

Submission to the Hawke Review of Freedom of Information

The Australian Transport Safety Bureau (ATSB) was supportive of the reforms brought about by the amendments to the *Freedom of Information Act 1982* (FOI Act). The implementation of the reforms at the ATSB was conducted on a project-managed basis, coordinated by ATSB Legal Services. This ensured that the breadth of the reforms was fully understood across the ATSB and that the implementation of the ATSB's Information Publication Scheme was delivered in advance of the statutory deadline. As part of that process the ATSB also engaged in proactive interaction with other Commonwealth agencies and the Office of the Australian Information Commissioner (OAIC).

(a) The impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system

The ATSB has not discerned any major change to its FOI program that can be directly attributed to the reforms. The ATSB predominantly receives applications from legal practitioners as an adjunct to the litigation process, students undertaking research, the media and members of the transport sector and the public on individual accident investigations. The FOI reforms did not appear to affect that. However it is likely that the reforms have enabled applicants to more easily locate FOI related matter on the ATSB website. That includes through the ATSB Disclosure Log. Most requests for access to material from the Disclosure Log come from the media. While the ATSB does not publish its operational information online, that material is currently being updated and the ATSB anticipates publishing that material, subject to any exemption, in 2013.

The reforms do not appear to have impacted on applications or requests for review to the ATSB.

The ATSB became an independent statutory agency on 1 July 2009. Prior to that date the ATSB was part of the Department of Infrastructure, Transport and Regional Services (now the Department of Infrastructure and Transport). The following figures represent statistics for FOI requests made since July 2009:

2009-10:	12
2010-11:	13
2011-12:	26
2012-13:	13 (as at February 2013)

The spike in requests for 2011-12 does not appear to be the direct result of the reforms, as most of the requests that year were from legal firms seeking information under FOI as part of their litigation processes. As FOI is generally used to obtain information in the early stages of a case this may be more reflective of the amount of cases commenced in a given part of that year, rather than being directly influenced by the reforms. The ATSB has also experienced an increase in the number of applicants seeking information about investigations that occurred from 30 to 50 years ago for the purpose of family histories. Again this is difficult to present as being an impact of the reforms.

(b) *the effectiveness of the Office of the Australian Information Commissioner*

Information Commissioner (IC) review process

The ATSB has had limited interactions with the IC with respect to FOI applications, although the interactions that have occurred have been positive and effective. The ATSB has had one internal review since the reforms took effect and one matter referred to the Information Commissioner for review. That application was later withdrawn as it was not reviewable.

The ATSB notes in the OAIC submission to this review that there is extensive discussion of the increased uptake of external or Information Commissioner review. A number of recommendations are made for refinements that would optimise the efficiency and effectiveness of the external review process. While the ATSB has not been directly affected, as a matter of policy the ATSB would support refinements that would enhance the efficiency and effectiveness of the external review process.

Provision of advice and guidance material

The resources currently being provided by the OAIC are very useful. The ATSB regularly directs applicants to those resources to assist in framing a submission that processing charges ought to be waived or reduced. However, in the lead up to Phase 2 of the reform process, instituting the Information Publication Scheme (IPS), the ATSB considers that the guidance material could have been enhanced by more timely provision of practical guidance when the reforms were instituted. More material was provided later and the ATSB did interact with OAIC officers and found their advice to be helpful. Cross-agency discussions and forums were also found to be of assistance.

(c) *the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters*

As stated above, the ATSB has little experience of the two-tier system. As a result the ATSB is not able to comment on the intent of the review process which we understand is to provide a cost and time effective solution for applicants wanting an alternative to a review undertaken by the Administrative Appeals Tribunal.

(d) *the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account:*

(i) *the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and*

(ii) *the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;*

The ATSB considers that the reformulations of the exemptions are in keeping with the objects of the FOI Act and encourage agencies to be more transparent. However, the ATSB wishes to make some comments about the need to take the interests identified in the term of reference above into account when considering any further changes. It is important in the context of an investigation like that conducted by the ATSB that persons who provide information have clearly defined expectations about how information will be disclosed and used. The ATSB wishes to avoid any uncertainty that might be created through application of a disclosure regime that is different to the one outlined in the *Transport Safety Investigation Act 2003* (TSI Act).

The ATSB has a particular interest in the provisions in the FOI Act relating to the legitimate protection of sensitive government information as well as information concerning third parties who deal with the ATSB. The Parliament inserted information protection provisions in the TSI Act in order to guarantee the free flow of information to the ATSB for safety purposes. The information that is protected by the TSI Act is information from Cockpit Voice Recordings (CVR) and information obtained or generated by the ATSB in the course of an investigation, termed 'restricted information'. The protective provisions are 'secrecy provisions' for the purposes of s.38 of the FOI Act. The following extracts from the Explanatory Memorandum (EM) prepared for the Bill for the TSI Act help explain the purpose of those provisions:

CVR

It is acknowledged that such recordings constitute an invasion of privacy for the operating crew of an aircraft that most other employees in workplaces are not subject to. Such recordings, therefore, must be treated with the utmost confidentiality and continue to be used for safety investigation purposes only. To ensure the ongoing availability of information from CVRs, it was considered necessary to protect the rights of individuals, in particular the operating crew of an aircraft. Inappropriate use of CVR information in the judicial system, for example, may adversely affect transport safety, both domestically and internationally, as it is unlikely that the availability and free flow of safety information will be guaranteed/continued in the future. Inappropriate use by an operator such as for disciplinary action may also result in an adverse outcome for transport safety. For example, the operating crew of an aircraft has the ability to deny access to CVR information simply by 'pulling' a circuit breaker, thus rendering a CVR inoperative.¹

Restricted Information

Restricted information covers various types of information acquired by a staff member under or in connection with the Bill..... Restricted information is a subset of evidential material and is sensitive information that may have an adverse impact on the free flow of safety information in the future (and in turn have a substantial adverse impact on the proper and efficient conduct of an investigation conducted under this Bill) if it was made freely available by the Executive Director for purposes other than transport safety, such as 'blame' inquiries.²

These extracts are an example of a number of references in the EM to guaranteeing the free flow of information to the ATSB by imposing strict limitations on the disclosure of such information.

This is essential so that the ATSB can fulfil its legislative function to improve transport safety through its accident investigations. The necessary evidence will not be available to do this if persons involved in an accident investigation are uncertain about the ability of the TSI Act to protect information about them from being used for blame or liability purposes.

The ATSB notes that the OAI in its submission to the review at paragraph 118 and 119 has sought legislative amendments which ensure that OAI and the AAT would get access to documents covered by the secrecy provisions of the FOI Act. OAI has also proposed that OAI and the AAT should be able to stand in the place of the original decision maker and be able to make decisions about the release of information subject to the secrecy provisions.

¹ EM p 65 – see http://www.atsb.gov.au/media/48079/tsi_act_em_2003.pdf

² *ibid.* pp31-32

Should further considerations be given to these proposals the ATSB requests that consideration be given to the objectives outlined by the Parliament when instituting the information protection provisions in the TSI Act (which are that are covered by the secrecy provisions of the FOI Act). In particular, it needs to be borne in mind what the impact would be if it were not possible to account for the potential views of a substituted decision maker when advising of the extent of the information protection provisions. Inconsistent views could have a damaging effect on the objective of the information protection regime put in place by Parliament in the TSI Act.

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

The ATSB has no concerns with the range of agencies covered either in whole or in part by the FOI Act.

(f) *the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime*

Processing an FOI request, even where substantial portions of the information may be exempt under secrecy provisions can nonetheless be time consuming and costly. In addition to discharging its statutory obligation to assist an applicant frame a valid request, the ATSB does seek to proactively assist FOI applicants to scope their requests in such a way as to minimise cost, while ensuring that the information the applicant is seeking is able to be provided, subject to valid exemptions.

The ATSB has found that changes from paper to electronic file management have presented challenges in processing FOI requests within statutory timeframes. While the ATSB acknowledges that the onus is on an agency to ensure that its records management systems are fit for purpose and efficient the ATSB recommends that with developments in document and records management the basis for charging processing fees are regularly reviewed.

As part of its functions, the ATSB does make a significant amount of information freely available through its website. It also maintains an "ATSB Info" service whereby information can be requested without the necessity of making an FOI application. Requestors are asked to make an application under FOI only where the information that has been requested may invoke an exemption under the FOI Act.

In terms of applying fees and charges, in general, the ATSB considers that the FOI Act gives the ATSB sufficient flexibility in deciding whether to impose charges and the ATSB's approach to charging is broadly consistent with the thrust of the recommendations in the Information Commissioner's review. For example, if there have been delays in the processing of a matter, or the information requested is solely the personal information of the applicant or the charges are likely to be very minimal, fees and charges are not imposed. Similarly, if a request is made for material that would be exempt by virtue of being covered by the secrecy provisions exemption the ATSB would not generally seek to impose fees and charges.

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

The ATSB does not consider that there is an onerous regulatory burden or that costs are too high. However, as part of the review the ATSB suggests the following matters could be given further attention:

(i) Where information is publicly available it should be excluded from the operation of the FOI Act except in so far as it is necessary for the agency to advise the applicant where the material may be available. While this may nonetheless impose a burden on the agency in many cases the agency will be better placed to provide that advice;

(ii) Paragraph 12(1)(a) of the FOI Act requires clarification. It currently provides that a person is not entitled to access a document in the open access period as defined in the *Archives Act 1983* unless it contains personal information. It is open to interpretation whether that is personal information of the person requesting access, information in which they may have a legitimate interest (i.e. of a family member), or personal information in the broad sense.

It is also open to interpretation whether having regard to paragraph 12(1)(a) an agency is obliged to process the material relating to the personal information only or the whole of the information captured by the scope of the request. The ATSB suggests that as potentially more information comes under the FOI Act with the reforms affecting the open access period under the *Archives Act* the position with paragraph 12(1)(a) should be put beyond doubt.

(iii) The time for processing requests should take into account over the Christmas stand-down period that most agencies now adopt for the period between Christmas and New Year. Currently a FOI request received at the close of business on Christmas Eve or during the shut-down period means processing time can be lost. .

While an agency can negotiate an extension of time with an applicant, an applicant must agree to the extension. If an applicant does not agree an added burden is put on the agency, or it has to exceed the statutory time period for the request. That can result in the application being deemed to be refused and the matter can be referred to OAIC.

A possible solution would be an amendment to the FOI Act providing that the period between the last business day before Christmas and the first business day after 1 January in the following year do not count toward any reckoning of time.

(iv) Currently there is no express provision in the FOI Act dealing with inter-agency consultation. This consultation is often required in circumstances where, for operational reasons or time pressures, an agency cannot accept a partial transfer of a request under s.16 of the FOI Act. Consequently there is no allowance for an extension of time for an agency to conduct this consultation. That may present a difficulty where material in which another agency has an interest is discovered late in the processing period. This is impractical as an agency would have to rely on agreeing an extension of time with the applicant. Agreement may not always be forthcoming. The ATSB recommends that where inter-agency is reasonably required then time should automatically be extended by 30 days in a similar way as for consultation with State and Territory agencies under s.26A of the FOI Act.