

Review of the *Freedom Of Information Act 1982 (FOI Act)*
DFAT submission

DFAT welcomes the opportunity to make a submission regarding the Review of the FOI Act.

DFAT has demonstrated its strong commitment to implementing the reforms to the FOI Act of recent years. Deploying additional staff to FOI functions, investing in improved technical resources and overhauling internal processes have all been positive steps taken to proactively ensure DFAT's compliance with the reforms. DFAT's rate of processing FOI requests has increased significantly to keep pace with the increased rate at which FOI requests have been lodged since the reforms, and only as a rare exception is it the case that FOI matters run beyond the timeframes and extensions allowed for.

DFAT has also demonstrated its strong commitment more broadly to making information it holds transparent where possible. For example, the Department's Passports and Smartraveller websites make extensive, useful information available online. DFAT publishes a range of trade data on the internet which is valuable information, including for Australian companies. Extensive information about Departmental processes has been made available through the Information Publication Scheme, including for example, the Consular Operations Handbook.

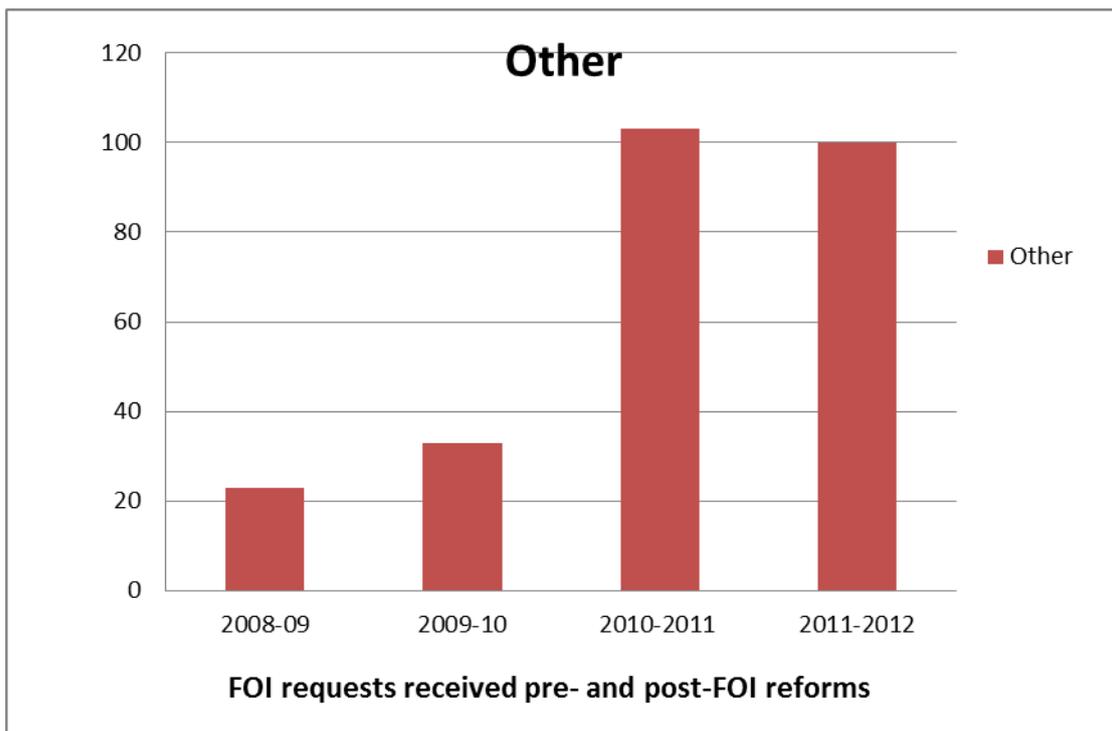
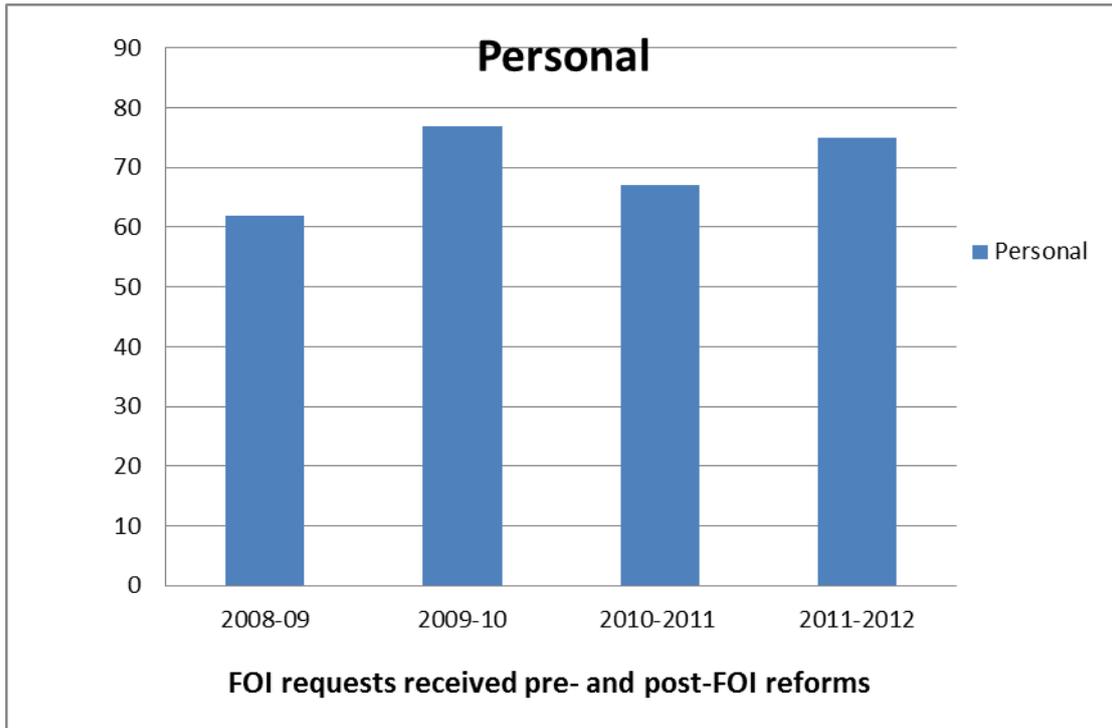
In DFAT's experience, the recent reforms to the FOI Act have resulted in some unintended consequences which could potentially be addressed through further reforms. DFAT considers it is timely to review the operation of the Act. Using its experiences since the reforms as a guide, DFAT's submission will focus on how the processes under the current FOI Act appear to be performing in terms of stated objectives of the Act and in terms of value-for-money.

This submission responds in turn to each of the terms of reference. We would welcome the opportunity to discuss any matters further with those conducting the review.

(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;*

DFAT's experience since reforms to the FOI Act

The following graphs highlight how DFAT's experience of FOI requests has changed since the November 2010 reforms of the FOI Act. The first graph illustrates how the numbers of personal requests for information have been trending either side of the FOI reforms. The second illustrates how the numbers of 'other' requests for information have been trending.



Key points to note in these graphs:

- In the statistics gathered by the Information Commissioner from each agency, there is recognition of two distinct types of applications under FOI, identified as “personal” and “other” applications.
- In DFAT’s experience, “other” applications are almost exclusively made by applicants who have other channels of access to unpublished Government information, in addition to FOI.

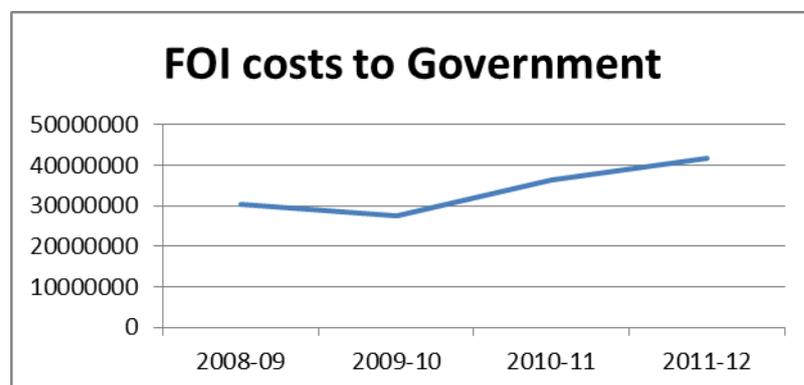
- “Personal applications” are almost exclusively made by applicants who have no access to unpublished Government information other than through FOI. In DFAT’s case, such applicants are usually consular and passports clients of the Department.
- The graphs show that since the November 2010 FOI reforms, “personal” applications have not increased. “Other” applications have increased threefold.
- Two basic consequences of this have been (a) a significant increase in the total amount of Departmental resources which are absorbed in work on FOI matters and (b) a significant shift in the proportional make-up of the Department’s FOI work – it is now the case that the vast majority of the Department’s time spent on FOI matters is handling “other” applications rather than “personal” applications.

Value-for-money

(a) Costs

DFAT submits that a fundamental expectation in relation to the FOI Act should be that it delivers value-for-money. DFAT notes in relation to this component that it has no concerns with the “value-for-money” proposition in relation to “personal” FOI requests by members of the general public. The value generated by facilitating such public access to personal documents is clear and uncontested. The discussion outlined below in relation to questions of “value” thus relates only to “other” FOI requests.

In terms of the cost of FOI, the best source of data is the data compiled by the OAIC. That data shows that the cost of FOI has trended as follows in recent yearsⁱ:



Since 2009-2010, the cost of FOI to Government has increased by 51.8%. Note that this does not include certain costs of the reformed system – for example, the added cost associated with FOI-related functions of the OAIC – so the actual increase in the cost of FOI is somewhat greater.

At the Government-wide level, given that there has been little rise in the number of “personal” applications (approximately 6% increase from 2009/10 – 2011/12) and given that it has not become significantly more onerous to process “personal” applications since the reforms, it is likely that most of the rise in FOI costs is due to the processing of “other” (non-personal) FOI requests (which have risen Government-wide by approximately 70% from 2009/10 – 2011/12).ⁱⁱ

(b) Value

DFAT submits that an essential question for this review is to consider, particularly given the environment of fiscal constraint, whether this increased investment in FOI has been accompanied with commensurate increased value from FOI, in terms of the objects of the Act. That is, if the Government has invested 50% more resources into FOI through the reforms, it could expect to see at least a 50% increase in the value being derived for the community from FOI. Otherwise, we could conclude that the value-for-money equation is less favourable than it was prior to the reforms.

A related question is whether a greater increased value, in terms of the objects of the Act, might have been achieved through the same investment directed elsewhere. For example, the review could ask the question whether an increased investment by Government agencies in proactive disclosure of, say, data sets would have produced greater benefit in terms of the objects of the FOI Act as they relate to transparency and openness of Government.

The objects of the Act, which define the framework for these questions of the value generated through FOI releases, are as follows:

FREEDOM OF INFORMATION ACT 1982 – SECT 3

Objects - general

(1) The objects of this Act are to give the [Australian](#) community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:

(a) requiring agencies to publish the information; and

(b) providing for a right of access to [documents](#).

(2) The Parliament intends, by these objects, to promote [Australia's](#) representative democracy by contributing towards the following:

(a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;

(b) increasing scrutiny, discussion, comment and review of the Government's activities.

(3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

(4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

There is at present no agreed methodology for estimating the value generated by the release of different kinds of Public Sector Information (PSI), which would assist greatly in the exercise of estimating the value generated by FOI releases. There are also no agreed methods to evaluate the achievement or otherwise of the other components of the FOI Act's objects – measures for the increasing of public participation, scrutiny, review etc. are all areas in which to DFAT's knowledge no methods have been developed and agreed.

Attempting to develop methods for the valuing of PSI has been the subject of some activity for the OAIC. The Gov 2.0 taskforce recommended for example that:

6.11 Within the first year of its establishment the proposed OIC, in consultation with the lead agency, should develop and agree a common methodology to inform government on the social and economic value generated from published PSI.

In progressing this recommendation, the OAIC formed the viewⁱⁱⁱ that the first step is to build a better picture of the PSI landscape in Australia by means of surveying agencies about the nature of their holdings of information. The OAIC would be best placed to advise on further progress with this work, but it appears in any case that the common methodology envisaged is a complex task which could take significant time to develop.

The conclusion from the above is that there is not at present a particularly strong framework for establishing the 'value' arising from FOI releases, which presents significant obstacles to any attempt to make a case that there has been a rise in value from the Government's FOI activity which is commensurate with the rise in cost associated with that activity. There is also not a strong framework for comparing the value generated by release of different kinds of Government information. For example, there is no agreed methodology to compare how much value is generated by an FOI release to how much value is generated by the public release of a data set, or other public disclosures which agencies make on a regular basis.

One observation in this regard is that the advent of online FOI disclosure logs provides a crude means to make some comparisons – for example, of the number of visitors to the Department's FOI disclosure log page compared to, say, the number of visitors to the Department's published data, published program information and published community information. These comparisons are not perfect indicators but they presumably correlate to some extent with the public value of the different kinds of published information. So, for example, we can make the observation that in a three month period, the Department's Smartraveller website, which contains travel advice for countries, issues and events, was visited one hundred times as often as the Department's FOI disclosure log web page.

A second observation in relation to the "value" side of the "value-for-money" expectation in relation to FOI is that it must be taken into account that use of Departmental resources to handle the increased level of FOI applications inevitably diverts resources from other work which is in the public interest. The Information Commissioner has acknowledged this perspective.^{iv} DFAT contends that the review

could closely consider the merit of increasing investment in an area whose value is difficult to measure and has not been measured, at the expense of investment in policy and program areas whose value is better established.

Value-for-money in individual cases

The above section considered the value-for-money question at a ‘macro-’ or system-wide level. Considered at the micro- level of individual cases, DFAT submits that following the reforms, the Department has experienced a significant rise in individual situations which are very challenging to justify in value-for-money terms.

At the inaugural conference of the Office of the Australian Information Commissioner, speakers referred to some particular anecdotes from recent times that had come to the attention of the Office.

Two of these anecdotes were:

- The increasing use of FOI by legal firms as an alternative and less expensive form of discovery, in some cases to assist in their efforts to bring a legal case against the Australian Government.
- The anomaly within the Act which enabled an applicant to submit 440 FOI applications in a single email as a means to avoid fair charges. Without application fees, this meant essentially that the applicant appeared to be entitled to 2200 free decision-making hours under the Act.

Scenarios such as these can be highly effective in prompting consideration of ways in which the Act’s processes may be able to be refined to avoid failures of the value-for-money proposition in individual situations. DFAT submits the following further scenarios from its experiences since the reforms.

- An applicant at an overseas university, with no financial or personal connection to Australia, put in a large request which was nevertheless comparable to others that DFAT had processed. The applicant’s goal was to look at a range of twenty year old documents, with a view to writing a course essay.

DFAT sought advice from the OAIC on whether the request might be refused on the grounds that it would be an unreasonable diversion of resources. The advice was that it did not appear that the circumstances would warrant a finding that the diversion of resources was unreasonable.

Accordingly, DFAT proceeded with the request. No charges were levied, as the applicant put forward a compelling argument of financial hardship. However, even if he had been charged the full amount, the charges would have been in the order of \$3000. Processing his request cost the Australian community approximately \$15000. Additionally, making decisions on the releasability of these twenty-year old documents diverted the senior executive responsible for managing the Government’s relationship with a key regional area for two full-time weeks so that he could make this FOI decision.

Such a situation warrants analysis in terms of whether the appropriate balance has been struck as a public policy matter. The benefit to Australia of such an FOI release seems to be difficult to identify, and yet the cost is substantial.

- Applicants frequently lodge requests for documents which due to their nature must be largely exempted from release – for example, requests for documents which concern confidential conversations between the Australian Government and a foreign government.

It is difficult to see how value-for-money is satisfied in such cases. Large amounts of Departmental resources are expended in processing these requests, including in ensuring that the statutory obligations to exempt certain information from release are complied with. The result is, often, a set of almost blank pages, released to the FOI applicant.

It could be contended that this is evidence that more information should be released, and that this is where the value in such a release would be derived. DFAT submits that the exemptions in the FOI Act, mirrored across numerous parts of our legal framework including public interest immunity claims, are essential to preserve since they go to questions of fundamental public interest. This being the case, it is hard to see how there is value generated, in terms of the objectives of the FOI Act, through consideration and release of very small portions of documents which are exempt virtually in full.

- Some applicants' requests absorb, over time, a far greater proportion of the Department's resources for FOI work than other applicants. One example for DFAT has been an applicant who has lodged multiple requests in sequence, to support a particular project. It is estimated that the cost to the community of processing these requests has been in the realm of \$50000.

It is hard to make out the value-for-money proposition for such scenarios. Applicants are able to lodge requests without limit, and absorb Government resources without limit, in order to further particular projects. In such circumstances the Government's FOI resources can effectively become a subsidy to facilitate pursuit of a particular project.

The review of the FOI Act could consider how the Act might be structured to facilitate the making of FOI requests which bring public benefit to Australia, and to discourage (but not eliminate the right to) the making of FOI requests which bring little or no public benefit to Australia. Arising from the observations above, regarding the impact of reforms, DFAT will put forward some particular suggestions for the review to consider, under item (g) of the review, below.

Connection with the Archives Act 1983

The *Freedom of Information (FOI) Amendment (Reform) Act 2010* amended the *Archives Act 1983*, bringing forward the 'open access period' for most Commonwealth records from 30 years to 20 years (phased in over ten years from 1 January 2011).

The demand for public access to DFAT records in ‘open access period’ through the National Archives of Australia (NAA) has been growing consistently. In 2011-2012 there was a substantial increase in the number of records referred to DFAT by the NAA for advice on whether any records should be exempt from release.

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

DFAT submits that it is timely to consider the effectiveness of the structures in place in relation to the Office of the Australian Information Commissioner (OAIC). The review could consider closely whether the OAIC has been assigned too many functions, as well as whether some of those functions are incompatible with each other and whether others have emerged as excessively difficult to realise in practice.

DFAT submits that it is apparent that a large number of functions have been given to the OAIC to fulfil under the 2010 reforms. Oversight and involvement with Government-wide FOI activity at a granular level is combined with leading consultation on information policy matters generally across Government. This submission below suggests some reform ideas which would remove some of the demands on the OAIC in terms of the fine detail of managing/overseeing FOI requests. DFAT submits that the OAIC information policy functions are generally filling genuine policy gaps for Government and – provided they are conducted in close consultation with the agencies which are to be affected by any proposed changes and rigorously considered from a value-for-money perspective – are useful investments. DFAT suggests therefore that, if the review is inclined to consider ways to reduce the number of functions assigned to the OAIC, the best place to seek this streamlining is through refining the close oversight of day-to-day agency FOI activity.

DFAT further submits that the OAIC has been given a range of functions whose compatibility is questionable. At a general level, DFAT observes that the OAIC has been given a mixture of adjudicative and advocacy roles in relation to FOI – in effect, combining the roles of ‘judge’ and ‘barrister’ into a single entity. Although this is not unique, DFAT submits that it nevertheless creates particular challenges in the context of FOI.

The difficult combination of advocacy and adjudication roles for the OAIC is clearest in the context of reviews by the OAIC of individual FOI decisions made by agencies. On one hand, the OAIC advocates for the greatest possible release of Government information. On the other, it is tasked in individual reviews with determining whether a particular release by an agency was in compliance with the FOI Act, which is an adjudicative deliberation. The review could consider whether there is a perceived, if not actual, conflict between attempting simultaneously to fulfil these two functions. It is difficult to see how an agency could be confident that the decision taken under review by the OAIC is the best legal reading of the FOI Act, in a context where the same body is responsible for urging for maximum possible release of information.

Similar to the above, DFAT submits that the OAIC advocacy role – attempting to inculcate a culture of maximum possible release of Government information – fills a genuine gap within Government. The adjudicative roles of the OAIC are therefore the area in which the review might best explore streamlining, given that adjudication in

relation to FOI is already a responsibility of agencies (through primary and internal review decisions) and courts. This theme is explored further under (c) below.

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

This review of the FOI Act could closely consider changes to the costly new two-tier system of merits review of decisions. The backlog of review decisions is an issue which deserves attention, but a greater consideration could be whether the concept of an intermediate level of merits review between the agency and the AAT has proven to be workable in practice.

The central issue in this regard is whether it is possible to make swift, fair, thorough decisions as to the appropriate use of FOI exemptions by an agency, when the subject matter is unfamiliar to the reviewer and there are no strong protections in place as regards the evidence tendered by the parties to the review.

DFAT submits that it may be possible to achieve the above in relation to assessing the use by agencies of certain exemptions under the FOI Act. For example, specific decisions under s47F (privacy) are usually able to be made and reviewed on the basis of a general understanding of privacy principles.

On the other hand, DFAT submits it appears less possible to make swift, fair, thorough decisions in relation to assessing the use of many other exemptions under the FOI Act. Take as an example the s33(a)(iii) (international relations) exemption. Jurisprudence and guidelines have substantiated ideas around the *types* of damage which qualify for exemption under s33(a)(iii) – for example, if a particular revelation would have the effect of reducing the quality or quantity of information provided to the Australian Government in future, this is a type of harm which warrants an exemption being made. But the fundamental question when reviewing the use of the exemption is whether or not the release of the exempt material would indeed cause damage to the international relations of the Commonwealth.

The only way that such a judgment can be made is to have an intimate knowledge of the details of Australia's current relationship with the foreign government or organisation in question. Within DFAT, senior members of the organisation with extensive experience in considering the particular international relations which might be affected are called on to form judgments about what material the s33(a)(iii) exemption does and does not apply to.

In the context of a merits review of an application of the s33(a)(iii) exemption, the reviewer is required to come to a judgment about whether or not particular revelations would or would not damage international relations. Without numerous years working on the specific international relationship in question, the only way to form this judgment is by gathering evidence, predominantly by calling on the specific expertise within the original agency.

To gather full evidence on a matter such as this will be essentially as time-consuming as it would be in a setting such as the AAT. Conversely, to any extent that the evidence gathered is not full, this threatens the validity of the findings. In the OAIC

review context, this is coupled with a lack of protection regarding the use by the other party of the evidence gathered and submitted to the reviewer, which itself constrains the evidence which can be provided.

DFAT submits that this review of the FOI Act could consider one of two reforms to the current OAIC merits review process. Either (i) limit the scope of merits review to certain exemptions and charges issues, which can be judged on the basis of little or no evidence supplied by the agency, and allow other exemptions to be reviewed through the AAT or (ii) remove the merits review function altogether and use a system where the AAT, operating in an appropriate legal and evidentiary environment, is the next stage of appeal following internal review 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.

While the principle of a public interest test for conditional exemptions is not in itself problematic, its realisation in the current FOI Act causes significant confusion and can lead to a perception that agencies are in certain instances required to release material which nevertheless harms the public interest.

DFAT submits that it remains vital to protect certain information from release and that it goes against the public interest to release such information. While the notion of conditional exemptions supplemented by public interest tests appears workable, many fine details could be clarified through the reviewed Act. For example, under s47F, the fact that protection of privacy itself is a legitimate public interest consideration against release could be factored in explicitly to consideration by decision-makers. The current Act might seem to suggest that the public interest is neutral as to whether privacy is violated and that only if there are public interest factors against release in the particular case which are *additional* to the violation of privacy may information be withheld under s47F.

This issue is particularly so in the case of the deliberative documents exemption, and DFAT submits that a consideration such as the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government (such as other governments) could be usefully made explicit as a presumed public interest factor against release.

In each case of a conditional exemption, DFAT submits that if there is an inherent public interest factor against release contained within the terms of that conditional exemption (such as protection of privacy), this could be spelled out in the Act and could establish the bar which public interest factors in favour of release must clear before release is appropriate.

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

DFAT submits that no additional agencies should be brought under the scope of the FOI Act. In respect of agencies which are exempt from the operation of the FOI Act in respect of certain types of documents they hold, DFAT submits that these partial exemptions are also appropriate.

(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

DFAT made a detailed submission to the fees and charges review, available at: http://www.oaic.gov.au/news/consultations.html#charges_review. DFAT's submissions to that review remain current, and are supplemented by the below.

In general terms, DFAT submits that the fees and charges regime is a vital part of the overall FOI structure, ensuring that personal applicants requesting their own information are exempt from paying fees and charges, at the same time as ensuring that other applicants pay charges to make the FOI framework sustainable and appropriately balanced in public policy terms. Significant time and cost to the Australian community is attributable to processing freedom of information requests. The fees and charges regime should be designed to ensure that the Australian community recoups a fair proportion of the costs of processing non-personal FOI requests. On the other hand, allowing a broad discretion to reduce or waive charges in appropriate circumstances ensures that these fees and charges can be adjusted downwards to suit the specific situation.

DFAT submits that continuation of existing components of the charges regime – in particular, the maintenance of the 1986 hourly rates for charges without any indexation – appears to be eroding gradually the capacity of the Australian community to recoup appropriate charges from FOI requests which are for information other than personal information of the applicant. At the current level of charges, even if the maximum charges are levied for a request, the community covers approximately 80% of the actual cost of processing an FOI request.

DFAT supports many of the recommendations made by the Information Commissioner in response to the review of fees and charges.^v Of particular note, DFAT considers the proposal to introduce a discretionary, non-reviewable ceiling of 40 hours processing time for FOI requests to be an essential reform. Advantages of this reform include ensuring that FOI requests are targeted and do not absorb excessive community resources. The reform will encourage high levels of communication between applicants and agencies to refine FOI requests to a manageable size. The reform will also go some way to preventing individuals from being able to take up an unacceptably large portion of community resources for the processing of requests relating to their particular interests. DFAT also considers the proposal to link charges under the FOI Act to inflation is an essential reform.

A further reform which DFAT urges this review to consider is to make clear the positive obligation on agencies to charge for the processing of (non-personal) FOI requests. Agencies could be compelled to charge for the processing of non-personal FOI requests unless an active decision is taken, with regard to the merits of a particular case, to reduce or waive those charges.

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

DFAT submits some reform ideas in terms of minimising the regulatory and administrative burden which the reviewers may wish to consider. Some have also been outlined above – the below reform ideas should be read in conjunction with the other ideas and proposals in the rest of this submission.

Significant reform ideas

(i) **Reform of timeframes provisions (s15AA, s15AB, s15AC, s54D).**

At present, the need to apply formally for extensions of time each time a 30 day period passes creates significant administrative burden for agencies and the OAIC. Usually, agencies are aware at the outset of a request whether it is likely to require extensions of time due to size and complexity, and yet there is a requirement to go through numerous processes to seek those extensions from applicants, apply for extensions through the OAIC and have those applications assessed by the OAIC.

A less burdensome system could be for agencies to provide a ‘quote’ regarding the time which it is expected that it will take to finalise an FOI matter, in much the same way as occurs currently for charges estimates. The time quote could have an upper limit of, say, 120 days.^{vi} The basis for the quote would need to be notified to the applicant by the agency (for example, the agency could indicate that a matter is complex or voluminous, that it will require extensive consultation etc).

This quote could be contested by applicants. Additionally, applicants could elect to refine the scope of their requests to reduce the applicable timeframe.

Only when agencies are approaching a point of going over time in respect of their own quote should they apply for further extensions of time, and these applications for extension should be exceptional and assessed rigorously.

A further beneficial effect of this system would be to create more transparency for applicants, giving them a better basis to judge whether to go ahead with their applications in their existing form, or seek ways to refine them to reduce the anticipated timeframe for completion.

Such a reform would work well in combination with the OAIC proposal (which DFAT supports) to allow agencies the discretion to refuse any request involving over 40 hours total processing time.

(ii) **Reinforcing FOI as the information-gathering method to be pursued once other channels of access are exhausted**

One reform which has worked well in the current FOI Act is the reform in relation to FOI access to personnel records by staff of an agency (s15A). Only once the privileged routes of access to agency documents enjoyed by staff of an agency under established procedures have been utilised may they apply for documents under FOI, and only then if they are unsatisfied with the access provided under established agency procedures.

The review could consider a similar reform for applicants who have other particular routes of access to agency information than FOI. As mentioned at the outset of this submission, a number of applicants already have available to them special routes of access to unpublished Government information. The review could consider an expansion of the thinking behind s15A of the current Act, to ensure applicants exhaust their other means of accessing Government information prior to using the more costly FOI route for access.

(iii)Reform of charges/public interest reduction components (s29)

The objects of the Act focus on promoting better-informed decision-making and increasing public consideration of the Government's activities. While not in any way impeding the legal right of access to Government documents, the review may wish to consider ways to revise the system to create a greater incentive for applicants to make applications which bring the greatest public benefit in terms of the objects of the Act.

The structures of the Act already do this to some extent, by allowing for reductions of charges on public interest grounds. However, the review could consider amplifying this effect by increasing the nominal charges associated with making an FOI request for 'non-personal' information requests, while simultaneously increasing the capacity to reduce applicable charges for FOI requests which have a high public interest value in terms of the objects of the Act.

While this would not prevent the making of non-personal FOI requests which bring little public benefit in terms of the objects of the Act, it could be expected to shift the relative balance towards the making of FOI requests which most promote the objects of the Act.

(iv)Limit on request numbers

The review could consider introducing a limit on the number of FOI requests for non-personal information which can be made by an individual to a given agency within a financial year. With the present arrangement, certain applicants, while not vexatious, manage to absorb an inordinate amount of the community-funded resources available for FOI matters. Linking into (iii), above, the limit on the number to be made by an individual could be relaxed in circumstances where an FOI application appears likely to bring substantial public benefit in terms of the objects of the Act.

Minor reforms

- (v) The review could consider using ‘working days’ rather than ‘calendar days’ as the basis for the calculation of timeframes under the Act. The current system creates anomalies around significant public holiday periods, such as at the end of the year.
- (vi) The review could consider creating a short period once a request is first lodged in which agencies can clarify with applicants the scope of their requests. At the moment, agencies are significantly disadvantaged when applicants lodge requests which they then wish to refine upon closer discussion with the agency, because statutory time commences immediately. This reform would provide active encouragement for agencies to contact applicants to discuss their requests in more detail, ensuring a better outcome for both applicant and agency through clarifying more precisely the request.
- (vii) The review could consider implementing reform to specify that there is no right of applicants to make anonymous FOI applications. In the case of non-personal requests, the capacity to make anonymous applications renders the vexatious applicant provisions redundant in practice. Vexatious applicant provisions are an important balancing component of the Act, to ensure that particular applicants are not able to absorb an unreasonable and excessive amount of the Government’s FOI resources.
- (viii) The review could consider reintroducing a requirement that applicants have a connection to Australia – through residency, citizenship or Australian postal address for example. It is hard to justify in public policy terms the use of significant Australian community resources to assist overseas individuals with no connection to Australia, with projects of private interest.
- (ix) Under (c) above, DFAT submitted two reform ideas in relation to the merits review processes run by the OAIC. However, should such reforms not be pursued, DFAT submits that it is at least necessary for the OAIC to develop guidelines regarding the conduct of merits reviews. Amongst other matters, these guidelines should inform agencies and applicants regarding how their submissions in the context of merits reviews will be considered and taken into account. The guidelines could specify that if agency submissions are rejected by the OAIC (for example under s55U of the current Act), reasons for this should be given by the OAIC. Guidelines could also ensure that the process of conducting reviews more generally is transparent for both agency and applicant.
- (x) It occasionally occurs that FOI requesters fail to pay the final charges owing on their requests, simply allowing them to lapse. In such circumstances, these requesters then owe a debt to the Commonwealth. In addition to the processes already in place for such circumstances, a minor reform to the FOI Act could be introduced to specify that an agency may not process further FOI requests for an individual who has an outstanding debt.
- (xi) Should the major reform idea with regard to timeframes not be pursued (see (i), above), a minor reform DFAT suggests is that where a matter requires consultation with the Cabinet Secretariat, agencies should be entitled to an automatic 30-day extension to the timeframe.

ⁱ <http://data.gov.au/dataset/freedom-of-information-requests-estimated-costs-and-charges-collected-1982-83-to-2011-12/>

ⁱⁱ This data can be established from the information reported in http://www.oaic.gov.au/publications/reports/annual-report_11-12/chapter9.html

ⁱⁱⁱ Issues Paper 2: Understanding the Value of Public Sector Information in Australia, at: http://www.oaic.gov.au/publications/papers/issues_paper2_understanding_value_public_sector_information_in_australia.html

^{iv} “Enabling tomorrow’s open government” – speech by Professor John McMillan, Australian Information Commissioner, available at: http://www.oaic.gov.au/news/speeches/john_mcmillan/enabling_tomorrows_open_government_august_2012.html

^v Review of Charges under the Freedom of Information Act, Report to the Attorney-General, Professor John McMillan, available at:

http://www.oaic.gov.au/publications/reports/2012_Charges_review_report_FINAL.html

^{vi} 120 days is selected as a possibility owing to its connection with the timeframes and extensions available under the current FOI Act. Standard statutory timeframes under the Act give 30 days to an agency for an FOI, which can be extended by 30 days by applicant agreement (s15AA), 30 days more if voluminous/complex (s15AB) and a further 30 days for consultation with third parties (e.g. s27). Though there are other extension provisions, such as s15AC, and though it is possible to apply for multiple s15AB extensions, it is generally the case that a large, complex FOI requiring consultation would attract a total timeframe of around 120 days, with extensions.