Defence Submission

Paper on the review of *The Freedom of Information Act 1982* and the *Australian Information Commissioner ACT 2010*

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Defence submission to the Hawke review of the operation of the FOI Act

1. Defence welcomes the opportunity to comment on the Terms of Reference of the review. At the outset, Defence wishes to express its appreciation of the excellent job done by the Office of the Australian Information Commissioner (OAIC) since the introduction of the revised Act in November 2010. We particularly appreciate the consultative nature of the relationship between the Office and Government agencies.

Part 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.

2. Since the commencement of the revised FOI Act, Defence has experienced a large increase in the number of FOI applications and reviews, as indicated in the statistics at Enclosure 1. Based on current 2012-13 figures, applications have doubled since the introduction of the revised Act and reviews have more than doubled.

3. This has resulted in an increase of 2 FTE to the FOI section within the department and a transfer of an EL1 and an APS 6 to deal with the influx of reviews.

4. In addition, Defence has dedicated an additional four FTE to manage the Information Publication Scheme. Defence welcomes the introduction of the scheme but notes that the resource increase has been absorbed internally.

5. Prior to the revised Act, Defence allowed for anyone at EL2/06 military equivalent or above level to be a FOI decision maker. In theory, this gave Defence 2,886 potential decision makers. Defence recognised that the revised Act meant that it would need to adequately train decision makers to improve the quality, consistency and impartiality of FOI decision making. To address this, Defence introduced an program to have a small number of accredited FOI decision makers in each of its Groups and Services, involving around 50 people.

6. Accredited FOI decision makers are required to complete a two-day training course and successfully pass an examination upon completion of the course. Defence believes that the introduction of the FOI accredited decision-makers program has improved the quality, impartiality and consistency of decision making and saved on FOI training costs.

7. To increase impartiality, Defence has also centralised internal reviews. The Assistant Secretary Freedom of Information and Information Management conducts all internal reviews. Defence notes that the number of internal review decisions that are subject to external appeal has reduced.

Part B: The effectiveness of the Office of the Australian Information Commissioner.

8. As stated in the introduction, Defence greatly appreciates the consultative and inclusive approach taken by the OAIC.

9. Defence has found that the guidelines issued, under section 93A of the FOI Act, by the OAIC has greatly assisted personnel within Defence in understanding and complying with our obligations under the FOI Act.

10. The OAIC has played an important role in the investigation and resolution of complaints. Their impartiality and objectiveness has defused many potentially difficult situations.

Part C: The effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters.

13. The two-tier system of merits review has added an extra step to an applicant's right of review which, we note, is free of charge. Defence is of the view that external review applications without a charge have contributed to an unjustified increase in the number of external reviews. In short, applicants can seek external review simply because they can without any charge. The resource cost to Defence has been quite steep as noted in paragraph 3 above.

14. Defence fully supports applicants having the right to apply for an internal review without charge. The internal review process allows for both the applicant and the agency to identify contentions that can be addressed prior to any need for external review. Our statistics indicate that only a small percentage of internal reviews proceed to external review.

15. Defence is of the view that an applicant should be required to seek internal review prior to seeking external review. Internal review should be free of charge but a charge should be made for external review. While we have no firm view on the amount that should be charged, we suggest that an amount of between $50 and $100 would be appropriate.

17. Defence is of the strong view that the current period of 30 calendar days for processing an internal review application and providing a decision on the outcome is insufficient. The Act requires that a fresh decision be made upon review. In many cases, the original FOI request might have had a number of extensions granted in respect of the complexity or the voluminous nature of the request. We think that it is unfair and an unnecessary impost on an agency to require it to make that fresh decision within 30 days. We would submit that the statutory period for internal review should be 30 *working* days and also allow for extensions of time with the applicant's agreement (refer to section 15AA of the FOI Act), as well as provisions for an extension of time to consult affected third parties (refer to sections 15(7), 26A, 26AA, 27 and 27A of the FOI Act).

Part D: The reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account:

(a) The requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and

18. To assist agencies in making informed public interest considerations on the release of Cabinet documents, we suggest that the 'FOI Guidance Notes', issued by the Department of the Prime Minister and Cabinet in July 2011, should be incorporated into the guidelines issued by the Information Commissioner.

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

19. The FOI Act has been in operation for 30 years and agencies have continued to operate in an environment that requires employees to communicate openly and honestly. Defence takes into account the exemptions in the FOI Act, the Information Commissioner's Guidelines and FOI Guidance Notes to protect government deliberative matters when exemption is warranted. We believe that the current protections are adequate.

Part E: The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act.

20. Defence supports the current range of agencies covered by the FOI Act.

Part 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.

21. Please refer to the attached paper at Enclosure 2 '*Defence Submission – Review of charges under the Freedom of Information Act 1982*', which contains Defence's views on FOI fees and charges. Some of the key issues in the Defence submission on fees and charges are set out below.

22. Defence found, through experience prior to the revised Act, that the actual costs associated with the receipt of an application fee exceeded the collection of that $30 application fee. We found that the abolition of the application fee contributed to administrative savings. We would not support the re-introduction of an application fee.

23. The FOI Act requires agencies to consider whether the giving of access to a document captured by a request is in the general public interest of a substantial section of the public (paragraph 29(5)(b) of the FOI Act) when deciding whether or not to reduce or not impose a charge. Yet the public interest test for waiver of charges is different from the public interest test in section11B. It is difficult for the public interest charge considerations to be fully balanced without actually reviewing the documents captured by a request. If an agency does review the documents and decides it is appropriate to waive, or reduce, the charges on public interest grounds then this pre-empts the actual FOI decision and implies that access to the documents must be in the public interest. Consideration needs to be given to removing the public interest test under paragraph 29(5)(b) of the FOI Act;

24. As stated in paragraph 15 above, Defence recommends that there should be an application fee for external review by the Information Commissioner, particularly where the applicant has chosen not to seek internal review.

25. Defence recommends that the FOI Charges Regulations need to be simplified with an hourly charge adjusted on a graduated tier structure in line with our submission at enclosure 2.

Part G: The desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

26. The following amendments to the FOI Act would assist agencies in mininising some of the administrative burdens and costs associated with processing requests.

Timeframe for notification of a decision

27. When the FOI Act first commenced on 1 December 1982, the compliance time for the administration of requests was 60 days. In 1983, the Act was amended to require the time for compliance with requests to be reduced progressively from 60 days to 30 days. Since that time, the *Electronic Transactions Act 1999* (Cth) ('ETA') has affected the operation of provisions in the FOI Act concerning communications with applicants and calculation of the passage of time. This has meant that agencies are taken to have received a request on the date/time it is received in the electronic system, which includes weekends and public holidays.

28. Section 15 of the FOI Act is a 'law of the Commonwealth' for the purposes of the ETA. The effect of section 9 of the ETA on section 15 of the FOI Act is that requests made under section 15 by way of an 'electronic communication', such as by e-mail, comply with the requirement in paragraph 15(2)(a) of the FOI Act that they 'be in writing'. An electronic communication is received when it enters an information system that has been designated by the recipient for making such a communication. For example, if an FOI applicant sends an email to an email address published by the FOI Directorate (such as FOI@defence.gov.au), the communication is deemed to have been received when it comes into the server hosting the e-mail system used by the FOI Directorate. Defence recommends that the reference to a 'day' as a calendar day in the FOI Act is amended to reflect a 'day' as a working day, which would exclude weekends, public holidays and stand down periods. The recommendation would also help alleviate the number of applications agencies make to the OAIC for extensions of time to deal with requests. In essence, Defence recommends that 30 calendar days be changed to 30 working days.

Requests may be refused in certain cases

29. Subsection 24(5) of the FOI Act, which was repealed on 1 November 2010, provided a discretion for a decision maker not to locate and identify relevant documents as part of the decision-making process, and not to identify and describe the documents in a section 26 statement of reasons. The purpose of the provision was to avoid unnecessary work where it was clear, as a matter of logic on the face of a request, that documents sought were exempt and there was no obligation to consider making deletions. Defence recommends that subsection 24(5) of the FOI Act is reintroduced to avoid unnecessary searches and obligations on agencies to provide edited copies of such documents.

Inclusion of new section to take into account documents released with security classifications

30. Defence suggests the FOI Act adopt the approach in section 59 of the Archives Act which states '*Where a record has become available for public access in accordance with this part [Miscellaneous], any security classification applicable to the record ceases to have effect for any purpose'*.

31. Our reason is that this would reduce the burden on agencies where section 33 exemptions are used extensively and thousands of pages are involved.

Section 12

32. We recommend that subsection 12(2) should be amended to include '*an agency or an official document of a Minister',* as contained in the FOI Act prior to the amendments. The current provision only applies to a document of a Norfolk Island agency, or an official document of a Norfolk Island Minister. We believe that this was an error in the revision of the Act.

Section 33

33. Requires amendment to reflect the extension provision under subsection 15(8), which allows for an additional 30 days to conduct consultation with a foreign entity. While 15(8) covers such extensions, it appears strange to us that this is not reflected under s33.

Section 49

34. Subsection 49(d) refers to 'paragraph 15(2)(d)'. There is no paragraph 15(2)(d) in the FOI Act, it was repealed as part of the amendments to the FOI Act.

35. And, finally, on that matter, we strongly recommend that the FOI Act should be written in plain English. We note that the Act has expanded more than five-fold in the November 2010 revision. The Act is user unfriendly and not very helpful both to applicants or practitioners.