



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

**Submission by the
Australian Federal Police**

January 2013

Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a submission in response to the review, to be conducted by Dr Allan Hawke, AC of the *Freedom of Information Act 1982* (FOI Act) and the *Australian Information Commissioner Act 2010* (AIC Act) (the FOI Review).

2. The FOI Review is required by section 93B of the FOI Act and section 33 of the AIC Act, which provide for a review of the operation of the FOI Act and the AIC Act respectively to be conducted two years after the majority of the Government's freedom of information (FOI) reforms commenced in November 2010.

3. This submission provides the AFP's response to the majority of the Terms of Reference for the FOI Review, including the following matters:

- the impact on the FOI system of the new structures and processes introduced following the reforms in 2010 for review of decisions and investigations of complaints under the FOI Act
- the effectiveness of the Office of the Australian Information Commissioner (OAIC)
- the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters
- the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account the requirement to ensure the legitimate protection of sensitive government documents, including Cabinet documents; the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government
- the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's recent review of the current charging regime, and
- the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

Response to the Terms of Reference

The impact on the FOI system of the new structures and processes introduced following the reforms in 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

4. While the AFP supports the objectives of the Government's 2010 reforms in promoting a pro-disclosure culture, the legislative processing and procedural changes put in place by the 2010 reforms have resulted in a significant increase in the AFP's workload and has impacted significantly on operational resources.

5. Prior to the 2010 reforms there were increases in both the number and complexity of FOI requests (318 requests). The number of requests received following the reforms has not abated, nor has the complexity of requests. The intention underlying the introduction of the Information Publication Scheme (IPS) was to reduce the number of FOI requests agencies received by making more

information publicly available about agencies, their operations, and the FOI requests they process. However, this has not been the AFP's experience. Rather, there has been a spike in the number of FOI requests following the implementation of the 2010 reforms.

6. The AFP considers that the increased FOI request workload can be attributed in part to increased public awareness following the promotion of the Government's 2010 reforms, and the abolition of the application fee. Significantly for the AFP, there were 344 FOI requests during 2010/11 and 381 requests in 2011/12, representing an 8% and 11% increase respectively. In addition, the compliance obligations under the IPS have contributed to the increased workload and administrative burden across the organisation.

7. The AFP's experience of less than 5000 hits on the website within a six month period indicate that the IPS link is not being utilised as frequently as envisaged. This is compared to 1,042,206 page views relating to job vacancies and 3,868,102 for the entire AFP website. The information available under the IPS is predominantly policy material and governance instruments. A large proportion of FOI requests made to the AFP are for personal information (71.4%) which are not published under the IPS.

8. During consultation on the 2010 reforms, the AFP sought a review of the timeframe for processing FOI requests. However, the 30 day timeframe did not alter, rather the reforms introduced mandatory options for seeking additional time by virtue of section 15AA (extension of time by agreement with the applicant), section 15AB (extension of time sought from the OAIC in respect to complex and voluminous requests) and section 15AC (additional time sought from the OAIC when a decision has not made within time also known as a deemed refusal).

9. The AFP maintains that 30 days is not sufficient time to process requests. This is largely due to the complexity and often sensitive nature of the information held by the AFP requiring internal consultation and briefing processes and liaison with other interested parties. In the majority of cases, requests involve a large volume of information created as a result of an investigation. The AFP proposes that the timeframe be increased in the first instance, which may obviate the need to seek an extension of time under section 15AA and possibly remove one administrative process.

10. The AFP recognises there are benefits to the applicant in being notified and consulted about extensions of time. However, the new provisions have resulted in applicants being frustrated by the additional delays imposed by the extensions available under sections 15AA, 15AB and 15AC, and the consultation provisions under section 26A (consultation under Commonwealth/State relations), section 27 (consultation in respect to business documents) and section 27A (consultation in relation to documents affecting personal privacy). In addition, the reporting requirements to the OAIC under section 15AA have resulted in an increased administrative burden. As the applicant has to be notified and agree to an extension of time sought by the agency, the AFP submits this reporting to the OAIC may be unnecessary.

The effectiveness of the Office of the Australian Information Commissioner

11. The AFP supports the OAIC. The AFP has established a good working relationship with the OAIC.

Merits Review

12. The AFP recognises that the OAIC has been establishing its processes and procedures. As the OAIC is aware the AFP has noted some inconsistency by the OAIC in notifying the AFP when there has been a request for a review by an applicant, and the subsequent follow up notification from the OAIC that submissions are required. There have been instances where there has been advice that a request for a review has been received and the OAIC decides to either not proceed or they have mediated the matter with the applicant without any notification to the agency. In other cases where the request for review has proceeded, many months have lapsed prior to the AFP receiving notification that submissions are required with only 10 working days given for the AFP to respond. In many cases where the OAIC has proceeded with the review, it has involved complex and sensitive information concerning other agencies, third parties and foreign countries.

13. The AFP considers that the requirement for the AFP to notify other interested parties who may wish to become a party to the review, together with preparing submissions in 10 days, is insufficient compared with the previously 28 day requirement of the Administrative Appeals Tribunal (AAT). Often the AFP has sought extensions for the OAIC and has been granted only small extensions of time to prepare submissions. The AFP believes that the OAIC approach of only granting minimal extensions of time has occurred in part due to the relevant OAIC officers having limited understanding of the complexities and sensitivities of AFP criminal and intelligence information. The AFP is working with the OAIC to address this as the timeframes for the OAIC to undertake reviews are not limited by the Act.

Extensions of Time

14. In addition to the reporting requirements under section 15AA as noted above, the mechanisms for seeking additional time under sections 15AB and 15AC have proved problematic. In a number of cases concerning AFP investigations involving documents that are complex, sensitive and voluminous, where extensions of time have been sought, OAIC officers do not have the contextual basis for the extensions of time sought because they have limited case knowledge or understanding of the AFP's role. The AFP is working with the OAIC to address this.

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

15. The AFP is not able to fully comment on the effectiveness of the two-tier system of merits review system as it has not sought review of a decision by the Information Commissioner at the AAT. Whilst the Information Commissioner is able to facilitate resolution of most FOI matters, it is reassuring for agencies and applicants to retain a review body, such as the AAT, to deal with highly contested matters involving extensive evidence.

16. During consultation on the 2010 reforms, the AFP raised concerns about the compressed time frames for providing submissions and the duplication of work required to defend appeals, especially in complex and voluminous cases. As noted above, short timeframes have already been experienced and proved problematic at the Information Commissioner review stage.

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

17. The reformulation of the FOI Act into two categories of exemptions and conditional exemptions has not had a significant impact on the AFP in performing its law enforcement functions and its role in policy development. The majority of requests received by the AFP concern personal information and law enforcement related activities, therefore the most common and relevant exemptions used are section 33 (documents affecting national security, defence or international relations), section 37 (law enforcement and the protection of public safety), section 47F (personal information), section 47B (Commonwealth/State relations), section 47E (operations of an agency). The remaining exemptions have been used to a lesser degree.

18. The single form of public interest test which is weighted in favour of the disclosure of documents has, however, simplified the process for weighing up the factors for disclosure and is supported by the AFP. Although personal information is now a conditional exemption and subject to the new public interest test, the AFP traditionally favoured disclosure of personal information to the applicant to which that information is about unless an unreasonableness of disclosure existed.

Intelligence and surveillance information

19. The intelligence and surveillance activities of law enforcement agencies are becoming increasingly important to ensure that investigative resources are effectively and efficiently targeted. The 2010 *Counter Terrorism White Paper* recognised the need for an intelligence-led response to terrorism, driven by a properly connected and properly informed national security community (which includes law enforcement agencies such as the AFP). The 2009 *Organised Crime Strategic Framework* also acknowledged that an intelligence-led approach was a fundamental requirement to successfully respond to organised crime. Further, one of the AFP Commissioner's *Seven Strategic Principles* for the AFP is to take an intelligence-led, risk based approach to prioritising deployment of resources around criminal and security risks.

20. The AFP has developed and maintains an enhanced intelligence function to support the disruption, investigation and prosecution of criminal activity, in accordance with the Government's national security priorities. The AFP's intelligence function operates to: expose unknowns as opportunities and vulnerabilities; inform internal and external decision making; and provide future views for law enforcement and national security.

21. The AFP intelligence process is directed towards delivering information that addresses identified gaps in agency knowledge about the criminal and national security environments, and to identify targets for further investigation. The AFP produces both criminal and national security intelligence. AFP intelligence product is developed and shared in cooperation with a range of agencies including Australian and overseas intelligence and security agencies.

22. Section 7(2A) of the FOI Act provides that documents originated or received from an "intelligence agency" (such as the Australian Security Intelligence Organisation) are exempt from the operation of the FOI Act. There is no equivalent 'blanket' exemption in the FOI Act for intelligence documents developed by the AFP or any other law enforcement agency. Instead, the AFP must rely on exemptions which protect intelligence information from disclosure, such as paragraphs 37(1)(a), 37(2)(b) and 47E(d) of the FOI Act.

23. In many cases, the existing exemptions in the FOI Act will be sufficient to protect AFP intelligence information. For example, information about the methodologies underlying the development of AFP intelligence product, and used in conducting surveillance activities would be protected under paragraph 37(2)(b) (disclosure could prejudice lawful methods for detecting breaches of the law). Further, intelligence information supporting a criminal investigation would be exempt under paragraph 37(1)(a) (disclosure could prejudice the investigation of a breach of the law). It would also be possible to rely on paragraph 47E(d) where disclosure of the intelligence information could have a substantial adverse effect on AFP operations.

24. However, reliance on existing exemptions does not adequately address the "mosaic effect", which entails use of a strategy in which repeated FOI applications for seemingly innocuous information are made and information that is not subject to exemption is published and pieced together to create more substantial conclusions. Unless there are sufficient protections for AFP derived intelligence information in the Act, there is a risk that the AFP might be targeted for intelligence information derived both internally and from other sources but used and contained within AFP documents.

25. Accordingly the AFP considers that it would be timely, in the context of the current review, to consider the introduction of an exemption that specifically addresses the protection of the intelligence and surveillance information of law enforcement agencies. The AFP suggests that the law enforcement exemption in section 37 of the FOI Act could be amended to include an additional paragraph along the following lines:

A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

... prejudice the conduct of surveillance activities, intelligence gathering activities and intelligence collection and analysis for identifying, preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law or the proper administration of the law.

The role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's recent review of the current charging regime

26. While it could be considered that the role of fees and charges creates an administrative burden in terms of being another layer of processing, it is not something that is generally considered a burden by the AFP. As noted above, the majority of requests processed by the AFP concern personal information which is free of charge. In other cases, the AFP considers the time taken to process the request has been unreasonable and whether there is a public interest in not charging. In cases such as this, the AFP does not generally impose fees and charges. The AFP is aware of the recent review of the current charging regime and would support the changes recommended by the OAIC (which are available on the OAIC public website).

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

27. The AFP supports ongoing review and evaluation of the practical operation of the FOI regime noting that any major reforms have an implementation cost to agencies. While the AFP has supported the FOI legislative reforms, establishing an IPS has been a time-consuming and a costly administrative exercise. However, it is expected that review and maintenance of the IPS, once established, will be a relatively smaller ongoing administrative burden.