

South Australia

Freedom of Information (Miscellaneous) Amendment Act 2004

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

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The Parliament of South Australia enacts as follows:

1—Short title

- (1) This Act may be cited as the *Freedom of Information (Miscellaneous) Amendment Act 2004*.
- (2) The *Freedom of Information Act 1991* is referred to in this Act as "the principal Act".

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Substitution of s. 3

Section 3 of the principal Act is repealed and the following sections are substituted:

3—Objects

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament—
 - (a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; and
 - (b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
- (2) The means by which it is intended to achieve these objects are as follows:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; and
 - (c) enabling each member of the public to apply for the amendment of such government records concerning his or her personal affairs as are incomplete, incorrect, out-of-date or misleading.
- (3) Nothing in this Act is intended to prevent or discourage the publication of information, the giving of access to documents or the amendment of records otherwise than under this Act if it is proper and reasonable to do so or if it is permitted or required by or under any other Act or law.

3A—Principles of administration

- (1) It is the intention of the Parliament—
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and

- (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.
- (2) Agencies are to give effect to this Act in a way that—
 - (a) assists members of the public and Members of Parliament to exercise rights given by this Act; and
 - (b) ensures that applications under this Act are dealt with promptly and efficiently.

4—Amendment of s. 4—Interpretation

Section 4 of the principal Act is amended—

- (a) by striking out paragraph (g) of the definition of *agency* in subsection (1) and substituting the following paragraph and words:
 - (g) a person or body declared by the regulations to be an agency,
but does not include an exempt agency;
- (b) by striking out the definition of *agency certificate* in subsection (1);
- (c) by inserting in paragraph (b) of the definition of *exempt agency* in subsection (1) "or a person or body referred to in that Schedule in respect of functions or classes of information specified in that Schedule" after "Schedule 2";
- (d) by inserting in paragraph (c) of the definition of *exempt agency* in subsection (1) "or declared by regulation to be an exempt agency in respect of functions or classes of information specified in the regulation" after "exempt agency";
- (e) by striking out the definition of *Ministerial certificate* in subsection (1);
- (f) by striking out paragraph (e) of the definition of *personal affairs* in subsection (1) and substituting the following paragraph and words:
 - (e) personal qualities or attributes,
but does not include the personal affairs of a body corporate;

5—Amendment of s. 20—Refusal of access

Section 20 of the principal Act is amended—

- (a) by striking out subsection (3);
- (b) by striking out from subsection (4) "(even though the exempt document may be a restricted document subject to a Ministerial or agency certificate)".

6—Substitution of Part 5

Part 5 of the principal Act is repealed and the following Part is substituted:

Part 5—External review and appeal

Division 1—Right of external review

39—External review

(1) In this section—

interested person, in relation to a review, means a person who should, under Division 2 of Part 3, be consulted in relation to an application for access to a document the subject of the review;

relevant review authority, in relation to a determination, means—

- (a) if the determination was not made by a person described in paragraph (b)—the Ombudsman; or
- (b) if the determination was made by a police officer or the Minister responsible for the administration of South Australia Police in that capacity—the Police Complaints Authority.

(2) A person—

- (a) who is aggrieved by a determination of an agency following an internal review; or
- (b) who is aggrieved by a determination that is not liable to internal review,

may apply to the relevant review authority for a review of the determination.

(3) Subject to subsection (4), an application under this section must be made—

- (a) where there has been a review of the determination by the agency—within 30 days after notice of the decision on review of the determination is given to the applicant; or
- (b) in any other case—within 30 days after the date of the determination.

(4) The relevant review authority may, in its discretion, extend the time for making an application under this section.

- (5) In conducting a review under this section, the relevant review authority—
- (a) may carry out an investigation into the subject matter of the application (and for the purposes of such an investigation may exercise the same investigative powers as are conferred on the Ombudsman by the *Ombudsman Act 1972* in relation to an investigation duly initiated under that Act, including the powers of a commission as defined in the *Royal Commissions Act 1917*); and
 - (b) may, if it appears to the relevant review authority that the agency has failed to properly sort or compile documents relevant to the review or to undertake consultations relevant to the review that should have been undertaken by the agency—
 - (i) require the agency to sort or compile the documents or undertake the consultations; or
 - (ii) require officers of the agency to attend at a time and place specified by the relevant review authority for the purpose of sorting and compiling the documents or undertaking the consultations; and
 - (c) may—
 - (i) try to effect a settlement between the participants to a review at any time during the review; and
 - (ii) at the request of the agency, suspend proceedings under this section at any time to allow an opportunity for a settlement to be negotiated.
- (6) Section 21 of the *Ombudsman Act 1972* does not apply in relation to a review under this section.
- (7) The agency and the applicant must cooperate in the process proposed by the relevant review authority for the purposes of the conduct of a review under this section (including any attempt of the relevant review authority to effect a settlement between the participants), and must do all such things as are reasonably required to expedite the process.
- (8) The relevant review authority may dismiss an application if the relevant review authority considers that the applicant has failed to comply with subsection (7).
- (9) If, in determining an application for a review under this section—
- (a) the relevant review authority is advised that the determination of the agency was made on grounds of the public interest; and

- (b) the Minister administering this Act makes known to the relevant review authority the Minister's assessment of what the public interest requires in the circumstances of the case subject to the review,

the relevant review authority must, in determining the application, uphold that assessment unless satisfied that there are cogent reasons for not doing so.

- (10) A relevant review authority must not make a determination to the effect that access is to be given to a document to which Division 2 of Part 3 applies unless the relevant review authority has taken steps as are reasonably practicable to obtain the views of any interested person as to whether or not the document is an exempt document under a provision of Part 2 of Schedule 1.
 - (11) On an application under this section, the relevant review authority may (based on the circumstances existing at the time of the review) confirm, vary or reverse the determination the subject of the review.
 - (12) If, in conducting a review under this section, the relevant review authority is satisfied that a document is an exempt document, the relevant review authority does not have power to make a determination to the effect that access is to be given to the document (but may, if it thinks fit, offer, together with its reasons for its determination, reasons why the agency might give access to the document despite its exempt status).
 - (13) On making a determination on a review under this section, the relevant review authority must notify each of the following persons of the determination and the reasons for the determination:
 - (a) the applicant;
 - (b) the agency;
 - (c) if—
 - (i) the determination is to the effect that access is to be given to a document; and
 - (ii) the relevant review authority—
 - (A) is aware that the views of an interested person are that the document is an exempt document under a provision of Part 2 of Schedule 1; or
 - (B) after having taken reasonable steps to obtain the views of an interested person, has been unable to obtain the views of the person,
- the interested person.

- (14) If the relevant review authority considers it to be in the public interest or the interests of an agency to do so, the relevant review authority may publish, in such manner as the relevant review authority thinks fit, the reasons for a determination made on a review under this section.
- (15) A relevant review authority should avoid disclosing in its reasons for a determination any matter that the agency claims is exempt matter (whether or not the relevant review authority agrees with that claim).
- (16) In publishing reasons for a determination, a relevant review authority may comment on any unreasonable, frivolous or vexatious conduct by the applicant or the agency.
- (17) If, after conducting a review under this section, a relevant review authority is of the opinion that there is evidence that a person, being an officer of an agency, has been guilty of a breach of duty or of misconduct in the administration of this Act and that the evidence is, in all the circumstances, of sufficient force to justify it doing so, the relevant review authority may bring the evidence to the notice of—
 - (a) if the person is the principal officer of a State Government agency—the responsible Minister; or
 - (b) if the person is the principal officer of an agency other than a State Government agency—the agency; or
 - (c) if the person is an officer of an agency but not the principal officer of the agency—the principal officer of that agency.

Division 2—Right of appeal

40—Appeal to District Court

- (1) An agency that is aggrieved by a determination made on a review under Division 1 may, by leave of the District Court, appeal against the determination to the District Court on a question of law.
- (2) A person (other than an agency)—
 - (a) who is aggrieved by a determination of an agency following an internal review; or
 - (b) who is aggrieved by a determination that is not subject to internal review; or
 - (c) who is aggrieved by a determination made on a review under Division 1,may appeal against the determination to the District Court.
- (3) Proceedings under this section must be commenced by an agency or person within 30 days after notice of the determination to which the proceedings relate is given to the agency or person or, in the case of a person who was not given notice of the determination, within 30 days after the determination.

- (4) Where an application for review is made under Division 1, an appeal cannot be commenced until that application is decided and the commencement of an appeal to the District Court bars any right to apply for a review under Division 1.
- (5) The following are parties to proceedings under this section:
 - (a) the agency;
 - (b) in the case of an appeal against a determination of an agency following an internal review or a determination made on a review under Division 1—the applicant for the review;
 - (c) in the case of an appeal against a determination that has not been the subject of a review—the applicant for the determination.
- (6) Neither the Ombudsman nor the Police Complaints Authority can be a party to proceedings under this section.
- (7) If, in proceedings under this section—
 - (a) the Court is advised that the determination of the agency was made on grounds of the public interest; and
 - (b) the Minister administering this Act makes known to the Court the Minister's assessment of what the public interest requires in the circumstances of the case subject to the appeal,the Court must, in determining the appeal, uphold that assessment unless satisfied that there are cogent reasons for not doing so.
- (8) In proceedings under this section—
 - (a) in the case of proceedings commenced by an agency—the Court must order that the agency pay the other party's reasonable costs; or
 - (b) in any other case—the Court must not make an order requiring a party to pay any costs of an agency unless the Court is satisfied that the party acted unreasonably, frivolously or vexatiously in the bringing or conduct of the proceedings.

41—Consideration of restricted documents

- (1) In any proceedings under this Division in which it is claimed that a document is a restricted document, the District Court must, on the application of—
 - (a) the agency concerned; or
 - (b) if the agency concerned is a State Government agency—the Minister administering this Act,

receive evidence and hear argument in the absence of the public, the other party to the appeal and, where in the opinion of the District Court it is necessary to do so in order to prevent the disclosure of any exempt matter, the party's representative.

- (2) If the District Court is not satisfied, by evidence on affidavit or otherwise, that there are reasonable grounds for the claim, it may require the document to be produced in evidence before it.
- (3) If the agency concerned is a State Government agency, the Minister administering this Act is a party to the proceedings, and the District Court must not determine the appeal unless the Court has given the Minister a reasonable opportunity to appear and be heard in relation to the matter and has given due weight to any submissions made by or on behalf of the Minister.

42—Disciplinary actions

If, at the completion of any proceedings under this Division, the District Court is of the opinion that there is evidence that a person, being an officer of an agency, has been guilty of a breach of duty or of misconduct in the administration of this Act and that the evidence is, in all the circumstances, of sufficient force to justify it doing so, the Court may bring the evidence to the notice of—

- (a) if the person is the principal officer of a State Government agency—the responsible Minister; or
- (b) if the person is the principal officer of an agency other than a State Government agency—the agency; or
- (c) if the person is an officer of an agency but not the principal officer of the agency—the principal officer of that agency.

7—Repeal of s. 46

Section 46 of the principal Act is repealed.

8—Amendment of s. 53—Fees and charges

Section 53 of the principal Act is amended—

- (a) by inserting in subsection (2) "reasonable administrative" after "reflect the";
- (b) by inserting after subsection (2) the following subsection:
 - (2aa) A fee or charge can only be required by an agency under this Act in respect of the costs to the agency of finding, sorting, compiling and copying documents necessary for the proper exercise of a function under this Act and undertaking any consultations required by this Act in relation to the exercise of that function.

9—Amendment of s. 54—Reports to Parliament

Section 54 of the principal Act is amended by striking out subsections (2) and (3).

10—Insertion of s. 54AA

The following section is inserted after section 54 of the principal Act:

54AA—Provision of information to Minister

Each agency must—

- (a) furnish to the Minister administering this Act such information as the Minister requires by notice in the Gazette—
 - (i) for the purpose of monitoring compliance with this Act; and
 - (ii) for the purpose of preparing a report under section 54; and
- (b) comply with any requirements notified by the Minister in the Gazette concerning the furnishing of that information and the keeping of records for the purposes of this section.

11—Amendment of Sched. 1

Schedule 1 of the principal Act is amended—

- (a) by striking out paragraph (d) of subclause (1) of clause 1;
- (b) by inserting after paragraph (a) of subclause (2) of clause 1 the following paragraph:
 - (ab) merely because it was attached to a document described in subclause (1); or
- (c) by inserting after subclause (2) of clause 1 the following subclause:
 - (2a) A document is not an exempt document by virtue of this clause if—
 - (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (d) by striking out paragraph (d) of subclause (1) of clause 2;
- (e) by inserting after paragraph (a) of subclause (2) of clause 2 the following paragraph:
 - (ab) merely because it was attached to a document described in subclause (1); or
- (f) by inserting after subclause (2) of clause 2 the following subclause:
 - (3) A document is not an exempt document by virtue of this clause if—
 - (a) the document has been submitted to Executive Council by a Minister; and

- (b) a Minister has certified that Executive Council have approved the document as a document to which access may be given under this Act.
- (g) by striking out from subclause (2) of clause 6 "and the truth of those allegations or suggestions has not been established by judicial process" and substituting "the truth of which has not been established by judicial process and the disclosure of which would be unreasonable";
- (h) by striking out subclause (4) of clause 6;
- (i) by inserting after subclause (2) of clause 7 the following subclause:
 - (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.
- (j) by inserting after the present contents of clause 13 (now to be designated as subclause (1)) the following subclauses:
 - (2) A document that is a contract entered into by the Crown or an agency after the commencement of this subclause is not an exempt document by virtue of subclause (1) unless—
 - (a) it contains matter the disclosure of which would, under a term of the contract, constitute a breach of the contract or found an action for breach of confidence; and
 - (b) that term of the contract has been approved by—
 - (i) in the case of a contract entered into by the Crown—a Minister; or
 - (ii) in the case of a contract entered into by a State Government agency—the responsible Minister for the agency; or
 - (iii) in the case of a contract entered into by an agency that is not a State Government agency—the agency.
 - (3) Subject to subclause (4), a Minister may, by instrument in writing, delegate the power to approve a term of a contract under subclause (2) to a specified person or to the holder of a specified office.
 - (4) A delegation under subclause (3) may be made subject to such conditions and restrictions as the Minister thinks fit and specifies in the instrument of delegation.
 - (5) A delegation by a Minister under subclause (3) is revocable at will, and does not derogate from the power of the Minister to act personally in any matter.
 - (6) If a Minister or agency approves a term of a contract in accordance with subclause (2), the Minister or agency must, as soon as practicable, notify the Minister administering this Act, in writing, of that fact.

- (7) The Minister administering this Act must, in a report under section 54, state the number of contracts containing terms approved in accordance with subclause (2) during the period to which the report relates.

12—Amendment of Sched. 2

Schedule 2 of the principal Act is amended by inserting after paragraph (f) the following paragraph:

- (g) the Essential Services Commission in relation to—
- (i) information gained under Part 5 of the *Independent Industry Regulator Act 1999* that would, if it were gained under Part 5 of the *Essential Services Commission Act 2002*, be capable of being classified by the Commission as being confidential under section 30(1) of that Act; and
 - (ii) information gained under Part 5 of the *Essential Services Commission Act 2002* that is classified by the Commission as being confidential under section 30(1) of that Act;

13—Transitional provision

- (1) Subject to subsection (2), an amendment to the principal Act effected by a provision of this Act applies in relation to an application under the principal Act, or review or appeal proceedings relating to an application under the principal Act, if the application or proceedings are determined after the commencement of that provision (whether the application was lodged before or after that commencement).
- (2) Part 5 of the principal Act, as substituted by section 6 of this Act, only applies in relation to determinations made on applications lodged under Parts 3 and 4 of the principal Act after the commencement of section 6 of this Act.
- (3) If, before the commencement of this subsection, a document ceased to be an exempt document under subclause (4) of clause 6 of Schedule 1 of the principal Act (as in force immediately before the commencement of section 11 of this Act) because the period of 30 years referred to in that subclause had expired, the document is, for the purposes of an application under the principal Act, or review or appeal proceedings relating to an application under the principal Act, determined after the commencement of section 11 of this Act, to be taken to have continued to be an exempt document under that clause (whether the application was lodged before or after that commencement).