

## **Submission to the review of the operation of the Freedom of Information Act 1982 (FOI Act) and the Australian Information Act 2010 (IC Act) by the Australian Society of Archivists**

December 7, 2012

The Australian Society of Archivists is the peak professional body for archivists in Australia. We provide leadership for the profession and advocate for archives and recordkeeping.

In order to achieve our Mission, we:

- Represent the interests of the archival and recordkeeping profession, and promote the value of archives and records in society.
- Provide and facilitate education and training for archivists and recordkeepers.
- Establish and maintain archival and recordkeeping professional standards.
- Inform and communicate within and beyond the profession.
- Govern and manage the organisation well.

Our members work in a wide variety of places. The Commonwealth, Territory and State governments, and some local governments, employ archivists to manage their archival records. Manuscripts libraries and other institutions which collect archives also employ archivists. Business corporations, religious bodies, universities and schools, museums, professional and trade associations, and community organisations are other examples of groups that employ archivists, and some members work as private consultants.

Thank you for the opportunity to comment on the Terms of Reference for the review *of the Freedom of Information Act 1982 (C'wealth) and the Australian Information Commissioner Act 2010 (C'wealth) which is currently being carried out by Dr Alan Hawke at the request of the Attorney General Nicola Roxon. We note the Terms of Reference published on the website of the Attorney General's Department in November 2012.*

With regard to Freedom of Information (FOI) in general, the Australian Society of Archivists (ASA) supports the propositions that:

- FOI provides a mechanism for individuals to see what information is held about them on government files, and to seek to correct that information if they consider it wrong or misleading
- FOI enhances the transparency and accountability of policy making, administrative decision making and government service delivery
- a community that is better informed can participate more effectively in the nation's democratic processes, and
- information gathered by government at public expense is a national resource and should be available more widely to the public.

It is the view of the ASA that any changes to the legislation should support the Government's commitment to open government information, using all available mechanisms, including the

important legislative rights embodied in FOI, which should be seen as the mechanism of last resort when the presumption and policy directives on 'open by default' and administrative access have failed.

## **Effectiveness of the FOI system**

We are concerned that the emphasis of the current terms of reference appear to be concerned with limiting the application of the FOI act under the assumption that undue costs and administrative burden is being placed on government agencies.

We submit:

- That the emphasis placed upon 'documents' in the current act restricts the release of information in digital form for machine processing, which is now increasingly sought by data journalists. Creating export copies of data in digital systems is being argued as exempt in that this data does not already exist in the requested form. Such responses are now out of alignment with the Commonwealth Government's strategy for moving from paper-based records management to digital information and records management, in its Digital Transition policy, which will see all government information and records created, managed and stored in digital form by 2015. A review of the definition to remove this implicit paper-based bias will improve accessibility of born digital information, and remove the definition as a barrier to releasing information and data in machine readable format.
- The FOI Act has been in place for 30 years, yet the intent of the law is still being constrained by the culture of government agencies which are risk-averse and inherently biased towards concealment of government information. Significant attention to culture change is still required to encourage disclosure and optimise opportunities for proactive disclosure.
- That the legitimate protection of sensitive Government information has not been imperilled by the operation of the new public interest test, and that Government policy with regard to Cabinet documents has, if anything, moved towards greater disclosure, with the recent revision of the closure period for general public access to Cabinet documents from 30 years to 20 years. The onus should remain on the Government to demonstrate a genuine public interest mitigating against disclosure for these and all other categories of information.
- Greater effort from government agencies to proactively disclose and make publicly available the information released may/should result in reduced administrative burden inherent in dealing with individual requests. Allowing others to query already processed requests and opened information may reduce unnecessary duplication of requests.
- Encouraging open cooperation with public interest, not for profit, groups such as the Open Australia Foundation to provide streamlined information on FOI requests will potentially increase efficiency. Open Australia Foundation (<http://www.openaustraliafoundation.org.au/about-us/>) are working to make **Freedom of Information requests straightforward** for ordinary people. The site also aims to open up the whole process of making Freedom of Information requests by making the whole

paper (or rather email) trail of request and responses public. A model for this cooperation is to be found in the UK service 'what do they know' <http://www.whatdotheyknow.com/>

- The administration of the 'relevance' provision is of concern. The release of overly redacted documents where minimal remaining detail is legible creates an environment of disrespect for the law and its intention. Such unnecessary redaction is a waste of time and resources.
- We note that requests are answered in paper-based form, most commonly in a PDF document which has been manually signed. This implies an administrative burden in creating an electronic document, printing it, signing it, and then scanning it. Agencies could be encouraged to streamline authorisation and dissemination processes, minimising time to create responses.

### **Effectiveness of the OAIC**

We submit that the Office of the Australian Information Commissioner (OAIC) is over-burdened and under resourced to perform the review functions allocated to it. The effect of this is a considerable delay experienced by members of the public seeking rulings by the Information Commissioner, with instances of delay of up to 2-3 years. This can only be exacerbated by recent resource cuts to the office.

We note that broad rules seem to have developed, such as the maximum revocation of 50% of charges when challenged at review. It would be far more effective to use the resources of the OAIC on matters of substance, rather than on administrative/process matters. We suggest a streamlining and minimal tolerance to administrative/process reviews with the assumption biased towards disclosure to the public.

### **Range of agencies covered**

We have noted with concern the problems encountered in accessing information held by private contractors undertaking activities outsourced from Government. The reform of 2010 made explicit the coverage of records of government maintained by private contractors on behalf of government. While the intention of the broad direction of government accountability clearly covers records of activities administered on behalf of government, we submit that the current section 6c does not provide the Information Commissioner with sufficient powers to compel agencies to obtain relevant documents from private contractors. The contractual obligations for contractors and model clause for inclusion in contracts is a good start, but greater powers to require compliance are required to support this clause. In addition, the use by contractors of 'commercial in confidence' as a reason to withhold information gathered or created on behalf of government should be addressed in guidance supporting FOI legislation, as I/we submit that this should not generally be an adequate reason to withhold such information in itself. Ideally arrangements and expectations for FOI would be written into contracts with third party providers of services to Government.

We note with concern that agencies created under either cross jurisdictional arrangements (where one jurisdiction passes establishing legislation and mirrored in other jurisdictions) and privatised organisations appointed under legislative mandate to perform government functions, are using these arrangements to claim exemption to the provisions of the Act. Specific examples are:

- Health Practitioners Regulation National Law (adopted by each State and Territory) where s215 clearly indicates intent of coverage by Commonwealth FOI Act, but because of the inclusion of a specific Act title, the claim has been made that the agency is only subject to the named act, not any revisions or subsequent updates to that act.
- Aged Care and Standards Accreditation Agency which claims exemption from the Act by virtue of its status.

With regard to the range of agencies covered we note the continued general exemption from FOI for security and intelligence agencies. We submit that this general exemption is not in line with the spirit of government accountability and transparency, and that a more suitable model would utilise the need for secrecy over classes of information rather than entire entities.

## **Charges**

We note the recommendations of Professor McMillan's review of charges applicable under the Act. In particular we note the suggestion that an agency should not be required to process a request that is estimated to take more than 40 hours. For substantive FOI cases, particularly those undertaken in the public interest, we suggest that this ceiling period is too low. We note the anecdotal evidence that agencies are already refusing processing of requests using this as a justification in advance of its adoption.

Another option may be to leave application fees as outlined by the Charging review, but to remove processing fees. Charges generally are felt to be timewasting – neither too high to act as a deterrent to vexatious requests, nor substantive enough to warrant agency time in collection.

We are also concerned that FOI decision makers in agencies may not be clear enough, or consulting the appropriate technologically literate people, to assess costs in making data available in machine processable terms, resulting in unrealistic and grossly inflated cost estimates for effort in making such data available.

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