Australian Government
Attorney-General's Department

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Attorney-General's Department submission

Senate Legal and Constitutional Affairs Legislation Committee inquiry — Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

The Attorney-General's Department (the department) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee as part of the Committee's inquiry into the Freedom of Information (Improving Access and Transparency) Bill 2018 (the Bill).

Background

The department has portfolio responsibility for the *Freedom of Information Act 1982* (FOI Act), the *Archives Act 1983* (Archives Act) and the *Australian Information Commissioner Act 2010* (AIC Act), which the Bill would amend. The amendments relate primarily to the exercise of freedom of information (FOI) functions under the FOI Act and the AIC Act and the position of FOI Commissioner as established under the AIC Act.

The FOI framework is intended to promote the disclosure of information held by government and increase scrutiny of government activity. The FOI Act recognises that this is balanced against the need to protect sensitive and confidential information, and provides exemptions for national security and intelligence agencies, as well as for the protection of essential public interests and the privacy of individual persons. The Office of the Australian Information Commissioner (OAIC) is the FOI regulator.

Item 1

This item would insert section 55B into the Archives Act. The proposed section would mandate that the National Archives of Australia (the Archives) must include in its annual report numbers of applications made to the Archives for access to records in which external legal expenses have been incurred, and provide the particulars of those expenses.

The Archives' external legal expenditure is already reported publicly on the Archives' website in an aggregated form. This is done in compliance with the obligation under paragraph 11.1(ba) of the *Legal Services Directions 2017* (LSDs). Guidance Note 8 on the LSDs notes that there is no required form for

publication of this aggregated information, but that agencies usually publish this information via their website or in their annual report.

The department's view is that the existing reporting obligations under the LSDs already adequately achieve the purpose Item 1 is intended to achieve. The department would also have concerns about imposing a new reporting obligation applying specifically to the Archives that is inconsistent with whole-of-government arrangements that apply under the LSDs.

Items 2 and 3

Item 2 would amend the AIC Act to provide that the Information Commissioner must not review FOI decisions unless the Commissioner holds legal qualifications. Under the FOI Act, applications for review of 'IC reviewable decisions' may be made to the Information Commissioner. IC reviewable decisions are decisions which grant or refuse access to information under the FOI Act.

Item 3 would amend the AIC Act to clarify that the Privacy Commissioner may perform freedom of information functions but that they may not review FOI decisions without holding legal qualifications. Under the AIC Act, the Freedom of Information Commissioner must hold legal qualifications, and both the Information Commissioner and the Privacy Commissioner are permitted to perform freedom of information functions. The effect of the proposed provision would be to require that any Information Commissioner review (IC review) be undertaken by a person with legal qualifications.

IC reviews are intended to be a 'simple, practical and cost efficient method of external merit review'. This is consistent with the objects of the FOI Act which is to facilitate public access to information promptly and at the lowest reasonable cost. Requiring the reviewer to have legal qualifications does not align with the informality intended in the review process. Furthermore, the effective operation of the OAIC should not be dependent on a statutory officer holding legal qualifications, as that capability should be resident within the staff of that office as it is with every other agency.

Practical experience has also demonstrated that legal qualifications are unnecessary to the exercise the FOI review function by the Information or Privacy Commissioner. In particular, Mr Timothy Pilgrim PSM served as Privacy Commissioner from the OAIC's establishment in 2010 until his retirement in March 2018, and served in the dual role of Information and Privacy Commissioner from October 2016, without having legal qualifications. During that time Mr Pilgrim exercised the FOI functions and made a large number of IC review decisions. There is no evidence that a lack of legal qualifications hindered Mr Pilgrim's effectiveness in making these decisions.

The department would also have practical concerns if the Information Commissioner, as agency head of the OAIC, would only be able to perform one of the key functions of the OAIC (that is, the FOI review function) based on qualifications which, as Mr Pilgrim's tenure demonstrated, are not essential to the role.

Finally, the review process built into the FOI Act ensures that final decisions in FOI review decisions are not made by the Information Commissioner, and leaves recourse to legal review where the merits of the case allow. The AIC Act provides for the review of IC review decisions to the Administrative Appeals Tribunal (AAT) for merits review or to the Federal Court of Australia on a question of law.

Items 4, 5 and 6

Item 4 would amend section 14 of the AIC Act to provide that the same person must not simultaneously hold more than one of the Information Commissioner, Privacy Commissioner and Freedom of Information Commissioner roles, including in an acting appointment. It would also provide that any vacancy in one of the roles must be filled within three months.

The department considers that these amendments are unnecessary. The OAIC has been operating efficiently with a single person undertaking the role of the Information Commissioner and Privacy Commissioner, whilst ensuring that FOI functions are fulfilled, since July 2015. Mr Pilgrim retired on 24 March 2018, and since then Ms Angelene Falk has performed both roles, including being substantively appointed to the positions for three years beginning on 16 August 2018.

Practical experience demonstrates that this model continues to ensure that the objectives of the FOI Act are being effectively met, without the need for a separate FOI Commissioner. As stated in the OAIC's Annual Reports, in 2015-16, the OAIC finalised 454 IC review decisions and finalised 87% of FOI review applications within 12 months of receipt. In 2016-2017, despite experiencing a 24% increase in IC review applications, the OAIC finalised 515 IC review decisions (13% more than in 2015-16) and finalised 86% of applications within 12 months of receipt.

The department considers that at present the OAIC is operating properly and efficiently under the one-Commissioner model, and is confident that Ms Falk is capable of continuing to manage these responsibilities effectively. The changes proposed by this Bill are unnecessary to the successful functioning of the OAIC.

Item 8

This item would alter the requirements in existing FOI Act section 11C about maintaining an FOI 'disclosure log' listing information released in response to FOI access requests. The proposed replacement subsection 11C(6) of the FOI Act would require the relevant agency or Minister to list information released in response to FOI access requests in the period between 10 to 14 working days after the applicant is given access. Presently, FOI Act subsection 11C(6) requires that the publication must occur within 10 working days after the applicant is given access to the information.

The Explanatory Memorandum for the Bill outlines that this provision is intended to address the practice of publicly releasing information provided to journalists under the FOI Act and thereby denying them 'any measure of exclusivity' to the information. As currently drafted, however, the provision would apply to information released to any FOI applicant, rather than just journalists. It would therefore result in information being released to the general public via FOI disclosure logs at a slower rate than the 10-day timeframe in current subsection 11(6), which would frustrate the policy objective of the FOI Act's disclosure log provisions of facilitating broader release of information released to FOI applicants (where appropriate).

It is also notable that nothing in the FOI Act prevents an agency or Minister from proactively releasing information, as long as no other legal restrictions prevent the release of the information. In that sense, the time restriction this provision would place on the publication of information on FOI disclosure logs is arguably contrary to the pro-disclosure outcomes the FOI Act is intended to achieve. If the provision is enacted, there could also be uncertainty about whether the provision prevents an agency or Minister from otherwise publicly releasing information that is subject to the provision before the 10-day minimum disclosure log publication timeframe has expired.

The *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act 1982 (FOI Guidelines), to which Ministers and agencies are required to have regard when processing FOI requests, already discuss 'same day' FOI disclosure log publication (i.e. within 24 hours of giving access to the FOI applicant). This includes specific discussion about how same day publication may adversely affect journalists (paragraph 14.27).

The department considers that dealing with these matters through the FOI Guidelines provides the appropriate degree of flexibility to ensure agencies and Ministers can consider disclosure log publication timing on a case-by-case basis. This will ensure that disclosure log publication timing decisions strike the right balance between the objectives of the FOI Act in promoting access to Government information with the particular interests of journalists or others in receiving exclusive access to documents.

Item 10

This item would insert the new subsection 29(5A) entitling a Senator or a Member of the House of Representatives to access documents under the FOI Act without charge, unless the work generated by the application involves charges totalling more than $1, 000.

The department's view is that the FOI Act already contains an appropriate mechanism to allow consideration of whether it is appropriate to charge a Senator or Member for access to documents under the FOI Act. Subsection 29(5) of the FOI Act provides that Ministers and agencies, in responding to an applicant who is contesting a charge for access, must take into account whether access to the document is in the general public interest in determining whether or not to reduce or to not impose a charge.

The FOI Guidelines already notes that the concept of the 'public interest' cannot be exhaustively defined when considering whether to impose a charge under the FOI Act. The FOI Guidelines do, however, include illustrative examples of when giving access may be in the public interest, including whether the document is to be used by Senator or Member in parliamentary or public debate (paragraph 4.83, dot point six).

Additionally, the FOI Act provides at present that the Information Commissioner can be asked, free of charge, to review an FOI charge which a minister or an agency proposes to impose.

This proposal also has scope to increase the burden on agencies as there is a practical risk that FOI applications will be progressed through Senators or Members to reduce costs to members of the public.

The purpose of facilitating public access to information under the FOI Act, promptly and at the lowest reasonable cost, must be balanced with the need to manage the demand for documents and to offset some of the costs incurred by ministers and agencies in FOI processing.

Item 11

This item would insert a new FOI Act section 55EA which prevents agencies or Ministers, in the course of making submissions or arguments to the Information Commissioner in the process of conducting FOI decision reviews, from making arguments based upon exemptions which were not relied upon in its internal decision making process.

This proposal is not consistent with the effective and efficient operation of the IC review framework. The FOI Act provides that the purpose of an IC review is to determine the correct or preferable decision in the circumstances, and allows the Information Commissioner to access all relevant material in making an

IC review decision. Accordingly, in undertaking an IC review the Information Commissioner can consider additional material or submissions not considered by the original decision maker, including relevant new material that has arisen since the decision was made. The existing review mechanisms ensure that there is opportunity for a fresh decision, by an independent decision-maker, to ensure consistency and transparency across all FOI decisions.

Agencies and ministers must also use their best efforts to help the Information Commissioner reach the correct and preferable decision. It is at odds with the objectives of the FOI Act to introduce a provision which will prevent agencies and ministers from advancing relevant information or arguments in the course of an IC review.

Item 12

This item would insert new FOI Act sections 55JA and 55JB. Section 55JA would require the Information Commissioner to notify an IC review applicant if it is likely that the review will take more than 120 days to complete. That notice must state that an application to transfer the Information Commissioner review application to the AAT may now be made under section 55JB. A matter transferred to the AAT in this way would not require an application fee to be paid to the AAT.

The proposed amendment may result in a *significant* increase to the workload of the AAT. The OAIC's recent performance has been discussed above, including that in 2016-17 the OAIC finalised 86% of IC review applications within 12 months (significantly longer than the proposed 120 days). In 2016-17, 44 applications for review of decisions of the Information Commissioner were lodged in the FOI Division of the AAT. An increase of 40 applications to the AAT would effectively double the workload of the FOI Division.

Any significant workload increase for the AAT resulting from the proposed amendments would adversely affect the AAT's ability to finalise matters. This in turn is likely to lead to longer finalisation timeframes and increased backlogs.

Additionally, the proposal to make transfers exempt from AAT applications is inconsistent with the AAT's current fee exemption reasons (for example, financial hardship or vulnerability). There is also scope for this provision to be abused by applicants seeking to avoid paying AAT application fees.

Presently, section 54W of the FOI Act provides that the Information Commissioner can refer matters to the AAT where the Information Commissioner is satisfied that the interests of the administration of the FOI Act would make it desirable for the AAT to review the matter. The FOI Guidelines (at paragraph 10.88) explain that circumstances where the Information Commissioner may decide to refer a matter to the AAT include where:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.

The department considers it is appropriate that the decision to refer a matter to the AAT continues to be made by the Information Commissioner, to ensure that the full range of matters linked to the administration of the FOI Act, such as those mentioned above, are taken into account.

Item 13

Item 13 would amend FOI Act section 57A to allow for a direct application from an applicant to the AAT to review of any IC, without first going through the Information Commissioner review process. Applicants would pay the usual fees associated with an AAT application.

This proposal would likely have similar consequences to those outlined under Item 12 in terms of increased costs and workload for the AAT.

Item 16

Item 16 inserts a new FOI Act section 93AA which requires that agencies report on external legal expenses relating to freedom of information requests. It requires that agencies' annual reports must list each request made under the FOI Act to access information in which external legal expenses have been incurred by the agency. The report must include the particulars of those external legal expenses in relation to each request.

This provision would unnecessary duplicate existing practices around FOI reporting. Agencies and Ministers already provide statistical information to the OAIC about legal expenditure under the FOI Act each year. The OAIC publishes this information at an aggregated whole-of-government level in its annual report, and also publishes the line-by-line data provided by each individual agency and Minister on the data.gov.au website.

The department considers that these arrangements, along with additional reporting obligations under the LSDs, already achieve the transparency in relation to government activities intended to be achieved through this provision. This proposal would simply create additional regulatory burdens on agencies and Ministers to achieve ends which are already achieved through current reporting arrangements.