



**Australian Government**

**Office of the Australian Information Commissioner**

# **Inquiry into the Freedom of Information Amendment (New Arrangements) Bill 2014**

**Submission to the Senate Legal and  
Constitutional Affairs Legislation Committee**

**November 2014**



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## Introduction

The Office of the Australian Information Commissioner (**OAIC**) appreciates the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee regarding its consideration of the Freedom of Information Amendment (New Arrangements) Bill 2014 (**FOI New Arrangements Bill**).

The OAIC was established by the *Australian Information Commissioner Act 2010* (**AIC Act**) and commenced operation on 1 November 2010.

The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner.

The former Office of the Privacy Commissioner was integrated into the OAIC on 1 November 2010.

The OAIC brings together the functions of information policy and independent oversight of privacy protection and freedom of information (**FOI**) in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

The Commissioners of the OAIC share two broad functions:

- the FOI functions, set out in s 8 of the AIC Act—providing access to information held by the Australian Government in accordance with the *Freedom of Information Act 1982* (**FOI Act**), and
- the privacy functions, set out in s 9 of the AIC Act—protecting the privacy of individuals in accordance with the *Privacy Act 1988* and other legislation.

The Information Commissioner also has the information commissioner functions, set out in s 7 of the AIC Act. Those comprise strategic functions relating to information management by the Australian Government.

This submission is made jointly by the three Commissioners who head the OAIC: the Australian Information Commissioner, Prof John McMillan; the Freedom of Information Commissioner, Dr James Popple; and the Privacy Commissioner, Mr Timothy Pilgrim. We have each held those offices since the OAIC commenced operation on 1 November 2010 under the provisions of the AIC Act.

This submission outlines our response to the proposed closure of the OAIC; notes some aspects of the FOI Act and the Privacy Act that will be altered from earlier arrangements and may therefore raise novel or practical issues for government; and offers our perspective on the OAIC's performance between 2010 and 2014.

Although the title to the Bill draws attention to proposed new FOI arrangements, the Bill has important implications for the administration of the Privacy Act and for the third OAIC function of providing advice to government on information policy and practice. The FOI New Arrangements Bill does not make arrangements for the third function to continue.

## Response to proposed closure of the OAIC

The Australian Government announced on 13 May 2014 that, as a Budget measure, legislation would be introduced to repeal the AIC Act and disband the OAIC by 1 January 2015. On the same day we issued a joint statement that read in part as follows:<sup>1</sup>

We acknowledge the Australian Government's Budget decision on Tuesday 13 May 2014 to disband the Office of the Australian Information Commissioner (OAIC) by 1 January 2015.

We note that the *Freedom of Information Act 1982* (FOI Act) and the *Privacy Act 1988* (Privacy Act), which confer valuable information rights on the Australian community, will continue to operate (as amended to reflect the abolition of the OAIC). The Privacy Act will continue to be administered by the Privacy Commissioner and supporting staff from an office based in Sydney. The FOI Act will be administered jointly: by the Attorney-General's Department (advice, guidelines, annual reporting), the Administrative Appeals Tribunal (merits review) and the Commonwealth Ombudsman (complaints). The information policy advice function currently discharged by the OAIC will cease.

We are committed to ensuring that the FOI Act and Privacy Act continue to operate effectively prior to 1 January 2015 and that a smooth transition to the new arrangements will occur.

The Commissioners take this opportunity to draw attention to the substantial achievements of the OAIC since its commencement on 1 November 2010.

Our statement then outlined the OAIC's achievements in four areas: information policy; FOI; Privacy; and corporate, public relations and community engagement. An updated version of our statement was published in the *OAIC Annual Report 2013–14*,<sup>2</sup> and is **Attachment 1** to this submission.

The OAIC has acted steadily since the Government announcement in May to prepare for the closure of the office by 31 December and to enable a smooth transition to new arrangements. The steps that have been taken include the following:

- OAIC Executive officers meet fortnightly with senior officers of the Attorney-General's Department to make arrangements for the OAIC's closure, on matters such as budget, staffing, premises, and records. Similar meetings have been held with the Australian Human Rights Commission (**AHRC**) concerning the arrangements for discharge of Privacy Act functions from 1 January.
- OAIC officers meet regularly with officers of the Commonwealth Ombudsman and the Administrative Appeals Tribunal (**AAT**) to discuss arrangements for the transfer of FOI complaints and Information Commissioner (**IC**) review applications that are unresolved at 31 December. A notice has recently been posted on the Ombudsman website announcing that that office commenced handling complaints about FOI

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<sup>1</sup> [www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/australian-government-s-budget-decision-to-disband-oaic](http://www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/australian-government-s-budget-decision-to-disband-oaic)

<sup>2</sup> [www.oaic.gov.au/about-us/corporate-information/annual-reports/oaic-annual-report-201314/oaic-achievements](http://www.oaic.gov.au/about-us/corporate-information/annual-reports/oaic-annual-report-201314/oaic-achievements)

processing from 1 November 2014, and that complaints received by the OAIC after that date will be transferred to the Ombudsman.<sup>3</sup>

- The OAIC has published three further statements on the OAIC website informing members of the community of the implications of the Government's Budget announcement for current and future handling of Privacy and FOI complaints and IC review applications received by the OAIC. Those three statements form **Attachment 2** to this submission: 'How the OAIC will deal with IC reviews and FOI complaints until 31 December 2014', published on 16 July; 'New Bill introduced to amend FOI and privacy laws', published on 2 October; and 'OAIC operations and processing times', published on 8 October 2014.<sup>4</sup>
- The OAIC has arranged for its Canberra-based staff to be provided with access to employment counselling, assistance for financial and career planning, assistance in seeking employment in other Australian Government agencies, and information about redundancy options.
- The OAIC has revised and republished 13 of the 15 chapters of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act,<sup>5</sup> and has similarly updated a few of the OAIC FOI fact sheets and agency resource documents, in preparation for handing over this function to the Attorney-General's Department.
- OAIC staff met with officers of the Departments of Communications and Finance concerning the information policy function, and in particular to facilitate arrangements for continuing government utilisation of the OAIC's signature publications, such as the *Principles on open public sector information*.<sup>6</sup>
- Pending enactment of the FOI New Arrangements Bill, the OAIC's FOI and Privacy responsibilities are unchanged. Consequently, we continue to receive and deal with FOI and Privacy enquiries, complaints and IC review applications. Some IC review applicants have elected to have their matters 'stockpiled' to transfer to the AAT on 1 January under proposed transitional arrangements; some others have elected to have their matter finalised under a provision of the FOI Act (s 54W(b)) that enables them to apply to the AAT prior to 1 January under the AAT's existing jurisdiction.

The present position of the OAIC's staffing, activity and workload is as follows:

- The number of staff in the Canberra office has reduced substantially, and currently comprises two Commissioners (the Information Commissioner and FOI Commissioner), an Assistant Commissioner and a part-time executive assistant. Previously there were up to 25 staff in the Canberra office working on all three OAIC functions.

<sup>3</sup> [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

<sup>4</sup> [www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic](http://www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic)

<sup>5</sup> [www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/summary-of-version-changes-to-s-93a-guidelines](http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/summary-of-version-changes-to-s-93a-guidelines)

<sup>6</sup> [www.oaic.gov.au/information-policy/information-policy](http://www.oaic.gov.au/information-policy/information-policy)

- Staffing levels in the Sydney office have been largely unaffected by the Government Budget announcement, though the office is preparing for the proposed new arrangement with the AHRC. Some Sydney-based staff work on FOI enquiries, complaints and IC review applications, and will continue to do so until the new arrangements take effect.
- The three Commissioners have terms of appointment that extend beyond 31 December 2014: until 31 October 2015 for the Information Commissioner and FOI Commissioner, and until 18 July 2015 for the Privacy Commissioner. The FOI New Arrangements Bill provides for the Privacy Commissioner to continue in the new statutory position of Australian Privacy Commissioner from 1 January 2015 for the remainder of his existing term of appointment (Schedule 4, Part 3).
- The OAIC proposes to vacate its Canberra office in early December 2014. The Information Commissioner and the FOI Commissioner will work through the Sydney office until 31 December.

## **New Privacy Act and FOI Act arrangements that differ from earlier arrangements**

In this section we offer some thoughts on aspects of the FOI New Arrangements Bill that vary the arrangements that existed both prior to and after 2010, and that may therefore raise novel or practical issues in administering the Privacy and FOI Acts.

### **Privacy regulatory oversight—issues with proposed structure for delivery of Privacy functions**

The 2014–15 Budget papers state that from 1 January 2015 an Office of the Privacy Commissioner will be established,<sup>7</sup> and shows funding for the privacy function provided to the AHRC. The Budget papers state that the Office of the Privacy Commissioner will be independent of the AHRC, and the Privacy Commissioner will not be a Human Rights Commissioner for the purposes of the *Australian Human Rights Commission Act 1986* (AHRC Act).<sup>8</sup>

Schedule 2 of the FOI New Arrangements Bill establishes the position of Australian Privacy Commissioner, but does not establish an Office of the Australian Privacy Commissioner as an entity. The AHRC Act will be amended to provide that the Commission ‘may provide such assistance to the Australian Privacy Commissioner as is necessary to enable the Commissioner to perform the functions conferred on the Commissioner’ by the Privacy Act, and may make AHRC staff members and services available to the Commissioner (new s 43A). Current Sydney-based OAIC staff are to be transferred to the AHRC as of 1 January 2015 and become employees of the AHRC.<sup>9</sup>

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<sup>7</sup> *Portfolio Budget Statement 2014–15, Budget Related Paper No 1.2, Attorney General’s Portfolio*, p 471.

<sup>8</sup> *Ibid*, p 194.

<sup>9</sup> Freedom of Information Amendment (New Arrangements) Bill 2014, Schedule 4, Part 3, cl 12.

Under the new arrangements the Privacy Commissioner will be an independent statutory officer responsible to Parliament for undertaking a diverse range of functions under the Privacy Act and other legislation. However, the resources available to perform those functions will be held by another entity, the AHRC, which will be responsible for reporting on how they are utilised. The level of staffing and administrative support provided to the Privacy Commissioner will be at the discretion of the AHRC.

This presents an untried model for Privacy regulatory oversight and raises potential challenges at a time when Privacy issues are growing in importance to government, business and the broader community. The new arrangements differ from those previously applying to Privacy functions:

- From 1 January 1989 to 30 June 2000, the Privacy Commissioner was a Commissioner of the then Human Rights and Equal Opportunity Commission, the predecessor of the AHRC. The staff and budget to undertake the Privacy functions were part of the resources of the AHRC.
- From 1 July 2000 to 31 October 2010, the Office of the Privacy Commissioner (**OPC**) operated as a separate statutory office established under the Privacy Act and was a *Financial Management and Accountability Act 1997* agency. However, the OPC continued to purchase its corporate services from the AHRC under a memorandum of understanding between the two agencies, including human resources, finance and information technology, and accommodation arrangements. This has brought efficiencies for both agencies.
- From 1 November 2010 to the present, Privacy Act functions have been undertaken by the OAIC. The functions are formally conferred by the AIC Act upon the Information Commissioner and are exercisable by the Privacy Commissioner and the FOI Commissioner.<sup>10</sup>

The change in 2000, separating the OPC from the AHRC, reflected the developing importance of Privacy regulation, the extension of the Privacy Act to the private sector, and key differences between Privacy and other human rights functions. The change in 2010, merging the OPC with the new OAIC, recognised the developing importance of information issues in government operations and adopted a new approach to combining information regulatory functions in a single statutory office.

Contemporary aspects of Privacy regulation that will be relevant to the arrangements adopted for the discharge of Privacy Act functions include:

- Privacy law regulates handling of personal information, a key business asset of private sector organisations and government. The objects of the Privacy Act require the protection of the privacy of individuals to be balanced with the interests of entities in carrying out their functions and activities (s 3). The OAIC has adopted a Privacy regulatory approach that is characterised by constructive cooperation with private sector organisations and government agencies, to ensure adequate protection of personal information consistent with harnessing the value of information by using and sharing it.

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<sup>10</sup> *Australian Information Commissioner Act 2010*, ss 9, 10, 12.

- The Privacy Act confers a broad range of regulatory tools not common to many regulatory agencies. These include powers to investigate and conciliate individual Privacy complaints, pursue Commissioner-initiated investigations, make determinations enforceable in the Federal Courts, accept enforceable undertakings, seek civil penalties and carry out assessments (formerly audits) of entities covered by the Act. This is in addition to a range of education, awareness-raising, monitoring and guidelines functions. The OAIC works with entities to achieve Privacy compliance in a manner appropriately consistent with meeting organisational objectives, while also stressing the use of Privacy Act enforcement mechanisms in appropriate cases.
- The Commissioner has a range of complex regulatory functions under other statutes including the *Personally Controlled Electronic Health Records Act 2012*, the *Healthcare Identifiers Act 2010*, the *National Health Act 1953*, the *Telecommunications Act 1997*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Personal Property Securities Act 2009*, the *Data-matching Program (Assistance and Tax) Act 1990*, and the *Crimes Act 1914*.
- There has been a significant growth in Privacy awareness and Privacy regulatory activity. This is reflected in the enquiry, complaint and investigation statistics given later in this submission, and the commencement of expansive reforms to the Privacy Act in March 2014.

A point of particular interest in the new arrangements for the discharge of Privacy Act functions is that staffing and administrative support are to be made available to the Privacy Commissioner at the discretion of the AHRC. Such an arrangement could put pressure on both the AHRC and the Privacy Commissioner to justify funding allocation against competing functions. An unintended consequence may be that the Privacy Commissioner will need to make a case for Privacy funding alongside AHRC priorities. There may be a countervailing pressure on the AHRC to draw funding away from existing human rights functions to support increasing Privacy regulatory activity (in the 2013–14 financial year the OAIC received nearly twice as many Privacy complaints as we understand the AHRC received complaints across its jurisdiction).

Privacy is recognised as an issue of national significance and is fundamental to many areas of Government policy. This is clear from current debates about national security. Administrative arrangements for the Privacy Commissioner need to ensure adequate resourcing to give the community confidence that functions under the Privacy Act and other legislation can be carried out. The Privacy Commissioner also needs to be able to support Government and business to meet emerging Privacy challenges in a complex and rapidly evolving technological environment.

The OAIC and the former OPC both enjoyed a close and productive working relationship with the AHRC. However, the FOI New Arrangements Bill will introduce an untested arrangement that will operate in a changed regulatory context. A different approach would be that funding for Privacy oversight is decided by Government rather than at the agency level. Greater clarity and certainty could also be provided as to how OPC staffing allocations are to be determined.



We also note that the FOI New Arrangements Bill currently provides for the transfer of OAIC staff to the AHRC but retains their current terms and conditions of employment until a new enterprise agreement is entered into by the AHRC. This is inconsistent with usual practice where staff transfer to the terms and conditions of employment in the gaining agency, to ensure there is no disparity of employment conditions for staff employed by the same agency.

## **Freedom of information processing and oversight**

The FOI New Arrangements Bill will largely restore the arrangements for FOI complaint handling and merits review that applied before the 2010 reforms: the Ombudsman will handle complaints and the AAT will conduct external merits review. But some features of the 2010 reforms will remain unchanged.

Of particular importance is that (since 2010) there is no application fee for FOI requests, there is no charge for the first five hours of processing time, and an agency cannot impose an access charge if it fails to comply with timeframes (including extended timeframes) under the FOI Act.

The OAIC has supported those features of the FOI Act, but has also acknowledged they can give rise to tensions and practical challenges in FOI administration. For example, those features have been identified as a contributing factor in requester behaviour that was classified as vexatious and restrained by a vexatious applicant declaration.<sup>11</sup> The FOI Act currently provides for the Information Commissioner to declare an FOI applicant to be vexatious (Part VIII, Division 1). The FOI New Arrangements Bill will repeal those provisions, and there will be no alternative mechanism for such a declaration to be made. The AAT can make a declaration that an applicant is vexatious, but only in relation to conduct in AAT proceedings (*Administrative Appeals Tribunal Act 1975*, s 42B).

There are other features of the FOI Act that will be changed by the FOI New Arrangements Bill, apart from those changes required to disband the OAIC.

An applicant will be required to seek internal review of a decision before applying for external merits review (by the AAT). This will not apply to decisions made personally by the principal officer of an agency or by a Minister. Internal review is not currently available from those decisions, but an applicant seeking review of an FOI decision made personally by the principal officer of an agency or by a Minister currently has access to external review of that decision by the OAIC without fee; external review by the AAT attracts an application fee. The same is true in relation to external review of an internal review decision.

The framework for investigation of FOI complaints will also change. Following an investigation, the Information Commissioner can make formal recommendations to the respondent agency that the Commissioner believes the agency ought to implement. If the Commissioner is not satisfied that the agency has taken adequate and appropriate action to implement the recommendations, the Commissioner may issue an

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<sup>11</sup> The Commissioner has made six declarations: [www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-declarations/](http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-declarations/). In a few other instances this has been raised as a possibility with a person.

‘implementation notice’ requiring an agency to explain the implementation steps it will take (Part VIIB, Division 2). The Commissioner may report to relevant Ministers on whether an agency has adequately implemented the Commissioner’s recommendations or responded to an implementation notice, and the report must be tabled in Parliament. The *Ombudsman Act 1976* contains a similar though less structured reporting framework, and does not require Parliamentary tabling of an Ombudsman’s report (s 15).

The FOI New Arrangements Bill will remove an agency’s capacity to seek an extension of time, currently available under s 15AB (for complex or voluminous FOI requests), s 51DA (for amendment or annotation requests) and s 54D (for internal reviews). An agency will still be able to agree an extension of time with the FOI applicant (s 15AA). There is a heightened risk that, with fewer options and less flexibility for obtaining an extension of processing time, agencies will not be able to comply with statutory deadlines, and thus not be able to impose an access charge. The ability to charge for non-personal requests has, on our observation, been an important tool used by agencies to facilitate discussion with applicants about reducing or clarifying the scope of overly-broad or unclear requests.

For completeness, we note that the FOI New Arrangements Bill will also remove provisions for the regular review of the Information Publication Scheme (Part II, Division 3).

Another feature of the 2010 reforms that will be retained is the power to issue guidelines, under s 93A, to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. This power is currently exercised by the Information Commissioner, and is closely tied to the Commissioner’s function of undertaking IC reviews and developing a body of FOI case law. The FOI New Arrangements Bill will give the power to issue guidelines to the Attorney-General.

The Hawke review of the FOI Act and the AIC Act made a number of recommendations.<sup>12</sup> In our response to the Hawke review (**Attachment 3** to this submission),<sup>13</sup> we commented on those recommendations, and made further suggestions for change to the FOI Act. Many of those recommendations—Dr Hawke’s and ours—would be applicable to the FOI Act as amended by the Bill. We remain of the view, which we expressed in our response, that further change is required to relieve the processing burden on government agencies, to make it easier for members of the public to make information access requests to agencies, and to strike a better balance between the FOI Act and other mechanisms that provide access to government information.

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<sup>12</sup> *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013), [www.ag.gov.au/Consultations/Pages/ReviewofFOI.aspx](http://www.ag.gov.au/Consultations/Pages/ReviewofFOI.aspx)

<sup>13</sup> [www.oaic.gov.au/news-and-events/statements/foi-statements/dr-allan-hawke-review-of-foi-and-aic-acts](http://www.oaic.gov.au/news-and-events/statements/foi-statements/dr-allan-hawke-review-of-foi-and-aic-acts)

## OAIC performance: 2010–14

Attachment 1 to this submission (extracted from the OAIC *Annual Report 2013–14*) summarises the OAIC's achievements in the period 1 November 2010 – 30 June 2014. A key element of the summary is the large number of individual matters that were resolved during that period. This includes handling 41,718 Privacy and FOI telephone enquiries and 8376 Privacy and FOI written enquiries; closing 6684 Privacy and FOI complaints; resolving 1345 IC review applications; conducting 137 own motion Privacy investigations and 14 audits; and receiving 213 data breach notifications.

There has been a steady annual increase over that period in the OAIC's workload of between 10–20% in most areas. An example of the significantly higher workload the OAIC has progressively cleared is that the number of Privacy complaints received rose by 183% in 2013–14, while the average completion time reduced by 44% to an average of 86.7 days from receipt to resolution. There was also a 74% increase in the number of matters completed that year (to 2617, from 1504 the previous year).

A similar improvement was achieved in the resolution rate of FOI matters. There was a 54% increase in the number of IC reviews completed in 2013–14 (to 646, from 419 the previous year); the number of IC reviews on hand at the end of the reporting year decreased by 28% (to 316, from 438); the oldest unactioned IC review was reduced from 206 to 40 days; and the number of FOI complaints on hand fell by 57% (to 32, from 74).

Further confirmation of the OAIC's efficiency in case resolution is that there was a decline over this period in the OAIC's Budget-supported staffing, from almost 80 Full-Time Equivalent (FTE) at 30 June 2011 to around 65 FTE at 30 June 2014. The OAIC appropriation for 2013–14 was \$10.6 million.

This workload performance has been maintained since 1 July 2014, notwithstanding the substantial decline in the number of OAIC Canberra staff following the Government's Budget announcement. For example, the number of IC review applications on hand at the date of this submission is 228, although the OAIC continues to receive approximately 30 new applications each month. The number of FOI complaints on hand at the date of this submission is 17.

The OAIC ascribes this improvement in case resolution to the following factors:

- The OAIC faced large challenges in the earlier years associated with start-up activities that occupied substantial staff resources. Now those challenges have been addressed the OAIC has been able to devote a higher proportion of staff resources to normal workload processing. The earlier challenges included:
  - establishing a new office in Canberra
  - establishing new business methods that merged the existing Privacy Act functions and the new FOI Act and information policy functions, including a new office structure, strategic plan, governance framework, staff training, website, case management system, records management system and FOI statistics database

- conducting intensive educational, community awareness and training activities on the far-reaching FOI Act changes that commenced in November 2010
- preparing and publishing guidelines on the operation of the FOI Act (250 pages), 16 fact sheets for the public and over 30 detailed agency resources on technical aspects of FOI administration, such as processing times, calculating charges, redaction, statements of reasons, third party objections, website publication, disclosure logs and sample letters
- at the request of Government, conducting a review and public consultation on FOI charges, resulting in a report, *Review of Charges under the Freedom of Information Act 1982* (2012)<sup>14</sup>
- preparing two detailed submissions for a review of the FOI and AIC Acts conducted by Dr Allan Hawke AC in 2013 pursuant to s 93B of the FOI Act,<sup>15</sup> and
- conducting a survey of Australian Government agency compliance with the new FOI Act requirements for the Information Publication Scheme.<sup>16</sup>

A significant challenge, later in the life of the OAIC, was implementing substantial changes to the Privacy Act in March 2014, by preparing nearly fifty legislative instruments, codes, guideline statements and information sheets, and conducting an extensive public consultation process (receiving more than 90 public submissions on draft guidelines).<sup>17</sup>

- FOI enquiries, complaints and review applications can now generally be resolved more speedily, based on the extensive published guidance and IC review case precedents the OAIC has developed over four years. OAIC case-handling staff are far better placed to engage knowledgeably and confidently with agencies and applicants in explaining FOI principles, the likely resolution of IC review applications and the practical pathways for agreed resolution of access disputes.
- The OAIC has constantly reviewed and trialled new methods for efficient case handling in FOI and Privacy matters. We have bedded down effective case management procedures, based on early assessment of new cases, informal resolution through OAIC-led discussion and negotiation among the parties, and written case appraisals.
- As to FOI processing, the OAIC has actively encouraged agencies to adopt flexible access procedures and to embrace proactive disclosure: for example, through the OAIC publications, *FOI agency resource 14: Administrative access*<sup>18</sup> and *Principles on*

<sup>14</sup> [www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982](http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982)

<sup>15</sup> [www.oaic.gov.au/news-and-events/submissions/foi-submissions](http://www.oaic.gov.au/news-and-events/submissions/foi-submissions)

<sup>16</sup> [www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/information-publication-scheme-survey-of-australian-government-agencies](http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/information-publication-scheme-survey-of-australian-government-agencies)

<sup>17</sup> [www.oaic.gov.au/privacy/privacy-act/privacy-law-reform](http://www.oaic.gov.au/privacy/privacy-act/privacy-law-reform)

<sup>18</sup> [www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-agency-resources/foi-agency-resource-14-administrative-access](http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-agency-resources/foi-agency-resource-14-administrative-access)

*open public sector information*.<sup>19</sup> The OAIC also convened an Information Contact Officers Network that met quarterly and provided an opportunity to convey targeted OAIC messages to FOI and Privacy contact officers from most large Government agencies. A central OAIC message is that it is easier and cheaper to engage with applicants and to disclose information, rather than to battle and withhold. We believe this philosophy is taking root, as evidenced by 2013–14 statistics which show a 14% increase in FOI requests to agencies, yet an 8% decrease in the reported cost of FOI Act administration. Another strong and compatible OAIC message is that administrative access and proactive disclosure are a natural corollary of new pressures on government to maintain digital records and to embrace online service delivery.

Reflecting more generally on OAIC achievements over the past four years, we believe our work has had an impact in the following ways:

- In establishing the OAIC we ensured that FOI, Privacy and information policy functions would be integrated in all aspects of our work, including the office structure, governance documents, case management system, website, telephone enquiries line, Commissioners' work, staff responsibilities, internal leadership forums and OAIC publications. An example is that the OAIC's *Strategic Plan 2011–2014* defines as the OAIC's purpose, 'To promote information rights and the strategic management of government information' and the OAIC's vision, 'An Australia where government information is managed as a national resource and personal information is respected and protected'. Another example is that the recently published *Australian Privacy Principles guidelines (APP guidelines)* emphasise that the threshold challenge for Privacy Act entities is the 'open and transparent management of personal information'. The APP guidelines also provide—for the first time—integrated guidance on providing access to and correction of personal information under the Privacy Act, FOI Act and administrative access and correction procedures.

This emphasis on integration stresses the essential connection between valuing, using and sharing information, while safeguarding personal information. In this setting, FOI and Privacy are no longer seen as opposing forces that create tension, but as essential public interests that must be properly balanced in a setting of responsible information management. Our belief is that this philosophy is now more strongly heard and keenly practised by government agencies.

- The OAIC has provided expert and comprehensive guidance to government, business and the community on the operation of the FOI and Privacy Acts. All OAIC publications—on FOI, Privacy and information policy—are consistent in style and messaging. This guidance is relied upon heavily by others, and is one factor behind the 10% increase last year in OAIC website visits. We regularly receive commendation from a variety of sources on the excellence of our publications, and we see them referred to and relied upon frequently by others.

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<sup>19</sup> [www.oaic.gov.au/information-policy/information-policy](http://www.oaic.gov.au/information-policy/information-policy)

- In FOI administration there is, in our view, greater consistency across government in FOI processing. This addresses a major criticism prior to the 2010 reforms, as captured in the central finding of the Commonwealth Ombudsman's 2006 own motion investigation of FOI administration in Australian Government agencies:

The investigation found that there is an uneven culture of support for FOI among Australian Government agencies. Some agencies are displaying a clear commitment to FOI, and are supportive of the Act's objective of extending as far as possible the right of the Australian community to access to information in possession of the Government ... Other agencies do not as firmly demonstrate such a commitment.<sup>20</sup>

The report drew attention to excessive processing delays in some agencies, lack of consistency in acknowledging FOI requests and notifying and applying FOI charges, and variable quality in decision letters. The OAIC has actively monitored and responded to 'black spots' in FOI administration through discussion with agencies, letters to agency heads and own motion investigations.<sup>21</sup>

- Open government must be supported by a political and administrative cultural commitment to facilitating public access to information. The OAIC has promoted this message through information policy work that includes membership of inter-agency forums, a national information policy conference, regular speeches and presentations, and the publications *Towards an Australian Government Information Policy* (2010), *Principles on Open Public Sector Information* (2011), *Understanding the Value of Public Sector Information in Australia* (2011), *Open Public Sector Information: from Principles to Practice* (2013), *Open data quick wins—getting the most out of agency publications* (2014) and *De-identification of data and information* (2014). Three principles permeate those publications and are now widely referred to and understood across government. These are that 'government information is a national resource to be used for public purposes', government information is better described as 'public sector information', and access to information laws embody a 'presumption in favour of disclosure'.
- The OAIC has been similarly successful in enhancing recognition that personal information privacy protection is variously a legal requirement in Privacy laws, a human right recognised in the International Covenant on Civil and Political Rights, an economic driver acknowledged in Australia's participation in the OECD, a fast-growing community expectation, and good administrative and business sense as practised by astute agencies and businesses. The expansive reforms to the Privacy Act that commenced in March 2014 built on those points. The OAIC played a lead role in publicising the reforms, providing expert guidance and ensuring the reforms were properly implemented by government and industry.

<sup>20</sup> Commonwealth Ombudsman, *Scrutinising government—Administration of the Freedom of Information Act 1982 in Australian government agencies*, Report No 2/2006: [www.ombudsman.gov.au/reports/investigation/2006](http://www.ombudsman.gov.au/reports/investigation/2006)

<sup>21</sup> For example, [www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-omi-report/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship](http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-omi-report/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship)

## Attachments

### 1. Extract from *OAIC Annual Report 2013–14*

- 'OAIC achievements', xxi–xxiii

### 2. OAIC statements

- 'How the OAIC will deal with IC reviews and FOI complaints until 31 December 2014', 16 July 2014
- 'New Bill introduced to amend FOI and privacy laws', 2 October 2014
- 'OAIC operations and processing times', 8 October 2014

### 3. OAIC response to the Hawke review

- Letter from Information Commissioner and Freedom of Information Commissioner to Attorney-General, 21 October 2013 (with three attachments)