

## OAIC Achievements

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Since its commencement in November 2010, the Office of the Australian Information Commissioner (OAIC) has been highly successful in protecting the community's information rights and the advancement of information policy within government.

Below are a number of the OAIC's achievements.

### Information Policy

- Published the *Principles on open public sector information* (2011) (Open PSI Principles) that are widely referred to across government
- Published two reports that promote Open PSI and the development of a national information policy — *Towards a national information policy* (2010) and *Understanding the value of public sector information in Australia* (2011)
- Conducted a survey and published two reports of the information management practices of 191 Australian Government agencies regarding their compliance with the FOI Act Information Publication Scheme and the OAIC's Open PSI Principles — *Information publication scheme: survey of Australian Government agencies* (2012), and *Open public sector information: from principles to practice* (2013)
- Promoted key information policy concepts that now have a defining influence in government agency information practices, including that government information is a national asset to be used for public purposes, and concepts of 'public sector information', 'open data' and 'proactive disclosure'
- Hosted a National Information Policy Conference (2011) attended by over 300 people
- Liaised with other government agencies to build a strong interagency network for coordinating information policy developments.

### Freedom of Information

- Resolved 1345 applications for Information Commissioner review (between 1 November 2010 and 30 June 2014), publishing reasons for decision in 199 of those cases
- Closed 406 Freedom of Information (FOI) complaints
- Dealt with 1313 applications for an extension of FOI processing time for complex and voluminous FOI requests
- Dealt with 4758 phone enquiries and 1985 written enquiries about FOI
- Conducted an own motion investigation into administration of sensitive and high profile FOI requests to the Department of Immigration and Citizenship
- Provided 35 FOI reform training courses for Australian Government agencies and the Norfolk Island Administration

- Published clear and comprehensive FOI guidelines (250 pages), 16 Fact Sheets for the public, and over 30 detailed agency resources on processing times, calculating charges, administrative access, third party objections, anonymous requests, statements of reasons, redaction, FOI training, website publication, disclosure logs, sample letters and frequently asked questions
- Conducted a public consultation on FOI charges and prepared a lengthy report to Government in 2012
- Made two substantial submissions to the review of the FOI Act by Dr Allan Hawke AC in 2013 (many of the OAIC's reform proposals were endorsed by the Review)
- Promoted the ideals of transparency, accountability, participation and better decision-making that underlie the FOI Act
- Celebrated the 30th Anniversary of the FOI Act with an event held at the National Portrait Gallery, Canberra. The event was attended by staff from both public and private sector bodies as well as members of the public.

## Privacy

- Closed 6278 privacy complaints
- Dealt with 36,960 phone enquiries and 6391 written enquiries about privacy
- Conducted 137 own motion investigations and 14 audits
- Received 213 data breach notifications
- Implemented substantial changes to the *Privacy Act 1988* (the Privacy Act) that commenced on 12 March 2014, by undertaking or commencing preparation of nearly fifty legislative instruments, codes (including a comprehensive Credit Code), guideline statements and information sheets, and conducting an extensive public consultation process (receiving more than 90 public submissions on draft guidelines)
- Published guidance on emerging privacy issues, including *Data Breach Notification Guidelines* (2012), *Privacy business resource 4: De-identification of data and information* (2014), a *Guide to Information Security* (2013) and *Mobile privacy: a better practice guide for mobile app developers* (2013)
- Conducted and published the results of a Community Attitudes to Privacy survey (2013)
- Annually hosted Privacy Awareness Week, and arranged participation by government agencies and private sector bodies (over 200 in 2014)
- Administered the Asia Pacific Privacy Authorities Forum, that includes members from the United States, Mexico, Hong Kong, South Korea, Canada, New Zealand and Singapore

- Participated in global forums that aim to build a coordinated approach to regulating crossborder data flows and challenges, including the Global Privacy Enforcement Network under the auspices of the OECD, and the APEC Cross Border Privacy Enforcement Arrangement.

## **Corporate, public relations and community engagement**

- Established an integrated office and scheme for managing freedom of information, privacy and information policy advice
- Hosted regular meetings of the Information Contact Officers Network for agency FOI and privacy officers, attended by approximately 130 agency staff on each occasion
- Convened the Information Advisory Committee and the Privacy Advisory Committee, that comprise senior government officers and external representatives with experience in archives, libraries, journalism, banking, medicine, trade unions, copyright law, information technology, disability access and community services
- Managed a dynamic website that receives up to 1.5 million visits annually
- Provided policy advice to agencies or organisations on 932 occasions, made 111 submissions to inquiries and undertook 128 consultations
- Made more than 270 keynote speeches and presentations to public conferences and in-house agency and business seminars, on open government and privacy protection.



Australian Government

Office of the Australian Information Commissioner

## How the OAIC will deal with IC reviews and FOI complaints until 31 December 2014

Wednesday, 16 July 2014

The Australian Government announced as part of the 2014–15 Budget that the Office of the Australian Information Commissioner (OAIC) will be disbanded from **31 December 2014**.

The OAIC's current functions will be split between four agencies. These changes will require legislative amendment to be passed by Parliament.

The changes announced by Government mean that from **1 January 2015**:

- the *Privacy Act 1988* will continue to be administered by the Privacy Commissioner and supporting staff from a new office based in Sydney
- freedom of information (FOI) policy advice, guidance and annual statistics will be administered by the Attorney-General's Department
- the right to external merits review of FOI decisions by government agencies and Ministers will lie directly to the [Administrative Appeals Tribunal](http://www.aat.gov.au/default.htm) (<http://www.aat.gov.au/default.htm>) (AAT)
- complaints about FOI administration by government agencies will lie directly to the [Commonwealth Ombudsman](http://www.ombudsman.gov.au/) (<http://www.ombudsman.gov.au/>)
- unresolved FOI review applications and complaints before the OAIC will be transferred to the AAT and the Commonwealth Ombudsman.

### What does this mean for my Information Commissioner review?

At this stage, Information Commissioner reviews (IC reviews) can still be lodged with the OAIC. There is no right to apply directly to the AAT. The OAIC will attempt to finalise all reviews quickly.

The *Freedom of Information Act 1982* (FOI Act) allows the Information Commissioner to finalise an IC review under section 54W(b) of the Act, by deciding that it is desirable in the interests of the administration of the FOI Act that the matter be reviewed instead by the AAT. In that event, the applicant can apply to the AAT, in accordance with normal AAT procedures.

The OAIC may contact you to either suggest or recommend that your IC review application be finalised under section 54W(b). We will do this if we do not think that we can complete your review before 31 December 2014, or if the nature, complexity and progress of your application mean that it is desirable that it be finalised under section 54W(b).

If an IC review is finalised under section 54W(b), an applicant has 28 days to lodge an application for review with the AAT. AAT application fees may apply. A summary of AAT fees is available on the [Information about application fees](http://www.aat.gov.au/FormsAndFees/Fees.htm) (<http://www.aat.gov.au/FormsAndFees/Fees.htm>) page of the AAT website.

If you don't want your IC review finalised under section 54W(b), the OAIC will:

- conduct an early assessment of your review
- aim to resolve your review informally. For example, we may provide you and the agency with our preliminary view on your review.

While the OAIC will endeavour to finalise all IC reviews lodged with us as quickly as possible, it is likely that some reviews will not be finalised before 31 December 2014, and will be transferred to the AAT for completion.

### Freedom of information complaints

The OAIC will endeavour to finalise FOI **complaints currently before us** by 31 December 2014.

When a **new complaint** is received we will contact you to discuss the matter and whether we can action it or finalise it before 31 December 2014. Unresolved complaints will be transferred to the Commonwealth Ombudsman for completion.

Complaints about FOI administration by government agencies can currently be made to the Commonwealth Ombudsman under the Ombudsman's existing jurisdiction (but may be transferred to the OAIC).

**We will update this advice as further information becomes available.**

## Protecting information rights — advancing information policy

### CONTACT US

**Call: 1300 363 992**

**Email:**

[enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au) (<mailto:enquiries@oaic.gov.au>)

**Address:**

GPO Box 5218  
Sydney NSW 2001

ABN 85 249 230 937



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**Australian Government**

**Office of the Australian Information Commissioner**

## New Bill introduced to amend FOI and privacy laws

Thursday, 02 October 2014

The Freedom of Information Amendment (New Arrangements) Bill 2014 (the Bill) was introduced into the Australian Parliament on 2 October 2014.

The Bill proposes ([http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5350](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5350)) the:

- repeal of the *Australian Information Commissioner Act 2010* (<http://www.comlaw.gov.au/series/c2010a00052>) including abolition of the Office of the Australian Information Commissioner (OAIC)
- amendment of the *Freedom of Information Act 1982* (<http://www.comlaw.gov.au/series/c2004a02562>) (FOI Act), *Privacy Act 1988* (<http://www.comlaw.gov.au/series/c2004a03712>) (Privacy Act) and related laws.

Below is some information that sets out:

- what happens to FOI and privacy matters if the Bill is passed
- how FOI and privacy matters will be dealt with until the new law commences on 1 January 2015.

### What happens if the Bill is passed by the Parliament?

If the Bill is passed by Parliament, from 1 January 2015:

- the functions of the Privacy Act will be undertaken by the Australian Privacy Commissioner. This includes the handling of privacy complaints, undertaking investigations and other regulatory activities, and the provision of guidance and advice on privacy to individuals, organisations and agencies
- relevant functions of the FOI Act will be undertaken by the Attorney-General's Department (AGD) (advice, guidelines, annual reporting), the Administrative Appeals Tribunal (AAT) (merits review) and the Commonwealth Ombudsman (Ombudsman) (complaints).

For more information, see [the Bill](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5350) ([http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5350](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5350)).

### How FOI and privacy matters will be dealt with between now and 31 December 2014?

#### Information Commissioner reviews still open at 31 December 2014

Applications for an Information Commissioner review (IC review) will continue to be received by the OAIC until 31 December 2014. IC reviews open at 31 December 2014:

- will be taken to be an application for review to the AAT and will be transferred to the AAT
- all records and documents associated with the IC Review will be transferred to the AAT
- no application fees will apply to IC reviews transferred to the AAT.

#### Review by the AAT of IC review decisions made prior to 31 December

The AAT will continue to receive applications for review of IC review decisions made by the OAIC prior to 31 December 2014. Standard application fees may apply.

#### FOI complaints

From 1 November 2014, the [Commonwealth Ombudsman](http://www.ombudsman.gov.au/) (<http://www.ombudsman.gov.au/>) will handle complaints about the processing of freedom of information requests. Any complaints received by the OAIC after this date will be referred to the Commonwealth Ombudsman.

FOI complaints made to the OAIC that have not been finalised by 31 December 2014 will be transferred to the Ombudsman.

## Privacy

It is business as usual for privacy. These changes have no effect on those organisations and agencies subject to the Privacy Act. The OAIC will continue to exercise all its privacy functions (including complaint handling) until 31 December 2014. After that date, privacy matters will be handled by the Australian Privacy Commissioner.

## More information

We will update this advice as further information becomes available.

# Protecting information rights — advancing information policy

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**Address:**

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ABN 85 249 230 937



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**Australian Government**

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## OAIC operations and processing times

Wednesday, 08 October 2014

'Recent media reports on the introduction of the Freedom of Information Amendment (New Arrangements) Bill 2014 (the Bill) have incorrectly suggested that the Office of the Australian Information Commissioner (OAIC) has largely ceased undertaking freedom of information (FOI) review work.

The OAIC is operational and active and will remain so until 31 December 2014. Last week, the OAIC issued a [statement that sets out how FOI and privacy matters are currently being handled](#) (/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/new-bill-introduced-to-amend-foi-and-privacy-laws), and what will happen if the Bill is passed.

The OAIC is managing to resolve a high volume of current FOI review cases, so that they are not affected by any transitional arrangements under a new law. In 2014 the OAIC has published to date 101 Information Commissioner review (IC review) decisions. In the 2013-14 reporting year the number of completed IC review decisions jumped by 54% (from 419 to 646), and the time lag in opening new cases reduced from 206 to 40 days.

The OAIC's privacy case review work is unaffected by the proposed legislative changes. A high volume of privacy enquiries and complaints are currently received and dealt with. After 31 December 2014 the *Privacy Act 1988* will continue to apply to the same organisations and agencies. After that date, privacy matters will be transferred to and handled by the Australian Privacy Commissioner.'

## Protecting information rights — advancing information policy

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Senator the Hon George Brandis QC  
Attorney-General  
PO Box 6100  
Senate  
Parliament House  
CANBERRA ACT 2600

Dear Attorney

**The Hawke Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010***

We write to convey our views on the recommendations in the report by Dr Allan Hawke AC following a review of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**). Dr Hawke's report was provided to the then Attorney-General on 1 July 2013 and tabled in Parliament on 2 August 2013.

The OAIC took an active interest in the review and regarded it as a timely opportunity to reflect on the OAIC's work since it was established in 2010, and on the substantial changes to the FOI Act that occurred at the same time. We made two extensive submissions to the review and also met with Dr Hawke.

We are pleased there was alignment between many of Dr Hawke's recommendations and the OAIC's proposals for FOI reform, including most of the proposals earlier made in an OAIC report to the Attorney-General in February 2012, *Review of charges under the Freedom of Information Act 1982*. We agree with Dr Hawke that the 2010 reforms have been instrumental in facilitating increased openness across government. We are similarly pleased that Dr Hawke found the establishment of the OAIC to be a very valuable and positive development in oversight and promotion of the FOI Act.

We have set out our views in three attachments:

- **Attachment A** comments on each of Dr Hawke's recommendations. We substantially support the recommendations, though we suggest a refinement or modification to what is recommended in a few instances. There are a few recommendations that we do not support, essentially as we did not share Dr Hawke's concern that the FOI Act causes a difficulty to which he alludes or that amendment of the Act in the manner proposed would remove the difficulty.

- **Attachment B** lists a range of technical and procedural FOI Act and AIC Act issues (including drafting errors and inconsistencies) that were raised in our submissions to Dr Hawke but were not discussed in his report. Most of these issues do not in our view raise any significant issues of principle and could appropriately be included at this stage in any proposed amendment of the FOI Act and AIC Act. At the end of Attachment B we discuss four issues that may warrant more substantial discussion before a decision is reached.
- **Attachment C** discusses Dr Hawke's recommendation that a more comprehensive review of the FOI Act be undertaken. Dr Hawke gave a non-exhaustive list in Annex G of eleven matters that could be considered in a further review. We comment on each of those matters in Attachment C. We agree that four of the matters could suitably be addressed in a further review, but are of the view that seven other matters could be dealt with presently by administrative or legislative changes.

We are committed to ensuring that the FOI Act continues to play a vital role as the legislative anchor for open government in Australia. Equally, we are of the view that change is required, to relieve the processing burden on government agencies and the OAIC, 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.

We look forward to the opportunity to discuss our views with you. We are also ready to work with both your office and your Department to discuss FOI reform and related issues.

We should also note that we regularly report our views to the Information Advisory Committee and the Privacy Advisory Committee, which are established respectively by the AIC Act and the *Privacy Act 1988*. There is a joint Committee meeting in mid-November at which we propose (in line with usual practice) to convey the text of the three attachments to this letter. The further practice followed within the office is to publish the Committee papers at a later date on the OAIC website.

Yours sincerely

Prof. John McMillan  
Australian Information Commissioner

Dr James Popple  
Freedom of Information Commissioner

21 October 2013



Australian Government

Office of the Australian Information Commissioner

## Attachment A: OAIC comments on Dr Hawke's recommendations

Dr Hawke considered that the matters in recommendations 2–40 of his report could be addressed without the need for any further review. The OAIC agrees, and has set out our view in relation to each of those recommendations below. More detailed discussion is available in our [submission](#) and [supplementary submission](#) to Dr Hawke.

Review recommendation	OAIC comments
<p><b>Recommendation 2 — Online Status of FOI Reviews and Complaints</b></p> <p><i>The Review recommends the OAIC consider establishing an online system which enables agencies and applicants involved in a specific FOI review or FOI complaint investigation to monitor progress of the review or complaint.</i></p>	<p>We will consider this recommendation with regard to security and resourcing issues. It is possible that the resources required to establish such a system may not deliver commensurate practical benefits either to applicants or the OAIC.</p>
<p><b>Recommendation 3 — Delegation of Functions and Powers</b></p> <p><i>The Review recommends that section 25 of the Australian Information Commissioner Act 2010 be amended to allow for the delegation of functions and powers in relation to review of decisions imposing charges under section 29 of the FOI Act.</i></p>	<p>We support this recommendation.</p> <p>However, we suggest that the option to delegate should not be restricted to functions and powers relating to FOI charges. Broader delegation of functions and powers — based on a model where the Information Commissioner must decide whether it is appropriate to delegate a matter to an Assistant Commissioner — would deliver significant efficiencies in the Information Commissioner review (<b>IC review</b>) process. This model has worked successfully in other jurisdictions (such as Queensland).</p> <p>We also recommend that complaint handling functions should be delegable from the Information Commissioner to junior staff. The <i>Privacy Act 1988</i> (Cth) allows for delegation of privacy complaint handling, resulting in a more efficient process than would otherwise be the case. We suggest that the same principle should apply to FOI complaints, so that the OAIC can realise the same efficiencies in processing complaints</p>

Review recommendation	OAIC comments
	under either function. Complaints to the Commonwealth Ombudsman operate successfully on a similar basis.
<p><b>Recommendation 4 — Power to Remit Matters to Decision-maker for Further Consideration</b></p> <p><i>The Review recommends the FOI Act be amended to provide an express power for the Information Commissioner to remit a matter for further consideration by the original decision-maker.</i></p>	<p>We support this recommendation.</p>
<p><b>Recommendation 5 — Resolution of Applications by Agreement</b></p> <p><i>The Review recommends the FOI Act be amended to make it clear that an agreed outcome finalises an Information Commissioner review and in these circumstances a written decision of the Information Commissioner is not required.</i></p>	<p>We support this recommendation.</p> <p>We also note that s 55(F)(1)(d) of the FOI Act states that the Information Commissioner can only give effect to agreements that are consistent with the Commissioner’s powers. Expanding the scope of this provision to include agreements consistent with the objects of the FOI Act would allow for much broader use of alternative dispute resolution or conciliation in the IC review process.</p>
<p><b>Recommendation 6 — Third Party Review Rights</b></p> <p><i>The Review recommends the FOI Act be amended to provide that only the applicant and the respondent are automatically a party to an Information Commissioner review. Any other affected person would be able to apply to be made a party to the review.</i></p>	<p>We support this recommendation.</p> <p>We also note related technical issues with ss 54L and 54M of the FOI Act, which do not allow third parties to seek IC review of an access grant decision made at internal review. In addition, s 54P contains impractical and inconsistent third party IC review notification provisions.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 7 — Extensions of Time</b></p> <p><i>The Review recommends the FOI Act be amended to:</i></p> <ul style="list-style-type: none"> <li>• <i>remove the requirement to notify the OAIC of extensions of time by agreement; and</i></li> <li>• <i>restrict the OAIC’s role in approving extensions of time to situations where an FOI applicant has sought an Information Commissioner review or made a complaint about delay in processing a request.</i></li> </ul>	<p>We support this recommendation.</p> <p>Our view is that the extension of time provisions should also be revised to make clear that agencies and ministers are obliged to continue processing a request until either a decision has been made or an IC review is commenced. The current provisions create confusion about whether an agency is empowered to make a decision on access if the agency has not been granted an extension by the OAIC or has failed to make a decision within an extension granted by OAIC.</p>
<p><b>Recommendation 8 — Agreement to Extension of Time Beyond 30 Days</b></p> <p><i>The Review recommends that section 15AA of the FOI Act be amended to provide an agency or minister can extend the period of time beyond an additional 30 working days with the agreement of the applicant.</i></p>	<p>We support this recommendation.</p> <p>We also recommend removing the requirement that agreement to extend time must be in writing and the requirement to notify the OAIC of an s 15AA extension. The value of both of these measures is questionable, and their repeal would result in greater efficiencies for both agencies and the OAIC.</p> <p>In addition we suggest that, if the Government accepts review recommendation 8, any consequent amendments to s 15AA should specifically address whether multiple extensions of time with agreement are possible.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 9 — Extension of Time for Consultation on Cabinet-related Material</b></p> <p><i>9(a) The Review recommends the FOI Act be amended to allow an agency to extend the period of time for notifying a decision on an FOI request by up to 30 working days where consultation with the Department of the Prime Minister and Cabinet on any Cabinet-related material is required.</i></p> <p><i>9(b) The Cabinet Handbook should be revised to accord with this recommendation.</i></p>	<p>We do not support this recommendation.</p> <p>Our view is that existing extension of time provisions are sufficient to deal with cases where an agency decides to consult with the Department of the Prime Minister and Cabinet (<b>PM&amp;C</b>) about whether s 34 of the FOI Act applies and needs more time to do so. We also note that such consultation is not mandatory under the Act: the decision about whether a document falls under s 34 lies with agency decision makers, not PM&amp;C.</p> <p>In addition, the FOI Act's consultation-related extension of time provisions only apply to consultation with third parties to the Australian Government. It is relevant that, in some cases, consulted third parties have review rights over any subsequent decision to grant access to the documents. It would infringe on the statutory obligations of agency decision makers if PM&amp;C had a right of review over decisions by other agencies to grant access to documents.</p>
<p><b>Recommendation 10 — Two-Tier External Review</b></p> <p><i>The Review recommends that the two-tier external review model be re-examined as part of the comprehensive review of the FOI Act.</i></p>	<p>We note this recommendation.</p>
<p><b>Recommendation 11 — Law Enforcement and Public Safety</b></p> <p><i>The Review recommends the exemption for documents affecting the enforcement of law and protection of public safety in section 37 of the FOI Act be revised to include the conduct of surveillance, intelligence gathering and monitoring activities. This revision should also cover the use of FOI as an alternative to discovery in legal proceedings or investigations by regulatory agencies.</i></p>	<p>We note this recommendation and will defer further comment until we see the text of any proposed amendment to s 37.</p>



Review recommendation	OAIC comments
<p><b>Recommendation 12 — Cabinet Documents</b></p> <p><i>The Review recommends the exemption for Cabinet documents be clarified by including definitions of ‘consideration’ and ‘draft of a document’.</i></p>	<p>We support clarification of this kind, but will defer further comment until we see the text of any proposed amendment to s 34.</p>
<p><b>Recommendation 13 — Ministerial Briefings</b></p> <p><i>The Review recommends that the FOI Act be amended to include a conditional exemption for incoming government and incoming minister briefs, question time briefings and estimates hearings briefings.</i></p>	<p>We do not support this recommendation.</p> <p>In <i>Crowe and the Department of the Treasury</i> [2013] AICmr 69, the Information Commissioner noted that a conditional public interest test would not provide an assurance of confidentiality for incoming government briefs. The better way of providing that assurance is the approach taken in the <i>Right to Information Act 2009</i> (Qld), which is that the Act does not apply to requests for incoming government briefs until a specific period of time has passed after their creation. Once that time period has passed, the documents would become subject to the FOI Act. At that point, the normal FOI decision-making process would apply if someone requested access to the document. In our view, this ensures that sensitive information will remain confidential for an appropriate time period without necessarily being withheld until the commencement of the open access period in the <i>Archives Act 1983</i> (Cth).</p>
<p><b>Recommendation 14 — Information as to Existence of Documents</b></p> <p><i>The Review recommends that section 25 of the FOI Act be amended to cover the Cabinet exemption.</i></p>	<p>We do not oppose rewording s 25 in this way, but will defer further comment until we see the text of any proposed amendment to s 25.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 15 — Parliamentary Departments</b></p> <p><i>The Review recommends the FOI Act be amended to make the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services subject to the FOI Act only in relation to documents of an administrative nature. The FOI Act should also be amended to provide an exclusion for the Parliamentary Librarian.</i></p>	<p>We support this recommendation, and note that it accords with the views of the Parliamentary Departments and the Parliamentary Librarian, as expressed in their submissions to Dr Hawke.</p>
<p><b>Recommendation 16 — Exclusion of Australian Crime Commission from the FOI Act</b></p> <p><i>The Review recommends the Australian Crime Commission be excluded from the operation of the FOI Act. Section 7(2A) of the FOI Act should be amended to refer to an ‘intelligence agency document’ of the Australian Crime Commission.</i></p>	<p>We do not support this recommendation.</p> <p>We are not aware of any submission or comments on the public record arguing why such a proposal should be enacted, and believe that the recommendation requires further public discussion.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 17 — Review of Agencies Listed in Part I of Schedule 2 to the FOI Act</b></p> <p><i><b>17(a)</b> The Review recommends the intelligence agencies remain in Part I of Schedule 2 to the FOI Act. The parts of the Department of Defence listed in Division 2 of Part I of Schedule 2 should also remain.</i></p> <p><i><b>17(b)</b> All other agencies currently in Part I of Schedule 2 should justify their exclusion from the FOI Act to the satisfaction of the Attorney-General. If they do not do this within 12 months, they should be removed.</i></p> <p><i><b>17(c)</b> The Attorney-General should also consider whether there is a need to include any other agencies in Schedule 2.</i></p>	<p>We note this recommendation.</p> <p>Another option would be to extend the Information Publication Scheme (IPS) requirements to agencies not covered by the FOI Act, such as intelligence agencies. Much of the information that these agencies would be required to publish under the IPS is already in the public domain via agency websites, annual reports and other existing accountability mechanisms. Extending the IPS to these agencies would effectively require them to publish the information in a consolidated, accessible form, and would explicitly not require publication of exempt information or information restricted or prohibited from release by other enactments.</p> <p>Nonetheless, our view is that, if intelligence agencies were subject to the access request provisions of the FOI Act, existing exemptions in ss 33, 37 and 35 would provide appropriate protection for sensitive information they hold.</p> <p>Should the Government decide to implement recommendation 17(b), we suggest that the Administrative Review Council (<b>ARC</b>) — as the body responsible for advising the Attorney-General on strategic and operational matters relating to administrative review — would be well-placed to provide advice on this issue.</p>
<p><b>Recommendation 18 — Criteria for Assessment of Agencies Exempt in Respect of Particular Documents</b></p> <p><i>The Review recommends the FOI Act contain criteria for assessment of agencies which are exempt from the FOI Act in respect of particular documents.</i></p>	<p>We support this recommendation, while noting our general policy position is that it is preferable to exempt specific categories of documents rather than fully excluding individual agencies from the FOI Act.</p> <p>Should the Government decide to implement this recommendation, we suggest that the ARC be tasked with developing the criteria.</p>

Review recommendation	OAI comments
<p><b>Recommendation 19 — Review of Agencies Listed in Part II of Schedule 2 to the FOI Act</b></p> <p><i><b>19(a)</b> The Review recommends Section 47 of the FOI Act be amended to make clear that it applies to documents that contain information about the competitive or commercial activities of agencies.</i></p> <p><i><b>19(b)</b> All agencies in Part II of Schedule 2 to the FOI Act should justify their exclusion from the FOI Act to the satisfaction of the Attorney-General. If they do not do so, they should be removed from Part II of Schedule 2.</i></p> <p><i><b>19(c)</b> The Attorney-General should also consider whether there is a need to include any other agencies in Part II of Schedule 2.</i></p>	<p>We note this recommendation. Should the Government decide to implement the recommendation, we suggest that it do so in consultation with the ARC.</p>
<p><b>Recommendation 20 — Review of Agencies Listed in Schedule 1 to the FOI Act</b></p> <p><i><b>20(a)</b> The Review recommends Schedule 1 to the FOI Act be amended to repeal the bodies listed, as they no longer exist.</i></p> <p><i><b>20(b)</b> The Attorney-General should also consider whether there is a need to include any tribunals, authorities or bodies in Schedule 1.</i></p>	<p>We support this recommendation. We would also support an amendment to the FOI Act to more explicitly state that the Act only applies to tribunals listed in Schedule 1 in relation to documents of an administrative nature, and not documents related to the tribunal's adjudicative functions. We also suggest that, if the Government decides to implement this recommendation, the ARC could usefully be tasked with developing criteria to decide which bodies should be included in Schedule 1.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 21 — Administrative Access Schemes</b></p> <p><b>21(a)</b> <i>The Review recommends the OAIC consider the development of appropriate guidance and assistance to encourage agencies to develop administrative access schemes.</i></p> <p><b>21(b)</b> <i>While the Review acknowledges the desirability of encouraging the use of administrative access schemes, it does not believe it appropriate for this to be done by reintroduction of application fees for FOI requests.</i></p>	<p>We support the greater use of administrative access schemes to allow for fast, efficient access to government information.</p> <p>In relation to review recommendation 21(a), we note that the Information Commissioner has already published guidance in <a href="#">Part 3 of the FOI Guidelines about administrative access schemes</a>. The OAIC has also published an <a href="#">FOI agency resource</a> explaining some of the practical considerations for establishing an administrative access scheme. Pending guidance material from the Information Commissioner and the Privacy Commissioner about reforms to the Privacy Act will also address administrative access in the context of personal information.</p> <p>We note recommendation 21(b) that an application fee should not be reintroduced, but believe that a mechanism is needed to enable an agency to insist on an administrative access approach. One option would be to allow a seven-day consultation period before the start of the formal FOI processing period to allow time to refine the scope of the request and establish the most efficient way of responding to it. The review report listed this as matter for further examination in a more comprehensive review of the FOI Act (see Attachment C below). We agree that the matter should be given further consideration but believe it could be considered in advance of a more comprehensive review.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 22 — FOI Processing Charges</b></p> <p><b>22(a)</b> <i>The Review recommends that a flat rate processing charge should apply to all processing activities, including search, retrieval, decision-making, redaction and electronic processing. No charge should be payable for the first five hours of processing time. Processing time that exceeds five hours but is ten hours or less should be charged at \$50 per hour. The charge for each hour of processing time after the first ten hours should be \$30 per hour.</i></p> <p><b>22(b)</b> <i>The current provisions for no processing charges for access to an applicant’s personal information and for waiver of charges should continue to apply.</i></p>	<p>We support this recommendation, which accords with recommendations made by the Information Commissioner in his February 2012 <a href="#">Review of Charges under the Freedom of Information Act 1982</a> (<b>Charges Review</b>).</p> <p>However, we note a possible drafting error in recommendation 22(a), which says:</p> <p style="padding-left: 40px;"><i>Processing time that exceeds five hours but is ten hours or less should be charged at \$50 <b>per hour</b>.</i></p> <p>In contrast, the introductory wording to this recommendation argues for a flat charge of \$50 for processing time between five and ten hours, as recommended in the Charges Review. We have therefore assumed the inclusion of ‘per hour’ in Dr Hawke’s recommendation to be a drafting error. We support the recommendation on that basis.</p>
<p><b>Recommendation 23 — FOI Access Charges</b></p> <p><b>23(a)</b> <i>The Review recommends that a flat rate access charge should apply to all access supervision activities of \$30 per hour and that no other access charges should apply.</i></p> <p><b>23(b)</b> <i>The current provisions for no charges for access to an applicant’s personal information and for waiver of charges should continue to apply.</i></p>	<p>We support this recommendation, which broadly accords with a recommendation in the Charges Review.</p>



Review recommendation	OAIC comments
<p><b>Recommendation 24 — Ceiling on Processing Time for FOI requests</b></p> <p><i>The Review recommends introduction of a 40 hour processing time ceiling for FOI requests.</i></p>	<p>We support this recommendation, which broadly accords with a recommendation in the Charges Review.</p>
<p><b>Recommendation 25 — Reduction and Waiver of FOI Charges</b></p> <p><b>25(a)</b> <i>The Review recommends that an agency should be able to waive or reduce charges in full, by 50% or not at all. However, it considers that it would be better for these options to be set out in guidelines rather than in the FOI Act itself and recommends the OAIC consider amending its guidelines accordingly.</i></p> <p><b>25(b)</b> <i>The Review believes that the current requirement to consider whether access to a document would be in the general public interest or in the interest of a substantial section of the public should remain unchanged.</i></p>	<p>We agree with the underlying policy rationale of recommendation 25(a), but suggest that the Information Commissioner’s FOI Guidelines are not the appropriate vehicle for this kind of change. Amendments to the <i>Freedom of Information (Charges) Regulations 1982</i> would be required.</p> <p>We do not support recommendation 25(b). There is tension between applying the public interest test for disclosure in s 29(5)(b) when deciding whether to reduce or waive a charge and the underlying philosophy of the post-2010 FOI Act that all disclosure is in the public interest (s 3). We recommend that this tension be resolved by replacing the current s 29(5)(b) test with a ‘special benefit to the public’ test, as used in the <i>Government Information (Public Access) Act 2009</i> (NSW). The review report said that this test would be no less difficult to apply than the current test in s 29(5)(b). However, based on our experience reviewing agency charges decisions, we suggest that our recommendation would provide a workable, more consistent test than the current arrangements, making it faster and simpler to decide whether a charge is in the public interest.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 26 — Reduction Beyond Statutory Timeframe</b></p> <p><i><b>26(a)</b> The Review recommends adoption of a sliding scale for reduction of charges where decisions are not notified within statutory timeframes in accordance with recommendation 6 of the FOI Charges Review.</i></p> <p><i><b>26(b)</b> No charge should be payable if the delay is longer than 30 working days.</i></p>	<p>We support this recommendation, which accords with a recommendation in the Charges Review. Our understanding is that 26(b) is intended to refer to a delay in making a decision within the FOI Act's statutory timeframes.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 27 — Application Fees for Information Commissioner Review for Review of Access to Non-personal Information</b></p> <p><b>27(a)</b> <i>The Review recommends that an application fee of \$400 apply for a review of an FOI decision for access to non-personal information. This fee would be reduced to \$100 in cases of financial hardship.</i></p> <p><b>27(b)</b> <i>If proceedings terminate in a matter favourable to the applicant, a \$300 refund would apply. There would be no refund of the reduced fee.</i></p> <p><b>27(c)</b> <i>No fee would apply for an Information Commissioner review of an access grant decision by an affected third party.</i></p> <p><b>27(d)</b> <i>In all other cases, fees would be payable for Information Commissioner review of decisions for access to non-personal information.</i></p> <p><b>27(e)</b> <i>There would be no remission of the fee where an applicant has first sought internal review or where internal review is not available.</i></p>	<p>We do not support this recommendation.</p> <p>While we recognise the recommendation’s underlying motivation of reducing the OAIC’s IC review caseload to a more workable level, in our view the proposed \$400 application fee would unreasonably deter people from seeking IC review of FOI decisions. It would also run contrary to the object of the FOI Act to facilitate and promote public access to information promptly and at the lowest reasonable cost (s 3).</p> <p>We suggest as a potential alternative the proposal in the Charges Review that a \$100 application fee should apply for IC review, but only in cases where an applicant who can apply for internal review has not done so first. As noted in the Charges Review, following the 2010 reforms there are signs that agencies are more willing to reconsider access decisions at the internal review stage. In 2012–13, 52% of internal reviews resulted in a change to the original decision. Encouraging this trend would both encourage agencies to take a more considered approach to initial FOI decisions and reduce the OAIC’s IC review caseload.</p> <p>In contrast, in addition to the issues mentioned above, we believe that a \$400 IC review application fee would introduce administrative difficulties for the OAIC in determining whether to reduce the proposed application fee in cases of financial hardship. These difficulties are similar to those experienced by agencies in making charges reduction decisions (see our response to recommendation 25 above).</p> <p>In our view, implementation of other review recommendations and recommendations from our own submission (as identified in this attachment and Attachment B below) would allow for greater efficiencies in the IC review process, and consequently reduce the OAIC’s caseload without the need for a \$400 IC review application fee.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 28 — Indexation of Fees and Charges</b></p> <p><i>The Review recommends that all fees and charges are adjusted every two years in accordance with the CPI based on the federal courts/AAT provision for biennial fee increases.</i></p>	<p>We support this recommendation, which accords with a recommendation in the Charges Review.</p>
<p><b>Recommendation 29 — Timeframes for Applicants to Respond to Agency Decisions</b></p> <p><b>29(a)</b> <i>The Review recommends that an applicant should be required to respond within 30 working days after receiving a notice under section 29(8), advising of a decision to reject wholly or partly the applicant’s contention that a charge should not be reduced or not imposed. The applicant’s response should agree to pay the charge, seek internal review of the agency’s decision or withdraw the FOI request.</i></p> <p><b>29(b)</b> <i>If an applicant fails to respond within 30 working days (or such further period allowed by an agency) the FOI request should be deemed to be withdrawn.</i></p>	<p>We support this recommendation, which accords with a recommendation in the Charges Review.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 30 — Practical Refusal Mechanism</b></p> <p><i>The Review recommends section 24AA(1)(b) of the FOI Act be repealed to make it clear that the practical refusal mechanism can only be used after an applicant has provided information to identify the documents sought.</i></p>	<p>We support this recommendation.</p>
<p><b>Recommendation 31 — Time Periods in the FOI Act to be Specified in <i>Working Days</i></b></p> <p><b>31(a)</b> <i>The Review recommends that where appropriate, the FOI Act be amended so that time periods are specified in terms of ‘working days’ rather than calendar days.</i></p> <p><b>31(b)</b> <i>The timeframe for processing an FOI request (not taking into account any extensions of time) should be 30 working days. Provision should be made to exclude any period in which an agency is closed such as during the ‘shut-down’ period between Christmas and New Year.</i></p>	<p>We support the recommendation to specify time periods in working days rather than calendar days, but note that an initial decision-making period of 30 working days translates to at least 42 calendar days, thus significantly lengthening existing timeframes. We suggest an initial decision-making period of 20 working days would be more appropriate, as it would be roughly equivalent to the existing statutory timeframe but easier for agencies to calculate.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 32 — Repeat or Vexatious Requests</b></p> <p>The Review recommends the FOI Act be amended to permit agencies to decline to handle a repeat or vexatious request or requests that are an abuse of process, without impacting on the applicant’s ability to make other requests or remake the request that was not accepted. The applicant can appeal against such a decision to the OAIC.</p>	<p>We support this recommendation, and note that the <i>Right to Information Act 2009</i> (Tas) offers a potential model vexatious request clause.</p>
<p><b>Recommendation 33 — Anonymous Requests</b></p> <p><b>33(a)</b> <i>The Review recommends the FOI Act be amended so that an FOI request cannot be made anonymously or under a pseudonym.</i></p> <p><b>33(b)</b> <i>It should be necessary for an applicant to provide an address in Australia.</i></p>	<p>We do not support this recommendation.</p> <p>The recommendation is inconsistent with an existing feature of the FOI Act that enables an anonymous or pseudonymous request to be lodged via email. The Information Commissioner discussed these provisions in a <a href="#">statement</a> released in conjunction with an update to the FOI Guidelines in January 2013 about who is eligible to make an FOI request. The Information Commissioner concluded that agencies will best meet the objects of the FOI Act to provide prompt access to information at the lowest reasonable cost if they, wherever possible, accept and respond to FOI requests without any threshold enquiry as to the identity of the applicant. Essentially, the agency’s focus should be on the request, not the requester. Cases where the requested documents are exempt and the applicant’s identity is relevant to the decision-making process can be dealt with on a case-by-case basis.</p> <p>The recommendation is also inconsistent with amendments to the Privacy Act, which come into force on 12 March 2014. These amendments include Australian Privacy Principle (APP) 2 (anonymity and pseudonymity), which provides that an individual must have the option when dealing with an entity to which the Privacy Act applies ‘of not identifying themselves, or of using a pseudonym’. Although there are exceptions to APP 2 if a law prevents anonymous or pseudonymous dealing, or if it would be impracticable, these are not likely to apply to all FOI requests.</p>



Review recommendation	OAIC comments
	<p>At a practical level, our experience in dealing with IC reviews and vexatious applicant declarations is that anonymous and pseudonymous requests have not proved to be a problem. We suggest that the recommendation would slow down the FOI decision-making process, contradicting the object of the Act to provide prompt access to information. The recommendation would also likely only be workable if the agency or minister collected a significant amount of personal information to verify an FOI applicant's identity. Otherwise, in our view the proposed requirement is not likely to deter an individual intent on using anonymous or pseudonymous requests to circumvent provisions of the FOI Act about repeat requests or the terms of a vexatious applicant declaration made by the Information Commissioner. The collection of this amount of personal information would have an adverse impact on personal privacy.</p>
<p><b>Recommendation 34 — Inspector-General of Intelligence and Security</b></p> <p><i>The Review recommends the FOI Act and the Archives Act 1983 be amended to clarify procedural aspects concerning the Inspector-General of Intelligence and Security giving evidence in FOI and archive matters before the AAT and FOI matters before the Information Commissioner.</i></p>	<p>We acknowledge the concerns raised by the Inspector-General of Intelligence and Security (IGIS), but suggest that those concerns can be resolved by a change in administrative practice rather than legislative amendment.</p> <p>As mentioned in IGIS's review submission, the OAIC's <a href="#">memorandum of understanding with IGIS</a> was specifically designed to ensure that IGIS was called upon to provide evidence only where required. There is no legislative barrier to the Administrative Appeals Tribunal adopting similar arrangements.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 35 — Amendment of Personal Records and the Archives Act</b></p> <p><i>The Review recommends the FOI Act be amended to enable a personal record to be amended when the amendment is authorised under the Archives Act 1983.</i></p>	<p>We suggest this recommendation requires further consideration, particularly in terms of the interaction with amendments to the Privacy Act that come into force on 12 March 2014. APP 10 (quality of personal information) obliges agencies to take reasonable steps to ensure the quality of personal information they hold about individuals at the point of collection and before using or disclosing the information. APP 13 (correction of personal information) obliges agencies to correct that information at the individual's request or on their own initiative (if, with regard to the purpose for which the information is held, the agency determines that the information is inaccurate, out-of-date, incomplete, irrelevant or misleading).</p> <p>We suggest that consideration could be given to the OAIC and the National Archives of Australia issuing joint administrative guidance on this matter and the interaction between the FOI Act, Privacy Act and the Archives Act.</p>
<p><b>Recommendation 36 — Single Website for all Disclosure Logs</b></p> <p><i>The Review recommends the disclosure log for each agency and minister should be accessible from a single website hosted by either the OAIC or data.gov.au to enhance ease of access.</i></p>	<p>We support this recommendation in principle and are not opposed to discussing the recommendation with the Department of Finance to determine whether it is feasible to provide whole-of-government disclosure log functionality through data.gov.au.</p> <p>However, we note that the recommendation potentially involves significant resourcing implications for both the OAIC and agencies and ministers (in terms of participating in the whole-of-government disclosure log website). Aside from potential development and maintenance costs, the FOI Act does not prescribe how agencies and ministers must lay out their disclosure log. This means that legislative amendment would potentially be needed to address the likely practical and administrative difficulties, such as resolving inconsistent formatting between agency disclosure logs and mandating participation in a whole-of-government disclosure log website.</p> <p>We also note the approach adopted by the Queensland Government, where a <a href="#">single webpage</a> links to agency disclosure logs and describes how to make an access request. This approach could offer one way of adopting this recommendation, although it would not capture some of the functionality proposed in some of the review submissions.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 37 — Minimum Timeframe for Publication of Disclosure Log</b></p> <p><i>The Review recommends that there should be a period of five working days before documents released to an applicant are published on the disclosure log. However, it considers that it would be better for this to be set out in guidelines rather than in the FOI Act itself and recommends the OAIC consider amending its guidelines accordingly.</i></p>	<p>We note that <a href="#">Part 14 of the FOI Guidelines</a> already supports delayed disclosure log publication. Unless the Government prefers to deal with this issue through legislative amendment, the Information Commissioner will update the Guidelines to note this recommendation.</p>
<p><b>Recommendation 38 — Copyright</b></p> <p><i>The Review recommends the Government consider issues concerning the interaction of the FOI Act and the potential impact that publication of third party material under the FOI Act may have on a copyright owner's revenue or market.</i></p>	<p>We support this recommendation and note the <a href="#">FOI Commissioner's submission</a> to the ALRC's <i>Copyright and the Digital Economy</i> discussion paper, which outlined the OAIC's views on these issues.</p>

Review recommendation	OAIC comments
<p><b>Recommendation 39 — Suspension of FOI Processing During Litigation</b></p> <p><i>The Review recommends the FOI Act be amended so that the processing of an FOI request is suspended where the applicant has commenced litigation or there is a specific ongoing law enforcement investigation in progress.</i></p>	<p>We support amending the FOI Act to reduce the use of the FOI process as a less expensive alternative to legal discovery, but suggest that this recommendation needs further consideration. Our concern is that the proposal would be complex to administer in practice. We also take the view that the existing s 37 exemption is sufficient to deal with the matters raised in the review report about law enforcement investigations.</p> <p>A simpler alternative may be to adopt the model in the <i>Right to Information Act 2009</i> (Qld), where access may be refused if the document can be accessed under another Act or arrangements made by an agency. We also note that implementing Dr Hawke’s recommendation 24 by introducing a 40-hour cap on FOI processing time would resolve some of the practical difficulties raised by use of the FOI process as an alternative to legal discovery.</p>
<p><b>Recommendation 40 — Backup Tapes</b></p> <p><i>The Review recommends the FOI Act be amended so that a search of a backup system is not required, unless the agency or minister searching for the document considers it appropriate to do so.</i></p>	<p>We do not support this recommendation.</p> <p>In our view, adequacy of search in terms of backup tapes is already sufficiently dealt with in <a href="#">Part 3 of the FOI Guidelines</a>.</p> <p>We also note that the substance of the recommendation essentially relates to the resources required to process an FOI request. In our view, this matter would be better addressed through amendments to the practical refusal mechanism (as per recommendation 24) and appropriate use of charges.</p>



## Attachment B: other suggested issues for consideration

### *Technical issues with the FOI Act and AIC Act*

The OAIC's review submission identified and proposed solutions to a range of technical and procedural issues with provisions of the FOI Act and AIC Act. Other than those already discussed at **Attachment A**, a brief description of the issues not addressed in Dr Hawke's report is provided below. A more detailed discussion and our proposed solution to each issue are available in the appendix to our first review [submission](#).

#### *FOI Act*

- There is a potential inconsistency between the definition of a document of a minister (s 4(1)) and the Archives Act's access provisions to records of former ministers.
- The Act requires agency decision makers not to consider the seniority of the document's author within their own agency, but is silent about the seniority of authors from other agencies (s 11B(4)(C)).
- The disclosure log provisions imply that both agencies and ministers can impose charges for making information available on the disclosure log in some circumstances, but only provide agencies the power to impose such charges (ss 11C(4)–(5)).
- In some cases it is unclear whether agencies are required to transfer requests to other agencies (s 16) or to assist applicants to redirect requests to the appropriate agency (s 15(4)).
- On a narrow interpretation, the Information Commissioner cannot impose conditions when extending time under s 15AB (because there is no express power to do so, as there is in s 15AC).
- The Information Commissioner can grant an extension of time for an agency or minister to deal with a request after a deemed refusal has occurred, but is not required to notify the applicant of the extension (ss 15AC, 51DA).
- There is no requirement to explain the grounds of specific deletions when editing a document before release under s 22 (which is recommended in both the Information Commissioner's FOI Guidelines and Dr Hawke's *FOI Better Practice Guide*).
- The notice provisions where an agency edits a document under s 22 are ambiguous (ss 22(4), 26).
- A notice neither confirming nor denying the existence of a document is deemed an access refusal for the purposes of internal review, but not IC review (s 25(2)(b)).
- The notice of decision provisions are inconsistent and confusing (ss 26, 54N(1)(b)).

- The term 'legal personal representative' is used in multiple sections instead of the more common 'representative' (ss 27A(1)(b), 53C(1), 91(1C), 91(2A)).
- It is not clear whether unpaid charges under the FOI Act are a debt owing to the Commonwealth for the purposes of the *Financial Management and Accountability Act 1997* (s 29 of the FOI Act and the *Freedom of Information (Charges) Regulations 1982*).
- Section 34(6) in the Cabinet documents exemption is largely redundant given the operation of s 34(3).
- Compared to an equivalent provision at s 47F, s 38(1A) in the secrecy provision exemption is drafted in a complex way that has adverse consequences during the IC review process.
- The 'qualified persons' provisions in ss 47F(4)–(7) are unduly onerous and inconsistent with equivalent provisions in the Privacy Act.
- The amendment and annotation provisions in Part V apply to records not controlled by Australian Government agencies and ministers (such as national information sharing systems), and provide no scope to transfer requests to the State or Territory from which the document originated.
- Part V applies only to documents to which access has already been lawfully provided. 'Lawful access' is not a requirement for exercising correction rights under the Privacy Act.
- Applicants must provide an address in Australia to make a request for amendment or annotation (ss 49(c), 51A(d)), which is inconsistent with the access request provisions in Part III.
- Sections 49(d) and 51A(e) do not allow applications to be sent by email and make reference to s 15(2)(d), which has been repealed.
- Part VI includes definitions in ss 53A, 53B and 53C that are not particular to internal review. This creates readability issues, and raises questions about the operation of some provisions in relation to Part VII (Review by Information Commissioner).
- The requirements for notice of an internal review decision are the same as those under s 26. However, a s 26 notice is in some ways unsuited to an internal review decision.
- Where internal review of an access refusal decision results in an access grant decision, an affected third party has no access to IC review (ss 54L, 54M).
- The Information Commissioner cannot treat a complaint transferred from the Commonwealth Ombudsman as an application for IC review, which in some cases would be the most appropriate way of dealing with the complaint (s 54N).



- The IC review notification requirements are inconsistent and impractical in cases where a third party consultation requirement applies (s 54P).
- Section 54T(6) refers to the Information Commissioner's power under s 54T(1) to grant an extension of time to apply for IC review, when this power actually lies under s 54T(2).
- It is unclear precisely when s 54Y (about application for IC review of a deemed access refusal decision) applies or how it interacts with s 55G.
- It is unclear whether the onus requirement in s 55D(1) applies to both access requests and amendment requests.
- The scope of the Information Commissioner's information-gathering powers for the production of national security and Cabinet documents is unclear (s 55U).
- The interaction between the Information Commissioner's various information-gathering powers is unclear (ss 55R, 55T, 55U).
- The requirement for the Information Commissioner to return exempt documents is impractical in terms of requiring return of emailed documents and the return of a document to the person within the agency who produced it (s 55T).
- It is not clear whether the protection from liability in the Information Commissioner's information-gathering powers applies to both criminal and civil proceedings (s 55Z).

#### *AIC Act*

- There is need for clarification about delegation of Commissioner powers and the interaction of ss 11 and 12.
- Section 29(2)(b), about the use of information acquired for a lawful purpose, is unclear and potentially superfluous.
- The 'freedom of information matters' specified in s 31 do not refer to the Information Publication Scheme or disclosure log requirements under the FOI Act.

#### ***Other OAIC recommendations that warrant further consideration***

We have also identified four other matters that were not taken up in the review report that we believe would allow the OAIC to operate more efficiently and improve the general administration of the FOI Act and the AIC Act across government.

#### *Merge the Privacy Advisory Committee and the Information Advisory Committee*

Our submission to Dr Hawke discussed the unexpectedly high cost of administering the Information Advisory Committee (**IAC**). To reduce these costs, we recommended the merger of the IAC and the Privacy Advisory Committee (**PAC**), with consideration given to the composition of the committee to ensure fair representation of the privacy and information policy interests as well as both the public and private sectors. Dr Hawke's view was that our proposal would dilute the specialist privacy role of the PAC. He also noted that the AIC Act

does not specify how often the IAC must meet, with the implication that costs could be reduced by holding fewer meetings.

We suggest that an appropriately managed and constituted merged committee would be preferable to further decreasing the meeting frequency of the IAC. This course of action would more appropriately balance the constrained resourcing environment in which the Government operates with the Information Commissioner's strategic role in relation to government information policy.

*Remove doubt about documents of the Official Secretary to the Governor-General*

The FOI Act does not apply to a request for a document of the Official Secretary to the Governor-General unless the document relates to matters of an administrative nature (s 6A). In *Kline and Official Secretary to the Governor-General* [2012] FCAFC 184 the Federal Court made the following comment *obiter dictum*:

One question which arose in the course of argument was whether the expression 'document of the Official Secretary' in s 6A was limited to documents in the possession of that official. In our view, the expression is not so limited. The scope of the section would be so limited if the definition of 'document of an agency' in s 4(1) applied, as it does in s 11(1), but that expression is not used in s 6A so the definition does not apply. The consequence is that s 6A would apply even where the document of the Official Secretary was in the possession of another agency.<sup>1</sup>

We reiterate the suggestion from our supplementary submission that this comment is difficult to reconcile with the definitions in s 4(1), and again recommend that the FOI Act be amended to remove doubt that s 6A does not apply when a document of the Official Secretary is in the possession of another agency.

*Definition of the privacy functions in the AIC Act*

As noted in our supplementary submission to Dr Hawke, recent legislation such as the *Healthcare Identifiers Act 2010* and the *Personally Controlled Electronic Health Records Act 2012* has conferred functions on the Information Commissioner. Some of these functions come under the definition of the privacy functions in s 9(1) of the AIC Act because they clearly relate to the privacy of an individual. However, some of these functions, such as those related to the design of systems to protect personal information, may not directly relate to the privacy of an individual. In addition, if a new function is not included in the table in s 9(2) which identifies provisions that confer privacy functions, confusion may arise about whether the function is a privacy function.

We reiterate the recommendation from our supplementary submission that:

- Section 9(1)(a) of the AIC Act be amended to include, in the definition of privacy functions, functions conferred on the Information Commissioner that 'relate to the privacy of an individual or the protection of personal information', and
- Section 9(2), including the table, be removed.

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<sup>1</sup> [28] per Keane CJ, Besanko and Robertson JJ.

### *Accessibility of online published content*

Our review submission described how the mandatory publication requirements of the FOI Act represent a particular accessibility challenge in some cases. 'Accessibility' in this context refers to agency obligations under the *Disability Discrimination Act 1992* and the whole-of-government *Web Accessibility National Transition Strategy* to ensure by 2014 that content on government websites complies with the Web Content Accessibility Guidelines 2.0 issued by the Worldwide Web Consortium.

FOI obligations may present particular accessibility challenges by requiring agencies and ministers to publish material that was never intended for electronic publication or was created long enough ago that it does not comply with modern accessibility requirements. An example would be an agency document held only in hard copy that is requested under the FOI Act, and must then be made available online through the disclosure log. If it would be impracticable or unreasonably resource-intensive for an agency to make the information accessible, there is a risk that the agency will decline to make the information freely available online and instead only provide details about how to request access to the information.

We suggest this would be contrary to the pro-disclosure objects of the FOI Act. Accordingly, we reiterate our recommendation that a balance may need to be struck between accessibility and FOI obligations in cases where a document that must be published was not created for the purposes of publication, and it would be resource-intensive to optimise the document for accessibility or create an alternative accessible version of the document's content.



## Attachment C: Dr Hawke's proposed comprehensive review of the FOI Act

Annex G of Dr Hawke's report identified 11 matters that could be examined in a further comprehensive review of the FOI Act. The OAIC's view is that some of these matters could be remedied by legislative amendment without the need for consideration in a comprehensive review.

The matters that we agree would be suitably addressed in any more comprehensive review are:

- *Whether the FOI Act should include provisions to protect decision-makers from interference in the decision-making process?*
- *Whether the FOI Act should provide a right of access to 'information' rather than a right to access 'documents'?*
- *Whether the FOI Act should be amended to allow for representative complaints, made on behalf of a group against the same agency, where the same common issue of law or fact arises? (We note that the Information Commissioner may commence an own motion investigation, which is alternative way of examining a complaint issue that touches more than request. Further, the Information Commissioner amended the FOI Guidelines in January 2013 to clarify that an FOI request may be made by a person on behalf of another, by a requester using a pseudonym or by an unincorporated group. In some circumstances this may enable an individual requester to raise an issue that is relevant to others.)*
- *Whether the same protections against civil and criminal actions that apply to release of documents under the FOI Act should apply to documents provided under an administrative access scheme?*

We suggest that the remaining matters in Annex G could be dealt with in advance of any further review. A list of these matters, including comments about some of them, is provided below.

- *Whether the FOI Act should contain express criteria for assessment as to whether an agency should be excluded from the operation of the FOI Act? (Please see our comments in Attachment A about Dr Hawke's recommendation 18.)*
- *Whether an agency should be able to refuse to grant access to documents without having identified any or all of the documents requested if it is apparent that all of the documents are exempt documents — in other words, should former section 24(5) of the FOI Act be reinstated?*
- *Whether publicly available information (including for example, information on an Australian Government website) should be excluded from the right of access under the FOI Act? (Our submission to Dr Hawke recommended that s 12(1) be amended to*

exclude documents publicly accessible without charge from documents that can be accessed under Part III of the FOI Act.)

- *Whether there should be a period of time for negotiation of clarification of a request prior to commencement of processing time?* (Please see our comments in Attachment A about Dr Hawke's recommendation 21.)
- *Whether the Information Publication Scheme requirements should be extended to ensure publication of other information such as research papers, expert/consultant reports, grants, loans and guarantees?* (Given the passage in June 2013 of the *Public Governance, Performance and Accountability Act 2013* (Cth), we suggest that this matter could be considered as part of broader reforms to public sector governance arrangements. We also note a recommendation in our supplementary submission to Dr Hawke which referred to additional categories of financial information that the Information Commissioner had previously suggested could be added to the Information Publication Scheme mandatory publication requirements.)
- *Whether there should be time limitations on the operation of all or any of the FOI Act exemptions?* (Please see our comments in Attachment A about Dr Hawke's recommendation 13.)
- *Whether the grounds for the Information Commissioner to decide not to undertake a review (s 54W FOI Act) or complaint investigation (s 73 FOI Act) should be expanded?* (Our submission to Dr Hawke recommended that s 54W be revised to allow the Information Commissioner to decline to undertake a review where the Administrative Appeals Tribunal is dealing with the substantive matter to which the documents relate, and that the Information Commissioner should have the power to refer matters to the Tribunal rather than simply deciding not to undertake a review. The submission also recommended that the Commissioner's power to decide not to investigate a complaint under s 73 should be expanded to match the comparable power under the *Ombudsman Act 1976*.)