Attachment A

DEEWR SUBMISSION - REVIEW OF THE *FREEDOM OF INFORMATION ACT 1982* AND THE *AUSTRALIAN INFORMATION COMMISSIONER ACT 2010*

(a) The impact of reforms to freedom of information (FOI) 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.

1. The recent reforms to the *Freedom of Information Act 1982* (the FOI Act) made by the *Australian Information Commissioner Act 2010* were intended to achieve in summary the following:

    - seek to create a cultural change, to make the provision of access to information the norm, unless there are compelling public interest reasons that argue against disclosure;
    - put a greater emphasis on the proactive publication of information by government agencies;
    - seek to improve FOI administration by government agencies
    - provide an external merit review process characterised by reduced formality and expense;
    - through the creation of the statutory positions of the Australian Information Commissioner and Freedom of Information Commissioner , provide a 'champion' to assist the public and agencies in managing FOI, to promote good FOI practice, and to monitor and review how the requirements of the legislation are being met;
    - through the creation of the Office of the Australian Information Commissioner (OAIC) (which includes the Privacy Commissioner), promote a more strategic approach to information management generally in government, and improve the way the interface works between privacy and freedom of information policies and issues.[1]

2. The Department of Education, Employment and Workplace Relations (the department) has worked to ensure that the intent of these reforms is recognised and assisted by staff within the department. The department strongly supports the notion that individuals should be able to efficiently and effectively access their own personal information and strives to assist individuals in this regard, both via the use of the FOI Act and through release outside the FOI Act where possible.

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[1] OAIC Guidance, Part 1 – Introduction to the *Freedom of Information Act 1982*

3. Further, the department has pursued an innovative and proactive information disclosure agenda to facilitate ease of access to other information it holds. For example, the department has published a range of user-friendly information concerning education, employment and workplace relations. The *My School* website (launched in 2010) provided Australia's first national information service on school education. The launch of *My School* achieved, for the first time in Australia, a data repository of rich and detailed information about all schools, with immediately observable transparency benefits.

4. The department has also responded to a marked increase in the number of FOI requests it has received since the reforms in 2010, particularly in relation to non-personal information. Arguably this increase suggests that the reforms have had an impact and assisted the public in seeking access to information under the FOI Act.

5. The department considers that many of the reforms have increased the effectiveness of the FOI Act. However, the department considers that further reform is needed to ensure that an appropriate balance is struck between promoting public access to information and the financial cost incurred by the Australian community in providing that access. The department's specific comments about the effectiveness of the reforms to the FOI system are detailed against the matters identified in the Terms of Reference for the Review.

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

6. The department supports the creation of the OAIC. It has long been recognised that the creation of a single, independent body to promote and monitor the FOI Act and provide assistance to agencies and members of the public is the most effective means of improving administration of the Act.[2]

7. The OAIC's role in FOI as a consequence of the reforms encompasses the key functions identified in previous reviews, including:

    - promoting awareness and understanding of the FOI Act among both agencies and the public;
    - promoting a pro-disclosure culture across government; and
    - providing external merits review of FOI decisions made by agencies and ministers.

8. The department considers that the ongoing role of the OAIC is critical to ensuring consistency and better decision making across agencies.

[2] Australian Law Reform Commission, *Open Government – A Review of the Freedom of Information Act 1982* (1995).

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

9. There has always been a two-tier system of merits review; being internal review and the Administrative Appeals Tribunal (AAT). The ability to now also seek merits review from the Information Commissioner (IC) has added a third tier to the system. The department strongly supports having a robust review process in relation to FOI decisions and has welcomed the addition of IC review. The department acknowledges that the inclusion of this additional layer of merits review does provide applicants with another opportunity to have his or her FOI decision scrutinised informally and at a lower cost than is available at the AAT stage. However, the effectiveness of IC review has been compromised due to significant delays in applicants receiving a decision. For example, in one matter that the department has before the IC, the application for IC review was lodged in July 2011 and the decision is still pending. As discussed in paragraphs 24 and 25 below, the ability for the IC to charge an application fee would likely assist in ensuring that the IC review function is used appropriately by applicants.

10. There are potentially two stages at which the IC may request an agency to produce information or a document. The first is when the IC is undertaking preliminary inquiries into whether to conduct a formal IC review; and the second is when the IC has decided to actually conduct a formal IC review. Currently, when an agency provides a document which is subject to legal professional privilege to the IC for both its preliminary inquiries and for the purposes of a formal IC review, the agency can maintain privilege over the document due to the operation of section 55Y. However, in contrast, it is arguable that when an agency is asked to provide information or a document to the IC, it is only protected against civil proceedings or a penalty under a provision of any law where the IC has formally requested the information or document for the purposes of an IC review (section 55Z). This means that if the IC requests an agency to produce information or a document for the purposes of his or her preliminary inquiries, those protections set out in section 55Z might not extend to the agency. As such, the department submits that consideration should be given to extending the application of section 55Z of the FOI Act to circumstances where information or documents are provided or produced to the IC for the purposes of both a formal IC review and in connection with the IC's preliminary inquiries. This will make section 55Z more clearly consistent with section 55Y.

11. Further, the department proposes that the FOI Act should be amended to prevent an applicant from being able to seek internal review within an agency and IC review at the same time. It is the department's understanding that IC review is intended to provide applicants with a review mechanism in circumstances where they do not wish to have the matter reconsidered internally within an agency or where they are unhappy with the internal review decision made by an agency. The department appreciates that a considerable amount of resources are required and necessary for the appropriate processing of FOI requests, however, it seems to be an unnecessary waste of Commonwealth resources to have a situation where the agency and the IC are being asked to review the primary decision at the same time and questions whether this was ever the intention of the legislation. The department has had an applicant lodge a request for internal review in conjunction with a request for IC review.

12. Additionally, the department notes that the dual role that staff within OAIC play in assisting/providing advice to agencies and being the external monitor of agencies has at times created some tensions. That is, the department has observed there is sometimes reluctance on the part of the OAIC to give helpful advice/assistance on the interpretation of the FOI Act or on the handling of a FOI matter due to a concern that IC's review function may be compromised. One possible way to address this issue would be to make it clear that advice provided by OAIC is not legally binding on the IC, similar to the way Australian Tax Office (ATO) rulings are not legally binding on the Tax Commissioner.

13. Finally, the department considers that further clarity is required around the internal review function with respect to decisions made under section 12 of the FOI Act. The department acknowledges that in accordance with subsection 11(1) of the FOI Act, a person has a legally enforceable right to obtain access to a document of an agency. However, this right of access is subject to section 12. For example, in accordance with paragraph 12(1)(c) of the FOI Act, a person is not entitled to obtain access to "a document that is available for purchase by the public in accordance with arrangements made by an agency". It is the department's view that a decision about whether paragraph 12(1)(c) of the FOI Act applies, is a threshold question about whether the applicant's request falls within the scope of the FOI Act. Such a decision is distinguishable from a situation where the applicant is entitled to seek access to the documents, but the department decides to refuse access in accordance with one of the grounds specified in the FOI Act.

14. Relevantly, it is only open to a person to seek internal review in relation to an 'access refusal decision' or an 'access grant decision'. A decision to refuse a request on the basis of section 12 is clearly not an access grant decision. Further, it is the department's view that such a decision would not constitute an access refusal decision either. This is because a decision under section 12 is essentially a decision that the applicant is not entitled to seek access to the documents requested and that the agency is not therefore required to process the request under the FOI Act. However, guidance issued by the OAIC seems to contemplate that a decision not to process a request due to the operation of section 12 is an access refusal decision and that the IC has the power to undertake a 'modified review process'.[3] Accordingly, the department considers that the FOI Act should make it clear that a decision made under section 12 is not an 'access refusal decision', but that it is open to an applicant to complain to the IC in accordance with section 70 of the Act.

<u>Summary of recommendations</u>

- Section 55Z of the FOI Act should be amended to remove any doubt that the protections afford apply to circumstances where information or documents are provided or produced to the IC for the purposes of his or her preliminary inquiries and in connection with a formal IC review.
- The FOI Act should be amended to prevent an applicant from being able to seek internal review within an agency and IC review at the same time.
- The FOI Act should make it clear that advice provided by the OAIC is not legally binding on the IC, similar to the way ATO rulings are not legally binding on the Tax Commissioner.

[3] OAIC Guidance Part 10.84 – Review by the Information Commissioner.

- The FOI Act should make it clear that a decision made under section 12 is not an 'access refusal decision', but that it is open to an applicant to complain to the IC in accordance with section 70 of the Act.

(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 legislative protection of sensitive government documents including Cabinet documents;

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

15. The department supports the reformulation of the exemptions in the FOI Act, including the addition of a public interest test to certain exemptions. However, the department notes that the reforms have impacted upon the sorts of matters that can be taken into consideration when determining whether it would be contrary to the public interest to disclose a document and removed the availability of conclusive certificates. There are some documents such as opinion, advice or recommendations prepared by senior officers of an agency for Ministers on sensitive matters which are currently being debated by Parliament or considered by the Government of the day in which there is an inherent public interest against disclosure, in the interests of providing frank and fearless advice.

16. The department also questions whether it is necessary for the business conditional exemption in section 47G to deal with an individual's business or professional affairs given the availability of the personal privacy exemption at section 47F. Arguably there is a level of unnecessary duplication here.

<u>Summary of recommendations</u>

- Consideration should be given to simplifying section 47G of the FOI Act so it only deals with an organisation's business affairs.

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

17. The department considers that documents provided to the IC in response to a review should be exempt from the operation of the FOI Act and that this should be made clear in Part 2 of Schedule 2 of the FOI Act. Currently an undesirable situation can arise where:

- an agency makes a decision to exempt certain documents in response to an FOI request;
- the applicant then applies to the IC for a review of that primary decision;
- however, before the IC makes its decision on review, the applicant lodges a new FOI request with the IC for its 'review file' (which would include the exempt material provided to the IC for the purposes of the merits review).

18. In this scenario, the IC has 30 days to make a primary decision on whether the applicant is entitled to the documents in the review file. Given the 30 day statutory timeframe, this primary decision is likely to fall due before the IC has made its review decision on whether the agency's primary decision to exempt the documents in the first place was correct. The department considers this scenario is undesirable for two reasons; firstly it enables the applicant to essentially circumvent the ordinary course of the review process. Secondly, the IC is called upon to make a decision on access to documents which originated from the agency and, arguably, the agency is better placed to make the decision on access to those documents given their familiarity with the material including any sensitivities (eg whether release would damage Commonwealth/State relations). While it is recognised that it would be open to the IC to consult with an agency, it is ultimately the IC's decision and an agency would have to go to considerable expense to appeal the decision to the AAT if it felt the decision was incorrect.

Summary of recommendation

- Documents provided to the IC in response to a review should be exempt from the operation of the FOI Act.

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

19. The rise in the number of policy-related requests appears to be a Commonwealth wide trend, with Ministers' offices and agencies covered by the FOI Act reporting a 72.8% increase in the number of FOI requests for non-personal information since reforms to the FOI Act.[4] At the same time, in 2011-12 Commonwealth agencies only recouped 1% of the total costs involved in processing FOI requests from applicants, down from 1.7% in 2010-11.[5]

20. Although the department recognises that under the FOI Act applicants have a right to access information at the lowest reasonable cost, there is a risk that a suitable balance between providing access to government information and the cost to taxpayers of administering the FOI Act has been lost.

21. The department notes the recommendations made by the OAIC in its *Report to the Attorney General - Review of Charges under the Freedom of Information Act 1982* and has provided comments against the key recommendations below.

Recommendation 1 – Administrative access schemes and an ability to charge an application fee where an applicant does not first seek access to documents under the scheme

[4] See chapter 9 of OAIC Annual Report 2011-12

[5] As above.

22. The department already provides members of the public with a number of avenues to obtain information, for example the popular *My School* and *My Child* websites and generally looks to provide information outside the FOI Act where appropriate. However, formalising these mechanisms into an administrative access scheme would come at considerable expense to the department. In addition, costs associated with providing members of the public with access to information would not be significantly reduced but simply shifted within the department.

23. The department has in the past supported the intent behind the removal of application fees. However, the department welcomes the opportunity to consider the re-introduction of application fees and not just in cases where an applicant has not first tried to access the information under an agency's administrative access scheme. The department has increasingly been called upon to process multiple FOI requests submitted by individual applicants simultaneously. This practice can enable applicants to avoid or minimise paying any charges associated with processing the requests (noting that no charge is payable for the first 5 hours of processing a request). Additionally, submitting multiple requests, rather than combining the requests, also means an applicant can avoid a finding that the single request would substantially and unreasonably divert the resources of the agency. Having an application fee would arguably make an applicant give proper consideration to whether it is appropriate to separate out their requests and submit them simultaneously.

24. Further, application fees encourage applicants to carefully frame the scope of their request and discourage applicants from making hastily submitted and/or broadly-framed requests which are later withdrawn or refused under section 24AB (substantial and unreasonable diversion). The department expends significant resources processing an FOI request in its preliminary stages, which may involve:
    - creating a file and allocating an action officer in the FOI team;
    - entering the details of the request into a database for time-recording and statistical reporting purposes;
    - acknowledging the FOI request in compliance with subsection 15(5)(a) of the FOI Act;
    - consulting with line areas, other agencies and the applicant regarding the scope of the request;
    - searching for, and preparing copies of all relevant electronic and physical documents and files; and
    - collating documents and calculating a charge.

25. If the applicant then withdraws the request, it is refused under section 24AB or the charge is not paid, the department is unable to recoup any of the costs associated with processing the request in its preliminary stages. By way of example, the department notes that between 1 January 2012 and 30 September 2012, it received 115 requests for non-personal information. Of these 115 requests, 51 were subsequently withdrawn. The introduction of an application fee would likely minimise this sort of practice.

Recommendation 2 – FOI processing charges

26. The department supports the simplification of the scale of charges. The department considers that this could be achieved by replacing the current scale of charges (which distinguishes between various types of activity) with a flat hourly rate applied to time spent processing the request irrespective of the nature of the activity. Efficiencies would flow from a simplified charging system (which actually relates to the time necessary to process an FOI request). It is the department's view that this approach would be more consistent with the objects of the FOI Act.

Recommendation 3 – FOI access charges

27. The department agrees with the recommendation to impose access charges at the following rates:
    - supervision of an applicant inspecting documents (or hearing or viewing an audio or visual recording) at $30 per hour;
    - the actual cost of providing information on electronic storage media, postage and transcription costs; and
    - printing and photocopying at $0.20 per page.

28. The department also considers that there is some merit in passing on the costs of printing and photocopying to applicants seeking their personal information in circumstances where the request forms part of a wider campaign or pattern of similar requests. For example, an individual applicant has submitted a number of FOI requests to the department since 2006, seeking copies of their personal information. There are in excess of 16,000 records held by the department in relation to this particular individual, with many of the documents being administrative files that were created to respond to previous FOI requests. Additionally, many of the FOI requests made by this applicant have been for the same documents.

29. Requiring applicants to contribute to the cost of processing their requests, especially in situations described above, is not inconsistent with practices across the government to charge applicants accessing personal information, for example, issuing birth, marriage and death certificates and passports.

Recommendation 4 – FOI processing ceiling

30. The department supports the imposition of a 40-hour processing ceiling whereby it would have discretion to refuse to process a request that is estimated to take more than 40 hours. However, the department considers that the 40-hour limit would be best served as a starting point, and that each potential refusal should be considered on a case-by-case basis taking into account all relevant factors at the time. It is noted that there may be a public interest to be served in processing requests exceeding the 40-hour ceiling. As such, the department considers it would be more appropriate to set a 40-hour processing ceiling for consideration by agencies in the Guidelines issued by the OAIC under s 93A of the FOI Act (the Guidelines) rather than in the FOI Act itself.

Recommendation 5 – Reduction and waiver

31. In circumstances where an applicant has applied for a reduction or waiver of a charge, the department supports the recommendation to provide an agency with three options: to waive the charge in full, by 50 per cent, or not at all.

Recommendation 6 – Reduction beyond statutory timeframe

32. The department takes its obligations to process decisions in accordance with the FOI Act very seriously and meets all relevant statutory timeframes. Nonetheless, it does not oppose the recommendation to introduce a sliding scale for the refund of charges paid by an applicant where an agency fails to notify a decision within the statutory timeframe.

Recommendation 7 – IC review fees

33. The department recognises that internal review is a valuable step in resolving disputes about an access request. As such, the department supports the introduction of an application fee of $100.00 for IC review of a decision where an applicant does not first seek internal review.

Recommendation 8 – Indexation

34. Consistent with our earlier submissions, the department strongly supports the recommendation to adjust all FOI fees and charges to the Consumer Price Index (CPI) every two years, by rounding the fee or charge to the nearest multiple of $5.00.

Recommendation 9 – Responding to an agency decision

35. Currently, when an agency issues an applicant with a preliminary estimate of the charge for processing his or her request, the applicant is required to respond within 30 days or the request is deemed to be withdrawn. However, where an applicant contests the imposition of a charge and the agency then makes a decision under section 29(4) (i.e. a decision to reject the applicant's request for a reduction or non-imposition of the charge), and notifies the applicant of that decision under section 29(8), the FOI Act does not require the applicant to do anything. This means that an FOI request can be left in abeyance for an extended period. As such, the department supports the recommendation that applicants should be required to respond within 30 days after receiving a notice under subsection 29(8) of the FOI Act and advise the agency whether they intend to (a) pay the charge, (b) seek internal review or (c) withdraw the FOI request. This will provide greater certainty around the status of an FOI request once a final decision on charge has been made and notified to the applicant.

<u>Summary of recommendations</u>

- Application fees should be incorporated into the FOI Act and not just in cases where the applicant has not first tried to access the information under an agency's administrative access scheme.
- The scale of charges should be simplified with a flat hourly rate applied to time spent processing an FOI request.
- In addition to the access charges described in paragraph 27, consideration should be given to allowing agencies to charge for the cost of printing and photocopying where applicants are seeking their own personal information.
- The FOI processing ceiling should be discretionary and set out in OAIC guidance rather than the FOI Act.
- Where an applicant has applied for reduction or waiver of a charge, an agency should have three options in the FOI Act; namely, waive the charge in full, by 50 per cent or not at all.
- A sliding scale for the refund of charges paid by an applicant should be introduced to cover circumstances where an agency fails to notify a decision within the statutory timeframe.
- An application fee of $100 should be imposed on an applicant seeking IC review where he or she has not first sought internal review.
- FOI fees and charges should be adjusted to the CPI every two years.
- Applicants should be required to respond within 30 days after receiving a notice under subsection 29(8) of the FOI Act.

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

36. The department is in favour of minimising the regulatory and administrative burden (including costs on government agencies), however, recognises that the reduction of these burdens must be balanced with the need to ensure ease of access to Australian Government information.

37. In the 2010-2011 financial year (noting the reforms commencing in November 2010 and May 2011) the amount of requests received by the department increased by approximately 48% from the previous financial year. The main type of requests that this increase affected were:
    - non -personal information requests (increase of approximately 142%); and
    - significant requests (increase of approximately 85%).

38. The number and type of requests received by the department in the 2011-2012 financial year largely mirrored those figures for 2010-2011 period.

39. While the department is able to impose a charge for the processing of some FOI requests, the amount recouped is minimal compared to the cost of administering the FOI Act. For example, in the 2011-2012 financial year the total cost recouped by the department in charges was $12,649.00, which is less than 1 per cent of the department's total cost of administering the FOI Act.

40. In addition, the statutory timeframe could be amended from calendar days to business days; noting that a significant portion of an agency's processing time is not in practice available to it because of weekends, public holidays and, significantly, the Christmas shutdown period.

41. The department also considers that administrative burden on agencies would be reduced, and better outcomes for an applicant would be achieved if the statutory timeframe for processing a request commenced from when a 'valid' request was received (i.e. when a request that was capable of being processed was received). Currently, the request consultation process and the timeframes around this process do not sufficiently enable the department to enter into helpful negotiations with an applicant over the scope of the request. For example, once the department has issued the applicant with a notice indicating its intention to refuse the request due to a practical refusal reason (i.e. because the request does not meet the requirements of paragraph 15(2)(b)), the applicant often comes back with an attempt to refine or reduce the scope of their request. However, where the revised scope is no clearer or does not reduce the number of documents captured, the department is forced to proceed to make a decision. This process thus limits the department's ability to negotiate and help an applicant reframe the request to something which is clear and capable of being processed.

42. Further, in an effort to reduce the administrative burden on agencies, the department would also welcome better processes around transferring FOI requests from one agency to another. Currently, the department notes that sometimes agencies are asked to accept transfer of an FOI request where a significant part of the 30 day statutory timeframe has already lapsed. One option to combat this issue would be to require an agency to transfer a request within a certain timeframe (eg 5 days) and a failure to do so would enable the proposed receiving agency to decline to accept the transfer. The agency who originally received the request should then be required to process the request based on any documents in its possession and the applicant invited to lodge a new FOI request with the other agency.

43. The department is also concerned that unnecessary strain is placed on FOI resources when an applicant contests a charge, but pays it anyway. This practice is currently permitted under the FOI Act and means the department is required to continue processing the request, while at the same time deal with the applicant's contest of the charge. The department considers that this subverts the intention behind the 'FOI clock' stopping while the matters around charge are dealt with.

Summary of recommendations

- The statutory timeframe should be amended from calendar days to business days.
- The statutory timeframe should commence when a 'valid request' is received (i.e. when a request that is capable of being processed is received).
- The FOI Act should place a timeframe on an agency wishing to transfer an FOI request.
- The FOI Act should prevent an applicant from contesting a charge, but then paying the charge at the same time.