



## **Submission to the 2012-13 Review of the Freedom of Information Act 1982**

The Accountability Round Table submits that critical to the consideration of the issues raised in the Review's terms of reference is a review of the recognized and stated policy objectives of the legislation and consideration of whether there are other related and connected policy objectives that should be specifically recognized and taken into account in the review of the Act.

### **The purposes of the Commonwealth legislation**

In his recent Report on FOI Act charges, the Information Commissioner paraphrased the declared objects of the FOI Act (the Act) as being:

- to give the Australian community access to information held by government, by requiring agencies to publish that information and by providing for a right of access to documents
- to promote Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision making and increasing scrutiny, discussion, comment and review of government activities
- to increase recognition that information held by government is to be managed for public purposes and is a national resource
- to ensure that powers and functions in the Act are performed and exercised, as far as possible, so as to facilitate and promote public access to information, promptly and at the lowest reasonable cost.<sup>1</sup>

The ART submits that there are two other very important objectives that the Act serves which should also be recognized, namely:

- (a) *the National Integrity system*; The risk of corruption is something all democracies must take seriously. Secrecy is the great friend of corruption. The Act renders most action

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<sup>1</sup> The objects of the FOI Act are set out in ss 3 and 3A.

taken in government open to examination. A sound FOI system is a very important part of any anti-corruption system, as has been recognised in the National Anti-Corruption Plan Discussion Paper.<sup>2</sup>

(b) *The public trust relationship between the government and the people; Public office is a public trust. The FOI Act facilitates the government's performance of its fiduciary obligations to the people and facilitates their access to information about its performance of those obligations. That information is far more than a national resource that should be exploited. We submit that this function of the Act should also be recognized as a key object of the legislation.*

### **The public office public trust principle**

Attached is a paper analysing the history, relevance and status of this principle. As there discussed, there exists a fundamental fiduciary relationship between the members of the public sector<sup>3</sup> and the people that they serve. The people have the right to expect that the members of the public sector will act in the interests of the people and not their own interests. That is the fundamental obligation arising from any fiduciary relationship.

In recent times, as discussed in the attached Paper, while the public office –public trust proposition appears to have been forgotten, it is relevant and applicable as a matter of law to members of the public sector and their relationship with the people they serve. It is recognised

- in the criminal law in the elements of two common-law offences -- bribery and misconduct in public office and
- in administrative law as the ethical principle providing the foundations upon which that law was developed and is presently based.

It has been relied on as the legal basis for holding a contract was illegal and for holding that conduct amounted to a criminal conspiracy.<sup>4</sup>

It may, therefore, fairly and accurately be described as a principle recognised by the Australian common law. The fact that the common law has not taken it further is a reflection in part of the

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<sup>2</sup> Attorney-General's Department, Discussion Paper, Australian Government's Approach to Anti-Corruption, pp16, 19.

<sup>3</sup> That is those who are engaged in the three branches of government and those who may undertake the provision of government services through business and other arrangements for which they receive public funds. .

<sup>4</sup> See attached Paper and discussion at p.5, of *Horne v Barber and R v Boston*.

magnitude and complexity of the mega public trust that is our democratic system of government<sup>5</sup> and the extent to which reliance has moved from the common law to legislation and regulation.

At the Commonwealth level, the principle recognises the fiduciary relationship between the members of the public sector and the people of Australia on whose behalf they act. We have entrusted enormous power, very significant and complex responsibilities and vast assets and income to be exercised and administered by the members of the public sector on our behalf.

Having placed our well-being, our future and that of future generations in the hands of the members of the public sector, they have a fiduciary obligation to protect the interests of those they serve. This includes strengthening the integrity of our system of government and recognising our "right to know" what our government has been doing and its reasons for its actions. The principle also reinforces that "right to know" because it recognises that the ultimate beneficial ownership of any documents and information in the hands of government rests with the people whom the members of the public sector serve.

At the same time, the public office public trust principle strongly supports the stated and recognized utilitarian objectives of the legislation of enhancing our democracy and enabling the people to become more involved in our democracy and to make informed choices when exercising their democratic rights, the ultimate method of enforcing the Public Trust.

We turn to the Terms of Reference and the issues that they raise

### **The Terms of Reference**

The overarching task is to

***"...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".***

We propose to focus primarily on the application of the identified objects to the particular issues, particularly the two additional objects of the Act identified above – serving the National Integrity System and the fiduciary relationship between members of the public sector and the people.

The terms of reference provide a list of specific matters for consideration:

***" 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;***

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<sup>5</sup> see discussion in attached paper

In reviewing the impact of the reforms it will be relevant to consider whether and to what extent they have served the public office public trust principle and the role of FOI in the National Integrity System and whether further reform is needed of the Act so that it better serves those objects.

Those objects lend powerful support to the reforms that were made in 2010 to the exemption process by removing exclusive certificates, reducing exemptions and use of the public interest test. They also strongly support the review and complaints' reforms. We submit that the onus is on those who might wish to reduce the effect of those reforms. We submit the importance of all the objects is such that the issue is whether more should be done to strengthen or extend those reforms.

***(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;***

The ART repeats the points made in response to specific Terms of Reference paragraph (a).

***(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;***

Documents for which exemption is claimed on the grounds that it is necessary to protect sensitive government documents including Cabinet documents, should be considered on the additional basis that that the documents and information have been prepared, obtained and held by the government on the people's behalf to enable it to serve them. The people, and each of them, therefore, should be regarded as having a prime facie right of access unless to give that access would be to the contrary of their community's interests.

As submitted in the attached paper, the ultimate means of enforcement of the public trust relationship is the right of the people to vote members of Parliament into and out of office and, as a result, into and out of government. There is the convention, however, that appears still to be accepted, that the discussions that occur in Cabinet shall be treated as confidential. That should not mean, however, that reports and other documents submitted to Cabinet and which may be there discussed should not be available to all the people. The Prime Minister of the day can explain to the people why it was that the advice contained in them or the information contained in them, which Cabinet apparently rejected, was rejected. For the Prime Minister, as a leading person in the body of public trustees, that should be seen as a routine fiduciary obligation; for it

involves explaining and justifying to the people decisions made on their behalf, particularly where individual people will be affected differently by such decisions.

As to frank and fearless advice, those in public sector agencies providing advice to government, should regard themselves as honour bound to give frank and fearless advice; for that is what is required of them to honour their obligations as public officers in a position of public trust. In addition, they should not, as fiduciaries, allow the prospect of exposure of that advice to the people (on whose behalf it is ultimately being given) to allow personal interests to override their obligations to the people. But is the real concern the prospect of public disclosure or is it the politicisation of the public service and the ongoing removal of job security for those engaged in the public sector?

As to the latter explanation, we note that Craig Thomler, in his submission to this review, gave examples of a few public servants showing

"a clear intention to withhold, or make extremely difficult to obtain, information on the basis that while it might qualify for release under the legislation, it could damage the reputation of the agency, Senior Executives, ministers or the Government and therefore release could result in repercussions that would damage the staff member's standing and career".

He expressed the belief that this was not "a particularly large issue, however it does exist and even a single instance exposed could damage the standing of the APS and government severely".

We submit that while the described reaction of those public servants is understandable, it would appear to be a situation where people in a fiduciary position have apparently made a decision on the basis of what they see as in their personal best interest but which is contrary to the best interests of those they (and those they are advising) are supposed to serve -- the people

The attached paper discusses the Public Service Commissioner's Advice publication<sup>6</sup> where it deals with the receipt of gifts and hospitality and its failure to address the public office public trust principle.

In the section dealing with public and private information<sup>7</sup>, that failure is less apparent but it appears to have been published in 2009 and, therefore, it predates the 2010 reforms. It does not appear to have been brought up to date. It has a heavy focus on secrecy and confidentiality obligations and directs APS personnel to the earlier FOI legislations exempt categories for guidance in the following passage.

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<sup>6</sup> APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads (2009); Section 4.12 - <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>

<sup>7</sup> Op.cit. Sections 1.2 and 1.3

*“ Effective working of government*

An APS employee must not disclose information obtained or generated in connection with his or her APS employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation of policies or programmes (PS Regulation 2.1(3)14). Depending on the circumstances, this restriction could cover information, such as opinions, consultation, negotiations (including about the management of a contract), incomplete research, or advice or recommendations to the Government, leading or related to, the development or implementation of the Government’s policies or programmes.

APS employees need to consider on each occasion whether the disclosure of information could damage the effective working of government, including, for example, in relation to unclassified information and in circumstances where there is no relevant agency head direction. In some cases it will be acceptable for employees to disclose information that is already lawfully in the public domain. However, there may be circumstances where it is not appropriate either to confirm or deny information already in the public domain. An example would be where a public servant makes a disclosure without authorisation which, because of their official role, has the effect of confirming a previous leak of information.

The exemptions set out in the FOI Act are a useful starting point in determining which categories of information may potentially fall within the scope of regulation 2.1. Further information about the operation of the FOI Act exemptions may be found in FOI Guidelines – Exemptions sections in the FOI Act (31 December 2007) on the Department of the Prime Minister and Cabinet website.”

Overall, the treatment of the issues in the Advice is confusing. If it is to continue, it needs to be brought up to date and the FOI legislation and obligations need to be dealt with separately in it making it clear that it qualifies what is said in the Advice about the general confidentiality obligation.

In relation to the Code, as well as it being brought up to date, its content needs to be reviewed. It does not, unlike the Federal Standards of Ministerial Ethics, acknowledge or attempt to address the public trust obligations that attach to public office. It is also very general in its approach. As a result an Advice document was necessary ..

The Code should be re-written to give effect to the objects of the current FOI legislation and its role in the National Integrity system and the principle that public office is a public trust and that those engaged in the public service should place the people’s interests ahead of their own. This should be stated and reflected through specific provisions instead of the present generalities and should reject propositions such as in the present Advice document that the paramount concern of those engaged in the public services is the reputation of the public service and should reflect the fact, and acknowledge, that the stakeholders of the public service are the people of Australia, not those extending gifts and hospitality to public servants.

Another important document is the FOI Guidance Notes issued by Prime Minister and Cabinet in 2011<sup>8</sup>. A person outside government reading it might be excused for thinking that it is a detailed primer on ways to maximise valid exemption claims. That conclusion, however, may be unfair because it is also attempting to ensure the effective operation of the Cabinet system. The challenge is how to strike the appropriate balance. We submit that the Guideline Notes should be reviewed to consider whether they strike the right balance and fairly and accurately address the objects of the FOI Act including serving the National Integrity System and the fiduciary obligations of government.

It may be argued that the Ethics Advisory Service that was introduced in recent years provides the remedy. But can it do so when there is such a lack of clarity and guidance in the Code and Advice on the basis of which, presumably, they will provide their advice service?

***(e) the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act;***

The objects of the Act, including serving the National Integrity System and the Fiduciary obligations of government, require that the range of agencies covered by the legislation should extend to and include all government agencies including national security agencies and extend to all those people, organisations and corporations that are engaged in the provision of government services paid for by public money whether it be operating detention centres, the building of infrastructure or being partners with the government in public private partnerships. They are assisting the government in discharging the public trust responsibilities entrusted to it by the people - in effect the partners, agents or employees of the fiduciary, the government. They are being funded from money supplied directly or indirectly by the people.

As we read the Act, it is prevented from fully extending into these areas by the relevant definitions.<sup>9</sup>

***(e) the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime;***

Consideration of the statutory objectives and the evidence collected and considered, led the Commissioner to identify in his review the following principles to be applied to the fixing of charges and fees.

"This report proposes four principles to underpin a new charges framework:

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<sup>8</sup> [http://www.dpmc.gov.au/foi/docs/foi\\_guidance\\_notes/foi\\_guidance\\_notes.pdf](http://www.dpmc.gov.au/foi/docs/foi_guidance_notes/foi_guidance_notes.pdf)

<sup>9</sup> Including the definitions of agency, department, prescribed authority, Commonwealth contract, contracted service provider, subcontractor, contracted service provider

- ***Support of a democratic right:*** Freedom of information supports transparent, accountable and responsive government. A substantial part of the cost should be borne by government.
- ***Lowest reasonable cost:*** No one should be deterred from requesting government information because of costs, particularly personal information that should be provided free of charge. The scale of charges should be directed more at moderating unmanageable requests.
- ***Uncomplicated administration:*** The charges framework should be clear and easy for agencies to administer and applicants to understand. The options open to an applicant to reduce the charges payable should be readily apparent.
- ***Free informal access as a primary avenue:*** The legal right of access to documents is important, but should supplement other measures adopted by agencies to publish information and make it available upon request"

We submit that the detailed purposes of these principles should be supported having regard not only to the stated objectives in the Act but to the NIS and the public office public trust principle objectives.

The issues and principles identified proceed on the basis that the there is a cost borne by the government not the people and a significant issue is whether and to what extent that burden should be borne by the people who are seeking information. The reality is different, however, and we submit that this becomes clear when the public office public trust analysis is applied.

For, while it is public sector members who will perform the tasks within government of considering the applications and responding to them, the costs are ultimately borne by the people, not the government. Viewed with that perspective, the cost question that remains is what is a reasonable balance to be struck between those seeking the information directly and the other people of Australia who are not directly seeking information. Looked at from that point of view there may in fact be an argument for charging fees to those seeking personal information rather than those seeking information that will benefit the whole community, particularly where that information will serve the critical democratic purpose of keeping all of Australians people informed about what is happening in government and why it is happening and enable them to participate in government processes. In particular, applying that analysis, the members of Parliament seeking information to hold government to account should not have to pay any charges. Nor should the media.

We support the Commissioner's position that

“No one should be deterred from requesting government information because of costs, particularly personal information that should be provided free of charge. “

We would go further and submit that the cost should be born out of the general revenue supplied to government. .

In considering this issue, it is also important to put the financial cost aspect into perspective. In its media release at the time the present Review was announced, the Government commented

“In 2011-12, more than 22,000 FOI requests were determined at an average cost of \$1876 per request.”

The significance of these figures was not explained.

We have attached as an Appendix, a Table, from the recent Report on Fees and Charges of the Information Commissioner. It has the number of applications received (not determinations) per financial year and the total cost per year since 1982. In the first year 1982 -83 it was in operation for 7 months during which it received 5576 applications and the costs totalled \$7,502,335, an average cost of \$1363. In 2010-2011 there were 23,605 and the total cost was \$36,318,030, an average cost of \$1140.00m. Plainly the annual costs will vary as will the costs of individual applications. This may be for a variety of reasons including the nature and complexity of the requests made in any one year and whether the rigour of the approach taken to the requests may vary from year to year and the resulting extent of legal advice needed and litigation.

The total cost for 2011-2012, multiplying the figures provided in the recent media release was \$41.272 M. As a cost to the people, it represents less than \$2.00 per person, a small price it might be said for trying to ensure that they can be adequately informed about what those to whom they have entrusted wide-ranging power, and funds, have done with them and so enable them to carry out their central role in our democracy. When one adds to that the FOI system's important role as part of the anti-corruption system, the price is even more reasonable. As to priorities, can there be any greater priority than to ensure the availability of a resource that directly serves our democratic system of government. We spend \$75 million per annum supporting elite athletes. We should not begrudge \$75 million of the billions of dollars that the people provide -the government to adequately resource the FOI system.

As to the issue of the vexatious claim, we submit that it is best dealt with directly using the system provided in s 89K of the Act.

At the same time, however, every action should be taken in this modern electronic era, to advance a proactive “right to know” approach, thereby reducing the need for public sector members, and appeal and review systems, to be engaged, so that the funds the people provide can be spent on other tasks where those funds are needed.

Applying this analysis, efficiency concerns become more important because greater efficiency will ensure that the people get the best value for the money they supply to government to be spent on their behalf. Any recommendations that would

- Increase direct access by the people to the information held by government and

- reduce the need for lawyers and government personnel to spend time determining whether particular documents and information may be exempt or not

should be welcomed.

**(f) *the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.***

We support the objective for the reasons advanced above but on the basis that the ultimate objective of the cost effective use of funds supplied by the people to government is that they be used for the benefit of the people in this and all areas of government responsibility.

### **Conclusion**

In his Submission recently published (17 December 2012), The Information Commissioner's first recommendation is as follows:

Establish a national action plan to further develop and embed the open government agenda and the Government's commitment to cultural change, and to explain the role and relationship of Australian Government agencies with responsibility for information policy and practice

We strongly support that recommendation. Establishing the full parameters of the role of Australian Government agencies under the FOI Act will require the inclusion and explanation of the National Integrity System function and their fiduciary role as public office holders and therefore public trustees. This can only help to ensure that sound reform will result from this review and that the Act will be able to effectively operate into the future.

Finally, is it time that the title of the Act was changed to the "Right to Information Act"? To do so would both recognise and acknowledge that its fundamental purpose is to serve the people's right to information.

## Appendix A

### Appendix B: Fees and charges collected since the commencement of the FOI Act<sup>10</sup>

Year	Number of requests received	Application fees received	Internal review fees received	Total fees collected (A)	Charges notified	Charges collected (%) (B)	Total fees and charges collected (A+B)	Total cost (C)	Fees and charges collected as % of total cost ([A+B]/C)
1982–83*	5,576	\$0	\$0	<b>\$0</b>	\$3,069	<b>\$2,067</b> (67.35%)	<b>\$2,067</b>	\$7,502,355	0.03%
1983–84	19,227	\$0	\$0	<b>\$0</b>	\$22,247	<b>\$13,535</b> (60.84%)	\$13,535	\$15,106,511	0.09%
1984–85	32,956	\$0	\$0	<b>\$0</b>	\$32,226	<b>\$21,977</b> (68.20%)	\$21,977	\$16,496,961	0.13%
1985–86	36,512	\$0	\$0	<b>\$0</b>	\$113,043	<b>\$75,464</b> (66.76%)	\$75,464	\$15,711,889	0.48%
1986–87	29,880	\$69,500	\$0	<b>\$69,500</b>	\$129,392	<b>\$91,990</b> (71.09%)	\$161,490	\$13,336,864	1.21%
1987–88	27,429	\$148,030	\$5080	<b>\$153,110</b>	\$228,214	<b>\$159,760</b> (70.00%)	\$312,870	\$11,506,931	2.72%
1988–89	24,679	\$130,400	\$4120	<b>\$134,520</b>	\$233,642	<b>\$121,951</b> (52.20%)	\$256,471	\$10,494,376	2.44%
1989–90	23,543	\$163,180	\$3320	<b>\$166,500</b>	\$190,378	<b>\$143,498</b> (75.38%)	\$309,998	\$10,373,321	2.99%
1990–91	24,929	\$216,365	\$4040	<b>\$220,405</b>	\$167,296	<b>\$131,309</b> (78.49%)	\$351,714	\$9,921,772	3.54%
1991–92	28,247	\$233,760	\$4560	<b>\$238,320</b>	\$223,743	<b>\$176,128</b> (78.72%)	\$414,448	\$12,723,097	3.26%
1992–93	33,804	\$309,766	\$8120	<b>\$317,886</b>	\$329,602	<b>\$226,723</b> (68.79%)	\$544,609	\$12,702,329	4.29%
1993–94	36,547	\$336,139	\$4345	<b>\$340,484</b>	\$348,101	<b>\$241,075</b> (69.25%)	\$581,559	\$13,977,360	4.16%
<b>1994–95</b>	37,367	\$374,396	\$5704	<b>\$380,100</b>	\$289,226	<b>\$206,687</b> (71.46%)	\$586,787	\$11,955,482	4.91%
1995–96	39,327	\$413,044	\$4022	<b>\$417,066</b>	\$308,608	<b>\$200,166</b> (64.86%)	\$617,232	\$14,564,562	4.24%
1996–97	30,788	\$237,839	\$5760	<b>\$243,599</b>	\$284,391	<b>\$116,223</b> (40.87%)	\$359,822	\$15,972,950	2.25%
1997–98	32,590	\$258,092	\$5580	<b>\$263,672</b>	\$386,726	<b>\$130,193</b> (33.67%)	\$393,865	\$12,191,478	3.23%

<sup>10</sup> [http://www.oaic.gov.au/publications/papers/FOI\\_Charges\\_Review\\_DP\\_2011.html](http://www.oaic.gov.au/publications/papers/FOI_Charges_Review_DP_2011.html)

Year	Number of requests received	Application fees received	Internal review fees received	Total fees collected (A)	Charges notified	Charges collected (%) (B)	Total fees and charges collected (A+B)	Total cost (C)	Fees and charges collected as % of total cost ([A+B]/C)
1998–99	33,484	\$271,026	\$6540	<b>\$277,566</b>	\$308,689	<b>\$168,989 (54.74%)</b>	\$446,555	\$13,066,029	3.42%
1999–2000	31,784	\$256,172	\$5340	<b>\$261,512</b>	\$552,038	<b>\$173,649 (31.46%)</b>	\$435,161	\$14,035,394	3.10%
2000–01	35,439	\$89,815	\$5780	<b>\$95,595</b>	\$1,099,380	<b>\$126,052 (11.47%)</b>	\$221,647	\$14,415,406	1.54%
2001–02	37,169	\$91,684	\$5600	<b>\$97,284</b>	\$825,779	<b>\$198,551 (24.04%)</b>	\$295,835	\$17,387,088	1.70%
2002–03	41,481	\$104,059	\$5626	<b>\$109,685</b>	\$928,124	<b>\$150,636 (16.23%)</b>	\$260,321	\$18,398,181	1.41%
2003–04	42,627	\$95,507	\$7324	<b>\$102,831</b>	\$1,287,010	<b>\$268,947 (20.90%)</b>	\$371,778	\$20,189,136	1.84%
2004–05	39,265	\$101,924	\$5720	<b>\$107,644</b>	\$943,429	<b>\$251,297 (26.64%)</b>	\$358,941	\$22,860,022	1.57%
2005–06	41,430	\$161,203	\$8010	<b>\$169,213</b>	\$1,700,801	<b>\$333,341 (19.60%)</b>	\$502,554	\$24,903,771	2.02%
2006–07	38,787	\$147,966	\$6765	<b>\$154,731</b>	\$1,508,409	<b>\$240,458 (15.94%)</b>	\$395,189	\$24,936,178	1.58%
2007–08	29,019	\$141,638	\$9133	<b>\$150,771</b>	\$2,683,042	<b>\$368,077 (13.72%)</b>	\$518,848	\$29,474,653	1.76%
2008–09	27,561	\$165,226	\$10,228	<b>\$175,454</b>	\$1,739,706	<b>\$262,544 (15.09%)</b>	\$437,998	\$30,358,484	1.44%
2009–10	21,587	\$203,572	\$8040	<b>\$211,612</b>	\$3,177,732	<b>\$305,178 (9.60%)</b>	\$516,790	\$27,484,129	1.88%
2010–11	23,605	\$68,449	\$3787	<b>\$72,236</b>	\$3,207,827	<b>\$536,318 (16.72%)</b>	\$608,554	\$36,318,030	1.68%
Total	<b>906,639</b>	<b>\$4,788,752</b>	<b>\$142,544</b>	<b>\$4,931,296</b>	<b>\$23,251,870</b>	<b>\$5,442,783 (23.41%)</b>	\$10,374,079	\$498,364,739	2.08%

- \* 7 months only

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