



REVIEW OF THE OPERATION OF THE *FREEDOM OF INFORMATION ACT 1982* (FOI ACT) AND THE *AUSTRALIAN INFORMATION ACT 2010* (IC ACT)

1. AGENCY SUPPORT

The ATO welcomes the opportunity to provide input into the review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010* by Dr Allan Hawke AC.

The ATO fully supports the intent and advancement of open government established by the freedom of information reforms. We view the legislation as offering further opportunities to demonstrate a continuing high standard of public administration and organisational integrity, by promoting transparency in decision making through the release of key information.

The pro-disclosure of information aligns with our value of being open. It strengthens the community's understanding of how we make decisions, resulting in enhanced community understanding, trust and confidence in the administration of Australia's tax and superannuation systems.

Our "write for the world to see and understand" initiative seeks to embed these outcomes in how our staff think about and record their work and decisions. To further drive these changes we have established two interdependent programs of work. One focuses on the cultural and process changes required by the freedom of information reforms. The other supports those changes through robust information management. Together these programs are designed to deliver the following:

Overarching strategic outcome

People understand how and why the tax and superannuation administration affects them.

Program outcomes

1. Information held by the ATO is accessible to the community, through:
 - the publication of the information
 - administrative release schemes, and
 - the right of access under FOI.
2. Better informed decision making through increased public participation in ATO processes.
3. ATO activities can be subject to scrutiny, discussion, comment and review.
4. Information held by the ATO is managed as a national resource, for public purposes.

5. Prompt and lowest reasonable cost public access to information is facilitated and promoted.

As this work and the related organisational changes are delivered we will draw linkages to the *ATO Strategic Statement 2010–15*. We view the legislative reforms as fully supporting our vision that *Australians value their tax and superannuation systems as community assets, where willing participation is recognised as good citizenship*. Three of our five strategic themes link directly to the freedom of information reform outcomes:

Encourage People support and understand the benefits of participation

Support People are helped and assisted to understand their rights and responsibilities

Champion Champion the interests of both individual taxpayers and the community, advising government on ways to improve the operation of Australia's tax and superannuation systems.

The embedded presentation provides further detail on the cultural, process and technology changes we will deliver in support of the legislative reforms.



Microsoft PowerPoint
Presentation

2. SPECIFIC MATTERS

Our comments on particular terms of reference, summarised below, are provided in the attachment.

- We generally support all of the recommendations of the Information Commissioner's recent review of FOI charges. In particular we support the development of schemes for administrative release and the introduction of a '40 hour rule' to provide certainty to section 24 of the FOI Act.
- We consider that the right to request documents under FOI should not be able to be exercised unless a person has tried the relevant administrative release route (if available) and is not satisfied with it.
- Where there is on-going compliance action by a regulatory or enforcement agency like the ATO, there is merit in the proposition that consideration of the FOI request be deferred until after the agency has completed the compliance action.
- We support a requirement in the FOI Act that an applicant make an application for internal review before applying for an Information Commissioner or Administrative Appeal Tribunal review, and that an application for merit review should attract an application fee.
- Consideration should be given to amending the FOI Act to allow an agency to suspend, pending OAIC direction, the processing of FOI requests which are reasonably apprehended to have the effect of a 'denial of service' attack.

ATTACHMENT

The ATO's comments on particular terms of reference are set out below.

Effectiveness of OAIC (terms of reference (b))

1. The introduction of the OAIC has been effective in raising the profile and awareness of FOI generally. It has been effective in projecting the message of pro-disclosure to agencies. The small number of published decisions so far has, however, meant that there may be greater scope for providing guidance and leadership in relation to FOI decision making.

Merit review (terms of reference (c))

2. The operation of merits review by the OAIC may not be effective in reducing the number of FOI requests being reviewed at the AAT. In our experience the OAIC has not been in a position to make decisions in larger cases and so has referred these directly to the AAT.
3. We note that, according to the Information Commissioner's annual report, about one quarter of all valid review requests finalised by the OAIC were finalised on the grounds that the matters were lacking in substance, the applicant failed to cooperate, or the applicant failed to maintain contact.
4. It is arguable that a reasonable fee, which could be waived in appropriate circumstances, may assist in focusing review applicants on the need to consider whether they have any particular grounds to think they may get something further. Reducing the number of such requests would have the impact of freeing up time and resources for both the OAIC and for agencies.
5. To avoid unnecessarily calling upon OAIC resources and those of the relevant agency, we consider that the FOI Act should require that an applicant apply for internal review before seeking IC or AAT review, and that an application for merit review should attract an application fee.

Amendment and annotation of personal information (terms of reference (d))

6. We consider that there is a need to streamline the operation of the FOI and Privacy Acts where there are overlapping provisions. We would be supportive of the transfer of the Part V amendment and annotation of personal information provisions from the FOI Act to the Privacy Act.

Fees and charges (terms of reference (f))

7. We agree with the widely held view that removing FOI application fees may have led to an increase in the number of FOI requests. In our experience some of that increase may be attributed to applicants seeking documents that they could otherwise obtain by way of administrative disclosure but are choosing FOI instead. Having requests of this type in the FOI system reduces the effectiveness of the system to the extent that resources are diverted away from the processing of requests for which there is no other access route available.

8. We generally support all of the recommendations of the Information Commissioner's review of charges. We support in particular the proposed repeal of section 24 and introduction of the 40 hour rule, and the development of schemes of administrative release.
9. We submit that the underlying policy or purpose of charging could be made clearer. We accept that it is not to signal underlying costs as in an efficient pricing mechanism. But what then is it supposed to signal to the Australian community? What is the desired effect? Is it to guard against ill-considered, impulsive, frivolous or vexatious requests? Is it to create the opportunity to narrow the scope of the request?
10. We submit that processing charge rates should be pegged to that imposed by the Federal Court, as suggested for example in the [Federal Court's submission to the review of FOI charges](#).

Administrative release (terms of reference (g))

11. The relative informality of administrative release, when it is available, is less of a burden on an agency than FOI processing. We consider that the FOI Act should place all agency administrative release schemes (administrative access schemes), if they exist, on the same footing as section 15A schemes (access to personnel records). That is, the FOI right should not be able to be exercised unless a person has tried the relevant available administrative release route and is not satisfied with it.

Deferment of FOI processing during compliance or enforcement action (terms of reference (g))

12. We consider that a problem for a regulatory or enforcement agency can arise when an FOI application is made by an applicant about whom that agency is conducting compliance or enforcement action. This can cause a dilution of the capacity of the agency to perform the compliance action, with consequent delay for the applicant.
13. For example, in a tax audit, the taxpayer may lodge an FOI request which has the effect that tax officer undertaking the audit may have to divert themselves from audit work. Instead they may have to search for documents and to examine them so as to be able to give information to the FOI decision maker about the possible harms and benefits which may attach to disclosure. That diversion may delay the compliance work.
14. In such circumstances the agency may find it difficult to sustain a conditional exemption under paragraph 47E(d) of the FOI Act for impairment of agency operations. The difficulty for the agency lies in the test for substantial and adverse effect. Whilst it may, in the example of the tax audit, be arguable that the particular FOI request has a substantial and adverse impact on that particular tax audit, it could be argued that a large agency like the ATO could reasonably be expected to reassign people to the audit and so bring the adverse impact below the threshold of what may be substantial.
15. Another problem is that an FOI request during compliance action often results in the documents being found to be exempt under the section 37 law enforcement provision. But as soon as the compliance action is concluded, if the applicant makes another FOI request, the documents are generally able to be released because the section 37 protection is no longer required. This means double handing of those documents for the agency.

16. The ATO's already significant investment in FOI processing is regularly supplemented by calling on external legal services. In the financial year 2011-12 the ATO spent \$3.3 million on external legal services in connection with the processing of FOI requests. About one quarter of that was in connection with two audit projects, and 42% was spent on processing FOI requests made by just five groups of related applicants (against whom the ATO was conducting compliance action).
17. A deferral provision could assist in managing the diversion of resources to dealing with FOI requests and reducing legal costs. Consideration could usefully be given to whether the section 21 deferment of access provision can be improved to provide for regulatory and enforcement agencies like the ATO to be able to defer commencing work on an FOI request until after the agency has completed compliance action on the applicant. Such a change could be justified on the grounds that working on the FOI request could, contrary to the public interest, divert resources from, and thereby delay, the particular compliance or enforcement action.

Working days (*terms of reference (g)*)

18. In terms of reducing the administrative burden on agencies, further time to process FOI requests would be beneficial. The FOI Act stipulates that, for the most part, statutory times are to be worked out in terms of calendar days. The exception to this is the newly inserted subsection 11C(6), which refers to working days.
19. The Information Commissioner, in deciding whether to allow an extension of processing time, takes into account non-working days falling within the original period (*FOI Guideline 7.63*). Similarly it is working days for the purposes of an Information Commissioner review (*FOI Guideline 10*).
20. Consistently using working days as the relevant time period would provide a level of certainty for everyone involved that is lacking when holidays and weekends intrude upon the calendar time available to meet the needs of the Act.

Electronic FOI applications (*terms of reference (g)*)

21. We note that the apparent lack of limitation on who may make an FOI request, combined with the ability to make a lawful request by electronic means, expands the practical boundaries of the Australian FOI regime to now include the billions of internet users world-wide. Thus there is the potential for an agency to be inundated with FOI requests lodged electronically.
22. One aspect of limitation that may need attention is whether the objects of the Act limit its operation to "the Australian community". That is because, according to page 64 of the Information Commissioner's report on the review of charges, it is a settled feature of Australian FOI practice that the words 'every person' in FOI Act subsection 11(1) does not carry any limitation on the place from which a person may make an FOI request and, according to the Information Commissioner's FOI Guidelines at paragraph 3.3, an applicant does not have to be an Australian citizen. For this, the Information Commissioner refers to *Re Lordsvale Finance Limited and Department of the Treasury*¹.

¹ [1985] AATA 174

23. In that case, however, Deputy President Todd said² that he was not comfortable with the conclusion he felt driven towards and that:

“If the conclusion is however thought to be objectionable in principle, it seems to me that only amendment of the FOI Act will suffice to restrict the scope of section 11”.

24. There are several factors in play here. One is the extra-territoriality issue canvassed in *Re Lordsvale*. Another is the need to accommodate people overseas whose dealing with the ATO puts them in a position to have to rely on a right of last resort to make an FOI request. Yet another is how the FOI Act can permit an agency to manage the risk of what is similar to ‘denial of service’ scenarios that can arise when dealings are internet based.

25. We consider that the Act may need to provide for an agency to suspend, pending OAIC direction, the processing of FOI requests which are reasonably apprehended to have the effect of a ‘denial of service’ attack.

² [1985] AATA 174 at paragraph 57