

The Senate

Legal and Constitutional Affairs
Legislation Committee

Freedom of Information Amendment
(Parliamentary Budget Office) Bill 2012
[Provisions]

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Ms Julie Dennett Committee Secretary

Ms Christine McDonald Inquiry Secretary

Dr Jon Bell Principal Research Officer

Ms Elise Williamson Administrative Officer

Ms Diana Harris Administrative Officer

Suite S1.61 Telephone: (02) 6277 3560

Parliament House Fax: (02) 6277 5794

CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

TABLE OF CONTENTS

MEMBERS OF THE COMMITTEE	iii
RECOMMENDATIONS.....	vii
CHAPTER 1	1
Introduction	1
Purpose of the Bill	1
Key provisions of the Bill.....	2
Conduct of the inquiry.....	3
CHAPTER 2	5
Key issues.....	5
Support for the Bill.....	5
No requirement to confirm or deny the existence of documents	6
Length of the exemption.....	7
Committee view.....	8
APPENDIX 1	11
SUBMISSIONS RECEIVED.....	11

RECOMMENDATIONS

Recommendation 1

2.15 The committee recommends that the Explanatory Memorandum to the Bill be revised and reissued to explain clearly that the Bill's proposed new exemption:

- applies only to documents prepared by departments and agencies for the 'dominant purpose' of providing information to the Parliamentary Budget Office or the Parliamentary Budget Officer relating to a confidential request, and that it does not apply to documents prepared or held by those departments and agencies in the ordinary course of their business or activities; and
- is modelled on the existing exemption under the *Freedom of Information Act 1982* for Cabinet documents.

Recommendation 2

2.16 Subject to Recommendation 1, the committee recommends that the Senate pass the Bill.

CHAPTER 1

Introduction

1.1 On 10 October 2012, the Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012 (Bill) was introduced into the House of Representatives by the Attorney-General, the Hon. Nicola Roxon MP.¹ On 11 October 2012, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 19 November 2012.² The House of Representatives passed the Bill on 30 October 2012,³ and the Bill was introduced into the Senate on the same day.⁴

Purpose of the Bill

1.2 The Parliamentary Budget Office (PBO) is established under the *Parliamentary Service Act 1999* as the fourth parliamentary department. The PBO is an important institution that further strengthens Australia's fiscal and budget frameworks by providing non-partisan and independent information to the Parliament on the budget, fiscal policy and financial implications of proposals. As set out in the Explanatory Memorandum (EM) to the Bill, the PBO is an exempt agency under the *Freedom of Information Act 1982* (FOI Act).⁵

1.3 However, the current exemption under the FOI Act is limited:

[T]he Freedom of Information Act does not currently provide a specific exemption for documents relating to requests from the Parliamentary Budget Office that may be held by departments and other agencies.⁶

1.4 The Bill addresses this issue by amending the FOI Act and the *Privacy Act 1988* (Privacy Act) to provide a new FOI exemption for documents related to confidential requests to the PBO. The exemption will apply to documents that are brought into existence for the 'dominant purpose' of providing information to the PBO in relation to a confidential request.⁷

1.5 The EM notes that 'this will ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined'.⁸

1 *House of Representatives Votes and Proceedings*, No. 137, 10 October 2012, p. 1854.

2 *Journals of the Senate*, No. 117, 11 October 2012, pp 3117-3118.

3 *House of Representatives Votes and Proceedings*, No. 140, 30 October 2012, p. 1915.

4 *Journals of the Senate*, No. 119, 30 October 2012, pp 3191-3192.

5 Explanatory Memorandum (EM), p. 1.

6 The Hon. Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 10 October 2012, p 11767.

7 Proposed new paragraph 45A(1)(b); (item 3 of Schedule 1 of the Bill).

8 EM, p. 1.

Key provisions of the Bill

1.6 As indicated in the EM, '[t]he Bill amends the FOI Act to provide an exemption for information held by departments and agencies that relates to a confidential request to the PBO' by a parliamentarian.⁹ The amendments will 'ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined'.¹⁰

1.7 The key provisions of the Bill:

- amend the FOI Act by inserting a new section 45A to provide an exemption for information held by departments and agencies that relates to a confidential request to the Parliamentary Budget Office;¹¹
- amend section 25 of the FOI Act to provide that an agency is not required to give information as to the existence or non-existence of a document, where it is exempt under the new exemption for documents that relate to a confidential request to the PBO;¹²
- amend subsection 58B(1) of the FOI Act to provide that, where an application is made to the Administrative Appeals Tribunal (AAT) for a review of a decision refusing to grant access to a document that is claimed to be exempt under the new PBO exemption, the AAT must be constituted by three presidential members or by a presidential member alone.¹³

1.8 The Bill also makes a consequential amendment to the Privacy Act, to reflect the amendment to section 25 the FOI Act. The Attorney-General noted that section 34 of the Privacy Act provides that the Information Commissioner, in carrying out functions under the Privacy Act such as investigating a possible breach of privacy by an agency, must not give a person any information as to the existence or non-existence of a document where it is exempt under the FOI Act.

1.9 The Attorney-General went on to state:

It is proposed to amend section 34 [of the Privacy Act] to refer to the new Parliamentary Budget Office exemption, reflecting the amendment to section 25 of the Freedom of Information Act and ensuring that Parliamentary Budget Office documents are confidential.¹⁴

9 EM, p. 2.

10 EM, p. 2.

11 EM, p. 6.

12 EM, p. 6.

13 EM, p. 8.

14 The Hon. Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 10 October 2012, p. 11767.

Conduct of the inquiry

1.10 The committee advertised the inquiry in *The Australian* on 24 October 2012, and details of the inquiry, the Bill and associated documents were placed on the committee's website at http://www.aph.gov.au/senate_legalcon. The committee also wrote to over 50 organisations and individuals, inviting submissions by 26 October 2012.

1.11 The committee received four submissions, which are listed at Appendix 1. No public hearings were held for the inquiry.

CHAPTER 2

Key issues

2.1 As noted in chapter 1, the PBO is an exempt agency under the FOI Act; however, documents related to PBO requests may be held by departments and other agencies and may not be protected from release under the FOI Act.¹

Support for the Bill

2.2 The PBO supported the proposed amendments to the FOI Act and informed the committee that the existing FOI exemption is essential to the PBO's effectiveness as a source of confidential budget analysis and policy costings for senators and members. The PBO submitted:

The proposed amendments to the FOI Act extend this logic to also provide an exemption under the FOI Act for information held by departments and agencies that relates to a confidential request to the PBO. The PBO is heavily reliant on other departments and agencies for information to use in its budget analyses and policy costings.²

2.3 The PBO also noted that the *Memorandum of Understanding between the Parliamentary Budget Office and the Heads of Commonwealth Bodies in relation to the Provision of Information and Documents* had been finalised and that strict confidentiality obligations are placed on the heads of Commonwealth bodies in relation to confidential information requests to the PBO. Confidentiality of information relating to confidential requests to the PBO is also recognised under protocols issued for Commonwealth bodies engaging with the PBO.³

2.4 In a joint submission, The Treasury and the Department of Finance and Deregulation welcomed the introduction of the Bill and advised the committee that, in their view, the amendments will ensure the confidentiality of requests from the PBO and that the integrity of the PBO processes are maintained.⁴

2.5 While the Australian Information Commissioner and the Freedom of Information Commissioner did not express an opinion on whether it is appropriate as a matter of policy to exempt PBO documents from the FOI Act, they submitted:

We accept that the exemption from the FOI Act of documents in the possession of the PBO and PBO-related documents held by other agencies,

1 EM, p. 2. Further background on the PBO and the FOI Act is contained in a recent Parliamentary Library Bills Digest: see Mary Anne Neilsen, *Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012*, Bills Digest No. 39, 2012–13, Parliamentary Library, 31 October 2012.

2 Parliamentary Budget Office, *Submission 1*, p. 1.

3 Parliamentary Budget Office, *Submission 1*, p. 1.

4 The Treasury and the Department of Finance and Deregulation, *Submission 2*, p. 2.

rest on the same policy rationale. The Bill does not appear to go further than necessary to effect that policy intent in the FOI Act...

We accept that the current Bill corrects an unintended consequence of the narrow scope of the earlier exemption.⁵

2.6 The Commissioners noted that the Bill will 'enact provisions similar to those already in the FOI Act that extend the exemption applying to security intelligence agencies (such as the Australian Security Intelligence Organisation) to "intelligence agency documents" held by other agencies but which originated with ASIO or were received by ASIO'.⁶

2.7 The Attorney-General's Department advised:

- the PBO exemption gives additional protection to the PBO and it is not based on the intelligence agency provisions, which recognise the special character and sensitivity of intelligence information; and
- the proposed new exemption will only apply to PBO documents held by agencies that relate to a confidential request made to the PBO and the new exemption does not apply to other PBO-related documents.⁷

No requirement to confirm or deny the existence of documents

2.8 Section 25 of the FOI Act provides the right of an agency, or a Minister when responding to an FOI request, to neither confirm nor deny the existence or non-existence of certain documents that would be exempt. Such rights are currently limited to documents affecting national security, defence or international relations, law enforcement and the protection of public safety.⁸ The Bill amends section 25 of the FOI Act to extend this right to the new exemption in proposed section 45A for PBO documents. In her second reading speech, the Attorney-General stated:

Freedom of Information requests may be made to agencies for the sole purpose of finding out whether or not the PBO has received a confidential request in relation to a particular matter. A response from an agency that documents could not be released because a relevant exemption applied would in effect confirm the existence of the documents and the fact that a confidential request had been made to the Parliamentary Budget Office.⁹

5 Office of the Australian Information Commissioner, *Submission 3*, p. 1.

6 Office of the Australian Information Commissioner, *Submission 3*, p. 1, referring to subsections 7(2A)-(2C) of the FOI Act.

7 Attorney-General's Department, *Submission 4*, pp 1–2.

8 See: Mary Anne Neilsen, *Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012*, Bills Digest No. 39, 2012–13, Parliamentary Library, 31 October 2012, p. 10.

9 The Hon. Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 10 October 2012, p. 11767.

Length of the exemption

2.9 The length of time for which there will be no legal right of public access to PBO documents was addressed by the Australian Information Commissioner and the Freedom of Information Commissioner in their submission. The Commissioners observed:

In effect, that will be 20 years after a PBO document was created (the open access period currently set at 28 years is being reduced progressively to 20 years). This archival open access principle also applies to other Commonwealth agency documents that are exempt under the FOI Act, but there is an important difference.

Many other FOI exemptions contain a qualifying phrase or principle that can result in a document that is initially exempt losing that status before the archival open access period is reached.¹⁰

2.10 The Commissioners raised the question of whether a time limitation should be placed on the operation of the PBO exemption from the FOI Act. The Commissioners went on to note that the Attorney-General in her second reading speech, indicated that the policy rationale for the PBO exemption is to provide parliamentarians with access to independent and non-partisan budget analysis over the entire course of the three-year election cycle.¹¹

2.11 Based on the linkage of the policy rationale to the election cycle, the Commissioners therefore suggested that, following the election of a new government, the rationale for exempting documents from the former government may not be the same. The Commissioners did not make a formal proposal to change the length of the exemption, but indicated that the matter may be considered further in the review of the FOI Act (which has recently been announced by the Attorney-General).¹²

2.12 In response to this issue, the Attorney-General's Department informed the committee that the 20-year period is appropriate:

While the Department recognises that the need for confidentiality for PBO documents and PBO-related documents will reduce over time, we consider that maintaining the 20 year open access period is appropriate. While the work of the PBO is directed at financial analysis and costings it may also be highly controversial and sensitive in nature...Any reduction in the open access period would undermine the effective operation of the PBO as senators and members would be reluctant to use its services if they thought

10 Office of the Australian Information Commissioner, *Submission 3*, pp 1–2.

11 Office of the Australian Information Commissioner, *Submission 3*, p. 2.

12 Office of the Australian Information Commissioner, *Submission 3*, p. 2, and the Hon. Nicola Roxon MP, Attorney-General and Minister for Emergency Management, *Review of the FOI Act*, media release, 31 October 2012, <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/31October2012ReviewoftheFOIAct.aspx> (accessed 8 November 2012).

that their confidential requests would be made publicly available sooner than expected.¹³

Committee view

2.13 The committee acknowledges that the Australian Information Commissioner and the Freedom of Information Commissioner questioned whether there should be a time limit on the PBO exemption for the FOI Act, and the committee notes that this issue may be considered further in the context of the impending FOI Act review. The committee agrees that it is appropriate for there to be no requirement to neither confirm nor deny the existence of a PBO document relating to a confidential request for PBO services by parliamentarians. From the evidence received, the committee concludes that the amendments will facilitate the integrity and effectiveness of the PBO and, accordingly, recommends that the Senate pass the Bill.

2.14 In relation to the types of documents that may be the subject of the proposed new exemption, the committee understands that the test is a 'dominant purpose' one – that is, the exemption will apply to documents that are prepared by departments and agencies for the dominant purpose of providing information to the PBO relating to a confidential request, and that it would not apply to documents prepared or held in the ordinary course of business by those departments and agencies (unless another exemption applies). The committee also understands that the new exemption is modelled on the existing test under the FOI Act for the exemption of Cabinet documents. In the committee's view, however, neither of these points has been articulated clearly in the EM to the Bill (the Cabinet documents 'model' is not mentioned at all). Accordingly, the committee considers that the EM should be revised and reissued to include a more comprehensive explanation of the application of the new exemption to documents held by departments and agencies.

Recommendation 1

2.15 The committee recommends that the Explanatory Memorandum to the Bill be revised and reissued to explain clearly that the Bill's proposed new exemption:

- **applies only to documents prepared by departments and agencies for the 'dominant purpose' of providing information to the Parliamentary Budget Office or the Parliamentary Budget Officer relating to a confidential request, and that it does not apply to documents prepared or held by those departments and agencies in the ordinary course of their business or activities; and**
- **is modelled on the existing exemption under the *Freedom of Information Act 1982* for Cabinet documents.**

13 Attorney-General's Department, *Submission 4*, p. 2.

Recommendation 2

2.16 Subject to Recommendation 1, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Parliamentary Budget Office
2	The Treasury and Department of Finance and Deregulation
3	Office of the Australian Information Commissioner
4	Attorney-General's Department