

**Review of the *Freedom of Information Act 1982* and the  
*Australian Information Commissioner Act 2010***

**Department of Health and Ageing Submission**

The FOI reforms of 2009 and 2010 have clearly succeeded in improving the administration of FOI by government agencies, in increasing transparency of government information and, by creating the Office of the Australian Information Commissioner, producing a more strategic approach to information management in government generally.

The creation of the OAIC in particular has been of great assistance to the Department, particularly in providing clarification of the obligations imposed by the FOI Act and of what is required by way of compliance, and in helping to ensure quality and consistency in FOI decision making.

The Department strongly supports the rights of individuals to access their own personal information in an economical and effective way, and seeks to operationalize this approach in its day to day dealings with individuals, both those seeking access under FOI and those seeking information by other means.

However, while the reforms have been productive and useful in most respects, the legislation still creates areas of difficulty for the Department. This submission will focus largely on those difficulties, rather than on the improvements which have been effected by the reforms.

***(a) The impact of the reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system;***

The reforms have not had a substantial impact on the Department, though there was some increase in the number of FOI applications received. The Department has previously expressed the view (which has not changed) that the resources utilised in processing FOI requests are not adequately compensated by recoverable charges, leading to substantial cross-subsidisation of FOI work by funding given to the Department for other activities, and in effect to subsidisation of FOI applications by the Australian taxpayer. A copy of the Department's submission to the AIC's review of FOI fees and charges is attached (**Attachment A**). Of particular importance is the need to raise FOI fees and charges so that they more closely reflect the real costs to the Commonwealth and the taxpayer.

The Information Publication Scheme (IPS) that commenced on 1 May 2011 has required the application of additional resources and has therefore increased ongoing costs to the Department which has not been the subject of additional funding. The IPS has two components: the publication of documents released in response to FOI requests and the publication of "operational information" about the Department. The requirement to publish documents released in response to FOI requests is one of the reforms but the work in publishing released documents has not proved to be onerous.

Dealing with the Office of the Australian Information Commissioner (**OAIC**) in respect of applications for review has proven to be more resource intensive than has been the case when dealing with internal review applications. Applicants are tending to seek OAIC review rather than internal review resulting in additional resources being required to those formerly required for internal review. Internal review, being purely internal, involves no additional stakeholders and is conducted relatively simply by an officer of the Department reviewing a decision which another officer has made. OAIC review is external, involving the OAIC both as a new stakeholder, and as the the regulator, and it inevitably involves some communication, discussion and requests for information between the Department and the OAIC. The processes contained in the new Division 2 of Part VIIB (“Information Commissioner investigations”) require additional formal steps (preliminary inquiries followed by a formal investigation process and consideration of scope for the agency to make a “fresh” decision if further material can be released by so doing).

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

In the Department’s experience the OAIC has been helpful. In particular the guidelines issued under section 93A contain useful practical advice to which we constantly refer. Dealings with OAIC staff on a day-to-day basis in relation to applications for review have also been helpful: staff are approachable and ready to assist. That said, there is a need for the OAIC and agencies to be clear that the OAIC’s role is that of regulator and a source of practical advice and not to allow function creep towards OAIC’s guidance to be taken as definitive legal advice.

In the Department’s experience, there have been delays in some of the processes when dealing with the OAIC which seem to be attributable to resource issues within that Office. The effectiveness of the OAIC would be enhanced by the provision of additional funding.

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

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

- (d) The reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account***
- (i) the requirements to ensure the legitimate protection of sensitive government documents including Cabinet documents; and***
  - (ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government.***

The Department considers it appropriate that Cabinet documents continue to be exempt as a class of documents without there being a public interest element.

The Department is of the view that maintaining a level of confidentiality is an essential component when communicating with Ministers, without which the provision of frank and fearless advice is at risk.

- There is clearly a need to strike a balance between facilitating the provision of advice to Ministers which is independent and ‘frank and fearless’, with the public interest in the public being informed about government decision-making and policy processes. Increased access to policy advice to Ministers creates the risk that the advice is constrained having regard to the real possibility that the advice may become public under FOI, and that parts of the advice may be used unfairly or out of context to criticise the government or the Department. For example, policy advice should usually present every feasible option to the government for consideration. However, it will often be the case that presenting one controversial alternative as an option will lead to criticism of the government merely because the option is under consideration. Striking the right balance between advice to government which will (on the one hand) risk embarrassing the government, and advice (on the other hand) which is constrained or bland can be difficult, and the right balance will not always be found.
- There is thus a real risk that views expressed in advice to government which may become public under an FOI process may tend to avoid saying anything which might be seized upon by the media or political opponents to unfairly criticise the government, ministers or public servants. This cannot be in the public interest.

Accordingly, the Department recommends that a similar class exemption should be added to the FOI Act to include all briefing material provided to Ministers on any matter of state. The Department notes in this context that section 27 of the *Tasmanian Right to Information Act 2009* (the Tasmanian Act) contains such an exemption provision (copy is **Attachment B**). It should be added to the Commonwealth Act without a public interest test.

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

The Department has no comment 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*

As stated in the attachment, the Department supports consistency in the charging of fees. There should be a single fee, indexed for CPI movements. Imposing fees would better even out the balance between the public’s right of access and the provision of resources to the Department to accommodate this right.

The point has been made above at paragraph (a) that existing charges are quite inadequate to cover the cost of processing FOI requests.

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

The regulatory and administrative burden that the Department identifies is one in which there is often a very short period of time to deal with at times complex requests with increasingly limited resources. Depending upon size and complexity, some requests simply cannot be dealt with within 30 days. The Department recognises that there is scope for negotiating extension and deadlines (although this can only be done once in respect of each request) and negotiating with applicants about potential workload issues under section 24AB.

Against this background, the Department considers that these practical administrative matters can be ameliorated by making the following changes:

- Scope for the OAIC to determine that an applicant is vexatious, for instance where it is known that documents sought are alternatively available to the applicant under relevant civil court proceedings.
- Given that the first 5 hours of decision making are free, and the idea canvassed (which the Department supports) to treat applications requiring more than 40 hours work as substantial and unreasonable diversion of resources, there would be a need to have a ceiling on the number of applications an individual or organisation may make within a 12 month period, to avoid splitting of applications by applicants to take advantage of these rules.

The Department also supports the following suggestions in other agencies' submissions to the Review:

- Changing 30 calendar days to 30 working days (Department of Education, Employment and Workplace Relations (DEEWR) submission, paragraph 44; Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) submission, page 1).
- A statutory period of perhaps five or seven days prior to the commencement of processing in which the applicant and the agency can negotiate clarification of request (as has been suggested publicly by the Australian Information Commissioner).
- Certainty as to the quantification of the resources required to constitute an unreasonable diversion for an agency in determining a reason for practical refusal eg the 40 hours canvassed by the Australian Information Commissioner in his 2012 review of fees and charges and at paragraph 25 of his submission to this Review. (The Department notes that this change was also supported by the National Health and Medical Research Council (NHMRC) at paragraph (f) and DEEWR at paragraph 30 of their submissions.)
- Indexation of charges to link them with consumer price index movements (DEEWR submission at paragraph 34).
- Extension of the scope of section 55Z so that it will include protection from liability for material submitted in the course of the Australian Information Commissioner's preliminary inquiries (DEEWR submission paragraph 10).

- Introduction of application fees of \$100 for both internal review and OAIC review applications (FHACCSIA submission final paragraph).
- Creation by the OAIC of a database containing reference material, including frequently asked questions (FAQs) (Department of Agriculture, Fisheries and Forestry submission at page 4, third paragraph).
- Removal of the public interest component in the personal information exemption (Department of Immigration and Citizenship submission page 8 at paragraph 3).
- Exemption from the operation of the FOI Act of documents in the possession of the OAIC where the OAIC has the documents only for the purpose of conducting an IC review of a decision made by another agency. (DEEWR submission paragraph 17).

**Attachment B****RIGHT TO INFORMATION ACT 2009 – Tasmania****27. Internal briefing information of a Minister**

(1) Information is exempt information if it consists of –

(a) an opinion, advice or a recommendation prepared by an officer of a public authority or a Minister; or

(b) a record of consultations or deliberations between officers of public authorities and Ministers –

in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.

(2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.

(3) Subsection (1) does not include information solely because it –

(a) was submitted to a Minister for the purposes of a briefing; or

(b) is proposed to be submitted to a Minister for the purposes of a briefing –

if the information was not brought into existence for submission to a Minister for the purposes of a briefing.

(4) Subsection (1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.

(5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.