

1 February 2013

Dr Allan Hawke AC
Freedom of Information Review
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Dr Hawke

**AIC Submission to the Review of the *Freedom of Information Act 1982*
(FOI Act) and the *Australian Information Commissioner Act 2010***

Thank you for providing the Australian Intelligence Community with the opportunity to make a joint submission to this review. Of the matters listed for review in the terms of reference, the items of particular interest to the Australian Intelligence Community (AIC) are:

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

(d) The reformulation of the exemptions in the FOI Act, including the application of the new public interest test...

and

(g) the desirability of minimising the regulatory and administrative burdens, including costs, on government.

As you are aware, section 7 of the FOI Act exempts AIC agencies from the operation of that Act. This exemption was preserved in the 2009/10 review of FOI legislation, which acknowledged the importance of providing appropriate protection to records maintained by AIC agencies.

The national interest in ensuring the highest level of protection for classified national security information was the key reason for the inclusion of an agency exemption in the original Act and is the reason this exemption has remained largely untouched since that time.

The 1996 report *Open Government: A Review of the Federal Freedom of Information Act 1982*, by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC), concluded that scrutiny by the Inspector General of Intelligence and Security (IGIS) and the relevant Parliamentary Committee of the internal processes and methods of the intelligence agencies was adequate and recommended that intelligence agencies remain exempt from the operation of the FOI Act. The IGIS has been provided with comprehensive powers of scrutiny over the AIC agencies to ensure public accountability, while at the same time protecting intelligence information.

It is our view that the FOI Act achieves an appropriate balance between openness and the protection of genuinely sensitive information. The section 7 exemption still represents, in our view, the best way to provide appropriate protection to records relating to national security, defence and international relations issues and to the operation of AIC agencies and should be retained. There are a number of reasons for this:

a. Removal of the section 7 exemption would weaken the protection of AIC records

We note that, in the event of the removal of the blanket exemption, AIC agencies would still be able to apply exemptions under sections 33, 37 & 45 of the FOI Act, which fulfil a similar function – in that they allow documents or information affecting, *inter alia*, national security, defence or international relations to be exempted on a case-by-case basis from applications made under the FOI Act.

These exemptions are, however, untested as a means of case-by-case protection for AIC records. AIC agencies note that intelligence agency or Ministerial decisions that rely on these sections to exempt documents or information are potentially subject to internal and external review. This review process removes the authority for decisions from those responsible for the protection of particular documents. This can have implications for the intelligence that foreign partners are willing to share with Australia, an issue which is discussed further in paragraph c below.

Additionally, decisions on whether the exemptions in these sections apply may be difficult to take. It will not be immediately clear to a non-expert reviewer whether certain categories of documents – such as those relating to finances, IT infrastructure, and personnel and recruitment practices – fall within the scope of the exemptions. Such documents may need protection, especially when they relate to agencies with covert responsibilities. However, due to the need to protect the most classified and covert activities of intelligence agencies and their sources it is entirely possible that the reasons why such information needs to be protected may properly be unknown to a decision maker in another agency.

A more robust form of protection than that provided by sections 33, 37 & 45 is therefore required to protect AIC agencies – and Australian national interests.

b. Removal of the section 7 exemption may impact negatively on our ability to maintain our national security

The section 7 exemption for the AIC recognises the predictive, long term nature of intelligence work and the potential for adverse consequences as a result of the release of AIC information. It also recognises that a fundamental tenet in the effective operation of intelligence agencies is that their areas of interest, the identity of subjects of security interest, and the details of their technological capability, sources and investigative techniques must be protected.

The continuing threat of espionage is of particular concern in the FOI context, with hostile entities targeting government departments and agencies and seeking access to government computer network systems. The disclosure of apparently innocuous pieces of information relating to the activities of the AIC could, therefore, result in damage to Australia's security. Such information can aid in building a detailed picture of Australia's security and intelligence agencies and their activities. It can alert groups, individuals or hostile intelligence agencies to a specific intelligence interest in them. This may undermine the intelligence agency's ability to fulfil its mandate, disclose technical capabilities and methodologies or simply confirm the existence of sensitive documents, making it easier for hostile individuals, groups or foreign agencies to engage in covert intelligence targeting and collection.

The removal of the section 7 exemption may result in coordinated applications to various agencies aimed at building a picture of intelligence activity, rather than for bona fide reasons under the FOI Act. This could result in a weakening of the protection of AIC methodologies and capability, undermining current and future activities.

The practical reality of these considerations is that the vast majority of information likely to be sought will be exempt. Indeed, to protect against the risk that even the absence of information would be of intelligence interest, the only safe response in many cases would be to neither confirm nor deny the existence of any documents.. As a result little would be gained from any amendment, but there would be an increased risk.

c. Removal of the section 7 exemption may impact negatively on our relationship with key intelligence partners

Any change to the existing exemptions could have serious implications for our information-sharing arrangements with allies, several of which are treaty-level. The confidence of our allies in our ability to protect information that they share with us remains fundamental to our intelligence sharing arrangements. We need to maintain this confidence.

If any of our intelligence partners consider the removal of the section 7 exemption represents a diminution of protection, this could also have a bearing on the level of trust they extend to us and the undertakings we can make. It could diminish the level of access to important intelligence on which we rely for coverage of threats to Australia's national interest.

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Recent commentary arguing for the removal of the section 7 exemption has referred to the operation of FOI in other countries, in particular the US and UK, where intelligence agencies are said not to be provided with a blanket exemption.

However, the FOI legislation in the US and UK is different in both substance and operation to Australia's FOI scheme, and contains additional safeguards protecting the records of intelligence agencies that have the practical effect of exempting intelligence agency material.

For example, the UK exempts entirely the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (See Sections 23 and 24 Freedom of Information Act 2000 (UK)).

Similarly, while the US FOI legislation extends in principle to cover intelligence agencies, it provides a range of blanket exemptions covering classified information related to the internal practices of an intelligence agency, as well as national security-related information (See Exclusion 3 and Exemption 1 and 3 of the Freedom of Information Act 1966 (USA)). Separate US legislation also prohibits US intelligence agencies from complying with the FOI requests of a foreign government, its representatives or international organisations (See section 552(a)(3) of title 5, United States Code).

If it is decided that a closer look at the exemption of AIC agencies is to be made, each AIC agency would like to the opportunity to meet and discuss this with you and the review team.

If you have any questions, or would like any additional information, please contact Mr Robert McKinnon on 02 6266 0900.

Yours sincerely

Allan Gyngell AO
Director-General

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