



File Ref: 30/5696

Review of *Freedom of Information Act (1982)* – Submission by Bureau of Meteorology (Version 1.0 - Approved)

Introduction

The Bureau of Meteorology ('the Bureau') welcomes the opportunity to provide a submission to the review of the *Freedom of Information Act 1982*.

The Bureau supports the objectives of the Freedom of Information Act 1982. As Australia's environmental intelligence agency, the Bureau appreciates the value of ensuring that public sector information is made available to the community as openly as possible, and that it is both discoverable and reusable. In support of its service to the community, the Bureau already makes large volumes of weather, climate, water and other information available, including as raw and processed data, real-time and historical data, and as derived and integrated products and services. The primary delivery channel for this information is the Bureau's website, which is the most visited government website in Australia.

To assist with the review of the FOI regime, the Bureau provides the following information and recommendations in relation to the Terms of Reference (Appendix A):

A. Impact of reforms to freedom of information laws in 2009 and 2010.

The abolition of conclusive certificates in 2009 had no effect on the Bureau. The 2010 reforms however, have resulted in a four-fold increase in the number of FOI requests received by the Bureau.

Other trends that have been observed since the 2010 reforms include:

- The majority of FOI requests are now from the media – two thirds of requests in 2012-13 have been from journalists.
- Requests have become much broader in scope and more complex. This is particularly the case with requests from journalists, who increasingly frame their requests very widely.
- There has also been a trend towards multiple requests from the same FOI applicant, often within short spaces of time.

As a consequence, the work involved in processing FOI requests has risen substantially, as has the over-all cost to the Bureau. This has been difficult to absorb in an agency where most available resources are appropriately focused on delivery of front line services to the community, and when agencies were expected to absorb the costs of implementing the FOI reforms.

B. Effectiveness of the Office of the Australian Information Commissioner

The Bureau makes no comments about the effectiveness of the OAIC. However the Bureau has welcomed the interactions it has had with the Information Commissioner and his officers.

C. Effectiveness of the new two-tiered system of merits review of decisions to refuse access to documents and related matters

Applicants appear to prefer to go straight to IC review rather than requesting internal review by agencies. There can be however, significant delays in the finalisation of IC reviews by the OAIC.

D. Reformulation of the exemptions in the FOI Act, including the application of the public interest test

In relation to the specific issues raised in the terms of reference:

i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents

In relation to the existing Cabinet document exemptions (s.34), the Bureau recommends that consideration be given to including a 'neither confirm nor deny' provision to enhance protection of Cabinet confidentiality, particularly when applying s34(3) to only part of a document: in some circumstances, it may be hard to do this without indirectly revealing the subject of the Cabinet discussions or deliberations in question.

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

The Bureau agrees that this needs to be considered as part of any reformulation of exemptions in the FOI Act, including the application of the new public interest test.

The ability of government to obtain frank and fearless advice from the public service and third parties could be gradually undermined by the ways in which some applicants use FOI, including to:

- subvert or discredit the scientific research process, peer review process, and individual scientists, noting that anonymity of reviewers and reviews is a widespread tradition in science;
- discourage scientific deliberation and disagreement around decisions, noting that selective use of released information by applicants can misrepresent processes and decisions;
- damage the reputation of other individuals or companies;
- obtain commercial advantage over competitors;
- 'wedge' agencies on particular issues for political purposes; and
- undertake large scale 'fishing expeditions' in the hope of turning up a sensational headline rather than balanced reporting and informing public debate.

If the net result is a general reluctance to commit critical or questioning communication to the public record, the traceability of decision-making may be significantly impaired, and the very objectives of the Act undermined.

Other exemptions

The Bureau also offers the following views and recommendations on other exemptions:

Section 47F – Personal Privacy

The Bureau believes that the statutory considerations for determining whether disclosure of personal information is ‘unreasonable disclosure’ [section 47F(2)] should be widened to include consideration of whether release could reasonably result in harassment, intimidation, threats to personal safety or adverse impacts on physical or mental health of the individual concerned.

Consideration should also be given to permitting the automatic exemption of direct contact details of individuals on privacy grounds. The Bureau has found that release of this information is a major area of concern to staff and third parties. Generally, this information has only been provided in a particular context, and would not have been supplied if it was known that the information was going to be made more widely available (e.g. by publication on a publicly available FOI disclosure log). As such, exemption of this type of information is more consistent with privacy principles.

This type of exemption should also apply to the direct work contact details of agency staff, except where those contact details are ordinarily made publicly available. This information (as opposed to the officer’s name and position details) is immaterial to most FOI requests, and the Bureau’s experience is that most applicants happily consent to its removal. Mobile phone numbers pose particular challenges: the distinction between what is an official and private mobile phone number has become increasingly blurred in recent years, and will continue to do so with the trend to BYO devices.

Section 47G – Business information

The Bureau notes that section 47G appears to only be intended to protect the interests of third parties dealing with the government. This may pose a problem for agencies which engage in competitive commercial activities, but do not have a partial exemption for these activities under Schedule 2 Part II. For this reason, the Bureau recommends that Section 47G be specifically extended to cover documents which contain information about the competitive commercial activities of agencies. In making this recommendation, the Bureau notes that:

- a) This type of exemption was recommended in the 1995 ALRC review of the FOI Act; and
- b) As s47G is only a conditional exemption, the public interest would still need to be considered in all cases before claiming the exemption.

Section 47H – Research

The Bureau agrees strongly with the views expressed by the CSIRO in its submission to the FOI review on the importance of maintaining this conditional exemption, particularly for research which has not yet been completed, peer reviewed and published. Conditional exemption (subject to meeting the requirements of the public interest test) is an essential safeguard to the integrity of the scientific research process.

The Bureau believes however, that this exemption should logically be available to all Australian Government agencies undertaking scientific research, and not just the CSIRO and Australian National University as is currently the case. It is incongruous that where the Bureau and CSIRO collaborate jointly in scientific research, the CSIRO can potentially apply section 47H to joint research material (subject to the public interest test), but the Bureau cannot do likewise.

It is worth noting in this regard, that under section 47C(3)(a), the conditional exemption for deliberative matters does not apply to reports of a scientific or technical nature, including presumably, draft scientific research reports which have not yet been finalised, peer reviewed or published.

The Bureau believes that section 47H should also explicitly be extended to protect the anonymity of persons involved in the scientific peer review process. Maintaining anonymity of the peer review process is again, an integral part of the scientific research process, and the Bureau is concerned that this could be undermined without specific protection in the FOI Act.

In making these recommendations, the Bureau notes that section 47H is only a conditional exemption, and the public interest would need to be considered in all cases before the exemption could be claimed.

E. Appropriateness of the range of agencies covered, either in part or in whole by the FOI Act.

Please note the Bureau's comments about section 47G and 47H above.

F. the role of fees and charges on FOI

The Bureau does not believe that the minimal application fee (\$30) that was imposed prior to the 2010 reforms inhibited or otherwise deterred people or organisations from making requests for information which was of genuine interest or concern to them.

Since the abolition of the application fee, the Bureau has noted the tendency of some FOI applicants to submit multiple FOI requests (often on closely related subjects), within short periods of time. In some instances, it appears that the same applicants are submitting large volumes of requests to multiple agencies.

While the Bureau does not recommend the reintroduction of an application fee, it does believe that some incentives need to be in place to encourage FOI applicants to consider the serious nature of the FOI process, and the amount of work involved, and the expense to the Australian community. Agencies also need greater certainty that the work expended on processing applications is not going to be wasted by applicants either withdrawing their applications late in the piece, or else being deemed to have withdrawn the application under Section 29(1)(G).

To this end, the Bureau recommends that:

- Personal information requests should remain free of charge, subject to a processing time limit or cap;
- Other FOI requests which take 7 hours or less in document searching and decision making time (i.e. less complex FOI requests) to be free of charge. Note that 7 hours approximates one full working day.
- Other FOI requests which take 7 hours or more in document searching and decision making time (i.e. more complex FOIs) will attract a flat processing fee (e.g. \$50), plus an hourly charge based on the amount of document searching and decision making over and above

the first 7 hours free. The hourly charges (but not the flat processing fee) could be reduced or waived on public interest or other grounds.

The Bureau believes that the existing fees for document searching and decision making contained in the FOI regulations no longer reflect anywhere near the true cost of servicing an FOI request. The Bureau understands that these charges have never been increased since the FOI Act came into force in 1982. As such, they reflect an era when document searches and decision making were done in the context of much lower volumes of information, and with most of the relevant information located on central registry files. Today's context is very different, with exponential growth in the volumes of information, and multiple versions of documents held in electronic format across multiple systems within the agency. The fees for document search and decision making need to be updated to reflect this reality, and once done, should be automatically indexed against CPI.

G. Minimising the regulatory and administrative burden, including the costs, on government agencies

The Bureau makes the following comments and recommendations:

- Change the processing time and third party consultation periods from 30 calendar days to 30 working days. Gazetted public holidays and the Christmas / New Year shut down periods should be excluded from the processing time.
 - In this regard, the Bureau notes that the requirement to publish information on the FOI Disclosure Log (introduced as part of the 2010 reforms) is 10 working days.
- Meeting the 30 day timeframe for FOI requests that involve consultation with multiple Commonwealth government agencies can be extremely challenging, and provision should be made for an extension of time similar to when consultation on Commonwealth / state, personal privacy and business affairs grounds is required.
- Section 16 should be amended so that when an FOI request is transferred from one agency to another, the receiving agency automatically has the benefit of a full 30 working days processing time. Currently, the receiving agency only has whatever time remains on the clock, unless they seek an extension of time (which in the case of s15AA can be time consuming depending on the applicant).
- Section 15AA should be amended to enable an applicant to grant an extension of more than 30 days for processing of an FOI request. In this regard, we note that under s15AB, the OAIC can grant extensions of more than 30 days. The Bureau believes that the provisions for practical refusal (s24AA) are more cumbersome compared to the former provisions.
 - In this regard, the Bureau recommends the introduction of a processing time cap for FOI applications, which would clearly establish a benchmark for determining whether a request can be refused on the grounds of being a substantial and unreasonable diversion of agency resources.
- Section 12(1) should be extended to ensure that information that is already freely available on an agency's website, or is otherwise in the public domain, is not available under FOI – otherwise, there is a waste of resources in processing the request. Such a measure would assist in dealing with requests that essentially seek the Bureau to do basic research for the applicant.

- The Bureau supports publication of released documents on FOI disclosure logs as soon as possible in the public interest. We note however, that it is presently impractical to comply with all of the OAIC's recommendations about web accessibility in relation to documents published on FOI disclosure logs.

Vicki Middleton

Deputy Director (Corporate)

08 March 2013

Appendix A: Terms of Reference

REVIEW OF THE FREEDOM OF INFORMATION ACT 1982 AND THE AUSTRALIAN INFORMATION COMMISSIONER ACT 2010

TERMS OF REFERENCE

I, Nicola Roxon, Attorney-General of Australia, request Dr Allan Hawke AC to review and report on the operation of the *Freedom of Information Act 1982* (FOI Act) and the *Australian Information Commissioner Act 2010* and the extent to which those Acts and related laws continue to provide an effective framework for access to government information.

1. The review should consider the following matters:
 - (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;
 - (b) the effectiveness of the Office of the Australian Information Commissioner;
 - (c) the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters;
 - (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; 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;
 - (e) the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act;
 - (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
 - (g) the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.
2. The review should include consultation with relevant stakeholders.
3. The report should be provided by 30 April 2013.

Dated 29 October 2012

Nicola Roxon

Attorney-General

Authority: Section 93B of the *Freedom of Information Act 1982* and section 33 of the *Australian Information Commissioner Act 2010*]