

## Review of Freedom of Information legislation: Submission to the Hawke Review

### 1. Background

- Consistent with its service delivery focus the Department of Human Services (the department) receives a large volume of requests under the *Freedom of Information Act 1982* (FOI Act). In the 2010-2011 financial year the department received 4352 FOI requests. In the 2011-2012 financial years the department received 3791 requests.<sup>1</sup>
- Demand from applicants seeking access under FOI to their own personal information has continued to be strong over the last 2 financial years. The vast majority of FOI requests made to the department are from such applicants.
- Like many other agencies, since the 2010 reforms, the department has experienced a significant increase in the number of FOI requests for non-personal information. This has correspondingly increased the demands on the department's resources, as these requests tend to be more sensitive and complex.
- The department is committed to the objects of the FOI Act, that is to:
  - give the Australian community access to Government-held information;
  - increase public participation in Government processes to promote better-informed decision-making;
  - increase scrutiny, discussion, comment and review of the Government's activities; and
  - increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.<sup>2</sup>

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<sup>1</sup> Annual Report for the Office of the Australian Information Commissioner (OAIC) for the year ending 30 June 2012 (page 119).

<sup>2</sup> *Freedom of Information Act 1982* s 3(1) – (3)

- The department is committed to performing its functions and powers consistent with Parliament’s stated intention that the functions and powers given by the FOI 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.<sup>3</sup>
  
- In formulating this submission the department has been guided by the broad objects of the FOI Act and specifically, by the following key principles:
  - Access to government held information is a key mechanism for effective democracy. To ensure that the objects of the FOI Act can be met as efficiently and effectively as possible, it is desirable that the FOI Act provides as much certainty as possible regarding the respective rights and obligations of agencies and applicants.
  
  - The application of charges to the processing of FOI requests (for information other than personal information) is essential to ensure the efficient operation of the FOI system as it discourages abuse and reflects Parliament's view that it is appropriate that applicants contribute to the cost of processing FOI requests. This requires agencies to strike the appropriate balance between the right of access and the obligation for applicants to contribute to processing costs.
  
  - It is important that the legislative framework for FOI include adequate protections for third parties who may be affected by the release of information.

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<sup>3</sup> FOI Act s 3(4)

## **2. Effectiveness of the Office of the Australian Commissioner (OAIC)**

The OAIC has been instrumental in providing practical guidance to agencies on the operation of the FOI Act. This guidance has been especially useful in assisting agencies to navigate the FOI Act which contains a number of ambiguities and in some instances appears to give rise to unintended consequences in its operation<sup>4</sup>.

The guidelines issued by the OAIC under Section 93A of the FOI Act have proven to be an essential resource in assisting agencies. There are instances however where it may be useful for the OAIC to revisit those guidelines, where they appear to construe the Act more narrowly than is apparent from the language of the FOI Act.<sup>5</sup>

## **3. Effectiveness of the new two tier system of merits review of decisions to refuse access to documents and related matters**

### **Simplification of avenues for merits review**

There are currently three levels of merits review available under the FOI Act: Internal Review by the agency; IC review and AAT Review.

The department would support amendment of the FOI Act so that AAT review is only available on a point of law against IC review decisions. This would streamline the FOI process and would be more consistent with Parliament's stated intention that the functions and powers given by the FOI Act are to be performed and exercised promptly and at the lowest reasonable cost.

Further the department would support the introduction of any mechanism that would encourage applicants to seek internal review prior to seeking external review. In practice, giving the agency the opportunity to conduct an internal review allows a matter to be resolved more efficiently and expeditiously than it would be through the IC review process.

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<sup>4</sup> See for example the omission from the FOI Act of any provision requiring an applicant to take action within a specified time frame where a decision on charge has been made under section 29(4) of the FOI Act which has the effect of leaving an FOI request in abeyance in perpetuity.

<sup>5</sup> For example s 4(d) of the FOI Act that defines "document" as excluding "material maintained for reference purposes that is otherwise publicly available". The discussion of this definition at paragraph 3.4 of the OAIC Guidelines appears to confine this exclusion more narrowly to "library reference material".

### **Options for IC to deal with application for IC Review**

The availability of IC review to an applicant who has not sought internal review from the relevant agency has increased the administrative burden on the IC, but has not reduced the administrative burden on agencies since the IC review process requires significant input from the agency.

The department would support amendment of the FOI Act to enable the IC to deal with a request from an applicant for IC review by remitting a matter to an agency or minister for reconsideration.

This would be particularly useful in relation to deemed refusal decisions<sup>6</sup> and would reflect the fact that the agency is best placed to make the original access decision. Further whilst the OAIC encourages continual processing notwithstanding that a decision has been deemed, the proposed amendment would provide certainty to an agency (that has failed to make a decision within the statutory time frame, and has therefore been deemed to have made an access refusal decision) that the agency has the power to proceed with making a substantive decision notwithstanding the effect of the deeming provisions.

### **Protection of affected third parties**

The department is concerned that the FOI legislative framework should include adequate protections for third parties (especially those who are disadvantaged or vulnerable) who may be affected by the release of information.

In many cases, third parties who receive notification from an agency that a request has been made for documents that include their personal or business information have difficulty in responding to such notifications. In some cases we have seen applicants incurring expense seeking legal advice to assist them to respond to such notices.

The risk of the disclosure of personal or business information is of particular concern where it relates to third parties who are at a special disadvantage (due to language difficulties or intellectual disabilities, for example) and ill-equipped to make submissions to protect their interests. The department submits that consideration should be given to whether the existing third party review provisions are adequate to ensure that affected third parties are adequately protected (and if not, what mechanisms could be included to achieve this).

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<sup>6</sup> It is not clear that an agency has the power to vary or make a substituted decision under s 55G of the FOI Act where a decision has already been made by the agency and in the absence of the IC having decided to consult an IC review.

## **Extensions of time for primary decision making**

Section 15AA of the Act provides that an agency or Minister can extend the timeframe for dealing with a request by no more than 30 days if the applicant agrees in writing to the extension. There may be instances where an applicant is agreeable to a longer extension, and the parties should be able to agree to that longer extension if they wish to do so.

By providing the flexibility for parties to agree to a longer extension period agencies may be more willing to process requests that would otherwise be refused as a substantial and unreasonable diversion of resources, on the basis of the longer time frame for processing. Currently the only option for an agency that wishes to process a voluminous request in circumstances where the time period permitted under the FOI Act is insufficient, is for the agency to formally refuse the request (provided the grounds exist under s 24AA(1)(a)(i) – substantial and unreasonable diversion of agency from other operations).

The department's experience is that the current extension of time provisions are onerous and divert agency resources from the primary activity of processing FOI requests. The provisions also create a significant administrative burden for the OAIC. The department would support amendment of these provisions as follows:

- Parties should be able to agree to extensions of time for any period rather than being limited to a 30 day extension period; and
- Where the parties have reached agreement about an extension of time, the requirement to notify the OAIC of that agreement should be removed.

**4. The role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner’s review of the current charging regime.**

The department broadly supports the recommendations made in the Information Commissioner’s 2012 Review of Charges under the Freedom of Information Act 1982.

**Simultaneously paying and contending the charge**

Instances have arisen where applicants, upon receipt of a preliminary estimate of charge have paid the charge deposit and purported to simultaneously contend that the charge should be reduced or waived. The Act does not appear to preclude an applicant from doing this. In this situation agencies are required to continue to process the FOI request and concurrently prepare a charge decision (and, if requested, an internal review of the charge decision). There is no disincentive for an applicant to take this approach on every occasion and this has the potential to add significantly to the administrative burden for agencies. The department submits that Section 29 of the FOI Act should be amended to make it clear that an applicant can agree to pay a charge or contend the charge but cannot do both.

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

The department supports the recommendation of the IC that an agency should have the discretion to refuse to process a request for personal or non-personal information if the processing time would be more than 40 hours.

The department submits that this discretion should be available in addition to the existing practical refusal provisions under the Act.

**Clarification of ambiguities in the FOI Act**

There are ambiguities in the FOI Act regarding the provisions that deal with the right of access to documents. Amendment of the FOI Act to clarify these provisions would assist agencies to efficiently manage their FOI function.

Section 12 of the FOI Act provides that a person is not entitled to obtain access to certain categories of documents including “a document that is available for purchase by the public in accordance with arrangements made by an agency.”<sup>7</sup> Issues have arisen where this section has been invoked, about whether a document that is available for purchase by the public, *but where access is subject to certain conditions or limitations regarding use*, would fall within this section.

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<sup>7</sup> Section 12(1)(c) FOI Act

Further there is some confusion about whether the following actions by an agency are access refusal decisions and therefore reviewable by the IC, or whether they can only be the subject of a complaint to the IC:

- Refusal to process a request for access to documents, where the request does not comply with the requirements in Section 15(2) or (2A);
- Refusal to process a request made for material that is excluded from the definition of “document” in Section 4; and
- Refusal to process a request for access to documents, where there is no right of access to the documents sought (i.e. Documents under the Archives Act within the open access period; Documents open to public access as part of a public register or otherwise, in accordance with another enactment; Documents open to public access as part of a land titles register; Documents available for purchase by the public in accordance with arrangements made by the agency: (Section 12 FOI Act).

We trust that this submission will be of assistance in the conduct of the review.

We would be happy to provide any additional information or to expand on our submissions should you require.