

Submission for the “Inquiry into the Freedom of Information Amendment (New Arrangements) Bill 2014”

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The OpenAustralia Foundation would like to thank the Senate Standing Committee on Legal and Constitutional Affairs for inviting us to make a submission to the inquiry the committee is conducting into the *Freedom of Information Amendment (new arrangements) Bill*, which is presently before the Senate.

We Recommend that the committee oppose the Bill

The OpenAustralia Foundation (OAF) recommends that the committee opposes the amendments proposed in the [Freedom of Information Amendment \(New Arrangements\) Bill 2014](#) (the Bill)

Specifically, OAF recommends that the committee oppose the repeal of the Australian Information Commissioner Act 2010 to abolish the Office of the Australian Information Commissioner.

OAF recommends that the committee oppose amendments the Freedom of Information Act 1982 to move functions relating to FOI matters exclusively to the Administrative Appeals Tribunal, the Attorney-General's Department and the Commonwealth Ombudsman.

Let's have options to review and appeal FOI decisions

OAF recommends that following an internal review, a choice be made available to FOI applicants

- 1) review a decision with the Information Commissioner (IC Review) or
- 2) appeal directly to the [Administrative Appeals Tribunal](#) (AAT), waiving the IC Review.

Freedom of Information is essential to a secure democracy

The Government holds information gathered on behalf of the Australian people. The Government is required to make documents in the public interest freely available to the public. Governments also need to give open access to people wanting specific information.

Australia was an early adopter of securing the rights of citizens to access information, but the rest of the world is moving quickly and we're now falling behind.

Only half a dozen countries secured the rights of citizens to access information when Australia enacted the Freedom of Information Act 1982. As of September 2013, at least 95 countries around the world now have Freedom of Information laws. These are also known as Access to Information and Right to Information laws. [1] This access is a key component of transparency, accountability and participation. It's a way for all citizens to scrutinize Government and public sector information, to become better informed, and to take full part in our democratic system. FOI is increasingly strengthened as part of Open Government initiatives, in which Governments are expected to be open and promote openness.

Today Australia ranks at only 49th in the global index of right to information standards [2] We can do much better.

RightToKnow.org.au

Freedom Of Information (FOI) is a crucial part of the checks and balances in any democracy, and key part of transparency and accountability of Government.

The process of making a freedom of information request is not very straight forward. OAF created the RightToKnow.org.au site with the aim of demystifying and simplifying this process and helping more Australians make FOI requests.

The site not only shows all requests but the paper trail of correspondence in pursuit of the request from those requesting documents and those holding them. Read more below at **About RightToKnow.org.au**

The site provides an unparalleled public view of the workings of the Australian Federal FOI system.

We've collected evidence

In appendix A OAF presents the 748 public FOI requests and their related correspondence made to Australian Federal authorities through RightToKnow.org.au* between Oct 16th 2012 and Oct 31 2014.

199 of these requests were successful or partly successful. 384 requests were unsuccessful (refused or did not turn up any documents), and 165 remain unresolved. These await reply, await classification, are overdue, or long overdue for a response.

How agencies behave

These publicly available FOI requests and their correspondence have given us all an opportunity to see first hand how agencies handle requests.

The evidence we present shows that there are big differences across agencies' handling of FOI requests. Some agencies handle requests professionally and courteously. Thank you to those agencies.

Some agencies show a **systemic culture of secrecy** and a disrespect for FOI requests at work; they're the ones gaming the system.

A systemic culture of secrecy

Australia has unbalanced laws about releasing information. The Government appears acutely aware of the risks associated with releasing information but much less aware of the risks of not releasing enough information. We have a system which severely punishes those public servants who release information which in it's view ought not be public, and consciously or not, systematically encourages and protects those who avoid publishing information they could easily share. Thus it becomes safer for every public servant to hold documents close, and release as little as possible by default. This all helps to create the culture of secrecy.

We're not surprised when we see agencies interpret FOI law to the most minute detail with the purpose of avoid releasing information to the public by default. They argue against the release of even mundane documents where the material is uncontentious or even publicly available in another form already. At the same time, obstructive agencies also display what might be wilful misinterpretation or incompetence in their failure or inability to give the documents requested.

Such responses show that there is a culture of working harder to refuse rather than share their documents, Whether due to failing inefficient old information storage and retrieval systems, fear or lack of leadership, they're acting in flat contradiction to their responsibilities under the [Freedom of Information Act 1982](#) (FOI Act).

Australia needs the OAIC

It is these agencies' behaviour which is most in need of ongoing guidance and training, and scrutiny.

Under this bill, important FOI functions would move from the OAIC to the The Attorney General's Department (AGD). They would be responsible for issuing guidelines in the Bill. However the AG's Department is not independent and it is clear that they are not modelling best practice in this area. The AGD along with other agencies routinely delay requests for documents made under FOI law [3]. Is this because the AGD sees FOI as responsibility of the legal department to defend against requests from citizen, and not as a service for citizens?

For accountability, citizens need access to a free merit review system administered by an effective Independent office. We already have that office, in the Office of the Australian Information Commissioner (OAIC).

Citizens Do Have a Right To Information and a right to review

Framing FOI as a legal problem, not a civic right is plain wrong. FOI decision makers and officers use the language of legal exemptions in interpreting the Act, rather than emphasise the need for openness and of 'maximum disclosure' made more explicit [in 2010 reforms to the FOI Act](#). [4]

Having learned all the standard tricks of the refusal trade, agencies have become very adept at refusing FOI requests as a matter of course. In doing this they are knowingly gaming the system. They know that on refusal a request will go to review, making more work for the OAIC. This puts pressure on genuinely difficult to assess requests, which leaves the OAIC overwhelmed and very under resourced. Practically speaking it is their safest and (pending a review) cheapest course of action, and so we are not surprised when they do it as a first response. This tactic is also used to avoid answering time sensitive questions, so that by the time they are answered the issues raised are less relevant to public discussion.

In an [interview](#) in February of this year John McMillan, the Information Commissioner said I'm not going to name individual cases, but I have a great concern that agencies will say, 'Let's just deny it. The person can appeal to the OIC, it may take them a year or two to get around to it,' in which case the sensitivity will go out of the issue... I accept that that happens at the moment. So there is gaming of the system going on.[5]

Before [RightToKnow.org.au](#) came along, the only people who knew about these tactics were 'insiders', many of whom who take this situation for granted. Now everyone can see what they are up to. See Appendix A

Keep Freedom Of Information Free

To give ordinary users of FOI access recourse when their requests are denied, refused or avoided, then FOI law gives the a right of appeal to an independent office. An external review

system which is accessible, free, and appropriately resourced to enable independent and timely assessment of whether the citizen's rights of access were upheld is essential.

The current system is a long way from perfect, but the suggested changes in the [Freedom of Information Amendment \(New Arrangements\) Bill 2014](#) would be a step backwards for transparency and would not serve the public interest.

Don't charge people for a review

The proposed \$861 charge levied on people seeking a review acts only as a barrier to entry for ordinary people who still want answers when a government agency denies or obstructs their request. People will stop asking for a review and the public interest will be undermined.

If the OAIC is abolished, agencies routinely refusing requests know it will go on unchecked, and as a result, far fewer cases will be investigated. In the end, fewer people will trust the FOI system and fewer requests will be made. Determinations will lead straight to a costly review process needing expensive legal assistance. That would be a terrible outcome for FOI and for Australia's democratic health.

There are those who do wish to go straight to the Administrative Appeals Tribunal (AAT), including media reporters following a time critical story. Their commercial interests and others argue for an alternative route to justice, one they are happy to pay for, but we should not make ordinary people pay for a process which does not best serve them.

Let's keep the OAIC.

About RightToKnow.org.au

Right To Know aims to make it easier for everyone to make Freedom of Information requests in a few different ways.

- Helping you make your successful request is the main focus of the site
- Bringing all the authorities together saves time, you don't have to trawl the web for the right authority first
- To make the process easier to understand, it uses plain english
- To get a feeling for the scope, wording of successful requests, it offers you dynamic search for related requests so you can see how others have done it
- Clearly communicates your rights of access
- Guidance appears as and when you need it to keep the request flowing through Right to Know and the Public Authority to whom your request is being made

RightToKnow does not provide help for individuals accessing private or personal information held by government.

About OpenAustralia Foundation

The OpenAustralia Foundation encourages and enables people to participate directly in the political process on a local, community and national level. We believe that we can help to reinvigorate Australia's civic culture by using powerful and exciting new technologies to inform and empower people, to address the growing disconnect between the Government and the people who elect it.

We currently do this through our five online projects TheyVoteForYou.org.au, RightToKnow.org.au, OpenAustralia.org, PlanningAlerts.org.au and ElectionLeaflets.org.au. These websites aim at finding better ways of making government, the public sector and political information freely and easily available and usable by all Australians. We aim to inform people so they can make a positive difference.

The OpenAustralia Foundation is a strictly non-partisan organisation. We are not affiliated with any political party. We are simply passionate about making our democracy work.

Notes and References

*Not included here or at RightToKnow.org.au one or two requests which were hidden from the website because they contained inappropriately personal requests for information (not what the site is for). This is made clear on the site's help page.

[1] Right to Information Index: <http://right2info.org/access-to-information-laws>

[2] http://www.rti-rating.org/country_data.php

[3] https://www.righttoknow.org.au/request/latest_document_summarising_curr

[4] overview of reforms to the FOI Act from 1982 - 2010

<http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-1-introduction-to-the-freedom-of-information-act-1982>

[5] interview with John McMillan in The Guardian

<http://www.theguardian.com/world/2014/feb/03/intelligence-agencies-foi-laws>

Appendix A: 16,832 page submission includes the main body of request emails, correspondence and decision letters made to RightToKnow.org.au between Oct 16th 2012 and Oct 31 2014. OAF has not included all of the documents released under FOI in this submission. All documents released are publicly available at RightToKnow.org.au