

Government information

**Restoring trust and
integrity**



New Leadership.

Government information

Restoring trust and integrity

Election 2007

Policy Document

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October 2007



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Government information: Restoring trust and integrity

Overview

Federal Labor has long supported the objectives of the *Freedom of Information Act 1982* (Cth).

Under the Howard Government, however, the FOI Act has become sclerotic; its objects ignored in favour of narrower interpretations by government and the courts, and its exemptions, charges and procedures arguably abused.

The culture of concealment in turn creates pressure for information to be released in ways other than those authorised by the Act. If the legitimate method of FOI is undermined to the point where nothing contentious can be released, the truth will find other ways to get out – for example, through the bureaucracy leaking to journalists.

In recent years, the Howard Government has responded by vigorously pursuing leak inquiries, including through intimidatory investigative raids – often at considerable expense. This approach has inhibited legitimate whistleblowing by public servants, undermining the proper reporting and investigation of corruption and misconduct.

It is also critical to ensure that laws relating to government information and court evidence are not misused to prosecute responsible journalists who present news that is merely embarrassing to government.

The Howard Government's over-reach has made clear the need for fundamental reform in several key areas. To achieve genuine change, a Rudd Labor Government will:

- drive a culture shift across the bureaucracy to promote a pro-disclosure culture;
- reform the FOI Act to make lawful disclosure possible;
- implement public interest disclosure reform for whistleblowers; and
- introduce further reform to provide shield protection for journalists and other professionals.

In an age defined by information, policies that promote a pro-disclosure culture are a key component of the architecture of a healthy, vibrant democracy.

Just as we must modernise the delivery of information, through investment in national high speed broadband, we must renovate or replace the ageing architecture that governs information policy.

A Rudd Labor Government will restore trust and integrity in the use of Commonwealth Government information, promoting a pro-disclosure culture and protecting the public interest through genuine reform.

Government information management under the Howard Government

Freedom of information

There is a general presumption that government held information should be freely available. This was the purpose of passage in 1982 of the original Freedom of Information Act by the Fraser Government, the introduction of which stated:

“the object of this Act is to extend as far as possible the right of the Australian community to access information in the possession of the Government of the Commonwealth...”

Federal Labor supported the passage of this Act in Opposition and the former Attorney-General Lionel Bowen extended its operation during the period of the Hawke Government. However, there has now been no major reform of the FOI Act since 1991.

While most FOI requests for personal documents are granted, requests for other information have higher rates of refusal. In addition, the recent High Court decision in *McKinnon* has effectively placed conclusive certificates beyond administrative review.

Australia’s Right to Know Campaign says:

“The current system of Freedom of Information is not working. Increasing resistance to the disclosure of information means news organisations are being severely hindered in their ability to report to the public on government processes, policies and services.”

Federal Labor agrees with this assessment and has identified FOI as an area in need of serious reform. It is clear that the FOI Act has become sclerotic; its objects ignored in favour of narrower interpretations by government and the courts, and its exemptions, charges and procedures arguably abused by government.

This culture of concealment in turn creates pressure for information to be released in ways other than those authorised by the Act – for example, through the bureaucracy leaking to journalists.

In recent years, and in an attempt to try to control information flows, the Howard Government has responded by upping the ante; pursuing leak inquiries and encouraging intimidatory investigative raids – often at considerable expense and where much of the material ‘leaked’ may otherwise have been readily accessible under a more transparent FOI regime.

Not allowing FOI access to contentious material enhances the likelihood that the public service will leak material. If the legitimate method of FOI is undermined to the point where nothing contentious can be released, the truth will find other ways to get out.

Federal Labor has long supported the objectives of the Commonwealth Freedom of Information Act

A culture of concealment creates pressure for information to be released in other ways – for example, through leaking to journalists

Similarly, the Privacy Act has been criticised, and is currently under review by the Australian Law Reform Commission (ALRC) to deal with:

- *“rapid advances in technology that affect how information is gathered, stored and communicated;*
- *possible changes in community views about privacy and how it should be protected by law; and*
- *laws introduced by state and territory governments that affect privacy.”¹*

Journalist shield laws

Journalists’ privilege or journalist shield laws are laws that create a form of legal privilege to protect journalists from naming their sources.

The journalists Michael Harvey and Gerard McManus were recently convicted and fined for contempt of court, for refusing to answer questions relating to their publication of material from a source.

This prosecution highlights the need identified in the ALRC’s 2005 recommendation – in its *Review of Uniform Evidence Laws* – to introduce a form of shield law to protect journalists.

Federal Parliament recently passed the *Evidence Amendment (Journalists’ Privilege) Act 2007*, which introduced a new section into the *Evidence Act 1995* (Cth) to allow journalists facing trial to refuse to disclose the identity of their sources – at the discretion of the court. The Act was based largely on similar provisions in the *Evidence Act 1995* (NSW).

However, Australia’s Right to Know has cited the conviction of McManus and Harvey to argue that, despite the passage of the new Act, laws to protect journalists’ sources remain inadequate.

Public interest disclosure laws (whistleblower protection)

Whistleblowing is the disclosure of information relating to the improper practices of a person’s employers or co-employees in the public interest.

Currently, federal laws allow only very few protections for whistleblowers in very limited circumstances – and even then the limited protection that is offered is inadequate.

The prosecution of Alan Kessing – for disclosing a report detailing security failings at Sydney airport – is a case in point. Although Mr Kessing’s actions ultimately made Australia safer, he was nevertheless prosecuted and ultimately convicted.

Australia’s Right to Know has highlighted the need to strengthen Australia’s public disclosure laws:

“As evidenced by the conviction of Kessing, there needs to be an effective regime to deal with the handling and disclosure of information in the public interest and consequential protection for public servants where appropriate.”

Journalist shield laws provide a form of legal privilege to protect journalists from naming their sources

Federal laws currently offer very little protection for whistleblowers

Reform of suppression orders

Australia's Right to Know states there is an increasing tendency to issue suppression orders in circumstances which are not justified or appropriate. This is detrimental to the open process of the justice system.

Australia's Right to Know has also raised the practical difficulties arising out of particular cases.

Federal Labor recognises that there are many provisions across State, Territory and Commonwealth jurisdictions that empower courts, tribunals and commissions to make suppression orders. The breadth of the power provided to these institutions is quite varied.

There are strong public policy reasons for the existence of this power – for example, in state laws where identifying victims of sexual offences is prohibited. Nevertheless, it is clear there are problems with the use and operation of suppression orders. For example, media organisations have criticised the use of 'blanket' orders that cover all reportage of a trial rather than orders that only cover issues of specific concern.

Many of these problems, at least so far as the Commonwealth is concerned, could be overcome with clear procedures to identify when suppression orders should be sought and when they should not. However, the Howard Government has failed to address this issue in any meaningful way.

It is clear there are problems with the use and operation of suppression orders but the Howard Government has failed to act

Federal Labor's new leadership for trust and integrity

Summary

The Howard Government's over-reach in relation to the use, disclosure of, and access to public information has made clear the need for fundamental reform in several key areas.

A Rudd Labor Government will significantly reform freedom of information and privacy laws and restructure their administration to ensure the laws are effective in the 21st century.

Federal Labor will abolish conclusive certificates, implement the recommendations of the 1996 ALRC Report, *Open Government*, and create an independent statutory Information Commissioner to act as a whole-of-government clearinghouse for complaints, oversight, advice and reporting for freedom of information and privacy matters.

Federal Labor will also take action to address the concerns raised by stakeholders in relation to:

- journalist shield laws;
- public interest disclosure; and
- suppression orders.

To achieve genuine change, a Rudd Labor Government will drive cultural change across the bureaucracy to promote a pro-disclosure attitude in relation to FOI and an individual's right to know what information is held about them. In an age defined by information, a pro-disclosure culture is a key component of the architecture of a healthy, vibrant democracy.

Freedom of information and privacy protection

A Rudd Labor Government will move to put in place the key findings of the 1996 ALRC Report, *Open Government*, namely:

- Revision of the FOI Act to promote a culture of disclosure and transparency.
- Appointment of a statutory Freedom of Information Commissioner.
- Rationalisation of the exemption provisions, and publication of guidelines, so that information is only withheld where this is in the public interest.
- Review of FOI charges to ensure they are not incompatible with the objects of disclosure and transparency – a scale of charges should be determined by the Information Commissioner, and access to an applicant's personal information should be provided free of charge.

Office of the Information Commissioner

The ALRC has identified how the Privacy and FOI Acts work together:

The interrelationship between the FOI Act and the Privacy Act is significant. The FOI Act and the Privacy Act both regulate the way in which information

A Rudd Labor Government will significantly reform freedom of information and privacy laws and restructure their administration

Labor will drive cultural change across the bureaucracy to promote a pro-disclosure attitude

is handled in government, but have different objectives. Freedom of information legislation is concerned mainly with transparency in government and protects privacy only to the extent that non-disclosure is, on balance, in the public interest. In contrast, privacy legislation is primarily focused on data protection and provides for transparency only to the extent that it enhances the information privacy rights of individuals.

The Privacy Act and the FOI Act are designed to interact with each other. For example, the public sector exemptions under the Privacy Act largely mirror the exemptions under the FOI Act.²

A Rudd Labor Government will bring together the functions of privacy protection and FOI in an Office of the Information Commissioner

The co-location of these two policy functions (privacy and FOI) would better equip all sectors in developing consistent, workable information policy – this is especially so as reconciling the opposite tensions of openness and access with the need for protections of certain confidentiality are common to both FOI and privacy administration.

Accordingly, Labor will:

- **Bring together the functions of privacy protection and freedom of information in an Office of the Information Commissioner** – a whole-of-government clearinghouse for complaints, oversight, advice and reporting for freedom of information and privacy matters.
- **Preserve the existing role of the Privacy Commissioner** – retaining the Commissioner as an independent statutory officer responsible for federal privacy law, under the Office of the Information Commissioner.
- **Appoint a Freedom of Information Commissioner** – as a statutory office holder responsible for freedom of information law, similar to the Privacy Commissioner.

Labor will appoint an FOI Commissioner as a statutory office holder responsible for FOI law

The two independent streams of policy – FOI and privacy – will be co-located in order to improve transparency and data protection across government. The Office of the Information Commissioner will be independent, but housed under the Attorney-General’s portfolio.

Office of the Information Commissioner (Information Commissioner as CEO)	
Independent statutory office within the Attorney-General’s portfolio responsible for guiding all agencies on information handling policy.	
Freedom of Information (FOI Commissioner)	Privacy (Privacy Commissioner)
Outcome 1: An Australian community that can properly access information in the possession of the Commonwealth Government.	Outcome 2: An Australian society in which privacy is respected, protected and promoted.

Currently, there is no unified office for handling FOI requests – these are processed by individual departments, with merits review to the Administrative Appeals Tribunal. The proposed changes would provide consistent information policy advice across government and provide a clearinghouse for FOI determinations after the Departmental stage. Staff attached to the Office of the Privacy Commissioner would retain their current positions.

In addition to policy, reporting, complaints handling and investigation already handled by the Privacy Commissioner, it is proposed to create a second policy stream for FOI, including a whole-of-government FOI clearing house so that, while at first instance all FOI applications will still be dealt with at the departmental or agency level; unsuccessful applications after internal review stage and complaints about non-compliance by agencies will be centralised under the FOI Commissioner who can direct, monitor and report on compliance.

This will ensure:

- Applications and outcomes can be monitored and reported more easily.
- FOI-related resources and support can be better prioritised across government.
- Complex and potentially precedent-setting cases can be identified and dealt with more effectively.
- Cross-departmental applications can also be identified and dealt with more effectively.

An FOI Commissioner would replace the Administrative Appeals Tribunal (AAT) in the FOI review process. An application rejected at the internal review stage would be externally reviewable upon application to the Office of the Information Commissioner at no additional cost. This will reduce the financial burden on the applicant and allow the Commissioner to act as a check on the procedures and handling of the departments.

At present, there is “no authoritative source of advocacy for good FOI practice”, and the major reports into FOI have recommended “many of the shortcomings in the current operation and effectiveness of the Act could be addressed with the establishment of a constant, independent monitor”, a “statutory FOI Commissioner”.³

Conclusive certificates

Under current arrangements, a conclusive certificate may be issued by the appropriate Minister in response to an FOI application. The effect of issuing that certificate is to state that it is not in the public interest to release a document.

The issuing of a conclusive certificate places a document outside the reach of normal FOI processes.

The recent decision of the High Court in the *McKinnon* case has effectively placed conclusive certificates beyond administrative review. Labor believes that conclusive certificates are no longer an appropriate legislative device to be used in government information management.

Labor will reform the FOI Act to abolish conclusive certificates, ensuring the public interest test is applied more thoroughly and consistently and establishing a pro-disclosure culture throughout government.

The Privacy Commissioner would remain an independent statutory officer within the Office of the Information Commissioner

The FOI Commissioner would replace the AAT in the FOI review process

A Rudd Labor Government will abolish conclusive certificates

FOI handling process

Under the proposed scheme, an FOI application would be handled as follows:

- An FOI request would be handled at first and second instance the same way it is now – that is, by application to the home agency, and if unsuccessful, internal review by another officer of the same agency.
- However, when an internal review upholds a decision to refuse an FOI request the process will differ. Rather than going to the AAT appeal at a cost of \$639, the rejected applicant will be able to apply for free review to the Office of the Information Commissioner.

In this way, not only is the applicant relieved of the expense of filing, but the Office of the Information Commissioner can act as a check on the procedures and handling of the departments and agencies. In 2005-06 there were 226 such cases, although this initiative may encourage more applicants to apply.

FOI Process	
Existing	Proposed
1. FOI Application to home agency.	1. FOI Application to home agency.
2. Internal review.	2. Internal review.
3. \$639 Application for AAT Review.	3. Free merits review upon application.
4. Federal Court action.	4. Federal Court action.

Under the current FOI process, after an application is initially rejected, the applicant has a right of appeal to an officer within the same agency or department. If the review is refused again, then the applicant must appeal to the AAT at substantial cost. Decisions of the AAT may be appealed to a court but only on the grounds of judicial review. The proposed FOI process would replace the AAT with the Information Commissioner, and would eliminate the application fee.

Because the FOI Commissioner would be an independent statutory officer, like HREOC or the Privacy Commissioner, it will substitute for the AAT appeals process, with an appeal lying directly to the Federal Court or Federal Magistrates Court.

In addition, the Commonwealth Ombudsman’s role in investigating delays and complaints about FOI will be transferred to the FOI Commissioner.

These transfers of responsibility allow the Office of the Information Commissioner to build up a knowledge base of why FOI applications are wrongfully refused, and therefore to modify decision making guidelines and practice directives as appropriate.

Labor will also allow a role for independent assessment of the refusal of a document under the public interest grounds of a person’s right to privacy, national security, law enforcement, or deliberative process, by the Privacy Commissioner, or the Inspector-General of Security and Intelligence, or the Australian Commissioner for Law Enforcement Integrity or the Commonwealth Ombudsman respectively.

The Commonwealth Ombudsman’s role in investigating delays and complaints about FOI will be transferred to the FOI Commissioner

Privacy

The existing Office of the Privacy Commissioner (OPC) has one outcome: “An Australian society in which privacy is respected, protected and promoted.”⁴ Like the FOI Act, the Privacy Act has not kept pace with our changing society.

Federal Labor takes privacy law seriously. In a world of increasing ability to access information and process or match data, Australians deserve a modern act with robust protections about the collection and use of personal information about them, along with access to this information held on them through FOI.

In tandem with the establishment of the Information Commissioner, a Rudd Labor Government will strengthen the terms of reference of the current ALRC review of the operation of the Privacy Act to ensure that it makes recommendations on ways to improve the consistency of rules around protection of, and access to, personal information across the Privacy Act and FOI Act.

A Rudd Labor Government will consider the recommendations of the ALRC report into the operation of the Privacy Act as a matter of priority.

Journalist shield laws

Federal Labor will support reasonable suggested changes to current laws, as adopted by Standing Committee of Attorneys-General, as model national law.

Working with the Australian Government Solicitor and the Director of Public Prosecutions, a Rudd Labor Government will also ensure a protocol is in place so that a responsible journalist presenting news in the public interest is not prosecuted by Federal agencies where the information presented is merely embarrassing to the government.

This will not cover reportage that jeopardises law enforcement, national intelligence or security, military operations or intelligence or diplomatic relations.

Public interest disclosure laws

A Rudd Labor Government will work with Department heads, the Public Service Commissioner and the Commonwealth Ombudsman to promote a pro-disclosure culture within Departments and agencies so that proper reporting and investigation systems are put in place to deal with allegations of corruption and misconduct.

These will cover not just APS employees but the entire Federal Government sector including agency staff, contractors, consultants and politicians.

Federal Labor will provide best-practice legislation to encourage and protect public interest disclosure within government to an integrity agency (for example, the Australian Federal Police, the Australian Commission for Law Enforcement Integrity or the Commonwealth Ombudsman).

Where a person has exhausted all legitimate mechanisms and avenues of complaint, and still finds that through the force of extreme circumstances they are obliged to disclose information to third parties such as journalists, protection by a court may still be provided dependent upon the circumstances.

Labor will strengthen the terms of reference of the current review of the operation of the Privacy Act

Responsible journalists presenting news that is merely embarrassing to the government will not be prosecuted by Federal agencies

Labor will ensure that proper reporting and investigation systems are put in place to deal with allegations of corruption and misconduct within the public sector

In situations where there may be compelling reason requiring disclosure, a court will be able to weigh up all the relevant factors and balance the public interest in disclosure against any breach of confidentiality which may have occurred.

In these cases, there will be two key tests to determine when public interest disclosure will attract legal protection. Firstly, where the whistleblower has gone through the available official channels, but has not had success within a reasonable timeframe and, secondly, where the whistleblower is clearly vindicated by their disclosure.

Reform of suppression orders

Media organisations have criticised the use of suppression orders by courts as both too broad in scope and too numerous in recent years.

For matters where national security or the protection of witnesses is vital there continues to be a role for the Crown to seek suppression orders to safeguard the security of the nation or for the victim's wellbeing.

However, it is of particular concern when such orders are used to avoid the release of information in matters that are merely embarrassing to government. In such cases, a Rudd Labor Government will seek to ensure that suppression orders are not sought by the Crown by way of standing instruction to the Australian Government Solicitor and the DPP.

Further, Federal Labor undertakes to examine the Victorian model as a positive step in promoting a cooperative relationship between the media and the courts.

In addition, a Rudd Labor Government will refer the issue of suppression orders to Standing Committee of Attorneys-General to consider the need for an ALRC review of the broader area of contempt by publication, particularly building on the work done by the New South Wales Law Reform Commission (Report 100).

Labor will refer the issue of suppression orders to the Standing Committee of Attorneys-General

Endnotes

1. ALRC, *Review of Australian Privacy Law: An Overview of Discussion Paper 72*, paragraph 1
2. ALRC, *Review of Australian Privacy Law*, Discussion Paper 72, paragraph 12.10
3. Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, March 2006
4. Office of the Privacy Commissioner, *Annual Report 2005-06*, paragraph 118