

Submission to the Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*

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EXECUTIVE SUMMARY

The parties to this submission are: AAP, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV Australia, MEAA, News Limited, Sky News and WAN (the parties).

The FOI system currently has two primary weaknesses:

- The government provides too few resources to meet public demand for information and review of decisions; and
- The protection of Cabinet documents and agency exemptions – preventing many documents from being accessed and made public.

Watering down FOI

The parties to the submission are disappointed that the terms of reference contemplate watering down the Australian public's right to know by proposing the reformulation of exemptions to the FOI Act.

The parties to this submission vehemently oppose any consideration of the argument that the provision of "frank and fearless advice" is threatened by the existence of FOI. The parties propose that "frank and fearless advice" is exactly the information that should be available to the Australian public. The parties also oppose any extension to the existing Cabinet exemption.

Under-resourced FOI system cannot continue

Under the reformed FOI Act and the AIC Act journalists continuously encounter barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making.

The parties to the submission urge the Government to adequately resource the management of FOI requests and reviews of decisions – within existing budgets.

Current review processes – timelines and alternative avenues required

Further, the Office of the Australian Information Commissioner is failing its core purpose of providing an independent merits review mechanism.

The parties to the submission hold that timeframes and timelines must be introduced into the review and appeals process.

The parties also recommend that applicants be allowed to access alternative means of review at an early stage, including to the Administrative Appeals Tribunal.

1. INTRODUCTION

Timely access to government information about policies and programs, administration and management is a fundamental right and crucial to allowing voters to be informed in a democracy. Any attempt to diminish this right is unacceptable.

On 24 March 2009 the then Special Minister of State, Senator John Faulkner, in a speech to the Australia's Right to Know (ARTK) Freedom of Speech conference said:

"Democracy has at its heart a tension between ideas of responsible government and the disincentives for members of a government – who live and die by public opinion – to make unpopular decisions."

"There is a growing acceptance that the right of the people to know whether a government's deeds match its words, to know what information the government holds about them, and to know the information that underlies debate and informs decision-making, is fundamental to democracy."

"We still expect our parliament and our government to make decisions in the public interest, rather than their own political interests, but we no longer accept that the possibility of punishment at the polls for a necessary but unpopular decision gives a government the right to evade scrutiny."

The Scope of the Review and the Terms of Reference

The Hawke review is required by s.93B of the *Freedom of Information Act 1982* (FOI Act) and s.33 of the *Australian Information Commissioner Act 2012* (AIC Act).

Senator Faulkner also noted in March 2009 that the then proposed reforms were not a final step because "new patterns of democratic engagement require new ways to inform debate and decision-making. Legislation, regulation, and policy must keep up, or they will end up strangling access rather than enabling it."

"In addition, the Government has given a commitment to again review the operation of the FOI Act after these reforms are bedded down," he said.

In the Terms of Reference published on 29 October 2012 the Attorney-General tasked Dr Hawke to:

"Review and report on the operation of the Freedom of Information Act 1982 (FOI Act) and the Australian Information Commissioner Act 2010 and the extent to which those acts and related laws continue to provide an effective framework for access to Government information."

Those Terms of Reference need to be approached with some caution, because those Acts and related laws do not, and never have, provided any framework for access to Government information. The FOI Act has always expressly provided for Ministers and agencies to have the power to publish or give access to information or documents apart from under that Act (see now s.3A(1); and before the 2010 amendments s.14).

The AIC Act does confer upon the Information Commissioner personally the function of reporting to the Minister on any matter that relates to the Commonwealth Government's policy and

practice with respect to the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government and on the systems used or proposed to be used for such collection, use, disclosure, management, administration, storage or accessibility (AIC Act s.7).

The review will be careful to distinguish between the restricted purposes of the FOI Act and the broader policy advisory role of the Information Commissioner.

The objects of the FOI Act are prescribed in s.3 of that Act and they are:

1. To give the Australian community access to information held by the Government of the Commonwealth via:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
2. The Parliament intends, by those objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better informed decision making; and
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
3. The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

Importantly the review is established pursuant to s.93B of the FOI Act.

The reviewer should exercise his functions in accordance with s.3(4) of that Act so that as far as possible, he facilitates and promotes public access to information, promptly and at the lowest reasonable cost.

The parties are concerned that terms of reference include issues that have the potential to diminish the scope and effectiveness of aspects the FOI Act. In particular:

- the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents;
- the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;
- the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act; and
- the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

The Hawke review should not recommend any changes that would diminish the right of Australians to obtain timely access to government information through the FOI Act. The Hawke review must aim to improve the FOI Act and further its objects by contributing to increased public participation in government processes, with a view to promoting better-informed decision-making, increasing scrutiny, discussion, comment and review of the government's activities.

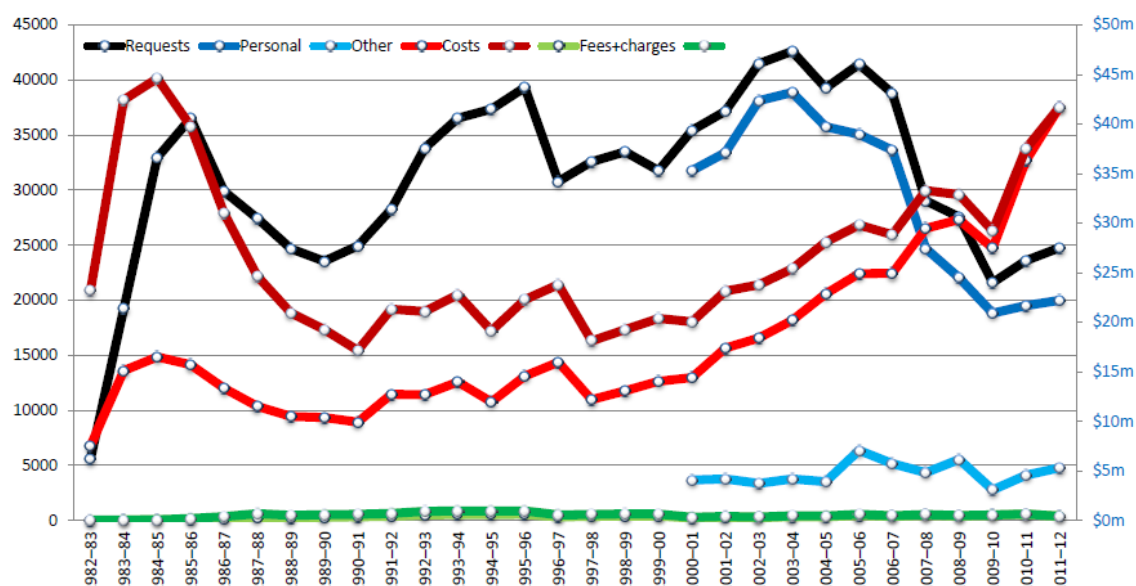
2. THE OPERATION AND EFFECTIVENESS OF THE FOI ACT

The reformed FOI Act improved the process of applying for documents held by the government. Key improvements include electronic lodgement and the removal of an application fee.

However, journalists still face a number of barriers to gaining access, including systemic delays in processing, sometimes exorbitant charges, failures of agencies to assist with applications and inappropriate exemption claims. There is also evidence of a clear decline in the proportion of requests granted in full or part and significant delays with a substantial minority of non-personal requests. Another noted failure is the merits review process administered by the Office of the Australian Information Commissioner (OAIC).

THE OPERATION AND EFFECTIVENESS OF THE OAIC

The OAIC costs \$14.6 million per year.¹ That additional administrative cost accounts for about the whole of the increase in costs experienced with changes to the FOI Act as shown in the following table.²



While some of the resources allocated to the OAIC would have been allocated in any event for privacy compliance functions, the question arises whether the increase in costs for administration of the FOI Act, through the allocation of additional resources to the OAIC for that function delivers value for money.

Issues with OAIC

The Freedom of Information Commissioner Dr James Popple stated in the OAIC Annual Report 2011-12; *"...the reforms have been successful...It is easier, and cheaper, to access documents and government information than it was before the reforms."*³

¹ Office of the Australian Information Commissioner *Annual Report 2011-12*, Appendix 1

² Source – Information Commission Presentation to ICON Network

³ Office of the Australian Information Commissioner *Annual Report 2011-12*, pp xii

However, the evidence relating to processing times and the quality of the information released does not support such claims. Further, the management of timely and effective reviews undertaken by the OAIC is sub-optimal.

In fact, it is becoming ever clearer that there is inadequate and ineffective resourcing to properly manage FOI requests and reviews of decisions. The parties to this submission urge the Government to cause agencies including the OAIC to address this matter expeditiously.

Poor processing times and quality of the information released

The Office of the Australian Information Commissioner's 2011-12 annual report shows that in each of the last four reporting years there has been a decrease in the proportion of FOI requests granted in full or in part:

- 93.9 per cent were granted in full or in part in 2008-09
- 92.5 per cent in 2009-10; and
- 88.4 per cent in 2011-12.

Over the same period, requests yielding full release have fallen from 71 per cent in 2008-09 to 59.1 per cent 2011-12.⁴ While the proportion of personal requests granted in full remained constant over the years spanning commencement of the FOI reforms the proportion of non-personal requests granted in full fell from 31.6% to 28.4% with the proportion refused rising from 25.9% to 26.9%.⁵

The same report shows significant delays with non-personal related FOI requests. Of 3507 non-personal requests in 2011-12:

- 2660 were completed within the statutory time frame;
- 394 requests were delayed by up to 30 days over the statutory limit;
- 192 requests were delayed by 30 to 60 days;
- 156 requests were delayed by 61 to 90 days; and
- 105 requests delayed by more than 90 days.

The OAIC itself notes that agencies' delay in processing FOI applications was the issue most frequently raised by complainants, and states that:

*"some agencies have made decisions or dealt with FOI applicants in ways that are at odds with the pro-disclosure culture that the FOI Act promotes and requires."*⁶

Poor performance of review processes and outcomes

The availability of a robust and timely merits review mechanism is fundamental to secure the right of access conferred by the FOI Act. That is currently a role of the OAIC. By the OAIC's own standards it is failing in this core area.

Non-personal material held by agencies is often the most valuable for informing the public of the government's performance. However, those matters are often those that are subject to the greatest level of delay.

⁴ Ibid, pp 120

⁵ Ibid, pp 120

⁶ Ibid, pp 124

As the 2011-12 annual report notes:

*"One of the OAIC's deliverables is to finalise 80% of all IC review applications within six months of receipt. In 2011-12, only 32.8% were finalised within six months [emphasis added]."*⁷

*"Since early in its operation, the OAIC has had a backlog of IC reviews on hand: that is, not finalised. On 30 June 2012, the OAIC had 357 IC reviews on hand: 56% of the total number of IC reviews received since November 2010."*⁸

Indeed, the failure in the review process is such that a report in *The Age* newspaper published on April 9, 2012 stated:

"The OAIC expects to receive as many as 700 FOI review applications in 2011-12. In February [2012], the office had a backlog of more than 340 applications and this is expected to grow. Applicants for FOI reviews can expect a six-week wait before any response and a delay of six months or longer before the matter is progressed."

*"Departmental FOI officers have candidly acknowledged that the OAIC's growing backlog allows 'sensitive' FOI requests to be 'put on the back burner.'"*⁹

Such outcomes can be interpreted as enabling Government to keep important information under wraps. The parties believe that it is undesirable, and detrimental to all Australians that delays and backlogs could conceivably be used to justify sensitive FOIs being left unaddressed (at worst) or delayed (at best).

Recommendation – appropriate resourcing within existing budgets

The parties to the submission call on the Government to appropriately and adequately resource the management of FOI requests and reviews of decisions – within existing budgets and ensure that agencies, including the OAIC devote sufficient resources to the review of FOI decisions.

The delays in processing caused by under-resourcing are real issues for all people seeking access to information – including media organisations. It is disappointing and also concerning that the outcomes that are experienced have a chilling effect on the right of the Australian – and international – public to know.

⁷ Ibid, pp 96

⁸ Op. cit.

⁹ Phillip Dorling "Reform on FOI bogs down" *The Age* 9 April 2012:
<http://www.theage.com.au/opinion/political-news/reform-on-foi-bogs-down-20120408-1wjof.html>

3. THE OPERATION AND EFFECTIVENESS OF THE TWO-TIER REVIEW SYSTEM

In addition to these issues regarding the timeliness of OAIC decisions, the parties to this submission are also concerned about the quality of decision making by the OAIC in relation to reviews.

Lack of time limits associated with review

In March 2012 Seven Network (a party to this submission) reviewed 17 published decisions taken by the OAIC since January 2011. Only one of the 17 decisions took less than 100 days. Eighty-two per cent of the decisions took longer than 20 weeks, meaning applicants were left waiting for more than five months in nearly all cases. Seven decisions took more than 200 days to be delivered and two took more than one year.

By way of further example, it took 393 days to decide whether a diary entry relating to political party function was an official document of a Minister; and it took 275 days to determine whether a letter to the Prime Minister from a political organisation is an official document of a Minister. These decisions, which only turn on whether s.4(1) of the FOI Act applies, should have been made more quickly and reflects poorly on the performance, capability and capacity of the OAIC. More recently, it took the Commissioner 11 months to decide that two letters to the Prime Minister from a former Prime Minister concerning current matters of political debate were not exempt by reason of their containing personal details (name and address) of the former Prime Minister. That decision turned on a very narrow question of fact – and while the former Prime Minister may have been entitled to be consulted, an appropriate decision making process could have accommodated that with very little delay.

It is relevant to note that more than two in three decisions made by the OAIC that were reviewed by the Seven Network affirm the original ministerial or agency decision (meaning in those cases, the applicant's appeal was unsuccessful). Only five of the 17 decisions were set aside and substituted with a different decision. Significantly, only one decision was wholly in the original applicant's favour.

In a speech to the Australian Corporate Lawyers Association on 12 August 2012, barrister Tom Brennan stated the Information Commissioner and the Freedom of Information Commissioner met regularly with government officials in a forum known as "ICON" (Information Contact Officers Network), and that that network is constituted by officials of agencies responsible for FOI administration.

Mr Brennan noted that material provided by the Freedom of Information Commissioner to the ICON network meetings indicates that the backlog has continued to grow:

"By 16 March 2012 the office had received 504 applications for review of which 162 had been finalised. Of the 162 finalised reviews, some 140 were finalised by the applicant withdrawing or by the exercise of summary dismissal powers by the Commissioner. Only 3 matters had been resolved by agreement between the applicant and the agency concerned or by the variation of decision and 19 matters had been resolved on the merits."

"In the six weeks following, until 31 May 2012 a further 100 applications were received. In that period 76 applications were finalised, of which 69 were dealt with through

withdrawal or summary dismissal and 7 were resolved on the merits. None were resolved by agreement or variation of decision.”

Mr Brennan raises a significant issue in relation to the review process – the high incidence of reviews dismissed or withdrawn:

“In total between 1 November 2010 and 31 May 2012 some 604 applications for review had been received. Of those, 209 have been dealt with through withdrawal or summary dismissal. That is a very high number and large proportion. Three matters were resolved by agreement or variation of the decision and 26 had been resolved on the merits. They are both low numbers and very low proportions. The backlog of unresolved review applications had grown to some 366. That is a very high number and constitutes 60% of applications received.”

Consideration of some of the data published in the Commissioner’s Annual Report indicates that major adjustments were made to the review process towards the end of the financial year.

For example at Table 8.3 on page 95 the Commissioner reports that in the year to 30 June 2012 some 78 applications for review were dismissed pursuant to s.54W of the Act, including 22 pursuant to s.54W(b) by which, in effect, the Commissioner refers applications for review to the AAT.

Yet at 31 May 2012 the total of all reviews which had been closed since November 2012 at the discretion of the Information Commissioner pursuant to any provision of s.54W was 57, and by 31 May 2012 there was no mention in any publication by the Information Commissioner of any decision having been made by him pursuant to s.54W(b) resulting in referral of applications for review to the AAT.

There seems no doubt that the rate of discretionary rejection of applications for review pursuant to s.54W rose substantially in June 2012 – no fewer than 21 were rejected for that reason that month. Further it may be that all 22 of the applications for review which were referred by the Commissioner to the AAT were referred in June 2012. The changes in review process merit close review.

Lack of time limits means no access to AAT until completion of review

The parties are also concerned about the high level of review applications being withdrawn or dismissed and the fact that the merits review role has been conferred without the imposition of any time limits for its exercise. As a consequence, an applicant usually has no access to the Administrative Appeals Tribunal (AAT) until after the Information Commissioner has completed the review exercise. There is serious concern that there no formal constraint on the OAIC to act promptly.

Further the significant number of reviews which have been refused by the Commissioner pursuant to s.54W(b) and thereby referred to the AAT calls into question the rationale for the prohibition on applicants approaching the AAT prior to the exercise of such a discretion by the Commissioner. There is no information publicly available to explain the basis for the decisions to refer applications to the AAT.

Recommendation – implementation of timeframes for review

Timeframes must be introduced into the review and appeals process. It is clear that timeliness is crucial when reporting on the activities of government, particularly as an issue may lose its relevance or currency as a result of delays.

Lack of rigour and independence of review process

In the *Open Government Report: a Review of the Federal Freedom of Information Act 1982*¹⁰ the ALRC commented upon the inconsistency of the role of conduct of determinative merits review on the one hand and the other FOI functions to be conferred on an Information Commissioner on the other.

The freedom of information functions conferred upon the OAIC by the *Australian Information Commissioner Act 2010* s.8 include:

- (a) promoting awareness and understanding of the FOI Act and the objects of the Act;
- (b) assisting agencies to publish information in accordance with the Information Publication Scheme;
- (c) providing information, advice, assistance and training to agencies and others on the operation of the FOI Act;
- (d) issuing guidelines to be taken into account by decision-makers under the FOI Act;
- (e) proposing to the Minister legislative changes to the FOI Act;
- (f) proposing to the Minister administrative action necessary or desirable in relation to the operation of the FOI Act;
- (g) monitoring, investigating, reporting on compliance by agencies with the FOI Act;
- (h) collecting information statistics from agencies and Ministers about the FOI Act.

In addition to those functions the Commissioner is responsible for the conduct of merits reviews under Part VII of the FOI Act.

There is a fundamental and necessary incompatibility between the function of performance of external merits reviews on the one hand and the other functions conferred upon the Commissioner on the other.

At least in some cases, and in particular in contentious cases in which the media are likely to be involved, the external merits review function cannot be effectively discharged without the reviewer being, and being seen to be, independent of the agency or Minister whose decision is subject to review.

¹⁰ <http://www.alrc.gov.au/report-77>

However the effective discharge of the Commissioner's other functions make it impossible for him to be seen to be independent of Government agencies.

For example the Commissioner has established a series of workshops with Information Contact Officers of departments and agencies under the acronym ICON. We do not doubt that that is an important and effective forum through which the Commissioner can discharge his functions of promoting awareness and understanding of the FOI Act, and assisting agencies on various aspects of operation and administration of the FOI Act. However it is impossible for the Commissioner to hold those regular meetings with respondent agencies and their representatives and to then be accepted as an independent umpire by applicants who seek to question decisions made by those respondent agents, hopefully under the influence of the Commissioner's guidance provided at those ICON meetings.

Similarly, the Commissioner has issued guidelines for decision makers. In discharge of his merits review function the Commissioner is required to consider whether or not to apply those guidelines in an individual case. In being required to do so he is required to make invidious choices – particularly where the statute operates to require the Commissioners themselves to personally make decisions and to issue guidelines.

Many of the Commissioner's merits review decisions have been on the assessment and waiver of charges. He has separately reviewed FOI charging and published his recommendations. Applicants seeking review of charging decisions under current law are left in the invidious position of seeking that outcome from a reviewer who has published his views that the legislation should be changed to restrict the right applicants are seeking to exercise.

Each of the above examples is an example of structural incompatibility of the OAIC's main stream role with its merits review role.

This circumstance is exacerbated by the OAIC's laudable commitment to alternative dispute resolution mechanisms, including conciliation and mediation. While those mechanisms may well be effective in many cases, the absence of any framework to clearly delineate between the alternative and informal dispute resolution mechanisms first employed, and formal merits review exacerbates the difficulties of providing an external merits review function which is capable of being seen by applicants to be independent. That is, parties dealing with the OAIC in an alternative dispute resolution process have no way of being assured that information provided or admissions made will not be taken into account in making any decision on a formal merits review.

There would be no incompatibility between the broader freedom of information functions of the OAIC and it retaining an alternative dispute resolution function – in which reviews would be resolved one way or another by agreement.

However consideration must be given to either removing the formal merits review function from the Commissioner, or providing to applicants the option of applying to the AAT for review, without requiring any decision by the Information Commissioner.

The fact that in the last financial year some 22 decisions were in effect referred by the Commissioner to the AAT would indicate that the Commissioner himself sees no difficulty arising from any such "bifurcated" review process. This review could usefully analyse the details of those 22 cases and assess the effect of the referrals to the AAT.

Attachment A provides relevant documentation regarding an application for review by Seven Network to the OAIC against the Commonwealth Department of Immigration in relation to current and future overcrowding in detention centres – issues upon which the Reviewer will be well informed from his own review of those matters. They are matters of manifest public interest. The OAIC was unable to complete the review in a timely manner and has revealed poor process and a failure to address bias. The decision making process adopted by the Commissioner might, or might not, ultimately prove to be effective and legally accurate. However it cannot result in the applicant (or affected third party) being satisfied that any review has in fact been conducted independently and in accordance with the facts. Not only has there been extensive delay in the handling of the application for review, the Information Commissioner in his letter of 28 November 2012 in effect concedes that advice to the review applicant from the OAIC, in giving reasons refusing to provide to the review applicant documents which had been provided to the Information Commissioner for the purposes of the conduct of the review, were inaccurate.

In his letter of 28 November 2012 the Commissioner advised that he had prepared a non-binding case appraisal that was being sent to the respondent agency and the affected third party. He noted it would be open to those parties to make further detailed submissions to him in response to that non-binding case appraisal but that the appraisal would not be provided to the applicant. It seems unlikely that any further submissions by the respondent or affected third party could be provided to the applicant.

The consequence is that the decision-making process will in effect be, as the Commissioner would have had it throughout, a dialogue between the Commissioner, the respondent and the affected third party. The applicant will not participate. The applicant cannot be provided with any adequate assurance that any decision has been made in accordance with the law and based on the facts.

Recommendation – access to alternative means of review, including the AAT, at an early stage

To address the issues outlined above the parties to this submission recommend that applicants be allowed to access alternative means of review at an early stage, including the AAT.

Under the *Government Information (Public Access) Act 2009* (NSW), a number of review rights exist. An applicant may seek an internal appeal, approach the Office of the Information Commissioner (NSW OIC) for a review of the agency's decision or they may go to the Administrative Decisions Tribunal to request a review.

In the Open Government Report, the ALRC considered whether the Information Commissioner should have a merits review role. It stated that it was:

“not usual for an institution responsible for formulating guidelines on the administration of legislation to have individual case dispute resolution powers. Providing advice and assistance to both parties and, perhaps, facilitating a request could give rise to a conflict

of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers.”¹¹

While, such conflict of interest may not exist in this case, the provision of an appeal process direct to the AAT from a refusal or deemed refusal of an agency would alleviate pressure on the OAIC and provide an alternative mechanism for applicants interested in accessing an independent tribunal with extensive experience with FOI matters. It is only through such a mechanism that the perceptions of lack of independence can be addressed in circumstances where those perceptions are necessary attributes of the OAIC’s other functions, and of the OAIC’s implementation of Alternative Dispute Resolution mechanisms.

Therefore the parties to this submission recommend amendment of the FOI Act to provide a direct right to apply to the AAT for applicants at the deemed refusal stage or from an internal review.

¹¹ Australian Law Reform Commission *Open Government - A Review of the Federal Freedom of Information Act 1982*, 1996, paragraph 6.20: <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf>

4. THE REFORMULATION OF THE EXEMPTIONS IN THE FOI ACT

In its June 1, 2009 response to the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009*, ARTK addressed the issue of key exemptions. The parties to this submission maintain that any reform to further extend of the Cabinet exemption or to protect the concept of frank and fearless advice are vigorously opposed.

Similarly, any attempt to limit access to so-called sensitive documents is also rejected. Existing exemptions amply protect the public interest and changes to increase a government's ability to prevent documents from release will only contribute to secrecy – perception and/or reality – and ultimately damage Australia's democracy.

The parties to the submission do not support the extension of exemptions in the FOI Act, including the application of the new public interest test taking account of sensitive government documents including Cabinet documents; and frank and fearless advice.

Public Interest Test

The parties believe the new public interest test has contributed to the efficiency of operation of the FOI Act. However, the test does not apply to several exemptions in the Act, including cabinet documents and documents relating to national security, defence and international relations.

The parties believe that the single public interest test should be applied consistently across all exemption categories, furthering the objects of the FOI Act.

There is no evidence that applying a public interest test to all categories of exemption will have a detrimental impact on the Government's decision making processes. It is unlikely that Australian decision makers, including courts, may conclude that it would be in the public interest that documents be released if it could cause the harm of compromising collective ministerial accountability or endanger national security.

The parties believe that the FOI law needs to provide for the extraordinary. Government failings of indisputable national and significant consequence can occur and should not be protected by the sanctity of Cabinet. The Australian Wheat Board bribery scandal, information relevant to weapons of mass destruction and Australia's decision to go to a non-UN sanctioned war in Iraq, the troubled home insulation scheme are examples where there is a legitimate public interest in release of information.

In such situations, decision makers should be required to consider where the public interest lies and consider whether or not to decide to release the documents. Of note, the New Zealand Official Information Act allows greater access to Cabinet information without any discernible problems in administration or management.

Reformulation of exemptions

The parties to the submission do not support the reformulation of exemptions in the FOI Act.

Sensitive government documents, including Cabinet documents, are no exemption

ARTK supported the amendments in the FOI Bill to clarify the scope of the Cabinet exemption on the basis the exemption only captures documents prepared for the dominant purpose of submission to the Cabinet.

The parties to this submission maintain that the Cabinet exemption should not extend to extracts of factual or statistical material contained in Cabinet documents. This material does not reveal the deliberations of Cabinet. This material does, however, play a vital role in informing the public about the quality of Cabinet decision making.

The provision of frank and fearless advice is no exemption

The terms of reference of the review refer to the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government.

The reference to third parties who deal with government causes us great concern. There is no basis to think that there exists any “third party” which in fact deals with government on a “frank and fearless” basis – and there are good and substantial reasons to think that public administration would generally be enhanced by commercial parties dealing with government continuing to experience the pressure to be accurate (including the pressure that comes from the risk of disclosure of their communications with government).

Notably, third parties are not subject to the *Public Service Act* and its duties and mechanisms to enforce obligations of accuracy.

“Frank and fearless advice” from public servants is exactly the information that should be available to the Australian public. Logically, if frank and fearless advice supports the quality of Government programs and policies, then Government would be happy for such information to be released. If such advice does not support a government policy or program, and/or identifies flaws or problems, then the public will be better informed – despite any negative political consequences for the Government.

Broader community knowledge of the failures or flaws of a government policy or program can lead to pressure to reform or discontinue the policy or program, ensuring funds are spent in the national interest, not the political interest of politicians. This is precisely the reason why ‘frank and fearless advice’ is the correct manner in which advisers to Government should act, and what should be available to the Australian public.

In its 1 June 2009 response to the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009*, ARTK noted its consistent arguments that the public interest factors first identified in *Re Howard*¹², including the issue of frank and fearless advice, lacked any evidentiary basis and have been blight on effective FOI. ARTK supported the decision to make at least some of those factors irrelevant in determining the public interest test.

However, ARTK argued the then FOI Bill should be amended to specify that the discouraging of full and frank advice is an irrelevant public interest factor.

The flaws in arguing against disclosure in those circumstances were identified in the AAT’s judgment in *McKinnon v Dept PM & Cabinet* V2005/1033¹³. In that case, Deputy President Forgie rejected claims that public servants have a reasonable expectation the documents they prepared

¹² *Re Howard and the Treasurer of the Commonwealth* (1985) 7 ALD 645

¹³ [2007] AATA 1969

would remain confidential. The case also showed that failing to provide frank and fearless advice directly contradicted obligations under the Public Service Act.

5. THE APPROPRIATENESS OF THE RANGE OF AGENCIES COVERED BY THE FOI ACT

The parties to this submission believe that as a general principle, all agencies should be covered by the FOI Act except agencies inexorably linked to national security such as ASIO or ASIS – although the administrative functions of such agencies should be in scope.

The Parliament and the Governor General should be covered by the FOI Act because tax payers are entitled to know how public funds are being spent and because their functioning as institutions is at the heart of the operation of Australia's representative democracy. The exclusion of parliamentary departments was criticised by the Australian Law Reform Commission (ALRC) which recommended their inclusion in 1996.

Internationally, England, Scotland, India, Ireland, South Africa and Mexico all allow FOI requests to parliamentary departments. Domestically, Tasmania's *Right to Information Act 2009* allows requests to parliamentary departments, although this is limited to administrative matters.

Further, the failure to allow FOI access to Parliament cannot be justified given the importance of Parliament to Australia's democracy and international best practice.

6. THE ROLE OF FEES AND CHARGES ON FOI

The veracity of the right to access information must be upheld

The report of the *Review of charges under the Freedom of Information Act 1982* (Charges Report) notes:

*"FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act. The objective of the Act to make government open and engaged with the public will be hampered if it is too expensive or cumbersome for people to make FOI requests".*¹⁴

The Charges Report goes on to refer to the *"problem of large and complex applications from specific categories of applicants who use the FOI Act rather than rely upon other means to obtain information (such as law firms that use the FOI Act as a form of discovery, and members of parliament, journalists, researchers and the media)"*.¹⁵

This comment displays a troubling misunderstanding of the importance of a legal right to information for everyone, regardless of profession or purpose.

The parties to this submission are committed to an FOI Act which provides a formal, legal right of access to government information at the lowest cost. Such a right cannot be subordinate and supplementary to the informal provision of information by agencies, which can selectively release information to an applicant. The FOI Act exists because an independently reviewable, legal right of access is required to ensure access to government information – and this should be upheld at all times, to the highest standards.

¹⁴ Prof. John McMillan *Review of charges under the Freedom of Information Act 1982* February 2012, pp 1

¹⁵ McMillan, op. cit, pp 5

Administrative release no substitute for FOI

The Charges Report states that *“agencies are encouraged to establish administrative access schemes that enable people to request access to information or documents that are open to release under the FOI Act. A scheme should be set out on an agency’s website and explain that information will be provided free of charge (except for reasonable reproduction and postage costs.”*¹⁶ However the availability of administrative access schemes cannot replace or diminish the FOI process.

When coupled with the right to access information at the lowest cost, the parties therefore reject the proposal in the Charges Report that agencies impose a \$50 application fee if a person makes an FOI request without first applying under an administrative access scheme that has been notified on an agency’s website.

This proposal diminishes the fundamental right to information and also penalises a citizen for exercising that right. Administrative access may be offered as an alternative to access through FOI but it cannot be used to replace the right to government information. Various States have well established systems whereby agencies, with the agreement of applicants, will initially deal with a request as if it were for administrative access and only move to the more formal and expensive FOI processes if the applicant is dissatisfied with the outcome. We have no difficulty with approaches such as that – but they operate by agreement, and not by curtailing a right otherwise enjoyed by the applicant.

Further, the assertion that administrative release can be an effective process for obtaining access to information has been found to be wrong by a research project conducted by Seven Network in September this year. (See Attachment B)

In October 2012, Seven Network sought information through fifteen administrative requests made to ten government departments in the period 5 September to 29 September 2012. Information contained in this document refers to phone and email conversations between a Seven News journalist and government department representatives.

The departments approached were:

- Education Employment and Workplace Relations (regarding two consultancies);
- Finance and Deregulation, the Department of Defence (regarding three consultancies);
- Attorney-General’s;
- Treasury (regarding three consultancies);
- Infrastructure and Transport;
- Industry Innovation Science Research and Tertiary Education;
- the Australian Public Service Commission;
- Sustainability Environment Water Population and Communities; and
- Families Housing Community Services and Indigenous Affairs.

Of the reports requested, three were unable to be released as they were not yet complete, one was apparently “confidential” and two reports were claimed to be an “internal evaluation”. Two requests were responded to with details of how to find information regarding the reports online, and one report and subsequent consultancy was cancelled. Of the total requests, six were replied to with varying responses regarding how to go about making a FOI request to gain access to the requested information.

¹⁶ Ibid., pp6

During the course of at least five phone conversations, the journalist requesting information was asked “what administrative release was” and was obliged to direct public servants to the website for the OAIC for further information.

This research establishes that there exists neither the culture nor the systems to ground any confidence that administrative access schemes can be made to operate as an alternative to the right to access under the FOI Act. In truth, at this time they may be not much more than a dream, a hope or a gleam in the Information Commissioner’s eye. While we have no doubt that the Commonwealth could learn a great deal from the States (and the OAIC could develop a better approach to administrative access by close study of State practice), the case for linking administrative access schemes with FOI charging has not been made out and should not be pursued.

Processing charges

The Charges Report also recommends that no FOI processing charge should be payable for the first five hours of processing time (which includes search, retrieval, decision making, redaction and electronic processing). The charge for processing time that exceeds five hours but is less than 10 hours should be a flat rate of \$50. The charge for each hour of processing after the first 10 hours should be \$30 per hour.¹⁷

Such a proposed charging mechanism – particularly the proposed payments beyond the first 10 hours – is a disincentive to seeking information. Such charges confirm the statement made in the Charges Report that *“FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act.”*

Such charging proposals undermine the objective of the Act – that is, to make government open and engaged with the public. The parties believe that such a proposal should not proceed.

Same day disclosure processes

Another issue impacting the parties to this submission is the use of same day disclosure processes by government, to diminish investment by media in FOI. A previous ARTK submission was made to Government regarding this issue. A copy of that submission is at [Attachment C](#).

OAIC guidelines – Part 14 Disclosure Log – are available on this matter.¹⁸ However, the parties note that some agencies are ignoring or failing to adhere to the guidelines, and/or using outdated versions of the guidelines.

The parties to the submission recommend review of this particular matter.

Processing time

The Charges Report also recommends a ceiling on processing time of no more than 40 hours replacing the practical refusal mechanism in ss 24, 24AA and 24AB. This is rejected by the parties to the submission.

¹⁷ Ibid, pp6-7

¹⁸ <http://www.oaic.gov.au/publications/guidelines/part14-disclosure-log.html>

The FOI Act uses the term “unreasonably” relevant to whether a request diverts resources or interferes with functions, and this term allows judgement on the basis of the public interest of the information sought. The parties contend that this term must remain; and in any event there must be external merits review of any decision to refuse a request because of processing demands.

Any suggestion that an agency can set a 40 hour limit by a non-reviewable decision will seriously diminish the effectiveness of the FOI Act. In fact we have grave concerns that such a provision would be available to agencies to defeat almost every contentious, public interest focussed FOI request. Even in cases where only specified and readily located documents were requested, how would an applicant effectively question a (non reviewable) decision to refuse access because the agency has estimated that reading the specific documents for the purpose of making exemption decisions will take more than 40 hours? Similarly, in the case of single, large documents the provision would operate to make the documents in effect exempt simply because of their size – because reading them would take longer than the 40 hours.

Other charges issues

The parties support the reform allowing an applicant to apply for reduction or waiver of an FOI charge on the basis of financial hardship.

The recommendation in the Charges Report that an applicant pay \$100 if applying directly for Information Commissioner review (when internal review is available) is onerous and denies a right of timely appeal. Such a proposal is not supported.

Payment options – electronic funds transfer must be available in all instances

There are various processes and payment options – including limitations – across agencies. The parties to this submission urge the government to ensure that electronic payment is available, and accepted, in all instances for the payment of FOI fees and charges.

