FREEDOM OF INFORMATION AMENDMENT BILL 2003

Second Reading

Resumed from 26 June.

HON NORMAN MOORE (Mining and Pastoral - Leader of the Opposition) [2.00 pm]: I am a little surprised that we have not had a response from the Government on this Bill. This is a private member's Bill moved by Hon Jim Scott. A second reading speech has been delivered to the House and we have been waiting for the Government's response to the legislation, yet nothing has happened. I was anxious that no vote be taken on this legislation until such time that we know what the Government's policy is. Now that I have drawn attention to this matter I have a feeling that the Government may be ready to respond to the proposed legislation and then the Opposition can consider its position based upon the Government's explanation of the situation.

Hon Ken Travers interjected.

Hon NORMAN MOORE: When there is private members' legislation, it is usual for the Government to respond before anybody else, just as it is usual when there is government legislation for the Opposition to respond after the Government has put its proposition. On this occasion it is important from our point of view to know what the Government thinks about this Bill because the Government has the resources to investigate the consequences of this piece of legislation, which we do not happen to have. It is helpful for the Opposition to know the Government's views on this matter because it may be privy to information that we do not have. We look forward to hearing a response from the Leader of the House.

HON KIM CHANCE (Agricultural - Leader of the House) [2.05 pm]: I thank the honourable Leader of the Opposition for raising that important point. It has been some time since Hon Jim Scott concluded his comments on the Bill on 26 June. I had lost the thread of where the debate actually was at that stage. However, I am now prepared to respond on the Government's behalf. As Hon Jim Scott noted in his second reading speech, which I have quickly re-read, this Bill provides for a small but significant amendment. It is similar, if not identical, to an amendment moved in the form of a Bill by the member for Nollamara around 1998. It is an amendment that is supportable and I will go into the Government's reasons for its preferred course of action in a moment.

The amendment is supportable on the basis that freedom of information legislation pretty much worldwide recognises that where an FOI request deals with or may deal with an investigation that might take place, it is necessary for the FOI commissioner to have the capacity to rule that such information should not be released. The Western Australian legislation deals with this differently from other jurisdictions in that it refers to an investigation in itself as being a reason for exemption, when it is more normal for the legislation to provide for that exemption when the release of that information may prejudice an investigation, which is the essence of the Bill proposed by Hon Jim Scott.

Clause 5(1)(b) of schedule 1 of the Act, which would be amended by this Bill, states that a document is an -

> . . . exempt matter if its disclosure could reasonably be expected to -
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> . . .
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> (b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;

Hon Jim Scott's Bill proposes that clause 5(1)(b) be amended so that a document has that exempt status under this clause only if its release could reasonably be expected to prejudice rather than simply reveal the investigation. I advise the House that on 3 February this year, Cabinet approved the drafting of a number of amendments to the Freedom of Information Act, including this amendment. The range of amendments that has been approved by Cabinet had been recommended in a number of reports, including the Information Commissioner's report. Included in those amendments for which drafting has been approved is an amendment to clause 5(1)(b), which does exactly what Hon Jim Scott's Bill proposes; that is, it substitutes the prejudice test for the revealed test.

The Western Australian Government supports an amendment to clause 5(1)(b) in the terms of Hon Jim Scott's Bill. In principle, we support the Bill. However, the Government believes that this amendment should proceed together with other amendments that have been recommended to the FOI Act. It would be more appropriate and preferable to proceed with all the amendments to the FOI Act in one Bill so that they can be comprehensively and coherently dealt with. The FOI amendments are being drafted. The Government intends to introduce those amendments in conjunction with its proposed privacy legislation.

I refer specifically to the proposed amendment to clause 5(1)(b). I have already mentioned that Mr J.C. Kobelke proposed this amendment in a private member's Bill on 28 May 1998. Incidentally, that amendment and the Bill were defeated on party lines. In his second reading speech, Mr Kobelke stated -

> . . . contrary to the rationale underlying the FOI Act, under clause 5(1)(b) exemption can be made out for documents the disclosure of which could cause no harm and the non-disclosure of which could not otherwise be justified. Accordingly, it seems that, even if, for example, the information in question has been extensively published, if the matter has been extensively aired in open court, or if the investigation was conducted a hundred years ago and none of those involved remain alive, the document will be exempt if the particular agency chooses to claim exemption under clause 5(1)(b), regardless of the fact that no harm would be caused by disclosure.
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> . . .
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> It sits incongruously in a scheme of exemptions which are clearly designed to protect identifiable public interests from harm which may be expected to follow from disclosure.

In support of the proposed amendment, Mr J.C. Kobelke cited examples from the Information Commissioner's 1996-97 annual report, which queried the agencies' reliance on clause 5(1)(b) to diffuse a number of documents relating to some circumstances. For example, documents relating to an investigation of a complaint under the Equal Opportunity Act 1984 in which the access applicant was not a party to the proceedings; documents containing matter relating to an agency's investigation into a possible breach of the gas standards regulations 1983; documents relating to an investigation under the Public Sector Management Act 1994; an accident report filed into the death of a passenger in a motor vehicle accident sought by the employer's indemnity insurer; a matter consisting of names and other identifying information of persons interviewed in relation to an investigation under the Public Sector Management Act 1994; and documents relating to an investigation by a local authority into an alleged breach of the Dog Act 1976.

It is the Government's view that clause 5(1)(b) needs amending. This clause is out of step with provisions in other jurisdictions. In all other Australian jurisdictions and in New Zealand, the equivalent exemption applies only if disclosure could reasonably be expected to prejudice the investigation of a criminal offence. That has led to the precise wording that which was contained in Mr Kobelke's private member's Bill and, indeed, in Hon Jim Scott's Bill.

Given that, the Government intends to legislate in a more comprehensive and coherent way on this and broader matters that have been identified in a series of reports. The Government does not intend to support this Bill. I look forward to the time when this Bill, which is currently being drafted and to which I have referred in relation to the privacy provisions, can be introduced into the House and this long overdue matter can finally be dealt with. The Government commends Hon Jim Scott for bringing this matter forward. We support the spirit in which the Bill is intended, but the Government does not intend to support this provision in isolation to other amendments that the Government believes are necessary.

HON PETER FOSS (East Metropolitan) [2.16 pm]: I suppose some members might feel a sense of deja vu when dealing with this matter. Not only did the member for Nollamara move this Bill previously, but also the reason given for not accepting it in 1998 was almost exactly the same. At that stage, the former Government was proceeding to draft a substantial range of amendments to the Freedom of Information Act. I am sad to say that prior to us losing Government, it was not completed, otherwise there is no doubt that this matter would have been dealt with. It is a bit strange that two and a half years later - in other words, five years from when it was suggested that this very minor and necessary amendment should be made - it was considered appropriate to wait just a little bit longer until the amendment was made in more substantial form. I have a problem working out why it could not have been done in 1998. However, assuming it was about to be done, it would have cut down the number of Bills before the House. Something must be radically wrong with the process if the Government has only just got around to approving the drafting of the legislation, yet the former Government was in the course of drafting it in 1998. Now that we are just a short distance away from the next election, I rate the member's chance of getting this amendment passed in the way he suggests, as being reasonably low.

In 1998, an argument was raised in the other House, which was slightly different from the argument the Leader of the House raised. It referred to prejudice. All members understand what was sought to be protected. I will read from page 3 242 of the *Hansard* from 11 November 1998, because it might be relevant. The then Minister for Police stated -

> I am aware that there has been some judicial pronouncement on the interpretation of clause 5(1)(b). I think it was by His Honour Justice Anderson in the case of the Police v Kelly and Smith, which I think was handed down on 30 April 1996. As far as I am aware it is unreported, but I have been given a library number of 960227. I will quote a little of what Mr Justice Anderson was reported as saying. In

summary, he talked about the operational reasons for not disclosing information even after an investigation is completed and said that it could be highly detrimental to government and the administration of law enforcement to disclose that a particular criminal investigation is completed, particularly in cases of large-scale criminality and multifaceted investigations. In my briefing notes His Honour is reported as saying -

In my opinion the phrase . . . if its disclosure could reasonably be expected to . . . reveal the investigation of any contravention of the law in a particular case . . . is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people. I think that there is a very good reason to accept that Parliament intended that such matter be exempt from access under the Act. It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed.

It is notorious that many investigations, particularly of large scale criminality, are multi-faceted, lengthy and sensitive and involve considerable personal risk to the officers engaged in them. No doubt it would be highly prejudicial to the practical success of many such investigations to allow or require the facts of them to be disclosed.

Even after an investigation has been completed, there may be very good operational reasons why there should be no disclosure of it. For example it may be part of a wider and perhaps incomplete investigation . . .

He went on to quote a particular example. One could possibly interpret that this should be read in such a way that it would deal with future investigations or, if one had been finished and another started, it should be read as similarly protected. I think perhaps the way to deal with it is for an amendment to be made in Committee in which we deal with a possible resumption in a future investigation. I would be happy for that amendment to go through now and for it to be dealt with. We could then deal with a major amendment to the Freedom of Information Act at a later stage. We would have hoped that in five years we would have had a bit more to bite down upon. There has been a reasonable amount of time for drafting and it is only because the Government has not given it any priority in the past two and a half years that it has only got as far as being drafted. A person would have to be incredibly optimistic to think that something will appear in this term of government. If the highly desired and hoped for result occurs at the next election, there will be an interruption of administration and that inevitably again leads to disruption. I suggest we get on with something of this nature right now and get the discussion going and ask the other House to have a look at it. The Government may find that, despite the fact that it is only just decided to do something about it, it might be able to do something even earlier. The Opposition supports the principle but it would like to look at the wording to see whether it can deal with the question raised by Justice Anderson.

HON JIM SCOTT (South Metropolitan) [2.23 pm]: I thank the Leader of the House and Hon Peter Foss for speaking on this amending Bill. I thank them for the brevity of their remarks. It was quite remarkable for this House. Hon Kim Chance said that the Government supported the amendment in principle, which was identical to the one proposed by the member for Nollamara in the other place in 1998. He said the Government was proceeding with drafting a number of amendments to the Act and that by putting them together it would be more "coherent" - I think that is one of the words he used -

Hon Kim Chance: And comprehensive.

Hon JIM SCOTT: Comprehensive and coherent. He said drafting was proceeding and the intention was to go ahead but did not say when that would occur. The same concern crossed my mind as that of Hon Peter Foss. As has been said, this has been around a very long time. I repeat the words of the Information Commissioner in her annual report of 2000-01 in which this particular clause was highlighted as something that needed to be addressed -

The amendment of Clause 5(1)(b)

One exemption in particular puts Western Australia out of step with all other FOI jurisdictions throughout the world. The exemption for law enforcement documents is designed to ensure that current and unsolved investigations conducted by law enforcement agencies are not prejudiced by disclosures under FOI.

The approach taken in the WA FOI Act is that the exemption applies to documents that would reveal any investigation conducted by any agency involving a contravention or possible contravention of the law. A contravention of the law includes a breach of, or a failure to comply with regulations, as well as local government By-laws, Codes of Ethics and human resource management standards made under the Public Sector Management Act 1994.

> The documents of law enforcement bodies are adequately protected under FOI legislation both nationally and internationally. However, the existence of the exemption in clause 5(1)(b) in its present form in WA, provides a convenient and ready justification for a myriad of agencies to hide behind a cloak of confidentiality, often without good reason.

That is the crux of the matter. This is happening right now. This has been going on all this time, from when the member for Nollamara's private member's legislation was unsuccessful to this very day. I brought this legislation to the House because I have been approached by people who have had problems with this clause. I note during my time in this House how often agencies are able to call on an internal investigation when they do not want to hand over particular information. It is a very convenient way to get out of providing information. In regard to that, the Information Commissioner stated -

> When applicants are denied access to documents resulting from complaints made by them to agencies, or they are denied access to investigative material relating to them, whether or not charges or disciplinary proceedings have resulted, it is inevitable that the FOI Act is viewed as a "toothless tiger". My impression is that applicants do not understand how or why the exemption in clause 5(1)(b) is applied by agencies to refuse access, and they do not accept the interpretation of that clause made by the Supreme Court in Western Australia.

That was mentioned by Hon Peter Foss. I presume that is the same interpretation. The commissioner continued -

> I remain hopeful that the enthusiasm for change exhibited then by the Member and his parliamentary colleagues has not been dimmed by the reality of being the Government.

I am glad to hear that the Government intends to go ahead. Again, this issue will go beyond the next election and more people will be affected. In terms of being coherent, if the Government puts in place the same change - it will - we should remember that we quite often hear that Governments are very keen to have coherence between our legislation and legislation in other States. Clause 5(1)(b) does not exist in other States and the amendment is what is in the legislation of other States; indeed, in other jurisdictions around the world. It will in no way make it less coherent just because it precedes the other changes. In fact, it will fit in neatly with what the Government is proposing. The only thing that it will do is save the Government some of its own time, because this is being done in private members' time. The Government should see that as an advantage, not as a disadvantage. The Leader of the House will be struggling for time at the end of this year and at the end of next year. When the freedom of information legislation is popped in at the last minute to follow up on his statements of today, we may find that once again there is not time to deal with it, it will fall over yet again, and the legislation will not be changed. As, in the words of the commissioner, this is the one exemption that puts it out of step with other jurisdictions, and because it will not be incoherent, if one likes, with whatever the Government puts forward - it will fit in without any incoherence - the argument that the Leader of the House put forward does not seem to be a proper argument.

Hon Peter Foss pointed out that the reason the legislation was not supported by the previous Government is exactly the same reason that has been given this time by the current Government. He also was concerned about whether it would go through in this term of government. He suggested that he would propose an amendment to the legislation in the committee stage. Although I have not had an opportunity to look at the amendment, I am almost willing to accept it, providing it does not make the legislation out of step and incoherent with what has happened in other jurisdictions. I doubt that the member would move an amendment that would have that effect.

As to existing exemptions, already quite a few provisions either side of clause 5(1)(b) of schedule 1 of the Freedom of Information Act protect information that is under investigation. For instance, clause 5(1)(a) states that matter is exempt if its disclosure could reasonably be expected to -

> impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;

Paragraph (d) states -

> prejudice the fair trail of any person or the impartial adjudication of any case or hearing of disciplinary proceedings;

Paragraph (e) states -

> endanger the life or physical safety of any person;

There are quite a few such provisions in clause 5(1). As clause 5(1)(b) is currently worded, it is simply a way for people to get out of providing information at their convenience when they may not, for whatever reason, want that information to become public, but not because it would prejudice any investigation.

I thank members for their comments. I urge the Government to reconsider its position because, as I stated, this will not be incoherent with any other government legislation, and it will be fully coherent with the FOI legislation in other jurisdictions in Australia and around the world. I commend the Bill to the House.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chairman of Committees (Hon Simon O'Brien) in the Chair; Hon Jim Scott in charge of the Bill.

Clause 1: Short title -

Hon PETER FOSS: I did not raise this earlier. However, I am curious whether there is a point of order when, in the second reading debate, the reply is longer than all the second reading contributions combined. Is that allowed or not?

The DEPUTY CHAIRMAN: There is no point of order as such. I think it is called an interesting precedent.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Schedule 1 amended -

Hon PETER FOSS: I move -

Page 2, line 10 - Insert after "investigation" the following -

or a possible resumption of an investigation or future investigation

This is the second amendment that has been circulated because, unfortunately, I drafted it incorrectly in the first instance. I was amending the Act rather than amending the Bill that seeks to amend the Act. This amendment seeks to insert after the words "prejudice an", which is the amendment that is presently contained in clause 4, and after "investigation" the words "or a possible resumption of an investigation or future investigation". Going back to the original Act, the clause, if amended, would read -

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

. . .

(b) prejudice an investigation or a possible resumption of an investigation or future investigation . . .

The reason for moving this amendment is the concern that, for instance, if an investigation against somebody were stopped because it had reach a dead end, people should not reach the conclusion that there was no case but that there was no evidence at that time. If that were to be revealed, it would be dangerous, because it would certainly prejudice any resumption of the investigation. The case given by the Honourable Justice Anderson was of when an investigation might finish and the same information might be used on a future investigation. The most important thing about the difference between "reveal" and "prejudice" is that the word "prejudice" would give the Information Commissioner an opportunity to use judgment, whereas the word "reveal" allows no qualitative judgment to be made. Will it reveal it? If it is disclosed, it obviously will. The use of the word "prejudice" requires establishing that prejudice will occur. The important change is to get the word "prejudice" into the clause. It could be argued that the prejudicing of an investigation includes a resumed or future investigation and not just the current investigation. That is arguable. This amendment puts it beyond doubt. I am quite happy, if the Act is shortly to be completely rewritten, for this issue to be looked at in the course of that review. However, I am happy to go ahead with this Bill on the basis of this amendment.

Hon KIM CHANCE: Although the Government's position on the Bill has not changed, it will support this amendment. If it seems likely that the will of the House will be that the Bill proceed, the amendment as proposed by Hon Peter Foss will considerably improve the scope of what is the primary intent of the Bill and put this question beyond doubt. As Hon Peter Foss said, it is probable that one could argue for that provision, but this amendment puts it beyond doubt. It clarifies and improves the clause. For that reason the Government will support the amendment.

Hon JIM SCOTT: This is interesting. I would have thought that the wording that I had put forward - that is, to "prejudice an investigation of any contravention or possible contravention" - would have picked up all investigations, whether they were current or future. My concern with this amendment is how the procedure might follow. An agency might not want to provide any information because that might prejudice some future investigation or the resumption of an investigation. It may be difficult to establish whether it would prejudice a

hypothetical investigation. I do not quite know how this would be decided, and whether an agency could use that clause to say that, while no current investigation was occurring, problems might arise or information might be provided that would enable the agency to carry out an investigation in the future. An agency might say that because it did not quite know how an investigation would go or the matters that would be important to an investigation, it would be unable to carry out an investigation properly if it released the information. In a way, that would make it fairly hard for anybody to properly judge whether an agency was being truthful. On the other hand, for instance, legislation dealing with DNA came before this House and has given people new ways in which to find evidence against people. By combining other information that is given to an applicant, it may in some way prejudice future investigations. I would like to hear a response from Hon Peter Foss on how we could guard against the possibility of an agency abusing this provision regarding future investigations. It is a fairly amorphous sort of thing to simply put off handing out information to people when an agency is just trying to hide its own shortcomings or something.

Hon PETER FOSS: There are two issues. The first is whether we should protect against prejudice to future operations. Hon Jim Scott said that this provision might already do that. We accept in principle that we do not want to prejudice future investigations. I do not think the intent is the problem. The question I think Hon Jim Scott is really asking is whether by phrasing the provision in this way it would make it easier for agencies to gain exemption by citing a totally hypothetical future or resumed investigation, as opposed to the current wording which does not make it clear how far it goes. There are two benefits to be derived from this amendment. The first is by using "prejudice" as opposed to "reveal". "Reveal" does not involve any real qualitative analysis. Does it reveal it? That is its extent. "Prejudice" would require an agency to establish that prejudice.

I believe the onus would be on the agency to show that the provision of information would prejudice an investigation, and that it would not be on the applicant to show that it would not. The agency would obviously claim that it would prejudice such investigations in the first instance, but the Information Commissioner would have the right to decide. The agency would have to justify to the Information Commissioner the qualitative situation that the provision of the information might prejudice. That is not purely notional; there must be some real possibility of prejudice. Do the words "possible" or "future" change that? The only way one might argue that it would is that the court would be reluctant to extend it to possible resumptions or future investigations in normal circumstances unless they were so imminent that they were part of the continuing set of affairs. An agency may have completed an investigation but may not consider it to be a dead file. It may be a closed file that might possibly be resumed, or a continuing investigation in another area may not have started. It is marginal. I do not think it would make a huge difference in terms of a finding. If those words are not included in the clause, I do not think the argument will be as good as I would like it to be for those investigations. I do not think putting in those words detracts too much from the essential change from a factual to a qualitative test. That is the real difference as far as I am concerned. I cannot guarantee that people will not try to use it. People will always try to use anything. I cannot guarantee that applicants will agree with the Information Commissioner or the Supreme Court. That is always one of the big problems people have. They sometimes criticise provisions even though they have been appropriately applied, in accordance with policies, simply because they do not agree. It does not make much of a difference in terms of negatives, but it makes it quite clear that investigation includes resumption or a future investigation. More importantly it allows us to make the change from reveal to prejudice. The change to prejudice is a very significant change, because of the change from a factual to a qualitative test. That is up to the department to satisfy the question.

Hon JIM SCOTT: I still have some concerns with this. With a number of issues where, for instance, a person may be seeking information that is necessary to take action against a department, quite often there are rules in the public sector that say that if application is not made to repair this wrong within a certain time, the person misses out. The regulations and the legislation only give limited time. An agency could easily use a clause like this to push out the time in which it could provide information to beyond the time in which the person could use that information. That is what concerns me. I can also see that prejudice is a much better word than reveal. In politics I take what I can get, and I will do that in this instance. I am happy to go along with the amendment on the basis that it is an improvement on what has been. Without really working through this carefully, and without a bit of time in practice, one cannot say whether or not the agencies will be able to use it to spread out the time in which they provide information that is being withheld, not because it will reveal an investigation, but because it will reveal faults within the agency. This is what should be investigated. Nevertheless, the amendment moved by Hon Peter Foss has some positive aspects, in ensuring that agencies may want to take action against some person, or investigate some person or some issue in the future. If the change, as I have suggested, prevents that happening for a future investigation, or the opening of an investigation, it may be of some benefit. The wording as I had it allows them to do that anyway, but as I said I will agree to the amendment of Hon Peter Foss.

Amendment put and passed.

Clause, as amended, put and passed.

Title put and passed.

Bill reported, with an amendment.

Leave granted to proceed forthwith through remaining stages.

Report

Report of Committee adopted.

Third Reading

HON JIM SCOTT (South Metropolitan) [3.00 pm]: I move -

That the Bill be now read a third time.

Question put and a division taken with the following result -

Ayes (16)

Hon Alan Cadby	Hon Frank Hough	Hon Simon O'Brien	Hon Bill Stretch
Hon Robin Chapple	Hon Robyn McSweeney	Hon Barbara Scott	Hon Derrick Tomlinson
Hon Peter Foss	Hon Dee Margetts	Hon Jim Scott	Hon Giz Watson
Hon Ray Halligan	Hon Norman Moore	Hon Christine Sharp	Hon Bruce Donaldson *(Teller)*

Noes (8)

Hon Kim Chance	Hon Sue Ellery	Hon Ljiljanna Ravlich	Hon Ken Travers
Hon Kate Doust	Hon Louise Pratt	Hon Tom Stephens	Hon Ed Dermer *(Teller)*

Pairs

Hon George Cash	Hon Adele Farina
Hon Murray Criddle	Hon Jon Ford
Hon John Fischer	Hon Graham Giffard
Hon Barry House	Hon Nick Griffiths

Question thus passed.

Bill read a third time and transmitted to the Assembly.