



Australian Government

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

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Content

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The Hon Mark Dreyfus QC MP  
Attorney-General and Minister for Emergency Management  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

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

You will recall my raising the prospect of Australia joining the Open Government Partnership at our meeting to discuss progress with this Review on 9 April 2013. Your 22 May 2013 announcement that Australia would join the Open Government Partnership was welcome and in keeping with related improvements since 2008, including:

- passing and implementing significant FOI reforms, abolishing conclusive certificates and certain application fees, and creating the Office of the Australian Information Commissioner (OAIC) – initiatives which are at the core of this Review;
- establishing data.gov.au as the Government’s central public dataset repository;
- adopting Government 2.0 principles, providing the public with and encouraging excellence in accessible information; and
- creating guidance to foster accessibility such as the OAIC Principles on Open Public Sector Information and the National Archives guidance on Digital Recordkeeping.

Until this framework was put in place, open government tended to be thought of simply through the FOI prism; that was useful, but limited. Your announcement reflects the Government’s decision to champion open government and what that means.

In essence, the Review found the recent reforms to be working well and having had a favourable impact in accordance with their intent. It has engaged more senior people in the process and triggered a cultural change across the Australian Public Service, although there is still some way to go on this aspect. Further effort, driven from the top, will be required to embed a practice where compliance with the FOI Act is not simply perceived as a legal obligation, but becomes an essential part of open and transparent government.

Submissions and consultations have led to proposed improvements which are dealt with throughout the Report. Contemporaneously with this Review, I have overseen development of an FOI Better Practice Guide for departments, agencies and practitioners. The Guide will go up on your Department’s website, following approval to do so.

## **Good Reforms and Progress Made with the FOI Act**

The *Freedom of Information Act 1982* (the FOI Act) introduced the right for individuals to access information held by government agencies, including personal information.

Over the three decades since the FOI Act commenced there has been a transformational change in government agencies toward release of personal information. Access to personal information is now completely accepted, with many agencies providing information without the need to apply formally through the FOI Act.

The Department of Human Services (DHS) offers access to several types of documents outside the FOI Act through forms or immediately through online services. These include information about an individual or family's Medicare and Pharmaceutical Benefits Scheme claims, and personal information held by DHS.

The Department of Immigration and Citizenship (DIAC) encourages those wishing to access personal information to contact the department first because some documents, such as copies of application forms or correspondence with the individual, may be made available without the need to make an FOI request. DIAC allows access to personal International Movement Records over the counter at any of their Offices or by postal request.

## **Issues in Review Justify a More Comprehensive Review**

This Review considered 81 submissions that raised significant and complex issues about the effectiveness of the FOI laws. Many submissions referred to the complexity of the legislation and argued that a more comprehensive review is needed, especially to consider the impact of reforms beyond the two-year implementation phase considered by this Review.

In accordance with the Terms of Reference, the Review considered several important aspects of the reformed FOI regime. A number of matters warrant further examination, including those listed in Annex G and the conclusions and findings in this Report that have not been picked up in the 40 Recommendations. Therefore, a more extensive review ought to be commissioned by the Government to consider in detail the issues raised in this Report that require more analysis, and those issues that could not be given adequate consideration by the Review.

## **Long Existence and Piecemeal Reforms Require Fundamental Rewrite**

The FOI Act has been amended many times since 1982, including substantial changes made by the 2009 and 2010 FOI reforms. These changes, however, have been largely developed and inserted into the form and structure of the FOI Act as it was in 1982. While the recent reforms have significantly overhauled the FOI Act and the regulatory framework, I believe a complete rewrite of the FOI Act in plain language is now necessary, so that it is readily accessible and easily understood. This would be done in conjunction with the more comprehensive review referred to above.

May I take this opportunity to express my appreciation for the Review Secretariat who undertook much of the research and drafting of the Report. Any errors, omissions or oversights are my responsibility.

Yours sincerely

A handwritten signature in black ink that reads "Allan Hawke". The signature is written in a cursive, slightly slanted style.

Allan Hawke AC  
1 July 2013

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# Executive Summary

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This Review examined the *Freedom of Information Act 1982* (FOI Act) and *Australian Information Commissioner Act 2010* and the extent to which those Acts continue to provide an effective framework for access to government information. The Terms of Reference are at **Annex A**.

The FOI Act commenced on 1 December 1982. In 2009 and 2010, both the FOI Act and the processing and administrative framework were substantially amended by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*, *Freedom of Information Amendment (Reform) Act 2010*, *Australian Information Commissioner Act 2010*, and *Freedom of Information (Fees and Charges) Regulations 2010* (No. 1).

Submissions from 81 individuals, agencies, and organisations were considered (including confidential submissions) and consultations held with key stakeholders, including government agencies, academics, and public interest groups as part of this Review. Relevant reports by the Australian Law Reform Commission, Australian National Audit Office, Commonwealth Ombudsman, Office of the Australian Information Commissioner (OAIC), and the Senate Standing Committee on Legal and Constitutional Affairs were also taken into account. A list of submissions is at **Annex B**.

## Summary of Findings

The Review finds that the reforms have been operating as intended and have been generally well-received.

Many concerns in submissions raised issues not directly addressed by the 2009 and 2010 reform packages.

Administration of FOI represents a significant cost and resource commitment for the Australian Government and its agencies. A key challenge for agencies, and for the OAIC, is to adopt and maintain practices to process FOI requests effectively and efficiently within their resources.

Legislative and administrative changes to streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload both by agencies and the OAIC are recommended. The Review also recommends changes and adjustments to the operation of the exemptions, fees and charges, and coverage of specific agencies. In making these recommendations, the Review focussed on ensuring that the right of access to government information remains as comprehensive as possible.

There are exemptions for certain classes of documents and agencies. The Review believes that these are warranted despite their limiting effect on the release of government information. The most used exemption is the personal privacy exemption, being applied in 58% of cases where exemptions were used, or in 17.3% of FOI requests.

The deliberative processes exemption was applied in 1.5% of requests and the Cabinet documents exemption in 0.5% of requests. This suggests that the use of these two exemptions, contrary to some views, is at a very low level.

## **Guide to this Report**

Chapter One provides background, including previous reviews and reports on Australia's federal FOI and the scope of this Review. It outlines the reforms to the framework as well as a brief description of the FOI process.

Chapter Two discusses the OAIC and examines its structure and processes, including the Advisory Committees. Resourcing and suggestions to alleviate particular issues faced by the OAIC are explored.

Chapter Three addresses the background to and effectiveness of the new two-tier system of merits review. Specific suggestions for improvements made by submissions are considered.

Chapter Four explores reformulation of the FOI Act exemptions. It examines both the principles and practical reasons for and effect of the existing exemptions and the impact of abolishing conclusive certificates.

Chapter Five looks at the specific agencies covered by the FOI Act and those that are exempt. It examines application of the FOI Act to the Parliamentary Departments as well as considering whether the range of documents covered by exemptions makes agency exemptions necessary.

Chapter Six examines the effectiveness of the FOI fees and charges framework and the OAIC's recommendations in its FOI Charges Review.

Chapter Seven considers the FOI regulatory and administrative burden, including discussion of best practice initiatives and recommendations to enhance administration of the FOI Act at an agency level, including time limits and practical refusal mechanisms.

Chapter Eight sets out some conclusions.

## **Recommendations**

### **Chapter 1: Introduction**

#### **Recommendation 1 – Further Comprehensive Review**

- 1(a)** The Review recommends that a comprehensive review of the FOI Act be undertaken.
- 1(b)** This review might also consider interaction of the FOI Act with the *Archives Act 1983*, *Privacy Act 1988* and other related legislation.

### **Chapter 2: Office of the Australian Information Commissioner (OAIC)**

#### **Recommendation 2 – Online Status of FOI Reviews and Complaints**

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.

### **Chapter 3: Effectiveness of the New Two-Tier System of Review**

#### **Recommendation 3 – Delegation of Functions and Powers**

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.

#### **Recommendation 4 – Power to Remit Matters to Decision-maker for Further Consideration**

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.

#### **Recommendation 5 – Resolution of Applications by Agreement**

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.

#### **Recommendation 6 – Third Party Review Rights**

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.

#### **Recommendation 7 – Extensions of Time**

The Review recommends the FOI Act be amended to:

- remove the requirement to notify the OAIC of extensions of time by agreement; and
- 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.

#### **Recommendation 8 – Agreement to Extension of Time Beyond 30 Days**

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.

#### **Recommendation 9 – Extension of Time for Consultation on Cabinet-related Material**

**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.

**9(b)** The Cabinet Handbook should be revised to accord with this recommendation.

#### **Recommendation 10 – Two-Tier External Review**

The Review recommends that the two-tier external review model be re-examined as part of the comprehensive review of the FOI Act.

## **Chapter 4: Reformulation of the FOI Act Exemptions**

### **Recommendation 11 – Law Enforcement and Public Safety**

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.

### **Recommendation 12 – Cabinet Documents**

The Review recommends the exemption for Cabinet documents be clarified by including definitions of ‘consideration’ and ‘draft of a document’.

### **Recommendation 13 – Ministerial Briefings**

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.

### **Recommendation 14 – Information as to Existence of Documents**

The Review recommends that section 25 of the FOI Act be amended to cover the Cabinet exemption.

## **Chapter 5: Consideration of Specific Agencies Covered by the FOI Act**

### **Recommendation 15 – Parliamentary Departments**

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.

### **Recommendation 16 – Exclusion of Australian Crime Commission from the FOI Act**

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.

### **Recommendation 17 – Review of Agencies Listed in Part I of Schedule 2 to the FOI Act**

**17(a)** 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.

**17(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.

**17(c)** The Attorney-General should also consider whether there is a need to include any other agencies in Schedule 2.

### **Recommendation 18 – Criteria for Assessment of Agencies Exempt in Respect of Particular Documents**

The Review recommends the FOI Act contain criteria for assessment of agencies which are exempt from the FOI Act in respect of particular documents.

### **Recommendation 19 – Review of Agencies Listed in Part II of Schedule 2 to the FOI Act**

- 19(a)** 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.
- 19(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.
- 19(c)** The Attorney-General should also consider whether there is a need to include any other agencies in Part II of Schedule 2.

### **Recommendation 20 – Review of Agencies Listed in Schedule 1 to the FOI Act**

- 20(a)** The Review recommends Schedule 1 to the FOI Act be amended to repeal the bodies listed, as they no longer exist.
- 20(b)** The Attorney-General should also consider whether there is a need to include any tribunals, authorities or bodies in Schedule 1.

## **Chapter 6: Fees and Charges**

### **Recommendation 21 – Administrative Access Schemes**

- 21(a)** The Review recommends the OAIC consider the development of appropriate guidance and assistance to encourage agencies to develop administrative access schemes.
- 21(b)** 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.

### **Recommendation 22 – FOI Processing Charges**

- 22(a)** 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 a flat rate of \$50. The charge for each hour of processing time after the first ten hours should be \$30 per hour.
- 22(b)** The current provisions for no processing charges for access to an applicant's personal information and for waiver of charges should continue to apply.

### **Recommendation 23 – FOI Access Charges**

- 23(a)** 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.
- 23(b)** The current provisions for no charges for access to an applicant's personal information and for waiver of charges should continue to apply.

### **Recommendation 24 – Ceiling on Processing Time for FOI requests**

The Review recommends introduction of a 40 hour processing time ceiling for FOI requests.

### **Recommendation 25 – Reduction and Waiver of FOI Charges**

**25(a)** 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.

**25(b)** 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.

### **Recommendation 26 – Reduction Beyond Statutory Timeframe**

**26(a)** 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.

**26(b)** No charge should be payable if the delay is longer than 30 working days.

### **Recommendation 27 – Application Fees for Information Commissioner Review for Review of Access to Non-personal Information**

**27(a)** 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.

**27(b)** If proceedings terminate in a matter favourable to the applicant, a \$300 refund would apply. There would be no refund of the reduced fee.

**27(c)** No fee would apply for an Information Commissioner review of an access grant decision by an affected third party.

**27(d)** In all other cases, fees would be payable for Information Commissioner review of decisions for access to non-personal information.

**27(e)** There would be no remission of the fee where an applicant has first sought internal review or where internal review is not available.

### **Recommendation 28 – Indexation of Fees and Charges**

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.

### **Recommendation 29 – Timeframes for Applicants to Respond to Agency Decisions**

**29(a)** 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.

**29(b)** 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.

## **Chapter 7: Minimising Regulatory Burden on Agencies**

### **Recommendation 30 – Practical Refusal Mechanism**

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.

### **Recommendation 31 – Time Periods in the FOI Act to be Specified in *Working Days***

**31(a)** 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.

**31(b)** 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.

### **Recommendation 32 – Repeat or Vexatious Requests**

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.

### **Recommendation 33 – Anonymous Requests**

**33(a)** The Review recommends the FOI Act be amended so that an FOI request cannot be made anonymously or under a pseudonym.

**33(b)** It should be necessary for an applicant to provide an address in Australia.

### **Recommendation 34 – Inspector-General of Intelligence and Security**

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.

### **Recommendation 35 – Amendment of Personal Records and the Archives Act**

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*.

### **Recommendation 36 – Single Website for all Disclosure Logs**

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.

### **Recommendation 37 – Minimum Timeframe for Publication of Disclosure Log**

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.

**Recommendation 38 – Copyright**

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.

**Recommendation 39 – Suspension of FOI Processing During Litigation**

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.

**Recommendation 40 – Backup Tapes**

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.

# Chapter 1: Introduction

## Background to the Freedom of Information Reforms

Since its commencement on 1 December 1982, there have been a number of reports and reviews of the *Freedom of Information Act 1982* (FOI Act). Many have resulted in legislative amendments and improvements to the FOI regime, including:

- the Senate Standing Committee on Legal and Constitutional Affairs *Report on the operation and administration of the Freedom of Information Legislation* (1987);
- the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC), *Open government: A review of the federal Freedom of Information Act 1982* (ALRC 77) (1995);
- the Commonwealth Ombudsman, *'Needs to Know': Own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth agencies* (1999);
- the Australian National Audit Office, *Administration of Freedom of Information Requests* (2004); and
- the Commonwealth Ombudsman, *Scrutinising government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies* (2006).

As part of the 2007 election platform, the Australian Labor Party undertook to reform the FOI Act.<sup>1</sup> A key aspect of this reform was to restore trust and integrity in the use of Australian Government information and to promote greater openness in government.

## Outline of the FOI Reforms

The reform package for the Australian federal FOI regime was implemented with three separate pieces of legislation in 2009 and 2010. The reforms emphasised increased access to government information and proactive disclosure of information by agencies through the new Information Publication Scheme. These changes represent the most substantial reforms to Australia's federal FOI scheme since its commencement in 1982.

The first significant reform came with passage of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*. Commencing on 7 October 2009, this Act repealed the power to issue conclusive certificates for exemption claims under the FOI Act and the *Archives Act 1983*. Previously, conclusive certificates made documents covered by the certificate exempt for the duration of the certificate's validity. Abolishing conclusive certificates granted jurisdiction to the Administrative Appeals Tribunal (AAT) to undertake full merits review of any exemption claim brought before the AAT. This reduced the determinative powers of government in withholding documents from public disclosure, enabling independent review to occur throughout the FOI process. The amendments also

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<sup>1</sup> Australian Labor Party policy statement, *Government Information: Restoring Trust and Integrity* (2007).

introduced procedural measures to protect particularly sensitive information in the conduct of proceedings before the AAT, including against unnecessary disclosure.<sup>2</sup>

The next reforms involved the *Australian Information Commissioner Act 2010* (AIC Act) and *Freedom of Information Amendment (Reform) Act 2010* which were released for public comment as exposure draft Bills in March 2009 before being introduced in Parliament in November 2009. The Bills were passed in May 2010 and came into effect on 1 November 2010.

The AIC Act established the statutory body, the Office of the Australian Information Commission (OAIC), and introduced the statutory positions of Australian Information Commissioner and Freedom of Information Commissioner. The OAIC has a comprehensive range of powers and functions to provide independent oversight of privacy and FOI and to advance information policy and management across Australian Government agencies.

The inaugural Australian Information Commissioner, Professor John McMillan AO, was appointed on 1 November 2010. The Commissioner is supported by two statutory officers - the Privacy Commissioner and the Freedom of Information Commissioner.

Mr Timothy Pilgrim was appointed Privacy Commissioner for five years from 19 July 2010 and Dr James Popple was appointed FOI Commissioner for five years from 1 November 2010. The Act also made provision to establish an Information Advisory Committee.

The *Freedom of Information Amendment (Reform) Act 2010* amended the FOI Act on both a principled and procedural level. Under the amended FOI Act:

- an objects clause was introduced and a consistent public interest balancing test applied to conditional exemptions. Access to information requested under the FOI Act is to be granted unless there is an overriding reason not to do so;
- the Information Publication Scheme (IPS) expands the range of information an agency is required to publish on their websites. The IPS invites agencies to publish proactively as much information, as practicable, of public interest;
- agencies are required to take contractual measures from 1 November 2010 to ensure that documents held by certain contractors or sub-contractors are received by the agency when subject to an FOI request; and
- agencies are required to maintain a disclosure log where information in response to an FOI request is published.

Changes were also made to the FOI Act's fees and charges regime by the *Freedom of Information (Fees and Charges) Amendment Regulations 2010 (No. 1)* which also began on 1 November 2010.

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<sup>2</sup> This measure is discussed further in Chapter 7 in the section dealing with the Inspector-General of Intelligence and Security.

These reforms:

- abolished application fees for FOI requests and internal reviews;
- removed all charges for access to an applicant's personal information;
- allowed all non-personal applications to receive the first five hours of decision-making time free of charge; and
- established that charges are not payable by the applicant where an agency or minister fails to notify a decision within a period prescribed by the FOI Act.

The *Archives Act 1983* was also amended as part of this legislative reform package. The open access period, which defines the age when most government information is released to the public, was reduced from 30 to 20 years; and from 50 to 30 years for Cabinet documents. This change is being phased in over a ten-year period that commenced on 1 January 2011. All Australian Government agencies, including security and intelligence agencies that are excluded from the operation of the FOI Act, fall under the Archives Act.

## **Scope and Process of this Review**

This Review of the FOI Act and AIC Act commenced on 1 November 2012, as statutorily required by the respective Acts, exactly two years after major reforms to FOI legislation commenced. The Review's Terms of Reference are at Annex A.

Submissions were invited on the Terms of Reference and 81 were received from a range of stakeholders including agencies, the parliamentary departments, media organisations, interest groups, FOI advocates and individuals (including confidential and supplementary submissions). The submissions cover a range of issues dealt with in this Report, from broad policy to agency-specific. A list of submissions is at Annex B.

Some submissions made broad-ranging suggestions for reform and improvements, including technical amendments to the legislation, which were not able to be considered in detail by this Review. Accordingly, a more comprehensive review is required to consider in detail the issues raised by this Report that need more analysis and those issues that were not able to be considered in detail in the timeframe of this Review. (See Recommendation 1 and the associated discussion at page 16).

## **Outline of the FOI Process**

The FOI Act gives everyone a legally enforceable right to obtain information from the government, an agency or minister, whether it is information about themselves or information about government policy or operational matters. An applicant does not need to provide any reasons for seeking access to such information.

Once an FOI request is made the agency must comply with the formal processes under the FOI Act to make their decision. The FOI Act also provides rights to seek review of an agency's or minister's decision, if the applicant disagrees with the decision.

To make an FOI request the applicant must:

- make the request in writing (many agencies have forms on their websites);
- state that it is an application for the purposes of the FOI Act;
- provide information about the document(s) requested, to help the agency or minister identify them;
- give details about how notices can be sent to the applicant (this can include an email address); and
- send the request to the agency or minister by either posting or delivering it to the address specified in the telephone directory, or sending it to the email or fax address.

There is no application fee for making an FOI request or for processing a request for an individual's personal information. However, there may be charges for processing a request for other types of information.

Decisions on granting or refusing access to documents must be made by the responsible minister or principal officer of an agency, or a person who is authorised to make such decisions. This is a matter determined by each agency and minister.

A document that is requested must be disclosed unless:

- the document or information it contains originated in an agency that the FOI Act does not cover;
- the document is 'exempt' (for example, a Cabinet document); or
- the document is 'conditionally exempt' and release at the time is not in the public interest (for example, a document whose release could prejudice an agency examination or test).

The agency or minister must take all reasonable steps to notify the applicant of their decision within 30 days of receiving the request.

If an applicant disagrees with the agency's decision, they may ask the agency to undertake an internal review.

Alternatively, the applicant may ask the Information Commissioner (IC) to review the decision without going through the internal review process. The IC can also review an internal review decision. Further merits review of FOI Act decisions can also be undertaken by the AAT. Questions of law regarding FOI Act decisions may be appealed to the Federal Court, and, by special leave, to the High Court.

## **Process Guidance**

Processing FOI requests and review of decisions under the FOI Act represents a complex and demanding task for government. It is desirable that adequate assistance be provided to ensure that agencies and ministers are able to implement best practice processes that progress the goal of open government. The OAIC publishes comprehensive guidelines and resources for agencies and applicants to assist in managing the process under the FOI regime.

The FOI Act's objects should always guide administration of the FOI scheme. Agencies and ministers should consider these central principles underpinning the right to access documents held by government, including the following:

- the functions and powers given by the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4));
- a person's reasons for seeking access to a document, or an agency or minister's belief about a person's reasons for access, are not relevant (s 11(2)); and
- the Act does not limit any power to give access to information under other legislative or administrative schemes (s 3A(2)).

The Review recognises differences in practice across various government agencies due to agency size, experience with FOI, resource availability, and number of applications received. However, all agencies must take reasonable steps to assist applicants in making a request that complies with the formal requirements of the FOI Act (s 15(3)). While the FOI Act places an obligation only on agencies, the IC also suggests ministers' offices adopt a similar approach to assisting applicants.

Agencies and ministers offices should also be flexible in their approach to analysing and refining requests. Where a request lacks sufficient information to enable the documents to be identified, an agency or minister's office should contact the applicant. Minor errors or lack of detail should rarely require another separate or formal application to be made.

To these ends, contemporaneously with this Review, an FOI Better Practice Guide has been developed for departments, agencies and practitioners. It is publicly available on the Attorney-General's Department website at [www.ag.gov.au](http://www.ag.gov.au). The Attorney-General's Department should be the guardian for this Guide and explore with the Department of the Prime Minister and Cabinet the inclusion of a self-contained section in the Guide dealing with Cabinet documents and related material.

Prior to a formal request being received, it is appropriate for staff to explain the agency's functions and type of information that is held. If the request relates to information that the agency or minister's office has already published in its disclosure log or as part of an agency Information Publication Scheme, the person should be advised where to find the information.

Agencies and ministers' offices should maintain open contact with the applicant and provide regular updates on progress of the request, particularly if consultation is required. It is important to keep good records of contact with applicants, such as file notes of conversations, to demonstrate the agency has taken reasonable steps in accordance with section 15(3) of the FOI Act.

The issues surrounding processing FOI requests are addressed further under Chapter Seven which deals with minimising the regulatory and administrative burden on agencies.

## **Further Comprehensive Review**

Submissions to this Review have indicated the difficulty in interpreting the FOI Act due to its complexity. While some have recommended amendment to particular provisions, in general the Review considers that the reforms are operating well.

Given the range of issues raised by submissions, the passage of over 30 years since the FOI Act was first enacted and the legislative amendments since then, it is recommended that the ALRC, or other appropriate body, be tasked with a comprehensive review of the FOI Act. Consideration should also be given to a complete rewrite of the Act to make it clearer and easier to understand. This would ensure a new FOI Act was couched in modern legislative drafting terms and enable a more thorough examination of issues that could not be given adequate consideration by this Review. Alternatively, given the timing of this Report, an incoming government might choose to use it as a Green Paper and commission another reviewer to seek and assess comments and provide guidance on the way ahead.

### **Recommendation 1 – Further Comprehensive Review**

- 1(a)** The Review recommends that a comprehensive review of the FOI Act be undertaken.
- 1(b)** This review might also consider interaction of the FOI Act with the *Archives Act 1983*, *Privacy Act 1988* and other related legislation.

# Chapter 2: Office of the Australian Information Commissioner

## Structure

The Office of the Australian Information Commissioner (OAIC) is an independent statutory agency headed by the Australian Information Commissioner who is supported by two other statutory officers - the FOI Commissioner and Privacy Commissioner.

The OAIC, established by the *Australian Information Commissioner Act 2010* (AIC Act), commenced operation on 1 November 2010. The former Office of the Privacy Commissioner was integrated into the OAIC on the same day.

The OAIC brings together the independent oversight of privacy protection and freedom of information in one agency to advance development of consistent workable information policy across all Australian Government agencies.

The OAIC Commissioners share two broad functions:

- the *FOI functions*, set out in section 8 of the AIC Act, which include:
  - to promote awareness and understanding of the FOI Act;
  - assist agencies to publish information in accordance with the information publication scheme;
  - provide information, advice, assistance and training to any person or agency on matters relevant to the operation of the FOI Act;
  - issue guidelines under section 93A of the FOI Act;
  - make reports and recommendations to the Minister about proposals for legislative change to the FOI Act and administrative action in relation to the FOI Act's operation;
  - monitor, investigate and report on compliance by agencies with the FOI Act;
  - review FOI decisions under Part VII of the FOI Act;
  - undertake investigations under Part VIIB of the FOI Act; and
  - collect FOI information and statistics from agencies and ministers to include in the annual report on the operations of the OAIC; and
- the *privacy functions*, set out in section 9 of the AIC Act (to protect the privacy of individuals in accordance with the *Privacy Act 1988* and other legislation).

The Information Commissioner also has the *information commissioner functions*, set out in section 7 of the AIC Act. They involve reporting to the Minister on matters relating to the Commonwealth's policy and practice in the management and administration of government-held information.

Any Commissioner can exercise both the FOI and privacy functions of the OAIC. The Information Commissioner (IC) alone discharges the *information commissioner functions*.

Establishment of the OAIC marked a new era in FOI administration. Previously, the disparate FOI responsibilities of independent review of agency decisions, complaint investigation, publication of FOI guidelines, FOI training, preparation of an annual report on the operation of the FOI Act and monitoring of the FOI Act's operations had been undertaken by either the minister responsible for the FOI Act or a range of agencies (including the Administrative Appeals Tribunal (AAT), Attorney-General's Department, Australian Government Solicitor, and Commonwealth Ombudsman). As a result of the FOI reforms, for the first time, these functions were brought together within one agency - the OAIC.

The OAIC's FOI and information management activities include:

- complaint investigation;
- Information Commissioner reviews (IC reviews);
- managing extensions of time;
- audits;
- surveys;
- publication of FOI guidelines and fact sheets;
- the Information Advisory Committee;
- administration of the Information Contact Officer Network (ICON);
- discussion groups;
- training sessions;
- presentations to forums inside and outside government; and
- general promotion of open government.<sup>3</sup>

More generally, the OAIC also has a role to provide advice to government, agencies and the general public about the operation of the FOI Act.

The OAIC's submission summarises the key aspects of its role as:

Taken together, these functions cast the OAIC in the roles of regulator, decision maker, adviser, researcher and educator. They require the OAIC to provide guidance and assistance to government, the private sector and the community, while monitoring and regulating compliance with the privacy and information laws that the OAIC administers. The combination of the OAIC's three functions represents a new model for promoting open government and for resolving disagreements between the public and agencies.<sup>4</sup>

The OAIC submits that inclusion of privacy and FOI in a single agency has enabled it to develop a more comprehensive understanding of these issues; and at a practical level, it has

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<sup>3</sup> OAIC, *Submission*, para 54.

<sup>4</sup> OAIC, *Submission*, para 53.

also enabled the Privacy Commissioner to make decisions in a number of privacy-related IC reviews. The OAIC notes that the synergies of the pro-disclosure aspects of the FOI and information policy functions has led to the development of cohesive advice about how agencies should administer their FOI obligations in a way that maximises the amount of government information available for public access and re-use.<sup>5</sup>

Some submissions refer to difficulties raised by potential conflict of interest issues in the OAIC's wide-ranging functions (for example, in simultaneously being the FOI regulator, FOI 'champion' and in advising agencies on matters relating to processing FOI requests).<sup>6</sup>

The Review agrees with the OAIC that the combination of its functions provides a logical basis for an integrated scheme for information management and policy.<sup>7</sup>

Outside its FOI functions, major amendments to the *Privacy Act 1988* contained in the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* will further broaden the regulatory role of the OAIC in relation to privacy.<sup>8</sup>

## Processes

The OAIC has offices in Sydney and Canberra and has three branches, each of which works across the OAIC's three functional areas - freedom of information, privacy and information policy:

- **Dispute Resolution** - is responsible for case management and carries out investigations in relation to compliance with the Privacy Act and the FOI Act;
- **Regulation and Strategy** - provides advice and guidance about the Privacy Act and the FOI Act, examines and drafts submissions on proposed legislation, conducts audits, and comments on inquiries and proposals that may have an impact on privacy, FOI and government information policy; and
- **Corporate Support and Communications** - supports the OAIC with corporate, communications, legal, public affairs and website management services, and plays a key role in raising awareness about privacy and FOI rights and responsibilities.<sup>9</sup>

## Advisory Committees

Two advisory committees provide advice to the IC - the Privacy Advisory Committee and the Information Advisory Committee.

### Privacy Advisory Committee

The Privacy Advisory Committee (PAC) provides strategic advice on privacy from a broad range of perspectives to the IC.

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<sup>5</sup> OAIC, *Submission*, para 70.

<sup>6</sup> See for example, submissions from the Department of Finance and Deregulation; Department of Foreign Affairs and Trade; and Department of Immigration and Citizenship.

<sup>7</sup> OAIC, *Submission*, para 55.

<sup>8</sup> OAIC, *Submission*, para 64.

<sup>9</sup> See OAIC website: <http://www.oaic.gov.au/about-us/who-we-are/our-structure/> (viewed on 17 June 2013).

The PAC, which was established under section 82 of the Privacy Act, is convened by the IC. All members except the Commissioner are appointed by the Governor-General. The PAC currently consists of no more than six members, who hold office for up to five years. Membership comprises a range of community interest groups and must include representatives with experience in industry, commerce or government, trade unions, electronic data processing, social welfare and the promotion of civil liberties.

The Review notes that the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* expanded the number of members of the PAC to eight and made other amendments to membership requirements.

PAC's strategic advisory role based on the functions set out in Part VII of the Privacy Act is to:

- advise the IC on privacy issues, and the protection of personal information;
- provide strategic input to key projects undertaken by the IC;
- foster collaborative partnerships between key stakeholders to further promote the protection of individual privacy;
- promote the value of privacy to the Australian community, business and government; and
- support office accountability to external stakeholders.<sup>10</sup>

### **Information Advisory Committee**

The Information Advisory Committee's (IAC) role is to assist and advise the IC in matters relating to the performance of the *information commissioner functions*, which are defined in section 7 of the AIC Act.

The AIC Act provides for appointment of the IAC. The Chair of the IAC is the IC. In addition to the IC, there are currently 12 members of the IAC, who have a broad range of backgrounds and current positions, including in government, the private sector, public interest groups, education and indigenous affairs.<sup>11</sup> Although the IAC advises the IC, it does not advise the Australian Government directly.

The OAIC's submission recommends that the PAC and IAC be merged to allow administrative savings in running both committees,<sup>12</sup> noting that the cost of hosting IAC meetings has proven to be unexpectedly high. The OAIC acknowledges that consideration would need to be given to the composition of any joint committee to ensure fair

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<sup>10</sup> Information about the Privacy Advisory Committee is available on the OAIC website: see <http://www.oaic.gov.au/about-us/working-with-others/privacy-advisory-committee> (viewed on 16 June 2013).

<sup>11</sup> Information about the Information Advisory Committee is available on the OAIC website: see <http://oaic.gov.au/about-us/working-with-others/information-advisory-committee> (viewed on 16 June 2013).

<sup>12</sup> OAIC, *Submission*, paras 68-69.

representation of privacy and information policy interests as well as both the private and public sectors.

The Review notes that IAC members are not entitled to receive any remuneration or sitting fees. The OAIC meets expenses incurred by members attending IAC meetings and provides an appropriate allowance where overnight travel is required. It is at the discretion of the OAIC how many times the IAC meets - there is no requirement in the AIC Act for the IAC to have regular meetings, nor is there a legislated process for how the meetings are conducted (for example, whether in person or by teleconference, which should be explored).

The Review considers that the differences in scope and membership requirements between the two committees are significant and far-reaching. The PAC is a specialist committee to advise the IC on privacy issues. There is a risk that a merger of the committees would result in a diminution of the privacy advice function. Accordingly, the Review does not agree that the PAC and IAC should be merged.

## **Resourcing Issues**

The Government provided additional resources in the 2009-10 Budget to establish and run the OAIC. The total funding provided (before the application of the additional efficiency dividend) was \$48 million over four years. This comprised funding for the Office of the Privacy Commissioner (\$28.9 million over four years) plus additional resources for creation of the OAIC (\$19 million over four years). In 2013-14 the OAIC's forecast revenue from government is \$13.4 million.<sup>13</sup>

In addition to direct appropriation from government, the OAIC receives funds from a number of agencies for the provision of privacy advice and related services, including Centrelink, the Department of Human Services and the Australian Customs and Border Protection Service. This funding is provided under Memorandums of Understanding (MOUs) and other arrangements made directly between the OAIC and the relevant agency. In previous years it has been approximately \$0.9 million per year and is included in the \$48 million total above. This amount has increased to \$2.8 million in 2013-14 due to additional funds received from the Department of Health and Ageing for privacy oversight initiatives.

The Review notes the resourcing challenges for agencies arising from the additional efficiency dividend of 2.5% in the 2012-13 financial year over and above the existing efficiency dividend of 1.5%.

In announcing the additional efficiency dividend, the Minister for Finance and Deregulation exempted five tribunals from the measure, including the AAT.<sup>14</sup> The OAIC believes that as it has taken over principal responsibility for external merit review of FOI decisions, a role previously undertaken by the AAT, it should be treated in the same way in regards to the

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<sup>13</sup> See *Portfolio Budget Statements 2013-14, Attorney-General's Portfolio*, Table 1.1 page 376. This comprises \$10.624 million departmental appropriation + \$2.75 million from other agencies under MOUs.

<sup>14</sup> See media release by Minister for Finance and Deregulation (29 November 2011), *Driving Efficiency Savings Within Government*.

additional efficiency dividend and exempted from any similar future measures in the same way as AAT and the other tribunals.<sup>15</sup>

The Review agrees that realisation of effective open government leadership and oversight requires appropriate investment and resourcing. However, the Review notes that unlike the other tribunals exempted from the efficiency dividend, the OAIC does not solely deal with merits review of FOI decisions but has a range of other regulatory, education and policy functions. The Review considers that the OAIC is more analogous to other bodies which are not exempt from the efficiency dividend, such as the Australian Human Rights Commission.

The Review also notes that the OAIC was funded in accordance with normal government funding protocols for the establishment of its new FOI functions. The OAIC has been the subject of additional efficiency dividend requirements imposed across the Commonwealth public sector. It has not been the subject of any budget cuts aimed solely at the OAIC. As with all Government agencies, the Government considers the OAIC's funding requirements in the context of the current fiscal environment against competing claims.

The OAIC is required to put in place measures to determine its priorities and manage its workload within the funding envelope provided by the Government of the day.

On 2 February 2012, the IC wrote to the Secretary of the Attorney-General's Department and the Secretary of the Department of Finance and Deregulation raising concerns about the implications of the additional efficiency dividend and the proposed 20% cut in capital funding.

The Review notes funding pressures for similar bodies in other jurisdictions.

Information Commissioners around the world face serious budgetary constraints and expect higher workloads, according to the first survey of Commissioners. In terms of their capacity to deal with current and projected workloads, 77% of Commissioners believe that their financial and staff resources are 'insufficient' (58%) or 'not at all sufficient' (19%), according to the report on the survey.<sup>16</sup>

The Canadian Information Commissioner recently reported the effect of budget cuts on her operations:

Like most other federal organizations, the [Office of the Information Commissioner] is in the process of absorbing successive and significant budget cuts - in our case, equalling roughly 8 percent of our budget since 2010-2011. This puts us at the limit of our

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<sup>15</sup> OAIC, *Submission*, paras 76-78.

<sup>16</sup> See <http://www.freedominfo.org/2013/04/commissioners-report-low-budgets-growing-workloads/> (viewed on 17 June 2013).

financial and organizational flexibility. ... Any meaningful solution could only come in the form of an infusion of resources so we could increase our staff complement.<sup>17</sup>

## Views of Agencies and other Stakeholders

A number of submissions consider that the OAIIC has made a positive contribution to transparency and accountability in government decision-making.<sup>18</sup> The Australian Taxation Office considers the introduction of the OAIIC has been effective in raising the profile and awareness of FOI generally, and projecting the message of pro-disclosure to agencies.<sup>19</sup> There is general acknowledgement that the OAIIC's FOI Guidelines have been useful and of great assistance to decision-makers under the FOI Act.<sup>20</sup>

The Department of Agriculture, Fisheries and Forestry notes that creation of the OAIIC has encouraged agencies to be more aware of their obligations under the FOI Act, ensure compliance with them, and in providing a source of information and guidance it has given agencies additional confidence in relation to management of FOI requests.<sup>21</sup>

Some submissions support enhanced funding for the OAIIC to enable it to manage its operations effectively and efficiently.<sup>22</sup>

Other submissions make specific suggestions for improvements. The Australian Society of Archivists considers it would be more effective to use the resources of the OAIIC on matters of substance, rather than on administrative matters.<sup>23</sup> The Public Interest Advocacy Centre suggests that each agency should be required to report to the OAIIC on its implementation of the FOI Act and that these reports should be publicly available.<sup>24</sup> Peter Timmins believes that the OAIIC has unambitious Key Performance Indicators (for example, 80% of FOI reviews to be completed within 12 months and 80% of FOI and privacy complaints to be finalised within 12 months).<sup>25</sup>

The Australian Privacy Foundation considers it would be preferable to promote the Privacy Commissioner as a clearly separate jurisdiction and function.<sup>26</sup>

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<sup>17</sup> Office of the Information Commissioner of Canada, *Report of Plans and Priorities 2013-14*: [http://www.oic-ci.gc.ca/eng/report\\_on\\_plans\\_and\\_priorities-rapport\\_sur\\_les\\_plans\\_et\\_les\\_priorites\\_2013-2014.aspx](http://www.oic-ci.gc.ca/eng/report_on_plans_and_priorities-rapport_sur_les_plans_et_les_priorites_2013-2014.aspx) (viewed on 16 June 2013).

<sup>18</sup> See for example, submissions from the Commonwealth Ombudsman; Department of Education, Employment and Workplace Relations; Department of Health and Ageing; Department of Human Services; New South Wales Society of Labor Lawyers; and the National Health and Medical Research Council.

<sup>19</sup> Australian Taxation Office, *Submission*, page 3.

<sup>20</sup> See for example, submissions from the Commonwealth Ombudsman; CSIRO; and Department of Defence. The FOI Guidelines are available at [http://www.oaic.gov.au/publications/guidelines.html#foi\\_guidelines](http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines).

<sup>21</sup> Department of Agriculture, Fisheries and Forestry, *Submission*, pages 1 and 3.

<sup>22</sup> See for example, submissions from the Department of Health and Ageing; Public Interest Advocacy Centre; and John Wood.

<sup>23</sup> Australian Society of Archivists, *Submission*, page 3.

<sup>24</sup> Public Interest Advocacy Centre, *Submission*, page 6.

<sup>25</sup> Peter Timmins, *Submission*, page 15.

<sup>26</sup> Australian Privacy Foundation, *Submission*, page 3.

Some submissions comment on delay in matters being heard by the OAIC<sup>27</sup> and suggest there could be a timeframe for completion of an IC review.<sup>28</sup>

The Review considers that the establishment of the OAIC has been a very valuable and positive development in oversight and promotion of the FOI Act.

### **Suggestion for Reform – Online Status of FOI Reviews and Complaints**

Some submissions note that there have been lengthy and consistent delays in the OAIC's decision-making and complaint investigation processes. There is support for the OAIC to finalise its reviews in a timely fashion.<sup>29</sup> The Review considers that it would be helpful if agencies and applicants could monitor the progress of a particular FOI review or complaint. This would improve awareness and potentially save time in responding to inquiries from the parties regarding the current status and progress of an individual matter.

#### **Recommendation 2 – Online Status of FOI Reviews and Complaints**

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.

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<sup>27</sup> See for example, submissions from the Pirate Party Australia; Jeremy Tager; and John Wood.

<sup>28</sup> See for example, submissions from Jeremy Tager; and Public Interest Advocacy Centre.

<sup>29</sup> See for example, submissions from the NBN Co; Moira Paterson; and Jeremy Tager.

# Chapter 3: Effectiveness of the New Two-Tier System of Review

## Background

The *Open Government Report* recommended that a statutory office be established as an independent monitor to oversee operation of the FOI Act. The report proposed a number of functions for the office:

- auditing agencies' FOI performance;
- preparing an annual FOI report;
- collecting statistics;
- publicising the Act in the community;
- issuing guidelines on how to administer the Act;
- providing FOI training to agencies; and
- providing information, advice and assistance on FOI requests.<sup>30</sup>

While the Australian Labor Party's 2007 policy endorsed these recommendations, they also proposed the new agency would replace the Administrative Appeals Tribunal (AAT) in the FOI review process and would have responsibility for investigating complaints about agency processing of FOI applications in place of the Commonwealth Ombudsman.<sup>31</sup>

The rationale for giving both these functions to the new agency was based on centralising merits review and complaint handling functions with the Office of the Australian Information Commissioner (OAIC) as a whole-of-government clearing house for FOI applications. Centralising these functions in the OAIC provides the necessary information to undertake its role of independent oversight of the operation of the FOI Act in agencies, address issues of agency performance, and provide advice on information management across government agencies as all applications for review (following internal review) are made to the OAIC.

The FOI reforms provide for a two-tier system of external merits review, the first being conducted by the Information Commissioner(IC)<sup>32</sup> and, if a party is not satisfied, the second being conducted by the AAT.<sup>33</sup> Merits review is where a person or body other than the primary decision-maker reconsiders the facts, law and policy aspects of the decision and determines the correct and preferable decision.<sup>34</sup>

It was expected that on receipt of an application for review of a decision to refuse access, the

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<sup>30</sup> *Open government: a review of the federal Freedom of Information Act 1982* Australian Law Reform Commission, Administrative Review Council 1995, recommendations 18 and 19.

<sup>31</sup> Australian Labor Party policy statement, *Government Information: Restoring Trust and Integrity* (2007).

<sup>32</sup> Sections 54L and 54M of the FOI Act.

<sup>33</sup> Section 57A of the FOI Act.

<sup>34</sup> Merits review is different from judicial review. Judicial review is where a court reviews the legality of the decision rather than whether the decision is the best decision that could have been made in the circumstances of the case.

IC would seek to resolve the dispute, including through mediation, and failing resolution make a decision. Although the reforms provide for the IC to conduct formal hearings, it was intended that most reviews would be conducted on the papers and this is the approach that the OAIC takes in reviewing decisions.

Applicants are able to seek external review by the IC without first having to go through the internal review process; alternatively they can ask the agency to undertake an internal review.<sup>35</sup> The IC can also review an internal review decision.<sup>36</sup> Internal review is where the agency reviews its decision through someone other than the original decision-maker, usually a more senior officer. Internal review is not available where the decision was made by the minister or agency head. There are no application fees for internal review or Information Commissioner review (IC review). Fees and charges are discussed in Chapter 6.

A right of review to the AAT after IC review is available to applicants and agencies. This provides a two-level independent merits review system for FOI matters. There is a further right of appeal to the Federal Court on a question of law from a decision of the AAT.<sup>37</sup>

The IC may decline to review a decision if satisfied that the interests of FOI Act administration make it desirable that the AAT review an FOI decision.<sup>38</sup> The reforms recognise that in some cases further merits review, after IC review may not be the right option. In these cases an applicant may appeal directly to the Federal Court on a question of law from a decision of the IC.<sup>39</sup> The IC is also able to refer a question of law to the Federal Court during a review.<sup>40</sup>

The objective of these reforms is to give applicants a timely, cost effective mechanism for resolving access disputes while at the same time providing, if necessary, both applicants and agencies the opportunity to resolve contested matters in the AAT which has developed expertise in dealing with FOI matters.

When the AAT was the primary venue for external merits review more than 50% of applications for review of FOI decisions were resolved by consent or withdrawn without a hearing. It was expected that the majority of IC reviews would also be resolved prior to formal decision. In 2011-12 of 253 reviews completed by the OAIC, 25 decisions were finalised by formal decision, 22 were referred to the AAT, 110 were resolved by consent or withdrawn and the remaining 96 were finalised through other means.<sup>41</sup> See further discussion of matters resolved by agreement at page 31. The Review appreciates that there is still a substantial workload for the OAIC in the preliminary assessment of matters and in assisting applicants to resolve matters by consent or finalise in other ways.

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<sup>35</sup> Sections 54 and 54A of the FOI Act provide for internal review.

<sup>36</sup> Sections 54L(2)(b) and 54M(2)(b) of the FOI Act.

<sup>37</sup> Section 44 of the Administrative Appeals Tribunal Act 1975 (AAT Act).

<sup>38</sup> Section 54W(b) of the FOI Act.

<sup>39</sup> Section 56 of the FOI Act.

<sup>40</sup> Section 55H of the FOI Act.

<sup>41</sup> OAIC, *Annual Report 2011-12*, page 95.

## Other Jurisdictions

There are different processes for review of FOI decisions, but most jurisdictions recognise that an effective system of merits review is critical to successful operation of the FOI legislation. This is consistent with the role of FOI in the framework of administrative law and the overarching objective of improving the quality of government decisions by ensuring that administrative decisions of government are correct and preferable. It also delivers greater access to justice for FOI applicants by providing a review mechanism that promotes fairness, accessibility, timeliness and informality in decision making.

Generally, the pathway for reviewing FOI decisions is internal review with further review to an external body. This varies from direct appeal to the judiciary, review by information commissioners, review by an administrative tribunal or review by the ombudsman. In some jurisdictions, internal review is a prerequisite for external review. Information commissioners and administrative tribunals generally have powers to make decisions or rulings on the release of information by government agencies. On the other hand, ombudsmen usually have only advisory or recommendatory powers. There is generally a further right of review by a court after external review although this may be limited to considering points of law rather than further merits review.<sup>42</sup>

In most Australian jurisdictions the review pathway is similar to that under the Commonwealth FOI Act with internal review by the primary decision-maker, external review by an information commissioner/administrative tribunal and appeal to a superior court on a question of law (e.g. New South Wales, Northern Territory, Victoria, Queensland and Western Australia). In general,<sup>43</sup> this pathway provides affordable and accessible review, as there is no requirement for legal representation at the information commissioner/administrative tribunal stage, and allows the decision-maker to develop expertise and experience in reviewing FOI matters. This can result in greater reliance being placed on decisions made by the expert review body, either commissioner or tribunal, and less reliance being placed on the courts as final arbiters.

## Applications to the Office of the Australian Information Commissioner

When the FOI reforms were being developed, some stakeholders expressed a concern that as external merits review is usually undertaken by tribunals comprising members, rather than by statutory office holders, review by the IC would not be as independent as the existing review by the AAT. While a number of submissions to this Review raise concerns about delays,<sup>44</sup> they have not raised any concerns about the independence of the IC review process.

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<sup>42</sup> The World Bank has examined appeals and enforcement mechanisms in recent reports on FOI legislation – see <http://www.worldbank.org>.

<sup>43</sup> This review pathway is also common in international jurisdictions, for example, India, Ireland, Mexico, Scotland, and the United Kingdom.

<sup>44</sup> See, for example, submissions from the Bureau of Meteorology; Department of Health and Ageing; Law Council of Australia, Administrative Law Committee; Moira Paterson; Pirate Party Australia and Jeremy Tager.

Applicants who may have been discouraged from applying to the AAT, whether due to application fees or otherwise, have had no hesitation in seeking IC review. This has led to a significant increase in applicants seeking external review of FOI decisions. In 2009-2010 before the FOI reforms commenced, when the only avenue of external merits review was the AAT, there were 110 applications for review of FOI decisions made to the AAT.<sup>45</sup> Since the reforms commenced in November 2010, there have only been 24 applications for merits review to the AAT.<sup>46</sup> Of these, 19 were referred directly to the AAT by the IC exercising his power to refer matters to the AAT where it would be more appropriate for the AAT to review the decision.<sup>47</sup>

The OAIC received 176 applications for review in 2010-11, 456 in 2011-12. In its submission to the Review in December 2012 the OAIC estimated that it would receive 550-600 applications for 2012-13.<sup>48</sup> The latest statistics from the OAIC suggest that the number will more likely be 500-550.<sup>49</sup> The OAIC considers that the main reasons for the increase are the lack of application fees and the fact that legal representation is not required.<sup>50</sup>

Another area of significant workload for the OAIC is dealing with notifications and requests for extensions of time. The FOI Act has statutory timeframes for processing FOI requests and provisions for these to be extended in certain circumstances: to allow consultation with a third party;<sup>51</sup> with the consent of the applicant;<sup>52</sup> to provide additional time to process complex or voluminous requests;<sup>53</sup> and to provide further time if the processing period has run out.<sup>54</sup> Where an applicant agrees to an extension of time, the agency must notify the OAIC of the agreement.

While the OAIC statistics indicate that it received 2,224 requests for an extension of time in 2011-2012 and 1,740 until the end of March 2013<sup>55</sup> these figures also include notifications by agencies that an applicant has agreed to an extension. In 2011-12, 66% or 1,148 were agency notifications with the remaining 592 being applications for the OAIC to approve an extension of time. It is expected that the 2012-13 figures would result in a similar breakup between notifications and applications to the OAIC.

The OAIC has also taken over the role of investigation of complaints about the processing of FOI requests by agencies that was previously undertaken by the Commonwealth Ombudsman

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<sup>45</sup> *Freedom of Information Act 1982, Annual Report 2009-2010*, Appendix G: AAT Review – Applications.

<sup>46</sup> AAT, *Submission*, page 2.

<sup>47</sup> Section 54W(b) of the FOI Act.

<sup>48</sup> OAIC, *Submission*, para 85.

<sup>49</sup> OAIC statistics 2012-13 as at 31 March 2013. These are available on the OAIC website at [www.oaic.gov.au](http://www.oaic.gov.au).

<sup>50</sup> OAIC, *Submission*, para 85.

<sup>51</sup> Section 15(6) FOI Act.

<sup>52</sup> Section 15AA FOI Act.

<sup>53</sup> Section 15AB FOI Act.

<sup>54</sup> Section 15AC FOI Act. Similar provisions apply to in relation to a request to amend or annotate personal information under sections 51DA or 54D of the FOI Act.

<sup>55</sup> OAIC, *Submission*, para 127.

and the number of complaints received is at a similar level, 126 to the OAIC in 2011-12, 137 to the Ombudsman in 2009-10.<sup>56</sup>

## **Suggestions for Reform**

In its submission to the Review the OAIC has made a number of suggestions for amendments to review and complaints procedures in the FOI Act to streamline procedures and increase the effectiveness and efficiency of these processes. In general the Review supports these suggestions as discussed below.

### **Delegation of Functions and Powers**

Section 25 of the *Australian Information Commissioner Act 2010* (AIC Act) provides for the IC to delegate functions and powers to staff of the OAIC. It also specifies functions and powers that cannot be delegated which are reserved for the IC or the other Commissioners. These include:

- the *information commissioner functions*;
- issuing guidelines;
- referring questions of law to the Federal Court;
- reviewing FOI decisions to refuse, or grant access, to information; and
- making privacy determinations.

The AIC Act does not confer functions on the FOI Commissioner or the Privacy Commissioner by delegation from the IC, it confers functions directly on the Commissioners. Section 10 provides for the functions of the IC, while sections 11 and 12 respectively provide for the functions of the FOI Commissioner and the Privacy Commissioner.

The OAIC believes that there is a need for the IC review functions to be able to be delegated to other senior officers.<sup>57</sup> In relation to IC review, non-delegable powers are:

- referring questions of law to the Federal Court (s 55H);
- making a decision on a review (s 55K); and
- correcting errors in decisions (s 55Q).

All the other powers in the decision making process are able to be exercised by OAIC staff and the IC has delegated these powers to the Assistant Commissioners as well as delegating a narrower range of powers to other officers depending on their seniority.<sup>58</sup>

There is a view that it is not appropriate for staff members to determine a review application as they are not independently appointed statutory office holders and do not have the level of expertise or accountability of a statutory officeholder. Nevertheless the Review considers that it would be appropriate for powers relating to applications for review of charges imposed

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<sup>56</sup> OAIC, *Submission*, para 120.

<sup>57</sup> OAIC, *Submission*, para 89.

<sup>58</sup> Delegation of FOI powers by the Australian Information Commissioner. This is available on the OAIC website at [www.oaic.gov.au](http://www.oaic.gov.au).

by agencies to be delegated. As with existing delegations, the matters delegated and the level of decision-maker would be specified in any instrument of delegation.

The OAIC also believes more FOI complaint investigations powers should be delegable. At present functions and powers in relation to a decision not to investigate a complaint (s 73), notifying completion of an investigation (s 86) and implementation notices and reports to Ministers (ss 89, 89A) must be exercised by the IC or the other Commissioners. The Review considers that it is appropriate for these powers to be exercised by Commissioners noting that all other powers in relation to complaints are able to be, and have been, delegated to OAIC staff.<sup>59</sup>

The OAIC has also suggested that the grounds for the IC to decide not to undertake a review (s 54W) or complaint investigation (s 73) be expanded. It suggests section 54W be revised by including where the AAT is dealing with, or has dealt with, the matter and that section 73 be revised by including where the IC considers that further investigation is not warranted having regard to all the circumstances.<sup>60</sup> As the existing grounds in both cases seem quite broad it is not clear whether these revisions would make much difference in practice, nevertheless, the Review considers that it would be appropriate for this to be considered in the context of the comprehensive review recommended in Chapter 1.

### **Recommendation 3 – Delegation of Functions and Powers**

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.

### **Power to Remit to Agency or Minister for Reconsideration**

There is no express power in the FOI Act to remit a matter to the original decision-maker for reconsideration. The OAIC has advised that this creates resource burdens where very large FOI requests may be referred to it for review under the deemed refusal provisions (s15AC). Where there has been little or no processing of the request by the agency, the OAIC is placed in the role of the original decision-maker which may not be the most effective use of OAIC resources.

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<sup>59</sup> See above.

<sup>60</sup> OAIC, *Submission*, para 120 and Appendix.

The AAT has the power to remit matters to the decision-maker for further consideration at any stage of an AAT review proceeding.<sup>61</sup> The Review notes that both the Victorian and New South Wales FOI legislation contain similar powers to provide for matters to be reconsidered by the agency.<sup>62</sup> The Review considers that it would be useful for the OAIC to be able to remit matters to the original decision-maker along the lines of the AAT remittal power. This would provide another mechanism to enhance the effectiveness of the review processes and increase the productivity of the OAIC. The Review does not support this power including the power for the OAIC to make binding directions as to how the decision should be made, as this could be construed as interference with the independent decision making process of the FOI decision-maker.

#### **Recommendation 4 – Power to Remit Matters to Decision-maker for Further Consideration**

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.

#### **Resolution of Applications by Agreement**

The powers of the IC to conduct proceedings under section 55 are very broad and include the power to conduct a review in whatever way the IC considers appropriate and to use any technique to facilitate an agreed resolution. The OAIC suggests that there needs to be a clearer mandate for the IC to resolve matters by agreement.<sup>63</sup> While the Review notes the OAIC view that a stronger legislative basis to use ADR mechanisms would be helpful, it considers that it would be better, given the clear support for ADR already in the FOI Act, for this to be pursued both in OAIC case management procedures and guidelines.

Another issue raised by the OAIC is the lack of a streamlined mechanism to finalise matters where agreement is reached. The Review agrees that it would facilitate informal resolution of matters if the FOI Act were amended to make it clear that an agreed outcome finalises the review and that a written decision of the IC is not required.

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<sup>61</sup> Section 42D AAT Act.

<sup>62</sup> Section 49L *Freedom of Information Act 1982* Vic; Section 93 *Government Information (Public Access) Act 2009* NSW.

<sup>63</sup> OAIC, *Submission*, paras 91-112.

### **Recommendation 5 – Resolution of Applications by Agreement**

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.

### **Third Party Review Rights**

The OAIC identifies what it considers to be some uncertainties and differences in the consultation provisions for affected third parties.<sup>64</sup> It notes that there is a stricter requirement for consultation in relation to documents affecting Commonwealth-State relations, where irrespective of whether or not the consulted party has made a submission in support of the exemption, access must not be given until review of appeal opportunities have run out. The Review believes that it is appropriate for a higher standard to apply in relation to consultation with the States.<sup>65</sup>

In all the consultation provisions there is an initial discretion for the agency to determine whether the third party might reasonably wish to make a submission in support of the exemption. If this discretion is exercised in favour of the third party, a distinction is then made with consultation ‘being required’ with the States (or in relation to Norfolk Island) whereas the other consultation provisions only provide for the third party to be given a reasonable opportunity to make submissions. Section 53C defines an affected third party in terms of the consultation provisions. The Review does not agree that this makes the definition of affected third party unclear.

The Review notes that section 54P of the FOI Act requires an agency to notify an affected third party where it decides not to give access to a document and an application is made for review of that decision.<sup>66</sup> A copy of that notice is also given to the IC. Agency submissions to the Review have not raised concerns about identifying affected third parties.

The OAIC also raises some issues about the parties to a review. Section 55A of the FOI Act defines the parties for an IC review. The OAIC notes that there is a difference in who is automatically a party to an IC review and an AAT review. At the IC stage, for a review of an access refusal decision the review parties will include an affected third party (if any). For review of an access grant decision, there is a discretion to join a person whose interests are

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<sup>64</sup> OAIC, *Submission*, para 113-117. Sections 26A, 26AA, 27 and 27A of the FOI Act deal with consultation.

<sup>65</sup> The Review notes that similar provisions apply for consultation in relation to documents affecting Norfolk Island intergovernmental arrangements under section 26AA of the FOI Act.

<sup>66</sup> All the consultation provisions contain a requirement for the agency to notify the third party if a decision is made to provide access to the relevant documents.

affected as a party to a review application, upon that person's application to the IC. In contrast at the AAT a third party is not automatically a party to a review of an access refusal decision.

The OAIC considers streamlining the provisions for the parties to the review so that only the applicant and respondent are automatically a party to the review would assist in resolving complex matters and provide a simpler and more effective approach.<sup>67</sup> It also believes that this may assist in resolving matters by agreement. Of course other affected parties would still be able to apply to be made parties. The Review notes that such a change would to some extent dilute the existing rights of third parties to participate in the review process. However, they would still be entitled to apply to be made a party to a review. Therefore, the Review supports this suggestion to enhance the efficiency of the review process.

### **Recommendation 6 – Third Party Review Rights**

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.

### **Extensions of Time**

A number of FOI Act provisions provide for extension of time, which may be available:

- to allow consultation with a third party( ss 26A, 26AA, 27 or 27A);
- by agreement with the applicant (s 15AA);
- if the request is complex or voluminous, by application to the IC (s 15AB); and
- after the processing period has run out to allow the request to be finalised, by application to the IC (s 15AC).

The agency is also required to notify the OAIC if an applicant agrees to an extension of time.

In the OAIC's view these provisions, together with the deemed refusal provisions for decisions not made within time (ss 15AC(3)), are complex and confusing particularly in relation to whether an agency can continue to process a request without an extension from the OAIC. It believes that revising these procedures would enhance their operation and reduce the burden on agencies including itself, suggesting the following modifications:

- remove the requirement to advise the OAIC of extensions of time by agreement under section 15AA of the FOI Act, given that such an extension requires the agreement of an

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<sup>67</sup> The OAIC refers to the *Right to Information Act 2009* (Qld) as an approach that could be adopted.

- FOI applicant;<sup>68</sup> and
- restrict the OAIC's role in approving extensions of time to situations where an FOI applicant has sought an IC review or made a complaint about delay in processing a request.<sup>69</sup>

The Review agrees with these suggestions.

### **Recommendation 7 – Extensions of Time**

The Review recommends the FOI Act be amended to:

- remove the requirement to notify the OAIC of extensions of time by agreement; and
- 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.

### **Agreement Beyond 30 Days**

Section 15AA of the FOI Act provides that an agency or minister can extend the timeframe for processing a request by no more than 30 days if the applicant agrees in writing to the extension. The Department of Human Services suggests there may be situations where both parties would wish to agree to a longer extension.<sup>70</sup> This would mean requests would be processed which might otherwise be refused as a substantial and unreasonable diversion of resources. The Review agrees that an applicant and an agency or minister should be able to agree to an extension of time beyond an additional 30 working days.<sup>71</sup>

### **Recommendation 8 – Agreement to Extension of Time Beyond 30 Days**

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.

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<sup>68</sup> See also the Department of Human Services, *Submission*, page 5. Megan Carter also recommends changes to sections 15AB and 15AC (*Submission*, page 7).

<sup>69</sup> See also National Health and Medical Research Council, *Submission*, pages 3-4.

<sup>70</sup> Department of Human Services, *Submission*, page 5. See also submissions from the Australian Federal Police, Bureau of Meteorology and National Health and Medical Research Council.

<sup>71</sup> See discussion in Chapter 7 on FOI Time Periods and recommendation 31 on working days.

### **Extension of Time for Inter-agency Consultation**

Some agencies have suggested that there should be an extension of time in the FOI Act where consultation with another agency (inter-agency consultation) is required, as part of processing a request.<sup>72</sup> The Review acknowledges that inter-agency consultation can be time-consuming. However, it considers that the recommendation in this Review to extend the timeframe for processing an FOI request to 30 working days will assist agencies.<sup>73</sup>

### **Extension of Time to Consult on Cabinet Related Requests**

Requests for access to Cabinet documents and Cabinet-related material must be handled in consultation with the FOI Coordinator of the Department of the Prime Minister and Cabinet (PM&C) who should be notified as soon as it is apparent that Cabinet or Cabinet-related documents come within the scope of a particular FOI request. Certain types of Cabinet and Cabinet-related documents are exempt under section 34 or section 47C of the FOI Act, and Cabinet notebooks are excluded from the operation of the FOI Act entirely. Consultation is required not only in cases where there is consideration of possible release of a Cabinet-related document, but also before exemption claims are made under section 34 or under section 47C for reasons related to Cabinet consideration.<sup>74</sup>

It is apparent that this consultation requirement imposes a high workload on PM&C. Agencies' ability to meet FOI Act timeframes is dependent on a timely response from PM&C, which may not always be possible. Consequently, the ability of the consulting agency to meet its own deadline for notifying a decision under the FOI Act will be impacted. It is therefore suggested that the FOI Act be amended to allow agencies to extend the period of time for notifying a decision on an FOI request by up to 30 working days to permit consultation with PM&C on any Cabinet-related material.

### **Recommendation 9 – Extension of Time for Consultation on Cabinet-related Material**

- 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.
- 9(b)** The Cabinet Handbook should be revised to accord with this recommendation.

<sup>72</sup> See submissions from the Australian Customs and Border Protection Service; Australian Transport Safety Bureau; and the Bureau of Meteorology.

<sup>73</sup> See discussion in Chapter 7 and recommendation 31.

<sup>74</sup> *Cabinet Handbook* (6<sup>th</sup> edition, 2009). The current edition of the Cabinet Handbook (7<sup>th</sup> edition, 2012) does not refer to this requirement. Both the FOI Guidance Notes and the OAIC's FOI Guidelines refer to the requirement to consult PM&C on Cabinet-related material. The FOI Guidance Notes were issued by PM&C in July 2011 and are now available on the Attorney-General's website, [www.ag.gov.au](http://www.ag.gov.au).

## Two-Tier External Review

The current system provides for multi-tier review of FOI decisions. There are three levels of merits review available: internal merits review (at the discretion of the applicant); external merits review by the OAIC; and external merits review by the AAT. There is also provision for further appeal to the courts on a question of law.

A number of submissions, including the OAIC, questioned whether having three tiers of merits review is the most efficient model, noting that the 2007 Labor Party policy statement indicated the new model would replace the AAT in the FOI review process.<sup>75</sup> The OAIC notes that the multiple review process can be used by a third party as a strategy to delay the release of documents.<sup>76</sup> Another concern is adding to the resource burden for both applicants and agencies in resolving document access issues. It also raises questions about providing greater avenues of review for decisions on access to documents than for other decisions affecting individual rights, such as migration decisions.

Some proposed that limiting AAT review of IC decisions to points of law would be appropriate and improve efficiency.<sup>77</sup> The Review notes that an applicant can appeal directly to the Federal Court on a question of law from a decision of the IC under section 56 of the FOI Act. This allows for resolution of matters without recourse to the AAT. In addition, a referral on a question of law to the AAT may not be consistent with the role of the AAT as an administrative review body that does not have the power to make binding decisions on questions of law. Others suggested giving applicants the ability to apply directly to the AAT or the Federal Court for review of the original decision on FOI requests.<sup>78</sup>

So far there has been a significant reduction in the number of cases proceeding to the AAT, with most of the workload being referrals from the IC exercising his powers to refer matters where it would be more appropriate for the AAT to review the matter. At this stage it is not clear what impact the FOI reforms will have on AAT caseload in the longer term. It is also unclear whether the FOI reforms will have any impact on Federal Court workload as so far no cases relating to the reforms have been considered by it.

The current system of multi-tiered review has been in operation for two and a half years. At this stage there is insufficient evidence to make a decision on whether this is the most effective or efficient model for reviewing FOI decisions, particularly in relation to the two levels of external merits review. The Review considers this issue warrants further examination and recommends that the two-tier external review model be re-examined as part of the comprehensive review recommended in Chapter 1.

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<sup>75</sup> See, for example, submissions from the Australian Federal Police; Australian Taxation Office; Department of Finance and Deregulation; and Department of Foreign Affairs and Trade.

<sup>76</sup> OAIC, *Submission*, para 136.

<sup>77</sup> See, for example, submissions from the Australian Greens; Megan Carter; Department of Human Services; and Peter Timmins.

<sup>78</sup> Public Interest Advocacy Centre, *Submission*, page 16.

**Recommendation 10 – Two-Tier External Review**

The Review recommends that the two-tier external review model be re-examined as part of the comprehensive review of the FOI Act.

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# Chapter 4: Reformulation of the FOI Act Exemptions

## Rationalisation of Exemption Provisions

A key element of the FOI reforms was to ensure the right of access to government information was as comprehensive as possible, limited only where the public interest in access to information is outweighed by a stronger public interest in protecting the information from disclosure.

The FOI legislation also protects information from disclosure through the use of exemptions.<sup>79</sup> Exemptions are a feature of all FOI legislation, recognising that the right of access provided by the legislation is not absolute. The purpose of exemptions is to balance the objective of providing access to government information against legitimate claims for the protection of sensitive material. The exemptions provide the confidentiality necessary for the proper workings of government and protection of the confidences and privacy of those who have dealings with government or about whom information is collected by government.

In accordance with recommendations of the *Open Government Report*<sup>80</sup> and 2007 election platform, the reforms:

- abolished the power to issue conclusive certificates in relation to certain exemptions;<sup>81</sup>
- rationalised the remaining exemption provisions including making many of them subject to a new over-riding public interest test; and
- introduced other initiatives to assist agencies in making decisions on FOI requests, particularly in relation to exemptions.

## Conclusive Certificates

Conclusive certificates were able to be issued under specific exemption provisions of the FOI Act<sup>82</sup> to establish conclusively the exempt status of the identified documents. The effect of a conclusive certificate was to limit the capacity of the Administrative Appeals Tribunal (AAT) to review the exemption underlying the certificate. In general, its jurisdiction was limited to determining if reasonable grounds existed for the exemption claim. Even where the AAT found that there were no reasonable grounds for the exemption claimed, the agency or minister could continue to refuse access to the documents.

Repeal of that power meant that all decisions to refuse access to documents on exemption grounds were subject to full independent merits review, a significant beneficial reform.

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<sup>79</sup> Protection is also provided by exempting specific agencies from the operation of the FOI Act. This is discussed in Chapter 5.

<sup>80</sup> *Open government: a review of the federal Freedom of Information Act 1982* Australian Law Reform Commission, Administrative Review Council 1995.

<sup>81</sup> *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*.

<sup>82</sup> The exemptions were the national security, the Commonwealth-State relations, Cabinet, Executive Council and internal working documents exemptions.

## Clarifying the Provisions

The exemptions provisions of the FOI Act have been reorganised to group together those provisions which are subject to a new single public interest test and those which are not. Exemptions subject to a public interest test are referred to as conditional exemptions. This is because they are conditional on the subsequent application of the public interest test.

Instead of the differing formulations of the public interest test that previously applied, a new single form of public interest test applies to information which is conditionally exempt. The new test makes it clear that the public interest in disclosure is the starting point for decision-makers when considering whether or not to release conditionally exempt documents. The public interest test is discussed in more detail below.

There are 18 exemptions in Part IV of the FOI Act. These exemptions are now clearly set out into two separate categories; exemptions subject to the public interest test (conditional exemptions) and those that are not (exemptions). There are ten exemptions and eight conditional exemptions.

The ten exemptions are:

- national security, defence or international relations (s 33);
- Cabinet documents (s 34);
- law enforcement and protection of public safety (s 37);
- secrecy provisions (s 38);
- legal professional privilege (s 42);
- material obtained in confidence (s 45);
- Parliamentary Budget Office documents (s 45A);
- contempt of Parliament or court (s 46);
- trade secrets or commercially valuable information (s 47);<sup>83</sup> and
- electoral rolls and related documents (s 47A).

The decision-maker can refuse to release material that comes within these exemptions.

The eight conditional exemptions are:

- Commonwealth-State relations (s 47B);
- deliberative processes (s 47C);<sup>84</sup>
- the Commonwealth's financial and property interests (s 47D);
- certain operations of agencies (s 47E);
- personal privacy (s 47F);
- business affairs (s 47G);

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<sup>83</sup> See further discussion of this exemption in Chapter 5.

<sup>84</sup> This exemption was previously referred to as the internal working documents exemption.

- research (by the CSIRO or the Australian National University) (s 47H);<sup>85</sup> and
- Australia's economy (s 47J).

If material comes within one of these conditional exemptions, the decision-maker also needs to consider whether releasing the information would, on balance, be contrary to the public interest at the relevant time.

Other changes to the exemption provisions involved the repeal of three exemptions, revision of the Cabinet exemption, revision of the national economy exemption. The new public interest test was added to personal privacy, business affairs and research exemptions, as well as to the national economy exemption. The exemptions repealed were the Executive Council (s 35), companies and securities (then s 47) and conduct by an agency of industrial relations (s 40(1(e))<sup>86</sup> exemptions.

The Cabinet document exemption has been revised so that it only covers documents at the core of the Cabinet process. This is to ensure that the exemption cannot be misused to cover documents which are not genuinely Cabinet documents or documents that are essential to the Cabinet process. Formerly, the exemption applied to all documents submitted to Cabinet. Under the new regime, the exemption is limited to documents prepared for the dominant purpose of consideration by Cabinet. Consistent with this amendment is an explicit provision that documents are not exempt merely because they are attached to an exempt document.

The Cabinet exemption makes it clear that briefing notes created for the dominant purpose of briefing a minister on a Cabinet submission or proposed submission are excluded. Drafts, copies or extracts of Cabinet documents were also made exempt.

The national economy exemption has been redrafted so that it reflects better the economic policy responsibilities of the Government. A document is exempt if it would, or could reasonably be expected to, have a substantial adverse effect on Australia's economy by influencing a decision or action of a person or entity, or by giving a business an undue benefit or detriment by providing premature knowledge of proposed or possible action or inaction by a person or entity. The provision clarifies that a substantial adverse effect on Australia's economy includes such effect on a particular sector of the economy or the economy of a particular region of Australia. This exemption is now also subject to the public interest test.

### **The Public Interest Test**

Prior to the reforms some of the FOI exemptions were subject to a public interest test,<sup>87</sup> but this test was not applied consistently in the FOI Act. The reforms introduced a single form of public interest test and applied it to four more exemptions<sup>88</sup> so that more FOI decisions involve a consideration of public interest factors for and against release.

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<sup>85</sup> See further discussion of this exemption in Chapter 5.

<sup>86</sup> The remaining exemptions for certain operations of an agency are now in section 47E of the FOI Act.

<sup>87</sup> Public interest tests applied to the exemptions for Commonwealth-State relations; deliberative processes; the Commonwealth's financial and property interests; and certain operations of agencies.

<sup>88</sup> The new test applies to the exemptions listed above as well as to the personal privacy, business affairs, national economy and research exemptions.

Application of the public interest test involves weighing up factors for and against disclosure. In this process a decision-maker needs to identify factors favouring disclosure and factors not favouring disclosure in the circumstances and to determine the comparative importance to be given to these factors.

To assist in the application of the test, section 11B(3) lists some factors that would favour disclosure and section 11B(4) lists factors that are irrelevant in determining the public interest. The factors in favour are whether releasing the information would:

- promote the objects of the Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; or
- allow a person to access their own personal information.

The test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making. It is not enough to withhold access to a document if it meets the criteria for a conditional exemption. Where a document meets the initial threshold of being conditionally exempt, it is then necessary for a decision-maker to apply the public interest test. The starting point is that access must be given to conditionally exempt documents unless to do so would, on balance, be contrary to the public interest.

The test is further clarified by listing specific matters that must not be taken into account when deciding whether access to a document is contrary to the public interest. Factors favouring non-disclosure are not listed because most conditional exemptions include a harm threshold, for example, that disclosure would, or could be reasonably expected to, cause damage to or have a substantial adverse effect on certain interests. Where a decision-maker is satisfied that an initial harm threshold is met that is in itself a factor against disclosure.

The FOI Act does not list factors which would favour not giving access for the purposes of applying the public interest test.

However, section 11B(4) sets out the factors that cannot be taken into account when deciding whether access to a document would on balance be contrary to the public interest:

- that access to the document could result in embarrassment to the Government or cause a loss of confidence in the Government;<sup>89</sup>
- that access could result in any person misinterpreting or misunderstanding the document;
- that the author of the document was or is of high seniority in the agency; or
- that access could result in confusion or unnecessary debate.

These factors are those usually identified as arguments against giving access to a document. Some of them are referred to by Justice Davies in the AAT decision in *Re Howard and the Treasurer* [1985] AATA 100 who encapsulated the factors that usually resulted, in the

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<sup>89</sup> Following extension of the FOI Act to Norfolk Island on 1 January 2011 this factor also applies to embarrassment to the Government of Norfolk Island or a loss of confidence in the Government of Norfolk Island.

pre-reform days, in the decision that disclosure of documents was not in the public interest being upheld. The ‘Howard factors’ are the seniority of the author, disclosure of policy development, inhibition of frankness and candour, confusion or unnecessary debate and misinterpretation or misunderstanding of the document.

A decision-maker must have regard to guidelines issued by the Australian Information Commissioner for the purposes of applying the new public interest test. These guidelines are incorporated in the general FOI Guidelines issued by the OAIC and include a non-exhaustive list of factors that may favour or be against disclosure.<sup>90</sup> The public interest factors must be considered by the decision-maker on a case by case basis. What is relevant in one case may not be relevant in another case where additional or different factors require consideration.

The FOI Guidance Notes also provide practical assistance to agencies in the application of the public interest test to the deliberative processes exemption.<sup>91</sup>

Where an agency or minister refuses access to a document where a conditional exemption applies, they are now required to identify the public interest factors taken into account in making the decision to refuse access (s 26(1)(aa)). Previously this requirement only applied to the deliberative processes exemption.

### **Operation of the New Provisions**

There were mixed views expressed in submissions to the Review on the operation of the new provisions and application of the new public interest test.

While some submissions supported rationalisation of the exemption provisions on the basis that they provide adequate protection of sensitive information,<sup>92</sup> others suggested that certain exemptions need to be clarified or revised to ensure that they remain effective.<sup>93</sup> This is discussed further below.

There was in-principle support for the new public interest test<sup>94</sup> noting that some of the uncertainty about how the test applies will be addressed over time through Information Commissioner decisions and guidelines. Some submissions suggested that the test be extended to apply to other specific exemptions<sup>95</sup> or that it apply to all the exemptions.<sup>96</sup>

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<sup>90</sup> OAIC, *FOI Guidelines*, para’s 6.23-6.29.

<sup>91</sup> The FOI Guidance Notes were issued by the Department of the Prime Minister and Cabinet in July 2011. The Guidance Notes are now also available on the Attorney-General’s Department’s website, [www.ag.gov.au](http://www.ag.gov.au), as the Attorney-General now has responsibility for FOI policy.

<sup>92</sup> See, for example, submissions from the Department of Defence; OAIC; Law Council of Australia, Administrative Law Committee; and New South Wales Society of Labor Lawyers.

<sup>93</sup> See, for example, submissions from the Australian Customs and Border Protection Service; Australian Federal Police; Australian Meteorological and Oceanographic Society; and Department of Health and Ageing.

<sup>94</sup> See, for example, submissions from the Australian Federal Police; Australian Network of Environmental Defenders’ Office, Australian Society of Archivists; and CSIRO.

<sup>95</sup> See, for example, submissions from the Department of Health and Ageing; Department of Immigration and Citizenship; and Moira Paterson.

Other submissions suggested that the exemptions are used too broadly, or that Cabinet and deliberative processes exemptions are being overused or misused by agencies.<sup>97</sup>

In 2011-2012, 8,027 exemptions were applied by agencies and ministers in processing 22,237 FOI requests; more than one exemption may have been applied in processing an individual request.<sup>98</sup> Overall, the most used exemption was the personal privacy exemption (s 47F) being applied in 58% of cases (3,850) where exemptions were applied or in 17.3% of FOI requests. The next most used exemptions were the law enforcement exemption (s 37), being applied in 995 cases (4.5% of requests) and certain operations of agencies (s 47E) in 638 cases (2.9% of requests).

The Cabinet exemption (s 34) was used in 100 cases (0.5% of requests) and deliberative processes exemption (s 47C) in 332 cases (1.5% of requests). These figures suggest, contrary to some views, use of these two exemptions is at a very low level.

Statistics on the use of exemptions were not collected in previous years so the Review is unable to compare the 2011-12 figures with the level of exemption activity prior to the FOI reforms. The Review recognises that information on exemptions is essential and acknowledges the OAIC's initiative in including this in its collection of FOI statistics.

## **Legitimate Protection of Sensitive Government Documents**

As discussed, a number of exemptions relate to government responsibilities and operations to provide protection for sensitive government processes and interests where necessary. These include conditional exemptions, subject to the public interest test, and other exemptions.

The Review believes that the reformulated exemptions have been effective in meeting the objective of greater access while at the same time providing appropriate protection for sensitive information. There is, however, scope to refine the operation of some exemptions further consistent with the new regime for access to government information.

## **Law Enforcement and Public Safety**

The exemption for law enforcement and public safety in section 37 of the FOI Act recognises the importance of protecting the administration and enforcement of the law.<sup>99</sup>

The exemption covers documents which would prejudice investigations of a breach, or possible breach of a law; disclose the identity or existence of a confidential source of information; endanger the physical safety or any person or public safety; or prejudice the fair trial of a person. The exemption also covers the lawful methods or procedures for preventing or detecting breaches of the law if disclosure would prejudice the effectiveness of those

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<sup>96</sup> See, for example *Media Joint Submission*; and submissions from Mark Diamond and Angela O'Brien-Malone; Wilfred Mentink; Public Interest Advocacy Centre; Rick Snell; and Transparency International Australia.

<sup>97</sup> See, for example, submissions from the Australian Privacy Foundation; Evelyn Doyle; and John Wood.

<sup>98</sup> See chapter 9 of the *OAIC Annual Report 2011-12* which reports on FOI activity by agencies and ministers in 2011-12.

<sup>99</sup> The exemption is set out in full in at **Annex C**.

procedures. This exemption concerns the investigative or compliance activities of an agency rather than an agency's own obligations to comply with the law.

A number of submissions raise concerns that this exemption does not encompass the conduct of surveillance activities or intelligence gathering activities.<sup>100</sup> Section 37 has not been amended since 1994. The scope of the exemption reflects standard operational activities of enforcement and regulatory agencies in the 1980s and 1990s that were commonplace and sufficient to realise community expectations of safety and security.

Since the 1990s there has been a transformation in the enforcement and regulatory landscape. This has resulted in operational agencies updating the standard range of activities undertaken in performing their legitimate and lawful functions. The Review agrees that this exemption should also be updated to reflect more accurately these activities so that it applies to the conduct of surveillance activities, intelligence gathering and other monitoring activities. The Review notes that this is consistent with the definition of enforcement related activity in the recent amendments to the Privacy Act which includes these activities.<sup>101</sup>

Some submissions raised concerns about use of FOI as an alternative to discovery in legal proceedings or as a tactic during the course of, or prior to, an investigation by a regulatory agency.<sup>102</sup> Changes are suggested to the law enforcement exemption to address these concerns. (See further discussion of use of FOI during investigations in Chapter 7.)

### **Recommendation 11 – Law Enforcement and Public Safety**

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.

### **Cabinet Documents**

The exemption for Cabinet documents in section 34 of the FOI Act recognises the importance of Cabinet confidentiality and the convention of collective responsibility of ministers for

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<sup>100</sup> See, for example, submissions from the Australian Customs and Border Protection Service; Australian Taxation Office; and Australian Federal Police.

<sup>101</sup> See item 20 of Schedule 1 of Privacy Amendment (Enhancing Privacy Protection) Act 2012.

<sup>102</sup> See, for example, submissions from the Australian Competition and Consumer Commission; Australian Taxation Office; and Moira Paterson.

government decisions that is central to the Cabinet system of government.<sup>103</sup>

Some commentators/submissions refer to New Zealand as an example of a jurisdiction that does not provide an exemption for Cabinet documents. While the New Zealand *Official Information Act 1982* does not expressly refer to Cabinet documents, there is a broad exemption for withholding information that maintains the constitutional conventions which protect collective and ministerial responsibility; the political neutrality of officials; and the confidentiality of advice tendered by ministers and officials.<sup>104</sup> There is also an exemption for information that maintains the effective conduct of public affairs through the free and frank expression of opinions by or between ministers and officials.<sup>105</sup> Both these exemptions are subject to a public interest test.

As noted above, the Cabinet exemption was revised as part of the FOI reforms. Some submissions accepted that this exemption provided adequate protection for Cabinet deliberations, while others suggested that it too should be subject to the public interest test.<sup>106</sup> Suggestions were also made to clarify some aspects of the exemption and the processes for applying the exemption.

There is a potential overlap in the operation of the Cabinet exemption and the deliberative processes exemption. This is acknowledged in the FOI Guidance Notes which state that a document may have ‘a close connection with Cabinet, but may not necessarily be covered by the Cabinet exemption’.<sup>107</sup> In practice, it is not always clear how documents that may be exempt under the deliberative processes exemption due to a close connection with Cabinet differ from documents that may be exempt, under section 34(3), as documents that may reveal a Cabinet deliberation or decision. This has led to claims being made that documents come within both exemptions, raising an incongruous result of the public interest test being applied to one exemption claim, with the consideration of the harm that might result if the document were released, but not the other.

Some of this uncertainty has arisen as the term ‘consideration’ rather than ‘deliberation’ is used elsewhere in the exemption (s 34(1)(a)) and the view that ‘deliberation’ in section 34(3) means active debate in Cabinet rather than mere consideration or noting by Cabinet.<sup>108</sup> One way to overcome this would be for the Cabinet exemption to be revised to recognise expressly another category of information that would if released, while not necessarily revealing active debate in Cabinet or Cabinet deliberations, prejudice the confidentiality of Cabinet considerations or Cabinet operations. Alternatively, ‘consideration’ could be substituted for ‘deliberation’ in the Cabinet or ‘consideration’ could be defined to include ‘noting’ and ‘consideration for any purpose’. The *Right to Information Act 2009* (Qld)

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<sup>103</sup> The exemption is set out in full in at **Annex D**.

<sup>104</sup> Section 9(2)(f) *Official Information Act 1982* (New Zealand).

<sup>105</sup> Section 9(2)(g) *Official Information Act 1982* (New Zealand).

<sup>106</sup> See, for example, submissions from Moira Paterson; Public Interest Advocacy Centre; and John Wood.

<sup>107</sup> Paragraph 29, FOI Guidance Notes.

<sup>108</sup> OAIC, *FOI Guidelines*, para’s 5.59, 5.67.

provides a useful example of a broad definition of ‘consideration’ which includes noting, with or without discussion.<sup>109</sup>

Another concern about the intersection of the Cabinet and deliberative processes exemptions is whether the Cabinet exemption covers briefings on draft submissions or memoranda, such as exposure drafts. As these draft documents are not prepared for the dominant purpose of submission to Cabinet, it can be argued that they do not come within the definition of an exempt document in section 34(1)(a); if this is indeed the case then the provisions covering briefing notes and drafts of Cabinet documents would not apply. Again this could be clarified by defining what is meant by a draft document so that it is clear that it covers exposure drafts and other drafts. This is consistent with the process of development of matters for Cabinet which requires agencies to prepare an exposure draft for consultation purposes.<sup>110</sup> (See also Chapter 3 regarding consultation on Cabinet documents.)

### **Recommendation 12 – Cabinet documents**

The Review recommends the exemption for Cabinet documents be clarified by including definitions of ‘consideration’ and ‘draft of a document’.

### **Frank and Fearless Advice**

While the FOI Act does not expressly provide for the protection of frank and fearless advice, the deliberative processes exemption has always been regarded as the key provision that enables such protection. This exemption recognises the need for confidentiality in the policy development process and other sensitive issues that have been or are being considered by the Government (s 47C).<sup>111</sup> This is a conditional exemption, and it is rightly subject to a public interest test - that is, documents that satisfy the exemption may be withheld if, on balance, disclosure is contrary to the public interest.

Section 47C defines deliberative matter to be matter in the nature of, or relating to, opinion advice or a recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purposes of the deliberative processes involved in the functions of an agency, minister or the Government. This exemption allows a decision-maker to consider whether disclosure would be detrimental to the proper workings of government by impairing the policy development process, particularly in relation to the development of sensitive policy matters.

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<sup>109</sup> Schedule 3, section 2(5) Right to Information Act.

<sup>110</sup> Paragraphs 37-45, Annex D, *Cabinet Handbook*.

<sup>111</sup> The exemption is set out in full in at **Annex E**.

Unlike the other conditional exemptions, there is no requirement that disclosure of deliberative matter would cause specific harm or have an undesirable outcome (e.g. having an adverse effect on the financial interests of the Commonwealth). The harm that may result from disclosure is, however, relevant to whether release of the document would be contrary to the public interest. The absence of a clear indication of the harm that the exemption is designed to protect results in the exemption being subject to differing interpretations and difficult to apply.

Section 11B(4) which lists irrelevant factors that must not be taken into account in deciding where the balance of interest lies, does not include the disclosure of policy development or inhibition of frankness and candour.

The FOI Guidance Notes and OAIC Guidelines both discuss factors for consideration in applying the public interest test to this exemption. While the OAIC Guidelines do not expressly refer to detrimental impact of a loss of frankness and candour that may occur if sensitive briefing documents are not properly protected, the FOI Guidance Notes recognise that as these factors are not irrelevant factors under section 11B(4), they may be considered in appropriate cases.

The Review notes that FOI legislation in other comparable jurisdictions expressly recognises the desirability of protecting the frankness and candour of sensitive government communications. For example, the United Kingdom legislation protects information that would inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.<sup>112</sup> The New Zealand provisions protect the free and frank expression of opinions by or between ministers and officials.<sup>113</sup>

Quite a few submissions raised the frank and fearless advice issue and the implication that the possibility of public disclosure limits the capacity of officials to provide comprehensive advice to ministers.<sup>114</sup> This Review inclines to John Wood's view that officials should be happy to publicly defend any advice given to a minister and if they are not happy to do so then they should rethink the advice. This is consistent with the view expressed by Senator Faulkner in launching the reforms; that the tradition of frank and fearless advice is more robust, and that public servants would be able to work professionally within the new FOI framework as they do within other accountability mechanisms.<sup>115</sup> Some submissions took the view that the deliberative processes exemptions should not be subject to a public interest test or that the test is being misused.<sup>116</sup> Others suggest an additional exemption be provided to protect incoming ministerial briefs.<sup>117</sup> While the Review acknowledges that adoption of

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<sup>112</sup> Section 36(2)(b)(i) *Freedom of Information Act 1982* United Kingdom.

<sup>113</sup> Section 9(2)(g)(i) *Official Information Act 1982* New Zealand.

<sup>114</sup> See, for example, submissions of Canberra Innovation Corporation Pty Ltd (CANIC); Rick Snell; and John Wood.

<sup>115</sup> *Open and Transparent Government – the Way Forward*, speech at Australia's Right to Know Conference 24 March 2009.

<sup>116</sup> Wilfred Mentink, *Submission*, page 9; Jeremy Tager, *Submission*, page 2.

<sup>117</sup> See, for example, submissions from the Department of Finance and Deregulation; Department of Health and Ageing; and New South Wales Society of Labor Lawyers.

these options would provide clarity and strengthen the protection of deliberative advice it also recognises that they may be viewed as diluting the objects of the FOI reforms.

Nevertheless the Review believes that there are good grounds for including a conditional exemption for incoming government and incoming minister briefs, question time briefings and estimates hearings briefings. This recognises the responsibilities and accountability of ministers in relation to their departments and agencies including:

- being in a position to inform and explain the actions and policies of the department/portfolio to Parliament;
- being responsible and accountable in relation to the department/portfolio's past and future expenditure;
- informing Parliament of developments concerning ministerial/portfolio responsibilities; and
- taking action to remedy unsatisfactory decisions or actions of the department/portfolio.

Ministers need to be fully informed on all matters in order to discharge these responsibilities effectively.

### **Recommendation 13 – Ministerial briefings**

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.

## **Information as to the Existence of Documents**

Section 25 of the FOI Act provides that an agency is not required to give information as to the existence of a document where it is exempt due to national security (s 33), where it would prejudice the conduct of an investigation of a breach of the law (s 37(1)), or where it is a Parliamentary Budget Office document (ss 45A(1), (2) or (3)). Where an agency decides not to provide access to a document, section 26 requires an agency to provide a written notice that states the reasons for the decision. This requirement is qualified by the operation of section 26(2) which provides that there is no requirement to include in the notice any information that would make the notice itself an exempt document.

Some submissions have suggested that section 25 be extended to cover more exemptions,<sup>118</sup> particularly in relation to the unconditional exemptions, noting that in some cases requests

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<sup>118</sup> See, for example, submissions from the Bureau of Meteorology; Megan Carter; and Department of Immigration and Citizenship.

may be made to agencies for the sole purpose of finding out, for example, whether or not material has been prepared for Cabinet consideration on a particular matter. A response from an agency that the material would not be released because it would be exempt would confirm the existence of the material.

In the *Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442 a single judge of the Federal Court, Emmett J, held that looking at the operation of section 25 and 26 together it was permissible in appropriate cases for agencies to neither confirm nor deny the existence of documents where other exemptions were relevant. In that case the court was considering pre-2010 exemptions, both conditional and unconditional. While the decision appears to support a neither confirm nor deny response for documents covered by any exemption, it is unlikely that the court would take such an expansive construction of the operation of sections 25 and 26 following the FOI reforms, although it may be arguable in relation to documents covered by unconditional exemptions.

The Review considers that consistent with the principles of confidentiality of the Cabinet process and the principle of collective ministerial responsibility, there may be circumstances where it would be appropriate to neither confirm nor deny whether Cabinet has considered a matter and considers that this should be made clear in the FOI Act. While the Review does not believe this should be extended to all the unconditional exemptions, there may be valid arguments for other exemptions to be included.

#### **Recommendation 14 – Information as to the Existence of Documents**

The Review recommends that section 25 of the FOI Act be amended to cover the Cabinet exemption.

# Chapter 5: Consideration of Specific Agencies Covered by the FOI Act

Both the OAI and the *Open Government Report* argued that agencies should only be excluded from the FOI Act in exceptional circumstances. In their view, sensitive government information should be protected by exemptions for specific documents rather than full exemption for agencies.<sup>119</sup> This Review generally supports that approach, with the exceptions outlined in this Chapter.

## **Application of the FOI Act to the Parliamentary Departments**

Successive governments have maintained that the parliamentary departments should not be subject to the FOI Act. This reflects the policy position when the FOI Act was initially enacted in 1982 of expressly excluding the parliamentary departments from the definition of ‘Department’. In 1983, the definition of ‘Department’ was revised to refer to a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth and the express exclusion of the parliamentary departments was deleted.<sup>120</sup>

Since commencement of the *Parliamentary Service Act 1999*, the Departments of the Senate, House of Representatives and Parliamentary Services could each be considered as a ‘prescribed authority’ for the purposes of section 4(1) of the FOI Act, being ‘a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of an enactment...’<sup>121</sup> and therefore come within the definition of ‘agency’ for the purposes of the FOI Act.

The Australian Information Commissioner’s FOI Guidelines were subsequently amended in May 2012 as follows:

Three of the Commonwealth Parliamentary departments (the Department of the House of Representatives, the Department of the Senate and the Department of Parliamentary Services) are subject to the FOI Act because they were established by, or in accordance with, s 54 of the *Parliamentary Service Act 1999* and they have not been exempted. The fourth Commonwealth Parliamentary department, the Parliamentary Budget Office, is exempted because it is expressly deemed not to be a prescribed authority (s 7(1) and Division 1 of Part I of Schedule 2).<sup>122</sup>

On 29 May 2013 the Parliamentary Service Amendment (Freedom of Information) Bill 2013 (the Bill) was passed by the House of Representatives. The Bill amends the *Parliamentary Service Act 1999* (the PS Act) to exclude the parliamentary departments and office holders

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<sup>119</sup> *Open Government Report*, page 152; and OAI, *Submission*, page 44.

<sup>120</sup> See *Freedom of Information Amendment Act 1983* which commenced on 1 January 1984.

<sup>121</sup> Paragraph (a) of the definition of ‘prescribed authority’ in section 4(1) of the FOI Act.

<sup>122</sup> OAI, *FOI Guidelines*, para 2.5.

under the PS Act from the operation of the FOI Act. The Bill was passed by the Senate on 18 June 2013 as an interim measure pending consideration of recommendations arising from this Review.<sup>123</sup>

### **Previous Reports**

In 1979 the Senate Standing Committee on Constitutional and Legal Affairs stated that ‘the parliamentary departments should be encouraged to act as if the legislation were applicable to them in the same way as the executive departments have been instructed to treat requests before the introduction of the legislation as if it were in force’.<sup>124</sup>

The *Open Government Report* recommended that the parliamentary departments should be subject to the FOI Act.<sup>125</sup> This report saw no justification for the parliamentary departments to be excluded and would not cause any greater inconvenience for them than is caused to other agencies subject to the FOI Act.

### **Submissions**

The joint submission to the Review from three of the four parliamentary departments (which precedes the Parliamentary Service Amendment (Freedom of Information) Bill 2013 that excludes the parliamentary departments from the operation of the FOI Act) recommends that the Departments of the Senate, House of Representatives and Parliamentary Services should all be subject to the FOI Act in relation to documents of an administrative nature only, because:

The current situation in relation to the parliamentary departments is inconsistent considering that sections 5, 6 and 6A of the FOI Act provide that the Act does not apply in respect of the other arms of government (namely the courts, tribunals and the Official Secretary to the Governor-General) unless the documents relate to matters of an administrative nature. Furthermore, sections 5 and 6 clarify the status of office-holders of courts and tribunals by declaring them not to be prescribed authorities for the purposes of the Act, yet the situation in relation to the Presiding Officers is not clear.<sup>126</sup>

The submission notes concerns about documents not of an administrative nature being subject to the FOI Act, such as the following categories of documents:

- materials which are covered by parliamentary privilege;
- advice to Senators and Members and to other persons on a range of matters which require frank and complete advice on questions related to the proceedings of parliament and any

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<sup>123</sup> The Bill received Royal Assent on 28 June 2013.

<sup>124</sup> *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (1979), page 159.

<sup>125</sup> *Open Government Report*, pages 149-50 and recommendation 73.

<sup>126</sup> Department of the Senate, Department of the House of Representatives and Department of Parliamentary Services, *Submission*, page 7.

other matter which supports parliamentarians, and the Houses and committees in the performance of their constitutional roles; and

- material held by Senators and Members which is not in the control of the parliamentary departments (e.g. emails on the Parliamentary Computing Network).

It also highlights the need for their officials to provide ‘frank and complete advice on a range of matters’ not all of which will be covered by parliamentary privilege.

The parliamentary departments recommend:

- the FOI regime not apply to any matter subject to parliamentary privilege and section 46 of the FOI Act (parliamentary privilege exemption) be amended to remove doubt;
- the impact of section 38B of the *Parliamentary Service Act 1999* (functions of the Parliamentary Librarian) on the FOI Act should be reviewed;
- the FOI Act should not apply to advice provided by *Parliamentary Service Act 1999* staff, irrespective of whether or not parliamentary privilege applies; and
- the FOI Act be clarified to remove any doubt that the provisions apply to any documents held by parliamentarians (and their staff) even if the information resides on facilities provided by the parliamentary departments.

The OAIC notes that section 46(c) of the FOI Act provides an exemption for documents the public disclosure of which would infringe the privileges of the Parliament. The OAIC submits that:

...the FOI Act should continue to apply to the Parliamentary Departments, other than the Parliamentary Budget Office. Consideration should be given to the possible need for a similar exemption for research/advice to Members of Parliament provided by the Parliamentary Library.<sup>127</sup>

The Australian Greens recommend that no amendment be made to the FOI Act to exclude the three parliamentary departments from the operation of the FOI Act.<sup>128</sup> Submissions to the Review state that ‘England, Scotland, India, Ireland, South Africa and Mexico all allow FOI requests to parliamentary departments’.<sup>129</sup>

In its recent report *The Public’s Right to Know* (2012), the New Zealand Law Commission noted that the *Official Information Act 1982* (NZ) was enacted to provide for accountability and transparency of executive government, but the rationale of the Act applies equally to the Parliament:

There are legitimate and significant public interests that weigh in favour of a principle of availability of information held by Parliament and its administration just as much as in the case of the Executive. These include the need to maintain openness and

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<sup>127</sup> OAIC, *Submission*, (Appendix).

<sup>128</sup> Australian Greens, *Submission*, page 7.

<sup>129</sup> Australian Greens, *Submission*, page 10; and *Media Joint Submission*, page 18.

transparency in the expenditure of public money in order to maintain public confidence; to enable the public to hold elected representatives to account; and to allow for informed public debate.<sup>130</sup>

Although the New Zealand Law Commission (NZLC) recommended that parliamentary offices should be covered,<sup>131</sup> the Government did not agree, supporting the status quo. Indeed, status quo best describes the New Zealand Government's response to the NZLC's findings, citing their current fiscal climate and the range of other urgent priorities as the rationale.

## **Application of the FOI Act to the Parliamentary Librarian**

The Parliamentary Library is part of the Department of Parliamentary Services and provides services to Senators, Members, their staff and staff of parliamentary committees.

The statutory office of Parliamentary Librarian is established by section 38A of the *Parliamentary Service Act 1999*. The key function of the Parliamentary Librarian is to provide high quality information, analysis and advice to Senators and Members in support of their parliamentary and representational roles. The Parliamentary Librarian must perform this function in a timely, impartial and confidential manner, having regard to the independence of Parliament from the Executive Government of the Commonwealth (s 38B of the *Parliamentary Service Act 1999*).

The Parliamentary Librarian's submission states that provision of confidential and individually-commissioned analysis and advice to assist and support clients in their parliamentary duties is fundamental to the Library's service.<sup>132</sup> Senators and Members may be hesitant to seek such analysis from the Library without the certainty that their request and the information provided in response would not be released under the FOI Act.<sup>133</sup>

The Parliamentary Librarian notes that the Australian Information Commissioner has advised that client advices do not attract a class exemption under the FOI Act, although requests and advice between parliamentarians and the Library, may, in many or most cases, be subject to an exemption under the FOI Act (for example, s 45 (breach of confidence) and s 46(c) (infringe the privileges of the Parliament)). However, it is not possible to be certain in all cases that documents would not be released in response to an FOI request. This is because each FOI request for access to documents needs to be considered on its individual merits.<sup>134</sup>

In her submission, the Parliamentary Librarian requested urgent legislative amendments to exempt the Parliamentary Library from the operation of the FOI Act (either in full or in part). The Parliamentary Librarian considers the functions of the Parliamentary Library to be

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<sup>130</sup> New Zealand Law Commission, *The Public's Right to Know* (2012), page 341.

<sup>131</sup> New Zealand Law Commission, *The Public's Right to Know* (2012), page 346.

<sup>132</sup> Parliamentary Librarian, *Submission*, page 2.

<sup>133</sup> Parliamentary Librarian, *Submission*, page 2.

<sup>134</sup> Parliamentary Librarian, *Submission*, pages 1-2.

similar to the functions of the Parliamentary Budget Office (PBO). She considers that analysis and advice provided by the Parliamentary Library warrants the same protection from disclosure under the FOI Act as that provided by the PBO.

The effect of the Parliamentary Service Amendment (Freedom of Information) Bill 2013, when enacted, will be that the Parliamentary Librarian is not subject to the FOI Act.

A complete exemption from the FOI Act for the Parliamentary Librarian removes the capacity for any documents held by the Parliamentary Librarian to be accessible under the FOI Act. A partial exemption is preferred by the present Parliamentary Librarian in the interests of ongoing openness and accountability.

The Chairs of the Joint Standing Committee on the Parliamentary Library support the proposal that potential access under the FOI Act to client requests and advice would jeopardise the Parliamentary Librarian's ability to carry out her statutory obligations to provide a confidential service 'having regard to the independence of the Parliament from the Executive'. The Joint Chairs consider the FOI Act should provide the Parliamentary Library with an exemption from the operation of the FOI Act.<sup>135</sup>

### **Review's Position**

The separation of powers doctrine in Australia divides the institutions of government into the three branches of legislative, executive and judicial. The legislature makes the laws; the executive put the laws into operation; and the judiciary interprets the laws.

The Review considers that parliamentarians' expenditure on entitlements should be information which is in the public domain.<sup>136</sup>

The Review agrees that the FOI-exempt status of three of the parliamentary departments was inadvertently removed in 1999, but considers there are sound accountability arguments to support all the parliamentary departments being subject to the FOI Act in some capacity. The Review agrees with the recommendation of the parliamentary departments in their joint submission that the parliamentary departments be subject to the FOI Act only in relation to documents of an administrative nature.

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<sup>135</sup> Joint Standing Committee on the Parliamentary Library, *Submission*, page 2.

<sup>136</sup> Reports of parliamentarians' expenditure on entitlements paid by the Department of Finance and Deregulation (DFD) are regularly published on the DFD website.

### **Recommendation 15 – Parliamentary Departments**

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.

It may well be somewhat presumptuous for the Reviewer to arrogate the will of the Parliament about this matter, so it is suggested that the Attorney-General discuss the recommendation with the Speaker of the House of Representatives, the President of the Senate and the Opposition parties with a view to Parliament deciding this matter.

### **Agencies Excluded from the FOI Act's Operations**

The following agencies are excluded from the operation of the FOI Act:<sup>137</sup>

- Aboriginal Land Councils and Land Trusts;
- Auditor-General;
- Australian Government Solicitor;
- Australian Secret Intelligence Service;
- Australian Security Intelligence Organisation;
- Inspector-General of Intelligence and Security;
- National Workplace Relations Consultative Council;
- Office of National Assessments;
- Parliamentary Budget Office; and
- Parliamentary Budget Officer.

The following parts of the Department of Defence are excluded from the operation of the FOI Act:<sup>138</sup>

- Defence Imagery and Geospatial Organisation;
- Defence Intelligence Organisation; and
- Defence Signals Directorate.

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<sup>137</sup> See section 7(1) and Division 1 of Part I of Schedule 2 to the FOI Act.

<sup>138</sup> See section 7(1A) and Division 2 of Part I of Schedule 2 to the FOI Act.

## Application of the FOI Act to the Intelligence Agencies

The *Open Government Report* recommended that intelligence agencies remain excluded from the operation of the FOI Act on the basis that existing accountability mechanisms were adequate. The report concluded that:

- intelligence agencies' internal processes and methods are scrutinised by the Inspector-General of Intelligence and Security and by the relevant Parliamentary Committee which oversees and reviews their administration; and
- if intelligence agencies were subject to the FOI Act, the vast majority of their documents would be exempt.<sup>139</sup>

## Submissions

The Australian Intelligence Community (AIC) submission states:

The section 7 exemption still represents, in our view, the best way to provide appropriate protection to records relating to national security, defence and international relations issues and to the operation of AIC agencies and should be retained.<sup>140</sup>

The AIC considers that removal of the section 7 exemption would weaken the protection of its documents as it would need to rely on the exemption provisions in Part IV of the FOI Act (for example, ss 33, 37 and 45) on a case-by-case basis. Moreover, the AIC believes removal may impact negatively on the ability to maintain national security (the effective operation of intelligence agencies relies on proper protection of the identity of subjects of security interest and the details of their operations in relation to technological capability, sources and investigative techniques).

The AIC submits that the vast majority of information likely to be sought under the FOI Act will be exempt. To protect against the risk that even the absence of information would be of intelligence interest, the only safe response in many cases would be to neither confirm nor deny the existence of any documents. As a result, little would be gained from any amendment, but there would be an increased risk.<sup>141</sup>

The AIC believes that any removal of the exclusion of the intelligence agencies from the operation of the FOI Act may impact negatively on Australia's relationship with key intelligence partners and could have serious implications for information-sharing arrangements with allies, several of which are treaty-level. The confidence of allies in Australia's ability to protect shared information remains fundamental to intelligence sharing arrangements. It could diminish the level of access to important intelligence to which there is reliance for coverage of threats to Australia's national interests.

Some submissions support the current exemption for intelligence agencies from FOI legislation.<sup>142</sup> Others argue that the current exemption granted to intelligence agencies

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<sup>139</sup> *Open Government Report*, page 152.

<sup>140</sup> Australian Intelligence Community, *Submission*, page 2.

<sup>141</sup> Australian Intelligence Community, *Submission*, page 3.

<sup>142</sup> See for example, Law Council of Australia *Submission*, page 5.

should be either repealed or reconsidered.<sup>143</sup> The joint submission from media organisations suggests they should be subject to the FOI Act only in relation to documents of an administrative nature.<sup>144</sup>

The Australian Greens believe that the current exclusion of Australia's intelligence agencies should be removed.<sup>145</sup> This proposal was advanced by Australian Green Senator Scott Ludlam during the FOI reforms of 2009-10. Senator Ludlam moved an amendment to the Freedom of Information Amendment (Reform) Bill 2010 to remove the exemptions applying to intelligence agencies. The amendment was opposed by the major parties.

The Australian Greens consider that there will be no threat to national security issues if intelligence agencies are brought under the powers of the FOI Act. The Greens do not consider that simply because a document originates in a security agency it automatically has implications for national security and should therefore receive automatic and full exemption from the Act. The Greens support intelligence agencies applying relevant FOI Act exemptions in responding to FOI requests.

The OAIC considers that the exclusion of intelligence agencies from the operation of the FOI Act should be reconsidered.<sup>146</sup> The OAIC recommends that Australian intelligence agencies should be subject to the operation of FOI legislation with information disclosure regulated by specific exemptions, and that sections 33, 37 and 45 of the FOI Act would provide appropriate protections for information held by intelligence agencies. The OAIC supports review of the operation of exemptions in Part IV of the Act to ensure appropriate protection of sensitive intelligence and security information, noting that exemptions applied on a document-by-document basis allow a nuanced approach to managing appropriate information disclosure.<sup>147</sup> In the OAIC's view, the full exemption applying to intelligence agencies can have unintended or undesired consequences, and obstruct consideration of otherwise reasonable FOI requests.

For example, a request made to the Attorney-General's Department for a document relating to the activities of an inter-departmental committee (IDC) was refused on the basis that the IDC was chaired by the Australian Security Intelligence Organisation, despite the IDC being under the oversight of AGD's Protective Security Policy Committee.<sup>148</sup> The Review is sympathetic to this point and wonders why common sense didn't prevail.

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<sup>143</sup> See submissions from the Accountability Round Table; Australian Greens; Australian Society of Archivists; Evelyn Doyle; New South Wales Society of Labor Lawyers; OAIC; Moira Paterson; Pirate Party Australia; Public Interest Advocacy Centre; Peter Timmins; and John Wood.

<sup>144</sup> *Media Joint Submission*, page 18.

<sup>145</sup> Australian Greens, *Submission*, page 3.

<sup>146</sup> OAIC, *Submission*, para 159.

<sup>147</sup> See also New South Wales Society of Labor Lawyers, *Submission*, page 6.

<sup>148</sup> OAIC, *Submission*, para 160.

The Public Interest Advocacy Centre (PIAC) recommends the continued use of Schedule 2 to the FOI Act should be reviewed by the Government and all agencies listed should be required to justify their continued exclusion or exemption in respect of particular documents.<sup>149</sup>

This approach is similar to recommendation 74 in the *Open Government Report*:

The intelligence agencies should remain in Schedule 2, Part I. All other agencies currently listed (other than GBEs) should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the Act. If they do not do this within 12 months, they should be removed from Schedule 2 Part I.<sup>150</sup>

In PIAC's view:

Agencies should not be automatically exempt from the provisions of the FOI Act merely because they are more likely to create sensitive documents in the course of their duties as a result of the nature of their organisation - e.g., the Australian Secret Intelligence Service, Australian Security Intelligence Organisation or the Parliamentary Budget Office.

PIAC submits that the majority of agencies named in Schedule 2 could rely on the other exemptions in the FOI Act where they hold truly sensitive documents that it would be contrary to the public interest to disclose. To the extent that the existing exemptions do not cover these documents, new exemptions could be created within the body of the FOI Act and made subject to the public interest test.<sup>151</sup>

### ***New Zealand***

The *Official Information Act 1982* (NZ) (Official Information Act) contains specific exemptions for information that would be likely to prejudice the security, defence or international relations of New Zealand. The Official Information Act covers the New Zealand Security Intelligence Service and the Government Communications Security Bureau, but not the Inspector-General of Intelligence and Security or the Independent Police Conduct Authority.<sup>152</sup>

### ***United States***

The Central Intelligence Agency and the Federal Bureau of Investigation must comply with the *Freedom of Information Act* (US) which exempts information classified to protect national security and contains exclusions for three categories of law enforcement and national security records.<sup>153</sup> The United States FOI law contains strong national security exemption provisions.<sup>154</sup>

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<sup>149</sup> Public Interest Advocacy Centre, *Submission*, page 12.

<sup>150</sup> Open Government Report, page 153.

<sup>151</sup> PIAC, *Submission*, page 12.

<sup>152</sup> New Zealand Law Commission, *The Public's Right to Know* (2012), page 336.

<sup>153</sup> OAIC, *Submission*, para 159.

<sup>154</sup> See Australian Intelligence Community, *Submission*, page 4.

### **United Kingdom**

The United Kingdom legislation exempts entirely the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (see ss 23 and 24 of the *Freedom of Information Act 2000* (UK)).

The AIC notes that US and UK FOI legislation is different in both substance and operation to Australia's FOI scheme, containing additional safeguards protecting the records of intelligence agencies that have the practical effect of exempting intelligence agency material.<sup>155</sup>

Similarly, while the US FOI legislation extends in principle to cover intelligence agencies, it provides a range of blanket exemptions covering classified information related to the internal practices of an intelligence agency, as well as national security-related information (see Exclusion 3 and Exemption 1 and 3 of the *Freedom of Information Act* (US)). Separate US legislation also prohibits US intelligence agencies from complying with the FOI requests of a foreign government, its representatives or international organisations (see United States Code, Title 5, s 552(a)(3)).<sup>156</sup>

### **Review's Position**

The Review notes that the FOI Act does not contain any criteria for an agency to be excluded from the operation of the legislation. The Review considers that the Inspector-General of Intelligence and Security has been provided with comprehensive powers of scrutiny over the AIC agencies to ensure public accountability, while at the same time protecting intelligence information. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) provides additional accountability as the parliamentary body responsible for oversight of Australia's intelligence agencies: the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate (DSD), the Defence Intelligence Organisation, the Defence Imagery and Geospatial Organisation (DIGO) and the Office of National Assessments. As outlined in the *Defence White Paper 2013*, DSD and DIGO are to be renamed the Australian Signals Directorate and the Australian Geospatial-Intelligence Organisation. The Review notes that the Prime Minister's January 2013 National Security Strategy identifies Australia's national security objectives.

The Review considers that the Australian Crime Commission (ACC) should be excluded from the operation of the FOI Act, to provide protection for criminal information and intelligence. The ACC's primary object is to support and complement Australian law enforcement efforts to reduce the threat and impact of serious and organised crime on the Australian community through the provision of timely and accurate criminal intelligence. The ACC plays an important role in the collection, synthesis and distribution of criminal intelligence. The ACC fosters interagency communication and collaboration against Australia's organised crime threats.

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<sup>155</sup> Australian Intelligence Community, *Submission*, page 4.

<sup>156</sup> Australian Intelligence Community, *Submission*, page 4.

The Review agrees with the general approach recommended in Recommendation 74 of the *Open Government Report* that all agencies listed in Part I of Schedule 2 to the FOI Act should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the FOI Act.

**Recommendation 16 – Exclusion of Australian Crime Commission from the FOI Act**

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.

**Recommendation 17 – Review of Agencies Listed in Part I of Schedule 2 to the FOI Act**

**17(a)** 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.

**17(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.

**17(c)** The Attorney-General should also consider whether there is a need to include any other agencies in Schedule 2.

**Range of Activities Covered by the FOI Act**

**Agencies Exempt in Respect of Particular Activities**

Part II of Schedule 2 to the FOI Act lists agencies exempt in respect of particular documents.

Many items in Schedule 2 refer to the commercial activities of agencies. In this respect, there is some overlap with the exemption in Part IV of the FOI Act for documents disclosing trade secrets or commercially valuable information (s 47).

The *Open Government Report* considered it preferable to protect competitive commercial activities of agencies by utilising the [then] section 43 (now s 47) exemption in the FOI Act

rather than by a Schedule to the FOI Act.<sup>157</sup> That report recommended amending the [then] section 43 of the FOI Act so that it clearly applies to documents that contain information about the competitive commercial activities of agencies.<sup>158</sup> The report also recommended:

#### Recommendation 75

If s 43 of the FOI Act is amended as recommended by the Review, the exemptions in Schedule 2, Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II.<sup>159</sup>

### Submissions

Some regulatory agencies consider that their processes and activities should be exempt through inclusion in Part II of Schedule 2. The Commonwealth Ombudsman submits that the Ombudsman should be exempt in relation to investigative functions and its oversight, inspection and reporting function. The Department of Education, Employment and Workplace Relations considers that the FOI Act should be clarified so that documents provided to the Information Commissioner in response to a review should be exempt from the operation of the FOI Act.

The Law Council of Australia and New South Wales Society of Labor Lawyers note that it is unclear why some agencies, and not others that perform at least some commercial activities, are included in Part II of Schedule 2 to the FOI Act, and that the list should be reviewed.<sup>160</sup>

The Law Council of Australia notes that the *Government Information Public Access Act 2009* (NSW) provides that a public interest consideration against disclosure is that the disclosure could be expected to undermine competitive neutrality in connection with an agency's functions, or place the agency at a competitive disadvantage in a market, and this is coupled with a much reduced list of agencies that enjoy a special exemption in respect of competitive and market sensitive information.<sup>161</sup>

In its submission, the OAIC recommends that Schedule 2 to the FOI Act should be reviewed to clarify the rationale for inclusion of agencies in the list and the criteria by which the functions of agencies can be assessed for inclusion in Schedule 2 and to simplify the way that

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<sup>157</sup> *Open Government Report*, pages 140-41. See also Bureau of Meteorology, *Submission*, page 3.

<sup>158</sup> Recommendation 68 of the *Open Government Report*, page 141.

<sup>159</sup> *Open Government Report*, page 154.

<sup>160</sup> Law Council of Australia, *Submission*, page 6; and New South Wales Society of Labor Lawyers, *Submission*, page 7.

<sup>161</sup> Law Council of Australia, *Submission*, page 7.

the FOI Act protects the commercial activities of agencies.<sup>162</sup> The OAIC supports a partial exemption in respect of the OAIC's merits review and complaint functions.

The Review notes that the current exemption for the Special Broadcasting Service Corporation (SBS) in Part II of Schedule 2 is 'in relation to its program material and its datacasting content'. In its submission, SBS supports the retention of a partial exemption under the FOI Act. SBS submits it would, however, be clearer to revise the wording similar to that which applies to the Canadian Broadcasting Corporation. Under that approach, SBS's exemption would then read:

Special Broadcasting Service in relation to its journalistic, creative or content activities, other than documents relating to its general administration.<sup>163</sup>

The Australian Broadcasting Corporation (ABC) has not made a submission to the Review, so the issue of whether a similar exemption should apply to it warrants consideration.

The Review agrees with the general approach in Recommendation 75 of the *Open Government Report* that all agencies listed in Part II of Schedule 2 to the FOI Act should be required to demonstrate to the Attorney-General that they warrant being partially exempt from the operation of the FOI Act. In addition, the Review agrees with the *Open Government Report* that section 47 of the FOI Act should be amended to make clear that it applies to documents that contain information about the competitive or commercial activities of agencies.

### **Recommendation 18 – Criteria for Assessment of Agencies Exempt in Respect of Particular Documents**

The Review recommends the FOI Act contain criteria for assessment of agencies which are exempt from the FOI Act in respect of particular documents.

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<sup>162</sup> OAIC, *Submission*, para 165.

<sup>163</sup> SBS, *Submission*, page 1.

## **Recommendation 19 – Review of Agencies listed in Part II of Schedule 2 to the FOI Act**

- 19(a)** 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.
- 19(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.
- 19(c)** The Attorney-General should also consider whether there is a need to include any other agencies in Part II of Schedule 2.

## **Documents of an Administrative Nature**

### **Tribunals and Bodies**

Section 6 of the FOI Act states that tribunals, authorities or bodies specified in Schedule 1 to the FOI Act are only subject to the FOI Act in relation to requests for documents of an administrative nature. Currently the only bodies listed in Schedule 1 are the Australian Industrial Relations Commission, Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars.

As none of these bodies now exist, Schedule 1 should be amended to remove them.

Other merits review tribunals and bodies, such as the Administrative Appeals Tribunal, Social Security Appeals Tribunal, Migration Review Tribunal, Refugee Review Tribunal and Superannuation Complaints Tribunal could be subject to the FOI Act only in relation to documents of an administrative nature. These bodies undertake review and dispute resolution functions, receiving documents in the course of investigating and responding to a complaint. In its review of privacy laws, the ALRC noted that:

The main argument in favour of exempting federal tribunals is that they perform similar functions to the courts and therefore should be exempt to the same extent as the courts. Not all of the rationales that apply to the exemption of federal courts, however, apply to federal tribunals.

...The partial exemption of federal courts also is based in part on the separation of powers in Chapter III of the *Australian Constitution*. This rationale does not apply to federal tribunals, which exercise executive rather than judicial power. Nevertheless,

many tribunals have adjudicative functions that are similar to the judicial functions of courts.<sup>164</sup>

The ALRC noted that exempting the federal tribunals in respect of their adjudicative functions would not necessarily cover sufficiently the range of activities that ought to be exempt. Exempting the AAT in relation to activities undertaken for the purpose of carrying out its functions under its empowering legislation would be too wide a formulation (as conceivably all the AAT's activities, including administrative, could be considered activities undertaken for the purpose of carrying out its functions).

The ALRC recommended that federal tribunals whose primary functions involve dispute resolution, administrative review or disciplinary proceedings should be exempt from the operation of the Privacy Act except in relation to an act done or a practice engaged in, in respect of a matter of an administrative nature.<sup>165</sup>

In its submission to this Review, the AAT considers it should be exempt from the operation of the FOI Act in relation to activities undertaken for the purposes of carrying out its functions under the *Administrative Appeals Tribunal Act 1975*.<sup>166</sup>

The Superannuation Complaints Tribunal recommends the FOI Act not apply to it completely.<sup>167</sup> Fair Work Australia considers that the FOI Act should not apply to documents which are created with respect to its adjudicative functions, so it should only be subject to the FOI Act in relation to documents of an administrative nature.<sup>168</sup>

### **Recommendation 20 – Review of Agencies Listed in Schedule 1 to the FOI Act**

**20(a)** The Review recommends Schedule 1 to the FOI Act be amended to repeal the bodies listed, as they no longer exist.

**20(b)** The Attorney-General should also consider whether there is a need to include any tribunals, authorities or bodies in Schedule 1.

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<sup>164</sup> ALRC Report 108 (2008), *For Your Information*, pages 1225-26.

<sup>165</sup> Recommendation 35-1 of the ALRC Report 108 (2008), *For Your Information*, page 1227.

<sup>166</sup> Administrative Appeals Tribunal, *Submission*, page 2.

<sup>167</sup> Superannuation Complaints Tribunal, *Submission*, page 1.

<sup>168</sup> Fair Work Australia, *Submission*, page 3.

## Courts

Section 5 of the FOI Act states that the FOI Act does not apply to documents of the courts unless the documents concern matters of an administrative nature. No submissions recommended change to this provision and the Review considers it should remain.

There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice.<sup>169</sup>

## Official Secretary to the Governor-General

Section 6A of the FOI Act states that the FOI Act does not apply to documents of the Official Secretary to the Governor-General unless the documents concern matters of an administrative nature. Although some submissions recommended consideration of whether the FOI Act should apply completely to the Official Secretary,<sup>170</sup> the Review does not consider this is required and does not recommend any change.

The Review notes that in *Kline v Official Secretary to the Governor-General and Anor* [2012] FCAFC 184 the Full Court of the Federal Court of Australia confirmed that documents about the Australian system of honours are not documents that relate to matters of an administrative nature and are not subject to section 6A of the FOI Act.

## Research Institutions

Section 47H of the FOI Act states that a document is conditionally exempt if it contains information relating to research that is being, or will be, undertaken by an officer of an agency listed in Schedule 4, and disclosure of the information before completion of the research would be likely to unreasonably expose the agency or officer to disadvantage.

Schedule 4 lists only the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and the Australian National University.

In its submission, the CSIRO argues that any removal or weakening of its exemption would significantly impede its relationship with industry, and the legitimate protection of commercial in confidence material and preliminary research.<sup>171</sup> The CSIRO contends that:

- commercial engagement with industry is integral to undertaking targeted scientific research and assisting industry, and such commercial activity involves collaborative and contract research, commercial licensing agreements and consulting and technical services with industry;

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<sup>169</sup> *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (1979), page 158.

<sup>170</sup> See submissions from Karen Kline; Craig Thomler and Peter Timmins.

<sup>171</sup> CSIRO, *Submission*, page 11.

- it competes with the private sector (and other international government) scientific institutes in an international and highly competitive market; and
- it often competes with private and public sector bodies for research funding and for the provision of research services.<sup>172</sup>

In contrast, Jeremy Tager argues that as a publicly funded institution, the CSIRO should be fully subject to the FOI Act.<sup>173</sup>

The Bureau of Meteorology, the Australian Meteorological and Oceanographic Society and Science and Technology Australia submit that the exemption for the CSIRO should be available to all Australian Government agencies undertaking scientific research, and not just the CSIRO and the Australian National University.

The Review, on balance, considers that the CSIRO exemption should be maintained.

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<sup>172</sup> CSIRO, *Submission*, page 12.

<sup>173</sup> Jeremy Tager, *Submission*, page 5.

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# Chapter 6: Fees and Charges

## The FOI Reforms

On 1 November 2010, application fees for all FOI requests for access and for internal review of agency decisions were abolished. At the same time, FOI processing charges were revised so that an applicant does not pay any charges for access to their personal information. For all other applications there is no charge for the first five hours of decision-making time, after that the processing charge is \$20 per hour. In addition, no charge is payable where an applicant has not been notified of a decision within a period set down in the FOI Act. Consistent with these reforms, application fees were not introduced for reviews of FOI decisions undertaken by the Information Commissioner (IC).

Prior to 1 November 2010, there was a \$30 application fee for an FOI request and a \$40 application fee for internal review of an agency decision on an FOI request. The main charges were \$15 per hour for search and retrieval time and \$20 per hour for decision-making time, with maximum charges of \$30 and \$40 respectively for personal information about the applicant. Additional processing charges could be imposed, including photocopying, transcription, supervised inspection and postage or delivery charges. This meant that in most cases the maximum payable for access to an applicant's personal information was \$100. The prescribed rates of charges for agency processing of FOI requests have not increased since 1986, so they are quite out of kilter with the current cost of processing FOI requests.

Although there are no fees or charges payable for access to an applicant's personal information, for all other requests the following charges (which are set out in the *Freedom of Information (Charges) Regulations 1982*) have applied from 1 November 2010.

**Table 1 - Fees and Charges for Access to Non-personal Information**

Fee or charge	Pre 1 November 2010	Post 1 November 2010
Application fee	\$30	No fee
Search and retrieval charge	\$15 an hour	No change - \$15 an hour
Decision-making charge	\$20 an hour	5 hours free, then \$20 an hour
Other access charges	Photocopy - 10c per page Transcript - \$4.40 per page Inspection - \$6.25 half hour Delivery – postage/delivery cost	Photocopy - 10c per page Transcript - \$4.40 per page Inspection - \$6.25 half hour Delivery – postage/delivery cost
FOI request not responded to within the time limit	Normal fees and charges apply	No charges
Internal review fee	\$40	No fee
IC review fee	N/A	No fee

## The Role of Fees and Charges

The Review believes that the fees and charges regime for processing FOI requests should reflect an appropriate balance between various objectives. The general objective of promoting access to information at the lowest reasonable cost has applied since commencement of the FOI Act.<sup>174</sup> On the other hand is the overarching objective for agencies to manage resources effectively, particularly in times of economic and budgetary restraint.

Processing FOI applications at the lowest reasonable cost is important for both applicants and agencies. While the reforms have been successful in delivering low cost access to information for applicants, they have also created challenges for agencies in managing increased workload.<sup>175</sup> Some agencies have reported higher costs of processing because the number or complexity of applications has increased.<sup>176</sup> This has raised questions about the appropriateness of diverting resources from other key areas to process FOI requests.<sup>177</sup>

Fees and charges should not be used to discourage applicants from exercising their rights under FOI, nor as a mechanism to seek full costs recovery or to generate revenue for agencies. Nevertheless, it is appropriate for users to make some contribution to the costs of processing applications as in many cases the costs of processing individual requests can be substantive. Costs should be set at an appropriate level to reflect the type of information sought and the resources of the applicant.

An appropriate level also assists in providing a disincentive for unmeritorious or repeat applications and streamlining large or complex requests. The regime must also be as simple as possible to administer as a complex scheme increases the costs of processing and increases the risk of disputes.<sup>178</sup>

## Review of Fees and Charges

In 2012, the IC reviewed fees and charges under the FOI Act and reported to the former Attorney-General. The *Review of charges under the Freedom of Information Act 1982* (FOI Charges Review) was released in March 2012. In July 2012, the then Attorney-General agreed to defer action on the report, so that the fees and charges regime and related issues could be examined more broadly as part of this Review. The IC's Report is available on the OAIC website at [www.oaic.gov.au](http://www.oaic.gov.au).<sup>179</sup>

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<sup>174</sup> The Review notes that while this was modified by the FOI reforms, it remains substantively the same.

<sup>175</sup> New South Wales Society of Labor Lawyers, *Submission*, page 3.

<sup>176</sup> See, for example, submissions to the FOI Charges Review of the Department of Health and Ageing; Department of Finance and Deregulation; and the Department of the Prime Minister and Cabinet. These submissions are available on the OAIC website at <http://www.oaic.gov.au/freedom-of-information/foi-engaging-with-you/previous-foi-consultations/review-of-charges-under-the-foi-act/>.

<sup>177</sup> Department of Health and Ageing, *Submission*, FOI Charges Review, page 1.

<sup>178</sup> Federal Court of Australia, *Submission*, FOI Charges Review, page 2.

<sup>179</sup> See: <http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982>.

In conducting his review, the IC set up a consultation group of key agencies with representatives from the Attorney-General's Department; the Australian Competition and Consumer Commission; the Australian Taxation Office; the Department of Defence; the Department of Education, Employment and Workplace Relations; the Department of Finance and Deregulation; the Department of Immigration and Citizenship; the Department of the Prime Minister and Cabinet; the Department of Resources, Energy and Tourism; and Treasury. In submissions to this Review agencies generally support the recommendations made in the IC's report.

Since commencement of the FOI reforms, agencies have reported a significant increase in the number of FOI requests for non-personal information. The IC considers the main reason for this to be the change to the fees and charges regime, but other reasons include abolition of conclusive certificates, reforms to the exemptions available, greater awareness of the right of access and of information rights generally following commencement of the FOI reforms and establishment of the OAIC. Many of these requests have been resource-intensive for agencies.

In 2008-09, the number of FOI requests received was 27,561. In 2009-2010, the number decreased to 21,587 primarily because agencies (principally Centrelink) adopted a practice of releasing personal information without requiring a request under the FOI Act. The percentage of personal information requests has decreased further since commencement of the FOI reforms from 87.2% in 2009-10 to 80.7% in 2011-12. Again, this decrease is due in part to agencies releasing information outside of the FOI Act.

While the total number of FOI requests increased by 4.9% from 23,605 in 2010-11 to 24,764 in 2011-12, there was a 16.4% increase in requests for non-personal information from 4,101 in 2010-11 to 4,776 in 2011-12. The number of these type of requests has increased from 2,764 in 2009-10. As noted by the OAIC in its 2011-12 Annual Report, this is an overall increase of 72.85% since 2009-10 and is significant as this type of request is more resource intensive for an agency than a request for personal information.

In undertaking the FOI Charges Review, the IC focussed on the 2010 FOI reform objectives of promoting greater transparency in government by providing the community with access to government information to support accountable and responsive government.

He acknowledged that FOI requests can impose a substantial administrative burden on agencies and divert resources from other functions and that there needed to be a better balance between providing public access to government information and other responsibilities of agencies and ministers.

The FOI Charges Review contained nine recommendations for reform (see **Annex F**).

In submissions to this Review, agencies generally support the recommendations made in the IC's report, particularly:

- administrative access - agencies should be encouraged to establish administrative schemes to allow people to request information outside the FOI Act. If an agency

establishes such a scheme and a person makes a FOI request without first applying under the scheme, a \$50 FOI application fee should apply;

- FOI processing charges - charges should apply at the same flat rate to all processing activities. Processing time of more than five hours, but less than ten hours should be charged at a flat rate of \$50. Processing in excess of ten hours should be charged at \$30 per hour;
- processing time - an agency should have the discretion to refuse to process a request that is estimated to take more than 40 hours to process;
- reduction of charges - an agency should be able to waive or reduce charges in full or by 50% in cases of financial hardship or public interest. Charges otherwise payable should be reduced if an agency fails to respond within statutory timeframes; and
- application fees - an applicant who seeks an IC review of an agency's decision without first seeking internal review should be charged a \$100 fee.

These recommendations are discussed in further detail below.

### **A More Effective and Responsive Fees and Charges Framework**

In making the recommendations below, the Review maintains the distinction between individuals requesting personal information and other applicants seeking access to broader categories of information. Accordingly, the Review considers it important that no application fee should apply for an FOI request for access to an individual's information or a request for IC review of an FOI decision relating to access to personal information.

In order to ensure a more effective use of resources, the Review believes that, as is currently the case, those seeking access to non-personal information should contribute to the costs of processing FOI requests, particularly where matters proceed to review by the IC. This recognises the ability of corporations, and others, who seek non-personal information to make a financial contribution and should assist in managing the increasing frequency, complexity and scope of such requests.

It is proposed that an application fee would apply to a request for a review by the IC of a decision on a request for access to non-personal information. The application fee would need to be set at a level sufficient to provide an incentive for applicants to seek internal review, where available. Processing and access charges would be streamlined along the lines proposed by the FOI Charges Review, as discussed in more detail in this chapter.

The recommendations are designed to provide a more effective use of government resources and address some concerns raised by agencies; for example, resources being absorbed by those seeking to use the FOI system as a form of discovery in private litigation, using the FOI Act against regulatory agencies, and people in the criminal justice system seeking names and sources. Implementation of these recommendations will ensure resources across government are better focussed on providing access in accordance with the FOI Act's objectives.

## **Administrative Release of Information**

The FOI Charges Review recommended that agencies set up administrative access schemes for the release of government information for a specific request outside of the FOI Act. In its submission to this Review, the OAIC notes that an administrative access scheme offers benefits to agencies and members of the public including, encouraging flexibility in and engagement with the public, potential for cost benefits and quicker processing time due to less time spent on formal FOI notice requirements and requests being handled by other areas of the agency rather than a specialist FOI unit.

The Review notes that a number of agencies have already taken steps to release personal information outside formal FOI procedures. This has been particularly noticeable in Centrelink, where the number of FOI requests for personal information has fallen from 10,253 in 2008-9 to 3,774 in 2010-2011. On 1 July 2011, Centrelink and Medicare Australia were integrated into the Department of Human Services (DHS). While DHS still remains one of the top four agencies in terms of the number of FOI requests received, it has advised that reducing its FOI burden by providing customers with information outside the FOI Act and moving classes of information requests to online delivery has freed up senior officers to attend to other duties. The number of personal requests received by DHS (aggregated to include Centrelink and Medicare Australia) has fallen from 4,298 in 2010-2011 to 3,761 in 2011-12, a decrease of 13%. The Review commends Centrelink, Medicare Australia and DHS for leading the way in the Australian Public Service in this regard.

In some cases, a request for personal information will involve third party considerations and it may be difficult to develop procedures for dealing with this category of information which don't replicate the FOI Act. In other cases, agencies may wish to release information under the FOI Act in order to obtain the benefit of the protections against civil and criminal liability, in sections 90, 91 and 92, where an agency publishes or gives access to a document in good faith. Although these protections would be available for documents outside of the FOI Act, they may be more difficult to attract in such circumstances.

Many agencies do not receive a large number of requests for personal information (e.g. in 2010-11, AGD 50, DOFAD 1, PM&C 5, Treasury 0; in 2011-12 AGD 102, DOFAD 14, PM&C 0, Treasury 9).<sup>180</sup> For these agencies there may be little, if any, opportunity to reduce the costs and burden of processing FOI requests by setting up an administrative scheme.

The Information Publication Scheme (IPS) is an important reform in its own right, requiring agencies to publish proactively general information about an agency and its operations and other information rather than in response to FOI requests.

The Review considers it appropriate for administrative access schemes to be promoted and implemented in accordance with OAIC guidelines rather than by way of amendment to the FOI Act. The current FOI Guidelines, which encourage agencies to release information

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<sup>180</sup> AGD (Attorney-General's Department), DOFAD (Department of Finance and Deregulation); PM&C (Department of the Prime Minister and Cabinet).

outside the FOI Act should be revised to provide further guidance and practical assistance to agencies that wish to establish administrative access schemes.<sup>181</sup>

The FOI Charges Review also recommended a \$50 application fee where an applicant applies under the FOI Act for information that is available under an administrative access scheme. The report recommended the fee apply to requests for both personal and non-personal information. Where an applicant was dissatisfied with the response to an administrative access request, they would be able to make an FOI request without paying the application fee.

The OAIC submission notes that while administrative access schemes would be particularly suited to requests for personal information, the effectiveness of its recommendation would be undermined if the \$50 application fee did not apply to requests for personal information.

The application fee payable for FOI requests prior to abolition of the fees was \$30. While this was an nominal fee that did not reflect agency processing costs, the report does not indicate the reasons for setting the proposed application fee at \$50 other than noting that this is a moderate amount.

The Review is concerned that the costs of setting up and administering a scheme for application fees could overshadow efficiencies that may be obtained from encouraging the use of administrative access schemes. In addition, imposing an application fee for personal information is not consistent with the policy of providing access to an applicant's personal information free of charge. Removal of application fees for all FOI access requests was a key part of the FOI reforms, a reform that the Review agrees with.

### **Recommendation 21 – Administrative Access Schemes**

- 21(a)** The Review recommends the OAIC consider the development of appropriate guidance and assistance to encourage agencies to develop administrative access schemes.
- 21(b)** 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.

### **FOI Processing Charges**

As noted above, the current charging regime provides that the first five hours of decision-making is free. The FOI Charges Review observes that the charging regime draws an artificial distinction in the different rates payable for processing FOI requests and that the separate charges categories complicate the imposition of charges for both agencies and

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<sup>181</sup> OAIC, *FOI Guidelines*, paras 3.2-3.5.

applicants. Search and retrieval is charged at \$15 per hour, decision-making at \$20 per hour and electronic processing charged at actual cost.

In order to simplify the charging regime and make it easier for agencies to administer and respond to applicants, the FOI Charges Review recommended that a single processing rate apply to FOI processing activities. A flat rate of \$50 would be payable for processing time that is between five and ten hours and after ten hours the rate would be \$30 per hour. (As is currently the case, no charges would be payable by an applicant seeking access to their personal information and for other information no processing charge would apply for the first five hours of processing.) Current provisions dealing with waiver on grounds of financial hardship or public interest would continue to apply to the revised charges.

Noting that there has been no increase in charges since 1986, the Review considers that the proposed new scale of streamlined charges is appropriate and will be straightforward for agencies to administer and for applicants to understand. The simplified charging regime will also assist in reducing unnecessary complexity in processing FOI requests.

### **Recommendation 22 – FOI Processing Charges**

**22(a)** 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 a flat rate of \$50. The charge for each hour of processing time after the first ten hours should be \$30 per hour.

**22(b)** The current provisions for no processing charges for access to an applicant's personal information and for waiver of charges should continue to apply.

### **FOI Access Charges**

Current regulations provide a combination of approaches for charges for access to documents including actual costs, by the page (e.g. photocopying) and by the half hour (for inspection of documents). The FOI Charges Review notes that some of these activities are carried on as part of general FOI processing ( e.g. electronic production) and should be part of the general processing charge while other charges no longer reflect the actual costs to the agency.

The FOI Charges Review recommended that the supervision charge be increased from \$6.25 per half hour to \$30 per hour on the basis that there is no justification for the charge for supervised inspection to be different to the proposed new standard processing charge of \$30 per hour. The FOI Charges Review also recommended that photocopying charges be increased to \$0.20 per page in line with other Australian jurisdictions, that this charge also

include printing and that actual costs apply to the mechanisms for providing access with a limit of \$30 on transcription costs.

The Review considers it appropriate for the proposed rate of \$30 per hour to apply to inspection of documents recognising that, as referred to in the FOI Charges Review, if a supervised inspection occurred it would take place outside an officer's normal work location and routine. However, the Review considers that consistent with the flat rate for processing charges there should also be a flat rate for access charges, with no other access charges applying, that is there would be no charges for postage, printing, photocopying, copying, transcription, delivery or any other access component.

The Review believes that the proposed changes to access charges will facilitate processing FOI requests. The revised access charges, together with the revised processing charges, will still provide access to government information at a reasonable cost.

### **Recommendation 23 – FOI Access Charges**

**23(a)** 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.

**23(b)** The current provisions for no charges for access to an applicant's personal information and for waiver of charges should continue to apply.

### **Managing Large Requests by a Ceiling on Processing Time**

Sections 24 and 24AA of the FOI Act allow for requests to be refused where the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations. In order to rely on these provisions an agency must consult with the applicant to provide an opportunity to revise the request.

The FOI Charges Review notes that it is difficult for an agency to determine when a request would impose an unreasonable burden on an agency and that Administrative Appeals Tribunal (AAT) decisions have not provided clear guidance on this issue other than to indicate that it is a high threshold. This has meant that agencies have been reluctant to use this mechanism and that its effectiveness in managing FOI requests that encompass multiple documents or require extensive consultation has been limited.

More recent anecdotal evidence suggests that agencies are taking a stronger approach to refusing requests on the basis of unreasonable diversion of resources. IC review decisions maintain the view that this is a high threshold.

The FOI Charges Review proposed a new approach for managing the administrative burden of dealing with complex and voluminous requests. This is to provide that an agency or minister could refuse to process a request that would take more than 40 hours. This equates to approximately one week of processing time or \$950 in processing charges (under the proposed new rates). There would be a requirement for consultation prior to refusal as well as a requirement to assist applicants to narrow the scope of requests. The discretion to refuse to process requests would also apply to requests for an applicant's personal information.

The FOI Charges Review argued that a processing ceiling would be a clear standard for when a request needs to be narrowed or amended because of its unmanageability. This would also represent a predictable measure in the FOI process, striking a balance between an individual's right to access and an agency's interest in managing the processing resource burden.

The Scottish and United Kingdom legislation have limits on processing times based on costs of £600 (40 hours processing time in Scotland at £15 per hour and 24 hours processing time in the UK at £25 per hour), but does not include decision-making time in either case.

The FOI Charges Review also recommended that the practical refusal mechanism in sections 24 and 24AA of the FOI Act should be repealed. In its submission to this Review, however, the OAIC acknowledges that the imposition of a ceiling on processing time would not completely replace the need for a practical refusal mechanism for large or complex requests or requests of a specialist nature that would require the consideration of a minister or senior officer. (See further discussion of the practical refusal mechanism in Chapter 7).

Agencies and others have expressed broad support,<sup>182</sup> on the basis that there should not be an unlimited obligation on limited government resources to process voluminous requests.<sup>183</sup> Some who support the proposal raised concerns that applicants may be disadvantaged by poor management systems or made suggestions to enhance its effectiveness.<sup>184</sup> Other submissions did not support a processing ceiling as they considered the proposed 40 hour ceiling was too low,<sup>185</sup> that it could be exploited by agencies to frustrate access to large documents,<sup>186</sup> that other factors such as the nature of the information being requested also needs to be considered,<sup>187</sup> or unless provision was made for the cost recovery charges to apply to that part of the request beyond the processing ceiling so that an agency could choose to process the request on that basis.<sup>188</sup>

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<sup>182</sup> See, for example, submissions from the Australian Taxation Office; Department of Foreign Affairs and Trade; Department of Human Services; Department of Immigration and Citizenship; and National Health and Medical Research Council.

<sup>183</sup> New South Wales Society of Labor Lawyers, *Submission*, page 3; Megan Carter, *Submission*, page 11.

<sup>184</sup> See, for example, submissions from Evelyn Doyle; Moira Paterson; PIAC and Rick Snell.

<sup>185</sup> See, for example, submissions from the Australian Society of Archivists; Law Council of Australia, Administrative Law Committee; and joint submission from the Taxation Committee of the Business Law Section of the Law Council of Australia and The Tax Institute.

<sup>186</sup> Australian Greens, *Submission*, page 11; Paul Farrell, *Submission*, page 7.

<sup>187</sup> Peter Timmins, *Submission*, page 19.

<sup>188</sup> Andrew Mitchell and Tania Voon, *Submission*, page 2.

A resourceful applicant could take action to overcome the processing ceiling by making serial or sequential requests in such a way that the requests could not be treated as a single request under section 24(2) of the FOI Act. While the FOI Charges Review recommended that the discretion not to process a request would not be reviewable, the estimate of time made by the agency or minister would be reviewable by the IC. It is likely that some applicants would seek both IC review of the estimate of time and review of the agency's discretion under the *Administrative Decisions (Judicial Review) Act 1977*. This would not assist in reducing the administrative burden.

Although the imposition of a processing ceiling does not provide all the answers, the Review believes that it would be an effective mechanism to assist agencies to manage large requests and would give an agency or minister the discretion to refuse or to accept the request. It would also assist in addressing concerns about the inappropriate use of FOI as an alternative or in addition to discovery. (See further discussion in Chapter 7).

The Review notes that it is appropriate for agencies to put in place measures to assist them to manage FOI requests that encompass multiple documents or require extensive consultation to reduce the administrative burden on agencies and understands that a number of agencies have done so. These measures should be consistent with the existing FOI framework and support the objects of disclosure and transparency of government information.

#### **Recommendation 24 – Ceiling on Processing Time for FOI requests**

The Review recommends the introduction of a 40 hour processing time ceiling for FOI requests.

### **Reduction and Waiver of FOI Charges**

Section 29(5) of the FOI Act provides that in deciding whether to reduce or waive FOI charges an agency or minister must consider whether the charge would cause financial hardship to the applicant and whether providing access to the document would be in the general public interest or in the interest of a substantial section of the public.

The FOI Charges Review recommended that the public interest requirement should be revised to refer to 'special benefit to the public'. The report takes the view that in light of the changes to the FOI Act as part of the recent FOI reforms the current public interest test would always be met and that it is no longer appropriate as a criterion for assessing whether or not charges should be reduced or waived.

In its submission to this Review the OAIC stated that under the 'special benefit' test the release of a document under the FOI Act and its publication in a disclosure log though in the public interest might not necessarily bring a special benefit to the public.

The Review notes that this is the standard that applies under section 66 of the *Government Information Public Access Act 2009* (NSW) and that the NSW Information and Privacy Commission has issued guidelines to assist agencies in considering the provision. It is not clear that introducing a revised public interest test would create clarity or make the provision easier for agencies to apply. In these circumstances, the Review does not support the proposed change to the public interest test.

The FOI Charges Review notes that it is difficult for agencies to determine what level of waiver should apply in a particular case and that there is uncertainty that waiver decisions are consistent across government agencies. In order to address these concerns, the FOI Charges Review recommended that if a decision is made by an agency to waive charges the options should be either to waive the charges in full, by 50%, or not at all.

The Review agrees that this is a sensible approach that would be simpler for agencies to administer and discuss with applicants. However, it would be preferable for this to be set out in the OAIC's FOI Guidelines rather than in legislation. This would provide a clear standard for agencies to apply and assist in developing a consistent approach to decisions on waiver. This would also provide flexibility for an agency to apply a different standard in a particular case depending on the circumstances. It also allows the options to be revised more easily if considered necessary or desirable.

#### **Recommendation 25 – Reduction and Waiver of FOI Charges**

**25(a)** 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.

**25(b)** 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.

#### **Reduction of Charges for Decisions Outside Statutory Timeframes**

Regulation 5(2) of the *Freedom of Information Charges (Regulations) 1982* provides that where an applicant has not been notified of a decision within the relevant statutory timeframe no charges are payable by the applicant.

The FOI Charges Review indicates that applying the full reduction from the moment the statutory timeframe is exceeded does not recognise that a delay may result from unexpected developments such as the request being larger or more complex than originally assumed or a sudden influx of requests to the agency.

The Review agrees that adoption of a sliding scale would continue to provide an effective mechanism to support the timely processing of FOI requests as well as a greater incentive for agencies to continue to process the request as quickly as possible. There would be no charge payable where the delay exceeded more than 30 working days. (See Chapter 7 for discussion of FOI time limits).

### **Recommendation 26– Reduction Beyond Statutory Timeframe**

**26(a)** 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.

**26(b)** No charge should be payable if the delay is longer than 30 working days.

### **Application Fees for Information Commissioner Review**

An FOI applicant dissatisfied with an agency decision can either seek internal review by the relevant agency or IC review. Internal review is not available if a minister or principal officer of an agency made the original decision.

There is no application fee payable for either review. Prior to the FOI reforms internal review was a mandatory step before an applicant could seek external review by the AAT. The application fee for internal review was \$40 and AAT fee was \$777. The current AAT fee is \$816.

Allowing applicants to seek IC review directly without going through internal review was designed to provide a streamlined and quick process for resolving FOI disputes by an independent decision-maker as well as to encourage agencies to make the best possible access decision in the first instance.

As the FOI Charges Review reports there is robust use of both internal review and IC review and confidence in the internal review mechanism is improving.<sup>189</sup> There were 389 applications for internal review in 2009-10, 419 in 2010-11 and 496 in 2011-12. As at 31 March 2013, the OAIC has received 383 applications for the current financial year.<sup>190</sup>

In 2012, 223 internal review applications (45.0%) were for review of personal information and 273 were for other information. Agencies made 423 decisions on internal review, of

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<sup>189</sup> OAIC, *Submission*, para 17.

<sup>190</sup> OAIC statistics 2012-13 as at 31 March 2013. These are available on the OAIC website at [www.oaic.gov.au](http://www.oaic.gov.au).

these 204 (48.4%) affirmed the original decision, 198 (46.8%) set aside or varied the original decision and 21 (4.23%) reduced the charges levied.<sup>191</sup>

Since figures are not readily available for IC reviews which have not been through internal review, it is difficult to assess the impact that mandating internal review could have on the number of requests for internal review or IC reviews.

The FOI Charges Review recommends an application fee of \$100 if an applicant seeks IC review without going through internal review. There would be no reduction or waiver for this fee. The reason for imposing this fee is to provide an incentive for applicants to resolve matters with agencies before seeking IC review.

Introducing an application fee could also address cost issues for the OAIC, lead to a reduction in the number of requests for IC review and assist the OAIC in managing its workload. The FOI Charges Review questions the ability of the OAIC to continue to manage its workload if the high level of applications for IC review continues. The OAIC submission to this Review also notes the resourcing challenges of the increasing FOI workload.

The Review acknowledges the resourcing constraints of the OAIC, but considers that it is too early to assess whether the current level of applications will continue after the initial phase of operations where a higher figure could be expected as applicants test the new FOI provisions and OAIC procedures.

The Review agrees that internal review can be a valuable step in resolving disagreements about access requests and that steps to promote greater dialogue between applicants and agencies should be encouraged, including encouraging applicants to seek internal review before applying for IC review.

The Review believes that those seeking access to non-personal information should make some contribution to the costs of processing the application. Therefore, the Review considers that application fees should apply for all applications for IC reviews of requests for non-personal information.

The Review has considered the appropriate level for proposed application fees at the IC review stage, noting some submissions suggested reintroduction of application fees for the initial request for access.<sup>192</sup> While the Review believes that reintroduction of an application fee, of say \$200, for non-personal information would be consistent with the applicant's ability to make a financial contribution and could also be effective in managing workload, it does not support application fees for FOI requests as this is not consistent with the objective of promoting access to government information. Maintaining the system of no fee at the internal review level is consistent with this approach and provides for free review of access refusal decisions.

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<sup>191</sup> Source OAIC, *Annual Report 2011-12*, Chapter Nine: Agency Freedom of Information Activity.

<sup>192</sup> See, for example, submissions from the Australian Society of Archivists; Department of Education, Employment and Workplace Relations; and Paul Farrell.

Taking these factors into consideration the Review considers that an application fee of \$400 for IC review is appropriate. This is twice the phantom \$200 application fee at agency level and approximately half the application fee in the AAT. As is the case in the AAT, it is recommended that a reduced fee of \$100 apply in cases of financial hardship, and where proceedings terminate in favour of the applicant \$300 would be refunded to the applicant, leaving a net amount of \$100. The existence of a fee for IC review would provide an incentive for people to seek internal review. However, it is not proposed that the fee is remitted or reduced where the applicant has first sought internal review or where internal review is not available.

**Recommendation 27 – Application Fees for Information Commissioner Review of Access to Non-personal Information**

- 27(a)** 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.
- 27(b)** If proceedings terminate in a matter favourable to the applicant, a \$300 refund would apply. There would be no refund of the reduced fee.
- 27(c)** No fee would apply for an Information Commissioner review of an access grant decision by an affected third party.
- 27(d)** In all other cases, fees would be payable for Information Commissioner review of decisions for access to non-personal information.
- 27(e)** There would be no remission of the fee where an applicant has first sought internal review or where internal review is not available.

**Indexation of Fees and Charges**

The FOI Charges Review recommended that all FOI fees and charges should be adjusted every two years to match any change over that period in the Consumer Price Index (CPI), by rounding the fee or charge to the nearest multiple of \$5.00.

The Review agrees that FOI fees and charges should be adjusted in accordance with the CPI, based on the federal courts/AAT model which provides for fee increases every two years.

### **Recommendation 28– Indexation of Fees and Charges**

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.

### **Timeframes for Applicants to Respond to Agency Decisions**

The FOI Charges Review reports that agencies have raised concerns about the absence of a requirement for an applicant to take action within a specified timeframe once notified of an agency decision in relation to a contention that charges should not be reduced or not imposed, which can lead to extended delays in FOI processing. This contrasts with the requirement for an applicant to respond to the initial charges estimate within 30 days or the request is deemed to be withdrawn under section 29(1)(f),(g) of the FOI Act. The Review agrees that it would assist processing FOI requests to provide a timeframe for an applicant to respond to a notice advising of an agency decision to reject a claim that a charge should be reduced or not imposed and for the FOI request to be deemed to be withdrawn if the applicant does not do so. This would be similar to the existing provisions in section 29(1)(f) and (g) of the FOI Act.

### **Recommendation 29 – Timeframes for Applicants to Respond to Agency Decisions**

**29(a)** 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.

**29(b)** 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.

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# Chapter 7: Minimising Regulatory and Administrative Burden on Agencies

Some submissions from departments and authorities outlined the significant resource constraints and issues they have experienced in administering the FOI Act in their agency.<sup>193</sup> As noted by the Department of Education, Employment and Workplace Relations, an appropriate balance needs to be struck between promoting public access to information and the financial cost incurred by the Australian community in providing that access.<sup>194</sup>

Despite the FOI Act providing a legal right to seek access to documents, FOI processing is not always considered by agencies as ‘core’ business,<sup>195</sup> in the same way as policy development and program administration, and it can be wrongly perceived as a diversion.

An important part of the objects clause<sup>196</sup> in the FOI Act is:

The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.<sup>197</sup>

‘Lowest reasonable cost’ in this context is taken to mean lowest reasonable cost to both the Government and FOI applicants. The objects clause also includes promoting Australia’s representative democracy by increasing public participation in government processes and increasing scrutiny, discussion, comment and review of the Government’s activities. As noted in one submission:

Public access to government held information is one of the pillars of mature democracies.<sup>198</sup>

## Impact of FOI on Agency Resources

The total reported cost attributable to the FOI Act in 2011-12 was \$41.7 million.<sup>199</sup>

This figure is calculated by the OAIC on the basis of information provided by agencies and

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<sup>193</sup> See for example, submissions from the Department of Foreign Affairs and Trade; and the National Health and Medical Research Council.

<sup>194</sup> Department of Education, Employment and Workplace Relations, *Submission*, page 2.

<sup>195</sup> Canberra Innovation Corporation Pty Ltd (CANIC), *Submission*, page 2.

<sup>196</sup> FOI Act, section 3.

<sup>197</sup> FOI Act, section 3(4).

<sup>198</sup> Rhonda Breit, Paul Henman, Johan Lindberg and Rick Snell; *Submission*, page 1. See also submissions from Greg Bean; and William Forgan-Smith.

<sup>199</sup> OAIC, *Annual Report 2011-12*, page 135.

ministers.<sup>200</sup> To assess the impact on agency resources of their compliance with the FOI Act, agencies and ministers are required to estimate staff-hours spent on FOI matters and non-labour costs directly attributable to FOI, such as training and legal costs.<sup>201</sup> These estimated costs are included in the OAIC's Annual Report. Agencies rarely, however, keep exact records of hours spent on FOI matters and other non-labour costs incurred.<sup>202</sup>

The Review accepts that there are no precise figures for the cost of FOI Act administration across the Australian Government and that the available figures are an estimate.<sup>203</sup>

FOI costs must be understood in relation to the 'unquantifiable social (and political) benefits derived from the right of access to documents conferred by the FOI Act'.<sup>204</sup> FOI is a critical component of Australian government. The objects section of the FOI Act specifically refers to the Parliament's intention to promote Australian representative democracy by contributing towards increased public participation in government processes and increasing scrutiny, discussion, comment and review of the Government's activities.

The Review agrees with the OAIC's submission that government agencies should not bear an unlimited obligation to provide access under the FOI Act to all non-exempt information a person requests.<sup>205</sup> For example, an FOI request may capture multiple copies of the same document. Limits on the exercise of FOI right of access to documents are essential.

The two main ways in which the FOI Act enables limits to be placed on FOI requests are the practical refusal mechanism in sections 24 and 24AA of the FOI Act; and the power to impose charges (discussed in Chapter 6).

### **Practical Refusal Mechanism**

Section 24 of the FOI Act states that an agency or minister may refuse to give access to a document if 'a practical refusal exists' in relation to the FOI request. The term 'a practical refusal reason' is defined in section 24AA(1) as work involved in processing the request which 'would substantially and unreasonably divert the resources of the agency from its other operations'.<sup>206</sup> An agency cannot rely on a practical refusal reason to decline to process a request until it has given the applicant an opportunity to revise the terms of the request (s 24AB). This process requires the agency or minister to give the applicant an opportunity to consult with a contact officer and provide any information that would assist the applicant to revise the request so that the practical refusal reason no longer exists.

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<sup>200</sup> FOI Act, section 93.

<sup>201</sup> OAIC, *Annual Report 2011-12*, page 135.

<sup>202</sup> OAIC, *Annual Report 2011-12*, page 135.

<sup>203</sup> See also submissions from the Public Interest Advocacy Centre and John Wood.

<sup>204</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982: a Report on the Operation and Administration of the Freedom of Information Legislation*, (1987), page 277.

<sup>205</sup> OAIC, *Submission*, para 196.

<sup>206</sup> The provision is expressed differently as it applies to ministers (see 'substantially and unreasonably interfere with the performance of the Minister's functions': section 24AA(1)(a)(ii) of the FOI Act).

In applying the practical refusal mechanism, agencies can also treat multiple requests for the same documents, or documents relating to substantially the same subject matter, as a single request (s 24(2) of the FOI Act).

The OAIC has noted the test of ‘substantially and unreasonably divert the resources’ from other operations is an indeterminate standard that relies on answers to other imprecise questions, such as:

- what resources of an agency should be taken into account?
- is it harder for a large agency to rely on this mechanism because it has more resources, even though it also has more operations, and may receive more FOI requests?
- what value should be placed on FOI processing compared to other operations in terms of resource allocation?
- when is a diversion of resources substantial and unreasonable?<sup>207</sup>

The AAT has indicated the test of whether a request would cause a substantial and unreasonable diversion of agency resources is strictly applied.<sup>208</sup>

The OAIC has submitted that the practical refusal mechanism could be amended to improve its operation. An example cited by the OAIC is to repeal section 24AA(1)(b) to remove the current overlap between the requirements of a valid request in section 15(2) of the FOI Act and the definition of a ‘practical refusal reason’ in section 24AA of the FOI Act.<sup>209</sup>

Section 24AA(1)(b) provides that a practical refusal reason exists if the request does not satisfy the requirement in section 15(2)(b) (identification of documents). If a request does not meet these requirements, an agency must take reasonable steps to assist the person to make a request that complies with the FOI Act (s 15(3)). However, this implies that a request can reach the practical refusal stage even if it is not valid, which can cause confusion about whether the time period for processing the request has commenced. Removing this overlap would make clear that the practical refusal mechanism can only be used after an applicant has provided the information reasonably necessary to identify the documents sought. The Review agrees with this proposal.

### **Recommendation 30 – Practical Refusal Mechanism**

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.

<sup>207</sup> OAIC, *Submission*, para 199.

<sup>208</sup> OAIC, *Submission*, footnote 64.

<sup>209</sup> OAIC, *Submission*, (Appendix). See also Megan Carter, *Submission*, page 7.

## Best Practice Initiatives

Some best practice initiatives to enhance FOI administration and to reduce the administrative burden and regulatory impact on agencies are outlined below.

### Legal Services Directions

To ensure that legal advice agencies receive on FOI issues reflects a co-ordinated whole of government approach, the Attorney-General has indicated his intention to amend the Legal Services Directions (which are a set of binding rules issued by the Attorney-General about the performance of Commonwealth legal work) to include FOI legal work in the categories of legal work that are tied to the Australian Government Solicitor (AGS) and the Attorney-General's Department (AGD). This work will be tied to the AGS and AGD to ensure consistent legal advice to and legal submissions by all agencies in relation to the interpretation and operation of the FOI Act.

The Review understands that only FOI legal work which is sourced from an external provider, and which raises significant legal issues or has significant whole of government implications will be tied to the AGS and AGD. Agencies will continue to obtain in-house legal advice, conduct FOI litigation using in-house resources where otherwise permitted, and engage a legal service provider of their choice to carry out all other FOI legal work.

### FOI Better Practice Guide

The Review has identified a need for practical guidance material to assist FOI officers in agencies to manage the processing of FOI requests effectively and efficiently.

The FOI Better Practice Guide (Better Practice Guide) has been prepared to meet this objective. This supplements the FOI Guidelines, issued by the OAIC, which include material on FOI processing.<sup>210</sup> The Better Practice Guide does not supplant or replace the FOI Guidelines, but is an additional aid, providing practical advice and strategies with the aim of promoting and encouraging positive FOI outcomes for both applicants and agencies.

The Better Practice Guide is available on the Attorney-General's Department website at [www.ag.gov.au](http://www.ag.gov.au).

## Other Amendments to Enhance FOI Processing

### FOI Time Periods

#### Reckoning of time in 'Working Days' rather than 'Calendar Days'

The time periods in the FOI Act are generally specified in terms of calendar days rather than working days or business days. Section 11C(6) of the FOI Act refers to a time period of 'working days'. A working day is defined in section 11C(7) as a day that is not a weekend or a public holiday.<sup>211</sup>

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<sup>210</sup> Section 93A of the FOI Act, agencies must have regard to these guidelines when performing a function or exercising a power under the FOI Act.

<sup>211</sup> Section 11C(7) was inserted by the *Freedom of Information Amendment (Reform) Act 2010*.

A business day is defined in section 2B of the *Acts Interpretation Act 1901* as a day that is not a weekend or a public holiday in the place concerned.

Some submissions consider that calculating time periods in terms of working days, rather than calendar days would assist to minimise the regulatory and administrative burden on agencies (and therefore, costs) without impacting the statutory right of access to government information.<sup>212</sup> As agency staff do not generally work on weekends or public holidays, an extended period of public holidays (such as the Christmas period), creates a substantial reduction in the amount of time available to process a request. In addition, many agencies have a 'shut-down' period between Christmas and the New Year specified in their workplace agreement in which staff are not at work.<sup>213</sup>

The time periods in the FOI Act refer to different processes. For example, there is a time period of 14 days to notify an applicant that a request has been received, and a timeframe of 30 days to notify a decision on a request, and a timeframe of 30 days for an application for internal review. There is also a timeframe for instituting an appeal to the Federal Court of Australia. The Review recommends that the timeframe for processing an FOI request should be 30 working days. The appropriateness of other timeframes will need to be considered by the Government on a case-by-case basis. A working day could be considered as equating to flex-time arrangements, which would mean it extends from 8:00am to 6:00pm.

Extending the period to process an FOI request to 30 working days should also reduce the number of extensions of time applications for processing FOI requests.

**Recommendation 31 – Time Periods in the FOI Act to be Specified in *Working Days***

- 31(a)** The Review recommends that the FOI Act be amended, where appropriate, so that time periods are specified in terms of 'working days' rather than calendar days.
- 31(b)** The timeframe for processing an FOI request (not taking into account any extensions of time) should be 30 working days.
- 31(c)** 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.

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<sup>212</sup> See submissions from the Australian Pesticides and Veterinary Medicines Authority; Australian Taxation Office ; Bureau of Meteorology; Megan Carter; Department of Employment, Education and Workplace Relations; Department of Families, Housing, Community Services and Indigenous Affairs; Department of Foreign Affairs and Trade; Department of Health and Ageing; OAIC; and Mark Diamond and Angela O'Brien-Malone.

<sup>213</sup> Australian Transport Safety Bureau, *Submission*, page 5.

## Repeat Requests and Vexatious Litigants

An ongoing issue for agencies is managing repeated requests for the same documents or requests that are otherwise vexatious.<sup>214</sup>

Agencies and ministers can apply to the Information Commissioner (IC) to declare a person a vexatious applicant under Division 1 of Part VIII, of the FOI Act. Section 89K(1) of the FOI Act states that the IC may, by written instrument, declare a person to be a vexatious applicant. The declaration may be made on the application of an agency or minister or on the IC's initiative (section 89K(2)). An agency that applies for a declaration bears the onus of establishing that it should be made (section 89K(3)). Before making a declaration, the IC must notify the person (section 89K(4)) and give them an opportunity to make a written or oral submission (section 89L(3)). A decision by the IC to declare a person to be a vexatious applicant is appealable to the Administrative Appeals Tribunal.

As at June 2013 only two vexatious applicant declarations have been made.<sup>215</sup>

The vexatious applicant provisions apply to requests for documents and amendment or annotation of personal records and applications for internal review and IC review (each of which is defined as an 'access action' under section 89L(2)). The concept of an 'abuse of the process' is covered by the provisions and is defined in section 89L(4) as including, but not limited to:

- harassing or intimidating an individual or agency employee;
- unreasonably interfering with an agency's operations; and
- seeking to use the FOI Act to circumvent access restrictions imposed by a court.

Part 12 of the OAIC's FOI Guidelines states that a series of FOI applications made with the intention of annoying or harassing agency staff could be classified as vexatious. The guidelines also state that it is relevant in considering an abuse of process whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused.

Section 89L(1) allows the IC to issue a vexatious applicant declaration only where the person is engaging in a particular or repeated access action involving an abuse of process, or where a particular access action would be 'manifestly unreasonable'.

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<sup>214</sup> The Commonwealth Ombudsman's submission cites examples such as where personal information about decision-makers is pursued obsessively, where requests contain abusive or offensive language, and where requests are buried in lengthy emails addressed to a broad range of agencies re-agitating a wide range of complaints or other issues.

<sup>215</sup> *Department of Defence and 'W'* [2013] AICmr 2 (17 January 2013) and *Commonwealth Ombudsman and 'S'* [2013] AICmr (27 March 2013).

A different approach in Tasmanian law is to provide agencies with the ability to refuse to process a particular request on the grounds that it is repeated or vexatious. Section 20 of the *Right to Information Act 2009* (Tas) states:

## **20. Repeat or vexatious applications may be refused**

If an application for an assessed disclosure of information is made by an applicant for access to information which -

- (a) in the opinion of the public authority or a minister, is the same or similar to information sought under a previous application to a public authority or minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or
- (b) is an application which, in the opinion of the public authority or minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) -

the public authority or minister may refuse the application on the basis that it is a repeat or vexatious application.

The OAIC suggests there are two advantages to adopting this approach over the existing vexatious applicant provision in the Commonwealth FOI Act:

The first advantage is that it could provide agencies with the opportunity to promptly and efficiently manage at their own initiative an individual request that would fall under the definition of an abuse of process under the current vexatious applicant provisions. Such a power would be consistent with the objects of the Act by allowing agencies to respond promptly to requests (as per s 3(4)) without having to devote resources to repeated or vexatious requests where it would be unreasonable to do so. The second advantage is that it would only apply to a particular request or series of repeated requests without impacting on the applicant's right to make other requests or to reframe the request classified by an agency as vexatious.<sup>216</sup>

The *Freedom of Information Act 2000* (UK) enables a 'public authority' to deal with vexatious applicants, section 14 stating that a public authority is not obliged to comply with a request where:

- it is vexatious; or
- the public authority has previously complied with an identical or substantially similar request from the person, unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

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<sup>216</sup> OAIC, *Submission*, para 213.

Under UK law, a request may be vexatious if it seeks information of a frivolous nature, if it is likely to cause distress or irritation without justification or if it is aimed at disrupting the work of an authority or harassing individuals in it.<sup>217</sup>

The OAIC submits that a repeat or vexatious request provision would provide agencies with a discretion when processing requests similar in some respects to the IC's discretion not to undertake or continue an IC review on the grounds that it is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 54W(a)). This discretion has been of use in the IC review process, having been applied in 42 of the 253 IC reviews finalised in 2011-12. An agency decision that a request was repeated or vexatious could be subject to IC review. Agencies would have to proceed with processing a request where the decision that the request was repeat or vexatious is set aside at IC review, although exemptions and considerations such as the 40-hour cap on processing time could still apply.<sup>218</sup>

It is noteworthy that John Wood does not support agencies having the power to make determinations in relation to querulous or vexatious applicants, suggesting this be left to oversight agencies alone, such as the IC and the Commonwealth Ombudsman.<sup>219</sup>

The OAIC recommends that 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.<sup>220</sup> The Review agrees with this approach. The decision by an agency would be reviewable by the IC. The criteria could be similar to those already in section 89L(1).<sup>221</sup> This would be in addition to the power for the OAIC to declare an applicant vexatious.<sup>222</sup>

A possible model for repeat requests is in NSW and Queensland legislation.<sup>223</sup> A provision to refuse repeat applications for amendment should also be considered.<sup>224</sup>

By giving an agency an explicit power to reject an individual application on the ground that it is not a valid FOI request, is vexatious or frivolous, or lacks clarity, an applicant would then have two options - reframe the request, or appeal to the OAIC.<sup>225</sup>

The FOI Act states that agencies can combine FOI requests for the purpose of determining if processing the requests would be a substantial and unreasonable diversion of the agency's

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<sup>217</sup> See <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/procedural-guidance/foi-vexatious> (viewed on 17 June 2013).

<sup>218</sup> OAIC, *Submission*, paras 214-15.

<sup>219</sup> John Wood, *Supplementary Submission*, page 2.

<sup>220</sup> OAIC, *Submission*, Recommendation 26. See also submissions from the Commonwealth Ombudsman and Public Interest Advocacy Centre.

<sup>221</sup> See submissions from Megan Carter and the Commonwealth Ombudsman.

<sup>222</sup> Megan Carter, *Submission*, page 10.

<sup>223</sup> See *Government Information (Public Access) Act 2009* (NSW) and *Right to Information Act 2009* (Qld).

<sup>224</sup> Megan Carter, *Submission*, page 10.

<sup>225</sup> See *Thirty Years of the FOI Act - Service, Overhaul or Refit?* Presentation by John McMillan, Information Commissioner to Australian Lawyers' Corporate seminar, Canberra, 29 November 2012.

resources if: (a) the requests relate to the same document or documents; or (b) the subject matter of the documents is substantially the same.<sup>226</sup>

The Australian Competition and Consumer Commission (ACCC) considers that the issue of sequential requests needs to be addressed so that an agency can consider all requests received from an applicant over a period of time in considering what would constitute a substantial and unreasonable diversion of resources, and not merely those requests that are made at approximately the same time. The ACCC suggests the FOI Act be amended to enable an agency to treat multiple requests from the same applicant as a single request in deciding whether it would constitute an unreasonable diversion of resources, without requiring the subject matter of the requests to be the same.<sup>227</sup>

### **Recommendation 32 – Repeat or Vexatious Requests**

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.

### **Anonymity/Pseudonymity Issues**

The ACCC considers that the ability of an applicant to make an anonymous request, or use a pseudonym, results in a number of unintended adverse consequences for the FOI regime:

The ability to make applications without identifying the applicant allows an applicant to circumvent the ability of an agency to determine whether multiple requests should be considered in aggregate pursuant to s.24, and accordingly to properly assess whether such requests would substantially and unreasonably divert resources. In this regard, even if the amendments to s.24 proposed by the ACCC above were to be adopted, an applicant would still be able to circumvent the operation of that provision by using multiple pseudonyms to prevent detection.

Anonymous applications or the use of pseudonyms can also be used to make a vexatious applicant declaration ineffective. In practice, even where the IC has declared a person to be a vexatious applicant and that an agency may refuse to consider an FOI request from that person, the vexatious applicant may circumvent the declaration without fear of detection by making applications anonymously or via a pseudonym. In this regard, even if the amendments to the vexatious applicant provisions proposed by the ACCC above

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<sup>226</sup> FOI Act, section 24(2).

<sup>227</sup> Australian Competition and Consumer Commission, *Submission*, page 6.

were to be adopted, an applicant would still be able to circumvent the operation of those provisions in this way.

Also, the lack of transparency in the process when dealing with an unidentified applicant has a significant impact on the consultation process. The nature of much of the information held by the ACCC is such that it is often not suitable for public release on a disclosure log, and in most circumstances, third parties must assess the impact of disclosure to the specific applicant. Where the applicant remains anonymous, this assessment cannot be made. In these circumstances, third parties will usually seek to resist any disclosure at all.

We also note that the use of pseudonyms raises real questions as to how review processes can operate effectively where an applicant seeks anonymity at OAIC, AAT and Federal Court stages.

Accordingly, the ACCC considers that the FOI Act should be amended such that an application must not be made anonymously or under a pseudonym.<sup>228</sup>

The Review agrees that an FOI request should not be made anonymously or under a pseudonym. The Review considers that it should be a requirement for an applicant to specify an address in Australia to which notices may be sent.

### **Recommendation 33 – Anonymous Requests**

**33(a)** The Review recommends the FOI Act be amended so that an FOI request cannot be made anonymously or under a pseudonym.

**33(b)** It should be necessary for an applicant to provide an address in Australia.

### **Inspector-General of Intelligence and Security**

The Inspector-General of Intelligence and Security (IGIS) provides independent oversight of the work of intelligence and security agencies in accordance with the *Inspector-General of Intelligence and Security Act 1986*.

Sections 55ZA to 55ZD and section 60A of the FOI Act enable the IGIS to give independent evidence before the IC or the AAT in cases involving national security, defence or

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<sup>228</sup> Australian Competition and Consumer Commission, *Submission*, page 8.

international relations exemptions. Section 50A of the *Archives Act 1983* makes equivalent provision for the IGIS to give evidence to the AAT in Archives Act appeals.<sup>229</sup>

The IGIS supports amendments to the FOI Act and the Archives Act to clarify procedural aspects concerning the IGIS giving evidence in FOI and archives matters before the AAT and FOI matters before the IC.

Section 60A of the FOI Act states that before determining that a document is not exempt under section 33 (national security, defence or international relations) the AAT must request the IGIS to appear personally and give evidence on the damage that may be caused to the security of the Commonwealth if the document were to be released. Section 60A was introduced in the context of the abolition of conclusive certificates and was intended to provide a safeguard to protect against the release of national security related documents. The policy intention was that the AAT would only ask the IGIS to appear if it was considering that the documents should be released, that is, after hearing some evidence and reaching a preliminary view. A corresponding amendment, new section 50A, was also made to the Archives Act dealing with archives matters before the AAT.

It was expected that the IGIS would only be called to appear in a small number of cases and only in relation to specific documents that the AAT was considering releasing. However, the AAT has determined that the IGIS should be invited to appear in every matter involving a section 33 FOI exemption before the AAT has heard any other evidence or formed a preliminary view about whether it would release the documents. This approach has had significant resource implications for the Office of the IGIS, which is a small agency. The IGIS has indicated there has been a consequential impact on the IGIS's ability to oversight the intelligence and security agencies effectively.

The IGIS notes:

If the current approach continues it may result in the IGIS becoming a bottleneck in the review system and significant IGIS resources being diverted into preparing evidence which is not ultimately used by the Tribunal. This will impact on IGIS oversight of intelligence and security agencies particularly in respect of more complex inquiry work.<sup>230</sup>

The IGIS considers the following proposal:

It is appropriate for the IGIS to continue to provide expert evidence to the AAT where it is relevant. My evidence, which will always be independent, may be of assistance to the AAT in difficult national security related cases. However, rather than seeking extra resources or unnecessarily diverting my office from intelligence oversight work, I suggest that the Review consider whether the FOI Act should be amended to confirm that my evidence should only be sought in cases where, having considered the other

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<sup>229</sup> Inspector-General of Intelligence and Security, *Submission*, page 2.

<sup>230</sup> Inspector-General of Intelligence and Security, *Submission*, page 3.

evidence, the AAT is not satisfied a document is exempt. For consistency, the provisions relating to the IC and the equivalent provisions in the Archives Act should also be amended.

I acknowledge that requiring that the proposed approach may, in a few cases, result in some delay. The process could sometimes require a second hearing in which the AAT takes further evidence from the IGIS (and possibly in response by the parties) on a contested document. I believe that this additional step in a small number of cases is not inconsistent with the government policy of requiring the highest level of consideration and scrutiny in cases which may potentially result in the release of information relating to national security. This approach should also prevent delay in other AAT cases caused by requiring the IGIS to review documents and prepare evidence where that evidence is not required.<sup>231</sup>

The Review agrees with the IGIS and recommends accordingly.

#### **Recommendation 34 – Inspector-General of Intelligence and Security**

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 archives matters before the AAT and FOI matters before the Information Commissioner.

#### **Amendment of Personal Records under the FOI Act**

The FOI Act allows an agency or minister to amend a record of personal information when the information is incomplete, incorrect, out of date or misleading. Section 50(3) of the FOI Act states:

To the extent that it is practicable to do so, the agency or minister must, when making an amendment under paragraph (2)(a), ensure that the record of information is amended in a way that does not obliterate the text of the record as it existed prior to the amendment.

The National Archives of Australia (NAA) considers that the inclusion of the words ‘to the extent that it is practicable to do so’ in section 50(3) raises some concerns as it:

- has the result that section 50 of the FOI Act does not fully reflect the requirements of section 24 of the Archives Act; and

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<sup>231</sup> Inspector-General of Intelligence and Security, *Submission*, page 3.

- introduces an unacceptable risk that important evidence could be deleted and thereby avoid accountability.<sup>232</sup>

Under section 24 of the Archives Act it is an offence to destroy a Commonwealth record without appropriate authority. Section 24(1) of the Archives Act states:

Subject to this Part, a person must not engage in conduct that results in:

- the destruction or other disposal of a Commonwealth record; or
- the transfer of the custody or ownership of a Commonwealth record; or
- damage to or alteration of a Commonwealth record.

Penalty: 20 penalty units.

Section 24(2) contains some exceptions to section 24(1). Section 24(2) states:

Subsection (1) does not apply to anything done:

- as required by any law;
- with the permission of the Archives or in accordance with a practice or procedure approved by the Archives;
- in accordance with a normal administrative practice, other than a practice of a Department or authority of the Commonwealth of which the Archives has notified the Department or authority that it disapproves; or
- for the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the records.

The NAA submits that section 50 of the FOI Act should be strengthened so that it only allows agencies to amend their records in such a manner that ensures there is no loss of the original record.<sup>233</sup> The NAA suggests that section 50(3) be amended to read:

The agency or minister must, when making an amendment under paragraph (2)(a), ensure that the record of information is amended in a way that does not obliterate the text of the record as it existed prior to the amendment unless permitted under the *Archives Act 1983*.<sup>234</sup>

The effect of this proposed amendment is that a personal record can only be amended under section 50 of the FOI Act if the original text is not obliterated or it is authorised under the Archives Act.<sup>235</sup>

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<sup>232</sup> National Archives of Australia, *Submission*, pages 6-7.

<sup>233</sup> National Archives of Australia, *Submission*, page 7.

<sup>234</sup> This recommendation is contained in correspondence dated 25 February 2013 from the National Archives of Australia to the Review.

<sup>235</sup> Under the Archives Act, Normal Administrative Practice (NAP) is a mechanism that enables sensible and efficient business practices such as destruction of low value or duplicate documents, and the amendment of documents without the need for formal authorisation by the National Archives of Australia.

An amendment without retaining the original text is authorised under the Archives Act where this does not compromise evidence of business decisions, accountability or transparency, for example, in correcting or updating documents where no action has been taken.<sup>236</sup>

### **Recommendation 35 – Amendment of Personal Records and the Archives Act**

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*.

### **Proactive Publication**

The Information Publication Scheme and disclosure log requirements were intended to reduce the number of FOI requests over time. The OAIC considers that the IPS and disclosure log mechanisms provide agencies an opportunity to lower the rate of FOI access requests and therefore decrease costs to agencies, and there is a strong argument in favour of greater proactive disclosure, not only in advancing the aims of open government but in terms of cost savings.<sup>237</sup> Implementation of the IPS and the disclosure log requirements has impacted on agencies in different ways, and in many cases has increased ongoing costs to agencies by requiring allocation of additional resources without additional funding.<sup>238</sup>

Currently each agency maintains its own disclosure log. This means members of the public have to search each one individually and presupposes that they know which ones to search. The ACCC considers that a technical solution should be developed to enable all Commonwealth disclosure logs to be searched globally.<sup>239</sup> Megan Carter requests a website which contains the disclosure log of all agencies with a strong search capability to facilitate better use of material released.<sup>240</sup>

Craig Thomler suggests the Government establish a central Australian Government FOI disclosure log.<sup>241</sup> The Review agrees that it would be convenient if one website, such as [data.gov.au](http://data.gov.au), hosted all disclosure logs. *Data.gov.au* is the central access and discovery point for Australian Government data. It is capable of hosting agency data for public release or linking to existing sources of government data (for example, on an agency website) and allows agencies to manage the associated metadata. A link from each agency's website would direct users to the website containing all disclosure logs. Craig Thomler suggests the

<sup>236</sup> Correspondence dated 25 February 2013 from the National Archives of Australia to the Review.

<sup>237</sup> OAIC, *Submission*, para 219. See also Patrick Conheady, *Submission*, pages 1-2.

<sup>238</sup> See submissions from the Australian Federal Police and the Department of Health and Ageing.

<sup>239</sup> Australian Competition and Consumer Commission, *Submission*, page 10.

<sup>240</sup> Megan Carter, *Submission*, page 3. See also submissions from Mark Diamond and Angela O'Brien-Malone; Evelyn Doyle; and Craig Thomler.

<sup>241</sup> Craig Thomler, *Submission*, page 5.

system ‘support a standard metadata and structure for the collection and presentation of FOI information to remove inconsistencies across agencies’.<sup>242</sup>

Mark Diamond and Angela O’Brien-Malone recommend amending section 11C to require agencies to make released information available for download from the agency website unless there are reasonable grounds for not doing so, and publish those reasonable grounds when the agency chooses not to make the information directly available.<sup>243</sup> In their view:

... an agency that focuses its efforts on a proactive, ‘push’ approach to FOI administration, and endeavours to publish its more significant work, is likely to receive fewer requests and to have more control over its workload than an agency which focuses its endeavours on responding to the ‘pull’ model of FOI administration.<sup>244</sup>

### **Recommendation 36 – Single Website for all Disclosure Logs**

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.

### **Time of Publication**

Section 11C(6) of the FOI Act states that agencies and ministers must publish information in a disclosure log within ten working days after the FOI applicant was given access to the document (subject to specific exceptions including personal information; information about the business, commercial, financial or professional affairs of any person; or where it would be unreasonable to publish the information). There is no requirement in the FOI Act specifying a minimum period of time in which the information must be published.

Some FOI applicants, such as journalists, have expressed concerns there is no prescribed minimum time period to enable them to consider the contents of the documents, and provide a period of exclusive access.<sup>245</sup> In June 2012, the IC amended the OAIC’s FOI Guidelines to note that special action should be taken by an agency if it intends to adopt a practice of same day publishing of documents on its disclosure log (i.e. within 24 hours of providing the documents to the applicant). The FOI Guidelines note that the practice of same day

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<sup>242</sup> Craig Thomler, *Submission*, page 5.

<sup>243</sup> Mark Diamond and Angela O’Brien-Malone, *Submission*, page 7.

<sup>244</sup> Mark Diamond and Angela O’Brien-Malone, *Submission*, page 5.

<sup>245</sup> Department of Finance and Deregulation, *Submission*, page 3. See also *Media Joint Submission*, page 20.

publication, if widely adopted or practised across government, may discourage journalists from using the FOI Act.<sup>246</sup>

Section 66(2) of the *Government Information (Public Access) Act 2009* (NSW) requires a full waiver of charges if an agency makes information publicly available either before or within three working days after providing access to an applicant.

The Nine Network notes that publishing documents on disclosure logs at the same time of release to applicants may take place even where significant processing charges have been paid for access.<sup>247</sup> The Nine Network considers that although all media outlets are affected by simultaneous disclosure, television news is especially disadvantaged due to its production requirements. The Greens recommend an amendment be made to provide a 24 hour 'grace' period between when information is provided to an applicant and published in a disclosure log.<sup>248</sup> Megan Carter considers that simultaneous publication in the disclosure log at the same time as giving access to an applicant has had a negative impact on use of the Act by journalists.<sup>249</sup>

The Nine Network argues that exclusivity is an important driver for the media to continue to invest in publishing or broadcasting information and that removal of exclusivity for media organisations results in the community losing the 'wider societal benefits that come from investigative journalism.' The Nine Network recommends that the Review consider the option of making ten business days the mandatory minimum timeframe for material released to an applicant to be placed on disclosure log. This would enable television news outlets enough time to properly produce and promote an exclusive story generated by their own investigation, and 'remove the possibility that agencies will use simultaneous or near-simultaneous publication to selectively punish journalists and discourage media outlets from using FOI'.<sup>250</sup>

The Public Interest Advocacy Centre (PIAC) agrees that the risk of immediate publication of documents on the disclosure log creates a powerful disincentive for journalists and some others to use FOI 'given the professional and commercial imperative in being able to 'break' a newsworthy story - that is, to be the first person to report a new event or story to the public.'<sup>251</sup> PIAC suggests that the FOI Act be amended to require an agency to consult with the applicant regarding the appropriate timing for publication of material on the disclosure log, and that the applicant should be able to request the documents not be published on the disclosure log for up to one week following disclosure to the applicant. The agency must

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<sup>246</sup> OAIC, *FOI Guidelines*, para 14.25.

<sup>247</sup> Nine Network Australia Pty Ltd, *Submission*, page 1.

<sup>248</sup> Australian Greens, *Submission*, page 6.

<sup>249</sup> Megan Carter, *Submission*, page 3.

<sup>250</sup> Nine Network Australia Pty Ltd, *Submission*, page 3.

<sup>251</sup> Public Interest Advocacy Centre, *Submission*, page 7.

comply with this request unless there are compelling public interest reasons to the contrary, and that a decision is subject to merits review by the OAIC.<sup>252</sup>

On the other hand, Craig Thomler considers that the Government ‘does not exist to provide ‘exclusives’ to media outlets.’<sup>253</sup>

The Review considers that there should be a minimum timeframe of five working days for the publication of information in a disclosure log. This requirement should be included in the OAIC’s FOI Guidelines, rather than in legislation.

### **Recommendation 37 – Minimum Timeframe for Publication of Disclosure Log**

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.

### **Copyright**

The OAIC has noted issues of concern regarding copyright and the publication of material originating from third parties that is released by agencies or ministers under the FOI Act:

The first issue is that, under s 177 of the *Copyright Act 1968*, the Crown owns copyright in any work first published in Australia by, or under the direction or control of, the Commonwealth. This applies unless the person who would otherwise own the copyright and the Commonwealth agree to a different arrangement (s 179 of the Copyright Act). The Copyright Law Review Committee recommended that these provisions be repealed.

Because the FOI Act applies to documents in an agency’s or minister’s possession (definitions of ‘document of an agency’ and ‘official document of a Minister’, s 4(1)), the agency or minister may be the first to publish in a disclosure log on their website unpublished material that a member of the public or organisation has sent to them, resulting in an unintended acquisition of copyright. There may be some concern that the Commonwealth could be perceived as facilitating a breach of a third party’s copyright by members of the public if it puts that material on a website, notwithstanding any accompanying warnings to the public about use and reuse. This concern could be addressed by amending the FOI Act or Copyright Act to exclude material that must be published under the FOI Act from the operation of s 177 of the Copyright Act.

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<sup>252</sup> Public Interest Advocacy Centre, *Submission*, page 7.

<sup>253</sup> Craig Thomler, *Submission*, page 3.

The second issue about copyright and FOI relates to the effect that Commonwealth publication on a website of previously published third party material may have on the copyright owner's revenue or market. Potential options to address this concern include amendments to the IPS and disclosure log provisions or a determination from the IC (under ss 8(3) and 11C(2)) to exempt information from the IPS and disclosure log requirements where publication on a website would be unreasonable, such as if the document is an artistic work or publication would clearly impact on the copyright owner's revenue or market. Such measures could be taken in conjunction with the potential amendment discussed above relating to the operation of s 177 of the Copyright Act.<sup>254</sup>

The Review agrees with the OAIC that issues should be considered concerning the interaction of the FOI Act and the *Copyright Act 1968* for some agencies or ministers publishing documents which, for the purposes of the Copyright Act, are unpublished. The Review notes a potential solution to this issue may be found in section 226 of the *Patents Act 1990*. The Review further agrees that issues concerning the potential impact that publication of third party material under the FOI Act may have on a copyright owner's revenue or market should also be considered.<sup>255</sup>

### **Recommendation 38 – Copyright**

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.

### **Use of FOI while Investigations are in Progress**

Some submissions raised the issue of the FOI Act being used as a strategic tool during the course of investigations or by parties in litigation.<sup>256</sup> For example, parties to litigation may seek access to documents through court processes (such as discovery, subpoenas and notices to produce) and at the same time use the FOI Act to engage broader searches that would not be available through court processes. Although this is permissible, the Australian Competition and Consumer Commission (ACCC) is concerned that the FOI process should not be used for the purpose of early discovery of documents outside the supervision of the relevant court where the proceedings (if any, following the ACCC's investigation) will be

<sup>254</sup> OAIC, *Submission*, paras 235-237.

<sup>255</sup> See also submissions from Megan Carter and the Australian Library and Information Association.

<sup>256</sup> See submissions from the Australian Competition and Consumer Commission; Australian Taxation Office; and Moira Paterson.

heard. The ACCC does not consider that existing provisions in the FOI Act (such as unreasonable diversion of resources) enable resolution of this issue.<sup>257</sup>

The Australian Taxation Office (ATO) considers that difficulties arise for regulatory or enforcement agencies when an FOI request is made by an applicant about whom that agency is conducting compliance or enforcement action. For example, in a tax audit, the taxpayer may lodge an FOI request which has the effect that the tax officer undertaking the audit may have to divert themselves from audit work, which can delay compliance work.<sup>258</sup> For some litigants, the requirement to pay any FOI charge does not raise significant concerns, as they are well-resourced, and FOI is not perceived to be expensive in comparison to other legal avenues.<sup>259</sup> An opposing view is that to effectively deny the exercise of FOI rights at the same time as the ATO is conducting an investigation into a taxpayer's affairs or is otherwise taking action against a taxpayer is undesirable for a number of reasons, and would be contrary to the public interest.<sup>260</sup>

Moira Paterson notes that the fact that an FOI applicant seeks access to documents in the context of ongoing litigation against the Commonwealth 'does not per se make that activity abusive or contrary to the public interest'.<sup>261</sup>

The ACCC has raised other possibilities which could be considered to reduce the risk of the FOI regime being used as a litigation tactic, namely:

- amend section 12 of the FOI Act to disallow FOI requests for material available to an applicant through other legal mechanisms (such as discovery, notice to produce or subpoena);
- allow an agency to recover actual costs incurred in complying with FOI requests made in the course of litigation in the same way that it can for producing documents via subpoena; and
- expand the concept of 'substantial and unreasonable diversion of resources' to include situations where documents are available or should be sought via other legal avenues such as the litigation process.<sup>262</sup>

The Review considers that if there is a regulatory investigation in progress, or legal proceedings on foot, then the operation of the FOI Act should be suspended. Section 100 of the *Commerce Act 1986* (New Zealand) contains a precedent which could be considered.

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<sup>257</sup> Australian Competition and Consumer Commission, *Submission*, page 4.

<sup>258</sup> Australian Taxation Office, *Submission*, page 4.

<sup>259</sup> Megan Carter, *Submission*, page 11.

<sup>260</sup> See submissions from the Institute of Chartered Accountants Australia; joint submission from the Taxation Committee of the Business Law Section of the Law Council of Australia and The Tax Institute; and the Corporate Tax Association of Australia Incorporated.

<sup>261</sup> Moira Paterson, *Submission*, page 8.

<sup>262</sup> Australian Competition and Consumer Commission, *Submission*, page 5.

### **Recommendation 39 – Suspension of FOI Processing During Litigation**

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.

### **Backup Tapes**

Megan Carter recommends amending the FOI Act to remove backup tapes and servers from the right of access under the FOI Act.<sup>263</sup> The Review acknowledges that searching backup tapes is time-consuming. Depending on the terms of an FOI request, this issue can be considered in the context of being a substantial and unreasonable diversion of resources. However, it would be advisable to amend the FOI Act, and there are precedents in NSW and Queensland legislation.<sup>264</sup>

### **Recommendation 40 – Backup Tapes**

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.

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<sup>263</sup> Megan Carter, *Submission*, page 5.

<sup>264</sup> See *Government Information (Public Access) Act 2009* (NSW) and *Right to Information Act 2009* (Qld).

# Chapter 8: Some Conclusions

The main purpose of the FOI reforms was to overhaul the FOI Act to usher in a new regime for access to government information and promote a culture of disclosure across government. A key element of the reforms were the new objects provisions which clearly identify the rationale of the FOI Act; that is, to give the Australian community access to government information and in so doing strengthen Australia's representative democracy through increasing participation in government processes and government accountability.

In assessing the effectiveness of the FOI framework, these concluding remarks of this Review reflect upon the objects now set out in section 3 of the FOI Act.

## **Requiring Agencies to Publish Information**

The requirement for agencies to publish information proactively has been realised through introduction of the Information Publication Scheme and agency disclosure logs. These reforms give the Australian public ready access to certain types of information, including details of information already released following an FOI request. The reform package has made good progress toward encouraging a pro-disclosure culture across government, where the release of information to the public becomes commonplace, and often expected.

The Review recognises that difficulties arise in meeting the demands of publication under the FOI Act, the integrity of published documents, and increased accessibility of documents.

## **Providing for a Right of Access to Documents**

The FOI Act gives individuals a legally enforceable right of access to documents, that is only limited by the statutory exemptions. Decisions under the FOI Act are reviewable internally by the relevant agency, reviewable on the merits by the OAIC and AAT, and by the courts on questions of law.

## **Promoting Representative Democracy and Increasing Public Participation in Government Processes**

The majority of Australians interact with the FOI Act when documents are disclosed to academics, journalists, public interest groups and politicians. On a daily basis, media reports cite FOI requests as the source for the information in a news article or program. Submissions noted that the reforms to the fees and charges regime, which removed application fees for FOI requests, saw significant increases in the use of the regime by academics, media, public interest groups and individuals. This is indicative of the success of the Government's reform objectives of increasing access to government information.

## **Increasing Scrutiny, Discussion, Comment and Review of the Government's Activities**

The federal FOI regime has promoted transparency across government and the public sector, facilitating release of information that may otherwise not have been released.

Repealing the power to issue conclusive certificates has created even greater transparency and accountability in government decision-making. It has also extended the scope of external review of government decisions to independent scrutiny of the FOI Act's administration.

The FOI Act includes exemptions for certain classes of documents and agencies. The Review believes these exemptions are warranted despite their limiting effect on the extent to which the public can scrutinise, discuss and comment upon those aspects of government activity.

### **Recognition that Government-held Information is a National Resource to be Managed for Public Purposes**

The FOI Act has been instrumental in facilitating increased openness across government and the public sector, enforced by a right to access government documents with very limited exemptions permitted. The Australian Information Commissioner Act has further enhanced greater openness by promoting best practice across government agencies in the administration of the FOI Act through the valuable assistance of the OAIC.

Proactive publication recognises that government information is a valuable resource that should be managed for the Australian public, and therefore made widely available on agency websites or from agencies at no or minimal charge. The Australian Bureau of Statistics (ABS) and the Bureau of Meteorology (BOM) are examples of agencies that release valuable information to the Australian public.

Indeed, both the ABS and BOM are model agencies for their management of government-held information as a national resource. The BOM's website is Australia's most visited government website and the main vehicle for providing access to extensive information about weather, climate, and water. The BOM is an exemplar for providing open access to information, providing much of its publicly available information in raw and processed data, current and historical data, and as both derivative and integrated products and services.

Similarly, the ABS has a well-established publication scheme for government information, captured in the ABS mission statement which reads:

We assist and encourage informed decision making, research and discussion within governments and the community, by leading a high quality, objective and responsive national statistical service.

The ABS continues to present its information in new ways that engage and increase access by the public. Investing in search engine optimisation, making audio podcasts available, and developing data visualisation techniques, presents government information in an accessible and useable form.

Defence is providing another example. Since January 2012, it has posted its Ministerial Hot Issues briefs on its website, one week after they go to the relevant minister.

## **Facilitate and Promote Public Access to Information, Promptly and at the Lowest Reasonable Cost**

Agencies have made, and continue to make, a concerted effort to administer the FOI scheme to a high standard. Many agencies commit significant levels of resources to fulfilling their obligations under the FOI Act. It has become common practice for agencies, particularly those that receive significant levels of FOI requests, to have dedicated processing officers or teams, but it would be fair to observe that there is still room for improvement for some agencies to embrace greater disclosure.

The FOI Act seeks to strike a balance between the public's interest in greater access to government information with the challenging resourcing issues presented by administration of the regime. The regime provides for statutory timeframes and appropriate charges to ensure that public access is granted in a timely fashion and at a reasonable cost to applicants. Practical refusal mechanisms and vexatious applicant provisions provide mechanisms to assist agencies in managing the workloads associated with requests.

The appropriateness of the balance struck by the FOI Act is an ongoing question that will require further consideration. This Review finds that, due to the growing complexity of FOI requests and the delays currently being experienced at both the agency and OAIC level, greater controls are needed to ensure that the FOI Act can operate efficiently and effectively.

## **FOI Cultural Change**

There is no doubt that we have come a long way since the Minister for Defence, Harold Thorby, said in 1938:

We, the Government, have vital information which we cannot disclose. It is upon this knowledge that we make decisions. You, who are merely private citizens, have no access to this information. Any criticism you make of our policy, any controversy about it in which you may indulge, will therefore be uninformed and valueless. If, in spite of your ignorance, you persist in questioning our policy, we can only conclude that you are disloyal.

The Australian community has had a right of access to government information under the FOI Act since 1 December 1982. While the FOI Act's purpose is to release information, it also provides protections to prevent the release of sensitive information. Unfortunately, after 30 years resistance and needless secrecy still exists in some places as well as an unwillingness to embrace the objects of the FOI Act.

Senator Faulkner made public servants' responsibilities quite clear in 2009:

Our reforms are intended to increase public participation in Government processes, leading to better informed decision-making. We believe they will increase scrutiny, discussion, comment and review of the Government's activities. Our reforms are based on the principle that information held by the Government is to be managed for public purposes, and is a national resource.

There is, however, a little bit of anecdotal evidence to the contrary in some quarters about the reforms, such as:

- the public service has become increasingly risk averse;
- that less is being put on the written record for history through greater use of telephone and oral communication;
- briefs being written for the public record, with much unsaid and in a less frank manner; and
- unhealthy cynicism and an ‘it’s your legislation you wear it’ bloody minded attitude to disclosure.

The 2009 and 2010 amendments and this Review’s recommendations present an opportunity to establish organisational cultures in which all staff within agencies feel comfortable in releasing government information as a matter of course, unless it is subject to national security considerations or other sensitivities. By embracing the spirit of the FOI reforms, agencies can move towards a more transparent system that accepts external scrutiny as a key driver of efficiency. This should reap practical benefits, not least in freeing up resources currently diverted in responding to requests for information or documents and negative media and parliamentary attention.

This remains a challenge because a pro-disclosure approach continues to meet resistance in some areas and is not yet an integral part of everyday public service ethos. Australian Government agencies need to pursue a deliberate strategy of reform and adaptation, and this must be driven from the top. Compliance with the FOI Act is not only a legal obligation, but an essential part of open and transparent government. Public servants must continue to be frank, fearless and professional in the provision of advice of ministers, knowing that the FOI Act provides the necessary protections should they be required.

# Glossary

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<b>AAT</b>	Administrative Appeals Tribunal
<b>ADR</b>	alternative dispute resolution
<b>Archives Act</b>	<i>Archives Act 1983</i>
<b>Disclosure Log</b>	Section of agency website where it publishes information accessed pursuant to a FOI request
<b>FOI</b>	Freedom of Information
<b>FOI Act</b>	<i>Freedom of Information Act 1982</i>
<b>FOI Commissioner</b>	Freedom of Information Commissioner appointed under section 14(2) of the <i>Australian Information Commissioner Act 2010</i>
<b>FOI Charges Review</b>	<i>Review of charges under the Freedom of Information Act 1982</i> , OAIC report released in March 2012
<b>FOI Guidance Notes</b>	FOI Guidance Notes issued by the Department of the Prime Minister and Cabinet (PM&C) in July 2011.
<b>FOI Guidelines</b>	FOI Guidelines issued by the Information Commissioner – available on the OAIC website at <a href="http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines">http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines</a> .
<b>IC</b>	Information Commissioner
<b>Information Commissioner</b>	Australian Information Commissioner appointed under section 14(1) of the <i>Australian Information Commissioner Act 2010</i>
<b>IC review</b>	Information Commissioner review – a review of an Information Commissioner reviewable decision undertaken by the Information Commissioner under Part VII of the FOI Act.
<b>OAIC</b>	Office of the Australian Information Commissioner
<b>OAIC Guidelines</b>	FOI Guidelines issued by the Information Commissioner – available on the OAIC website at <a href="http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines">http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines</a>
<b><i>Open Government Report</i></b>	<i>Open government: a review of the federal Freedom of Information Act 1982</i> Australian Law Reform Commission, Administrative Review Council 1995
<b>Privacy Act</b>	<i>Privacy Act 1988</i>

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# Annexes

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## Annex A

### REVIEW OF THE *FREEDOM OF INFORMATION ACT 1982* AND THE *AUSTRALIAN INFORMATION COMMISSIONER ACT 2010*

#### TERMS OF REFERENCE

I, Nicola Roxon, Attorney-General of Australia, request Dr Allan Hawke AC to review and report on the operation of the *Freedom of Information Act 1982* (FOI Act) and the *Australian Information Commissioner Act 2010* and the extent to which those Acts and related laws continue to provide an effective framework for access to government information.

1. The review should consider the following matters:

- (a) the impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system;
- (b) the effectiveness of the Office of the Australian Information Commissioner;
- (c) the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters;
- (d) the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account:
  - (i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and
  - (ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;
- (e) the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act;
- (f) the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime; and
- (g) the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

2. The review should include consultation with relevant stakeholders.

3. The report should be provided by 30 April 2013.

Dated 29 October 2012



Nicola Roxon  
Attorney-General

[Authority: Section 93B of the *Freedom of Information Act 1982* and section 33 of the *Australian Information Commissioner Act 2010*]

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## Annex B

### List of Submissions Made to the Review

1. Academic Joint Submission: Breit, Henman, Lidberg and Snell
2. Accountability Round Table
3. Administrative Appeals Tribunal (AAT)
4. Australian Competition and Consumer Commission (ACCC)
5. Australian Customs and Border Protection Service
6. Australian Federal Police
7. Australian Greens
8. Australian Intelligence Community
9. Australian Library and Information Association (ALIA)
10. Australian Meteorological and Oceanographic Society (AMOS) and Science and Technology Sydney
11. Australian Network of Environmental Defender's Offices Inc (ANEDO)
12. Australian Pesticides and Veterinary Medicines Authority (APVMA)
13. Australian Privacy Foundation (APF)
14. Australian Society of Archivists
15. Australian Taxation Office (ATO)
16. Australian Taxation Office Supplementary Submission
17. Australian Transport Safety Bureau (ATSB)
18. Bean, Greg L
19. Bureau of Meteorology
20. Canberra Innovation Corporation Pty Ltd (CANIC)
21. Carter, Megan
22. Commonwealth Ombudsman
23. Commonwealth Scientific Industrial and Research Organisation (CSIRO)
24. Confidential
25. Confidential
26. Confidential
27. Confidential
28. Confidential
29. Confidential
30. Confidential
31. Confidential
32. Confidential
33. Confidential
34. Conheady, Patrick
35. Corporate Tax Association of Australia Incorporated
36. Department of Agriculture, Fisheries and Forestry
37. Department of Defence
38. Department of Education, Employment and Workplace Relations
39. Department of Families, Housing, Community Services and Indigenous Affairs
40. Department of Finance and Deregulation

41. Department of Foreign Affairs and Trade (DFAT)
42. Department of Health and Ageing
43. Department of Human Services (DHS)
44. Department of Immigration and Citizenship (DIAC)
45. Department of Resources, Energy and Tourism (RET)
46. Departments of the Senate, House of Representatives, and Parliamentary Services
47. Diamond, Mark R and O'Brien-Malone, Angela
48. Doyle, Evelyn
49. Fair Work Australia (FWA)
50. Farrell, Paul
51. Forgan-Smith, William
52. Inspector-General of Intelligence and Security
53. Institute of Chartered Accountants Australia
54. Joint Standing Committee on the Parliamentary Library
55. Kline, Karen
56. Law Council of Australia – Federal Litigation Section - Administrative Law Committee
57. Law Council of Australia – Business Law Section – Taxation Committee and The Tax Institute
58. Media Joint Submission: AAP, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV Australia, MEAA, News Limited, Sky News, WANC
59. Mentink, Wilfred
60. Mitchell, Andrew and Voon, Tania
61. National Archives of Australia
62. National Health and Medical Research Council (NHMRC)
63. NBN Co Limited
64. New South Wales Society of Labor Lawyers
65. Nine Network Australia Pty Ltd
66. Office of the Australian Information Commissioner
67. Office of the Australian Information Commissioner Supplementary Submission
68. Parliamentary Librarian
69. Paterson, Moira
70. Pirate Party Australia
71. Public Interest Advocacy Centre Ltd (PIAC)
72. SBS
73. Snell, Rick
74. Snell, Rick Supplementary Submission
75. Superannuation Complaints Tribunal
76. Tager, Jeremy
77. Thomler, Craig
78. Timmins, Peter
79. Transparency International Australia
80. Wood, John T D
81. Wood, John T D Supplementary Submission

## Annex C

### Law Enforcement Exemption, Section 37 FOI Act

#### 37 Documents affecting enforcement of law and protection of public safety

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
  - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or
  - (c) endanger the life or physical safety of any person.
- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
- (a) prejudice the fair trial of a person or the impartial adjudication of a particular case;
  - (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
  - (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.
- (2A) For the purposes of paragraph (1)(b), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:
- (a) witnesses; or
  - (b) people who, because of their relationship to, or association with, a witness need, or may need, such protection; or
  - (c) any other people who, for any other reason, need or may need, such protection.
- (3) In this section, **law** means law of the Commonwealth or of a State or Territory.

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## Annex D

### Cabinet Documents Exemption, Section 34 FOI Act

#### 34 Cabinet documents

##### *General rules*

- (1) A document is an exempt document if:
- (a) both of the following are satisfied:
    - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
    - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
  - (b) it is an official record of the Cabinet; or
  - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
  - (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.
- (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
- (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

##### *Exceptions*

- (4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.  
Note: However, the attachment itself may be an exempt document.
- (5) A document by which a decision of the Cabinet is officially published is not an exempt document.
- (6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:
- (a) the disclosure of the information would reveal a Cabinet deliberation or decision; and
  - (b) the existence of the deliberation or decision has not been officially disclosed.

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## Annex E

### Deliberative Processes Exemption, Section 47C FOI Act

#### 47C Public interest conditional exemptions—deliberative processes

##### *General rule*

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
- (a) an agency; or
  - (b) a Minister; or
  - (c) the Government of the Commonwealth; or
  - (d) the Government of Norfolk Island.

##### *Exceptions*

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see section 8A);
  - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
  - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

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## **Annex F**

### **Recommendations of the FOI Charges Review**

#### **Recommendation 1 – Administrative access schemes**

1.1 Agencies are encouraged to establish administrative access schemes by which persons may request access to information or documents that are open to release under the FOI Act.

1.2 The details of an administrative access scheme should be set out on an agency's website, and explain:

- how a person may make a request for information or documents that will be provided free of charge (except for reasonable reproduction and postage costs), and
- the interaction of the administrative access scheme with the FOI Act.

1.3 If an agency establishes an administrative access scheme that is notified on its website, a person who makes an FOI request without first seeking the same information under the scheme may be required by the agency to pay an application fee of \$50.

1.4 No FOI application fee shall be payable if a person has first applied under an appropriate administrative access scheme. The FOI request may be made either upon receipt of the agency's response to the administrative access request, or after 30 days if no agency response is received.

#### **Recommendation 2 – FOI processing charges**

2.1 The FOI processing charges referred to in 2.3 and 2.4 should apply to all processing activities, including search, retrieval, decision making, redaction and electronic processing.

2.2 No processing charge should be payable for the first five hours of processing time.

2.3 The charge for processing time that exceeds five hours but is ten hours or less should be a flat rate charge of \$50.

2.4 The charge for each hour of processing time after the first ten hours should be \$30 per hour (or part thereof).

2.5 No processing charge should be payable for providing access to a document that contains the applicant's personal information.

#### **Recommendation 3 – FOI access charges**

3.1 Supervision of an applicant inspecting documents (or hearing or viewing an audio or visual recording) should be charged at \$30 per hour.

3.2 Providing information on electronic storage media (such as a disk or USB drive) should be charged at actual cost.

3.3 Postage costs should be charged at actual cost.

3.4 Printing (including photocopying and other printed copying) should be charged at \$0.20 per page.

3.5 Transcription should be charged at actual cost.

## **Annex F**

### **Recommendation 4 – FOI processing ceiling**

4.1 An agency or minister should have a discretion to refuse to process a request for personal or non-personal information that is estimated to take more than 40 hours to process. While the estimate of time would be an IC reviewable decision, an agency decision not to process a request above the 40 hour ceiling would not be reviewable.

4.2 Before making a decision of that kind the agency or minister must advise the applicant of the estimated processing time and take reasonable steps to assist the applicant to revise the request so that it can be processed in 40 hours or less.

4.3 For the purposes of exercising this discretion, an agency or minister may treat two or more requests as a single request, as provided for in s 24(2) of the FOI Act.

4.4 The practical refusal mechanism in ss 24, 24AA and 24AB of the FOI Act should be repealed.

### **Recommendation 5: Reduction and waiver**

5.1 The specified grounds on which an applicant can apply for reduction or waiver of an FOI processing or access charge (but not an FOI application fee) should be:

- that payment of all or part of the charge would cause financial hardship to the applicant, or
- that release of the documents requested by the applicant would be of special benefit to the public.

5.2 The options open to an agency should be to waive the charges in full, by 50% or not at all. The decision would be an IC reviewable decision.

5.3 An agency should also have a general discretion not to impose or collect an FOI application fee or processing or access charge, whether or not the applicant has requested it to do so. The exercise of that discretion should not be an IC reviewable decision.

### **Recommendation 6 – Reduction beyond statutory timeframe**

6.1 Where an agency fails to notify a decision on a request within the statutory timeframe (including any authorised extension) the FOI charge that is otherwise payable by the applicant should be reduced:

- by 25%, if the delay is 7 days or less
- by 50%, if the delay is more than 7 days and up to and including 30 days
- by 100%, if the delay is longer than 30 days.

## **Annex F**

### **Recommendation 7 – Internal and IC review fees**

- 7.1 No fee should be payable for an application for internal review.
- 7.2 No fee should be payable for an application for IC review of an internal review decision or a deemed affirmation on internal review.
- 7.3 An application fee of \$100 should be payable for IC review if an applicant who can apply for internal review has not done so first. The fee of \$100 should not be subject to reduction or waiver.
- 7.4 No fee should be payable for an application for IC review of a decision of a minister, the principal officer of an agency, or a deemed decision of an agency to refuse access to a document or to refuse to amend or annotate a personal record. No fee should also apply to an application for IC review by a third party of a decision to grant access to the FOI applicant.

### **Recommendation 8 – Indexation**

- 8.1 All FOI fees and charges should be adjusted every two years to match any change over that period in the Consumer Price Index, by rounding the fee or charge to the nearest multiple of \$5.00.

### **Recommendation 9 – Responding to an agency decision**

- 9.1 An applicant should be required to respond within 30 days after receiving a notice under s 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.
- 9.2 If an applicant fails to respond within 30 days (or such further period allowed by an agency) the FOI request should be deemed to be withdrawn.

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## Annex G

### Some Matters for Further Consideration

The following matters could be examined as part of the comprehensive review of the FOI Act recommended in Chapter 1 of the Report. This is not meant to be an exhaustive list.

1. 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?
2. Whether the FOI Act should include provisions to protect decision-makers from interference in the decision-making process?
3. 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?
4. 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?
5. Whether there should be a period of time for negotiation of clarification of a request prior to commencement of processing time?
6. Whether the FOI Act should provide a right of access to ‘information’ rather than a right to access ‘documents’?
7. 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?
8. 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?
9. 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?
10. Whether there should be time limitations on the operation of all or any of the FOI Act exemptions?
11. 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?