120.pdf>> accessed on 28 June 2023