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Submission to Senate Legal and Constitutional Affairs Committee
Inquiry into Freedom of Information (New Arrangements) Bill 2014 (the Bill)

Guardian Australia appreciates the opportunity to make a submission to the Committee's inquiry and is concerned that an inquiry by the Legislature into a statute designed to make the Executive more accountable and transparent should have such an extremely tight timeframe.

We submit that the Committee should recommend that the Bill not be enacted in its present form.

In particular, Guardian Australia submits that abolition of the Office of the Australian Information Commissioner (OAIC) would be both retrograde policy and a false economy.

Should the Committee nevertheless endorse abolition of the OAIC, we submit that there are several steps which the Committee could recommend to reduce the unhealthy impact of abolition on the overall functioning of Australia's Commonwealth Freedom of Information Act (FoI).

The remainder of this submission, which is necessarily brief because it is necessarily rushed, elaborates these two core points.

Why is Parliament thinking of sending an anti-democratic signal about what has been a bipartisan democratic adornment?

FoI is traditionally bipartisan, a hallmark of modern public administration and an aid to public participation in democratic life.

FoI laws form part of the package of administrative law – ombudsmen, judicial review and administrative review tribunals as well as FoI – that is an adornment to the Australian model of the Westminster system. (Australia had FoI by 1982; the UK not until 2005.) They have developed since the Seventies to improve the functioning of public administration. They have gradually spread throughout commonwealth, state and territory administrative structures. Sometimes they have been introduced in response to sobering and costly malfunctioning of government processes which were found to have been made worse by excessive secrecy – for example in Queensland FoI was one result of the Fitzgerald Inquiry and in Western Australia FoI followed the royal commission into the 'WA Inc' scandal.

Governments of different political complexions have enacted these reforms because their general objective – more open government and consequently better chances of more accountable and efficient government – has been a bipartisan objective. The Commonwealth FoI Act was proposed by the Whitlam Government and passed during the Fraser Government.

The options to request official information and to appeal refusals to specialist independent decision-makers are important tools for legislators in opposition, for the Fourth Estate in its crucial role in scrutinising government, for academics in myriad fields, for businesses subject to regulatory bureaucracies and for many of the individuals and organisations who take part in the democratic process and the wider civil society.

While the functioning of FoI schemes can always be improved, enforceable and practical structures for citizens to seek information from government is a hallmark of modern democratic life.

It follows that to legislate to weaken those structures sends a signal that democratic life itself is being weakened. Guardian Australia submits that that is a perilous signal for Parliament to send to the public at a time when there is a perception that public confidence in political institutions and public engagement with the political process are less strong than they used to be.

Disclosures made through FoI may discomfort Ministers and their departments from time to time, but in a sense that is the point. They can be a vivid illustration of one of the checks and balances that help the system to function. They are the antithesis of spin. They show that the flow of information about Executive Government is not entirely under the control of Ministers and their departments. Independent statutory officeholders, tribunal members and judges have their roles to play.

One of the subtle benefits of FoI, which is incalculable but a fact of life for those with experience of public administration, is its potential to deter maladministration by its mere existence. The simple fact that an enforceable request for information is possible may in some circumstances be enough to make a decision-maker think twice about a measure that he or she knows would not withstand scrutiny if disclosed. The practical structures that underpin this subtle benefit include the existence of specialised, independent agencies that have the knowledge and resources to investigate complaints about manipulative handling of FoI requests or to counter specious uses of the exemption provisions. The OAIC is one such agency.

A neglected purpose of FoI schemes is that they can improve not just government accountability but also *public participation* in the democratic process and commerce in the information economy by improving the amount, quality and timeliness of information available.

This purpose has even more potential relevance in our digital era, when so much government information is more readily and cheaply searched, collated, copied and circulated than in the more cumbersome paper-document days of FoI's beginnings.

Guardian Australia urges the Committee to treat FoI as just one aspect – a precursor - of the much larger theme of how Australia must adapt itself to take advantage of the benefits of the digital age. In part this means freeing up the flow of public sector information so that it can have broader beneficial effects.[1] Seen in this light, the current Bill seems narrow-minded and self-defeating.

Not a saving, a false economy?

Smaller government does not necessarily mean better governance. It depends where you cut and what results from the cuts.

A recent example was the decision, since reversed, to abolish the position of Independent National Security Legislation Monitor. A combination of the signal sent by that decision and the weakening of the informed scrutiny that the Monitor would have brought to bear on the successive national security bills which the Parliament has recently had to consider has been to make the process of enacting the legislation all the harder. That combination, and the inexplicable failure to appoint anyone to the position during a period of intense legislative activity when a competent Monitor is clearly needed, has had a cost both in trust and the perceived legitimacy of what are serious reforms in anyone's language.

The revised Explanatory Memorandum for the FoI amendment Bill forecasts cost savings of $10.2 million over four years. It does not quantify how much of this will be required for the extra resources likely to be required by the agencies that are to take up the tasks formerly undertaken by the OAIC – the Ombudsman's Office, the Australian Human Rights Commission and the Administrative Appeals Tribunal.

FoI has been around for more than 30 years and there is a fund of experience on which reasonable predictions can be based. Accordingly, one consequence of the abolition of OAIC oversight of FoI will be to embolden some public administrators – whether pushed to it by ministerial advisers or not - to exploit the situation, cut procedural corners, stretch deadlines, fob off requesters and generally degrade the FoI scheme in the hope that users will desist. Guardian Australia has already noticed that since the abolition of the OAIC was announced the incidence of breaches of time limits has increased.

We urge the Committee to ask itself what would be likely results of increased obstruction and would they enhance efficiency? First, we predict, frustrated media requesters will report the obstruction in ways that may make the government of the day seem like it has something serious to hide when, in the particular circumstances, the matter the subject of the request may actually be relatively minor. As publicity escalates, so does the amount of time senior people spend on a matter, regardless of its inherent significance. We know this, and we know it is not efficient.

Second, a proportion of frustrated requesters (whether or not journalists) will be intrigued and spurred by obstruction, not dissuaded, and they will complain elsewhere. They may go to the Ombudsman or their local MP, with a vociferousness that will make their complaints all the more time-consuming and tedious for the Ombudsman's staff and the MPs' staff to handle. Where are the savings in such an outcome, in such a drearily predictable outcome?

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[1] The territory is conveniently mapped in the report of the Government 2.0 Taskforce, available at http://www.finance.gov.au/publications/gov20taskforcereport/

The Ex Mem and Second Reading Speech for the Bill lay stress on the role of internal review and on the AAT as the sole arbiter on external review. Experience teaches that internal review, because it involves the agency being judge in its own cause, is not a very useful step for requesters seeking information on matters of significance. It is in such cases that internal reviewers tend to err on the side of reaffirming decisions to exempt. Internally, decisions to overturn refusals and to order disclosure tend to be left for someone of a 'higher pay grade'. This tendency is natural enough, perhaps, but the fact that it is to be expected helps to underline the value of OAIC review. The OAIC was created independent. Its reviews were not as formal or as costly to the requester as will be the AAT.

The $800 AAT filing fee is just the start of the potential costs to the requester in getting his or her application in front of the first reviewer who is genuinely independent of the agency which may have an interest in keeping the requested information secret and therefore in overstating the exemptions. OAIC reviews could be conducted on the papers, whereas AAT reviews will often involve hearings. The Committee will be aware that a tribunal must give procedural fairness to an unrepresented applicant, and that such hearings impose burdens on all parties and on the tribunal. Generally, they are not as efficient as proceedings in which all parties are represented by experienced practitioners.

In its early years the OAIC did seem to take an inordinately long time to process complaints and reviews. We cannot say, without further information, whether this was a result of lack of adequate resources from the outset or, say, unforeseen demand, or otherwise. In any event, the evidence suggests that OAIC was resolving those problems. According to its latest annual report 80 percent of reviews were completed within 12 months and the backlog of reviews had been substantially reduced. A record 646 reviews were closed within the reporting period.

For the Committee's consideration

If the Committee agrees with abolition of the OAIC, Guardian Australia urges the Committee to consider recommending measures which may ameliorate the adverse effects on FoI requesters which experience suggests are highly likely to occur.

We suggest the Committee consider –

- building in disincentives to agency behaviours which give rise to complaints; and
- take steps to ensure that, if AAT review is to be the only external review, it will work efficiently to advance the objects of the FoI Act.

Disincentives to behaviours that cause complaints

A regular response by agencies to FoI requests is to group together everything that is responsive to the request, including material that is already in the public domain such as reams of clippings of media reports or agency documents which, for example, have been disclosed already to Parliament or are on the agency's website or available from the National Archives. By including such public material amongst the documents caught within the scope of the request an agency increases both the time necessary for processing the request and the potential to characterise the request as unreasonably burdensome. The Committee is urged to consider how this problem could be tackled, perhaps by excluding from the definition of a document which may be included within the scope of a request any material which is already public.

This would focus minds on the information which, because it is not yet public, matters in two relevant senses. It matters because if disclosed it will add to the flow of information and in that

way advance the accountability, participation, economic and other objectives of FoI. And it matters in the sense that it genuinely needs to be assessed against the exemptions laid out by Parliament as being necessary to protect certain public and private interests.
Exclusion from FoI requests of material that is already public would have another benefit. It would ensure that FoI statistics are more meaningful because it would prevent the categorisation as 'granted' FoI responses which disclose only materials already in the public domain, or 'granted in part' FoI responses which release only materials already public but claim as exempt everything else. These latter responses should be categorised as 'denied in full' because in a practical sense nothing new has been added to the public flow of information.

If the Committee tackles this issue any proposed change should oblige the agency to inform the requester that the information is already in the public domain and where the requester can get it if that fact is reasonably within the knowledge of the agency.

Delay generates considerable complaint. In some cases the delay may be the result of pressure on resources devoted to FoI matters within the recipient agency. If so, nothing will improve resource allocation decisions unless the agency's leadership is given an incentive based on self-interest. Accordingly, requested documents could be deemed non-exempt unless a decision to exempt on stated grounds is made and communicated, with reasons, within the statutory deadline. This creates a significant disincentive to agency inaction. If the agency fails to process the request, make a decision and inform the requester then the information is to be disclosed.

Independent FoI Advocate

Less than the OAIC, but better than nothing, would be the creation of a new independent statutory office, the FoI Advocate, whose role would be to assist unrepresented requesters, first, to assess whether their matter is worth AAT review and, second, to prepare for and to conduct AAT review. The requester would not be bound to consult the Advocate, accept his or her assessment, nor accept his or her assistance in any review.

Creation of the FoI Advocate would be likely to advance efficiency of the proposed one-tier external review model.

The FoI Advocate should have at least a function to appear and be heard as of right before the AAT – or, on matters of law, the Federal Court – where, in the Advocate's view, a case relating to the FoI Act involves an important issue of interpretation which, if determined in favour of the applicant, would result in the disclosure of the documents in question.

On behalf of Guardian Australia

6 November 2014