



The Commonwealth Scientific Industrial and Research
Organisation (CSIRO)

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

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CSIRO Legal

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Terms of Reference

The CSIRO notes the terms of reference for the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioners Act 2010* (“the Hawke Review”):

“The review should consider the following matters:

- (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 *Freedom of Information Act 1982* (Cth) (“FOI Act”), on the effectiveness of the FOI system;
- (b) the effectiveness of the Office of the Australian Information Commissioner (OAIC);
- (c) the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters;
- (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;
- (e) the appropriateness of the range of agencies covered, either in part or in whole, 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; and
- (g) the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.”

Executive summary

In considering the terms of reference, the CSIRO notes the following:

1. Cost of the reforms

- (a) The increased cost and administrative burden of the FOI reforms have been, and remain, significant. The CSIRO notes the desirability of minimising the resource burden on agencies in the current constrained Commonwealth fiscal environment; to avoid diverting funding from core agency functions.
- (b) Further reforms to the *Freedom of Information Act 1982* (Cth) (“FOI Act”), coupled with additional resourcing of the OAIC, would also assist in alleviating the resource burden on agencies, particularly:
 - (i) The reintroduction of the practical refusal reason (previously pursuant to section 24(5)).
 - (ii) Changing the time period to process FOI request to working days, rather than calendar days.
 - (iii) The reintroduction of a requirement that the applicant provide an Australian postal address (or proof of Australian residency or citizenship when an email address is provided).
 - (iv) Limiting the number of non-personal FOI requests an individual applicant can make under the FOI Act, per financial year.
 - (v) Reforms to the charges regime.

2. Effectiveness of the OAIC

- (a) The OAIC is an effective policy support body, and has provided some valuable assistance to agencies through the provision of guidelines, policies and precedents.
- (b) The OAIC’s effectiveness as the independent reviewer of FOI decisions is hindered by the inconsistent process and delays in providing determinations.

3. Fees and charges

- (a) A nominal fee should be reintroduced for Information Commissioner (IC) review applications (other than a review of FOI requests for personal information), to alleviate the burden on the OAIC and to provide an incentive for agencies’ decisions to be considered properly by an FOI applicant.
- (b) A charges calculator formulated by the OAIC would ensure consistency of charges imposed by agencies.

Part I Addressing the terms of reference

1 Introduction

The CSIRO welcomes the opportunity to make a submission to the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioners Act 2012* (“the Hawke Review”). Engaging stakeholders in the review process ensures the Review takes into account the practical working knowledge and expertise of agencies who engage in the FOI process every day, whilst understanding the experience of FOI applicants.

The CSIRO notes in considering the terms of reference that there may be some repetition in the responses provided. For example, term of reference (1) asks for a discussion on the impact of the FOI reforms and on the effectiveness of the new FOI system and term of reference (2) asks for a response regarding the effectiveness of the OAIC. It is the CSIRO’s view that an integral part of the new FOI system (term of reference (1)) is the role the OAIC. The CSIRO has addressed each term of reference individually but notes when a response refers to analysis provided in a response to a preceding term of reference.

2 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

2.1 The impact of the reforms;

2.1.1 THE COST TO THE CSIRO

Since the reforms in 2009 (and 2010) the CSIRO has experienced a significant increase in the number of FOI requests, from an average of 17 (2007, 2008, and 2009) to 42 (2011 and 2012), see figure 1 below.¹ The CSIRO understands that this increase is agency-wide, with the overall cost to government increasing by 51.8% (or in excess of \$40 million dollars per year in dollar terms).² In order to conform to the strict statutory timeframes prescribed by the FOI Act, the CSIRO has increased its dedicated FOI staff, to include a part time administrative assistant and a full-time Legal Counsel at a cost of approximately \$150 000 per year. The introduction of the reforms has also meant a higher level of involvement by the Executive of the CSIRO in the FOI area including strategic planning for the Organisation to comply with the requirements of the Information Publication Scheme (IPS), an additional cost to the CSIRO.

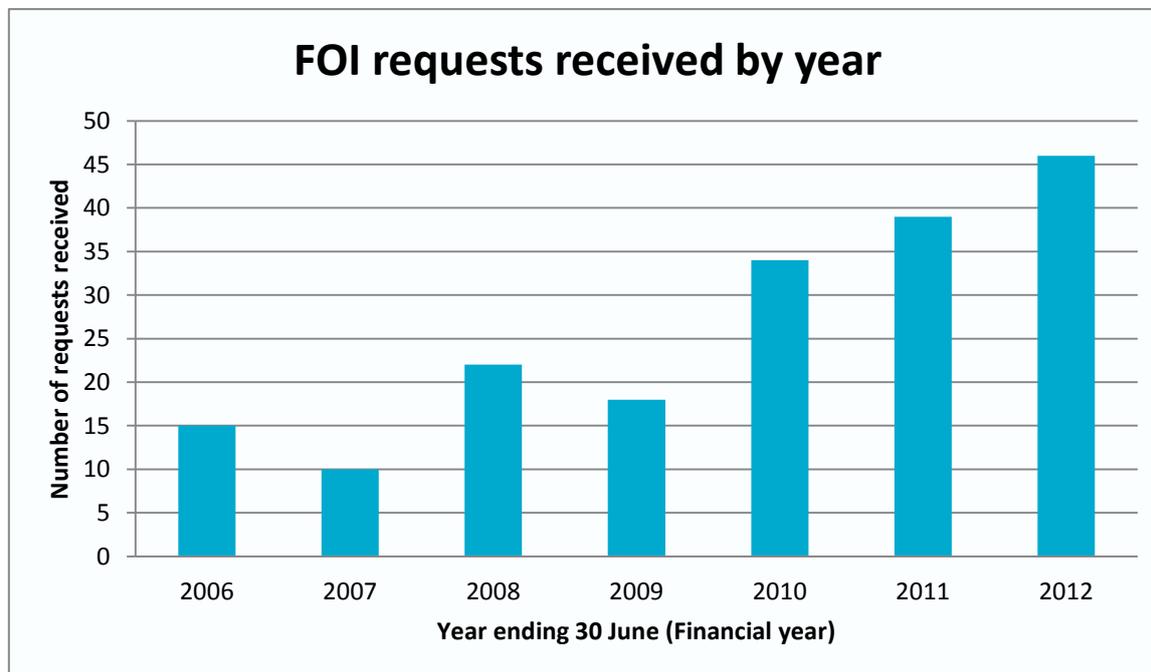


Figure 1: Freedom of Information requests received by the CSIRO (including transfers) each financial year

¹ It is the CSIRO's view that the abolition of the application fee is the likely cause of this increase.

² The OAIC (previous the Attorney General's Department) has compiled the data referred to, see, e.g. http://www.oaic.gov.au/publications/reports/annual-report_11-12/chapter9.html

The CSIRO also notes, as a result of the reforms, the CSIRO engaged (in 2010-2011) external legal counsel to advise and provide guidance in relation to the new FOI Act provisions.³ This incurred significant costs to the Organisation in the tens of thousands of dollars.

2.1.2 THE IPS AND DISCLOSURE LOG

The CSIRO values the IPS and disclosure log introduced by the reforms to the FOI Act. Both the IPS and disclosure log are useful tools in creating an organisational pro-disclosure approach to information. The CSIRO has committed to a pro-disclosure approach to information through initiatives such as the data-access portal <https://datanet.csiro.au>, which shares important research data with the Australian community (and indeed the global community). Indeed, the dissemination of scientific information is one of the CSIRO's statutory functions.

The IPS and disclosure log in the CSIRO's experience has raised the profile of FOI within the Organisation. However, given the breadth of information already available through the CSIRO's public website, www.csiro.au, and our data access schemes, the CSIRO questions whether the IPS is a cost-effective information access tool. Indeed the CSIRO questions whether, given the cost, highlighting under the banner of 'IPS' pre-existing, easy to access information, was beneficial.

2.1.3 THE EFFECTIVENESS OF THE OAIC AS AN INDEPENDENT REVIEWER

It is the CSIRO's view that the OAIC has provided valuable support to agencies through the development of guidelines, policies, procedures and precedents. However, the CSIRO has concerns with the effectiveness of the OAIC as an independent reviewer and the CSIRO has outlined our concerns, including the timeliness of reviews, below at [3.2].

2.1.4 THE IMPACT OF THE ABOLITION OF SECTION 24(5)

Prior to the reforms in 2009/10, the FOI Act contained a 'practical refusal' reason pursuant to section 24(5). Section 24(5) stated:

(5) An agency or Minister may refuse to grant access to the documents in accordance with the request without having identified any or all of the documents to which the request relates and without specifying, in respect of each document, the provision or provisions of this Act under which that document is claimed to be an exempt document if:

(a) it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents; and

(b) either:

(i) it is apparent from the nature of the documents as so described that no obligation would arise under section 22 in relation to any of those documents to grant access to an edited copy of the document; or

(ii) it is apparent, from the request or as a result of consultation by the agency or Minister with the person making the request, that the person would not wish to have access to an edited copy of the document.

The abolition of this 'practical refusal' reason has added a significant resource burden. Previously, when an applicant requested material which clearly related to the CSIRO's commercial activities (exempt from the operation of the FOI Act under section 7(2)), the CSIRO could refuse to process the request pursuant to section 24(5). Removing this practical refusal reason has led to the incongruous result where documents

³ Including, for example, legal advice on the application of section 6C on CSIRO's research contracts.

are clearly exempt from the operation of the Act nevertheless must be processed through the FOI procedures. The CSIRO is not the only agency affected by the removal of section 24(5), e.g. if the Department of Defence received a request for documents relating to analysis of operational intelligence on a particular subject, exempt from the operation of the Act pursuant to section 7(2) (pursuant to Part II of Schedule 2), the Department would be required to locate and retrieve all relevant information, collate it, schedule and exempt each document. The FOI Act clearly exempts such documents from the operation of the Act and it is a significant resource burden for agencies to be required to treat such requests in the same manner as a FOI requests for documents that are not exempt from the operation of the FOI Act and would be released (in full or in part).

The CSIRO notes, in our context, it is relatively rare that such a request is made, but such requests are resource-intensive. A recent FOI request will illustrate the additional burden placed on the CSIRO by the removal of section 24(5). In 2012 an applicant requested documents in relation to a commercial contract (collaboration), which included confidential contractual terms, including the negotiation history of the contract, intellectual property rights and the actual research undertaken under the contract. The CSIRO in forming this collaboration was in clear competition with other private sector companies. It was clear from the terms of the request that the documents would be exempt from the operation of the FOI Act pursuant to section 7(2). However, the abolition of section 24(5) meant that the CSIRO was required to process the request in the normal way, conduct the search and retrieval process, assess the relevance of all or part of the documents and consider whether the processing of the request was a substantial and unreasonable diversion of the CSIRO resources under section 24. That process took the CSIRO over 22 hours (or 3 working days). The decision, that all documents were exempt from the operation of the FOI Act and unreasonable to process under the new section 24, is the same decision that would have been made under section 24(5) but with an additional 22 hours of search, retrieval and collation of documents which were clearly exempt from the operation of the FOI Act.

The CSIRO recommends the reintroduction of section 24(5), noting that a decision under section 24(5) is reviewable, and requires the agency to provide proper reasons and evidence of why, pursuant to the terms of section 24(5), it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents.

3 The effectiveness of the Office of the Australian Information Commissioner (“OAIIC”)

As noted above, the OAIIC has provided support to agencies, through the provision of guidelines, policies and procedures. The OAIIC also provides practical training support through Information Law Conferences and agency meetings. However, the CSIRO notes that the effectiveness of the OAIIC has been impaired by the substantial delays in providing determinations.

3.1 The Information Commissioner’s Publications

3.1.1 THE INFORMATION COMMISSIONER’S GUIDELINES

The Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (“the Guidelines”) provide practical support to agency decision makers. They are clear, easy to read guidelines that also provide references to legal authorities which are invaluable to legal counsel, and external legal providers. However, it should be noted that the Guidelines are not comprehensive; the absence of guidelines governing the search and retrieval process is of most concern to the CSIRO.

The CSIRO notes that the FOI Act is silent in relation to the specific searches that should be conducted when processing a FOI request. However, it is clear through interaction with the IC review process that in practice, the OAIIC requires that particular search procedures have been undertaken in order to satisfy its search requirements. Such procedures, if written as a guideline pursuant to section 95A of the FOI Act, would greatly assist agencies in understanding why their seemingly comprehensive electronic and hardcopy searches are sometimes considered inadequate by the OAIIC. The CSIRO also notes that there was an absence of Guidelines in relation to vexatious litigant applications; this is discussed further below at paragraph [3.2.2].

Moreover, the CSIRO notes, although the guidelines that have been published are extremely useful, the guideline for the Information Publication Scheme (“IPS”), was officially released a week before the IPS deadline (that is the date agencies were required to have their IPS online). The Information Commissioner’s Guidelines are an excellent tool, but it is the CSIRO view that updates should be made in a timelier manner.

3.1.2 THE INFORMATION COMMISSIONER’S PRECEDENTS AND TEMPLATES

Similar to the Guidelines, the precedents and templates provided by the OAIIC are an excellent agency resource. However, the CSIRO notes, that the delay in the creations of the templates by the OAIIC meant that many agencies had developed their own precedents/templates (or indeed engaged, at a not insignificant cost, external legal counsel to develop the precedents) in the interim, before the OAIIC had released their templates.

3.2 The effectiveness of the OAIIC as an independent reviewer

Since the commencement of the new FOI reforms and the establishment of the OAIIC as independent regulator in 2010, the CSIRO has experienced delays in the processing of IC review requests. Such delays unduly impact the agency and create an additional resource burden (refer to the cost column in the table below at paragraph [3.2.1]). Moreover, the IC Review process is flawed, in that it approaches the review in a piecemeal way, rather than considering the decision (and the documents released) in its entirety. See for example, the process outlined in the table below (request (2)).

The following information may assist the review in considering the effectiveness of the OAIC, taking into account the timeliness of IC review decisions.

FOI REQUEST (AND DATE)	IC REVIEW PROCESS (AND DATES)	IC DETERMINATION (AND DATE)	COST TO CSIRO
<p>7 Feb 2011: request (1)-2011 received.</p> <p>1 Sept 2011: Internal review finalised.</p>	<p>24 May 2012: The CSIRO advised by the OAIC, that an IC review was on foot.</p> <p>7 June 2012: Documents provided to OAIC as requested.</p> <p>25 Sept 2012: The CSIRO requested to provide further submissions on applicable exemptions to the IC review.</p> <p>16 Oct 2012: The CSIRO provided further submissions to OAIC.</p>	<p>16 Nov 2012: No determination made by IC review, "applicant indicated they were satisfied with the CSIRO's decision" and withdrew request for internal review.</p>	<p>\$9462 (external assistance)</p> <p>23.5 hours (estimated FOI Administrative Law Unit)</p>
<p>19 Feb 2012: request (2)-2012 received.</p>	<p>23 Aug 2012: CSIRO advised that the OAIC is making preliminary inquires under section 54V of the FOI Act to determine whether to conduct a review.</p> <p>2 Oct 2012: The CSIRO provided submissions and documentation as requested by the OAIC.</p> <p>1 Nov 2012: The CSIRO requested to provide further submissions.</p> <p>12 Nov 2012: The CSIRO provided further submissions.</p> <p>13 Nov 2012: OAIC advised the CSIRO it was still in the preliminary inquiries stage. Further submissions requested.</p> <p>21 Nov 2012: Further submissions provided as requested by the OAIC on 1 Nov 2012.</p>	<p>8 Dec 2012: The CSIRO notified the preliminary inquiry was closed pursuant to section 54W of the Act.</p>	<p>\$ 5920 (external assistance)</p> <p>49 hours (estimated FOI Administrative Law Unit)</p>
<p>8 Nov 2010: request (3)-2010 received.</p> <p>25 Jan 2012: Internal review finalised.</p>	<p>21 Aug 2012: The CSIRO advised that the OAIC was conducting an IC review.</p> <p>4 Oct 2012: The CSIRO provided submissions as requested by OAIC.</p> <p>16 Oct 2012: Discussion between OAIC and the CSIRO regarding searches.</p> <p>3 Dec 2012: The CSIRO provided further information as requested by OAIC.</p> <p>10 Dec 2012: IC requested further</p>	<p>IC determination yet to be finalised.</p>	<p>\$ 3000 (apx incurred cost - external assistance)</p> <p>25 hours (estimated FOI Administrative Law Unit)</p>

3.2.1 IC REVIEWS ON ACCESS REFUSAL DECISIONS

The following table illustrates the time and the approach the OAIC takes processing access refusal decisions.

Table 1: IC Review process

Table 1 illustrates that on the basis of the three IC reviews, outlined above, the decision making agency, and importantly, the applicant had to wait, on average 105 days before an IC review on an access refusal decision is completed. Although, seemingly a short amount of time, the CSIRO notes, that **no actual determination** in any of the three matters was made by the Information Commissioner. Importantly, the IC review process has resulted in a significant commitment of resources, at significant cost to the CSIRO, including a substantial investment in labour. The structure and piecemeal approach to submissions requested by the OAIC creates an additional burden and should be addressed through the formation of consistent and formal procedures and processes within the OAIC.

An IC review on access refusal decisions requires the OAIC to undergo the same process as the agency when processing a request (although the CSIRO notes that the OAIC does not have to conduct searches). The statutory time limit on an agency to complete a request and make a decision is 30 days, extended to 60 days with consultation. In some circumstances the processing time is extending to 90 days with the applicant's consent (pursuant to section 15AA) or with the OAIC consent if the request is particularly voluminous or complex (pursuant section 15AB) or under section 15AC.

The CSIRO understands that in reviewing a decision the OAIC may require the agency to write further submissions (and allow time for such submissions). However, it stands to reason that "further submissions" should not take any longer than a third party consultation. The CSIRO is of the view that a statutory timeframe, should be applied to IC reviews.⁴

3.2.2 OAIC (OTHER) DETERMINATIONS

On 7 September 2011 the CSIRO requested a vexatious applicant declaration from the OAIC pursuant to section 89K of the *Freedom of Information Act 1982* (Cth). The CSIRO did not receive any written acknowledgment from the OAIC that they had received the application. On 4 October 2011 the CSIRO contacted the OAIC regarding the application. The OAIC stated that because the Information Commissioner had not yet determined the internal guidelines for a vexatious applicant declaration,⁵ there may be a slight delay in his decision.

A final decision was made on 7 September 2012 exactly 12 months after the CSIRO had submitted the application. The determination was not, in the CSIRO view, complex, noting the application by the CSIRO was 12 pages, with seven pages of supporting information. The cost of this application to the CSIRO was significant, and the lack of a timely determination is of concern to the CSIRO.

The CSIRO believes that the significant delays in IC reviews stems from the considerable amount of IC reviews sought by FOI applicants. It is the CSIRO's view that such delays would be ameliorated by the provision of further resources (more decision makers at the OAIC), or alternatively, a nominal application fee for IC reviews. The CSIRO notes that prior to the introduction of the OAIC, the Administrative Appeals

⁴ CSIRO notes that additional Government resourcing of the OAIC would help to ensure the OAIC meet any introduced statutory timeframes.

⁵ CSIRO notes that Part 12 of the Guidelines provide a very brief overview on section 89K outlining the 'procedure' but in CSIRO's view does not provide any significant practical guidance (or examples) on what would be considered a vexatious applicant.

Tribunal was an applicant's only recourse for external review and a filing fee of approximately \$400 was payable.

4 The effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters

4.1 The four stage review process;

The CSIRO understands that the right of review by the Administrative Appeals Tribunal (“AAT”) pursuant to Part VIIA has yet to be pursued by an FOI applicant (or agency). The CSIRO notes that this may be incorrect, but there is no public record of any AAT proceedings (regarding a determination under the amended FOI Act) on foot.⁶ It is therefore difficult to comment on the effectiveness of the two-tier system, however, the CSIRO notes the following:

- i. The introduction of IC reviews has added a review stage to the FOI process. There are now four stages of review; internal review, IC review, review by the AAT and, in certain circumstances, Federal Court review.
- ii. The CSIRO appreciates that the IC review stage is undertaken as a “desk-top review”, which is cost effective for agencies (and does not require the agency to engage an external legal counsel for appearance work).
- iii. The CSIRO’s experience with IC reviews is one of delays in the review process, where no determinations were made (no reviewable decision made). Such delays also significantly impact the applicant, suggesting that the two tier structure may not be the most time effective review system.

⁶ CSIRO notes the decision of *Francis v The Department of Defence* [2012] AAT 838 handed down on the 27 November 2012, which concerned an amendment of records pursuant to section 50 of the FOI Act. CSIRO notes that this decision did not review a determination by the OAIC, but rather was heard pursuant to section 54W(b) of the FOI Act (the OAIC exercised its discretion not to review the decision).

5 The reformulation of the exemptions in the FOI Act, including the application of the new public interest test

5.1 Analysis of (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 CSIRO is in a unique position to comment on the term of reference (d)(i) and (ii) given our specific exemption from the FOI Act under section 7 for commercial activities and our research exemption under section 47H. The CSIRO is Australia's national science agency and the independent advisor to government on science and research. The CSIRO believes that frank and fearless advice should (and is) provided to Government regardless of the operation of the FOI Act. The purpose of the FOI Act is to ensure that the public has access to the decision-making processes of government including access to advice paid for by tax payers' money. The FOI Act provides such access whilst balancing the need to protect sensitive documents including commercial in confidence material and research. Sections 7 and 47H of the FOI Act are vital to protect the intellectual property rights of the CSIRO and our commercial partners. To date, the inclusion of the 'public interest' test has not impacted the legitimate protection of the CSIRO's commercial activities or research, and the CSIRO would always consider the public interest in regards to the release of incomplete research regardless of whether this was a statutory requirement or not.

Any removal or weakening, of sections 7 or 47H would significantly impede the CSIRO's relationships with industry and the legitimate protection of commercial in confidence material and preliminary research. The CSIRO has provided a brief outline of our exemptions and how they operate to ensure the principles of FOI are maintained, to assist the review, below:

5.2 Section 7(2) – Exemption from the operation of the FOI Act in respect of commercial activities

5.2.1 THE CSIRO'S COMMERCIAL ACTIVITIES; FULFILLING OUR STATUTORY FUNCTIONS

The CSIRO's main functions pursuant to section 9 of the *Scientific and Industry Research Act 1949* (Cth) are:

(a) *to carry out scientific research for any of the following purposes:*

(i) *assisting Australian industry;*

(ii) *furthering the interests of the Australian community;*

(iii) *contributing to the achievement of Australian national objectives or the performance of the national and international responsibilities of the Commonwealth;*

(iv) *any other purpose determined by the Minister;*

(b) *to encourage or facilitate the application or utilization of the results of such research;*

(ba) to encourage or facilitate the application or utilisation of the results of any other scientific research;

(bb) to carry out services, and make available facilities, in relation to science;

A wide range of commercial activities are necessarily involved in fulfilling the CSIRO's functions, especially with regards to assisting Australian industry. Commercial engagement with industry is integral to undertaking targeted scientific research and assisting industry, such commercial activity involves collaborative and contract research, commercial licensing agreements and consulting and technical services with industry. The CSIRO competes with the private sector (and other international government's) scientific institutes in an international and highly competitive market. The CSIRO often competes with private and public sector bodies for research funding and for the provision of research services.

5.2.2 THE CSIRO'S COMMERCIAL ACTIVITIES AS AN EXTERNAL REVENUE STREAM

The commercial activities of the CSIRO help drive our innovation, our scientific excellence and contribute to our ability to provide world renowned research for the benefit of all Australians. The CSIRO's external revenue streams in the 2011-2012 financial year provided the CSIRO with approximately 40 per cent of our external funding.

5.2.3 THE CSIRO'S ENGAGEMENT WITH INDUSTRY

To remain competitive in a global market for scientific research and technology, the CSIRO must be able to operate in a commercial and business-like way in relation to its commercial activities, including the ability to maintain commercial confidences. The CSIRO's exemption in section 7(2) of the Act allows the CSIRO to assure our collaborators that commercial dealings remain confidential, which in turn, facilitates engagement with private industry and ensures the CSIRO remains one of the leading scientific research bodies in the world. If the CSIRO was unable to provide some guarantees to its commercial partners that its research activities with industry were confidential, the CSIRO would be at a significant comparative disadvantage to many of our industry and public sector competitors who are not subject to FOI compliance obligations

5.2.4 PUBLIC DISCLOSURE OF INFORMATION RELATING TO THE CSIRO'S COMMERCIAL ACTIVITIES

It should be noted that generally, the existence of the CSIRO's commercial collaborations are not confidential. We routinely publicly disclose the nature of our projects and the identity of our partners in general terms as part of our ordinary communications activities and in some cases in accordance with our obligations under the *Commonwealth Authorities and Companies Act 1997* (Cth) to ensure that our Minister is informed of all significant contracts and events. Moreover, our partnerships with industry are often heralded by the other contractual parties (and by the CSIRO) as significant steps towards scientific innovation. Public announcements of collaborations are the norm. Although section 7(2) of the FOI Act ensures our commercial activities, our business negotiations, our commercial correspondence and our specified contractual deliverables remain confidential, it does not operate as a secrecy clause. It is only used when required by the CSIRO when engaged in confidential commercial activities.⁷ This ensures that the CSIRO remains competitive, whilst also maintaining the Australian public's trust in our independence.

⁷ See, e.g. *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40

5.3 Section 47H – Public interest conditional exemptions – research

Section 47H is currently available to the CSIRO and the Australian National University (ANU) in respect of research that is or is about to be undertaken. Section 47H amended the (then) section 43A and introduced an additional public interest requirement.

The CSIRO is of the strong view that section 47H is a necessary exemption that preserves the balance between the legitimate protection of information and the public interest. It is critical that the CSIRO be able to protect its research while in development, in order to preserve the reputation and research advantage of its staff and the Organisation as a whole, and also to protect its research from disclosure at a time when the research remains incomplete. In addition to the risks of incomplete research results being potentially misleading there are also risks in publishing research prior to the impact or commercial pathways for that research being considered. Sound scientific practice dictates that only research that is complete and peer reviewed should be published and it would be unwise for the FOI regime to create an exception to this general principle. On this basis we suggest there are also strong public policy reasons why the disclosure of incomplete research is not to be recommended.

By way of example, the CSIRO undertakes research into a virus detected in certain Australian livestock; the preliminary results of that research suggests that the virus has its origins in a particular foreign country or region, and more particularly, may have been brought into Australia via imports from that country or region. This virus is a key human disease (pandemic) threat. Subsequent testing found the preliminary results/conclusion to be wrong. Premature disclosure would have resulted in unnecessary public concern and reaction, including pressure for a policy response which would likely have had an impact in terms of international relations.

Further, it is critical for the conduct of research, within established moral and ethical parameters, to be free from public and media scrutiny. Sometimes, mere disclosure of the fact that the CSIRO is conducting research in a particular field or has reached a certain stage in given research or its preliminary findings may be valuable commercial information for other commercial organisations domestically or internationally (including competitors to the CSIRO's industry partners). Release of this information would be contrary to the public interest and has the potential to seriously affect the CSIRO's ability to compete on a level playing field with other Research and Development institutions in certain research fields; to protect its intellectual property; to deliver confidential policy advice to government; and to engage effectively with Australian industry. Section 47H is a legitimate exemption that is necessary taking into account the public interest and policy concerns surrounding incomplete research.

It should be noted that the application of sections 7 and 47H exemptions does not ease the workload in processing FOI requests. Indeed the application of section 7 still requires the FOI decision maker to undergo the formal FOI processes and apply section 7 as if it were an exemption (because of the abolition of section 24(5) discussed above at paragraph [2.1.4]). The CSIRO does not receive specific FOI funding from the Government, and the FOI process although an important part of democracy, is an expensive time consuming process that may require additional government funding in order to optimise its effectiveness.

6 The appropriateness of the range of agencies covered, either part or in whole, by the FOI Act;

As outlined above at paragraph [5.1] the CSIRO is partially exempt from the operation of the FOI Act pursuant to section 7(2). The CSIRO is of the view that this part exemption is fundamentally important to the operations of the CSIRO. The CSIRO is of the view that the exemption of certain other bodies in their entirety from the operation of the Act is legitimate, and protects Australia's security interests both domestically and abroad.

7 The role of fees and charges in FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime

7.1 Fees and charges and the right to access government information

The objects of the FOI Act are clear; 'to give the Australian community access to information held by the Government of the Commonwealth' and 'as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost'.

Government information is a national resource and members of the public have a statutory right of access to Government Information. The FOI reforms abolished the \$30 application fee for FOI requests and it is the CSIRO's view that application fees should not be reintroduced.

7.1.1 ACCESS FEES FOR INTERNAL REVIEWS AND IC REVIEWS

It is the CSIRO's view that after an agency conducts the relevant search and retrieval processes and makes a decision on those documents relevant to an applicant's FOI request, there should be some incentive on the applicant to properly consider the agency's decision before appealing. A nominal fee for internal review and IC review would provide such incentive.⁸

A nominal fee for internal review and IC review would by no means cover the real costs of engaging a separate decision maker to consider the FOI application and documents afresh under the internal review process (or the cost of an IC review). However, a fee would act as an incentive for applicants to seriously consider the reasonableness of the initial decision, including reading and assessing any released material rather than "automatically" triggering an IC review.

For example, in early 2012 the CSIRO handed down a FOI decision to an applicant via email and within two minutes the applicant responded by lodging an application for internal review. The decision was very complex and challenging, releasing documents in part, and exempting parts pursuant to the relevant sections of the FOI Act. It was clearly evident that the applicant had not attempted to consider the decision in any detail before applying for internal review. The introduction of a nominal fee would provide an incentive for applicants to seriously consider the decision handed down to them by agencies before seeking an internal review.

As outlined above, the CSIRO has experienced considerable delays in the processing of IC review requests (e.g. up to six months). This no doubt reflects the significant additional workload that has been placed on the OAIC. The introduction of a nominal fee for IC reviews would provide an incentive for applicants to seriously consider the agency's decision and determine whether the IC review would provide them with a substantially different outcome and would assist the OAIC by minimising the allocation of their resources on determinations that would not substantially depart from the initial decision. Additional resourcing of the OAIC would also assist in the timely delivery of determinations.

⁸ Other alternatives may include the introduction of a short "cooling off" period or "waiting period" before the applicant can seek internal review or the introduction of a requirement that the applicant provide brief submissions in regards to the reasons why internal review is sought may also suffice.

7.1.2 A MANDATED CHARGES CALCULATOR

Consistent with our submission to the 'OAIC Review of Charges under the Freedom of Information Act 1982' dated 24 November 2011, the CSIRO considers that a Commonwealth-wide mandated agency approach to the calculation of charges would ensure the consistent and fair application of charges for Government information under the FOI Act.

Such an approach would allay the concerns of members of the public that excessive charges are imposed in order to frustrate access to information that may be judged as sensitive or contentious (but not necessarily exempt under the Act). Charges would be calculated on the number of *relevant* documents (and pages) discovered during the searches rather than an ad hoc agency specific approach. It would also ensure that agencies consistently priced the process of search and discovery,⁹ thereby providing applicants with certainty surrounding the charges imposed for the search and retrieval process.

⁹ Guidance from the OAIC on the search process would also assist in ensuring a consistent agency-wide charges regime (refer to paragraph b).

Part II Recommendations

The CSIRO's recommendations to the Hawke Review

8 Recommendations to minimise the administrative burden and cost of the FOI process

The CSIRO is of the view that it is highly desirable to reduce the regulatory and administrative burden of FOI, including costs of FOI compliance for government agencies. The CSIRO supports the objects of the FOI Act as enunciated in section 3 and agrees that they are of fundamental importance to the operation of a democracy. The delivery of the objects of the FOI Act, by agencies, will always require a substantial commitment of resources, including time; however, the real issue is the finding of an appropriate balance between the requirements of open Government and the unreasonable diversion of agency resources to FOI compliance activities.

In considering the terms of reference, the CSIRO has formed the view that the following recommendations would assist to minimise the administrative burden on agencies and therefore the cost of FOI compliance, without impacting the Australian public's statutory right to access government information.

- (i) The introduction of 'working days' timeframes. The 30 day processing period is currently specified in calendar days; agency staff are not generally employed to work on the weekends or public holidays. If the 30 day period were to be reframed as 30 working days, the pressure on agency staff would be reduced.
- (ii) The introduction of a statutory timeframe for IC reviews and determinations, coupled with additional resourcing of the OAIC, noting that a determination under section 89K took the OAIC 12 months to complete.
- (iii) The reintroduction of a requirement that an FOI applicant be an Australian resident, or provide a postal address within Australia. If the applicant would prefer correspondence by email, the provision of evidence of Australian residency would suffice. The CSIRO notes, that although we live in a global community, Australian Government resources should be used for the benefit of the Australian community.
- (iv) A limit on the number of FOI requests for non-personal information which can be made by an individual within a financial year would assist to minimise the administrative burden. The CSIRO notes, that some applicants make a significant number of non-personal requests on related matters. While these applicants are unlikely to meet the vexatious threshold they nonetheless consume a disproportionate amount of the FOI resources.
- (v) The reintroduction of a practical refusal reason (formerly section 24(5)) on processing time (referred to briefly above at paragraph [2.1.4]).¹⁰

¹⁰ CSIRO notes that the IPS and disclosure log could make a positive impact on FOI costs, as agency information would be 'pro-disclosed'. However the practical difficulties of pro-disclosure and the lack of public awareness around the IPS may extend the time period over which this occurs.

CONTACT US

t 1300 363 400
+61 3 9545 2176
e enquiries@csiro.au
w www.csiro.au

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FOR FURTHER INFORMATION

CSIRO Legal
Beth Maloney
Legal Counsel
t +61 2 6276 6436
e beth.maloney@csiro.au
w www.csiro.au

CSIRO Legal
Rosemary Caldwell
FOI Coordinator
t +61 2 6276 6123
e rosemary.caldwell@csiro.au
w www.csiro.au

CSIRO Legal
Megan Fincher
Senior Legal Counsel
t +61 3 9662 7323
e megan.fincher@csiro.au
w www.csiro.au