# Legislative Council Hansard (Extract)

## Freedom of Information Amendment (Improving Public Access to Information) Bill

Extract from NSW Legislative Council Hansard and Papers Thursday 28 September 2006.

**Second Reading**

**Ms LEE RHIANNON** [2.52 p.m.]: I move:

That this bill be now read a second time.

I am very proud to introduce the Freedom of Information Amendment (Improving Public Access to Information) Bill on behalf of the Greens today. The Freedom of Information Act is an important cornerstone of democracy in New South Wales. However, the Act is far from perfect. As the Act currently stands, it is outdated, laden with loopholes and vulnerable to an increasing culture of secrecy within the Government. Requests for information are becoming costly, lengthy and adversarial. This is clearly not good enough.

This bill provides for a comprehensive and independent review of the Freedom of Information Act with a view to improving access to information in New South Wales. I urge members to support this bill. Freedom of information laws are key to open and accountable government. James Madison, a founder of democracy in America, wrote of "the power which knowledge gives". This is very true. This bill is about ensuring that citizens of New South Wales have the power to access and independently scrutinise government-held information. It is about ensuring that citizens have sufficient information to participate meaningfully in government decision making and in holding representatives to account. It is about preserving and ensuring our democratic rights. Justice Michael McHugh in the High Court case of *Stephens v West Australian Newspapers Limited* pointed out:

… each member of the Australian community has in interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia ... The common convenience and welfare of Australian society are advanced by discussion_the giving and receiving of information_about government and political matters.

I particularly mention the media and the importance of a properly functioning freedom of information [FOI] system for journalists. Media scrutiny of government information is essential in a robust democracy. In the New South Wales Ombudsman's annual report he notes that there has been a threefold increase in the number of complaints about FOI applications made by journalists from 2001-02 to 2004-05. This is a disturbing trend. In these times of government spin doctoring and public relations, it is vital that we have an effective FOI system so that the media and the public can see behind the Government's news management. For the Greens, the importance of freedom of information goes beyond the role it plays in democratic accountability. We believe that information held by the Government is an important public resource—a resource that should be freely available for the social and environmental advancement of New South Wales.

The Government holds vast stockpiles of valuable information, such as research, statistical data, maps of natural resources and surveys of health, education and environmental standards. The Government does not own this information. It is not a gift that government departments can bestow upon a waiting public at their discretion. Government information is an important public asset that is created and collected in the public interest and with public money. It should be accessible for all people and used and re-used for the betterment of society. The Greens believe that a comprehensive review of this Act is well overdue. The health of democracy in New South Wales is suffering from the inadequacies in the current Act and the culture of secrecy in the current Government.

The Freedom of Information Act came into force in July 1989. When the Act was introduced the Greiner Government promised a full review of the legislation after two years. Seventeen years have passed since then, but there has been no comprehensive review of the Act. It is hard to credit that 17 years has passed and there has not been a review of the Act, and that reflects no credit on this Government. For over a decade, the New South Wales Ombudsman has repeatedly called for a review of the Freedom of Information Act, yet nothing happened. The Act became a patchwork of piecemeal amendments and it sits uncomfortably alongside several separate and sometimes inconsistent Acts in New South Wales under which members of the public seek to access information. These different schemes confuse the public and government agencies alike.

Other Acts in New South Wales are routinely reviewed, so why not the Freedom of Information Act? I asked the Premier, Mr Morris Iemma, about the need for a review in the recent budget estimates hearings. The answer he gave was far from clear. The debate was amusing but I cannot say it was enlightening. So what do we have from this Government? We have no report, no recommendations and no call for public submissions. We need more than a Clayton's review of this important Act. I note that the New South Wales Law Reform Commission is

currently undertaking a review of privacy protection in New South Wales. That review will examine any inconsistencies between laws on privacy and the Freedom of Information Act. The Greens do not believe this review is sufficient.

In the 17 years since the Act came into force the context of government in New South Wales has changed dramatically. Our FOI procedures are struggling—and are often failing—to keep up. In the last decade in New South Wales we have seen a huge shift to privatisation, corporatisation and the rise of the ubiquitous public-private partnership. Many agencies and corporate entities that fulfil government duties are now no longer covered by the Freedom of Information Act. Information about important public services and infrastructure is now often held by the private sector and shrouded from the public gaze by commercial-in-confidence exemptions. This is akin to information theft and a direct deception of the New South Wales public.

The Cross City Tunnel debacle is just one example of that. Community groups had an almost impossible struggle to access information from a private consortium about this key piece of infrastructure affecting their community. The contract between the Cross City Tunnel Consortium and the Government became public only after pressure from the Greens and a ruling by Sir Laurence Street. There have also been major developments in information and communications technology since 1989. The world has turned to digital recording, and information is collected, stored and disseminated in a very different way now than the way it was done in 1989. The Greens believe that these information technology developments are an exciting opportunity to rework FOI procedures in New South Wales.

No longer are we dependent on someone standing in front of a photocopier in a windowless room copying documents for hours on end to distribute. Should we not now move to a system of proactive disclosure where all documents are automatically publicly available from the Internet? The Freedom of Information Act in the United States of America established what is known as reading room access to information. In the reading room agencies must make categories of documents routinely available for inspection and copying. Those records must be available in electronic form, usually on the Internet. In comparison, the New South Wales procedures are languishing in the dark ages. It is clear that the Act in its current form is not working and that it is open to manipulation by an increasingly secretive Government**.**

Freedom of information applications have almost doubled in the past decade. The Annual Report of the NSW Ombudsman shows that applications have increased from 8,328 in 1995-96 to 15,791 in 2003-04. Despite that increase, the percentage of applications where all documents have been released in full has dramatically decreased to only 63 per cent in 2001-02, down from 81 per cent in 1995-96. The number of applications refused in part has more than tripled in that time. The New South Wales Ombudsman is blunt in naming this as a "significant and disturbing downward trend" in the release of information.

My office is awash with stories from disgruntled freedom of information applicants. The efforts of many community groups, journalists and members of the public are being frustrated by exorbitant application costs and lengthy delays in processing. Since 1995-96 the number of applications refused on the basis that advanced deposits were not paid has increased almost four-fold. The Ombudsman has received complaints that some agencies are charging up to $1,000 as an advanced deposit to release information. That is beyond the means of many community groups and individuals. The obvious conclusion is that unrealistic fees are being used to discourage freedom of information applicants. Clearly there is a culture of secrecy in this Government. Freedom of information is not meant to be adversarial—that is against the spirit of the Act. The objects of the Act make it clear that the Act is to be interpreted in favour of disclosing information.

As noted in the parliamentary briefing paper on Freedom of Information and Open Government, agencies are going to considerable lengths to prevent disclosure of contentious information. There are claims of direct political interference where information is contentious; anecdotal evidence that some public servants avoid placing matters in writing in order to avoid material being sought under freedom of information; and reports that agencies have not followed the requirements of freedom of information legislation, because the information would be embarrassing for the Government. There are also reports that government agencies are overusing and misusing exemption clauses to deny access to information. Section 25 (1) of the Act gives agencies some discretion to refuse access to a document if it is classified as an "exempt document". In 2005 the New South Wales Ombudsman noted a marked increase in agencies claiming Cabinet confidentiality as a reason to refuse access to a document.

There are legitimate reasons that some information should not be publicly disclosed, such as national security and personal privacy. But this Government is hiding behind defences, such as commercial in confidence and Cabinet in confidence protections, to block access to information. This is reprehensible. Rather than FOI facilitating access to information, the system is being used—or, I should say, abused—to protect the partisan interest of the Government. The most recent example of this government-sanctioned secrecy was under the Minister for Health. In this case the Opposition made an FOI request for incidents of medical errors in New South Wales hospitals. Rather than release the information on what is clearly an important public health issue, the Minister instead moved to amend laws to allow gaol terms for people who release information relating to reportable incidents in hospitals.

Does that sound like an open government revelling in the free flow of information? It certainly indicates that we have massive problems with this Government and its whole realm of secrecy. Greens members of Parliament have made use of a parliamentary call for papers to uncover information on the Cross City Tunnel, the Lane Cove Tunnel and other major projects. As members of Parliament we have the privilege to use Parliament to make a call for papers. Community groups, journalists and members of the public do not have that privilege. We must ensure that any member of the public, not just members of Parliament, can uncover information that should rightly be in the public domain.

I will now explain the details of the bill. The bill adds two new sections to the Freedom of Information Act, sections 70 and 71. Section 70 requires that the Government appoint an independent reviewer to conduct a review of the Freedom of Information Act. The bill stipulates that the reviewer is not to be a government department or a member of government staff. Here, the Greens envisage an organisation, such as the New South Wales Law Reform Commission, conducting the review. Alternatively, the New South Wales Ombudsman has a review be conducted by a judicial officer. The broad aim of the review, as set out in proposed section 71 (1), is to determine whether the policy objects of the Freedom of Information Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Proposed section 70 (3) lists a number of issues that the review must consider. This is not an exhaustive list, but raises key concerns about the operation of the Freedom of Information Act. The bill requires that the reviewer consider whether the right to access information is being adequately supported by the provisions and practical operation of the Act. That includes examining any trends in the determination of applications under this Act. The reviewer must consider whether the objects of the Act would be more appropriately served by establishing an independent body to manage FOI applications and provide independent oversight of the Act.

The reviewer must consider also whether the objects of the Act would be more appropriately served by a presumption that any document to which access is sought is not an exempt document. FOI expert Rick Snell warns that various Australian freedom of information Acts effectively allow government agencies to shift the burden of proof to the applicant to demonstrate why it is in the public interest to release information. The reviewer must also consider the use of exempt bodies and exempt documents, the impact of technological change, the interaction of the Act with other legislation in New South Wales and the impact of piecemeal amendment of the Act, the costs of lodging and processing applications, and the timeliness of the processing and determination of applications.

The issues for consideration listed in the bill have been repeatedly raised by the New South Wales Ombudsman, by academics, by the media and by members of the public. I note that the issues we have detailed primarily relate to access to public information, rather than access to personal information. The Greens note that the review is not exhaustive and, therefore, would also consider personal privacy. Proposed section 70 (4) specifies that the review is to commence as soon as possible after the reviewer is appointed and that a report of the review will be tabled in each House of Parliament within 18 months after the commencement of this section.

The bill specifies also that the reviewer will hold public hearings at locations across New South Wales and consider public submissions. Proposed section 71 inserts a clause that requires a review of the Act every five years. This is standard in most new legislation and will hopefully in the future avoid the situation we are currently in, where this vitally important piece of legislation has not been reviewed for 17 years. Today, 28 September, is International Right to Know Day. On this day every year, FOI advocates around the world join together—

**The Hon. Rick Colless:** Who said that? You made it up.

**Ms LEE RHIANNON:** I most definitely did not. I acknowledge all the guffawing that is going on. Today is most definitely International Right to Know Day. I have been most fortunate to have the opportunity to make my speech on such a day. I heard someone say "International Legal Rights Day".

**The Hon. Tony Kelly:** League of Rights day.

**Ms LEE RHIANNON:** League of Rights. I hope that the members' guffawing does not indicate an attitude to the bill. FOI advocates around the world join together to promote the importance of freedom of information as a basis for open and accountable government on this day each year. In 2005, civil society organisations in more than 30 countries celebrated the Right to Know Day. On this day, I urge members to support the bill. Freedom of information is a key plank in a participatory and robust democracy. It is a plank that is under threat by the Government. The Greens believe that this bill can begin a process to improve the quality of democracy in New South Wales. It is incumbent on us to ensure that the community gets the open and accountable government that it so rightly deserves. The responsibility lies with the members of this House. I look forward to the debate