SECOND READING SPEECH

RIGHT TO INFORMATION BILL 2009

Mr Speaker, in August 2008 the Premier, David Bartlett announced a ten point plan to strengthen trust in democracy and political processes in Tasmania. That agenda included a review of the *Freedom of Information Act 1991* with a view to improving transparency in the operations and decision making processes of the Government through better access to information for all Tasmanians.

The introduction of this Bill is the culmination of eleven very intensive, inclusive months of work towards that goal. Tasmania has taken a leading role in the current nationwide review of Government information handling processes.

The construction of this Bill has been made possible by seeking constant input from the widest possible range of sources, from experts in the field, to the public and interested organisations, and the public sector, including both policy and operational employees. There has been engagement with the Members for the Opposition, and it has been particularly pleasing and encouraging that the Greens have fully participated in providing comments and vital feedback on the Bill throughout the process.

It became clear whilst listening to the input that there is a significant need for change to the Tasmanian system for handling the release of information. Change was supported by all contributors and there was a high degree of consensus on the direction of that change. The new framework put to the House in this Bill has four key elements, which are: it mandates the proactive release of information; it includes an enhanced role for the Ombudsman in relation to both review and the monitoring of the release of information; it minimises fees payable for the formal release of information and for the first

time seeks to clarify what exactly the public interest test consists of. I will now go on to look at these four main features of the Bill in more detail.

The new system for disseminating information is very different to the current one. It has defined information disclosure into four categories, namely required disclosure, which is information already required to be released by law; routine disclosure, which is information which a body decides to release on a routine basis; active disclosure, being information which is freely released on request; and assessed disclosure which is information which is released on application after it has been assessed against the legislation.

This feature is the legislative core of the major culture change we hope will be facilitated by this Bill. The first two methods are not reliant on a request to be available; information in this category will automatically be accessible to Tasmanians. Current examples of this sort of disclosure are the publishing by the Government of the Health Progress Chart and the Schools Improvement Report. All public authorities will be encouraged to publish information on websites in this way. The release of this information will result in less need for assessed disclosure – effectively this is the key element of the "push" or "proactive disclosure" model.

The third method, active disclosure, allows for an informal release of information that isn't of sufficient interest to be published regularly, but may be of interest to some Tasmanians nonetheless, and does not require scrutiny to ensure it is not exempt.

The fourth method, assessed disclosure, replaces the current method for release of information under the *Freedom of Information Act 1991*. When an application comes in and the information it refers to is of a nature that requires consideration as to whether it is exempt information as in Part

3 of the Bill, it will be considered assessed disclosure. It is hoped that this formal process will rarely be necessary.

The second key element is the extended role of the Ombudsman. As a small jurisdiction Tasmania has a tradition of combining roles/jurisdictions across a number of justice areas, streamlining and ensuring the cost effectiveness of the public service. The Bill provides that the Office of the Ombudsman continues to be the review body for the Right to Information Act and further provides for the Ombudsman to publish decisions of note as a guide to interpretation of the Act; to prepare and maintain practice guidelines on the application of the legislation; to have greater flexibility and increased powers in determining reviews; and to conciliate applications for review whereupon the agreed outcomes will have the force of a decision of Ombudsman.

The third main feature of the Bill is the innovative fee structure it implements. The Bill proposes that each application for assessed disclosure be accompanied by an application fee of 25 fee units, which at this time is $33.25. This application fee can be waived for those of a low income status, for instance healthcare card holders, and for Members of Parliament acting in connection with their official duty. Apart from this one-off application fee, similar to those charged for applications and in six other Australian Jurisdictions. There will be no further fees levied on the applicant in return for information, whereas in the current *Freedom of Information Act 1991* fees have been charged for searching, photocopying and transcripts. No fees at all are to be levied in the case of required, routine or active disclosures. These are the lowest fees to be found anywhere in the country in this sort of legislation.

Finally, the clarification of the public interest test is an important feature of the new system. Feedback gathered throughout the consultation and drafting stages of the Bill indicated that this test was one of the biggest issues with the

current Act and needed to be made clearer and more user-friendly, especially as in the current Act there are no less that five separate tests to be applied to different exemption provisions. There has also been confusion regarding whether 'in the public interest' means 'things which interest the public' which is of course very different to 'things that are in the interests of the public to know'.

To that end, the exemptions in this Bill that are to be subject to the public interest test are separated from those which refer to information that is exempt by its nature. At the beginning of that division, there is a clause referring to Schedules 1 and 2. Schedule 1 is an extensive but not exhaustive list of 25 matters to be considered when assessing if the disclosure of particular information would be not contrary to the public interest. It covers such matters as the general public need for government information to be accessible; whether the whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government; and whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.

Schedule 2 is a list of the matters which are <u>not</u> to be taken into account when assessing if disclosure of particular information would be contrary to the public interest. These include such factors as the seniority of the person responsible for preparing the information, or indeed the subject of the information; that the disclosure of the information may lead to loss of confidence in the government; and that the disclosure would lead to the applicant being unable to understand or to misinterpret the information.

The Bill makes it very clear that disclosure of information must occur unless its disclosure would be contrary to the public interest, which supports the 'push' model of proactive disclosure.

This Bill hopes to change the prevailing view that this sort of legislation is a means to block the disclosure of information, instead of a means to encourage and streamline disclosure with a framework of protection in limited circumstances.

The *Freedom of Information Act 1991* was a very important and successful of legislation that has slowly become eroded and outdated since its introduction 18 years ago. At that time Tasmania was at the dawn of the digital information age, access to computers was limited, the internet didn't exist in Tasmania, emails were not part of normal government communication and the sophisticated information management tools that we now have access to, were not available.

The Right to Information Bill is legislation for today and for the future, dedicated to improving democratic government in Tasmania by increasing the accountability of the executive to the people of Tasmania; by increasing the ability of the people of Tasmania to participate in their own governance; and by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania.

I commend this Bill to the House.

CLAUSE NOTES

RIGHT TO INFORMATION BILL 2009

Clause 1:
This Act may be cited as the Right to Information Act 2009.

Clause 2:
This Act will commence on 1 July 2010 or such earlier date as proclaimed.

Clause 3:
This provision states the objects of the Act, namely that it is to increase the accountability of the executive to the public and the ability of the public to participate in their governance by giving the public the right to obtain information held by public authorities and Ministers relating to the operations of Government.

Clause 4:
This provision provides that the Act is to bind the Crown.

Clause 5:
This clause contains the definitions to be used in interpreting the Act, including definitions of what constitutes 'information', a 'public authority', and what being 'in possession' means for the purposes of this Act.

Clause 6:
This provision excludes the information in the possession of a list of persons and public authorities from being subject to the Act, unless the information relates to the administration of that person or public authority. It also provides for some of the information in the possession of the Law Society of Tasmania to be subject while the remainder is excluded.

Clause 7:
This clause provides that a person has a legally enforceable right to be provided, subject to the Act, with information in the possession of a public authority or Minister, except where the information is exempt information as provided in Part 3 of the Act.

Clause 8:
This provision includes in the Act information generated by a publicly funded private authority but held by a public authority where the information relates to the performance, progress of work, evaluation of work, or the expenditure of public money by the private authority, unless that information is exempt information as provided in Part 3 of the Act.

Clause 9:
This clause provides that a person is not entitled to apply for information that may be inspected or purchased for a reasonable cost under another Act or by arrangements in place with the public authority.

Clause 10:
This provision limits the application of the Act in the case of electronic information to that which can be produced using normal computer hardware and software and the normal technical expertise of the public authority, and that which the production of which would not substantially and unreasonably divert the resources of the authority from its usual operations. When considering what constitutes that level of diversion, the clause required regard to be given to the factors lists in Schedule 3 of the Act.

Clause 11:
This clause confirms that information placed in the custody of the Archives Office remains information in the possession of a public authority for the purposes of this Act.

Clause 12:
This provision makes it clear that this Act is not intended to discourage a public authority or Minister from publishing or providing information, including exempt information in other ways than under this Act. It also defines the four types of disclosure to be used in accordance with this Act, being required, routine, active and assessed disclosure. It clarifies that assessed disclosure is only to be used as method of last resort, and it makes it the responsibility of the principle officer of a public authority to ensure there are sufficient processes in place to ensure that there is appropriate disclosure using the other methods available. Further, this clause provides that an application for assessed disclosure may be refused where the information concerned is otherwise available or will become otherwise available in accordance with a decision made before the receipt of the application within 12 months of the application.

Clause 13:
This provision defines the process for making an application of assessed disclosure, and includes requirements that the public authority must provide the minimum information as contained in the regulations regarding the public authority's assessment procedure, and that the applicant in return must include in the application the minimum information as prescribed by the regulations. The public authority or Minister must also assist the applicant where an application is made that does not comply with this clause. This clause also provides that the two parties may negotiate to refine or redirect the application and that on request ort o assist the application the public authority must make available to the applicant general details of the information in the possession of the public authority.

Clause 14:
This clause relates to the transfer of applications where an application is not directed to the correct body. Ministers or public authorities must transfer applications and inform the

applicant, as well as sending any information that they might hold with the application to assist the Minister or public authority in receipt. Time in which to respond to an application starts from the time at which the transfer is completed or 10 working days after the date of the original application, whichever occurs first.

Clause 15:

This clause provides the timelines for responding to a request for assessed disclosure. An application is considered to be accepted on the day it is received, unless negotiation needs to take place. There is a possible negotiation period of a maximum of 10 days that may occur prior to the acceptance of an application. Then an applicant must be notified of a decision as soon as possible, but in any case not later than 20 working days after the acceptance of the application. This period may be extended by agreement with the applicant, or if that is not possible to procure and the application is complex and/or voluminous, then by application to the Ombudsman. Also, where a third party must be consulted about the release of information, a further 20 working days is allowed, though if the third party does not respond within 15 days, the authority may make the decision without the input of the third party.

Clause 16:

This provision sets the application fee for an application for assessed disclosure at 25 fee units. This may be waived if the applicant is impecunious, a Member of Parliament acting in accordance with his or her official duties, or where the applicant can show that the information is to be used for a purpose that is of general public interest or benefit.

Clause 17:

This clause allows the provision of information to be deferred where a decision has been made before the receipt of the application for the information that the information is going to be disclosed as a required or routine disclosure within the next

12 months, or where the information has been prepared for presentation to Parliament and this has not yet occurred, providing less that 15 sitting days have passed since its presentation to the Minister for presentation to Parliament. If there is a deferral, the public authority or Minister must, when notifying the applicant of the reason for the deferral, indicate as far as practicable when the information will be published or presented.

Clause 18:
This provision describes the manner in which information may be provided: by allowing inspection, by transcript, by copy or electronic copy, by hearing or viewing or sounds or images. It also required copies where material is deleted due to exemptions applying to have this fact clearly marked. Electronic information that can be extracted must be extracted. If an applicant requests information in a certain manner, the public authority or Minister must provide it in that way unless illegal or impractical to do so. This clause also provides that an applicant whose physical or mental health may be harmed by the information must have the information requested redirected to a legally qualified medical practitioner nominated by that person.

Clause 19:
This clause provides that applications that would substantially and unreasonably divert the resources of the public authority from its work or would substantially and unreasonably interfere with the performance of a Minister, having regard to the list of factors in Schedule 3, the application may be refused without identifying, locating or collating the information. However, the public authority or Minister must allow the applicant to negotiate a more limited or acceptable application.

Clause 20:
This provision allows an application to be refused where the information sought by the application is the same or similar as

information sought by a previous application, and the application does not disclose any reasonable basis for reapplication. An application may also be refused where it is vexatious or continues to lack definition after attempts to negotiate with the applicant.

Clause 21:
This clause provides for the arrangement of decision makers under this act. It provides that decisions shall be made by the responsible Minister, the principal officer of a public authority, or a delegated officer. It also states that the decision maker must be impartial.

Clause 22:
This provision requires the Minister or public authority to give the applicant written notice of a decision where some or all of the information is not to be supplied to the applicant. This notice must state the reasons for the decision, the name of the person making the decision and inform the applicant of their right to apply for review of the decision, the authority to whom that application for review may be made and the time in which that application for review must be made. It must also state the public interest consideration, if any, on which the decision was made.

Clause 23:
This clause lists the other responsibilities of the principal officer, including development and publication of procedures and policies, and provision on an annual basis of the details of information disclosed under each disclosure method.

Clause 24:
This provision allows a principal officer or Minister to delegate for no more that three years at a time the performance or exercise of functions or duties. The principal officer or Minster must ensure that the person to whom the delegation is made

has the necessary skills and knowledge to perform or exercise those functions or powers.

Clause 25:
This clause provides that information brought into existence for submission to the Governor or Executive Council is exempt information.

Clause 26:
This clause provides that information brought into existence for submission to Cabinet is exempt for the first 10 years of its existence. It does not include purely factual information unless disclosure would disclose a deliberation or decision of Cabinet that has not been officially published, nor does it stop the Premier from voluntarily disclosing information that is otherwise exempt information.

Clause 27:
This clause provides that information that is internal briefing information of a Minister in connection with official business or parliamentary duties, for instance opinions, advice or recommendations prepared for Ministers or consultations or deliberations between Officers and Ministers is exempt information for the first 10 years of its existence. It does not include purely factual information unless disclosure would disclose opinions, advice, recommendations, consultations or deliberations of a Minister that has not been officially published, nor does it stop a Minister from voluntarily disclosing information that is otherwise exempt information.

Clause 28:
This clause provides that information not relating to the business affairs of a Minister or the public authority for which the Minister has responsibility is exempt information.

Clause 29:
This clause provides that information that affects nation or state security or defence or international relation is exempt information and includes information about the location of dangerous goods or substances.

Clause 30:
This clause provides that information relating to the enforcement of the law, for instance that which may prejudice the investigation, enforcement or adjudication under the law, or disclose information about confidential sources, databases of criminal intelligence, or methods or procedures of law enforcement agencies is exempt information.

Clause 31:
This clause provides that information that is subject to legal professional privilege is exempt information.

Clause 32:
This clause provides that information that is part of the record of a closed meeting of a council is exempt information for the first 10 years of its existence. It does not include purely factual information unless disclosure would disclose the deliberations or decision of a close meeting that has not been officially published, nor does it stop a Minister from voluntarily disclosing information that is otherwise exempt information.

Clause 33:
This clause provides that Division 2 of the Act contains exemptions that are only to apply where the public authority or Minister considers after taking into account all relevant matters and the matters in Schedule 1 that it is contrary to the public interest to disclose the information. It also contains a reference to Schedule 2, which lists matters that are irrelevant to consideration of the public interest.

Clause 34:
This clause provides that information communicated by other jurisdictions is exempt information subject to the public interest test if it would prejudice relations or the information was communicated in confidence and its disclosure would possibly impair the ability to obtain such information in the future. It is also exempt where it would be exempt under a corresponding law of another State of the Commonwealth.

Clause 35:
This clause provides that the internal deliberative information relating to the official business of a public authority, Minister or of the Government is exempt subject to the public interest test for the first 10 years of its existence. This does not include purely factual information, final decision or ruling or order in the exercise of an adjudicative function, or reasons for that decision or ruling or order.

Clause 36:
This clause provides that information that would disclose the personal information of a third party is exempt subject to the public interest test. If the information applied for is not personal information but the disclosure of it may still be expected to be of reasonable concern to the third party, the public authority or Minister consult the third party, and allow comment within 15 days. If it is decided that the information is to be released, the public authority or Minister must notify the third party and also allow a period of 10 days for an application for review of that decision.

Clause 37:
This clause provides that information relating to the business affairs of a third party and also relating to trade secrets or likely to expose the third party to a competitive disadvantage is exempt subject to the public interest test. If the information applied for is not in these categories but the disclosure of it may still be expected to be of reasonable concern to the third

party, the public authority or Minister consult the third party, and allow comment within 15 days. If it is decided that the information is to be released, the public authority or Minister must notify the third party and also allow a period of 10 days for an application for review of that decision.

Clause 38:
This clause provides that information relating to the business affairs of a public authority, for instance a trade secret, scientific results or technical research, or contained in an examination or submission by a student is exempt subject to the public interest test.

Clause 39:
This clause provides that information obtained by a public authority or Minster in confidence, and the information would be exempt if it were generated by the Public authority or Minister or would impair the ability of the public authority of Minister to obtain such information in the future is exempt subject to the public interest test. This does not include information acquired from a business, commercial or financial undertaking, information relating to trade secrets of a business, commercial or financial undertaking, or information provided to the public authority or minister pursuant to a requirement of another law.

Clause 40:
This clause provides that information consisting of procedures, criteria used in financial commercial or labour negotiations, the execution of contracts or the settlement of cases is exempt, subject to the public interest test.

Clause 41:
This clause provides that information likely to affect the State economy by giving or exposing to any person an unfair advantage is exempt, subject to the public interest test.

Clause 42:
This clause provides that information that is likely to adversely affect the cultural, heritage or natural resources of the State is exempt, subject to the public interest test.

Clause 43:
This provision outlines the process and timeframes affecting an internal review of a decision on an application for assessed disclosure, where the decision was not made by the principal officer or Minister.

Clause 44:
This clause provides that a person or external party may apply for an external review of a decision formerly subject to internal review within 20 days of the internal review, or 40 days of an unanswered application for an internal review being made.

Clause 45:
This clause allows for external reviews by the Ombudsman of other decisions within the Act, for instance a decision that has been made by a principle officer or Minister in the first instance and therefore cannot go through the internal review process, or the information has been provided in a form other than that requested by the applicant, or the applicant believes there has been an insufficiency of search for information.

Clause 46:
This provision provides the process for an external review by the Ombudsman where the time for a public authority or a Minister to make a decision has elapsed.

Clause 47:
This clause lists the powers the Ombudsman has when considering an application for review.

Clause 48:
This clause describes the options when the Ombudsman makes a decision; that he may consult with the public authority or Minister concerned, or other interested parties; that he may only alter a final decision to correct a mistake or omission; and that copies of a decision and statement of reasons must be provided to the parties. It also states that the Ombudsman must not include in his decision any exempt information of confirm or deny the existence of exempt information.

Clause 49:
This provision requires that the Ombudsman issue, maintain and publish guidelines and a manual on the use of this Act. He may also provide advice to a public authority or Minister, and he may publish decisions and statements of reasons.

Clause 50:
This clause contains two offences – one of obstructing or influencing a decision maker, and one of failing to disclose information which is the subject of an application for assessed disclosure. Both carry a fine of 50 penalty units.

Clause 51:
This provision provides protection against actions for defamation or breach of confidence for decision makers under the Act disclosing information in accordance with this Act.

Clause 52:
This provision provides protection against criminal offences arising from decision makers disclosing information in accordance with this Act.

Clause 53:
This clause requires the Secretary of the Department of Justice to prepare a report on the administration of the Act for each financial year, and to table it in Parliament. It also required the

Ombudsman to include a report on the operation of the Act and any other relevant matters in his or her annual report.

Clause 54:

This clause provides that the Governor may make regulations for the purposes of this Act.

Clause 55:

This clause provides for the administration of the Act.

Clause 56:

This clause repeals the *Freedom of Information Act 1991*.

Clause 57:

This clause rescinds the *Freedom of Information Regulations 2001* and the *Freedom of Information (Fees) Regulations 2004*.

Schedule 1:

This schedule contains 25 non exhaustive matters to be taken into account when assessing if disclosure of particular information would be contrary to the public interest.

Schedule 2:

This schedule contains four matters that are irrelevant when assessing if disclosure of particular information would be contrary to the public interest.

Schedule 3:

This schedule contains nine matters to be taken into account when assessing if the processing of an application for assessed disclosure of information would result in a substantial and unreasonable diversion of resources.

Schedule 4:

This schedule repeals the *Freedom of Information Act 1991*.

Schedule 5:
This schedule rescinds the *Freedom of Information Regulations 2001* and the *Freedom of Information (Fees) Regulations 2004*.

FACT SHEET

Right to Information Bill 2009

In August 2008 the Premier, David Bartlett announced a ten point plan to strengthen trust in democracy and political processes in Tasmania. That agenda included a review of the *Freedom of Information Act 1991* with a view to improving transparency in the operations and decision making processes of the Government through better access to information for all Tasmanians.

The introduction of this Bill is the culmination of eleven very intensive, inclusive months of work towards that goal. Tasmania has taken a leading role in the current nationwide review of Government information handling processes.

The new framework put to the House in this Bill has four key elements, which are: it mandates the proactive release of information; it includes an enhanced role for the Ombudsman in relation to both review and the monitoring of the release of information; it minimises fees payable for the formal release of information and for the first time seeks to clarify what exactly constitutes a public interest test.