

7 December 2012

**RE: Review of FOI laws submission**

Dear Dr Hawke,

Canberra Innovation Corporation Pty Ltd (CANIC) welcomes the opportunity to make the following submission to the Review of FOI laws announced by the Attorney-General on 30<sup>th</sup> October 2012.

We address two items from the Terms of Reference:

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

**d) 'the necessity for the government to continue to obtain frank and fearless advice'**

**Who are we?**

By way of background, CANIC was formed over two years ago by three directors with a mutual interest in developing software applications to help agencies comply with their administrative law obligations. Our primary project has been the development of a Commercial-Off-the-Shelf (COTS) FOI processing software system (FOIDEX) which has been designed specifically to assist Federal Government agencies address their obligations under the *Freedom of Information Act 1982*.

We recently received funding for our project from the ACT Government through their InnovationConnect funding program (ICON), and expect to be able to release the FOIDEX product to market early in 2013.

**Submission addressing item g):**

The 2010 reforms of the *Freedom of Information Act 1982* made significant progress in breaking down barriers of public access to Government information, and as a result, there has been a steady increase in the numbers of requests, along with a corresponding rise in compliance costs for agencies.

We argue that the advances made in promoting a pro-disclosure culture in Government is worth maintaining in the broader interests of a system of representative democracy. Clearly, however, such a culture has come at a cost to the Government, with estimated compliance costs across all agencies rising in the past year from \$36 million per annum to over \$41 million per annum.

While there may be opportunities to reform parts of the Act to streamline its efficient operations, we would contend that any attempt to hinder and hamper access to Government information would be contrary to the broader public interest that has been served by the 2009-2010 reforms.

Our research into the handling of FOI requests across agencies has endorsed our commitment to pursue the development of a value-for-money solution specifically targeted to address the issue of FOI processing. The research has indicated the following:

- Agencies handle FOI requests in many and varied ways, some supported in a limited manner by case management systems, with many responding in an ad-hoc manner.
- FOI is never an agency's core business, and as a result typically receives little or no budget for the acquisition or development of systems to support FOI request processing.
- FOI requests, particularly for non-personal information, tend to hit agencies right at the point they are focussed on policy development and implementation of high-profile Government initiatives. As a result, resources that would otherwise be focussed on delivery of such policy initiatives are diverted to respond to FOI requests.
- A high proportion of FOI decisions are overturned on internal review, indicating that the primary decisions are not being made according to law, thereby increasing the costs of compliance.
- The quarterly and annual reporting obligations to the OAIC are performed in an ad-hoc manner across agencies.

CANIC suggests that many of the inefficiencies and costs associated with complying with FOI requests could be better controlled by systems that delivered decisions in the first instance that are made and founded according to the specific provisions of the Act. These provisions, apart from the specific agency exemptions noted in the Act, apply across the Commonwealth, which further suggests that agencies have an opportunity to leverage off a shared decision support and recording service across the whole of Government, or at the very least, the same decision support system deployed locally in individual agencies<sup>1</sup>. Similarly, use of a Government-wide adopted system that supports consistent decision making according to law would greatly improve and expedite FOI

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<sup>1</sup> CANIC's FOIDEX system has been designed in accordance with the principles outlined in the Australian Government's *Automated Assistance in Administrative Decision-Making: Better Practice Guide*, 2007 (AGIMO, the Commonwealth Ombudsman, ANAO and the Office of the Privacy Commissioner).

reporting obligations, making a further contribution to reducing the costs and time associated with compliance.

Before making changes to the Act which may roll-back or restrict the public's right of access to Government information, CANIC urges the FOI review to examine the opportunities to improve the efficiencies of processing FOI requests under the existing regime.

To that end, CANIC would welcome the opportunity to meet with you to discuss further our perspectives on how an effective FOI decision-support system may contribute to improving compliance and reducing costs associated with administration of the FOI Act.

## **Submission addressing item d)**

The terms of reference ask you to look at the impact of the FOI Act on the ability of officials to give 'frank and fearless' advice. The implicit argument is that officials cannot always give frank and fearless advice when it will be public.

CANIC submits this argument is rubbish, and has always been rubbish.

Let's assume the premises of this argument are all true.

- Assume a Minister asks an official for advice on public policy.
- Assume the advice will become public.
- Assume the official has something legitimately to fear for their career prospects from giving frank advice.

Now the official has four and only four options:

- Refuse to give advice.
- Give advice that is not frank, yet give it fearlessly.
- Give advice that is both not frank and not fearless.
- Give advice that is frank but not fearless.

The official cannot refuse to give advice. That would breach the APS Code of Conduct. Employees have to 'comply with any lawful and reasonable direction'.

The next two options involve giving unfrank advice. These would breach the first principle in APS Code of conduct: to 'behave honestly and with integrity in the course of APS employment'.

So the only thing the official can feasibly do is give frank advice, but give it fearfully.

# CANIC

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When you boil off the vapour, the argument is just this: the FOI Act causes people to be fearful.

The FOI Act was never intended to be a mental health measure for public sector employees.

Plato had something to say about this: 'we can easily forgive a child who is afraid of the dark; the real tragedy of life is when men are afraid of the light.'

Yours sincerely,



James McKay and Nick Miller, Directors, CANIC (Canberra Innovation Corporation Pty Ltd).