



**Australian
Privacy
Foundation**

email: mail@privacy.org.au

website: www.privacy.org.au

Review of Freedom of Information (FOI) laws 2012

**Submission to the Independent
Reviewer, Dr Allan Hawke AC**

December 2012

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

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Publication of submissions

We note that we have no objection to the publication of this submission in full. To further the public interest in transparency of public policy processes, APF strongly supports the position that all submissions to public inquiries and reviews should be publicly available, except to the extent that a submitter has reasonable grounds for confidentiality for all, or preferably part of, a submission.

Our Submission

Freedom of Information Act 1982 (FOI Act)

The APF has only very infrequently made applications for information under the FOI Act, but this is largely because we have been only too aware, from our contact with other regular users, of the limitations of the FOI regime. Public interest NGOs such as APF (which relies entirely on volunteers) simply find it too time consuming and difficult to use FOI requests as part of their 'toolkit', despite the fact that it is precisely such groups that should in theory benefit from FOI laws in playing their part in exposing government actions to public scrutiny and holding governments to account.

We strongly support the detailed and informed submissions from those with greater experience, and in particular those from Peter Timmins, Rick Snell and John Wood, who have all been great champions of FOI and 'Right to Information' legislation in Australia for many years and are very well informed. We note in particular their detailed evidence based criticism of delays, costs and processes. The well intentioned 2010 amendments have not in practice led to the significant improvements that were promised, largely because of a failure to transform the culture of the public service in relation to FOI. Many agencies remain resolutely unsympathetic to the aims of the legislation at least in respect of requests for 'non-personal' information such as policy documents.

We believe it is essential, in forming any view about the success or otherwise of the FOI regime, and of the 2010 Amendments in particular, to distinguish clearly between individuals' access to personal information (the highest volume segment of the regime which by and large works well) and access requests for non-personal information, which are mostly made by journalists, public interest groups and non-government political parties or politicians. This latter segment of the FOI regime is the one which has never worked well, and where bureaucratic (and political) resistance continues to frustrate the objectives of the Act. We submit that in particular, agencies continue to misuse the 'deliberative process' and 'prepared for Cabinet' exemptions and also abuse the provisions of the Act that provide for consultation with third party individuals – the third party privacy exception is routinely treated as affording individuals a veto over disclosure when their views should properly be taken into account but only as part of a balance of interests test.

One practical suggestion we make is for a much clearer distinction between the two regimes in the reporting requirements of the legislation – both by agencies to the public and to the OAIC, and by the OAIC.

We also submit that the Review should look very critically at submissions from agencies seeking further exemptions or relief from obligations under the FOI Act. These are typically based on a failure to accept the underlying objectives of the legislation and to make the required cultural change.

Australian Information Act 2010 (IC Act)

The APF does have more specific experience of the effect of the IC Act, not so much in relation to the FOI regime as in relation to the privacy regime which has been integrated into the responsibilities of the new Office of the Australian Information Commissioner (OAIC). We draw your attention to both our submission¹, and that of the UNSW Cyberspace Law & Policy Centre², to the Senate Committee on the then IC Bill in 2010, in which we predicted a number of problems with the model being adopted for FOI and Privacy within a combined office.

¹ At <http://www.privacy.org.au/Papers/InfoCommnerBill-100127.pdf>

² At http://www.cyberlawcentre.org/ipp/publications/CLPC_submission_FOI_Bills.pdf - the 2010 APF submission endorsed this one, which was by the same author as the current submission.

We also draw your attention to our letter to the Information and Privacy Commissioners dated 20 November 2011 about the relationship between the FOI and Privacy functions, and their joint reply dated 7 December³.

In summary, we submit that many of the concerns we expressed in 2010 and 2011 have been vindicated. The OAIC seems to be struggling to adequately perform either its FOI or Privacy functions effectively. Limited resources may be one reason, and we support the need for additional resources, but it is not the sole cause. We also question the focus and priorities of the combined office, which is not only failing to deal adequately with the volume of privacy complaints and FOI review applications, but is also failing to adequately address systemic compliance issues in either jurisdiction.

A particular concern is the way in which the public profile of the privacy jurisdiction, under the Privacy Commissioner brand, which had been slowly and painfully built up over 20 years, has been largely dissipated by the confused new branding and promotion of the OAIC. It is now extremely difficult to explain in plain English who is responsible for what functions under the Privacy Act. This problem was to some extent inevitable given the legislation, but has been compounded by the administrative decision by the Commissioners not to maintain a clear Privacy Commissioner brand. We submit that it is not too late to accept that this was a mistake and revert to promotion of the Privacy Commissioner as a clearly separate jurisdiction and function.

APF would be pleased to expand on the concerns raised in this submission.

For further information please contact:

Nigel Waters 02 4981 0828 and 0407 230 342 and board5@privacy.org.au

Board Member
Australian Privacy Foundation

APF Web site: <http://www.privacy.org.au>

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³ At <http://www.privacy.org.au/Papers/OAIC-Openness-111120.pdf> and <http://www.privacy.org.au/Papers/OAIC-Openness-Reply-111207.pdf>