23 January 2020

The Hon Vickie Chapman
Attorney-General
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By email: LLPSubmissions@agd.sa.gov.au

Dear Ms Attorney

Draft Freedom of Information (Miscellaneous) Amendment Bill 2019


2. The Society is pleased to have the opportunity to consider the Draft Bill and understands the amendments are intended to ensure the legislation is able to keep pace with changes in technology and other legislative developments interstate.

3. The Society considers many of the proposed reforms are appropriate and will serve to achieve the objectives of the Freedom of Information Act 1991 (SA) (“the FOI Act”), in particular to promote openness and accountability in Government. The reforms regarding cabinet and executive council document exemptions, the Ombudsman’s powers to review refusals and the extension of statutory timeframes are welcomed by the Society.

4. Set out below are specific amendments which the Society has some concerns around and would be grateful to be provided with some additional information. In particular, the reasons why the scope of reviewable decisions by the South Australian Civil and Administrative Tribunal (SACAT) has been limited and the proposed power of the Ombudsman to make submissions to the SACAT on a review application.

**External review by the SACAT**

5. The Society notes the Draft Bill proposes the following changes with respect to reviews by the SACAT:

   5.1 External review applications must first be made to the Ombudsman, and only then to the SACAT with permission.

   5.2 External review by the SACAT will only be on issues relating to the application of exemptions.

   5.3 Agencies will no longer be limited to reviews on error of law.
5.4 The Ombudsman will be entitled to make written submissions to the SACAT on review.

6. The Society has concerns with respect to two of the proposed changes, first being the limitation in the type of Freedom of Information (FOI) decisions that are reviewable by the SACAT; and the second is the proposed power of the Ombudsman to be able to provide written submissions to the SACAT on a review application.

Scope of reviewable decisions

7. Clause 35 of the Draft Bill provides that a review under the SACAT may only relate to:

7.1 a determination that a document was not an exempt document; or
7.2 a question of law.

8. The proposed provisions would in effect, exclude a number of decisions made by the Ombudsman from external review, including decisions about whether or not the request was ‘unreasonable’, whether an extension of time for making an application should have been granted, whether an application was appropriately dismissed, or whether an application was appropriately declared vexatious.

9. The Society seeks further information as to rationale behind these amendments and the justification for the limitation of reviewable decisions by the SACAT.

Role of the Ombudsman in SACAT Reviews

10. Clause 35(4) of the Draft Bill provides that the Ombudsman cannot be a party to proceedings but is entitled to be notified of the proceedings and to make written submissions to the SACAT in relation to the proceedings.

11. While it is clear that the reasons of the Ombudsman in reaching his or her decision are relevant material to which SACAT should have access, it is not clear why it is necessary to permit the Ombudsman (who is not a party to the review proceedings) to be able to make written submissions to SACAT on a review application.

12. This raises concerns with respect to the impartiality and fairness of the SACAT review process, if the decision-maker to whom the review relates is effectively able to have a ‘second go’ at explaining why he or she made the decision, and possibly to the detriment of the applicant. It would be akin to giving a Magistrate the right to provide ‘extra submissions’ to an Appellate court who is reviewing his or her judgment. The potential arises for ‘new’ information not previously notified to the applicant being put before SACAT as part of the review process. This raises concerns about procedural fairness.

13. It is noted that under section 51 of the Victorian Freedom of Information Act 1982, the Information Commissioner may be called upon to assist the Tribunal, but does not appear to have a right to make written submissions without being requested to do so by the Tribunal.

14. Once again, the Society seeks further information about why such proposed reform is necessary in South Australia, having regard to SACAT’s existing powers to request information that would assist in its review function, where necessary.
Extension of statutory timeframes – Christmas period

15. The Society welcomes the proposal to extend timeframes for agencies to deal with FOI requests from 30 to 45 days, and considers this an important reform to address the incidence of ‘deemed refusals’. However, the Society further suggests that consideration be given to the Christmas/New Year holiday period where staff assigned to dealing with FOI requests may not be able to address requests within this timeframe. Further consideration could be given to how to address these periods within the proposed legislative and workplace changes.

Determinations – identifying the person making the determination

16. The Society supports, in the context of safety concerns, the proposal to change the requirement to name the person making the determination to only requiring the position title or designation and listing contact details for the agency in case of follow-up questions. The Society suggests that consideration also be given to inserting a requirement for the agency to clearly state if the determination is made by or at the direction of the principal officer of the agency or at the direction of a person or body to which the principal officer is responsible (in which case the determination is consequently not subject to internal review). Further consideration could be given to how this suggestion could work together with the proposed new offence for improperly directing or influencing a decision or determination made under the FOI Act.

Yours sincerely

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