

Legislative Council—No 1

As introduced and read a first time, 9 May 2018

South Australia

**Freedom of Information (Miscellaneous)
Amendment Bill 2018**

A BILL FOR

An Act to amend the *Freedom of Information Act 1991*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Freedom of Information Act 1991*

- 4 Amendment of section 3—Objects
 - 5 Insertion of section 8A
 - 8A Public interest
 - 6 Insertion of section 13A
 - 13A Acknowledgement of application
 - 7 Insertion of section 14B
 - 14B Remittance of fees
 - 8 Amendment of section 18—Agencies may refuse to deal with certain applications
 - 9 Insertion of section 18A
 - 18A Documents that cannot be found or do not exist
 - 10 Amendment of section 20—Refusal of access
 - 11 Amendment of section 23—Notices of determination
 - 12 Amendment of section 29—Internal review
 - 13 Amendment of section 39—External review
 - 14 Insertion of section 49A
 - 49A Improper direction or influence
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

- 5 This Act may be cited as the *Freedom of Information (Miscellaneous) Amendment Act 2018*.

2—Commencement

This Act will come into operation 6 months after the day on which it is assented to by the Governor.

3—Amendment provisions

- 10 In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Freedom of Information Act 1991*

4—Amendment of section 3—Objects

- (1) Section 3(1)—delete "consistently with the principle of the Executive Government's responsibility to Parliament" and substitute:

5 consistently with the principles of representative democracy (including the Executive Government's responsibility to Parliament)

- (2) Section 3(1)(b)—delete "by members of the public in" and substitute:

, scrutiny, comment and review by members of the public in relation to

- (3) Section 3(1)—after paragraph (b) insert:

10 and

- (c) to recognise that documents held by government are a public resource to be held on behalf of the public and managed for public purposes by the government.

5—Insertion of section 8A

15 After section 8 insert:

8A—Public interest

- (1) In deciding whether disclosure of matter contained in a document would, on balance, be contrary to the public interest for the purposes of this Act, the following factors must be taken into account:

- 20 (a) the general public's need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- 25 (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- 30 (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- 35 (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

- 5
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- 10 (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- 15 (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- 20 (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for an agency;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by an agency of the agency's staff;
- 25 (q) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (r) whether the applicant is resident in Australia;
- (s) whether the matter is related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- 30 (t) whether the matter is related to the business affairs of a person which is generally available to the competitors of that person;
- (u) whether the matter is related to the business affairs of a person, other than an agency, which if it were information of an agency would be exempt information.
- 35 (2) The following factors must not be taken into account in deciding whether access to a document would, on balance, be contrary to the public interest for the purposes of this Act:
- (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
- (b) that access to the document could result in embarrassment to the government;
- 40 (c) that disclosure would cause a loss of confidence in the government;
- (d) that access to the document could result in any person misinterpreting or misunderstanding the document.

6—Insertion of section 13A

After section 13 insert:

13A—Acknowledgement of application

5 An agency that receives an application under section 13 must, as soon as practicable after receiving the application, give to the applicant written notice—

- 10 (a) specifying—
 - (i) the date on which the application was received by the agency; and
 - (ii) the name of a contact person within the agency (being an accredited FOI officer); and
- (b) summarising—
 - 15 (i) the processes that will apply to the application (including whether the application is to be transferred under section 16 and the time within which the application must be dealt with); and
 - (ii) the rights of review and appeal conferred by this Act.

7—Insertion of section 14B

20 After section 14A insert:

14B—Remittance of fees

25 If an agency fails to determine an application within 30 days after receiving the application or, if the period for determining the application is extended under section 14A, within the period as so extended—

- 30 (a) the agency must refund any fee paid by the applicant in relation to that application; and
- (b) if access is granted to a document in respect of that application (whether on review or not), no fee may be charged under this Act in relation to the granting of access to the document.

8—Amendment of section 18—Agencies may refuse to deal with certain applications

Section 18—after subsection (2) insert:

- 35 (2aa) For the purposes of subsections (1) and (2), an application that would, if dealt with by 1 person within the agency, be likely to take more than 40 hours to be so dealt with will be taken to be an application that would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the
- 40 exercise of its functions.

9—Insertion of section 18A

After section 18 insert:

18A—Documents that cannot be found or do not exist

- 5
- (1) An agency may determine that it is not possible to give access to a document if—
- (a) all reasonable steps have been taken to find the document; and
- (b) the agency is satisfied that the document—
- 10
- (i) is in the agency’s possession but cannot be found; or
- (ii) never existed.
- (2) If an agency makes a determination that it is not possible to give access to a document under subsection (1) it must, on making the determination, advise the applicant of the determination by written notice that sets out details of the efforts made to locate the document including—
- 15
- (a) how, when and where searches were conducted; and
- (b) the records management systems and databases searched (including a description of each system or database and the search terms used).
- 20

10—Amendment of section 20—Refusal of access

Section 20—after subsection (1) insert:

- 25
- (1a) An agency must, in considering whether to refuse access to an exempt document, act consistently with the objects of this Act in section 3 and the principles of administration of this Act in section 3A.

11—Amendment of section 23—Notices of determination

Section 23(2)—after paragraph (g) insert:

and

- 30
- (h) if the determination is one to which section 29(6) applies—the reason why the determination is not subject to internal review under that section (which must, if the determination was made at the direction of another person, include the name of that other person and the extent of the direction, such as whether the reasons for the determination were included in the direction).
- 35

12—Amendment of section 29—Internal review

(1) Section 29—after subsection (2) insert:

(2a) An agency that receives an application for internal review under this section must, as soon as practicable after receiving the application, give to the applicant written notice—

(a) specifying—

(i) the date on which the application was received by the agency; and

(ii) the name of a contact person within the agency (being an accredited FOI officer); and

(b) summarising—

(i) the effect of subsection (5); and

(ii) the rights of review and appeal conferred by this Act.

(2) Section 29(5)—delete subsection (5) and substitute:

(5) An agency that fails to determine an application made under this section within 14 days after it is received by the agency—

(a) must refund any fee paid by the applicant in relation to that application; and

(b) is, for the purposes of this Act, to be taken to have confirmed the determination in respect of which a review is sought.

13—Amendment of section 39—External review

Section 39(11)—delete subsection (11) and substitute:

(11) On an application under this section, the relevant review authority may (based on the circumstances existing at the time of the review)—

(a) confirm, vary or reverse the determination the subject of the review; or

(b) remit the determination the subject of the review to the agency for further consideration.

14—Insertion of section 49A

After section 49 insert:

49A—Improper direction or influence

A person must not—

- 5
- (a) direct an accredited FOI officer to make a decision or determination for the purposes of this Act that the person knows, or ought reasonably to know, is not a decision or determination that the officer should, in the circumstances, make; or
- 10
- (b) improperly influence (whether directly or indirectly) the making of a decision or determination for the purposes of this Act by an accredited FOI officer.

Maximum penalty: \$5 000.