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## Review of the Freedom of Information Act 1991 (Tas)

### Submission to the Tasmanian Department of Justice

**May 2009**

#### ***The Australian Privacy Foundation***

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see [www.privacy.org.au](http://www.privacy.org.au)

#### ***Submission***

The Australian Privacy Foundation generally welcomes the Tasmanian Government's proposed reforms of its Freedom of Information Act, which coincide with a long-overdue improvement in FOI schemes in other Australian jurisdictions.

We support the main proposals, including the passage of a new *Right to Information Act*, and the relationship between this Act and the *Personal Information Protection Act 2004*. We note however that in our view the Personal Information Protection Act 2004 does not go far enough in protecting the privacy rights of Tasmanians, particularly in its monitoring and enforcement provisions, and needs significant amendment to bring it up to the standard of best practice in Australian and international privacy law. We hope that the Tasmanian government will take accept the recommendations of the Australian Law Reform Commission in its 2008 Report 108 and join with other Australian jurisdictions in enacting consistent and complementary world-class information privacy law.

We suggest that a common weakness of both the *Personal Information Protection Act 2004* and the proposed new *Right to Information Act* is its reliance on the Ombudsman. We favour the Information Commissioner model proposed by both Queensland and the Commonwealth, with a single office responsible for both Privacy and FOI law. If, for reasons of economy in a small jurisdiction, the roles are given to the Ombudsman, the culture of that office needs to change from the traditional investigation-recommendation mode to a much more proactive promotion, monitoring and enforcement mode. This needs to be ensured by appropriate appointments, powers and resources.

We support almost all of the recommendations in the Directions paper, with the following exceptions:

## **Rec 22, Fees**

We strongly submit that there should be no application fee – at the proposed level of 25 units (currently \$32) the administrative cost of processing fees will almost certainly outweigh the revenue, but the fee will act as a significant deterrent. There are sufficient other safeguards proposed (e.g Recs 36-39) to prevent abuse of a right to a free application.

## **Rec 33 – Exemptions – Table 9**

### **Law enforcement and related information**

We note that this exception includes “information gathered or created for criminal intelligence, such as the intelligence database, DNA database and ‘crimestoppers” We assume that this exemption (and others) will automatically carry over into the ‘access to personal information’ provisions to be transferred to the *Personal Information Protection Act 2004*. If so, we are concerned that the inclusion of ‘DNA database’ in this exemption might inhibit individuals’ legitimate right to access DNA information held about them even where it does not relate to suspicion of a crime or a current investigation. We understand that the national DNA database held by Crimtrac and with input from and output to Tasmanian law enforcement agencies contains DNA information about suspects, witnesses and others not suspected of any crime. It is essential that this information should be available to the individual concerned.

### **Personal information of a third party**

There is a risk that in changing the terminology of this exception from ‘personal affairs’ to ‘personal information’ that the exception could be abused to prevent the disclosure of information about public servants acting in their official capacity or in relation to their official duties. While a single consistent definition of personal information consistent between FOI and privacy law is desirable in many respects, we believe that the RtI Act should expressly state that any personal information about public servants relating to their official functions and duties is NOT subject to this ‘reverse FOI’ consultation requirement, which could if interpreted broadly slow down almost all applications – the presumption must be that such information will be disclosed.

## **External Review**

We read the recommendations as providing for a right of external review of all agency decisions, including decisions to refuse an application and decisions on all categories of exemption, with the Ombudsman being able to substitute any agency decision. We strongly support all decisions being reviewable, initially by the Ombudsman, but then if required on their merits by a tribunal or court. Only with this uninterrupted hierarchy of appeal rights is the enforcement ‘pyramid’ complete.

## **Resources**

It is essential that the Ombudsman be adequately resourced to take on the substantial new responsibilities under the RtI Act. This is particularly important in the first few years when the Ombudsman will face a significant challenge in changing an entrenched culture of secrecy in the bureaucracy.

*Specific questions about this submission should be directed to APF Board member Nigel Waters*  
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*Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.*