

## Review of Freedom of Information Act 1982 and Australian Information Act 2010

### Joint submission by Australian Meteorological and Oceanographic Society and Science and Technology Australia

The Australian Meteorological and Oceanographic Society (AMOS) and Science and Technology Australia welcome the opportunity to make a submission to the review of Commonwealth Freedom of Information laws. Whilst we support the principles of open scientific data and that the results of scientific research carried out under Commonwealth jurisdiction should be available as widely as possible, we have a number of concerns about the ways in which Freedom of Information laws have been used, or have the potential to be used, in the scientific arena, in both Australian and international jurisdictions.

In particular, our perspective is drawn from the experiences of climate scientists in this area, both internationally and in Australia. It is our view that laws which are intended to give greater transparency to government, in practice, are most often used to target and attempt to discredit individual scientists, at both senior and junior levels. We do not believe it was the intent of the Government for FOI laws to be used in such a way.

#### *Experiences with FOI laws in the climate science area*

It has become commonplace for climate scientists involved with scientific findings which draw attention from the climate change sceptic community to be subjected to FOI applications. These usually involve requests for data, or requests for large volumes of correspondence. Examples (from outside Australia) include:

- A request for all e-mails written by a particular U.S. scientist between 1999 and 2005 (about 12,000 in total).
- 60 separate applications, solicited through a climate sceptic blog, for data from 60 separate sets of 5 locations, all sent to the same institution over the course of a few days (in the U.K).

It has become commonplace for e-mails obtained through these means (or through other means, such as the hacking incident at the University of East Anglia in 2009) to be made public, often through selective quotation to portray the authors in the worst possible light. It has also become commonplace for climate scientists to be subjected to abusive, harassing or threatening correspondence following the publication of such material. Whilst such behaviour can occur in the absence of FOI-related publication of material, experience shows that such publication is often a trigger for its commencement and intensification.

Being the recipient of abusive correspondence, and in some cases abuse in the public arena as well, has been a highly stressful experience for many scientists, with some perceiving a significant threat to their personal safety or wellbeing, and we believe that it has the potential to deter talented individuals from entering, or remaining in, science. A number of scientists have also reported to us that they have become less willing to use e-mail because of the perceived risks, which inhibits the collaboration (especially international collaboration) which is important to many areas of scientific research.

Furthermore, FOI applications, especially broad-ranging ones, can be extremely time-consuming to deal with, and as most universities and science-related agencies have few or no resources specifically dedicated to FOI, a large part of the burden inevitably falls on scientists themselves, diverting resources from the research for which they are funded by the Australian community. The potential exists for

multiple large FOI applications to be used as a “denial of service” attack on scientific agencies (it is arguable that the U.K. example cited above fell into this category).

We note that provision exists for a request to be refused on the grounds that it would be an unreasonable burden on an agency’s resources, but also note that this provision is vague and, to our knowledge, untested under current Commonwealth laws, and would benefit from a more objective definition of ‘unreasonable burden’. We furthermore note that a request on the scale of that in the first dot point above would probably require a minimum of several person-months to assess each of the 12,000 documents, even before consulting with the undoubtedly vast number of third parties involved. (In contrast, British FOI legislation has a specific provision that allows for practical refusal of a request with an assessed agency cost in excess of GBP 450, which equates to 18 hours of time). We believe that it is quite plausible that some agencies, if they were faced with a request on such a scale, would simply release all the documents, including those containing personal correspondence (potentially of a sensitive nature) unrelated to an individual’s public duties.

We acknowledge that, thus far, the majority of FOI applications related to climate science in Australia have been directed at university scientists under State FOI laws. However, we believe that it is likely that similar applications will be made under Commonwealth legislation at some point in the future.

#### *Risks to the scientific peer review process*

The peer review process is an integral part of science. It is applied most often to journal papers, but is also applied to some other reports, and to many grant proposals. This process involves a paper, proposal or other document being reviewed by one or more (usually two or three) independent referees. In the context of a journal paper, the referees would normally recommend to the journal’s editor (normally a scientist acting in an honorary capacity) that a paper be accepted outright (almost unknown in our experience), revised and resubmitted, or rejected outright. To encourage frank and objective reviews, it is normal that the referees are anonymous to the original author unless they choose to identify themselves. (Some science journals operate a ‘double-blind’ system where the author(s) is/are also anonymous to the reviewers).

Numerous individual scientists falling within the scope of Commonwealth FOI have an involvement with the peer review process, as a referee, an editor or both. Furthermore, at least one peer-reviewed journal is published by a Commonwealth agency (the *Australian Meteorological and Oceanographic Journal* is published by the Bureau of Meteorology).

While we are not aware of any such applications having been made, either in Australia or overseas, we are concerned that attempts may be made for FOI laws to be used to ascertain the identity of anonymous reviewers, which would pose a significant threat to the integrity of the peer review system. We note that an exemption exists under the Act for ‘documents containing material obtained in confidence’ but believe it is untested whether such an exemption would apply to peer review arrangements, which are normally implicit (it is rare for a formal confidentiality agreement to be entered into).

#### *Specific proposals*

Whilst some of the issues outlined above – such as the use to which material released under FOI is put – are beyond the realistic control of the legislative process, we believe that the following changes to the Act, or to the accompanying guidelines of the Office of the Information Commissioner, would help address some of the issues of greatest concern to the science community:

- The introduction of a specific cap on agency time (as per the British legislation) beyond which practical refusal could be made, as a deterrent to large-scale “fishing expeditions”.
- Making the conditional exemption for pre-publication research available to all agencies in which research is carried out, not only specified agencies in the Schedule as is currently the case.
- Including, as one of the possible grounds against disclosure when considering application of the conditional exemption for personal information, the potential for disclosure to lead to the harassment of the individual whose personal information is being disclosed, or for adverse impacts on that individual’s health (including mental health) or safety. (With respect to the latter point, we note that an exemption exists for personal safety but that current guidelines indicate it is very narrowly defined and requires a specific, pre-existing threat).
- The strengthening of guidelines, and if necessary supporting legislative amendments, to make clear that the exemption for confidential materials extends to those where standard practice implies a duty of confidentiality, even where that has not been formally documented.