

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100 Parliament House Canberra ACT 2600  
Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Sir/Madam,

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

I write this in response to the Senate inquiry into the above Bill.

I strongly endorse the sentiment of several of the published submissions, in particular the one by Associate Professor Moira Paterson. Abolishing the Office of the Australian Information Commissioner winds the clock back to 2007 before the reforms of the Commonwealth Freedom of Information Act 1982. Most of the changes and good work increasing independent access to federal government held information would be lost. It is a major retrograde step.

Both A/Prof Paterson and I advised on the FOI reforms during 2008-2010. It was an exciting time as Australia was finally, at least in part, catching up with the access to information changes taking place globally. The 2010 amendments to the federal FOI Act and the establishment of the OAIC brought it significantly closer to international best practice on access to public sector information (PSI).

The establishment of the OAIC was the single most important reform. It finally brought together FOI and privacy (which, in my view, are two sides of the same coin) and gave the Commonwealth a real champion for FOI and made FOI appeals affordable. The OAIC is by no means perfect, but it was a good start and there is evidence (see article below) it had started to make inroads into its most important mission – changing the culture in Commonwealth departments and agencies from one of secrecy and obstruction of access to information to one of pro-active disclosure of information.

Abolishing the OAIC will undo most of this hard work and again make FOI more expensive and cumbersome to use from a user's perspective. It will also wind back what in essence is a win-win situation. A well functioning FOI system is a trust building tool between the government and the public. By facilitating access to information a government demonstrates it trusts the citizens with the un-spun information they need to take part in the political process in a meaningful way. To juxtapose this with the savings claimed by the current government created by passing this Bill is cynical and in the long term democratically counter productive.

I have conducted internationally comparative research into FOI practical functionality for the last 13 years. In my experience this Bill harms not only the usability of federal FOI in Australia, but undermines the current federal government's claims of being accountable and transparent.

I submit, below, to the Senate inquiry my latest research comparing a generation one FOI system, Victoria, with the reformed Commonwealth system. As pointed out below, international experience shows that abolishing bodies such as the OAIC will bring the functionality of federal FOI closer to the first generation FOI systems. This would bring Australia, yet again, out of step with international best practice on access to public sector information. This would truly be a pity.

Best Regards

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PLEASE NOTE – THIS ARTICLE IS UNDER REVIEW FOR THE AUSTRALIAN  
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Title:

**Next generation Freedom of Information – from “pull” to “push” – a comparative study**

**By Dr Johan Lidberg, School of Media, Film and Journalism, Monash University, Melbourne, Australia**

**Abstract**

Access to information remains a fundamental provision in the practice of journalism; regardless of the disruptive transformations the profession and the industry are currently experiencing. The quality of reportage is directly linked to the quality of un-spun information journalists can access.

This is the second article in a series describing the evolution of Freedom of Information (FOI). The first article outlined the historical roots of FOI and summarized some of the research to date (Lidberg, 2013). This second article reports on a pilot project comparing a first generation FOI law with an amended and updated FOI system in Australia.

The question posed in this article is; has the reform made a difference in practice? To answer this a number of novice FOI users were asked to seek similar information in one “pull” FOI jurisdiction and one reformed “push” system. A diary method was employed and the findings indicated that the new generation FOI regime delivered better and faster access. But it also became clear that FOI 2.0 demands more of its users in terms of web and IT literacy. The results also pointed to great discrepancies between agencies in how the information requests were interpreted and how the information was made available.

**Introduction**

Access to information systems and laws have come a long way since the first such law passed the Swedish parliament in 1766. From a very hesitant start, via information access soul searching in the United Nations post World War II to the freedom of information revolution after the fall of the iron curtain we have now arrived at the current digital ongoing information disruption.

This paper will describe a pilot project that sought to compare new and old freedom of information (FOI) systems in Australia. The move from the first generation “pull” FOI systems where the use of FOI requests submitted to government agencies was the norm to the second generation “push” regimes where information is available by default on government web sites is now increasingly a global phenomenon.

Based on the interactive nature of web 2.0 enabling e-government (Henman, 2010), the expectations on the next step in the FOI evolution are high. However, until there is empirical evidence that the second-generation FOI systems deliver easier and faster public access to government held information, the assessment is incomplete. Collecting and analysing empirical evidence was the aim of this project, posing the research question: **in what way, if any, is a second generation FOI system providing better public access to information compared to a first generation FOI law?**

The findings from the pilot study findings indicate that the new generation FOI does deliver much better and faster access. But it has also become clear that greater web and IT literacy are the price to pay for this improved access. Furthermore, the results pointed to discrepancies between agencies in how the information was made available.

The article will start by providing a brief historical background to FOI, describe the methodology used in the study, move on to outlining the results and close with a discussion of the findings and where FOI research should go next.

### **Background**

One theoretical base for access to public sector information (PSI), represented by FOI systems, is accountability theory (Przeworski, 1999) and the argument that it offers an accountability tool to citizens available during political terms (Willems, 2012). FOI laws usually consist of two tiers: access to individual (personal) information held by government agencies and access to so called third party information. Previous research shows that in the vast majority of FOI regimes, access to personal information functions well, the challenge occurs when journalists, the political opposition, bloggers and others use the third party access mechanism to request or access non personal information (Lidberg, 2009).

The rationale for FOI laws can be described as three fold. First, to provide access to personal information held by governments. Second, it aims to limit corruption and maladministration through increased transparency and extensive access to information. Third, to increase public participation in the political process by providing access to information on which citizens can base their decisions and opinions (Keighly-Gerardy, 1999).

There is a strong argument for well functioning FOI systems as it creates a win-win situation. It could be seen as a trust building mechanism between those that govern and the governed (Lidberg, 2009). Roberts argues that there is an inherent tension in the evolution of FOI between governments' need to be left alone to govern effectively and the public's need (and right) to access information that is held by governments on its behalf (Roberts, 2006). This tension has been the main obstacle for the evolution of FOI during the last 300 years. Reluctantly governments around the globe have been persuaded that some level of access to information is a sign of democratic maturity to the extent that it can be argued that implementing FOI laws has become a 'democratic rite of passage' (Lidberg, 2009, p. 167).

It is important to note that FOI is an **internal** accountability mechanism put in place and administered by the political system. Until the arrival of WikiLeaks this was the principal official political accountability tool available. One of the most important effects on accountability systems by the arrival of WikiLeaks is that it added a new **external** mechanism based on providing unprecedented digital protection of whistle blowers leaking information. However, exactly how important and influential WikiLeaks has become is still being debated (Roberts, 2012).

The evolution of FOI can be described in four stages.

The **first** starts in 1766 in Sweden when the opposition party, led by the progressive Swedish/Finnish clergyman and member of the Swedish parliament Ander Chydenius, managed to draft and pass the first access to information law in the world. Following this global progress on FOI was painfully slow and between 1766 and 1945 and only a handful of Acts were passed.

The **second** stage (and first watershed moment) is post World War II. As part of the analysis (in the newly founded United Nations) of why there was a second world war, it was concluded that one of the reasons was too much secrecy inside and between nations (Lamble, 2002). The US led a push for a template law that could be adapted by member states. This proposal was seen as too far-reaching and was never adopted by the UN. Instead the US passed its own first version of the FOI Act in 1958. To this day the Swedish and US FOI laws remain the two template systems that other countries draw on. Most have adapted the US model, which some argue is unfortunate as it is best suited to federal political systems, while the most common political regime by far is the unitary system (Lamble, 2003). Even though progress was made, only 13 FOI laws had been passed globally by 1990 (Banisar, 2004).

The **third** stage (and main watershed moment thus far) followed on the fall of the Soviet empire and the iron curtain in the 1990s. The fledgling and hopeful new democracies in Eastern Europe, formerly under soviet dictatorship, contributed greatly to the close to 40 FOI laws that were passed between 1990 and 2000 (ibid).

The current **fourth** stage is based on the digitisation of information and the subsequent rise of the information society (Breit, 2010). The ease with which information is shared and accessed has led to a development where governments and FOI laws increasingly move from the old "pull" system where formal requests were lodged with government agencies to "push" regimes where government held information is made public by default on government web sites. The thinking is that this will facilitate better public access to information and save agencies time and resources handling FOI requests as the information is already available (Lidberg, 2013). This recent development is also at times labelled FOI 2.0 as it uses the tools made available by web 2.0 which is far more interactive compared to web 1.0 (Henman, 2010).

The current state in the FOI evolution has seen a number of additions to access to information terminology. One is that FOI increasingly is referred to as Right to Information (RTI). This is problematic, as it has taken many decades to raise public

awareness around FOI. Replacing this term with a new one is a major communication challenge and one is left to wonder what is won by implementing the RTI term.

Another term that is becoming increasingly common is Public Sector Information. This is a broader concept that is based on the notion that information created using public funds should be made available to the public for re use. This strongly supports the reform of FOI laws that facilitates this. Based on a European Union directive ("European Union," 2003), some EU countries have passed PSI laws stipulating that government agencies treat all their information as PSI unless exempt by the law ("Sveriges Riksdag," 2010).

Australia's first FOI law was passed in 1982. By 2002 all states and territories had implemented access to information systems. The current situation is that a number of jurisdictions, Queensland, New South Wales, Tasmania and the federal government, have amended and reformed their Acts to incorporate the 'push system' (henceforth termed FOI 2.0). The remaining five jurisdictions, Western Australia, South Australia, Victoria, Northern Territory and the Australian Capital Territory, employ the first generation 'pull' systems (henceforth referred to as FOI 1.0).

The current two-tier situation in Australia has created a situation well suited for a comparative study of the old and new FOI systems in terms of functionality. The aim of FOI 2.0 is to facilitate easier and quicker public access to PSI. The question is: do the reforms deliver in practice?

The importance of FOI functionality research cannot be overstated. Ongoing literature reviews show that although, FOI research is plentiful, the vast majority of studies are legal in nature and few project focus on how FOI delivers information access in practice (Lidberg, 2013). One of the reasons for this could be that legally comparative research is relatively cheap, whereas FOI functionality projects are more labour intense and hence expensive.

Previous research has showed that passing Freedom of Information (FOI) laws is relatively easy – making them work in practice is the challenge (Lidberg, 2013, 2009; Roberts, 2006; Snell, 2004). This is illustrated by the strong growth in the number of laws in the last 15 years, from 13 in 1990 to 90 plus in 2014 (Freedominfo, 2014). This gap between what the laws promise and what they deliver in practice is an ongoing challenge for policymakers and at times a source of embarrassment for governments that have often promised increased openness and transparency when in opposition, but take a very different view when in government. This means that FOI laws and systems need constant monitoring, review and amendment.

## **Methodology**

To answer the research question: **in what way, if any, is a second generation FOI system providing better public access to information compared to a first generation FOI law?** It was decided that a combination of the methods participant observation and direct observation would be utilised.

Participant observation is a common method used for collection of qualitative data. In participant observation the researcher becomes part of the culture/context observed. In direct observation the researcher is detached from the process observed (Neuman, 2000). As the participants/diarists became part of the process by submitting FOI requests and following up on the requests via phone and email, this part of the project was classified as participant observation. The direct observation component was made up by the author observing the information search and access process instigated by the participants/diarists.

The approach in the study was comparative. The state of Victoria passed its FOI law in 1982 and has only done minor amendments to the law since. A reform that was described by the current government as major was the appointment of a Freedom of Information commissioner in 2012. However, no major changes to the law was made, so the change had little effect on the day to day administration of FOI in Victoria and the amendments did not transform the Victorian FOI regime to FOI 2.0.

The federal FOI Act was also implemented in 1982. It went through major reforms in 2007-2010. These changes did transform it to FOI 2.0 with features such as disclosure logs (lists on government web sites where earlier releases of information should be listed) and the proactive publication of new information. Before this study, it was unclear what impact, if any, this has had on information access in practice.

To allow for the closest comparison possible, six closely matching portfolios/ministers were selected. They were:

Table 1: Ministers included in the study

<b>Victoria (state government)</b>	<b>Australian Commonwealth (federal government)</b>
Premier	Prime Minister
Treasurer	Treasurer
Attorney General	Attorney General
Education Minister	Education Minister
Health Minister	Health Minister
Finance Minister	Foreign Minister <sup>1</sup>

The information sought was the expenses during the financial year 2011/2012 for the ministers (eg. Travel, domestic and international, use of government cars and planes, telecommunications costs, IT, office refurbishments, state dinners, etc). It was hypothesised that this information was relatively uncontroversial, and hence readily available, while still of high public interest.

The six participants were all third year journalism students. They were recruited from a group of 130 students in a journalism, law and ethics course. A call was put out on the closed Facebook group used in the course and the first six to respond to the call

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<sup>1</sup> The foreign minister was included as he/she has a high profile portfolio that generates a lot of ministerial expenses.

were selected for the study. The only pre requisite was that the participants had not used FOI before.

In a one-hour session the participants were briefed on their task, which was to spend a minimum of eight hours (one working day) in each jurisdiction seeking the information listed above. Added to this was a third day for writing of a FOI request (if necessary) and follow up on the request until a decision was received from the agency. The participants were allocated one case each (i.e. one Victorian and one federal minister each).

Preliminary research done by the author had indicated that the Commonwealth FOI system was likely to yield the information quicker than its Victorian counterpart; hence a secondary information search task was set for the federal part of the project. The diarists were asked to search for information on suicide and self-harm in federal refugee detention centres during 2011/12 if they completed the first research task with time to spare.

The only information the diarists were given about FOI was that Victoria had the original non-reformed 'pull' law, while the federal system had been reformed into a 'push' system. The justification for providing this information was that it would save time and allow the diarists to focus on the information search process. Apart from that they all started from scratch when it came to FOI use. In the diary they were asked to record time spent searching for the information, the web sites visited, phone calls made, emails sent, outcome of the information search, appeals made and finally they were asked to write a one page reflection on their experiences using the two FOI systems. The diaries varied from 11-23 pages in length.

## **Findings**

The table below provides an overview of the FOI diaries kept by the six participants in the study.<sup>2</sup>

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<sup>2</sup> The full diaries are available on request from the author.

Table 2 Findings summary information access Victoria –and Federal governments 2013

Cases	Victoria time spent and cost	Federal time spent and cost	Victoria outcome	Federal outcome	Victoria reflections	Federal reflections
Premier/Prime Minister	10 hours FOI request lodged: cost \$25.70	1 hour no request lodged	FOI request process inconclusive. No information released	Detailed information obtained on Prime Minister's expenses	<p>'When searching for information in the pull system, hours of research produced minimal results with barely any information of substance, and the need to submit an FOI request to the state.'</p> <p>'My conclusion is that the Victorian system is sadly outdated, and needs to be updated to a new and improved push system, that will allow for more transparency and accountability in the system.'</p>	'In the push system, I found a great deal of information straight away using the internet. It was easy to access and clearly laid out, with the first search result on Google containing exactly the information for which I was looking.'
Treasurer	16 hours FOI request lodged: cost \$25.70  Days until until end of the search: 83 days including appeal 26/11/2013 - 17/2/2014	15 minutes 30 minutes on secondary request no cost  Days until end of the search: Less than 1 day - 45 minutes	Denied access to information: "allowances are administered by the Department of Parliamentary Services, which is not subject to the Act" Appealed to information	Access to thorough breakdown of expenses: sample - domestic travel, overseas travel, telecom costs, etc	'the Victorian system is inconsistent'	'the federal system is surprisingly easy to work'



			commissioner			
Attorney General	8 hours FOI request lodged cost \$25.70 One follow up phone call and email needed. Confirmation letter received on Dec 30. Request transferred from A-G's office to Dep of justice. Final decision received on Jan 31 – the last day of the 45 day response period allowed by the Act.	30 min on A-G expenses  1 h on secondary request  no cost	Release of an expense list that was much less detailed than the federal equivalent.  This is inconsistent with the decision in the Victorian treasurer case – please see this column above	Same outcome as the federal Treasurer above	‘The FOI process in Victoria also seemed phone-call intensive to ensure the information was in fact not available online, that I had addressed the request and cheque to the correct agency etc. ‘  ‘I also imagine people are repeatedly requesting the types of information I searched for and so it seems to be an inefficient allocation of resources for agencies to provide the information on an individual demand type basis than simply publish the materials online for public viewing. I think it would be highly beneficial and more efficient for both the State and the public if Victoria adopted the push information system as employed by the Commonwealth. ‘	‘I was able to conduct my research into the Commonwealth Attorney-General, and the self-harm rates in commonwealth ran detention centres in a reasonably autonomous manner without making any phone calls. ‘
Finance/Foreign Ministers	8 hours FOI request submitted – cost \$25.70	4 hours topic one 4 hours topic two. FOI request submitted –	Reply from agency: no relevant document found. No advise offered	Breakdown of expenses obtained. Refugee self-harm FOI request ruled		‘I found the Commonwealth system much more accessible than the Victorian system. I have two major issues with the Victorian system. These are: That you have to pay a variety of fees to access the

		no cost	on where the information may be located.	not eligible due to information missing in request,		information (and even then, this does not guarantee you access to information)'
Health Ministers	8 hours FOI request lodged Cost: \$25.70	8 hours FOI request lodged No cost	Inconclusive – no response regarding the request despite follow up phone calls	Inconclusive – no response regarding FOI request		'In comparing these two sites (Victoria and Federal) one point of difference that stands out is that at state-level it appears the FOI website is of most use in making a request, whereas federally it is best to make requests through specific agencies' websites. '
Education Ministers	2 hours FOI request lodged - \$25.70	4 hours FOI request lodged for secondary topic – refugee self harm – no cost	Inconclusive – no confirmation of request received in spite of verbal confirmation via phone. No information obtained	Health Minister expenses located and obtained. Refugee detention centre self harm report located. FOI request lodged to clear up discrepancy in the report. Request inconclusive.	'Overall I would say that the FOI system is not easy to use in either jurisdiction and some level of training, patience, audacity and imagination is necessary in order to navigate it.'	'If I were to compare the two the federal system is far better. For the most part it is possible to do most of the tasks without having to pick up a phone or email anyone. The information was readily available on different websites and often there are icons on the pages themselves, which direct you to their FOI departments. When I did email, I normally received responses within 24 hours.'

### **Analysis:**

Victoria - only one of the total six requests generated any information (albeit incomplete). The other requests were either ignored or the information was not obtained. One denied request was appealed to the FOI Commissioner. This request process including the appeal took 83 days. The lodgement fee for each request was \$25.70.

A very important finding in the Victorian case is that one agency, the Attorney General's office, partially released the expenses for the minister, while one other agency, the Treasurers office, decided that the information could not be released as the allowances were administered by an office that was not covered by the FOI Act. This demonstrates a major inconsistency in the decision-making on FOI requests in the Victorian jurisdiction.

Commonwealth - detailed expenses breakdown for Prime Minister, Treasurer, Attorney General and Foreign Minister found and obtained without lodging FOI requests. Three of the cases generated detailed information on self-harm by refugees in detention centres. In total seven successful searches for information compared to one partially successful in Victoria.

Significantly more time was spent on the Victorian searches and the reflections written by the diarists made it very clear that they found the federal FOI 2.0 system much easier and faster to use.

### **Discussion**

So, based on the findings, what is the answer to the research question: **in what way, if any, is a second generation FOI system providing better public access to information compared to a first generation FOI law?** Clearly the answer is that the reformed Australian federal FOI law provides much quicker, easier and cheaper access to government held information compared to the first generation Victorian FOI system.

Further context can be added by comparing the federal findings in this study to a similar project undertaken in 2003 using the un-reformed FOI 1.0 federal law. In that study the Prime Minister's expenses for 2001/2002 were sought via a FOI request. The reply to this application was that it would cost close to \$1000 to process and that there was no guarantee that any information would be released. Compared to this study the Australian federal access to information regime has improved significantly (Lidberg, 2009). In the same 2003 study information on suicide and self-harm in detention centres were sought but not obtained from the then Department of Immigration. The findings in the current study further illustrate an improvement in the reformed federal FOI system.

From an accountability perspective this project indicates that the better functioning federal FOI law increases political accountability. The ability to access a detailed breakdown of how federal ministers spend the public funds allocated to their departments allows the public and journalists to independently scrutinize and analyse the use of public funds. It should however be noted that the release and publication of the information is still the prerogative of each department and that the public does not have access to the raw data.

As mentioned above a far reaching FOI system can function as a trust building tool between the government and the public. Being able to access government information in a timely and easy way creates a feeling of being trusted and more connected to the governing process creating a win-win situation. To this can be added that proactively publishing information created by government cuts the cost of administering FOI requests.

Based on the findings in this project and the above discussion only one negative consequence can be identified with the move to FOI 2.0 – the digital divide. Citizens with no or limited access to the web will find it increasingly hard to access information. To address this, it is important that FOI 2.0 governments retains a service where citizens on the wrong side of the digital divide can still be given information access. Examples of such a service could be the option to request hard copy documents via phone sent to the requestor using ordinary mail.

### **Conclusion**

This paper has described an access to information assessment project comparing a reformed FOI law with a first generation FOI regime in Australia. The findings clearly showed that the reformed law provided quicker and easier access to information.

The next stage in this project is already under way. The rest of the FOI jurisdictions in Australia are currently being assessed and it will be interesting indeed to see if the pattern identified in this first pilot study will be repeated in the other jurisdictions. The findings from this project will be reported in the forthcoming, third article in this series.

In a longer perspective the methodology used in this project could be applied to assess information access systems across the globe. It would be particularly interesting to apply the study to countries that have signed up to the Open Government Partnership (OGP). The OGP describes itself as ‘multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance (Partnership, 2011).’ Functionality studies as the one described in this paper will be crucial in determining if the OGP makes a difference and is delivering on its promises. The OGP currently has 56 member nations and is a growing force in the next generation access to information systems.

Coupled to OGP is the Public Sector Information concept described above. As PSI is implemented an important question that needs to be addressed is if PSI delivers independent access to government information or if there is a risk that the public will increasingly experience ‘information overload syndrome’– a situation where the sheer amount of information available obscures the most important information (Blair, 2010). There is a need to monitor the effects of the rollout of PSI.

This project pointed to the fact that as a user of FOI 2.0 you need relatively advanced knowledge of information technology, the web and political structures. This needs to be factored into future research projects. It may well be that the generation one FOI requests need to exist in parallel to the new FOI 2.0 systems for some time yet.

As always with FOI we are still predominantly dealing with access to information generated and held by governments. In many ways the actions of the global corporate giants have as much, and sometime more, impact on our daily lives, as do governments (Lidberg, 2009). Yet, FOI and other access to information systems do not apply to the corporate sector in any meaningful way. This is something that needs to be addressed in future research.

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