



Richard Glenn  
Assistant Secretary  
Business and Information Law Branch  
Attorney General's Department  
3-5 National Circuit  
Barton ACT 2603

51 Allara Street, Canberra City ACT 2601  
GPO Box 1564, Canberra ACT 2601  
Phone (02) 6276 1000  
[www.ret.gov.au](http://www.ret.gov.au)

ABN 46 252 861 927

Dear Mr Glenn

***RE: Review of the Freedom of Information Act 1982 (Cth) (FOI Act) and the Australian Information Commissioner Act 2010 (Cth).***

The Department makes the following submission in response to the terms of reference:

- a. The impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes of decisions.***

#### **The 2009 reforms**

The reforms in 2009 had no real effect on this portfolio. Conclusive certificates had not been issued in this Department or in the Department of Industry, Tourism and Resources, this Department's predecessor.

#### **The 2010 reforms**

The 2010 reforms have had a number of effects, some welcome and others causing a serious diversion of Departmental resources away from core work.

The welcome reforms include introduction of a no-fee application process which has enabled applicants to apply for documents by email and freed Departmental staff from the inconvenience of banking cheques of little (\$30) value. A related reform has been the introduction of the free period in relation to the charging regime. The provision of five free hours has meant that the Department has not had to levy and process low charge amounts (under \$100) since the reforms.

The regularisation of extensions of time through obtaining the applicant's agreement or by way of application to the Office of the Australian Information Commissioner (OAIC) has been welcome. The 30-day time limit is extremely arbitrary in that it applies to all applications, whether the request is for a single document or for a broad range of documents which can be great in volume. Previously the Department often secured informal agreement

from the applicant in cases of voluminous requests and exceeded the time limit with impunity. However, the new process is far superior.

The Information Publication Scheme and the associated requirement for an Agency Plan is a desirable initiative which assists the public to locate publicly available material. Likewise, the introduction of the disclosure log has been welcome in that it facilitates dissemination of information efficiently and effectively to a wide audience with little cost to the Department. It also forestalls repeated requests to the Department by different applicants all of whom are seeking the same material.

Less welcome has been the upsurge in applications for complex and sensitive policy material from politicians, journalists, non-profit organisations, students and lawyers. The reforms in 2010 raised the profile of freedom of information (FOI) in the community which encouraged its use by a wider range of applicants and this was assisted by the simplification and no-cost nature of the application process. We found journalists in particular, were making numerous requests on a single day. We have had students using the Department to conduct research for them. We have had lawyers using FOI as a cheaper and quicker, possibly more liberal, process than court ordered discovery or subpoenas. This has combined to require more work and effort by staff at all levels in this quite small (350 staff) Department. Exacerbating this has been the Department's loss of 20% of its staff in 2012 as a result of government stringency. The Department is now unable to accept substantial FOI requests and we utilise section 24AA of the FOI Act to avoid actioning them.

It might be different if supplementation were available to support the FOI effort. However, there is no supplementation. The FOI process, the FOI Act and the OAIC FOI Guidelines are complex and absorb time in correctly processing FOI applications. The FOI charges regime also goes nowhere near paying for the administrative costs in processing FOI requests. Indeed, section 29 of the FOI Act is so complex and demanding in its requirements that it is scarcely worth imposing charges because of the consequent administration that follows.

### **Processing time limit**

The Department does not believe that a flat 30-day time limit is appropriate in all cases as, in particular, it does not take into account the need for agencies to consult with other federal government agencies in cases where there is no automatic extension to the 30-day limit. It also takes no account of how complex or voluminous a request may be. As noted above, it is possible to obtain an extension of time or successive extensions. However, this involves a bureaucratic process which takes time better spent on actioning the request. The Department would see a 45-day period as preferable to the 30-day period if it is necessary to hold to flat time limits. Best of all would be a system permitting a respondent to approach the OAIC within the first two weeks of receiving a request to negotiate a response period appropriate to the specific request.

## **Reforms to the public interest test**

The Department has not found that the introduction of conditional exemptions and the reforms affecting the public interest tests have resulted in applicants receiving significantly less information from the Department. Our experience has been that public interest considerations set out in the Guidelines issued under section 93A of the OAIC are readily available where a conditional exemption needs to be relied on.

### ***b. The effectiveness of the Office of the Australian Commissioner;***

The OAIC has been effective in dealing with requests for extensions of time and in providing guidance on issues when the Guidelines issued under section 93A of the FOI Act. The Guidelines issued by the OAIC could be improved in providing further guidance on charges, and the considerations that need to be taken into account in applying the public interest test for waiver of fees and charges. The Department appreciates the OAIC's quarterly half-day information sessions at the National Library as they are invariably interesting and provide excellent opportunities for informal communication between staff from the Department and from the OAIC.

The Department believes that the OAIC is doing a remarkable job with limited resources.

### ***c. The effectiveness of the new two-tier system of merits review of decisions to review access to documents and related matters;***

This Department has never had much demand from applicants for internal review. No applicant has ever lodged an application for Administrative Appeals Tribunal (AAT) review for one of our FOI decisions. Therefore, in the Department's experience a two-tier system is a new phenomenon.

There is an obvious inconsistency in the arrangements where the OAIC has no time limit in dealing with a review application whereas the Department is allowed only 30 days for an internal review. A clear problem for the OAIC has been handling its reviews within a reasonable time. This appears attributable to resource constraints, an inherently cumbersome set of review procedures and processes provided for in the FOI Act and a limited number of senior officers in the OAIC with the powers to review cases. If OAIC review is to be taken seriously, these constraints need to be addressed.

### ***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;***

In this Department's experience in review matters, there appears a risk that the OAIC intends to adopt a less protective approach to Cabinet documents than the AAT. Traditionally, it has been sufficient for the Department of the Prime Minister and Cabinet (PM&C) to determine the status of any apparent Cabinet document and for that

determination to dictate how the document is treated in the FOI process. The OAIC appears prepared to regard Cabinet confidentiality as of less importance as time passes. This is totally at odds with traditional attitudes to Cabinet material in public administration where the 20-year rule applies.

The same is true of the international relations and relations with the states exemptions. However, these have always been regarded as less sacrosanct than the Cabinet exemption.

*ii. the necessity for the government to contribute to obtain frank and fearless advice from agencies and from third parties who deal with government.*

It is of course vitally important that government receives frank and fearless advice from a professional and apolitical public service. The Department is aware that the citation of this consideration as a public interest factor has always been a controversial matter in FOI administration. Nevertheless, it remains a ground that can be relied on in balancing whether the public interest is better served by disclosure or by exemption of material from disclosure. In the Department's view, this is the appropriate treatment of this public interest and should be available. However, there should be something in the nature of the advice or the particular position of the adviser that makes disclosure unpalatable if an exemption is to apply.

*e. The appropriateness of the range of agencies covered either in part or in whole by the FOI Act;*

The Department has no comment to make on this term of reference.

*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*

**The recommendations of the current charging regime**

The Department supports an Administrative Access Scheme as it offers a more relaxed and cheaper alternative to the current FOI process where it can be utilised.

The Department supports the proposal for a \$50 application fee if a person makes a FOI request without first applying under an Administrative Access Scheme that has been notified on an agency's website.

The Department supports the introduction of a 40 hour ceiling. The Department sees 40 hours as still overly burdensome but is realistic and accepts that any lesser figure would be very difficult to sell to the community and to Parliament.

The Department also supports reform of the provisions regarding the reduction in charges where the agency fails to notify the applicant of a decision within the time period. A reduction in fees as opposed to a complete waiver in charges recognises the work involved in processing FOI requests, especially when requests are complex and involve multiple third

consultations. The phased reduction in fees depending on the lateness of the decision is supported.

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

This has been addressed in earlier remarks.

Thank you for the opportunity to make a submission.

Yours sincerely

*M Sassella*  $\frac{13}{12}$

Michael Sassella

Acting Chief Lawyer

*2012*