

## Department of Finance and Deregulation

### **Response to the 2012 Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010***

#### **Overview**

The Department of Finance and Deregulation (Finance) is committed to open government and supports the objectives of the FOI Act to manage public sector information for public purposes as a national resource, including proactive disclosure of information. In supporting the objectives, it is appropriate to consider whether the current FOI Act and legislative framework is achieving the objectives in a cost efficient manner. Finance makes a number of comments and suggestions for improvement, in the context of the terms of reference, below.

**(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;**

In the first year following the introduction of the freedom of information (FOI) reforms from 1 November 2010, Finance experienced an increase in FOI requests. The increased number of requests has been sustained since, as demonstrated in the table below.

| Calendar year | Overall Number of FOI requests <sup>1</sup> |
|---------------|---|
| 2009          | 50  |
| 2010          | 72 (25 from 1 November)                     |
| 2011          | 122   |
| 2012          | 129   |

The increase may partially reflect the practical implementation of the open government framework. However, Finance considers that with the removal of application fees, coupled with the increased awareness of FOI access rights, applicants have been more likely to lodge FOI requests without full consideration of:

- the actual documents being sought (such as the scope of material within a request);
- the fact that documents may already be published and publicly available; or
- alternative sources of access. Applicants may be using the FOI process to obtain access to documents which may be more appropriately accessed through other means. For example, subpoenas, production, Senate Estimates, Questions on Notice and media enquiries.

Consistent with other agencies, the types of FOI requests received by Finance appear to have become more complex, relating more to policy development and government decision-making documents. These types of requests tend to be more resource intensive to process as noted by the Office of the Australian Information Commissioner (OAIC) in their [2011-12 Annual Report](#) (see page 117).

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<sup>1</sup> For detailed summaries of FOI data, including Finance, see [FOI annual reports](#) located on the Office of the Australian Information Commissioner website.

Reforms to fees and charges may have generally lowered the cost of FOI requests for applicants (including the removal of FOI application fees and the provision of 5 hours of decision making time, without charge). The imposition of charges for processing FOI requests continues, however, to be a contentious issue for applicants, who at times perceive that charges are used to prevent access to documents. In Finance's experience, applicants are not always aware of the extent of documents/information that falls within the scope of FOI requests submitted or are not aware more generally that charges may be applicable for the processing of FOI requests. These issues are covered in more detail in response to term of reference (f) relating to the role of fees and charges and the Australian Information Commissioner's (Information Commissioner) review of charges, below.

Finance has found that a consistent practice of consulting applicants early in the FOI process and clarifying the terms of their request is an important tool to manage an applicant's expectations of the documents that may be accessed under an FOI application and associated charges. The obligation is already legislated in subsection 15(3) of the *Freedom of Information Act 1982* (FOI Act). In our view, there may be merit in considering reforms to support agencies to assist applicants in clarifying the scope of FOI requests.

One area of current and future concern is the FOI disclosure log requirements (subsection 11C of the FOI Act) to publish documents released to applicants so that other interested parties can also access copies of those materials/documents.

Consistent with the guidelines issued by Information Commissioner under section 93A of the FOI Act (the FOI Guidelines)<sup>2</sup> the objects of the FOI Act and open government, Finance publishes copies of the documents released to applicants on its website rather than publishing details of how copies can be obtained.

As a consequence, the disclosure log provisions, which commenced in May 2011, have added significantly to the administrative workload of FOI processing within Finance. While disclosure log publication requirements have been met, in terms of timing and document availability, Finance has at times struggled to achieve full compliance, under the Web Content Accessibility Guidelines (WCAG) accessibility requirements, on 'legacy' documents released to applicants under the FOI Act and published on the disclosure log. The preparation of FOI documents, particularly legacy documents, to comply with WCAG compliance requirements is at times difficult as documents are not always electronically sourced and the cost and resourcing implications associated with converting documents, based on current technology, is high. Finance estimates that preparation of documents for disclosure logs has been as high as 30-50 % of the time spent on some FOI requests. Finance notes that there is vast divergence across agencies in the availability of material disclosed through FOI processes. While a number of agencies provide direct access to documents released to applicants, with varying degrees of WCAG compliance, a number offer access to documents only on request to the agency.

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<sup>2</sup> See paragraph 14.30

Finance submits that better support and guidance to agencies about the interactions of government policy, including appropriate exemptions for legacy documents, might ensure better consistency. Further consideration could be given to supporting and resourcing pro disclosure models of information.

#### Timing of publication on disclosure log

While *agencies and ministers must publish information in a disclosure log within ten working days after the FOI applicant was 'given access' to a document* (subsection 11C(6) of the FOI Act), there is no requirement under the FOI Act that limits or directs a minimum length of time prior to publication in the disclosure log. A number of applicants, generally journalists, have voiced strong concerns to Finance regarding the timing of publications and some, more strongly than others, pursue assurances regarding a minimum period prior to publication. They argue that failure to provide a suitable minimum period (usually at least 3 working days) would inhibit their ability to consider the contents of the documents and take further related steps that may be required if the documents are to be used in any media reporting on the issues.

As indicated by the FOI Guidelines (paragraph 14.24), it is open to an agency or Minister to publish information at any time, including on its disclosure log and a pro disclosure is supported by the objects of the FOI Act. In our view, the issue is the perception that by paying or making a contribution to the payment of the processing of FOI fees and charges, that an applicant has an expectation about exclusivity of access to those documents at least for a certain period. Some applicants have also indicated that publication on any earlier day would discourage lodgement of future FOI requests and would tend to diminish future relationships between the applicant and the agency as, in their view, it shows a lack of cooperation between the agency and the applicant. Threats of legal action have also been made toward departmental officers if the requested timeframe for publishing documents is not adhered to and publication occurs earlier than requested.

The Information Commissioner amended the FOI Guidelines on 28 June 2012 to highlight that 'special action' should be taken by an agency if it intends to adopt a practice of same day publishing of documents on its disclosure log (i.e. within 24 hours of providing the documents to the FOI applicant). The 'special action' requires a decision maker to consider a range of factors before deciding on same day publication (e.g. waiving charges) and to address those factors in decision letters.

Further guidance by the OAIC or legislative certainty on this matter would be welcomed and would assist agencies maintain constructive relationships with applicants. For example:

- Subsection 78(4) of the *Queensland Right to Information Act 2009* provides that *nothing about the document (including a copy of the document) may be put on a disclosure log until at least 24 hours after the applicant accesses the document.*
- Subsection 66(2) of the *NSW Government Information (Public Access) Act 2009* provides that *if the information applied for was not publicly available at the time the application was received but the agency makes the information publicly available*

*either before or within 3 working days after providing access to the applicant, the applicant is entitled to a full waiver of the processing charge imposed by the agency.*

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

Finance considers that it works productively with the OAIC to ensure positive outcomes for applicants and to work toward innovative solutions. The benefits of having an independent body means applicants have a better understanding of the FOI process and assurance about their experiences with agencies. Finance supports the role of the OAIC to review and hold agencies to account for transparent and accountable decisions.

Like most agencies, the OAIC balances the competing demands and expectations of its workload, including dealing with the high number of applications for Information Commissioner Review (IC Review), its complaints functions, assisting agencies with policy guidance and advice and pursuing information policy reform and pro disclosure cultural reform.

In Finance's experience, the OAIC has been unwilling on occasion to provide advice on issues of concern to agencies around the possible operation of the FOI Act citing that it conflicts with its role in any possible future review of a particular FOI matter. We understand that this may be due to complexities in the current delegation and authorisations provided to the relevant Commissioners and this issue could be considered further to ensure that Agencies are supported when they seek guidance from the OAIC before they finalise decisions, rather than on review.

General advice

Agencies must have regard to the FOI Guidelines when they are performing a function or exercising a power under the Act. Finance has found the guidance provided in the FOI Guidelines invaluable. The need for extensive guidance highlights the complexity of the legislative provisions and in our view, supports the need for legislative reform.

A possible separation of responsibilities within the OAIC, which would allow OAIC officers to provide operational advice on these issues, may better assist agencies. Such advice may then feed into any subsequent consideration by the Information Commissioner if relevant FOI Guidelines are required. This could also lead to a decrease in the number of IC Reviews, by dealing proactively with complex matters at the decision making stage rather than on external review.

Information Policy

Information policy is one of the three broad functions that have been conferred on the OAIC. The general objects of the FOI Act at subsection 3(3) provide that *information held by the Government is to be managed for public purposes, and is a national resource*. However, FOI applications and release of documents should not be relied upon as the main vehicle for implementing a change to more open access to information. A central element of the FOI reform objective to drive a cultural shift towards more proactive release and publication of

public sector information is the Information Publication Scheme (IPS). There may be merit in considering if the current FOI Act requirements for the IPS, other than those for the disclosure log, would be better placed outside of the FOI Act in advancing the broader Commonwealth information policy. An associated issue related to proactive disclosure is canvassed in more detail at term of reference (g) below.

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

Finance considers the current system has generally resulted in delays in finalising FOI requests. Currently, review may be sought, following initial agency decision, from either the agency (internal review) or from the Information Commissioner (IC Review). Applicants are not required to seek internal review before applying for IC Review.

Published FOI statistics indicate that in the period 1 November 2010 to 30 June 2012, the Information Commissioner received 632 applications for IC Review and finalised 282. While FOI statistics do not record whether the IC Review applications have been made in lieu of seeking agency internal review, the large number of IC Reviews places a large administrative burden on the resources of the OAIC.

In dealing with the large number of IC Review applications the OAIC has encouraged applicants to seek internal review in the first instance before an IC Review is commenced. Given this OAIC practice, it may be appropriate to formalise this approach and amend the legislation to require applicants to seek internal review with the agency before seeking IC Review. Consideration could also be given to carving out specific circumstances where a person could seek a review directly from the Information Commissioner without having first had the decision reviewed internally by the agency.

**(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;**

Finance is of the opinion that the revised exemption provisions, coupled with the FOI Guidelines, have provided greater clarity and a more consistent application of the public interest test.

Notwithstanding, public interest factors will ultimately be determined subjectively at the relevant time by individual decision makers. While Finance supports consistency in good decision making processes, there are inherent discretions granted to individual decision makers. In our view, better support and training to FOI decision makers could potentially address balancing the independence with consistent decision making including public interest considerations. Finance is aware that the Department of Defence has introduced an accredited training program for its decision makers, based on the South Australian model in the FOI legislation. Consideration could be given to a similar model.

As a central agency, Finance is often involved in FOI requests for sensitive government documents, including Cabinet materials, such as those related to the budget/expenditure review committee process. Finance submits that the FOI Act should be amended to include an express third party consultation provision similar to sections 26A, 26AA, 27 and 27A of the FOI Act, with the Department of the Prime Minister and Cabinet (PM&C) in respect of Cabinet materials, including an extension of the processing period by a further 30 days.

In relation to the exemption under section 34 of the FOI Act for Cabinet documents Finance notes that:

- agencies and Ministers must have regard to the FOI Guidelines in making a decision on an FOI request;
- the FOI Guidelines note the requirements in the *Cabinet Handbook* that requests for access to Cabinet documents and Cabinet-related material under the FOI Act must be handled in consultation with PM&C; and
- it is our understanding that PM&C receives a significant number of consultation requests in relation to Cabinet documents.

The requirement to consult with PM&C on Cabinet documents impacts on the ability of agencies to finalise a request within the statutory timeframes.

While agencies could seek an extension of time, from the applicant under section 15AA or from the Information Commissioner under section 15AB of the FOI Act, there is an element of uncertainty and administrative burden associated with arranging these extensions.

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

Finance has no comment.

**(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**

Finance made a detailed submission to the fees and charges review, available at:

[http://www.oaic.gov.au/news/consultations.html#charges\\_review](http://www.oaic.gov.au/news/consultations.html#charges_review)

While charges may (at times) deter or at least impact on an applicant's decision to pursue access to information, it may also encourage applicants to clearly specify the scope of their request, which can be of benefit to both the applicant and the agency. Applicants are not always aware of the extent of documents/information that fall within the scope of the FOI request submitted (particularly in relation to broad requests for 'all' documents) or are not aware more generally that charges may be applicable for the processing of FOI requests.

Since the application fee for FOI requests was abolished, Finance has experienced a significant increase in FOI requests being made to the Department. However, Finance has also experienced a significant number of FOI requests being withdrawn (approximately 21% in the calendar year 2011 and 50% in 2012 either through the deeming provisions when no response is received within 30 days, or formal withdrawal of requests) after an estimate of charges letter is sent to an applicant.

Similarly, Finance submits that the absence of application fees for internal and IC Reviews of decisions may lead to applicants being more likely to request reviews if they are not happy with the outcome, even where the discussions are supported by sound statements of reasons. Finance has found that since the abolition of fees for internal review, the number of requests for internal review has steadily increased (nil in 2009, 3 in 2010, 5 in 2011 and 13 in 2012).

In respect to **recommendation 2** of the Information Commissioner's review of charges under the FOI Act, Finance considers that rather than imposing a \$50 application fee to encourage people to use an administrative access scheme it would be more appropriate to include a provision, similar to the current section 15A provisions applicable for access to personnel records, to access material available through established administrative access schemes prior to seeking access to material under the FOI Act.

Finance has experienced an increase in the number of FOI applicants seeking access to personal information in relation to the act of grace, special claims and Comcover files. Finance continues to support the current FOI provisions and **recommendation 6** of the Information Commissioner's review of charges under the FOI Act, namely that there should be no processing charge for providing access to documents that contain an applicant's personal information. In practice, Finance as part of its other legislative obligations to provide procedural fairness to applicants, already provides access to the categories of applicants through administrative access arrangements (see submissions above and below). At times, Finance experiences a disproportionate amount of time to process numerous requests, while balancing the competing operational requirements to perform its functions. We also support the recommendation that personal information requests be subject to the 40 hour ceiling (**recommendation 4**) applying to other requests.

Noting concerns of being overly intrusive into an applicant's financial affairs Finance considers **recommendation 7** relating to waiver of charges could be supported by improved guidance to agencies from the OAIC on the practical assessment of financial hardship.

Finance also supports the OAIC's recommendation to consider possible replacement of the 'public interest' test under subsection 29(5) of the FOI Act with a 'special benefit' to the public test. While public interest considerations are inherently subjective, the FOI Commissioner has issued a number of Information Commissioner decisions regarding applications for waiver of charges on public interest grounds, in which he has determined that where public interest grounds are present, waiver of at least 50% of the processing fees is appropriate.

Finance has experienced an increase in the number of applications seeking waiver of processing charges on the basis of public interest. A number of applicants routinely seek waiver when submitting their request, particularly applicants who make multiple requests, such as Parliamentarians and journalists. Finance is concerned that any increase in charges may, in practice, lead to an increase in the number of waiver requests and the associated workload in assessing applications for waiver.

Finance submits that it would also be useful to consider the interaction of charges with the mandatory publication obligations under section 11A (FOI disclosure log). Finance has increasingly received submissions from FOI applicants seeking a waiver of processing charges on the basis of public interest considerations. Some applicants support their submissions that publication on an FOI disclosure log amounts to public interest by reference to paragraph 4.54 of the FOI Guidelines (Charges for providing access), which relevantly provides:

*... The policy of the Act is that documents disclosed in response to individual requests should be made available to the public generally. Agencies and ministers should be more inclined than they may have been prior to the changes to decide that disclosure of a document – especially a document relating to the policy processes of government – would be of general or identifiable public interest and that a charge should not be imposed.*

A mandatory obligation to publish documents should not, in our view, be used as evidence that the document(s) may be in the general public interest.

Finance supports **recommendation 8** of the Information Commissioner’s review of charges under the FOI Act noting that there are occasions when delays result from discussions with the applicant. The proposed approach would provide a more equitable outcome than the current situation of not being able to impose charges if processing delays occur.

Under current charging arrangements there is an inherent tension in the possible and practical advantage that may be obtained by an applicant not agreeing to an extension of processing time under section 15AA of the FOI Act. While Finance’s experience does not indicate that this is a substantial issue at this time, there is potential for it to be misused. For this reason, we submit that where an agency makes every effort to discuss timeframes with the applicant and the applicant does not respond, it is appropriate that charges should still be payable.

Finance supports an internal and IC Review process that strengthens good decision making through greater scrutiny. On the other hand, the volume of applications for IC Review (over 632 from 1 November 2010 to 30 June 2012) suggests that applicants who can access review opportunities at no cost may be more inclined to exercise those review rights regardless of the primary decision. Finance would be concerned that if application fees for IC Reviews were introduced without also re-introducing application fees for internal review by an agency, it would likely result in a spike in the number of applications for internal review. This would only transfer the burden from one review mechanism to possibly another without regard to the soundness and merits of the decision.

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

Since the FOI reform measures were implemented on 1 November 2010 the numbers of FOI requests received by Finance have increased substantially as indicated above in the table in paragraph (a).

The suggestions made under the Information Commissioner's Review of Charges, to introduce administrative access processes (**recommendation 1**) and changes to charges to encourage smaller, less expensive, more targeted FOI requests (**recommendation 4**), would assist in reducing the burden on agencies.

The concept of proactive disclosure is also an important factor which is encouraged and can minimise the impact on agencies. However, where applicants attempt to pre-empt the disclosure of information provided on a regular basis, and therefore increase the regulatory and administrative burden on government agencies, Finance submits reform might better support agencies.

By way of example, Finance has devoted considerable resources to the pro-disclosure of detailed information on the expenditure on entitlements for all current Parliamentarians and former Parliamentarians on its website (<http://www.finance.gov.au/publications/parliamentarians-reporting/index.html>). This detailed information is published every six months and includes expenditure on domestic and overseas travel, travelling allowances, printing and communications, office IT and equipment, office accommodation, telecommunications and family travel, for the preceding six month period. This reporting process is underpinned by a robust consultation and certification process. Finance has experienced a number of cases where the provisions of the FOI Act currently operate to undermine and duplicate the consultation and certification process, and the perceived integrity of the final published information.

In a number of cases, FOI applicants pre-emptively request access to the summary data to be tabled prior to publication under the FOI Act. In terms of the desirability of minimising the regulatory and administrative burden, including costs, on government agencies, greater consideration, weight and recognition could be given to information that is already publicly available, or which will become publicly available, when considering the scope of an FOI request.

While such requests can be dealt with through the use of provisions relating to practical refusal reasons, section 24 and section 24AB consultation processes, the time spent in refining the request in order to remove the practical refusal reason, coupled with any processing of the request can increase the regulatory and administrative burden on agencies, when the information is to be published later. The process of refining the scope of the request, to remove the practical refusal reason, can also result in applicant dissatisfaction with the process and possible complaint to the Information Commissioner.

In the situation described, section 12 does not assist as it only operates to not entitle a person to access documents under the Act if the document is publicly accessible and subject to a fee. Neither of which applies prior to the report being published.

Section 21, which enables access to be deferred, also does not assist as the publication of the six monthly reports, being a transparency initiative by Government, is not required by law or prepared for presentation to Parliament. Further, it would be difficult to argue that premature release of the documents would be contrary to the public interest.

In our view this issue could be addressed in one of two ways:

- First, by expanding section 12 of the FOI Act (Part III – Access to documents) so that a person is not entitled to obtain access to a document which is likely to be, or form part of, a document that will be published within six months of the date of the FOI request.
- Second, by expanding section 21 to enable access to also be deferred where the government or an agency, on its own initiative, regularly publishes information that is the subject of the request. Deferment of access could be until the information is published, provided it is published within, or close to, the anticipated timeframe.

## **Other Issues**

### **Section 24A – Refusal – documents not found, do not exist or have not been received**

Under section 24A of the FOI Act, an agency or Minister can refuse a request, in part or full, on the basis that after all reasonable steps have been taken to find the document the agency is satisfied that the document is in the agency's or Minister's possession but cannot be found or the document does not exist. A decision under section 24A is a request refusal decision.

Describing such a decision as an access refusal decision and in FOI reporting could be misleading as it suggests the agency is refusing access to documents when in fact there are no documents held by the agency or Minister that fall within the scope of the request. Finance considers a decision under section 24A should be described in terms that more accurately reflect that the agency or Minister is not refusing access as such, but rather there are no documents, or documents that can be found, that fall within the scope of the request.

Providing for a 'no documents' decision to be an 'access refusal decision' means that the review rights that apply to an access refusal decision will apply to the decision, such that a person who is concerned that the agency may in fact hold documents can seek a review of the decision on that basis. However, we consider it preferable to more accurately describe the decision being made and to create review rights via a separate mechanism.

### **Processing timeframes**

The OAIC's 2011-12 FOI statistics indicate that 12% of FOI requests made to all Commonwealth agencies exceeded statutory timeframes. Further consideration may be warranted as to whether current provisions for processing requests are adequate. Finance suggests that any consideration examine whether:

- days for processing should be business or calendar days;
- figures showing some agencies do not comply could indicate resourcing problems, or may indicate that the time period is not reasonable for type of request;
- current arrangement for extension for complex matters are adequate but not being utilised.