

Comments against the Terms of Reference for the Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*

(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 FOI reforms were the most significant reform of Australian freedom of information laws in two decades. They have been successful in promoting a much stronger pro-disclosure culture across the public service and helping to drive the shift towards a more transparent and open government. The Australian Information Commissioner, supported by the Freedom of Information Commissioner, has been effective at promoting awareness and understanding of the FOI Act.

The department liaises with a number of other departments and portfolio agencies on FOI requests and on general policies and procedures in relation to information provision. It is evident that the reforms have made it easier for people to find FOI-related information on agencies' websites, submit FOI requests and to seek a review of FOI decisions. Requests for access to documents and reviews are now free and the charge for decision making has been reduced. As charges can only be imposed if the request is processed within the statutory timeframes, agencies are encouraged to process the requests in a timely manner. More FOI requests are being made, far more information is being disclosed and agencies are providing better reasons where information is considered exempt from release. Agencies are also pro-actively considering giving access to information outside of the FOI Act.

There has been great interest from the media and the public in the information published on agencies' FOI disclosure logs. In contrast, there seems to have been relatively little interest in the information published under the Information Publication Scheme (IPS).

The creation of the Office of the Australian Information Commissioner (OAIC) as an external review body has encouraged agencies to be more aware of their obligations under the FOI Act and to ensure they are fully complying with them. It has provided a source of information and guidance that has given agencies additional confidence in relation to the day-to-day management of FOI requests as well as the longer term challenges presented by the IPS. Since its creation, there has been a significant increase in the number of requests for external reviews. As a consequence, there has been a noticeable increase in the overall time (and associated Commonwealth resources) taken to finalise requests under external review.

Over time, as the scope of advice from the OAIC continues to expand, we anticipate there being more clarity and consistency in how FOI requests are managed by agencies. This should assist by reducing the number of matters on which applicants seek an OAIC review and accelerate the OAIC's consideration of such requests. Capturing the precedents and principles from IC review decisions and actively promoting these to agencies would provide substantial value in improving the consistency and efficiency of FOI decisions.

At the most basic level, the department has noticed a number of direct impacts flowing from the reforms:

- As with many Australian Government agencies, the number of FOI requests received by the department has risen significantly since 1 November 2010.
 - During 2011–12, 74 new requests were made for information. This is an increase on the 57 requests received in 2010–11 and a significant increase on the 21 requests received in 2009–10.
 - There is no indication this trend will change. The department is on track to receive over 80 FOI requests during 2012-13, many of which are complex to process.
- People are more aware of their right to access information under the FOI Act. In some cases this is improving applicants' engagement with the department on how they can access information outside of formal FOI requests. In other cases, it is helping them to better formulate their requests, which means the department can process their requests more efficiently and the applicants are more satisfied with the information to which they are given access.
- There has been an increase in departmental resources dedicated to FOI-related matters. The number of centralised, dedicated FOI officers has risen from 1.5 in 2009-10 to (at times) more than six in 2011-12 and 2012-13.
- It is also evident that much greater use is being made of the FOI process for issues under political debate or where consideration maybe being given to legal action against the department. These requests are taking substantial resources.
- There has also been an increase in resources required across the department more broadly to assist with FOI-related matters, including from:
 - the business areas that search for records and help to identify potential sensitivities (business areas are very committed to meeting their obligations under the FOI Act but, where requests for their information are received concurrently, they can struggle to balance the work and continue to perform their day to day operations).
 - information management, IT and web production teams that help search for and publish information, including information on the disclosure log.
- The reforms have been a driver for change within the department, for example:
 - the department has streamlined its internal FOI processing and decision making processes. FOI requests and decisions are now managed by a team of authorised officers in a dedicated unit within the Governance Division. The reforms have improved the quality and consistency of decisions relating to FOI access and charges. This team also has responsibility for the department's IPS.
 - a cultural change is underway within the department. More consideration is being given to how the public accesses information and to releasing information proactively. Also, more context is being provided with information released under the FOI Act, to help people to understand what they are being given.
 - the department has been reassessing how it manages information and investing in new IT systems so records can be stored and retrieved more cost-effectively – a project that will have broad-ranging benefits across the agency, including for FOI processing.

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

Information Commissioner (IC) review process

Part 10 of the FOI Guidelines state:

“The IC review process is intended to be efficient and lead to resolution as quickly as possible. An early evaluation of the merits of the decision under review will be facilitated through IC review officers considering the primary material and making relevant preliminary inquiries of agencies and ministers.”

As mentioned above, the creation of the OAIC has provided a valuable source of information for agencies and played a key role in encouraging compliance with obligations under the FOI Act. Unfortunately, it seems that the very high number of matters being referred to the OAIC for review may be stretching its resources to a point where the review process is considerably slower than would be ideal. Although the FOI Act does not specify a time for the completion of an IC review, it might be helpful to applicants and agencies if the OAIC was in a position to give indicative timeframes for the various stages of the IC review process. It would also be valuable to develop a standard process for registering and advising agencies when the OAIC receives a request for a review. Currently, the OAIC relies on agencies contacting them to check if an applicant or third party has sought an IC review, which could lead to the release of information subject to an appeal if there is a lag in advice.

The department has seven FOI decisions currently under review by the OAIC. At this stage, no matters have been finalised.

- Two requests for review were submitted 15 and 17 months ago. They are to go to the Australian Information Commissioner for formal review.
- One request was submitted 10 months ago. This is in relation to a decision by the department to process the request because it was too voluminous. Following two teleconferences in September 2012, a new request scope was agreed and a decision on access was made. The applicant has now sought a IC review of the exemptions applied to those documents and the department is processing the OAIC’s request for documentation.
- One request was submitted six months ago; three requests for IC review were submitted by applicants three to four months ago. OAIC preliminary inquiries in relation to these matters are underway.

Provision of advice and guidance material

As mentioned above, the OAIC has produced some very useful FOI and IPS reference material for agencies, including the guidelines, fact sheets and templates. This material is a very good resource, especially for small agencies, and has helped guide and standardise the processing of FOI requests across the Commonwealth. It has also played an important role in providing advice to members of the public about how to access information and their rights under the FOI Act.

Due to the scale of the reforms and workload placed on the OAIC, its advice has sometimes been issued later than would be ideal. For example, the FOI guidelines were released several months after the introduction of the reforms and IPS guidance became available only weeks before the reforms commenced.

In the absence of such definitive advice, agencies have sometimes invested significant time considering issues and money seeking legal advice from their lawyers (the views of which may not always be consistent with those of the OAIC). The department’s legal costs rose approximately four fold when comparing financial year 2010-11 to 2009-10. As well as managing the increasing complexity of requests, this investment was in part required to ensure compliance with the new legislative requirements, including the IPS. During 2012, the legal costs have been much lower, due to the increase in guidance material, greater general knowledge of the reformed FOI Act and increased expertise of the FOI officers.

The department has observed instances of apparent inconsistency in advice from the OAIC (both written and oral). For example, the sample FOI notice the OAIC has published for notices to third parties, released mid 2012, was different to advice in the consultation paper the OAIC released in August 2012 entitled 'Personal and business information — Third party review rights under the Freedom of Information Act 1982'.

Professor John McMillan, the Australian Information Commissioner, has advised agencies that his preferred approach is to provide additional guidance to agencies and applicants via the IC's external review decisions. This would provide valuable guidance, particularly if the approach is used to target the early conclusion of outstanding reviews that provide test cases. Two issues where more guidance would be helpful in this way are:

- how to assess whether or not imposing a charge for processing an FOI request would cause an applicant to suffer financial hardship and
- the circumstances in which it is reasonable to decide that processing a request would substantially and unreasonably divert an agency's resources from its other operations.

To reduce the impost on the OAIC of having to answer questions from agencies and the general public alike, and to facilitate agencies taking a consistent approach to matters, it would be helpful if the OAIC could create a Frequently Asked Questions database which one could search by topic and/or a database of precedence that summarises key decisions from IC reviews. Further, separate to making review decisions, it would also be helpful if the Australian Information Commissioner could issue more guidance material on some of the difficult issues with which agencies are dealing, such as the practical refusal mechanism.

Statistical reporting

Under section 93 of the FOI Act, an agency or a minister must give whatever information the Australian Information Commissioner requires to prepare reports. Until this year, the information collected was provided to Parliament in a separate FOI annual report. The department supports the OAIC's change, this year, to report on FOI matters in the OAIC annual report and to publish additional material on the OAIC website.

It may be beneficial for the review to consider whether the statistical reporting process could be further improved.

Agencies are required to collate and report on FOI statistics quarterly and annually. Over the last 12 to 18 months, there have been a number of changes to the OAIC's reporting requirements for the compilation of this data. This has required regular revision by agencies to spreadsheets and systems that record the data. To minimise the impact on agencies, it would be helpful if the changes could be limited to once a year at most.

Collating extra data can be time consuming. In continuing to strive for efficiencies, the department suggests there may also be capacity to reduce the number of matters on which agencies are to report (for example, removing the need for agencies to report on visitor statistics and new listings in relation to the disclosure log page. These are new requirements introduced in July 2012).

Joining of privacy and FOI functions

The FOI reforms brought together, for the first time, functions relating to freedom of information and privacy, as well as new functions relating to information policy. This change does not appear to have had a significant impact on the role of the Privacy Commissioner and the administration of the privacy function. Over time, one would expect the merger will help ensure greater consistency in the handling of privacy matters raised under the *Privacy Act 1988* and the FOI Act.

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

The department supports the concept of the two-tier system that provides applicants and third parties with a quick, cheap alternative to a review undertaken by the Administrative Appeals Tribunal. As discussed above, we do believe that some improvements may need to be considered to allow the system to operate to its full potential.

(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 reformulated exemptions support the objects of the FOI Act and are helping drive the cultural change towards more open government. The new 'conditional exemptions' and the new 'public interest' test, in particular, are playing an important part in encouraging agencies to be more transparent and open with their information. The new provisions have, however, also made the assessment of some documents more complex and time-consuming.

The department regularly has to seek advice from the Department of the Prime Minister and Cabinet and the Department of Foreign Affairs and Trade in relation to whether certain exemptions should be applied to documents. This has put an added impost on those agencies and made it more challenging for agencies to process requests within the legislative timeframes. In recognition of this, it would be helpful if consideration could be given to providing 14 calendar days under the FOI Act for agencies to consult with one another.

Following the introduction of the FOI reforms, some of the department's stakeholders have expressed concern about the possibility of their information being released under the FOI Act.

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

There are a number of agencies within the Agriculture, Fisheries and Forestry Portfolio that are subject to the FOI Act. Six are research and development corporations. Three are prescribed agencies that perform regulatory functions and are fully or partially funded by industry. These agencies have relatively few corporate resources and can find it difficult to allocate resources to processing FOI requests and implementing the IPS.

One—the National Rural Advisory Committee—is a statutory advisory committee of eight members. It seems onerous for such agencies to be subject to the FOI Act and to implement an IPS. Where the department provides secretariat services to these bodies, any FOI request would be processed by the department.

There are a range of other small statutory and non-statutory bodies, such as the Statutory Fishing Rights Allocation Review Panel and the fisheries joint authorities, where it is unclear whether these bodies are subject to 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*

Administration of the FOI Act represents a significant cost for the Commonwealth. It is important to regularly review the methodology used to calculate charges and the circumstances in which charges

can be imposed. Of equal importance, though, is to consider ways in which agencies can process FOI requests more efficiently as this would generate savings for agencies and the applicants alike.

The department broadly supports the recommendations in the IC's review of the current charging regime, particularly placing a ceiling on processing time so that refusing to process an FOI request on the grounds that it is 'voluminous' is considered a legitimate response. The department would encourage this review to also consider other ways in which the charges regime could be improved to reflect more accurately the cost to agencies.

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

As Professor John McMillan, Australian Information Commissioner, remarked in his address to Australian Corporate Lawyers' seminar on 29 November 2012, "the FOI Act is not easy to interpret or administer...".

The FOI Act is complex and there are a number of provisions that are open to interpretation. It is not uncommon for the department to receive different opinions from lawyers and the OAIC on some matters. One example is advice about an applicant's review rights following a decision to reduce a charge in response to an applicant's contention of charges.

Settling a position on a matter can be time consuming and expensive, especially when considering how much effort might be being expended across the Commonwealth on the same point of contention. Amending the FOI Act or providing more guidance material to clarify these matters would help minimise the regulatory and administrative burden for government and clarify applicants' rights.

From our experience to date, we have identified some areas where consideration could be given to clarifying the Act:

- The FOI Act requires agencies to process FOI requests for publicly available documents. Although many applicants are satisfied to receive the information outside of the FOI Act, some are not. It would be more efficient for existing publicly available information to be excluded from the operation of the FOI Act.
- Except in limited circumstances, agencies are required to process requests for information that may be explicitly excluded from release under other legislation. For example, section 27 of the *Primary Industries Levies and Charges Collection Act 1991* states that the name and address of a levy payer or charge payer or information relating to the levy or charge received by the Commonwealth should not be published in a manner that enables an amount of levy or charge to be identified with a person. If, however, this information is requested under an FOI request, the department is required to gather and assess relevant documents to see what exemptions may be applicable. The request cannot be rejected outright at the beginning. It would be preferable for there to be a provision that excludes the operation of the FOI Act where other legislation explicitly excludes information from being released.
- Giving departments an ability to exclude certain categories of information without retrieving and reviewing all documents within the scope of a request would make it easier for agencies to determine access to documents and reduce the time and cost spent on the request by all parties involved. For example, documents relating to a current investigation of a breach or possible breach of the law, which is exempt from disclosure under s37 of the FOI Act. This could be achieved via the reintroduction of a provision similar to the revoked section 24(5) of the *FOI Act* or section 23 (4) of the *Freedom of Information Act 1989 (ACT)* that gave agencies the power to not search and retrieve documents where it is apparent from the nature of documents that the documents are exempt.