

AUSTRALIA'S RIGHT TO KNOW

RESPONSE TO DISCUSSION PAPER – DISCLOSURE LOGS OFFICE OF THE AUSTRALIAN INFORMATION COMMISSION

28th March 2011

Australia's Right to Know (ARTK) Coalition welcomes the opportunity to comment on the March 2011 Disclosure Log Discussion paper issued by the Office of the Australian Information Commission.

Australia's Right to Know (ARTK) has been actively involved in the process of reforming the FOI regime, implementation of the new legislation and formation of the Australian Information Commission. Journalists of our organisations regularly use the FOI system to obtain information that is then made available to the public through our media businesses.

ARTK strongly supports the principle of the new regime of openness of access to information and documents of government. ARTK supports disclosure logs as integral to facilitating a pro-disclosure culture across government. Together with the Information Publication Scheme that commences on 1 May 2011, they will enable ready access to the public, to government information.

We consider the term disclosure log is appropriate and we are of the view a similar template for all disclosure logs would assist access to such logs.

We note it is intended the disclosure log requirement will not apply to certain information including:

- personal information about any person if publication of that information would be 'unreasonable' (s 11C(1)(a))
- information about the business, commercial, financial or professional affairs of any person if publication of that information would be 'unreasonable' (s 11C(1)(b))
- other information of a kind determined by the Information Commissioner if publication of that information would be 'unreasonable' (ss 11C(1)(c) and 11C(2))
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete information listed in one of the above dot points (s 11C(1)(d)).



However, to ensure equity of disclosure, it is important that the disclosure log requirement should apply to information about a person or business that has been released to another FOI applicant, where the person or business was consulted under ss 27 or 27A of the FOI Act and did not object to the release to that particular FOI applicant.

We do not consider there should be a requirement for agencies and ministers to inform FOI applicants and third parties of the requirements in s 11C. Applicants and third parties have already been consulted and the decision to publicly release has already been made by the FOI process.

ARTK supports disclosure logs containing a summary of an FOI applicant's request, whether the documents requested were provided in full or in part, and whether all information provided to the FOI applicant is made available under the disclosure log. An agency or minister should be allowed to supplement a disclosure log entry with comment or explanation although this must be a purely supplementary aspect of the log.

We are of the view as much information concerning the application that can be made publicly available the more open the process will be.

ARTK accepts that 12 months is a reasonable period for agencies and ministers to make available, by website download or otherwise, information that is listed in a disclosure log register.

However, any log should provide an archival aspect so that applicants can check whether the agency has released documents on a given issue in the past. The log should advise when information is likely to be removed from an agency's or minister's website and the date of any removal.

10 Days disclosure/simultaneous disclosure

ARTK notes that agencies and ministers must publish information in a disclosure log within ten working days after the FOI applicant was 'given access' to a document (s 11C(6)). It is open to an agency or minister to publish information on a disclosure log earlier than the period of ten days stipulated in s 11C(6) and therefore open to an agency or minister to publish information that is to be provided to an FOI applicant either at the same time that access is provided, or earlier.

ARTK understands that this provision is included in the Act as it promotes openness and makes documents available for all to access not just the FOI applicant

Some ministers and agencies have been publishing information at the same time or very shortly after they are making it available to the journalist who has sought the documents under a FOI request.

As noted in the discussion paper informal representations have been made to the Information Commissioner by a number of journalists pointing out the practical effect this is having and suggesting that public release should be delayed for several working days after the documents have been given to the applicant.

ARTK notes the Information Commissioner response is that a “principle of equal public access rather than exclusive individual access is inherent in the Information Publication Scheme and the disclosure log mechanism. A key function of the Information Commissioner is to promote greater openness for the benefit of the public generally. It is always open to an individual applicant, including a journalist, to make special arrangements with an agency about the scope, form and time of access. It is not part of the Information Commissioner’s role to script or endorse individual arrangements, beyond monitoring their consistency with the FOI Act.

We strongly support the principle of openness. However, we are concerned that simultaneous release, ultimately works against the objective of openness and can be used to undermine the efficient operation of FOI.

Allowing the public and other journalists to have simultaneous access disregards the work expended and costs incurred by the applicant in pursuing the FOI request.

Journalists are responsible for the majority of non-personal related FOI requests to the Commonwealth Government. There is a definite and strong public interest in journalists pursuing stories using FOI as it provides credible and useful information about policies, programs and administration that would not otherwise emerge.

The discussion paper notes that: “The objects of the FOI Act are, it is said, more likely to be achieved if experienced and interested journalists use the FOI Act. This use will be discouraged if the fruits of their labour are undercut by simultaneous release.

Indeed, there is a risk that agencies will strategically use this device to discourage media interest in using FOI.

FOI works more smoothly and effectively if there is cooperation and trust between agencies and applicants. This is important when the need arises to discuss the scope of a request or to agree upon an extension of time to process a request. There is a risk that a dispute about the date of disclosure on a particular occasion will flow over and create an unhealthy climate for efficient FOI processing in the future.

We are concerned that the simultaneous release does not take into account the realities of the business of journalism.

Media companies choosing to use FOI in pursuit of stories invest considerable resources and time in FOI applications without any guarantee of a useful result and historically such FOI applications often fail to produce any useful information. Simultaneous release rewards all media companies equally for the work of just one organisation.

For example, a recent request to Commonwealth Treasury, that required an appeal to the AAT, yielded information placed on the agency's website. This information appeared exclusively in one newspaper that was alerted to its existence by a senior Treasury official while the company involved in the appeal did not receive the information in a timely enough fashion to allow broadcast before that publication.

Simultaneous release of FOI information deters journalists and media companies from undertaking the often time-consuming and expensive use of FOI legislation given the benefit accrues to everyone and does not recognise the decision by a company or organisation to invest in FOI-related journalism.

Another significant public interest factor in support of staged release for journalists is the nature of FOI documents themselves. The documents are often obscure, complex and require contextual explanation. As it stands, journalists are obliged to publish or broadcast immediately after receipt of information in order to beat competitors. Once again, this is the reality of the media industry. If a 5-day period of grace is provided, then there is time available to ensure the information is understood and both agency and political comment can be sought and provided to the public as part of the context. There is an overwhelming public interest in journalists being able to report accurately and fairly on often complicated public policy and program issues.

ARTK believes that at best there is only a miniscule benefit to the public interest in the general release of documents sought by a journalist at the same time as release to the applicant providing those same documents are still released within the 10 days envisaged under the Act as the case under the Act.

It is long-standing practice in both Commonwealth and State press galleries that responses to questions about information for potential stories is provided exclusively to the journalist seeking the information. This recognises the reality of the media industry and its competitive nature and such an approach should be applied to some extent to the release of FOI information to journalists.

The Queensland *Right to Information Act 2009 (QLD)* provides the opportunity for release to journalist 24 hours before general public release. In practice, this arrangement often is longer than 24 hours as agencies accept the advantage of allowing journalists to have sufficient time to digest, analysis and report on government information.

Ideally, in the Commonwealth sphere there should be a 5-day grace period (working days) before public release of information sought by a journalist. This time frame reflects the complexity of many of the documents in a number of FOI applications.

It should be noted that a number of Commonwealth agencies, including Department of Defence and Customs, already allow a stage release process for journalists.

However, some agencies like Commonwealth Treasury have already adopted a same day release policy. ARTK is of the view, all agencies should be bound by a common policy in relation to this issue.